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NOTE

From: Presidency
To: The High Level Working Group on Competitiveness and Growth
Subject: Collaborative economy: policy debate

Delegations will find in Annex a discussion paper by the Presidency in view of the meeting of the High Level Working Group on Competitiveness and Growth on 12 September 2016, on the collaborative economy.

Collaborative Economy***Discussion Paper***

The Commission Communication 'A European agenda for the collaborative economy', adopted on 2 June 2016, presents legal guidance and policy recommendations for the balanced development of the collaborative economy in Europe. It responds to concerns over a lack of legal clarity and regulatory fragmentation in the single market and aims to support public authorities, entrepreneurs and consumers engaging in the collaborative economy. The Communication covers several key issues, in particular market access regulation, liability regimes, consumer protection rules, labour law and tax obligations.

Whether, and if so to what extent, under existing EU law collaborative platforms and services providers can be subject to market access requirements such as business authorisations or licensing obligations is currently debated in many Member States. Some Member States have introduced or are preparing to introduce either horizontal or sector-specific legislation, others are developing wider policy strategies. With market access regulations falling directly within the responsibility of the Competitiveness Council, it is suggested to focus the debate in the HLG on this issue, while also touching upon the items of liability rules and consumer protection.

Market Access Requirements

In line with the EU Treaty and applicable secondary legislation, any regulation restricting market access (e.g. business authorisation and licensing requirements) must be necessary, justified and proportionate to meet legitimate public interest objectives. Absolute bans of an economic activity can be imposed only where no less intrusive policy means exist and have been called by the Commission a 'measure of last resort'.

The EU Services Directive includes an obligation for Member States' authorities to review existing legislation to ensure market access requirements continue to be justified, necessary and proportionate. The emergence of the collaborative economy provides an opportunity in this regard, both for operators in the collaborative economy and for traditionally operating services providers. This could lead to a reduction in the regulatory burden for all business operators. The Commission Communication recalls in this context that no one business model should be favoured over another and that it is for consumers, not regulators, to choose which business model they prefer.

The Commission Communication explains that not everything that has historically been considered justified and proportionate in an economic sector is automatically also justified and proportionate in the collaborative economy. When assessing the justification and proportionality of market access restrictions, the specific features of collaborative economy business models should be taken into account. Reviewing mechanisms may for example reduce the need for regulation or need a different kind of regulation.

Professional and occasional services providers

In the collaborative economy, services are provided both by services providers acting in a professional capacity and by private citizens offering services on an occasional basis to other citizens ('peer-to-peer services'). Market access requirements that are justified and proportionate for professional services providers may not automatically be justified and proportionate also for private citizens offering services occasionally to other citizens.

EU law does not establish at what point a private citizen offering a service on an occasional basis becomes a professional services provider. Member States use different means to distinguish between the two: some differentiate between profit-seeking and not for profit services limited to sharing costs. Others use thresholds to differentiate between the two and to establish legal clarity (e.g. income thresholds). The Commission Communication points out that thresholds can help create a clear legal framework, in particular for private citizens offering services on a non-professional and occasional basis to other citizens.

Collaborative platforms

Under EU legislation, collaborative platforms cannot be subject to market access requirements if their activity is limited to the electronic intermediation of independent services providers and users. Where, however, the activity of platforms goes beyond electronic intermediation and they effectively control the underlying services provision, collaborative platforms may be subject to market access requirements applying to the underlying services (e.g. urban transport services or tourist accommodation services).

The Commission in its Communication points out that if a platform exercises effective control over the underlying services must be established case by case, assessing in particular if the platform sets the price or other contractual terms and conditions of the underlying service or employs the services provider or owns key assets used by him/her. Where the collaborative platform offers ancillary services (e.g. rating facilities; payment services; insurance coverage or aftersales services), this is not an indication of control of the platform over the provider of the underlying services.

EU legislation also clarifies that where the collaborative platform has no knowledge of or control over information that is provided by services providers and hosted on its platform, it cannot be held liable for such information. Member States cannot impose on collaborative platforms providing hosting services a general obligation to monitor or investigate information provided by services providers or users. On the other hand, EU consumer law applies to any platform (and indeed services provider) that qualifies as a trader and engages in commercial practices vis-à-vis consumers.

Questions for debate:

In its Communication, the Commission recommends Member States among others:

- *To assess whether market access requirements applied to the collaborative economy are necessary, justified and proportionate, taking into account the specific features of the collaborative economy. This may also be an opportunity to review market access requirements and reduce regulatory burden for traditional services providers.*

- *To differentiate in applicable services regulation between professional services providers and private citizens providing services on an occasional and non-professional basis. Establishing thresholds to this end may be suitable.*
 - *To help improve the quality and independence of online rating and review mechanisms and to encourage voluntary action by collaborative platforms to increase trust and credibility in the collaborative economy (without this impacting the liability exemption).*
1. *What is your view on these policy recommendations and the Commission Communication on the collaborative economy more widely?*
 2. *Has your government already introduced (or intends to introduce) any policy for providers in the collaborative economy? In response of what issue or concern did you introduce this policy? Do you already have feedback from the market?*
 3. *What issues of the Communication should Ministers focus on in their debate in Council?*
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