

Marco Inglese

Regulating the Collaborative Economy in the European Union Digital Single Market

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 Springer

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Preface

The idea behind this book and the manuscript thereof have been accompanying me over the last 3 years and in the course of a number of different academic positions and States.

It was pure coincidence that I came across the (then) sharing economy during my postdoctoral research stay at the University of Sarajevo between the autumn of 2015 and spring of 2016. While I was working at the China University of Political Science and Law, during the autumn of 2016, I transformed my embryonic notions into a comprehensive research project which I used to apply for an Excellence Grant of the Swiss Confederation to spend a year in Fribourg. Pending the evaluation of my project, I moved to University College Dublin and started to present some selected aspects of my research project at conferences, gathering the first, extremely useful, feedback. Finally, I obtained the Excellence Grant of the Swiss Confederation and enjoyed an entire year in Fribourg. Ultimately, I collected enough material to submit a meaningful book proposal to Springer which gladly agreed to publish my manuscript. I then started to write the first draft of the manuscript when I joined Freie Universität Berlin for a winter semester visiting professorship, finally submitting it once back in Italy as a research fellow at the University of Parma.

I owe a debt of gratitude to Professor Giacomo Di Federico, who has been mentoring me since my graduation day. Without his steady encouragement, this book would have never been written.

I thank Roberta for her strength and for all the support she is giving me. Our discussions have been great moments of personal enrichment.

I thank my family for understanding what I do.

Parma, Italy
May 2019

Marco Inglese

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Chapter 1

Introduction



The collaborative economy is a new triangular business model enabling the exchange of services and the common usage of goods among users registered on an online platform. These activities can be carried out for free or for a fee, either by natural persons or by professionals. This phenomenon, also referred to as the sharing economy, the gig economy, the platform economy, the peer-to-peer economy and even the ‘Uberized’ economy, is radically modifying trade patterns and consumption habits.

Whereas sharing something and collaborating with somebody to achieve a common goal are activities as ancient as human beings, they have always been practised among families, neighbours and colleagues, essentially in a very limited network of participants. Unsurprisingly, the steady development of the Internet has decisively contributed to the mushrooming of a massive variety of online platforms which match demand and supply in terms of the most heterogeneous services and objects: accommodation, car rides, house-swapping, household chores, professional advice, childcare, food delivery, technology assistance, investments, crowd-working, education—the list is almost endless. This has boosted the capacity and increased the willingness to share idle assets, as a recent Eurobarometer survey shows. The advent of the collaborative economy is nowadays challenging not only consolidated legal acquisitions but imposing unprecedentedly hard choices on policymakers and the judiciary, at the national, supranational and international level. Whether and how the collaborative economy and online platforms are or, rather, should be regulated by the European Union (EU) is the leading research question this monograph seeks to answer.

To start with, throughout this book, the expression *collaborative economy* is preferred over others for two intertwined reasons: on the one hand, it is the official terminology adopted by the European Commission in the communication titled ‘A European Agenda for the Collaborative Economy’; on the other, it emphasizes how collaborating is more far-reaching than sharing, at least in the legal context. Indeed, the latter does not always entail an economic exchange while the former, by contrast, does: this difference is crucial for the application of EU internal market law.

Online platforms operate in multisided markets, insofar as they provide a so-called underlying service—e.g., offering a ride, a translation, accommodation—for remuneration while simultaneously competing in the wider arena of online platforms as such. They adopt different attitudes towards their users to the extent that they can exert an overtly pervasive control over the latter—for instance, by setting prices, quality requirements and standard conditions—or, by contrast, not interfering at all in their transactions. Depending on those various degrees of influence, online platforms might also be assimilated to employers. Online platforms acquire personal data, using them both to customize their offers and as a means to maximize their competitive advantage in the (multisided) relevant product market. Users, in turn, can be at the same time providers and recipients of an underlying service, thereby blurring the dichotomy between traders/sellers and consumers. These situations clearly affect legal certainty.

Despite these issues having a decisive impact over local communities, the fact that the Internet has such a strong influence in dematerializing and matching demand and supply points to the view that the collaborative economy has to be tackled in different ways on the national and supranational dimension. Therefore, not only does the challenge lie in the identification of the competent regulatory body, if any, at the most appropriate level, but also in how to absorb negative externalities. For instance, it is well known that taxi drivers' unions in Barcelona and Brussels lobbied against Uber for alleged anticompetitive practices. Moreover, many drivers installed cameras in their cars to monitor aggressive behaviour while passengers reported sexual harassment. Airbnb hosts were accused of refuse bookings on a purely racial basis so the platform reacted by introducing an automatic, yet to be voluntarily adopted, system of reservations. Furthermore, as a strategy to prevent the exponential increase in rental prices in the most attractive zones, Berlin and Amsterdam imposed a predetermined number of nights per calendar year on Airbnb hosts wishing to rent their spare rooms. More recently, Airbnb itself entered into agreements with some municipalities—e.g. Milan, Lisbon and Strasbourg—to gather tourism tax on their behalf. Other examples pertain to the recent effort that took place in Bologna to persuade food delivery platforms to adopt a code of conduct in order to protect riders in case of adverse weather conditions and to extend to them basic health insurance.

These forms of self-regulation and horizontal cooperation should be appreciated insofar as they develop the idea of a common effort to cope with negative externalities; yet, they tend to compartmentalize the market at a national or even regional level. This, in turn, runs counter to the idea of having, among the Member States of the EU, a Digital Single Market (DSM) where 'the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality of place of residence' as affirmed in the Commission communication 'A Digital Single Market for Europe'. This very same act, for the first time in 2015, acknowledged that 'the rise of the sharing economy also offers opportunities for increased efficiency, growth and jobs, through improved consumer choice, but also

potentially raises new regulatory questions'. Adhering to the idea that there are several EU internal markets but that the DSM does not necessarily follow different rules, being simply a part of a broader picture, it is nonetheless true that the collaborative economy is perhaps the most profitable aspect thereof. Back in 2015, it already amounted to 28 billion EUR, as reported in the Commission communication 'A European Agenda for the Collaborative Economy'.

The collaborative economy hence fits within the narrative of the completion of the EU internal market, a domain in which the EU has always been keen on exercising its shared competences through harmonization measures. Therefore, in order to respond to the research question identified above—i.e., whether the collaborative economy and online platforms should be regulated and at what level—this book argues that EU legislation, possibly in the form of a directive, is needed in order to regulate various aspects of the collaborative economy, in particular, consumer protection, labour relations, data protection and selected competition law issues. These aspects constitute the bulk of this book which, in turn, is structured in seven chapters, each one presenting some of the most controversial issues of the collaborative economy and seeking to respond to the challenges it is bringing in. In essence, each chapter constitutes an autonomous reason why the EU should step in to regulate the collaborative economy.

Chapter 2 introduces the main actors involved in typical, triangular collaborative economy transactions: an online platform, a service provider and a user/consumer (otherwise known as a 'prosumer'). It then focuses on the concept of remuneration, thereby stressing—congruently with the scope and aim of the book—that, in light of the consolidated case law of the Court of Justice of the European Union (CJEU) regarding internal market freedoms, only gainful economic activities are considered relevant for the purposes of the collaborative economy in the EU legal order. However, gathering and exploiting personal data, through so-called 'freemium' mechanisms, represent forms of *sui generis* remuneration, worthy of specific attention. The chapter concludes by exploring the applicability of the Information Society Services Directive and the Database Directive. Finally, this chapter presents a first appraisal of the most recent case law of the CJEU in the so-called Uber saga as well as initiates a discussion on the opinion of Advocate General (AG) Szpunar in the Airbnb Ireland case.

Chapter 3 encapsulates the collaborative economy within the current development of the DSM. To do so, the collaborative economy is assessed against the bulk of EU law, primarily through the lenses of classical free movement rules. In addition, the Charter of Fundamental Rights of the European Union (the Charter) has a salient role to play in what concerns the freedom to choose an occupation and to conduct a business. Once the impact of primary law has been tested, secondary law is used to evaluate whether the collaborative economy fits within a well-designed framework comprising the Services Directive, the Information Society Services Directive, the Database Directive, the Recognition of Qualification Directive and the General Data Protection Regulation. The case law of the CJEU in the Uber saga as well as AG Szpunar opinion in Airbnb Ireland are further discussed in this specific context. Chapter Three hence concludes that, when a collaborative economy

transaction is at stake, its legal qualification, as well as the consequences stemming from it, depends on the very nature of the underlying service.

Chapter 4 investigates whether the EU consumer *acquis* is applicable in a collaborative economy triangular relation by exploring the possibilities offered by, among others, the Unfair Commercial Practice Directive, the Consumer Rights Directive and the e-Commerce Directive. Indeed, in a typical collaborative economy transaction, it is extremely difficult to correctly identify the intent and the personal characteristics of each party and, eventually, whether one of them is acting in a professional capacity or not. This, in turn, might affect the outcome of a transaction in terms of undermining legal protection as well as legal certainty for all the parties involved. These aspects are also linked to the concept of trust in a digital environment to the extent that rate-and-review mechanisms—as self-regulatory tools directly implemented by online platforms—could be useful instruments by which to distinguish between a consumer and a trader/professional, thereby providing more information on the personal characteristic of users. Finally, the chapter evaluates the brand-new Commission’s Consumer New Deal to verify whether it confers more thorough consumer protection in the collaborative economy.

Chapter 5 assesses how the collaborative economy is transforming labour law and employment relations, blurring the distinction between an employer and an employee, hence rarefying even the protection of social rights. Indeed, working in one’s spare time, with no subordination whatsoever, lacking any form of social security and with no predetermined tasks, hardly fits within the pattern of classical labour law. In other words, depending on the underlying service, an online platform can decide to exert either a powerful command-and-control chain or a more flexible intermediary role. These issues are addressed through an analysis of the applicability of the Working Time Directive and the Protection of Atypical Workers Directives. In this respect, national judicial experiences in the UK, France and Italy are used to demonstrate that domestic courts have a different understanding of the factual circumstances leading to genuine employment relations. Nonetheless, should certain conditions be met—such as the imposition of tariffs, control of behaviour, exclusionary powers, prohibition of multihoming and mandatory qualitative requirements—an online platform can be assimilated to an employer. Ultimately, this chapter discusses whether the recently adopted European Social Pillar confers added value to the protection of workers in the collaborative economy.

Chapter 6 intends to bridge a gap between competition law and data protection in order to explore, first, whether or not online platforms compete in the same market with incumbent operators and, second, whether the critical mass of consumers’ data gives them competitive advantage over new entrants. This is especially so, since online platforms operate in multisided markets. In this context, from a purely competition law perspective, the accumulation of big data might represent a sort of essential facility in the hands of a few platforms, thereby raising serious concerns regarding the protection of consumers’ data as well as the potential abuse of a dominant position. For this reason, the General Data Protection Regulation is used as a

benchmark to evaluate the lawfulness of online platforms' practices vis-à-vis individuals, especially against the backdrop of the new right to data portability.

In light of the findings of the previous chapters, Chapter 7 puts forward the author's proposal: the collaborative economy or, at least its most controversial aspects, should be regulated at the EU level through a legislative act in the form of a directive. Therefore, first, it is posited that the EU is competent to adopt a directive aimed at levelling the playing field of the collaborative economy in context of the EU's shared—yet, extremely wide—competence in the internal market. Second, this directive would be in compliance with the principles of subsidiarity and proportionality. Third, such a directive could be based on the general approximation of law clause enshrined in Article 114 of the Treaty on the Functioning of the European Union (TFEU) while simultaneously taking into account other non-market values, especially consumer protection, transparency and fairness in labour law, and legal certainty for involved actors. Furthermore, the key elements of such a directive will be singled out, in particular, its material and personal scope of application. Specifically, regarding the former, distinguishing between professional and non-professional service providers according to the number of transactions, taking also into account their continuity, they perform in each calendar year is proposed. This would enhance trust in the online environment and also pave the way to understand whether platforms should be considered as marketmakers or matchmakers since, solely in the former scenario, they should be considered as employers. This would fill the gap in consumer protection as well as protect workers' rights.

The collaborative economy impinges upon many other sectors, such as the liability of online platforms and service providers as well as the fiscal regime applicable to both of them, the efficiency of alternative online dispute resolution and dedicated aspects of intellectual property. In addition, given that the collaborative economy is a worldwide phenomenon, several entrenchments can be found at the level of the World Trade Organization. Considering the specialities of these issues, they will only be incidentally touched upon to the extent that they are useful to corroborate our findings.

Despite this book being entirely based on the EU legal order, with some references to the national legislation and case law of its Member States, a substantial part of the scholarly opinions to be commented upon come from the US for a contingent reason: the first forms of the sharing economy were born overseas, thus legal doctrine is highly developed and diversified in that context. By contrast, solely in the last 3–4 years, EU law specialists have started to deal with the collaborative economy: it is now time to fill this gap and to contribute to this enriching debate, addressing this book to EU lawyers, academics, practitioners, policymakers, students and, eventually, to online platforms.

This book takes into account cases, legislation and legal literature up to 31 May 2019.

Chapter 2

Searching for a Definition of the Collaborative Economy in the European Union



Abstract This chapter introduces the main actors involved in typical, triangular collaborative economy transactions: an online platform, a service provider and a user/consumer (otherwise known as a ‘prosumer’). It then focuses on the concept of remuneration, thereby stressing—congruently with the scope and aim of the book—that, in light of the consolidated case law of the Court of Justice of the European Union (CJEU) regarding internal market freedoms, only gainful economic activities are considered relevant for the purposes of the collaborative economy in the European Union (EU) legal order. However, gathering and exploiting personal data, through so-called ‘freemium’ mechanisms, represent forms of *sui generis* remuneration, worthy of specific attention. The chapter concludes by exploring the applicability of the Information Society Services Directive and the Database Directive. Finally, this chapter presents a first appraisal of the most recent case law of the CJEU in the so-called Uber saga as well as initiates a discussion on the opinion of Advocate General Szpunar in the Airbnb case.

Keywords Online platforms · Service providers · Users · Remuneration · Information society services directive and e-commerce directive

2.1 Introduction

The collaborative economy is an economic activity that has evolved in the last decade whose disruptive effects over consolidated legal acquisitions is now more evident than ever. It is indeed blurring the notions of consumer, service provider, employer, self-employed, command and control, user, digital platforms, online trusts etc. Moreover, it has also been generating a plethora of different reactions, ranging from anger to enthusiasm, from a new business avenue for entrepreneurs to the fear of anticompetitive practices of established incumbents, from offering everybody a source of small income to undermining social rights. Therefore, new challenges have been posed to local, national and supranational policymakers. In this

jumble of uncertainties, the way of categorizing this phenomenon is also disputed; therefore, it is necessary to reach at a unified notion for the sake of clarity.

The collaborative economy is known by different labels: the sharing economy, the gig economy, the platform economy, the on-demand economy, the peer-to-peer (P2P) economy and even the Uberized economy. Each of these expressions catches a different, prominent feature of the topic which this book aims to analyse.¹

Commencing with the latter, the Uberized economy refers to the predominant role of Uber, perhaps the most well-known online platform, as well as to the worldwide success of its business model.² Indeed, as *The Wall Street Journal* stated in May 2015, ‘there is an Uber for everything’.³ The P2P economy stresses that, despite transactions being facilitated through an online platform, the main actors still are peers,⁴ who are identified as natural persons not acting in their professional capacity but according to a consumer-to-consumer (C2C) pattern. The on-demand economy considers that access to a service or to a good is requested solely when necessary; hence, the remuneration or the price for it is only paid for limited usage, while being neither fixed nor predetermined. The platform economy recognizes that the mushrooming of online platforms as virtual marketplaces to match demand and supply amongst peers has been and will be the driving force of the platform economy itself.⁵ After all, while the P2P economy emphasizes the role of humans, the platform economy underlines the importance of algorithms and the Internet. The gig economy, in turn, draws attention to a model according to which companies tend to hire independent contractors or freelancers, limiting their assignments to ongoing projects or performing low-skilled tasks.⁶ A typical example in this respect is the activity of food delivery.

The sharing economy, perhaps the most famous expression, indicates a system whereby the involved actors behave differently: an online platform performs the passive role of the matcher of demand and supply while a service provider and a user exploit their respective, often idle, expertise or resources,⁷ such as a car ride, baby-sitting, translation, legal advice and household chores.⁸ Often, the sharing economy

¹Hatzopoulos (2018a), pp. 4–8.

²Mostacci and Somma (2016) and Zou (2017), pp. 269–294.

³There’s an uber for everything now, *The Wall Street Journal*, 5 May 2015, www.wsj.com/articles/theres-an-uber-for-everything-now-1430845789 (accessed: 13 June 2019).

⁴Aloni (2016), pp. 1397–1459.

⁵Busch et al. (2016), pp. 3–10.

⁶De Stefano (2016); Todoli-Signes (2017), pp. 241–268.

⁷For a seminal study, see Botsman and Rogers (2011), pp. 67–93. For other criticisms, see also Eckhardt G M, Bardhi F (2015) The sharing economy isn’t about sharing at all. HBR, hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all (accessed: 17 June 2019). The archetypal concept of the sharing economy is thus spelled out in legal terms by Scott and Brown (2017), pp. 553–599.

⁸In particular, see Exploratory Study of Consumer Issues in Peer-to-Peer Platform Markets. Task 4 Report—Cross Analysis of Case Studies of 10 Peer-to-Peer Platforms, ec.europa.eu/newsroom/just/item-detail.cfm?item_id=77704 (accessed: 24 June 2019).

as such does not imply an economic gain; rather, it solely ensures mutual benefit between the two parties, so much so that this notion basically refers to the ideal archetype of a consumer as well as ecological awareness developed in order to rediscover human relationships among neighbours⁹ and to put in place common idle goods and capacities, including time and even professional knowledge. The original idea behind it was not, thus, to earn additional income. Until a decade ago, therefore, in the golden age of couch-surfing and before the advent of the now-symbolic Uber and Airbnb, online platforms simply helped out to match demand and supply in a passive manner while exchanges were essentially limited. This scenario has now radically changed¹⁰ to the extent that online platforms have moved away from this pioneering attitude and evolved toward a true business model¹¹ aimed at profit-seeking. Even first-hour users were floored by this quick transformation, while online platforms became more and more commercially aggressive and competitive in relation to each other as well as market incumbents. Certain commentators even coined the expression share-washing to indicate those online platforms that attempted to reproduce the original sharing economy scheme to attract more users.¹²

Be that as it may, the Internet has decisively contributed to the rapid growth of the collaborative economy, not only by prompting the creation of dedicated website functioning as virtual marketplaces but, more recently, through the availability of apps on everybody's mobile phones. These apps thus work as intermediaries between service providers and users.

In legal jargon, the collaborative economy covers all the aforementioned aspects and nuances, while crucially adding the constituent factor of remuneration, in other words, the idea of doing something in exchange for a valuable economic gain.¹³ Further, this economic exchange, in its most sophisticated form, can also take place through so-called freemium mechanisms, whereby users agree to transfer their personal data to an online platform. This discards the naivety of the original sharing economy. This economic exchange, be it in a simple or in a sophisticated form, is often transnational and hence covered by the European Union (EU) internal market law.¹⁴ Thus, it is essential to ascertain how the EU reacted to the rise of the collaborative economy.

In 2015 and 2016, the Commission stepped in the then-embryonic debate surrounding the sharing economy by delivering two remarkable communications: while the first stressed the need to complete the Digital Single Market (DSM Communication),¹⁵ the second put forward an agenda for the collaborative economy

⁹Paulauskaite et al. (2017), pp. 619–628.

¹⁰Arguably, the sharing economy does not fall within the wide domain of the so-called Internet of Things either. See Hojnik (2016), p. 1578.

¹¹Katz (2015), pp. 1067–1126; Ranchordas (2015), pp. 413–475.

¹²Scott and Brown (2017), pp. 583–585.

¹³For a more detailed account of the economic resources generated and involved, see Petropoulos (2016).

¹⁴Hatzopoulos (2012), pp. 38–42.

¹⁵Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A Digital Single Market Strategy for Europe, COM(2015) 192 final.

(the Agenda).¹⁶ Meanwhile, also the Committee of the Regions¹⁷ and the Parliament¹⁸ contributed to the idea that the collaborative economy is a widespread phenomenon affecting, on the one hand, the internal market and, on the other, the way in which individuals participate in the economic life of the EU. In this respect, it is interesting to note that the aforementioned DSM Communication acknowledged that ‘the rise of the *sharing economy* [emphasis added] also offers opportunities for increased efficiency, growth and jobs, through improved consumer choice, but also potentially raises new regulatory questions’.¹⁹ Evidently, dissatisfied with this hardly pertinent nomenclature, the Commission itself now uses the expression *collaborative economy* and has done so since the very beginning of the Agenda. The correctness of this choice is stressed in its critical assessment²⁰ which, in turn, emphasizes the birth of what is called a ‘novel economic agent’,²¹ characterized by ‘decentralisation and de-professionalisation’,²² hence giving rise to the concept of peer and/or prosumer, as a person combining production and consumption. Neologisms dictate the agenda of policymakers. The Agenda adopts the following definition for the collaborative economy:

Business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills – these can be private individuals offering services on an occasional basis (‘peers’) or service providers acting in their professional capacity (‘professional services providers’); (ii) users of these; and (iii) intermediaries that connect – via an online platform – providers with users and that facilitate transactions between them (‘collaborative platforms’). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.²³

The expression *collaborative economy* is preferred over the others mentioned above for two intertwined reasons: first, it is the official name adopted by the

¹⁶Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. A European Agenda for the Collaborative Economy, COM(2016) 356 final.

¹⁷Opinion, Committee of the Regions, 3–4 December 2015. The Local and Regional Dimension of the Sharing Economy, COR-2015-02698-00-00-AC-TRA (Rapporteur: B Brighenti); Draft Opinion, Committee of the Regions, 28 September 2016. Collaborative Economy and Online Platform: A Shared View of Cities and Regions, COR-2016-04163-00-00-PA-TRA (Rapporteur: B Brighenti).

¹⁸See the two motions for a European Parliament resolution on the collaborative economy, 3 February 2016, B8-0249/2016 (Rapporteurs: S Monteal, F Philippot) and 22 February 2017, B8-0175/2017 (Rapporteurs: J Mélin, M Troszczynski), and the European Parliament Resolution of 15 June 2017 on a European agenda for the collaborative economy, 2017/2003(INI) (Rapporteur: N Danti).

¹⁹A Digital Single Market Strategy for Europe, para. 3.3.1.

²⁰Smorto (2017).

²¹Ibid., p. 12.

²²Ibid.

²³A European Agenda for the Collaborative Economy, para 1.

Commission; second, it implies that exchanges effectuated among peers and intermediated by online platforms can be carried out for free or against remuneration. However, it is only when the latter condition is satisfied that EU fundamental economic freedoms come into play.²⁴

Following these premises, this chapter is structured as follows. First, it identifies the actors of a typical collaborative economy transaction, making reference to a triangular scheme including an online platform, a service provider and a user. Second, it delves into the elements of a typical collaborative economy transaction by evaluating whether online platforms should be considered as mere facilitators or the real suppliers of the so-called underlying service. In doing so, a specific focus is placed on the concepts of economic exchange and gain and whether the transfer of data from users to platforms can be considered as a *sui generis* form of remuneration. Hence, the chapter explores the applicability of Directives 2015/1535 (Information Society Services Directive)²⁵ and 2000/31 (e-Commerce Directive)²⁶ as the EU acts arguably most capable of regulating a collaborative economy transaction: the former defines information society services as services provided upon a user's request, supplied through an information society service, at a distance and for remuneration; the latter establishes that those services must move freely within the EU internal market. Bearing these elements in mind, the chapter concludes by offering a first assessment of the Uber saga, which recently came under the spotlight of the Court of Justice of the European Union (CJEU) and commencing a discussion on the Airbnb Ireland case.

2.2 The Collaborative Economy Triangle

In the legal field, triangular commercial relations are not uncommon, nor is their widespread presence imputable solely to the advent of the Internet. Indeed, it suffices to recall the well-established figure of commercial agents, executing a business on behalf of a principal and concluding it with a third party. In the collaborative economy domain, this is depicted by the concurrent presence of an online platform, a service provider and a user. It might also be the case that the last two coincide, being simultaneously involved for the purposes of the same transaction, hence originating a now common neologism, 'prosumer'. What distinguishes the collaborative

²⁴ See para. 1.3.2 and 1.3.3.

²⁵ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, pp. 1–15. The Information Society Services Directive repealed Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.7.1998, pp. 37–48.

²⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, pp. 1–16.

economy from any other sort of triangular legal relation is the diriment role of online platforms.

Taking into account the asymmetric positions of those three parties, a collaborative economy triangle can be construed as follows. Online platforms are situated at the apex, on the intuitive ground that, lacking their intermediary role, the collaborative economy cannot exist.²⁷ In contrast, providers and users represent the basis of, and maintain, a binary mutual relation between them, while, at the same time, addressing themselves to an online platform for different reasons: on the one hand, for issues concerning labour law; on the other, to seek redress in the case of wrongdoing perpetrated by providers. Some of these arguments will be analysed in the following chapters.

The aforementioned three intertwined categories are spelled out in this section, making reference to the Agenda and its critical assessment.

2.2.1 Online Platforms

Online platforms represent the main engine of the collaborative economy and, depending on their inherent features, are able to steer transactions as well as the relation between a provider and a user. It should be affirmed at the outset that there is no general understanding of what an online platform is, especially since it can cover a great variety of different and unrelated fields. The Communication on online platforms²⁸ is instructive in this respect, insofar as it refrains from offering legally sound definitions. Instead, it lists some common features: (i) the ability to create, shape and challenge markets and incumbents; (ii) operating in multisided markets; (iii) benefiting from a network effect; (iv) reliance on information technology; (v) the creation of digital value.

Considering those elements, at least two opposite schemes can be identified.

On one side, digital platforms can embody an extremely passive attitude, thereby limiting themselves to behave in a non-interventionist manner and acting solely as a mere virtual (non-)marketplace for the match between demand and supply, as in the early days of couch-surfing or in the more modern car-pooling of BlaBlaCar.

On the other, digital platforms can be highly engaged, thereby influencing not only the performances of their providers but also the relation they establish with users. For instance, through a complex algorithm, Uber is able to push drivers towards more profitable zones, e.g., shopping centres, railway stations, touristic areas, and to impose differentiated fares during peak time; this practice is known as surging.

²⁷This calls into question their role in terms of private law. Sorensen (2016), pp. 15–19.

²⁸Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe, COM(2016) 0288 final.