

Opinion of the European Economic and Social Committee on the ‘Sharing economy and self-regulation’

(exploratory opinion)

(2016/C 303/05)

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On 16 December 2015, under Article 304 of the Treaty on the Functioning of the European Union, M. J. BOEREBOOM, Director-General at the Ministry of Social Affairs and Employment of the Netherlands, asked the European Economic and Social Committee on behalf of the Dutch presidency of the Council to draw up an exploratory opinion on the:

Sharing economy and self-regulation.

(exploratory opinion)

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 10 May 2016.

At its 517th plenary session, held on 25 and 26 May 2016 (meeting of 25 May), the European Economic and Social Committee adopted the following opinion by 133 votes to 1 with 7 abstentions.

1. Conclusions and recommendations

1.1 The EESC is presenting this opinion in response to the Dutch presidency’s request for the EESC to draw up an exploratory opinion on the sharing economy and self-regulation, and having completed its discussions, has formulated the following conclusions.

1.2 In several of its opinions, on which this opinion of course draws, the EESC has already anticipated various aspects of this phenomenon, under its different designations, which vary from language to language and according to the angle from which it is approached.

1.3 This opinion will seek to respond to the request by drawing up a definition that encompasses the specific characteristics of the economic practices covered by this concept. It will try to establish how these economic and social practices should be protected by law, and by what measures and means, with particular emphasis on self- and co-regulation.

1.4 Socially and economically significant since the 2000s through the use of the internet and social networks, it is not a reciprocal exchange like bartering, which dates back as far as human history, but ‘non-reciprocal pro-social behaviour’ or, to be more precise, ‘an act and process of distributing what is ours to others for their use as well as the act and the process of receiving something from others for our use’.

1.5 Rather than a definition, which we will nevertheless seek to provide, it is important to define its characteristics, of which the following stand out:

— it does not result in the ownership or joint ownership of goods, but in pooled use,

— an intermediary platform — which is usually electronic — to put a significant number people offering goods or services in touch with a significant number of users,

- a common objective to make better use of goods and services by sharing them, and
- the final parties to these complex three-way transactions are primarily peers (P2P) and are never part of a business to customer (B2C) contractual relationship.

1.6 These characteristics, supported by a concept that benefits from fairly widespread consensus, make it possible to define the model for this type of economic relations and to distinguish between real sharing economy practices that require special arrangements and those that are sometimes wrongly described as such merely to get around regulations that should apply to them. Uber is a topical example. A more precise analytical distinction concerning the concept of 'sharing' and the use of platforms might help to better inform policy and develop more appropriate regulation.

1.7 In addition to highlighting the growing economic importance of sharing economy practices, which already represent significant European and world trade volumes, it is important to mention the social and environmental dimensions of the sharing economy, which have the potential to strengthen solidarity between people, boost local economies, create jobs, rationalise household consumption by pooling the use of certain goods, reduce energy footprints and promote more responsible and sustainable consumption. Relevant examples are given in point 5.2.

1.8 In view of these circumstances, the EESC once again urges the Commission to undertake a whole raft of indispensable policy measures in order to ensure that the numerous varieties of the sharing economy and the different ways it operates are supported, implemented, and gain credibility and trust at EU level and in the various Member States.

1.9 It also draws attention to the need for these new business models to comply with the applicable national and EU legislation, especially with respect to workers' rights, appropriate taxation, data protection and the privacy of stakeholders, social rights, fair competition and the fight against monopolies and anti-competitive practices, the accountability of platforms in the context of transactions between the partners and the legality of their dealings and, above all, the protection of the rights of all partners operating in the sharing economy, including prosumers, by adapting these relations across the existing EU acquis on consumer rights, with particular reference to unfair contractual terms, unfair commercial practices, health and safety and e-commerce.

1.10 The EESC therefore considers that the EU — and, of course, the Member States meeting within the Council under the Dutch presidency — must urgently define a clear and transparent legal framework within which these activities should be developed and implemented in the European area, as defined in point 8.2.4. It also calls on the Commission to publish without further delay the long overdue 'European agenda for the collaborative economy'.

1.11 This agenda should provide a clear definition of the complementary role that self- and co-regulation must play, in accordance with the principles and the arrangements which the EESC has already advocated over the years in opinions and information reports on these aspects, which it reaffirms and which remain entirely valid.

2. Introduction: a topical and controversial subject

2.1 The Dutch presidency asked the EESC to draw up an exploratory opinion on the *Sharing economy and self-regulation* in a letter from the Ministry of Social Affairs and Employment, but without laying down any guidelines or specifying any questions.

2.2 The sharing economy is a highly controversial and topical issue in terms of its definition and scope, the various concepts it covers, the practices it incorporates and its effects.

2.3 The practices which, in recent years, have been attributed to this concept are just as extensive as the wide range of publications written about it.

2.4 It is consequently quite natural that the EESC, which is always attentive to civil society trends, should already have published several opinions, on which this opinion of course draws ⁽¹⁾ and whose general philosophy is embraced and further developed, anticipating various aspects of this phenomenon, under its different designations, which vary from language to language and according to the angle from which it is approached.

2.5 This opinion sets out to respond to the Dutch presidency's request by seeking to develop a definition that encompasses the specific characteristics that set the sharing economy apart conceptually and the economic practices it covers. It will try to establish whether and how these economic and social practices should be protected by law, and by what measures and means, with particular emphasis on self- and co-regulation.

3. A question of attitude: 'To have or to be?'

3.1 The practices of certain forms of sharing economy actually date back to before the concept began to take shape. They stem from an attitude that relates to having or being and is essentially based on the idea you are not what you have, but what you can access.

3.2 It is clear that a certain type of sharing economy is as old as humankind and has its historical roots in the barter economies of early societies which were only gradually replaced by the introduction of money, which gives whoever possesses it the ability to buy and therefore to have.

3.3 Although it has been gaining social and economic significance since the 2000s through the use of the internet and social networks, it is not a reciprocal exchange, but 'non-reciprocal pro-social behaviour' or, to be more precise, 'an act and process of distributing what is ours to others for their use as well as the act and the process of receiving something from others for our use'. The sharing economy is therefore inspired by various strands of thought ranging from free universal access to knowledge to a functional economy or a gift economy, based on sharing with no intent to profit. Unlike a straightforward bartering economy, the sharing economy is based on the idea of a monetary or non-monetary consideration.

4. An economically significant practice

4.1 This concept will have to serve as the basis for outlining the area that is specific to the sharing economy in its various facets by listing the characteristics that its practices must have and which distinguish it from other commercial market practices.

4.2 First of all, the dominant and common feature is that it does not result in the ownership or joint ownership of goods, but in pooled use.

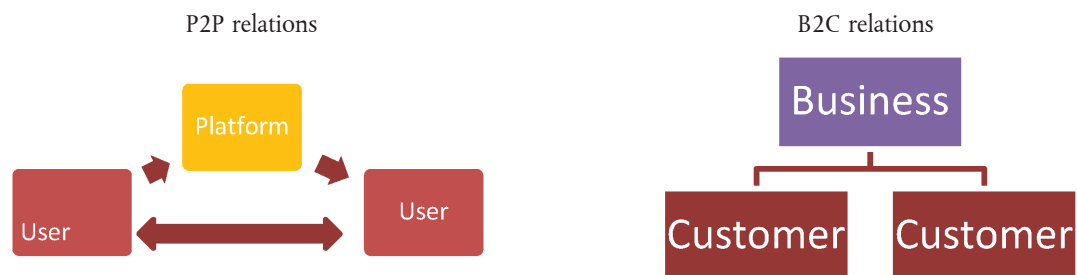
4.3 Furthermore, it requires an intermediary platform, which is usually electronic (a browser or application), putting a significant number of people offering goods or services in touch with a significant number of users.

4.4 A common and typical objective of this kind of activity is to make better use of the idling capacity of goods or services by sharing them.

⁽¹⁾ OJ C 177, 11.6.2014, p. 1.

4.5 In this business model, it is also considered essential that the final parties should primarily be peers (P2P) and are never part of a B2C contractual relationship, whether this involves individual or legal persons, including companies, and do not themselves turn this sharing transaction into a business objective (e.g. a company sharing its car fleet or equipment with another). However, the possibility that an entire 'business' may be 'peer-to-peer' cannot be discounted.

4.6 The following figure shows the differences between the business models at issue:



4.7 This type of transaction presupposes a complex three-way contractual structure reflected in the contractual relationship between the person in possession of the good or the service provider and the platform operator; between the user and the intermediary handling the transaction on the platform, possibly against payment, and between platform users for the use in question.

4.8 This is why the following features are not considered to be particularly distinctive or specific:

- (a) whether it is free or for a fee, e.g. Couchsurfing vs Airbnb;
- (b) the reciprocity of contractual positions;
- (c) the financial or non-financial character of the transaction, therefore accepting the inclusion of crowdfunding in this activity;
- (d) the straightforward sharing of goods or services between private individuals (e.g. giving a colleague a lift; letting a friend have a room for the night or a short stay; letting neighbours use a washing machine because theirs has broken down);
- (e) the exchange or sale of second-hand goods, which does not involve sharing and results in the transfer of ownership of goods.

5. Some practical examples of what is or what is not an aspect of the sharing economy

5.1 The constraints on the length of this opinion exclude a long description or detailed discussion of the nature of a wide range of situations that supposedly include characteristics of the shared economy.

5.2 Nevertheless, a few are worth mentioning as illustrations of the subject under consideration in this opinion:

5.2.1 Examples in the housing sector include platforms such as Airbnb, Rentalia, Homeaway, Couchsurfing and Bedycasa, where homeowners can register to temporarily share rooms or entire homes, and on which hostels, guesthouses and other tourist accommodation providers can also make their services available. Given the ease with which anyone can register their property on these sharing networks, and the profit that owners make from this activity, the proliferation of accommodation in this segment has led to cooperation agreements on tax collection and distribution between the platforms and tax authorities, namely in Paris and Amsterdam. Schemes have been set up in Amsterdam, Barcelona, London and Berlin for the compulsory registration of this type of accommodation and rules on time limits, in order to protect long-term leasing and prevent any resulting increase in rents.

5.2.2 Examples in the transport sector include Blablacar, Umcoche, Liftshare and Karzoo. Private vehicle owners can register on these applications to offer people lifts in their vehicles (carpooling). Some of these platforms allow travel expenses to be shared but charges to make a profit are prohibited. Uber, however, is a case apart since in addition to offering peer-to-peer vehicle sharing (UberPop — banned almost everywhere in the EU), it also allows users to call on the services of professional drivers (UberBLACK and UberX — similar to traditional taxi services). Its characteristics are not clear since the company does not have a transparent business model. This has even resulted in the need for some courts to consider whether Uber's drivers are not in fact its employees⁽²⁾. This service has led to sometimes violent demonstrations as well as legal proceedings across Europe. Only the United Kingdom and Estonia have passed laws to legalise these services, pending the CJEU's response to requests for preliminary rulings from a court in Barcelona and another in Brussels for clarification about their nature⁽³⁾.

5.2.3 Examples of collaborative funding include interest-bearing loans, such as Zopa and Auxmoney; buying an equity stake in the company created, such as Fundedbyme and Crowdcube, or funding for profit, such as Kickstarter or Indiegogo, and finally, donation-based funding, with no strings attached to the sums invested.

6. The need to define a concept

6.1 As is usually the case, efforts to define concepts — especially when the method used is inductive — are not linear, and take time to bed in and achieve unanimity. This is what is happening with respect to the 'sharing economy' concept, which appears in the media alongside other concepts such as 'social or inclusive economy', 'circular economy', 'functional economy', 'green economy', 'blue economy', 'economy of solutions', 'horizontal economy', 'on-demand economy', 'platform economy' and 'gig economy'.

6.2 As a result, some authors prefer not to attempt a definition for fear that it would not be sufficiently comprehensive and might even define its scope incorrectly.

6.3 Despite the numerous references to the concept in EESC opinions, no definition has been attempted; this is also true of the CoR's opinion⁽⁴⁾, which attempts a classification involving two main categories and four types, but does not risk a definition. Finally the Commission's recent Communication on *Upgrading the Single Market*⁽⁵⁾, first uses the term 'collaborative economy' as a synonym but, instead of giving a definition, restricts itself to listing the benefits for stakeholders (consumers and workers) and focuses on its impact in terms of productivity and sustainability to develop a 'European agenda for the collaborative economy' in 2016. The European Parliament has not made any substantial contribution so far beyond a resolution on Towards a Digital Single Market Act⁽⁶⁾ (21 December 2015) and a number of high-quality studies and a few briefings on specific issues. So far however, none of these documents have studied the impact in terms of job creation and growth.

⁽²⁾ <http://www.theguardian.com/technology/2015/sep/11/uber-driver-employee-ruling>

⁽³⁾ OJ C 363, 3.11.2015, p. 21; OJ C 429, 21.12.2015, p. 9.

⁽⁴⁾ OJ C 51, 10.2.2016, p. 28.

⁽⁵⁾ COM(2015) 550 final, p. 4.

⁽⁶⁾ A8-0371/2015.

6.4 The EESC sees no need to be original when one of the many existing definitions would seem to have won broad acceptance. It has therefore adopted the Botsman & Rogers definition of a sharing economy, namely an 'economic system based on sharing underused assets or services, for free or for a fee, directly from individuals' using online platforms, although a more precise analytical distinction concerning the concept of 'sharing', i.e. 'non-profit', and the use of platforms might help to better inform policy and develop more appropriate regulation.

6.5 This definition is comprehensive enough to include areas as varied as production, consumption, financing (crowdfunding) or knowledge itself and to allow subdivision into four fairly autonomous areas: collaborative consumption; collaborative education, training and knowledge; collaborative funding; and collaborative production (⁷).

6.6 This definition also makes it possible to identify business models masquerading as sharing economy practices when in reality they are no more than profit-making B2C business models. This conclusion can serve as a gauge for the purposes of analysing the functioning of these platforms (though not always transparent) and we can find examples of genuine sharing economy practices based on P2P platforms, where the platforms' only role is to enable peer-to-peer contact. However, there are also examples of companies that use the guise of P2P platforms to carry out business — by receiving commission, receiving payments, providing ancillary services — and which should not be treated as sharing economy operators, but as providers of B2C services, with the consequences that this entails.

6.7 This definition therefore permits the immediate exclusion of certain types of practices from the sharing economy concept, which might otherwise be deemed to qualify, namely:

- (a) the sharing of food or non-durable goods;
- (b) mutual societies and cooperatives;
- (c) social entrepreneurship;
- (d) philanthropy;
- (e) the on-demand economy;
- (f) the functional economy, which has more to do with the circular economy;
- (g) pure intermediation.

7. The growing economic importance of this trend and policy options to be developed

7.1 Although its scope has still not been very clearly defined, numerous studies or surveys have been carried out to determine its economic weight at EU and international level.

7.2 There can therefore be no question that in recent years and especially during and in response to the ongoing crisis, sharing economy initiatives have continued to increase. The Collaborative Consumption website features over 1 000 initiatives.

(⁷) <http://www.euro-freelancers.eu/marco-torregrassa-presentation-on-the-sharing-economy-2/>

7.3 According to estimates used by the European Commission, the volume of world trade hidden beneath the banner of the sharing economy amounted to USD 3,5 billion in 2013, representing an annual growth rate of 25 %. It is currently estimated at 20 billion. Forecasts by PwC consultants point to sharp growth until 2025 ⁽⁸⁾.

7.4 In addition to creating economic value, the social and environmental dimensions of the sharing economy have the potential to strengthen solidarity between people, boost local economies, create jobs, rationalise household consumption by pooling the use of certain goods, reduce energy footprints and promote more responsible and sustainable consumption.

7.5 The EESC believes that this type of economy 'represents an innovative complement to a production economy in the form of a use-based economy offering economic, social and environmental benefits' and that it 'also offers a way out of the economic and financial crisis' ⁽⁹⁾.

7.6 As a result, the EESC has not hesitated to urge the Commission to undertake a whole raft of indispensable policy measures in order to ensure that the numerous varieties of the sharing economy and the different ways it operates are supported, implemented, and gain credibility and trust at EU level and in the various Member States. This opinion cannot but reiterate the views which the EESC has already published on these issues and to which it explicitly refers. It therefore considers that the new business models constituted by these platforms raise urgent issues regarding the application of national legislation, safeguarding workers' rights and ensuring appropriate taxation. The EESC calls on the Commission to address these concerns if the social benefits offered by these business models are indeed to be delivered.

7.7 It is also important to draw attention to the urgent need for definitions, guidance or guidelines at EU level because some Member States are already defining their own policies independently, in view of the delay and the apparent uncertainty of the European institutions.

8. An activity protected by law

8.1 *The interests at stake and their legal protection*

8.1.1 Like any other activity that juxtaposes people with their own — sometimes conflicting — interests, the sharing economy is covered by the laws governing the interests involved. The EESC therefore believes that it is wholly unrealistic to argue that the sharing economy should be a 'law-free' area where freedom must reign unconfined and unconstrained, based exclusively on trust and innate goodness (along the lines of Rousseau's 'noble savage').

8.1.2 The EESC has systematically and consistently argued that all economic activities must be protected by law; however, as it has also argued, these rules can also take different forms, which need to be coordinated harmoniously.

8.1.3 In particular, we refer to its most recent opinion on the role of self-regulation and co-regulation in the EU ⁽¹⁰⁾, where the EESC argues that 'self-regulation and co-regulation are mechanisms for regulating economic and social relations or commercial practices among the various economic stakeholders; they may be decided spontaneously or be imposed'. They should be viewed as important instruments for complementing or supplementing hard law, but not as an alternative to it, and in order to be valid, 'their configuration and ambit must be defined by specific precepts that are legally binding and enforceable, whether at national or Community level, respecting at the same time the nature of these instruments, especially the voluntary agreement of the participants'.

⁽⁸⁾ http://www.cpcp.be/medias/pdfs/publications/economie_collaborative.pdf

⁽⁹⁾ OJ C 177, 11.6.2014, p. 1.

⁽¹⁰⁾ OJ C 291, 4.9.2015, p. 29.

8.2 *Rights and obligations*

8.2.1 Indeed, once purely spontaneous practices between private individuals assume the significance of an economic activity and the reciprocal rights and obligations of the parties take on a contractual nature, they must be subject to national or EU laws that provide a legal framework for the rights and obligations of all parties.

8.2.2 However, the complexity of relations created within the social economy and described in point 4.7 warrant the definition of a legal framework in which the parties should operate, especially in the case of hybrid activities such as freemium or donationware transactions, as highlighted by the typical example of geocaching.

8.2.3 Insofar as this phenomenon, by its very nature, now clearly extends beyond the borders of the Member States, the EU must define, for the purposes of its common and integrated area as a vast single market, the legal framework applicable to these activities when they are carried out across borders. Its absence has already resulted in several Member States taking different and sometimes contradictory positions with regard to certain specific cases (e.g. Uber), as is also happening in the United States.

8.2.4 This legal framework mainly concerns the following priority areas:

- (a) protection of the rights of all partners operating in the sharing economy, including prosumers, by adapting these relations across the existing EU acquis on consumer rights, with particular reference to unfair contractual terms, unfair commercial practices, health and safety and e-commerce;
- (b) basic consumer rights, which would have to be extended to include them (information, transparency, data protection and privacy, health and safety);
- (c) protection of data and privacy of those involved (tracking and profiling) that ensures the portability of their data;
- (d) competition law, insofar as these activities compete on the market with companies pursuing identical objectives and activities, and insofar as they ensure fair competition and combat monopolies and anti-competitive practices in order to address other challenges of the sharing economy;
- (e) tax law, insofar as revenues from these activities cannot be exempt from appropriate taxation, in order to combat tax evasion and avoidance;
- (f) the responsibility of the platforms, depending on the services they provide, and in line with their level of involvement in the transactions undertaken through them and guarantees relating to the legality of their dealings;
- (g) the impact on the labour market and the very definition of the concept and forms of work in the digital environment;
- (h) protection of the workers involved, distinguishing between the situations of workers who do not have an employee-employer relationship with the platform, protecting them on the basis of the principles that apply to self-employed workers, and of workers who actually qualify as employees, applying the principles that protect employed staff, particularly with regard to 'false' self-employment and job insecurity;

- (i) protection of workers' social rights and instruments, such as the right of association, the right to strike and the right to collective bargaining and social dialogue;
- (j) protection of social models and of the Member States' capacity to ensure the future sustainability of these models;
- (k) the environmental dimension, with a view to monitoring the environmental impact of the collaborative economy in order to prevent negative repercussions ⁽¹¹⁾;
- (l) copyright and intellectual property, to be considered during the review of Directive 2001/29/EC.

8.3 *Regulatory options*

8.3.1 At EU level, the only level of relevance to this opinion, the EESC believes that the institutions, starting with the Commission, due to its right of initiative, but also the Council and the EP, should devote very particular and urgent attention to developing a regulatory framework that defines its precise scope and the parameters within which this activity should be developed since there is no doubt that the measures will have to be adapted to the various forms of sharing economy.

8.3.2 Within this framework, pride of place must be given to the common principles of public order and interest, which should be considered as mandatory requirements for participants in these forms of economic activity, and in particular those mentioned in point 8.2.4.

8.3.3 However, the EESC has always maintained that, at the same time and in parallel, there is a whole space which must be left to self-regulation and co-regulation and even believes that we are confronted with a typical instance of what some refer to as 'shared regulation', as recently argued by the Royal Society for the encouragement of Arts, Manufactures and Commerce (RSA), London or the model code of conduct drawn up by Sharing Economy UK (SEUK) ⁽¹²⁾.

8.4 *A special role for self-regulation*

8.4.1 The EESC has always held the view that the EU institutions and national authorities should not define the content of self-regulatory codes, which should be left to the sole discretion of the parties when they do not seek to obtain binding recognition between the parties.

8.4.2 However, to the extent that these agreements aspire to recognition as 'an accessory regulatory instrument in the legal system concerned', the EESC has argued — in its abovementioned opinion — that the EU's 'parameters for recognising these regulatory instruments must be quite clear, as must the principles governing them and their limits'. This reasoning applies fully to the sharing economy, which is no exception.

8.4.3 The EESC regrets that when a new Interinstitutional Agreement between the Council, Parliament and the Commission was adopted on 13 April 2016, these institutions did not take the opportunity to make the improvements to it as advocated by the EESC in its abovementioned opinion on self-regulation and co-regulation (SRCR), which featured in the previous agreement, and that, at this stage, SRCR only gets an unspecific mention in the 'Better Regulation' package, which is relegated to a footnote referring to the principles on making better use of SRCR and the CoP platform, and a few scattered references in the guidelines and the toolbox.

8.4.4 If there is one field where, in order to gain credibility and the trust of its users, the definition of the parameters described above is increasingly necessary, then it is undoubtedly the shared economy, which would benefit greatly from a solid architecture and reliable self-regulation or co-regulation at EU level.

8.4.5 The EESC therefore looks forward to the announced 'European agenda for the collaborative economy', and as of now urges the Commission not to neglect the regulatory aspects of this activity and the role that self-regulation and co-regulation should play in this area.

Brussels, 25 May 2016.

The President
of the European Economic and Social Committee
Georges DASSIS

⁽¹¹⁾ http://www.iddri.org/Evenements/Interventions/ST0314_DD ASN_sharing economy.pdf

⁽¹²⁾ <http://www.sharingeconomyuk.com>