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Intermediaries, traders and consumers – who is who in the collaborative economy under EU law and why does it still matter in 2023?

I. It is common knowledge that the collaborative economy business model engages providers of services who share assets, resources, time and/or skills (these can be private individuals offering services on an occasional basis or service providers acting in their professional capacity); recipients of these services and intermediaries which both connect — via an online platform — providers with users and facilitate transactions between them. When a service is provided for remuneration in the transnational context of the EU internal market, it is recognised as exercise of freedom to provide and receive services guaranteed under Article 56 of the Treaty on the Functioning of the European Union (TFEU). All three categories of actors benefit from the free movement of services in the EU internal market, but – depending on the context - they are also subjected to rights and obligations arising from EU secondary law (consumer law, data protection, etc.). When collaborative economy platforms - as entities facilitating the exchange of services - were introduced in the Member States of the EU, the new business model appeared to disrupt the well-established rules of running a business activity, including the legal ones.

The collaborative economy triangle of actors – so 'natural' for matching online persons willing to share a car, an apartment or skills – clashed against the existing legal rules, including these on resolving disputes in the cases of contract non-performance , which were drafted in a completely different social and economic environment of the offline world. This enormous change in social and economic relations provoked reflection and discussion about the position of collaborative economy platforms in this configuration as well as legal rules applicable to obligations of all economic actors involved in the collaborative economy model.

The research conducted in the past years within the framework of the project *Free movement of services in the collaborative economy model - regulatory challenges in the European Union internal market* allowed analysing and, as a result, drawing conclusions on the importance of the legal classification of economic actors involved in the provision of services in the internal market under the collaborative economy model. The most important results of the research to be presented during the annual conference of SIDE-ISLE in December 2023 are as follows.

II. Firstly, it seems that the position of collaborative economy platforms in 2023 (as part of larger and very diverse category of online platforms) is regulated in a quite extensive way under the EU law, as a result of legislative activities and case-law of the Court of Justice of the EU (CJEU). In general, online platforms are recognised as providers of information society services (pursuant to the E-commerce Directive) and more precisely as providers of hosting, which consists in the storage of information provided by a recipient of a service. In 2022, the Digital Services Act (DSA) and the Digital Markets Act (DMA) were adopted. These are the legal acts crucial for the operation of information society services providers. The DSA is of particular importance for the subject matter of the research, as it concerns provision of intermediary services. Without entering into details, it is

important to note that 1) both the E-commerce Directive and the DSA impose considerable obligations on all online platforms, including collaborative economy platforms, and 2) these are obligations concerning recipients of intermediary services. This means that both providers of underlying service (for example transport, accommodation or maintenance) and recipients of such service are treated as one uniform category. As a result, there is no need to classify the recipients of intermediary services any further under these EU rules. Nevertheless, these rules do not affect the relations between providers and recipients of underlying services.

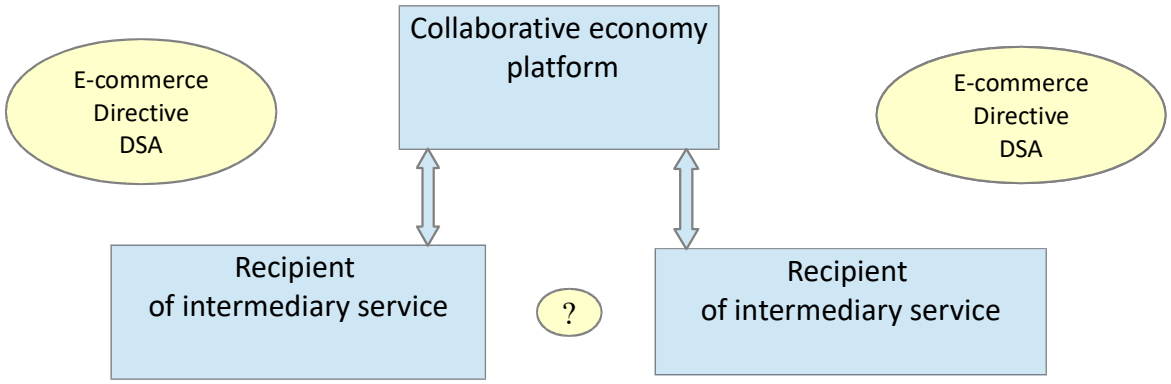

Table 1.

II. Still, the situation is not entirely clear-cut as the services provided by these three categories of actors may also fall under specific EU rules. This of course makes the case quite a complicated puzzle. Therefore, an answer to the question asked in the title of this presentation on whether it still matters who is who in the collaborative economy is affirmative, and below there is an explanation why.

When a provider of any service in the internal market acts for purposes falling within his trade, business, craft or profession, he is recognised as a 'trader' under the EU rules on consumer protection. Parallelly, a recipient of that service acting for purposes which fall outside his trade, business, craft or profession, is recognised as a 'consumer' under the same rules. The foundation for the EU consumer law is the assumption that a consumer is a weaker party to a contract and therefore he needs more protection in legal relations with traders. Put it in other words, a contract between a trader and a consumer is not a contract between peers, as the first one is better informed about the consequences of such contract. For that reason, the EU law imposes obligations on traders to inform consumers before the contract is concluded (Directive on unfair commercial practices, Directive on consumer rights), to refrain from including unfair terms into contracts (Directive on unfair terms in consumer contracts) and to refrain from unfair commercial practices (Directive on unfair commercial practices). The EU law includes respectively rights for consumers, in particular the right to withdraw from a contract concluded at distance and off-premises (Directive on consumer rights) and the right to redress in all cases where the consumer right has been infringed. There should be no doubt that collaborative economy platforms are not only providers of information society services, but also 'traders' for the purposes of the EU consumer law, as long as recipients of intermediation services are considered 'consumers' (acting outside their business).

This might be a relatively frequent situation when a person lets her apartment for short-term rental to a person who comes for short-term vacation stay. In such a situation both parties are also recipients of intermediation services and should be recognised (as a matter of principle) as consumers in the light of the EU consumer law, with allthe consequences for them and for the platform. These rules are additional to the general regime as shown in Table 1 and they constitute

additional burden for the providers of intermediary services. At the same time, the legal relations between providers and recipients of underlying service are governed by classical private (civil) law who are treated as peers.

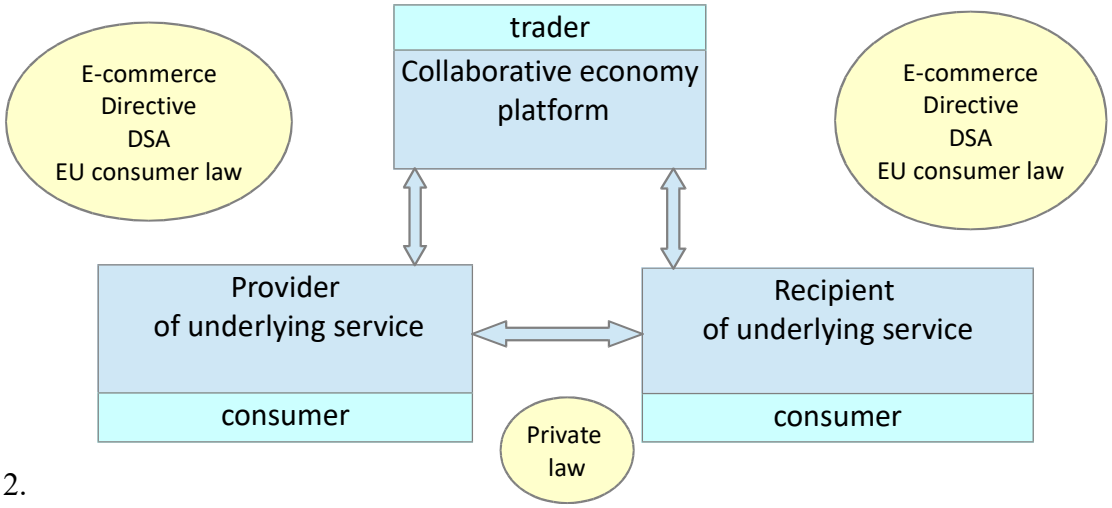

Table 2.

III. Moreover, the discussion on the role and market power of online platforms led to the assumption that the recipients of intermediary services, when they act for the purposes of their business and hence cannot be recognised as 'consumers', may still be a weaker party to a contract with an online platform. Therefore, the regulation on promoting fairness and transparency for business users of online intermediation services (the so-called P2B regulation) was adopted in 2019. This legal act imposes several obligations on online platforms vis-a-vis business users, when they are 'any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession'. Such a definition of a business user clarifies that it is the same category as a 'trader' under the EU consumer law. There are several implications in such a configuration. It seems to be the most important that a provider of underlying service who declares himself as a 'business user' for the purposes of business relations with the collaborative economy platform, has to be recognised as a 'trader' for the purposes of business relations with the recipient of underlying service. That means that he will be obligated to comply with all duties entrenched in the EU consumer law in a situation when the recipient of underlying service is recognised as a 'consumer'.

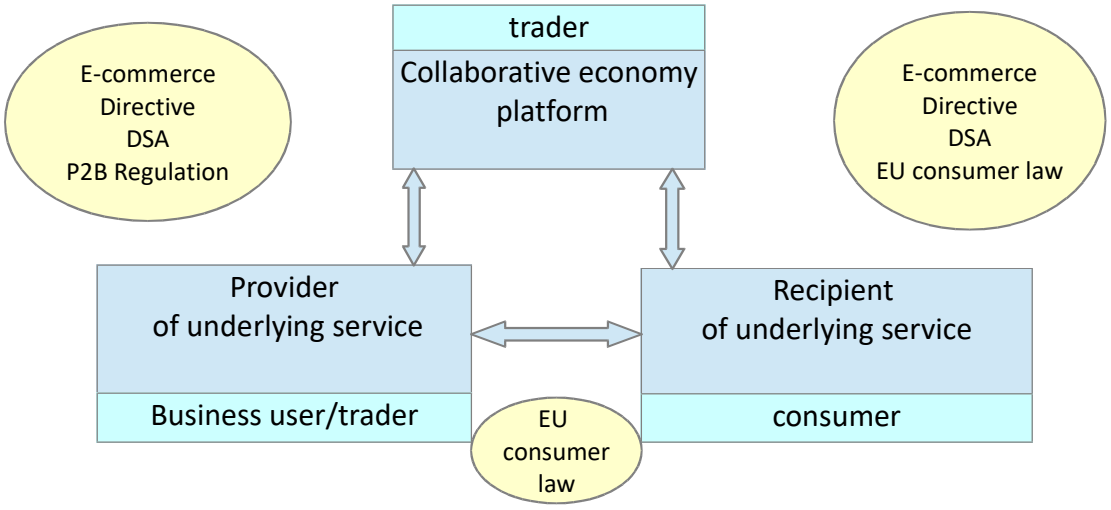

Table 3.

IV. The final configuration seems to be the one where both a provider and a recipient of underlying services declare in a business relation that they are 'business users' in view of the P2B Regulation. The P2B Regulation applies to intermediation services contracts concluded between the collaborative economy platform and the provider of underlying service The same applies to contracts between a collaborative economy platform and the recipient of underlying service. Still, as providers and recipients of underlying service are peers, contracts between them will be governed by private (civil) law of a given Member State.

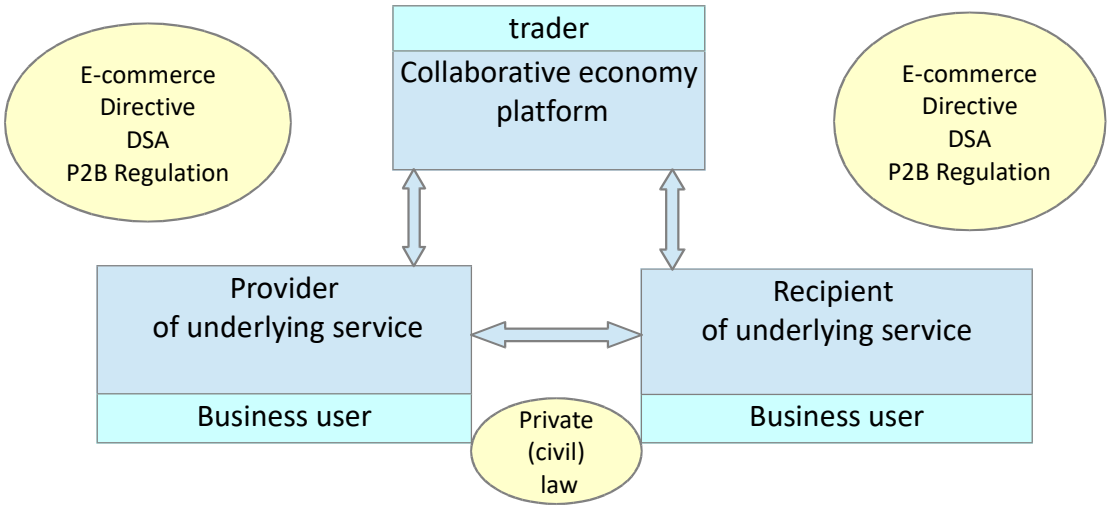

Table 4.

Conclusions

1. The legal framework for information society services providers, including online platforms and collaborative economy platforms, appears to be completed with the adoption of the P2B Regulation (2019), the DSA and the DMA (2022) as far as their obligations in the Digital Single Market are concerned. The scope and nature of these obligations have been regulated separately elsewhere, but it is necessary to state that they are far- reaching and extensive. As the DSA has been adopted as the regulation, its provisions are directly applicable to all entities that fall within its scope of application. That is a significant change for their operation in the internal market. The issue of legal classification of collaborative economy platforms seems not to raise doubts. The platforms are recognised as providers of hosting services, thus falling under the scope of application of the above EU rules. The collaborative economy platforms should also be recognised as 'traders' in the light of the EU consumer law, as far as the recipient of intermediary service is recognised as a ‘consumer'. This implies the application of obligations imposed on traders and of rights conferred on consumers (under the EU consumer law.

2. In the context of the collaborative economy business model, it seems more problematic to decide who is a trader (business user) and who is a consumer. As explained above, such a decision is important both for providers and recipients of underlying services (transport, accommodation, maintenance). From the perspective of the provider of underlying service, it is important to decide whether he is acting for the purposes of his business, because in a contract for intermediation services with a collaborative economy platform, he will be treated either as a business user (P2B Regulation) or as a consumer (EU consumer rules). The same applies to the recipient of underlying service in relations with the collaborative economy platform.

This distinction is also important for underlying services contracts between providers and recipients. Depending on their status as a trader/consumer, such contracts are governed either by the EU consumer law or by private (civil) law (where both parties are recognised as peers).

3. Last but not least, there are two areas where there are no simple answers. The first aspect is that distinction between who is a trader (business user) and a consumer is always effectuated in the light of the EU law on an *ad-hoc* basis. Economic activities are so diverse and divergent that there is no legal possibility to construct more detailed definition, which – on the one hand- would respond more clearly to our questions - but on the other – could encompass all possible business configuration in the future. What is possible to conclude with certainty is that when a business actor declares to be a 'business user' for the purposes of application of the P2B Regulation, he should be recognised as 'a trader' in relations with the recipient of underlying service (who is recognised as 'a consumer'). In all other situations, the exercise in interpreting these terms will continue on a case-by-case basis both in EU courts and domestic courts.
The second aspect is that private (civil) law has not been harmonised to a larger extent at the EU level. Thus, when it was said that private law applies to a particular contract it is meant that the national law of a given Member State applies outside of the EU law. These rules vary from the MS to the MS. The EU rules govern the conflicts over the jurisdiction only partly, excluding the consequences of s of non-performance of a contract under the governing substantive law. Whereas the obligations of online platforms in relations with the recipients of intermediary services seem to be sufficient to manage possible disputes between the parties of such contracts, the EU law has no simple answers to the resolution of disputes between the parties of underlying services contracts. It would be easy to propose more harmonisation of private law at the EU level. Still, one must remember that in general terms the EU has no competence to regulate this area. It remains the national competence. As long as the Member States are not ready to transfer these competences to the EU, there will be no harmonised or unified rules. This also refers to the collaborative economy actors. Still, this is not a particular problem for collaborative economy but rather a general obstacle to run a business activity in trans-border context of the internal market.