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Gender equality and the collaborative economy

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Gender equality and the collaborative economy

Authors

Eugenia Caracciolo di Torella

Bridgette McLellan

Coordinators

Susanne Burri

Alexandra Timmer

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The text of this report was drafted by Eugenia Caracciolo di Torella and Bridgette McLellan, and coordinated by Susanne Burri, Alexandra Timmer and Franka van Hoof for the European network of legal experts in gender equality and non-discrimination.

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Members of the European network of legal experts in gender equality and non-discrimination

Management team

General coordinator	Marcel Zwamborn	Human European Consultancy
Specialist coordinator gender equality law	Susanne Burri	Utrecht University
Acting specialist coordinator gender equality law	Alexandra Timmer	Utrecht University
Specialist coordinator non-discrimination law	Isabelle Chopin	Migration Policy Group
Project management assistants	Ivette Groenendijk Michelle Troost-Termeer	Human European Consultancy Human European Consultancy
Gender equality assistant and research editor	Franka van Hoof	Utrecht University
Non-discrimination assistant and research editor	Catharina Germaine	Migration Policy Group

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Senior expert on EU law, sex, gender identity and gender expression in relation to trans and intersex people	Christa Tobler
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Executive summary

This report analyses the potential impact that the collaborative economy may have on gender equality. This is a particularly complex issue, mainly because the collaborative economy is a recent development and the legislator at both EU and national level is still struggling with it. Collaborative economy is an umbrella term that comprises a vast and ‘complex ecosystem of on-demand services and temporary use of assets based on exchanges via on-line platforms’.¹ As it can take many forms,² it is difficult to provide a comprehensive definition. Broadly, it is a rapidly growing business model where goods and services are shared for the mutual benefit of the service provider and the consumer. Its potential is enhanced by the use of digital platforms that, acting as a broker,³ connect the provider and the parties and make it possible to share goods and services with a vast network. The goods and services in question may include vehicles, tools, food, a ride from A to B, short-term home swaps, renting a room in someone’s private home, and health services.⁴ The collective economy has rapidly expanded across key economic sectors and many aspects of our lives and has fundamentally altered the traditional way in which we work; it has been driven by, and in a way it has been a logical consequence of, ongoing changes, such as the development of technology and the rise of social networks. Although at the moment it is still not the norm,⁵ it is a phenomenon that is not to be ignored as it will most probably develop further.

To date, however, there is not a clear normative framework to address it, at either EU⁶ or national level.⁷ Indeed, across Europe, so far any response has been very fragmented. Some Member States have regulated specific aspects⁸ of this new business model at local or national level and this has triggered a wider debate at EU level.⁹ This new business model has the potential to bring new and exciting opportunities for both providers and users.¹⁰ For example, it has the potential to offer service providers some sort of ‘flexibility’, a source of additional income,¹¹ as well as to enable certain people to work who would not otherwise have the possibility to do so because they are, for example, house-bound. It may also help small businesses to reach a wider market. To consumers it may offer a wider choice of products and services at a lower price.

Yet, at the same time it also presents risks. For providers it does not usually guarantee jobs and/or social security, while consumers are faced with uncertainty as regards the applicable national consumer protection rules, due to the multi-faceted relationship between the parties involved in this business model.

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- 1 European Commission Communication, *Upgrading the Single Market: More opportunities for People and Business* COM (2015) 550 final. At 2.1., accessed 14 December 2017.
 - 2 See Section 1.1 of this Report.
 - 3 Jourdain L. J., Leclerc M., Millerand A. (2016) *Économie collaborative & Droit*, Limoges, available at <http://www.fypéditions.com/economie-collaborative-droit/>, accessed 14 December 2017.
 - 4 The list is not exhaustive.
 - 5 CIPD, Survey Report (2017) *To Gig or not to Gig?* Available at https://www.cipd.co.uk/Images/to-gig-or-not-to-gig_2017-stories-from-the-modern-economy_tcm18-18955.pdf, accessed 14 December 2017.
 - 6 See Section 2 of this Report.
 - 7 See Section 3 of this Report.
 - 8 For example, Belgium has adopted measures aimed at the fiscal regime (Income Tax Code 1992).
 - 9 See the European Commission Communication *A European Agenda for the Collaborative Economy* COM(2016) 356 available at <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations>, accessed 14 December 2017; see also European Parliament, *The Situation of Workers in the Collaborative Economy*, September 2016, available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf) accessed 14 December 2017; Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment*, European Parliament Research Service, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf), accessed 14 December 2017.
 - 10 See Section 1.3 of this Report.
 - 11 But see the discussion in Section 1.3 of this Report that highlights that the income is often too low to make a living out of it. In many cases, it is probably more of an additional income.

They may also have difficulty organising themselves in consumer protection organisations and there may be a lack of protection against discrimination or harassment by fellow consumers or service providers.¹²

These risks are increasingly being discussed;¹³ in the Communication *A European agenda for the Collaborative Economy*, the Commission has identified five areas in which relevant concerns have arisen: market-access requirements, liability regimes, protection of users, employment matters, and taxation.¹⁴ This report explores one area of concern that has so far been overlooked: the impact of the collaborative economy on gender equality.

Gender equality concerns may arise in two specific areas: either in relation to the service providers or to the consumers. The first case is more generally linked to employment-related conditions: Are the individuals working in the collaborative economy able to use rights such as social-security entitlements or sick leave? For example, can UBER drivers claim a pension or fair pay? In these cases, the connection with gender equality is easy to identify. Such cases have recently been brought to the attention of the general public by discussion in the news and social media,¹⁵ as well as in national and EU case law. Depending on the employment contract, these aspects are likely to be addressed by national and EU employment and non-discrimination legislation.¹⁶

This report focuses on the second issue, where discrimination occurs when goods and services are offered to consumers. Here the link with gender equality may be less obvious; this may apply, for example, when a product is offered in a discriminatory way, such as an Airbnb room offered to women only. In order to identify gender-related concerns, a questionnaire was distributed to national gender experts in the European Network of legal experts in gender equality and non-discrimination,¹⁷ covering all EU Member States and three associated countries (Iceland, Liechtenstein and Norway). It is important to note that currently there is little domestic case law and literature, and the CJEU has not yet had the opportunity to interpret this issue.¹⁸ The questionnaire showed that apparent gender discrimination does not appear to be an issue when it comes to the collaborative economy. Although the national experts across Europe reported several issues that have arisen in the context of the collaborative economy,¹⁹ gender discrimination was rarely mentioned. Does this mean that there have been no cases where gender equality was at stake? The situation is more complex than this. It clearly appears that across Europe issues

12 See the European Commission Communication *A European Agenda for the Collaborative Economy* COM(2016) 356 available at <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations>, accessed 14 December 2017; see also European Parliament, *The Situation of Workers in the Collaborative Economy*, September 2016, available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf) accessed 14 December 2017; Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment*, European Parliament Research Service, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf), accessed 14 December 2017.

13 For the growing body of literature in this area, see the bibliography.

14 See the European Commission Communication *A European Agenda for the Collaborative Economy* COM(2016) 356 available at <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations>, accessed 14 December 2017; see also European Parliament, *The Situation of Workers in the Collaborative Economy*, September 2016, available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf) accessed 14 December 2017; Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment*, European Parliament Research Service, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf), accessed 14 December 2017.

15 See for example 'Fresh call for crackdown on gig economy' in BBC News 20 November 2017 available at <http://www.bbc.co.uk/news/business-42044699>, accessed 14 December 2017.

16 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast); Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity; Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

17 The questionnaire is available in Annex II of this Report. For more information on the European Network of legal experts in gender equality and non-discrimination, see http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm accessed 14 December 2017. Further information on the national reports on gender equality are available at <http://www.equalitylaw.eu/> accessed 14 December 2017.

18 The only case that the CJEU has decided in the context of Directive 2004/113/EC is not related to the collaborative economy but to financial products: Case .C-236/09, *Association Belge des Consommateurs Test-Achats and Others*, ECLI:EU:C:2011:100.

19 See Section 3.1 of this Report.

related to gender discrimination are simply not reported. This may be because these are not normally brought to public attention because, at the time of writing, this specific element of the debate has not yet attracted much public attention. As a consequence of the lack of attention, neither the authorities nor the general public are aware that gender equality issues may arise in the first place. One of the reasons might be that users identify discriminatory acts as unfriendly behaviour or treatment. A further issue in case of discrimination when offering goods and services in the context of the collaborative economy is how to determine the relevant liability: If an Airbnb customer is denied a room on the ground of his/her sex or is sexually harassed, who is responsible? The platform (Airbnb) or the service provider (the host)? If there is a case of sexual harassment in an UBER taxi, who would be responsible: the service provider (the driver) or the platform (UBER)? The response differs across the Member States depending on the service involved (taxi or a room), which does not constitute a cohesive EU response.

This report maintains that, in this case, the relevant legislative instrument is Directive 2004/113/EC²⁰ and the national legal systems implementing it. Therefore, it explores the extent to which Directive 2004/113/EC has been used and could be used directly or indirectly to address gender-related concerns in the collaborative economy. In other words: Can Directive 2004/113/EC play a role in the collaborative economy and, if so, what role could this be?

Applying this Directive to the collaborative economy, although not impossible, is complex. A reason for this complexity is that only a few Member States have identified Directive 2004/113/EC as a suitable instrument to address situations arising in the context of the collaborative economy.²¹ This might well be the case because, at the time of the entry into force of the Directive, the collaborative economy was not foreseen. The challenge, therefore, is to strengthen the link between gender equality and Directive 2004/113/EC on the one hand, and the collaborative economy on the other hand. More work is necessary to raise awareness of how to identify and access relevant rights at national level.

Finally, the collaborative economy can also have more general 'unintended' consequences for gender equality. This may arise from the fact that this new model will affect traditional business models: platforms such as Couchsurfing and Airbnb will have an impact on the hotel market, for example. Many women work in the traditional hotel business as chambermaids or waitresses. How will these changes affect them?

In conclusion, the collaborative economy is an emerging model that may affect the principle of gender equality in many respects. Although the relationship between the collaborative economy and gender equality, at the time of writing, may appear marginal, the more the collaborative economy develops, the more this is likely to become apparent. This report submits that it is time to expressly acknowledge and regulate the potential impact that the collaborative economy may have on gender equality and that the legislation that could be used for this purpose already exists. It will depend on the existence and the type of an employment relationship between the service provider and the platform.²² However, if such a relationship is not in place, i.e. if the discrimination concerns the goods and/or service offered, Directive 2004/113/EC can and should be applicable.

20 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373, 21 December 2004.

21 Section 3.1 of this Report.

22 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast); Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity; Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

Résumé

Le présent rapport analyse l'impact potentiel que l'économie collaborative pourrait avoir sur l'égalité entre les hommes et les femmes. La problématique est particulièrement complexe, essentiellement parce que l'économie collaborative est un développement récent que le législateur, tant au niveau de l'UE qu'au niveau national, éprouve encore beaucoup de difficulté à appréhender. Il s'agit d'un terme générique qui englobe «un système complexe, fondé sur des services à la demande et l'utilisation temporaire de biens, reposant sur des échanges conclus sur des plateformes en ligne».¹ Étant donné les multiples formes que l'économie collaborative peut revêtir², il s'avère difficile d'en formuler une définition exhaustive. On peut la désigner en gros comme un modèle économique en rapide croissance prévoyant le partage des biens et des services dans l'intérêt mutuel du prestataire et du consommateur. Son potentiel est démultiplié par l'utilisation de plateformes numériques, lesquelles, agissant en qualité d'intermédiaires³, mettent le prestataire et les parties en relation et permettent de partager les biens et les services à l'échelle d'un vaste réseau. Les biens et les services en question peuvent consister en véhicules, en outils, en denrées alimentaires, en trajet du point A au point B, en échanges de résidences de courte durée, en location de chambre chez un particulier et en services de soins.⁴ L'économie collective s'est rapidement étendue aux principaux secteurs d'activité et à de nombreux aspects de notre vie, et a fondamentalement modifié notre façon traditionnelle de travailler; elle a été impulsée par les évolutions actuelles que sont notamment le progrès des technologies et l'avènement des réseaux sociaux, et elle en est, d'une certaine manière, la conséquence logique. L'économie collaborative n'est pas encore la norme à ce jour⁵, mais le phénomène ne peut être ignoré car il va très probablement poursuivre sa progression.

Il n'existe cependant aujourd'hui aucun cadre normatif dans lequel l'inscrire, que ce soit au niveau de l'UE⁶ ou au niveau national.⁷ Où que ce soit en Europe, en effet, les réactions éventuelles ont été jusqu'ici très fragmentées. Certains États membres ont réglementé des aspects spécifiques⁸ de ce nouveau modèle économique à l'échelon local ou national, ce qui a déclenché un débat plus large à l'échelon de l'Union.⁹ Ce nouveau modèle économique peut potentiellement ouvrir des opportunités nouvelles et passionnantes à la fois pour les prestataires et pour les usagers.¹⁰ C'est ainsi qu'il pourrait offrir aux prestataires de services une certaine «flexibilité», une source de revenu supplémentaire¹¹, et permettre à certaines personnes de travailler alors qu'elles n'en auraient pas la possibilité autrement, étant par exemple confinées à domicile. Ce modèle pourrait également aider de petites entreprises à toucher un marché plus vaste, et proposer aux consommateurs un choix plus large de produits et de services à un prix inférieur.

1 Communication de la Commission européenne, *Améliorer le marché unique: de nouvelles opportunités pour les citoyens et les entreprises*, COM (2015) 550 final, point 2.1., consultée le 14 décembre 2017.

2 Voir le point 1.1 du présent rapport.

3 Jourdain L. J., Leclerc M., Millerand A. (2016) *Économie collaborative & Droit*, Limoges, disponible sur <http://www.fypeditions.com/economie-collaborative-droit/>, consulté le 14 décembre 2017.

4 La liste n'est pas exhaustive.

5 CIPD, Survey Report (2017) *To Gig or not to Gig?* Disponible sur https://www.cipd.co.uk/Images/to-gig-or-not-to-gig_2017-stories-from-the-modern-economy_tcm18-18955.pdf, consulté le 14 décembre 2017.

6 Voir le point 2 du présent rapport.

7 Voir le point 3 du présent rapport.

8 Ainsi par exemple, la Belgique a adopté des mesures axées sur le régime fiscal (Code des impôts sur le revenu 1992).

9 Voir la communication de la Commission européenne *Un agenda européen pour l'économie collaborative*, COM(2016) 356, disponible sur <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations>, consulté le 14 décembre 2017; voir également Parlement européen, *The Situation of Workers in the Collaborative Economy*, septembre 2016, disponible sur [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf), consulté le 14 décembre 2017; Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment*, Service de recherche du Parlement européen, disponible sur [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf), consulté le 14 décembre 2017.

10 Voir le point 1.3 du présent rapport.

11 Voir aussi la discussion au point 1.3 du présent rapport, qui montre que le revenu est souvent trop faible pour permettre de gagner sa vie. Il s'agit probablement davantage, dans de nombreux cas, d'un revenu supplémentaire.

Dans le même temps toutefois, ce modèle comporte des risques. Du côté des prestataires, il ne garantit généralement pas d'emplois ni/ou de sécurité sociale; les utilisateurs sont, de leur côté, en situation d'incertitude pour ce qui concerne les règles nationales de protection des consommateurs qui leur sont applicables, étant donné les multiples facettes de la relation entre les parties prenantes de ce modèle économique. Ils peuvent également rencontrer certaines difficultés pour s'organiser en associations de protection des consommateurs, et une protection pourrait faire défaut à l'encontre d'une discrimination ou d'un harcèlement de la part d'autres consommateurs ou de prestataires de services.¹²

Ces risques sont de plus en plus analysés¹³; dans sa communication *Un agenda européen pour l'économie collaborative*, la Commission recense cinq domaines dans lesquels des préoccupations pertinentes ont surgi: les exigences à satisfaire pour accéder au marché, les régimes de responsabilité, la protection des utilisateurs, les questions d'emploi et la fiscalité.¹⁴ Le présent rapport se penche sur un domaine de préoccupation négligé à ce jour: l'impact de l'économie collaborative sur l'égalité hommes-femmes.

La question de cette égalité peut se poser sous deux angles spécifiques: soit en rapport avec les prestataires de services soit en rapport avec les consommateurs. Dans le premier cas, elle est plus généralement liée aux conditions d'emploi: les personnes travaillant dans l'économie collaborative peuvent-elles exercer des droits tels que ceux à la sécurité sociale ou au congé de maladie? Ainsi par exemple, les chauffeurs UBER peuvent-ils revendiquer une pension ou un salaire équitable? Le lien avec l'égalité des genres peut être aisément établi dans ce type de cas, lesquels ont parfois été portés récemment à l'attention du grand public au travers de débats dans la presse et les médias sociaux¹⁵ ainsi que dans la jurisprudence nationale et européenne. Selon le contrat d'emploi, ces aspects sont susceptibles d'être traités par la législation nationale et de l'UE en matière d'emploi et de non-discrimination.¹⁶

Le présent rapport se concentre sur la seconde problématique, à savoir la survenance d'une discrimination dans l'offre de biens et de services aux consommateurs. Le lien avec l'égalité hommes-femmes peut ici s'avérer moins évident; il peut exister, par exemple, lorsque le produit est offert de manière discriminatoire: tel serait le cas d'une chambre Airbnb proposée uniquement aux femmes. Afin de cerner les préoccupations liées au genre, un questionnaire a été distribué aux membres nationaux du réseau européen d'experts juridiques dans le domaine de l'égalité des genres et la non-discrimination¹⁷, lequel couvre tous les États membres de l'UE plus trois pays associés (Islande, Liechtenstein et Norvège). Il est important de souligner qu'à l'heure actuelle la jurisprudence et la littérature nationales restent peu abondantes, et que la CJUE

12 Voir la communication de la Commission européenne *Un agenda européen pour l'économie collaborative*, COM(2016) 356, disponible sur <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations>, consulté le 14 décembre 2017; voir également Parlement européen, *The Situation of Workers in the Collaborative Economy*, septembre 2016, disponible sur [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf), consulté le 14 décembre 2017; Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment*, Service de recherche du Parlement européen, disponible sur [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf), consulté le 14 décembre 2017.

13 Pour le nombre croissant d'ouvrages dans ce domaine, voir la bibliographie.

14 Voir la communication de la Commission européenne *Un agenda européen pour l'économie collaborative*, COM(2016) 356, disponible sur <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations>, consulté le 14 décembre 2017; voir également Parlement européen, *The Situation of Workers in the Collaborative Economy*, septembre 2016, disponible sur [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf), consulté le 14 décembre 2017; Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment*, Service de recherche du Parlement européen, disponible sur [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf), consulté le 14 décembre 2017.

15 Voir notamment «*Fresh call for crackdown on gig economy*» dans BBC News du 20 novembre 2017, disponible sur <http://www.bbc.co.uk/news/business-42044699>, consulté le 14 décembre 2017.

16 Directive 2006/54/CE relative à la mise en œuvre du principe de l'égalité des chances et de l'égalité de traitement entre hommes et femmes en matière d'emploi et de travail (refonte); directive 2010/41/UE concernant l'application du principe de l'égalité de traitement entre hommes et femmes exerçant une activité indépendante; directive 79/7/CEE relative à la mise en œuvre progressive du principe de l'égalité de traitement entre hommes et femmes en matière de sécurité sociale.

17 Le questionnaire figure à l'annexe II du présent rapport. Pour de plus amples informations concernant le réseau européen d'experts juridiques dans le domaine de l'égalité des genres et la non-discrimination, voir http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm, consulté le 14 décembre 2017. D'autres informations concernant les rapports nationaux sur l'égalité des genres sont disponibles sur <http://www.equalitylaw.eu/>, consulté le 14 décembre 2017.

n'a pas encore eu l'occasion d'une interprétation sur ce point.¹⁸ Le questionnaire montre qu'il n'existe apparemment pas de problème manifeste de discrimination fondée sur le genre dans le contexte de l'économie collaborative. Alors que les experts nationaux signalent, partout en Europe, certains problèmes survenus dans ce contexte¹⁹, la discrimination fondée sur le genre n'a été que rarement mentionnée. Faut-il en conclure qu'il n'y a eu aucun cas dans lequel l'égalité des genres était en cause? Les choses sont plus compliquées que cela: il apparaît clairement en effet que, dans l'ensemble de l'Europe, les problématiques liées à la discrimination fondée sur le genre ne sont tout simplement pas rapportées – une situation qui pourrait résulter du fait que ces problématiques ne sont généralement pas portées à l'attention du public car, à l'heure d'écrire ces lignes, cet aspect particulier du débat n'a pas été très mobilisateur. Faute d'une attention suffisante, ni les autorités ni le grand public n'ont conscience que des problèmes d'égalité des genres sont susceptibles de survenir. L'une des explications pourrait être que les utilisateurs assimilent les actes discriminatoires à un comportement ou un traitement inamical. Un autre problème se pose en matière de discrimination au niveau de l'offre de biens et de services dans le cadre de l'économie collaborative, à savoir la détermination de la responsabilité en cause: si un(e) client(e) Airbnb se voit refuser une chambre en raison de son sexe, ou s'il/si elle est victime d'un harcèlement, qui est responsable? La plateforme (Airbnb) ou le prestataire de service (l'hébergeur)? En cas de harcèlement sexuel dans un taxi UBER, qui serait responsable: le prestataire de service (le chauffeur) ou la plateforme (UBER)? La réponse diffère d'un État membre à l'autre selon le service concerné (chambre ou taxi), ce qui ne constitue pas une réponse cohérente au niveau de l'UE.

Le présent rapport soutient que, dans ce cas, l'instrument législatif pertinent est la directive 2004/113/CE²⁰ et les ordres juridiques internes qui la mettent en œuvre. Il examine donc dans quelle mesure la directive 2004/113/CE a été utilisée et pourrait être utilisée directement ou indirectement pour répondre aux préoccupations liées au genre dans le cadre de l'économie collaborative. En d'autres termes, la directive 2004/113/CE peut-elle jouer un rôle dans l'économie collaborative et, dans l'affirmative, quel serait-il?

Sans être impossible, l'application de la directive 2004/113/CE à l'économie collaborative est complexe – du fait notamment que seuls quelques États membres l'ont identifiée comme un instrument valable pour gérer des situations survenant dans le contexte de cette forme d'économie.²¹ Il pourrait en être ainsi parce que l'économie collaborative n'était pas prévue au moment de l'entrée en vigueur de ladite directive. Le défi consiste donc à resserrer le lien entre l'égalité des genres et la directive 2004/113/CE, d'une part, et l'économie collaborative, d'autre part. Des efforts supplémentaires s'imposent pour sensibiliser à la manière de déterminer et d'exercer les droits pertinents au niveau national.

Enfin, l'économie collaborative peut également avoir des conséquences «involontaires» plus générales sur l'égalité des genres. On songe ici au fait que ce nouveau modèle est appelé à affecter les modèles économiques classiques: ainsi des plateformes telles que Couchsurfing et Airbnb auront une incidence sur le marché de l'hôtellerie, par exemple. Or de nombreuses femmes travaillent dans ce secteur traditionnel en tant que femmes de chambre ou serveuses. De quelle manière seront-elles touchées par ces évolutions?

En conclusion, l'économie collaborative est un modèle émergent susceptible d'affecter le principe de l'égalité des genres à plusieurs égards. Même si le lien entre l'économie collaborative et cette égalité peut sembler marginal à l'heure d'écrire ces lignes, il ne manquera pas de devenir de plus en plus manifeste au fur et à mesure du développement de ce modèle économique. Le présent rapport fait valoir que le moment est venu de reconnaître et de réglementer expressément l'impact potentiel que l'économie

18 La seule affaire dans laquelle la CJUE a statué dans le cadre de la directive 2004/113/CE ne concerne pas l'économie collaborative mais les produits financiers: affaire C-236/09, *Association Belge des Consommateurs Test-Achats e.a.*, ECLI:EU:C:2011:100.

19 Voir le point 3.1 du présent rapport.

20 Directive 2004/113/CE du Conseil du 13 décembre 2004 mettant en œuvre le principe de l'égalité de traitement entre les femmes et les hommes dans l'accès à des biens et des services et la fourniture de biens et services, JO L 373 du 21 décembre 2004.

21 Point 3.1 du présent rapport.

collaborative pourrait avoir sur l'égalité des genres, et que la législation pouvant servir à cette fin existe déjà. Elle dépendra de l'existence et du type de relation d'emploi entre le prestataire de services et la plateforme.²² En l'absence d'une telle relation toutefois, autrement dit si la discrimination concerne les biens et/ou les services offerts, la directive 2004/113/CE peut et devrait s'appliquer.

22 Directive 2006/54/CE relative à la mise en œuvre du principe de l'égalité des chances et de l'égalité de traitement entre hommes et femmes en matière d'emploi et de travail (refonte); directive 2010/41/UE concernant l'application du principe de l'égalité de traitement entre hommes et femmes exerçant une activité indépendante; directive 79/7/CEE relative à la mise en œuvre progressive du principe de l'égalité de traitement entre hommes et femmes en matière de sécurité sociale.

Zusammenfassung

Der Bericht untersucht die möglichen Auswirkungen der kollaborativen Wirtschaft auf die Gleichstellung von Frauen und Männern. Es ist ein besonders komplexes Thema, was vor allem daran liegt, dass es sich bei der kollaborativen Wirtschaft um eine neue Entwicklung handelt und der Gesetzgeber, sowohl auf EU- als auch auf nationaler Ebene, sich mit ihr noch schwertut. Kollaborative Wirtschaft ist ein Überbegriff, der ein riesiges „komplexes Ökosystem aus Dienstleistungen auf Abruf und der über Online-Tauschplattformen laufenden vorübergehenden Nutzung von Gütern“ bezeichnet.¹ Da kollaborative Wirtschaft viele Formen annehmen kann,² ist es schwierig, eine genaue Definition zu liefern. Grob gesagt handelt es sich um ein schnell wachsendes Geschäftsmodell, bei dem Waren und Dienstleistungen zum beiderseitigen Vorteil von Anbietern und Verbrauchern gemeinsam genutzt werden. Das Potenzial der kollaborativen Wirtschaft wird durch den Einsatz digitaler Plattformen gesteigert, die, indem sie als Vermittler fungieren,³ Anbieter und Interessenten in Verbindung bringen und es ermöglichen, Waren und Dienstleistungen mit einem großen Netzwerk zu teilen. Bei den betreffenden Waren und Dienstleistungen kann es sich um Fahrzeuge, Werkzeuge, Lebensmittel, eine Fahrt von A nach B, einen kurzzeitigen Wohnungstausch, die Anmietung eines Zimmers in einer Privatwohnung oder um gesundheitliche Dienstleistungen handeln.⁴ Die kollektive Wirtschaft hat sich in wirtschaftlichen Schlüsselsektoren und vielen Aspekten unseres Lebens rasch ausgebreitet und unsere traditionelle Arbeitsweise grundlegend verändert; sie wurde von den laufenden Veränderungen – Entwicklung von Technologien, steigende Nutzung sozialer Netzwerke usw. – vorangetrieben und war in gewisser Weise auch eine logische Folge derselben. Auch wenn sie derzeit noch nicht die Regel darstellt,⁵ handelt es doch um ein Phänomen, das nicht ignoriert werden darf, da es sich höchstwahrscheinlich weiter entwickeln wird.

Bislang gibt es jedoch weder auf der Ebene der EU⁶ noch auf nationaler Ebene⁷ einen klaren normativen Rahmen, um mit diesem Phänomen umzugehen. Tatsächlich waren die bisherigen Reaktionen innerhalb Europas allesamt sehr bruchstückhaft. Manche Mitgliedstaaten haben bestimmte Aspekte⁸ des neuen Geschäftsmodells auf lokaler bzw. nationaler Ebene geregelt, was eine breitere Debatte auf EU-Ebene ausgelöst hat.⁹ Das neue Geschäftsmodell kann sowohl Anbietern als auch Verbrauchern neue, spannende Möglichkeiten eröffnen.¹⁰ Es hat zum Beispiel das Potenzial, Anbietern von Dienstleistungen eine Art „Flexibilität“, eine Quelle zusätzlichen Einkommens zu verschaffen¹¹ und es bestimmten Menschen zu ermöglichen zu arbeiten, die andernfalls diese Möglichkeit nicht hätten, weil sie beispielsweise ans Haus gefesselt sind. Auch kann es kleinen Unternehmen helfen, einen breiteren Markt zu erreichen. Den

1 Mitteilung der Europäischen Kommission, *Den Binnenmarkt weiter ausbauen: mehr Chancen für die Menschen und die Unternehmen*, COM(2015) 550 final, Abschnitt 2.1 (letzter Zugriff am 14. Dezember 2017).

2 Vgl. Abschnitt 1.1 des Berichts.

3 Jourdain L. J., Leclerc M., Millerand A. (2016), *Économie collaborative & Droit*, Limoges, abrufbar unter <http://www.fypeditions.com/economie-collaborative-droit/> (letzter Zugriff am 14. Dezember 2017).

4 Diese Liste ist nicht abschließend.

5 CIPD, Untersuchungsbericht (2017) *To gig or not to gig?*, abrufbar unter https://www.cipd.co.uk/Images/to-gig-or-not-to-gig-2017-stories-from-the-modern-economy_tcm18-18955.pdf (letzter Zugriff am 14. Dezember 2017).

6 Vgl. Abschnitt 2 des Berichts.

7 Vgl. Abschnitt 3 des Berichts.

8 Belgien hat zum Beispiel Maßnahmen getroffen, die auf die Besteuerung abzielen (Einkommensteuergesetz 1992).

9 Vgl. die Mitteilung der Europäischen Kommission *Europäische Agenda für die kollaborative Wirtschaft*, COM(2016) 356, abrufbar unter <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations> (letzter Zugriff am 14. Dezember 2017); vgl. ebenso Europäisches Parlament, *The Situation of Workers in the Collaborative Economy*, September 2016, abrufbar unter [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf) (letzter Zugriff am 14. Dezember 2017); Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services, Directive 2004/113/EC – European Implementation Assessment*, Wissenschaftlicher Dienst des Europäischen Parlaments, abrufbar unter [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf) (letzter Zugriff am 14. Dezember 2017).

10 Vgl. Abschnitt 1.3 des Berichts.

11 Siehe jedoch Abschnitt 1.3 des Berichts, in dem darauf hingewiesen wird, dass das Einkommen häufig zu niedrig ist, um davon leben zu können. In vielen Fällen handelt es sich wahrscheinlich eher um einen Zuverdienst.

Verbrauchern kann es eine größere Auswahl an Produkten und Dienstleistungen zu günstigeren Preisen bescheren.

Gleichzeitig birgt das neue Geschäftsmodell jedoch auch Gefahren. Den Anbietern gewährleistet es in der Regel keinen Beschäftigungsschutz und keine soziale Absicherung; für die Verbraucher ergeben sich – aufgrund der vielgestaltigen Beziehungen zwischen den an diesem Geschäftsmodell beteiligten Parteien – Unsicherheiten bezüglich der anzuwendenden nationalen Verbraucherschutzvorschriften. Es kann für sie auch schwierig sein, sich in Verbraucherschutzverbänden zu organisieren, und der Schutz vor Diskriminierung oder Belästigung durch andere Verbraucher oder Dienstleistungserbringer ist unter Umständen mangelhaft.¹²

Über diese Gefahren wird zunehmend diskutiert;¹³ in der Mitteilung *Eine europäische Agenda für die kollaborative Wirtschaft* hat die Kommission fünf Bereiche benannt, in denen entsprechende Bedenken aufgetreten sind: Marktzugangsanforderungen, Haftungsregelung, Schutz der Nutzer, Beschäftigungsfragen und Besteuerung.¹⁴ Der Bericht widmet sich einem Problembereich, der bisher übersehen wurde: die Auswirkungen der kollaborativen Wirtschaft auf die Gleichstellung von Frauen und Männern.

Probleme bezüglich Geschlechtergleichstellung können in zwei Bereichen auftreten: entweder in Bezug auf die Dienstleistungsanbieter oder in Bezug auf die Verbraucher. Im ersteren Fall geht es im Allgemeinen um beschäftigungsbezogene Aspekte: Können die in der kollaborativen Wirtschaft tätigen Personen Rechte wie Sozialleistungen oder Krankheitsurlaub in Anspruch nehmen? Haben UBER-Fahrer beispielsweise Anspruch auf Rente oder gerechte Bezahlung? In diesen Fällen ist der Zusammenhang zur Geschlechtergleichstellung leicht zu erkennen. Entsprechende Fälle wurden in letzter Zeit in den Nachrichten und sozialen Medien¹⁵ sowie in der nationalen und der EU-Rechtsprechung behandelt und sind so in den Fokus der Öffentlichkeit gerückt. Es ist anzunehmen, dass diese Aspekte, abhängig vom jeweiligen Arbeitsvertrag, von den nationalen und den EU-Vorschriften zum Thema Beschäftigung und Nichtdiskriminierung erfasst werden.¹⁶

Der Bericht konzentriert sich auf die zweite Variante, bei der Diskriminierung dann auftritt, wenn Waren und Dienstleistungen den Verbrauchern angeboten werden. Hier ist der Zusammenhang mit Geschlechtergleichstellung möglicherweise weniger offensichtlich; dies kann zum Beispiel der Fall sein, wenn ein Produkt in diskriminierender Weise angeboten wird (etwa ein Airbnb-Zimmer, das nur Frauen angeboten wird). Um solche geschlechtsbezogenen Probleme ausfindig zu machen, wurde ein Fragebogen

12 Vgl. die Mitteilung der Europäischen Kommission *Europäische Agenda für die kollaborative Wirtschaft*, COM(2016) 356, abrufbar unter <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations> (letzter Zugriff am 14. Dezember 2017); vgl. ebenso Europäisches Parlament, *The Situation of Workers in the Collaborative Economy*, September 2016, abrufbar unter [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf) (letzter Zugriff am 14. Dezember 2017); Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services, Directive 2004/113/EC – European Implementation Assessment*, Wissenschaftlicher Dienst des Europäischen Parlaments, abrufbar unter [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf) (letzter Zugriff am 14. Dezember 2017).

13 Für die wachsende Zahl an Veröffentlichungen in diesem Bereich siehe das Literaturverzeichnis.

14 Vgl. die Mitteilung der Europäischen Kommission *Europäische Agenda für die kollaborative Wirtschaft*, COM(2016) 356, abrufbar unter <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations> (letzter Zugriff am 14. Dezember 2017); vgl. ebenso Europäisches Parlament, *The Situation of Workers in the Collaborative Economy*, September 2016, abrufbar unter [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf) (letzter Zugriff am 14. Dezember 2017); Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services, Directive 2004/113/EC – European Implementation Assessment*, Wissenschaftlicher Dienst des Europäischen Parlaments, abrufbar unter [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf) (letzter Zugriff am 14. Dezember 2017).

15 Siehe zum Beispiel „Fresh call for crackdown on gig economy“ in BBC News, 20. November 2017, abrufbar unter <http://www.bbc.co.uk/news/business-42044699> (letzter Zugriff am 14. Dezember 2017).

16 Richtlinie 2006/54/EG zur Verwirklichung des Grundsatzes der Chancengleichheit und Gleichbehandlung von Männern und Frauen in Arbeits- und Beschäftigungsfragen (Neufassung); Richtlinie 2010/41/EU zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen, die eine selbständige Erwerbstätigkeit ausüben; Richtlinie 79/7/EWG zur schrittweisen Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen im Bereich der sozialen Sicherheit.

an die nationalen Gender-Expertinnen und Experten des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung verteilt,¹⁷ das sämtliche EU-Mitgliedstaaten sowie drei assoziierte Länder (Island, Liechtenstein und Norwegen) umfasst. Es ist wichtig festzuhalten, dass es derzeit nur wenig nationale Rechtsprechung und Literatur gibt und dass der EuGH bislang noch keine Gelegenheit hatte, zu diesem Thema Stellung zu beziehen.¹⁸ Aus den Fragebögen ergab sich, dass offenkundige Geschlechterdiskriminierung in der kollaborativen Wirtschaft kein Thema zu sein scheint. Zwar berichteten die Länderexpertinnen und -experten aus ganz Europa über diverse Probleme, die im Zusammenhang mit der kollaborativen Wirtschaft aufgetreten sind,¹⁹ geschlechtsbezogene Diskriminierung wurde jedoch nur selten erwähnt. Bedeutet dies, dass es keine Fälle gegeben hat, in denen die Gleichstellung von Frauen und Männern bedroht war? Die Situation ist komplexer. Es sieht so aus, als ob Probleme im Zusammenhang mit Geschlechterdiskriminierung in ganz Europa schlichtweg nicht gemeldet werden. Grund dafür ist möglicherweise, dass die Öffentlichkeit auf diese Probleme normalerweise nicht aufmerksam wird, weil dieser spezielle Aspekt der Debatte zum Zeitpunkt des Berichts in der Öffentlichkeit noch keine größere Beachtung gefunden hat. Infolge dieser mangelnden Beachtung sind sich weder die Behörden noch die breite Öffentlichkeit bewusst, dass Gleichstellungsprobleme überhaupt auftreten können. Einer der Gründe dafür könnte sein, dass Verbraucher diskriminierende Handlungen für ein unfreundliches Verhalten oder eine unfreundliche Behandlung halten. Ein weiterer Punkt bei Diskriminierungen im Zusammenhang mit dem Anbieten von Waren und Dienstleistungen im Rahmen der kollaborativen Wirtschaft ist die Frage, wie die entsprechende Haftung festzulegen ist: Wenn einem Airbnb-Kunden bzw. einer Airbnb-Kundin aufgrund seines/ihrer Geschlechts ein Zimmer verweigert oder er/sie sexuell belästigt wird, wer ist dann verantwortlich: die Plattform (Airbnb) oder der Dienstleistungsanbieter (der/die Gastgeber/in)? Wer ist verantwortlich, wenn es in einem UBER-Taxi zu sexueller Belästigung kommt: der Dienstleistungserbringer (der Fahrer) oder die Plattform (UBER)? Die Antwort fällt je nach betroffener Dienstleistung (Taxi oder Zimmer) in den verschiedenen Mitgliedstaaten unterschiedlich aus, was keine einheitliche Reaktion der EU darstellt.

Der Bericht geht davon aus, dass das maßgebliche Rechtsinstrument in diesem Fall die Richtlinie 2004/113/EG²⁰ und die nationalen Rechtsvorschriften sind, mit denen diese umgesetzt wurde. Er geht daher der Frage nach, inwieweit die Richtlinie 2004/113/EG direkt oder indirekt angewendet wurde oder angewendet werden könnte, um mit geschlechtsbezogenen Problemen in der kollaborativen Wirtschaft umzugehen. Mit anderen Worten: Kann die Richtlinie 2004/113/EG in der kollaborativen Wirtschaft eine Rolle spielen und, wenn ja, welche?

Die Richtlinie 2004/113/EG auf die kollaborative Wirtschaft anzuwenden, ist zwar nicht unmöglich, aber kompliziert. Grund dafür ist, dass nur wenige Mitgliedstaaten die Richtlinie 2004/113/EG als geeignetes Instrument ansehen, um mit Situationen umzugehen, die im Kontext der kollaborativen Wirtschaft entstehen.²¹ Dies dürfte darauf zurückzuführen sein, dass zum Zeitpunkt des Inkrafttretens der Richtlinie die kollaborative Wirtschaft noch nicht vorherzusehen war. Die Herausforderung besteht also darin, die Verbindung zwischen Geschlechtergleichstellung und der Richtlinie 2004/113/EG einerseits und der kollaborativen Wirtschaft andererseits zu stärken. Es bedarf weiterer Anstrengungen, um das Bewusstsein dafür zu schärfen, wie entsprechende Rechte auf nationaler Ebene erkannt und in Anspruch genommen werden können.

17 Der Fragebogen ist in Anhang II des Berichts zu finden. Nähere Informationen zum Europäischen Netzwerk von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung unter http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm (letzter Zugriff am 14. Dezember 2017). Nähere Informationen zu den Länderberichten zu Gleichstellungsfragen unter <http://www.equalitylaw.eu/> (letzter Zugriff am 14. Dezember 2017).

18 Der einzige Fall, den der EuGH im Zusammenhang mit der Richtlinie 2004/113/EG entschieden hat, bezog sich nicht auf die kollaborative Wirtschaft, sondern auf Finanzprodukte: Rechtssache C-236/09, *Association Belge des Consommateurs Test-Achats u. a.*, ECLI:EU:C:2011:100.

19 Vgl. Abschnitt 3.1 des Berichts.

20 Richtlinie 2004/113/EG des Rates vom 13. Dezember 2004 zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen, ABl. L 373, 21. Dezember 2004.

21 Vgl. Abschnitt 3.1 des Berichts.

Die kollaborative Wirtschaft kann schließlich auch allgemeinere, „unbeabsichtigte“ Folgen für die Gleichstellung von Männern und Frauen haben. Grund dafür ist die Tatsache, dass das neue Modell Auswirkungen auf traditionelle Geschäftsmodelle haben wird: Plattformen wie Couchsurfing oder Airbnb werden sich zum Beispiel auf den Hotelmarkt auswirken. Viele Frauen arbeiten im traditionellen Hotelgewerbe als Zimmermädchen oder Kellnerinnen. Wie werden die Veränderungen sich auf diese Frauen auswirken?

Zusammenfassend lässt sich sagen, dass die kollaborative Wirtschaft ein aufstrebendes Geschäftsmodell ist, das in vielerlei Hinsicht Auswirkungen auf den Grundsatz der Geschlechtergleichstellung haben kann. Auch wenn der Zusammenhang zwischen kollaborativer Wirtschaft und Geschlechtergleichstellung zum Zeitpunkt des Berichts marginal zu sein scheint: Je mehr sich die kollaborative Wirtschaft weiterentwickelt, desto deutlicher wird er wahrscheinlicher zu Tage treten. Der Bericht weist darauf hin, dass es an der Zeit ist, die potenziellen Auswirkungen der kollaborativen Wirtschaft auf die Geschlechtergleichstellung ausdrücklich zur Kenntnis zu nehmen und zu regeln, und dass die dafür einsetzbaren Rechtsvorschriften bereits existieren. Es wird auf die Existenz eines Arbeitsverhältnisses zwischen dem Dienstleistungserbringer und der Plattform sowie auf die Art des Arbeitsverhältnisses ankommen.²² Besteht ein solches Arbeitsverhältnis nicht, betrifft also die Diskriminierung die angebotenen Waren und/oder Dienstleistungen, so kann und sollte allerdings die Richtlinie 2004/113/EG zur Anwendung kommen.

22 Richtlinie 2006/54/EG zur Verwirklichung des Grundsatzes der Chancengleichheit und Gleichbehandlung von Männern und Frauen in Arbeits- und Beschäftigungsfragen (Neufassung); Richtlinie 2010/41/EU zur Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen, die eine selbständige Erwerbstätigkeit ausüben; Richtlinie 79/7/EWG zur schrittweisen Verwirklichung des Grundsatzes der Gleichbehandlung von Männern und Frauen im Bereich der sozialen Sicherheit.

1 Introduction: subject matter and scope of the report

This report analyses the potential impact that the collaborative economy may have on gender equality. The collaborative economy is a recent but rapidly growing business model where goods and services are shared for the mutual benefit of the service provider and the consumer. Its potential is enhanced by the use of digital platforms that, acting as a broker,¹ connect the provider and the parties and makes it possible to share goods and services with a vast network. The goods and services in question may include vehicles, tools, food, a ride from A to B, short-term home swaps or renting a room in someone's private home, and health services.² The collaborative economy has changed the traditional working relationship and has created a new model: the 21st century workplace.

As it is a very recent development, to date there is no set definition let alone a clear normative framework to address it, at either EU³ or national level.⁴ Indeed, across Europe, so far there has been a very fragmented response. Some Member States have regulated specific aspects⁵ of this new business model at local or national level and this has triggered a wider debate at EU level.⁶ It is becoming increasingly clear that this new business model, even if still in its infancy, is here to stay and, although it has the potential to bring new and exciting opportunities, at the same time it also presents risks.

Whilst these risks are increasingly being discussed,⁷ a specific one may have been overlooked by both the EU and the Member States: this is the potential impact that this new business model could have on gender equality. First, there are 'unintended' repercussions, discussed in the course of this report, which the collaborative economy can have in general terms for gender. Second, gender equality concerns may arise in two specific respects: either in relation to the service providers or to the consumers.

The first aspect is more generally linked to employment-related conditions: are the individuals working in the collaborative economy able to use rights such as social security entitlements or sick leave, to name a few? For example, can UBER drivers claim a pension or fair pay? In these cases the connection with gender equality can be easily identified. Furthermore, these cases have been brought to the attention of the general public by discussion in the news and social media,⁸ as well as national and EU case law. Depending on the employment contract, these aspects are likely to be addressed by national and EU employment and non-discrimination legislation.⁹

The second aspect refers to the situation where discrimination occurs when goods and services are offered. Here the link with gender equality may be less obvious; this may apply, for example, when a product is offered in a discriminatory way, such as an Airbnb room offered to women only.

In this report we focus on the aspect of access to goods and services in particular. We seek to identify gender-related concerns which have emerged – or may emerge – from this new model and as a consequence of partial national regulation or lack thereof. We argue that specific regulation should be

1 Jourdain L. J., Leclerc M., Millerand A. (2016) *Économie collaborative & Droit*, Limoges, available at <http://www.fypeditions.com/economie-collaborative-droit/> accessed on 14 December 2017.

2 The list is not exhaustive.

3 See Section 2 of this Report.

4 See Section 3 of this Report.

5 For example, Belgium has adopted measures aimed at the fiscal regime (Income Tax Code 1992).

6 See the European Commission Communication *A European Agenda for the Collaborative Economy* COM(2016) 356 available at <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations>, accessed on 14 December 2017; see also European Parliament, *The Situation of Workers in the Collaborative Economy*, September 2016, available at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA\(2016\)587316_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/587316/IPOL_IDA(2016)587316_EN.pdf) accessed on 14 December 2017; Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment*, European Parliament Research Service available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf), accessed on 14 December 2017.

7 For the growing body of literature in this area, see the bibliography.

8 See for example 'Fresh call for crackdown on gig economy' in BBC News 20 November 2017 available at <http://www.bbc.co.uk/news/business-42044699>, accessed on 14 December 2017.

9 In the EU there are specific Directives, see Section 2 of this Report.

developed in this area. The main difficulty lies in the fact that, because of the little discussion and general awareness of gender discrimination in the context of the collaborative economy, cases of gender discrimination in the context of the collaborative economy are often unreported.

As regards the access to goods and services, the relevant legislative instrument is Directive 2004/113/EC¹⁰ and the national instruments implementing it. This report therefore looks at the extent to which Directive 2004/113/EC has been used and could be used directly or indirectly to address gender-related concerns in the collaborative economy. In other words: Can Directive 2004/113/EC play a role in the collaborative economy and, if so, what role could this be?

The report consists of three main parts. Part 1 discusses the main features of the collaborative economy. This part goes on to introduce the complex relationship between gender equality and the collaborative economy. Part 2 focuses on the policy developments as well as the instruments available at EU level to address this new business model; particular emphasis is placed on the role of Directive 2004/113/EC. Finally, Part 3 covers the situation in the Member States.

In order to identify gender-related concerns, a questionnaire was distributed to national gender experts in the European Network of Legal Experts in Gender Equality and Non-Discrimination,¹¹ covering all EU Member States and three associated countries (**Iceland, Liechtenstein and Norway**). It is important to note that currently there is little domestic case law and literature highlighting gender-related concerns in the context of the collaborative economy.¹² Furthermore, the CJEU has not yet had the opportunity to interpret this issue.¹³

1.1 The collaborative economy: definition and main features

There is no set terminology, let alone a definition, of this new business model and many terms are often used interchangeably: collaborative economy, sharing economy, crowd economy, platform economy, access economy or gig economy to name a few. In 2015 the Commission referred to the collaborative economy as 'a complex ecosystem of on-demand services and temporary use of assets based on exchanges via online platforms'.¹⁴ Different definitions and terminology emphasise different elements. For example, using 'sharing' or 'collaborative' economy, highlight a different focus. In the former case, an individual provider via a 'platform' 'shares' a product or a service with a consumer, and in the latter case, an individual provider via a 'platform' 'collaborates' to provide consumers with products or services.¹⁵ In some cases, the platform may receive a percentage of the fee or remuneration but it can also be non-profit. Regardless of the focus, the terms 'collaborative' or 'sharing economy' have been challenged.¹⁶

It has persuasively been argued that the transactions involved are standard market transactions, more appropriately described as 'renting' rather than 'sharing' or 'collaborating':

10 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373, 21 December 2004.

11 The questionnaire is available in Annex II of this Report. For more information on the European Network of legal experts in gender equality and non-discrimination, see http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm accessed on 14 December 2017. Further information on the national reports on gender are available at <http://www.equalitylaw.eu/> accessed on 14 December 2017.

12 See Sections 3.1 (domestic case law) and 3.9 (national literature) of this report.

13 The only case that the CJEU has decided in the context of Directive 2004/113/EC is not related to the collaborative economy but to financial products: Case .C-236/09, *Association Belge des Consommateurs Test-Achats and Others*, ECLI:EU:C:2011:100.

14 European Commission Communication, *Upgrading the Single Market: More opportunities for People and Business* COM (2015) 550 final at 2.1.

15 However, it has been argued that this does not apply to specific situations – such as the gig economy. See O'Connor S., (2016) 'The gig economy is neither "sharing" nor "collaborative"', *Financial Times*, 14 June 2016.

16 Codagnone C., Martens B., (2016) 'Scoping the Sharing Economy: Origins, Definitions, Impact and Regulatory Issues', JRC Technical Reports, Digital Economy Working Paper 2016/01 available on SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783662, accessed on 14 December 2017.

Sharing is a form of social exchange that takes place among people known to each other, without any profit. Sharing is an established practice, and dominates particular aspects of our life, such as within the family. (...) When 'sharing' is market-mediated — when a company is an intermediary between consumers who don't know each other — it is no longer sharing at all. Rather, consumers are paying to access someone else's goods or services for a particular period of time. It is an economic exchange, and consumers are after utilitarian, rather than social, value.¹⁷

Against this backdrop, Drahokoupil has proposed the alternative term 'platform economy' in order to emphasise the matching element between the service provider and the consumer, provided by the digital platform.¹⁸

With that said, it is important to mention that there are also models such as Share Some Sugar where 'you can find someone in your neighbourhood or social network who is willing to lend you something that you need.'¹⁹

The lack of uniform definition mirrors the many forms that this business model can take. Overall, the term collaborative economy still means different things to different people.²⁰ In some cases, the use of an app will instantly give access to a product²¹ or a service; others are based on the sharing of an underused asset.²² Some may involve a model where a digital platform mediates physical services, such as plumbing, driving or cleaning services, and others virtual services, such as accounting or translating, that may be performed anywhere in the world. The services provided can involve both skilled and low-skilled activities. Others can be content platforms²³ that raise complex intellectual property rights and are beyond the scope of this report.

The collaborative economy is not by any means a new concept – indeed, informally money has always been lent between family and friends and tools have always been borrowed from neighbours. Its structure as a business model, however, is relatively new.²⁴ Its most innovative feature is the fact that digital platforms are used to create an open market place. These digital (collaborative) platforms take the form of electronic devices, increasingly apps that can be installed on any device (telephone, iPads, tablets, etc.) making it accessible and available to large numbers of people. They have enabled this model to progress 'from a community practice into a profitable business model'.²⁵

As a result, this model (Figure 2) introduces 'a change of paradigm'²⁶ and differs from more traditional ones (Figure 1) as it involves three key actors: (i) the service provider, (ii) the consumer and (iii) the intermediary that connects the provider with the consumer ('collaborative platform').

17 Degryse C., 'Digitalisation of the economy and its impact on labour markets', ETUI Working Papers, 2016/02, at p. 28. available on SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730550, accessed on 14 December 2017.

18 Drahokoupil J., Fabo B., 'The platform economy and the disruption of the employment relationship', ETUI Policy Brief No. 5/2016 available on SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809517 accessed on 14 December 2017.

19 'Why I Started Share Some Sugar' available at <https://www.shareable.net/blog/why-i-started-share-some-sugar>, accessed on 14 December 2017.

20 Celikel E., Funda, Abadie F., Biagi F., Bock A-K., Bontoux L., Figueiredo do Nascimento, S., Martens B., Szczepanikova A. (2016), *The European Collaborative Economy, A research agenda for policy support*, JRC Science for Policy Report, Luxembourg: Publications Office of the European Union Studies, available at http://publications.jrc.ec.europa.eu/repository/bitstream/JRC103256/20161114_jrc%20collaborative%20economy_jointreport_formatted_onlineversion.pdf.

21 E.g. Deskbears.

22 E.g. BlablaCar and Relayride.

23 E.g. Spotify, ResearchGate and Netflix.

24 The collaborative economy model can be traced back to 1999 with the creation of *Couchsurfing*. This was created as a non-profit organisation matching people who were travelling cheaply with people who could offer a couch. See Hatzopoulos V., Roma S. (2017), 'Caring for Sharing? The Collaborative Economy under EU Law' *Common Market Law Review* Vol. 54, pp. 81-128.

25 Böckmann M. (2013), *The Shared Economy: It is time to start caring about sharing; value creating factors in the shared economy*, available at <https://static1.squarespace.com/static/58d6cd33f5e231abb448d827/t/58ea595e1b10e3a416e8ab5b/1491753311257/bockmann-shared-economy.pdf>, accessed on 14 December 2017.

26 Werner H., 'Sharing Economy: Opportunities and Threats', unpublished paper.

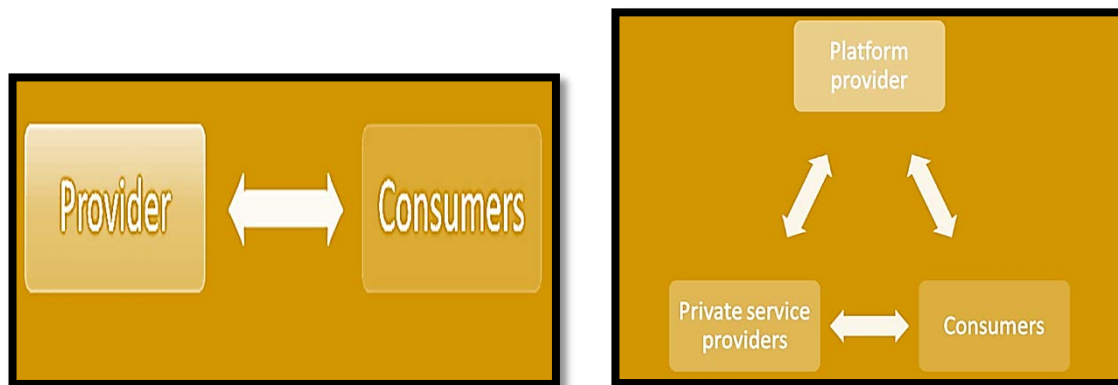


Figure 1: A shift in the traditional business model (Source: European Parliamentary Research Service, 2017)

Broadly, there are three main models of collaborative economy: the business-to-peers/consumers (B2P or BtoC), the business-to-business (B2B) and the peer-to-peer (P2P).²⁷ These three models have in common the use of a digital platform but they differ in terms of their composition. The B2P model occurs applies when business or transactions are conducted directly between a company and consumers who are the end users of its products or services.²⁸ An example of B2P is that of Zipcar²⁹ that rents out to consumers (peers) cars that are owned by the business. The B2B is a model where one business makes a commercial transaction with another business. Examples of the products offered range from company websites site-building tools and templates to database and methodologies, as well as transaction software.³⁰ In the P2P model, neither the person offering the service or the product nor the consumer is a professional entity; they are peers amongst peers: this is the case, for example, of Airbnb. In the P2P model, services can be offered on an occasional basis, for profit or not for profit. Finally the ‘peers’ can equally be providers and consumers; indeed they are also referred to as ‘prosumers’.

The line between B2P and P2B may be blurry and Member States use different criteria to differentiate between the two. These criteria range from considering whether a service is provided against remuneration – rather than simply compensating costs incurred by the service provider – to using thresholds that take into account the level of income generated or the regularity with which the service is provided. For example, in some countries (**Ireland, France and Spain**) it is specifically stipulated that profits beyond the sharing of the costs of the ride (P2P), can only be made by licensed taxi drivers (B2P).³¹

This report focuses on the B2P and the P2P models, as issues of gender equality are more likely to occur when a service is offered to an individual. It would be advisable to have a set definition wide enough to encompass different models to avoid further fragmentation and to provide clarity to the debate.

In this report we will use the term ‘collaborative economy’ because this is the one used by the European Commission. It refers:

*to 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*

27 Well-known examples include AirBnB, Uber, Taskrabbit, BlaBlaCar.

28 An example would be the platform *Zipcar*, a business that rents cars to peers (consumers).

29 <http://www.zipcar.co.uk/>, accessed on 14 December 2017.

30 Although models for B2B sites are still evolving, it is predicted that B2B revenues will soon far exceed business-to-consumers (B2C) revenues; see Hatzopoulos V., Roma S. (2017), ‘Caring for Sharing? The Collaborative Economy under EU Law’ *Common Market Law Review* Vol. 54, pp. 81-128.

31 See further, European Commission Communication, *A European Agenda for the Collaborative Economy* COM 2016 356 final, at 27.

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.³²

1.2 The drivers of the collaborative economy

In order to gain a better understanding of this complex area and to appreciate why it has risen so rapidly, it is important to understand what has driven the collaborative economy in the first instance. Drawing on existing literature,³³ three main drivers have been identified: economic, societal and technological.³⁴

Economic Drivers: following the financial crisis and the high level of unemployment, private individuals found themselves in the position of having to resort to alternative types of jobs, previously not provided (such as UBER drivers or renting out their own couch). This has been facilitated by the development of internet technology that has helped to lower both the cost of market entry for individual providers and those related with working remotely. At the same time, increasing globalization and communication across the globe has allowed people to discover the possibility of earning income with ownership of property (e.g. renting out their own couch).³⁵

Societal Drivers: these include increased population density³⁶ and sustainability.³⁷ As to the former, a high population concentration has created a 'critical mass' enabling sharing to occur with less friction. Access to areas with a high population means that supply and demand increase and it becomes simpler to create a match. As to the latter, there is indeed growing awareness of the environmental impact of our consumption practices meaning that sharing, rather than owning, might become more appealing.

Technological Drivers: there is little doubt that the development of digital technologies, combined with the rise of social networking (making it easier to match service providers and consumers),³⁸ has been a key ingredient of this model. The development in mobile devices such as smartphones and apps, as well as changes in payment systems (e.g. intelligent e-commerce and invoicing systems) required for quick transactions, have created favourable conditions for the development of this new business model.³⁹ Indeed, a recent study has shown that the collaborative economy is developing quickly in EU Member States with high levels of internet access and usage (e.g. **UK, the Netherlands and Sweden**).⁴⁰

These drivers are becoming increasingly embedded in our way of life. A survey conducted by TNS Political & Social network in 28 Member States in 2016 reported that 52 % of the respondents are aware of

32 European Commission Communication, *A European Agenda for the Collaborative Economy* COM 2016 356 final, at 3.

33 Böckmann M. (2013), *The Shared Economy: It is time to start caring about sharing; value creating factors in the shared economy*, available at <https://static1.squarespace.com/static/58d6cd33f5e231abb448d827/t/58ea595e1b10e3a416e8ab5b/1491753311257/bockmann-shared-economy.pdf> accessed on 14 December 2017; see also European Commission Communication, *A European Agenda for the Collaborative Economy* COM(2016) 356 available at <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations> accessed on 14 December 2017.

34 See also European Commission Communication, *A European Agenda for the Collaborative Economy* COM 2016 356 final, at 27.

35 M. Chui M., Manyika J., Bughin J., Dobbs R., Roxburgh C., Sarrazin H., et al. (2012) 'The social economy: Unlocking value and productivity through social technologies', McKinsey Global Institute.

36 Kriston A., Szabo T., Inzelt G., (2010) 'The marriage of car-sharing and hydrogen economy: A possible solution to the main problems of urban living', (2010), *International Journal of Hydrogen*.

37 Porter M., Kramer M., (2011) 'Creating Shared Value' *Harvard Business Review* Vol. 89, pp. 62-77.

38 Constantinides E., Fountain S. (2008), 'Web 2.0: Conceptual foundations and marketing issues', *Journal of Direct, Data and Digital Marketing Practices*, pp. 231-244.

39 Black B., Lynch L., (2004) 'What's driving the new economy?: The benefits of workplace innovation' *The Economic Journal*, pp. 97-116.

40 Eurostat, *E-Commerce Statistics*, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics accessed on 14 December 2017; Eurostat, *Information society statistics – households and individuals*, http://ec.europa.eu/eurostat/statistics-explained/index.php/Digital_economy_and_society_statistics_-_households_and_individuals accessed on 14 December 2017.

collaborative platforms and one in five (17 %) have used it at least once.⁴¹ The more these drivers develop, the stronger the collaborative economy phenomenon is likely to become.

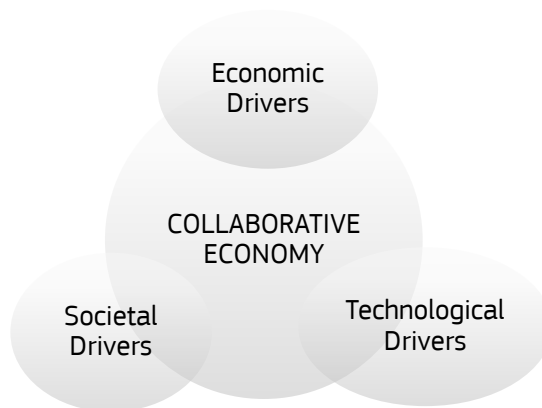


Figure 2: The drivers of the collaborative economy (source Böckmann 2013)

Although this model has grown rapidly and this trend is expected to continue, it is important to emphasise that it has not yet superseded traditional employment practices: at the time of writing it is estimated that there are 100 000 active workers in the collaborative economy or 0.05 percent of total employees in the EU.⁴² However, considering how embedded the drivers are in our lives, we cannot assume that this will not change.

1.3 Benefits and risks

This new business model has the potential to offer significant benefits and opportunities for providers (entrepreneurs, businesses, private individuals) and consumers alike.

For service providers, the collaborative economy offers new and innovative employment opportunities, apparent 'flexibility' and additional sources of income, allowing them to capitalise on their personal property (cars, apartments) or skills (cooking, financial, other professional skills). Although, at the moment, platforms cannot guarantee sufficient income to survive,⁴³ recent research identified a combination of personal control, flexibility and monetary compensation as the main motives to work on collaborative platforms.⁴⁴ As an example, the figure below shows the situation in the UK where only 5 % of those providing services through a digital platform are able to earn enough to live on this income alone.

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- 41 Flash Eurobarometer 438 (2016), *The use of collaborative platforms* available at <http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2112>, accessed on 14 December 2017. See also the European Commission Communication, *A European Agenda for the Collaborative Economy* COM(2016) 356 available at <http://ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations> accessed on 14 December 2017.
- 42 De Groen W.P., Maselli I., 'The Impact of the Collaborative Economy on the Labour Market'. CEPS Special report, June 2016, available at https://www.ceps.eu/system/files/SR138CollaborativeEconomy_0.pdf accessed on 14 December 2017.
- 43 CIDP (2017), *Survey Report: To gig or not to gig? Stories from the modern economy*, available at https://www.cipd.co.uk/Images/to-gig-or-not-to-gig_2017-stories-from-the-modern-economy_tcm18-18955.pdf; De Groen W.P., Maselli I., 'The Impact of the Collaborative Economy on the Labour Market'. CEPS Special report, June 2016, available at https://www.ceps.eu/system/files/SR138CollaborativeEconomy_0.pdf accessed on 14 December 2017; see also Berg, J. (2016), 'Income Security in the Collaborative Economy: Findings and Policy Lessons from a Survey of Crowdworkers', *Comparative Labor Law and Policy Journal*, 37/3.
- 44 Teodoro, R., P. Ozturk, M. Naaman, W. Mason and J. Lindqvist (2014), 'The motivations and experiences of the collaborative mobile workforce', *Proceedings of the 17th ACM conference on Computer supported cooperative work and social computing*, pp. 236-247.

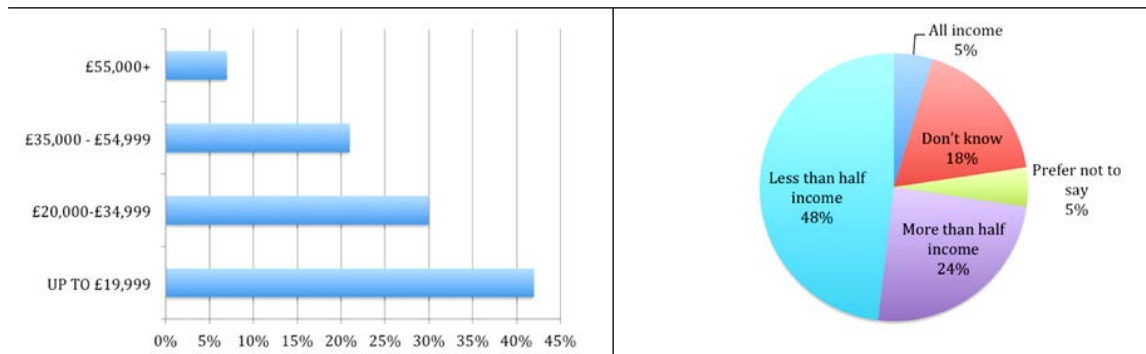


Figure 3: Personal income and proportion of income in the UK (source Hews. U, Joyce S., Crowdfunding in the UK)

Furthermore, this business model, in particular when run remotely, can offer opportunities to people that are house-bound because of, for example, caring responsibilities (often borne by women) or disability.⁴⁵

For **consumers**, it offers easy and broad access to a variety of new services and lower prices.

Indeed in 2011 the collaborative economy was nominated one of '10 ideas that will change the world'⁴⁶ and it was likened to the 'fourth industrial revolution'.⁴⁷ Furthermore, at EU level a recent report has highlighted that the 'potential economic gain linked with a better use of capacities (otherwise under-used) as a result of the sharing economy' has steadily increased over recent years (see figure below) and was estimated at more than EUR 500 billion per year across the EU-28.⁴⁸

Year	Net Revenue	Growth (%)	Total Commerce	Growth (%)
2013	1.0		9.9	
2014	1.8	55	15.3	80
2015	3.6	76	26.9	97

Figure 4 (source PwC Consulting, in European Commission Communication, 2016)

These 'benefits', however, should not be overplayed.⁴⁹ On a general level, there are possible market imbalances and issues of unfair competition in relation to traditional market players as, unlike the traditional marketplace, the collaborative economy is largely unhindered by strict rules and regulations. As an example, this may mean that unless specifically regulated, UBER drivers can provide a driving service against a fee without complying with national licensing regulations by which registered taxi drivers are bound. Equally, Airbnb hosts can provide short-term accommodation without complying with the same regulations to which hotels are bound. In addition, there are issues relating to taxation and liabilities, and issues concerning the quality of the services provided.

In addition, if not regulated, the collaborative economy may present specific risks for both service providers and consumers, who are often both private individuals.

On the one hand, for **service providers**, the 'employment opportunities' offered by the collaborative economy are often short-term and task-based. Also in reality the flexibility is limited by the platform in

45 Barrio A., Zekić (2017) 'Connecting Crowd-Work with Work-Life Balance: Mission Impossible?' in Work-life balance in the modern workplace, De Groofs (ed.), Kluwer Law International, pp. 9-25.

46 Walsh 'Today's smart Choice: don't own. Share' Time (17 March 2011).

47 Shwab K., 'The Fourth Industrial Revolution: What it means and how to Respond' Foreign Affairs, 12 December 2015.

48 Goudin P., *The Cost of Non-Europe in the Sharing Economy*, EPRS, January 2016 available at [http://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 on 14 December 2017.

49 De Stefano V. (2016), *The Rise of the 'just in time workforce': on-demand work, crowdwork and labour protection in the gig economy* (2016) ILO Report, Conditions of Work and Employment Series N0.71.

order to increase its own productivity. This is done ‘indirectly’ by using different techniques. UBER, for example, uses ‘surge prices’ when there is more demand than supply to encourage drivers to provide more services, ‘nudges’ them to be active at peak hours, or guarantees gross fares to selected drivers who comply with certain requirements, such as accepting 90 % of the calls.⁵⁰ Ratings also play a very important role for the selection of workers.⁵¹ This means that, *de facto*, service providers have little choice but to comply with rules and instructions that are designed to increase the platform owners’ economic benefit and sustainability as well as their informational power over both individual service providers and consumers. These individuals find themselves in a completely new situation. Although they are often considered not to be employed (and therefore not entitled to certain rights), they are not completely independent as they have to follow certain instructions and have no complete ‘choice’ in their work. This means they rather are ‘semi-independent’. Furthermore, there may be concerns relating to employment-law standards and rights, including rights to some leaves and a lack of social protection and guarantees. This has recently been highlighted in the area of transport, where a series of cases on the employment status of UBER drivers were brought before both national courts⁵² and the CJEU.⁵³ In addition, neither are service providers organised in syndicates or trade unions, nor is there a clear legislative framework to which they can refer. It therefore appears that the most powerful players are the digital platform providers that use rules to their advantage, and according to their priorities. For all of these reasons, certain Member States, such as the **UK**,⁵⁴ are exploring the possibility of granting service providers the status of ‘independent contractors’ which would grant them some specific rights.

On the other hand, **consumers** are faced with uncertainty as regards the applicable national consumer protection rules, due to the multi-faceted relationship between the parties involved in the collaborative economy. Consumers may also have difficulty organising themselves with consumer-protection organisations, and there may be a lack of protection against discrimination or harassment by fellow consumers or service providers, to name a few. Werner quotes the example of vandalism in rooms rented through Airbnb and harassment in a car rented through a platform.⁵⁵

Finally, as the collaborative economy blurs the traditional lines between consumers and services/providers, it raises questions regarding which party needs protection. Is it the Airbnb consumer that has been discriminated against because the provider has a ‘girls only’ policy, or is it the UBER driver that is denied employment because she is a woman? Any determination of the applicable rules needs to be assessed in the first instance at national level by the relevant decision-makers and on a case-by-case basis. Potentially, as goods and services are provided, Directive 2004/113/EC could be applicable.

50 Rosemblat, A., Stark L. (2015), ‘Uber’s Drivers: Information Asymmetries and Control in Dynamic Work’, Data and Society Research Institute, 5 November 2017, available at <http://ssrn.com/abstract=2686227>.

51 De Groen W.P., Maselli I., ‘The Impact of the Collaborative Economy on the Labour Market’. CEPS Special report, June 2016, available at https://www.ceps.eu/system/files/SR138CollaborativeEconomy_0.pdf, accessed on 14 December 2017.

52 See for example the UK Employment Tribunal ruling of 28 October 2016, which after in-depth analysis of the UBER rules for drivers and the factual application of the rules on the ground, qualified UBER drivers not as self-employed but as workers, entitled to the national minimum wage, holiday pay, pensions and other workers’ rights, available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>, accessed on 14 December 2017; see also ‘Uber faces legal threat from union over London licence’, 16 May 2017 <https://www.theguardian.com/technology/2017/may/16/uber-legal-threat-union-london-licence-gmb-transport-for-london>. Furthermore, the Employment Tribunal in *Gasgoine v Addison Lee* ruled that a cycle courier should be classed as a worker and thus failed to pay him holiday pay, available at https://assets.publishing.service.gov.uk/media/598c5d7ce5274a75134a9924/Mr_C_Gascoigne_v_Addison_Lee_Ltd_2200436-2016_-_Final_and_Reasons.pdf, accessed on 14 December 2017.

53 The CJEU heard a case related to UBER, Case C-453/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, where it was asked to decide whether UBER is a transport company or a digital service. AG Szpunar delivered his opinion on 11 May 2017 stating that UBER falls within the field of transport. See also other requests for preliminary rulings related to UBER, Case C-526/15 and Case C-320/16 (from France and Belgium respectively).

54 UK Department for Business, Energy & Industrial Strategy, *Good Work: the Taylor review of modern working practices*, 11 July 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf accessed on 14 December 2017.

55 Werner H, ‘Sharing Economy: Opportunities and Threats’ (2017), unpublished paper.

1.4 The impact of the collaborative economy on gender equality

In addition to the opportunities and risks highlighted above, there are also concerns specifically associated with *gender equality* for service providers and consumers alike.

As far as **service providers** are concerned, again using the example of UBER, by treating drivers as contractors rather than employees, rules on basic employment protection such as overtime, minimum wage, and family-related leave, can be avoided. Whilst this may be part of the perceived 'flexibility' that being an UBER driver offers,⁵⁶ it is easy to see that women in particular may be affected by the lack of certain guarantees. Indeed, women may be attracted to this type of work because it could enable them to work from home⁵⁷ and/or around their caring and family responsibilities; however, quite apart from the general lack of control over certain aspects of the work (for example the timing of the work required), they will not be able to benefit from basic employment rights and protection such as care-related leaves if UBER is not considered to be the employer.⁵⁸ A recent study exploring the impact of these new business models on work-life balance concludes that although they may seem to offer opportunities, these opportunities need to be weighed against poor conditions and lack of security.⁵⁹

There are also tangible examples of direct and indirect sex discrimination, discrimination on grounds of gender reassignment, harassment and sexual harassment, and violence and vandalism by individual consumers against both individual service providers and/or other fellow consumers, with such incidents being reported.⁶⁰

Gender discrimination can also arise for **consumers**. As an example, in the United States a transgender woman was recently denied accommodation by an Airbnb host on the basis of her gender.⁶¹

There are also some more indirect gender effects on the **wider population**.⁶² For example, the massive rise in renting rooms to tourists via sharing platforms (such as Airbnb) has considerably curbed the availability of housing space in several cities, in particular Barcelona,⁶³ London⁶⁴ and Berlin⁶⁵, resulting in

56 Renan Barzilay A., Ben-David A. (2017), 'Platform Inequality: Gender in the Gig-Economy', 47 Seton Hall Law Review, pp. 393-431; see also the discussion above in this section.

57 Berg. J., 'Income security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers', 2016 Comparative Labour Law & Policy Journal 37:3, 552-X.

58 Renan Barzilay A., Ben-David A. (2017), 'Platform Inequality: Gender in the Gig-Economy', 47 Seton Hall Law Review, pp. 393-431.

59 Barrio A., Zekić N. (2017) 'Connecting Crowd-Work with Work-Life Balance: Mission Impossible?' in *Work-life balance in the modern workplace*, De Groofs (ed.), Kluwer Law International, pp. 9-25.

60 Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment*, European Parliament Research Service available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf).

61 Palazzo C., 'Airbnb host banned for denying transgender woman room after viral tweet' (The Telegraph, 07 June 2016). Available at <http://www.telegraph.co.uk/technology/2016/06/07/airbnb-host-banned-for-denying-transgender-woman-room-after-viral/> accessed on 14 December 2017; see also European Network of Legal Experts in Gender Equality and Non-discrimination, "'Girls only' housing illegal' (News Report), 14 April 2015, available at <http://www.equalitylaw.eu/downloads/2743-13-be-ge-girls-only-housing-illegal> accessed on 14 December 2017.

62 European Parliament, *Gender Equal Access to Goods and Services Directive 2004/113/EC*, Study compiled for the European Parliamentary Research Service, January 2017, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf) accessed on 14 December 2017.

63 The Barcelona municipality intends to impose penalties of EUR 600 000 on Airbnb and Homeaway for placing flats without licence and without paying the associated fees, after a first penalty of EUR 30 000 imposed in December 2015 proved fruitless; see <http://www.handelsblatt.com/unternehmen/dienstleister/airbnb-und-homeaway-barcelona-plant-hohe-strafen-fuer-wohnungsvermittlungsportale/14892790.html>, accessed on 14 December 2017. This measure was justified on the basis that 'houses and flats got unaffordable for most local people' and 'the fundamental right for accommodation is violated'; see http://ccaa.elpais.com/ccaa/2016/11/24/catalunya/1479976225_934881.html, <http://www.lavanguardia.com/local/barcelona/20161124/412132887490/barcelona-multa-airbnb-homeaway-pisos-sin-licencia.html>, accessed on 14 December 2017.

64 The London municipality agreed with Airbnb to limit the renting of flats to a maximum of 90 days per year, <https://www.theguardian.com/technology/2016/dec/03/airbnb-regulation-london-amsterdam-housing>, accessed on 14 December 2017.

65 In Berlin rents rose by 56 % between 2009 and 2014, and in an attempt to keep housing affordable for local people, the municipality passed a law which limits owners to renting rooms, but not entire flats or houses, via platforms like Airbnb, Wimdu and 9Flats; offenders can face fines of up to EUR 100 000; see <http://www.spiegel.de/reise/aktuell/berlin-klage-gegen-ferienwohnungsverbot-abgeschmettert-a-1096411.html> of 8 June 2016, accessed on 14 December 2017.

a reduced availability of low-cost housing which is particularly important for vulnerable people such as single-parent families, which are mostly led by women.

Furthermore, this could also potentially affect a more traditional industry, i.e. the hotel industry where many women are employed as chambermaids and waitresses.

Thus, even if at the moment the impact of the collaborative economy on gender is not as prominent as the impact on other areas, in the view of the national experts this impact is a real possibility and is likely to become more apparent as this business model grows and becomes more established.

2 Regulating the collaborative economy in the EU: what about gender?

There is no doubt that this 21st century ‘workplace’ has dramatically changed the traditional working relationship and has created new opportunities. Equally, there is little doubt that the collaborative economy has developed somewhat ‘in the wild’, at least from a legal standpoint: entering a market first, taking advantage of its dominant position, exercising a significant degree of control over workers, evading regulations and only then dealing with legal compliance.⁶⁶ There is agreement amongst legal commentators that it is important to address and regulate, at domestic and EU level, the challenges and the opportunities that have been created.⁶⁷ This section focuses on the EU’s position in this area, whereas the reaction of the Member States is addressed in Section 3 of this Report. So far, however, the impact of the collaborative economy on gender equality has largely been missing from any debate.

At EU level the collaborative economy has been the subject of studies⁶⁸ and is addressed as part of the Commission’s Digital Single Market Strategy.⁶⁹ In 2016, the Commission also published a communication that specifically addresses the collaborative economy, entitled *A European agenda for the collaborative economy*.⁷⁰

2.1 The European Commission’s Communication A European agenda for the collaborative economy

In the introductory remarks of this Communication, the Commission notes the fragmented regulatory approaches of Member States to the collaborative economy arising from uncertainty over applicable rules, which hinders its full development in Europe.⁷¹ The aim of the Communication is to address such concerns by clarifying the position under EU law, so as to help Member States to reap the benefits of this new economic model. It therefore serves as guidance for Member States to help ensure the balanced development of the collaborative economy in Europe.

The Communication identifies five aspects of the collaborative economy model where concerns regarding uncertainty have arisen: *market-access requirements*, *liability regimes*, *protection of users*, *employment matters* and *taxation*. For each aspect, the Communication clarifies the position under EU law and sets key criteria for Member States to consider when determining issues on a case-by-case basis. For example, the Commission clarified that in line with the E-Commerce Directive,⁷² collaborative platforms should not be subject to authorisations or licenses where they only act as intermediaries between consumers and those offering services, and that they are exempted from intermediary liability for the information they store provided that certain conditions are met. Regarding consumer protection, the Commission clarified that criteria such as frequency of service, profit-seeking motive and level of turnover can be helpful in determining whether a service provider is a trader as compared to the consumer. The significance of this distinction is that EU consumer law does not apply to P2P (peer to peer) transactions but it does to B2P (business to peer); therefore if neither service provider nor service user qualify as traders, their transaction will fall outside the scope of EU consumer law.

66 Maselli I, Lenarts K, Beblavý M. (2016) Five things we need to know about the on-demand economy, CEPS Essay No 21/8.

67 Jourdain L. J., Leclerc M., Millerand A. (2016) *Économie collaborative & Droit*, Limoges, available at <http://www.fypeditions.com/economie-collaborative-droit/> accessed on 14 December 2017.

68 Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment*, European Parliament Research Service available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf).

69 Available at <https://ec.europa.eu/digital-single-market/news/digital-single-market-strategy-europe-com2015-192-final> accessed on 14 December 2017.

70 European Commission Communication, *A European Agenda for the Collaborative Economy* COM 2016 356 final.

71 Commission Staff Working Document, *A Single Market Strategy for Europe: Analysis and Evidence* SWD(2015) 202 final, at 6.

72 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 July 2000.

The Communication makes no explicit reference to gender equality. There is a general reference to discrimination (including gender and sexual orientation) in the context of EU labour law, without mentioning which directives might be applicable. It merely affirms the right for workers to be protected against discrimination. In our view, the lack of reference concerning the application of the principle of gender equality is striking. This is true because gender equality is one of the aims and values⁷³ of EU law and has been successfully implemented and upheld by the CJEU⁷⁴ and applied by national courts. It has permeated all aspects of life and society, and the collaborative economy should not be an exception. In addition, gender-related concerns may potentially arise as part of many of the aspects already examined in the Communication. These include issues of liability for discrimination occurring on online platforms, as well as the applicable consumer-protection law for instances of sexual harassment during the supply of a service. Equally, employment matters may be applied to the service providers: these matters include various forms of leave, including care-related leaves. Finally, taxation may indirectly have a considerable gender impact. Indeed taxation, ultimately, supports the sustainability of the welfare state and the main beneficiaries of the welfare state are those individuals who are in a position of vulnerability, including single parents who are often women.

The Communication concludes that:

In view of the significant benefits that new collaborative economy business models can bring, Europe should be open to embracing these new opportunities. The EU should proactively support the innovation, competitiveness and growth opportunities offered by modernisation of the economy. At the same time, it is important to ensure fair working conditions and adequate and sustainable consumer and social protection. For this to happen, citizens and businesses should be aware of the rules and obligations applying to them, as clarified in this Communication. Member States are encouraged to clarify their national situation in a similar way. The Commission stands ready to work with Member States and relevant authorities to support them in this process.

It is submitted that, in order to proactively support the full development of the collaborative economy, with equal opportunities and inclusion, it is also important to ensure the respect for gender equality and the principle of non-discrimination.

Despite the lack of specific reference in the Communication, EU legislative instruments already exist which could provide guidance for Member States in ensuring gender equality in the collaborative economy. The following section provides an overview of EU legislative instruments in order to determine the potential for existing EU law to provide clarification and guidance in relation to the collaborative economy. It focuses in particular on Directive 2004/113/EC which, in the case of gender discrimination in the access to and supply of goods and services, is the most suitable instrument.

2.2 Applying EU gender equality law to the collaborative economy

The EU is committed to gender equality. For this purpose there is a vast array of primary and secondary legislative measures which have been interpreted and complemented by the extensive case law of the CJEU. *A fortiori*, this commitment also extends to new areas such as the collaborative economy.

73 Articles 2 and 3 TFEU respectively; see also Section 2.2 of this Report; see also Bell M. (2012), 'The Principle of Equal Treatment: Widening and Deepening' in Craig P., de Burca G. (eds.), in: *The Evolution of EU Law* (Oxford University Press), pp. 611–639.

74 Inter alia, Case 149/77, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*. ECLI:EU:C:1978:130 where the Court held that 'there can be no doubt that the elimination of discrimination based on sex [is] part of fundamental rights'; the message that fundamental rights include the general principle of equality and non-discrimination was reiterated in Case 442/00, *Ángel Rodríguez Caballero v Fondo de Garantía Salarial (Fogasa)* ECLI:EU:C:2002:752; in the more recent case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, ECLI:EU:C:2011:100 it was again stated that equality between men and women is a fundamental principle of the European Union.

2.2.1 Primary Legislation

Articles 2 and 3 of the Treaty on the European Union (TEU) refer to gender equality as an ‘aim’ and a ‘value’ of the European Union. This is reinforced by Articles 8 and 10 of the Treaty on the Functioning of the European Union (TFEU) which introduce the principle of gender mainstreaming.

Furthermore, Article 157 TFEU establishes the obligation of equal pay between men and women for equal work or work of equal value and Article 19 TFEU brings the general principle of non-discrimination beyond the strict confines of the workplace and extends it to several grounds, namely sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. Both Article 157 and Article 19 TFEU provide a general legal basis for the adoption of measures in the field of gender equality.

Following the adoption of the Treaty of Lisbon in 2009, the EU Charter of Fundamental Rights⁷⁵ has achieved the status of primary legislation. The Charter firmly reiterates the importance of the concept of equality (Article 20), non-discrimination (Article 21) and gender equality (Article 23). Finally, Article 53 of the Charter provides for minimum protection and only allows the adoption of measures that go beyond that.

2.2.2 Secondary legislation

Depending on the relationship between the service provider and the platform, various EU instruments may be relevant.

1. Essentially, depending on the employment relationship,⁷⁶ there are four possible legislative instruments that can be used. If a *contract of employment* between the service provider and the digital platform exists, **Directive 2006/54/EC (the Recast Directive)**⁷⁷ applies. The Recast Directive provides for the principle of equal treatment between women and men, which means that there should be no discrimination whatsoever – direct or indirect – on the grounds of sex.
2. If the service provider acts in a *self-employed capacity*, **Directive 2010/41/EU (the Self-Employment Directive)**⁷⁸ applies. The Self-Employment Directive provides that all provisions contrary to the principle of equal treatment must be eliminated by the Member States, in particular in respect of the establishment or extension of a business or of any other form of self-employed activity.
3. If some sort of employment relationship is established between the service provider and the platform, *social security provisions* would also apply. In this instance, **Directive 79/7/EEC**⁷⁹ is relevant. Article 1 refers to social security schemes and statutory pensions and Article 4 prohibits both direct and indirect sex discrimination.
4. Finally, **Directive 2004/113/EC (the Goods and Services Directive)**⁸⁰ on the access to and supply of goods and services, may also apply. As access to goods and services is the main focus of this report, this Directive will be further discussed below.

⁷⁵ OJ [2010] C82/02.

⁷⁶ There is a growing array of literature that addresses the issue of the relationship between the platform and the service provider; see for example Codagnone, C., Abadie F., Biagi, F. (2016), *The Passions and the Interests: Unpacking the Sharing Economy*, JRC Science for Policy Report, Luxembourg: Publications Office of the European Union Studies; Eurofund, *New forms of Employment*, (2015) Luxembourg available at <https://www.eurofound.europa.eu/publications/report/2015/working-conditions-labour-market/new-forms-of-employment>.

⁷⁷ Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast). Directive 2006/54/EC incorporates and updates several existing Directives: Equal Pay Directive 75/117/EEC, Equal Treatment Directive 76/207/EEC as amended by Directive 2002/73/EC, Occupational Social Security Directive 86/378/EEC as amended by Directive 96/97/EC and Burden of Proof Directive 97/80/EC.

⁷⁸ Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity. It replaces Directive 86/613/EEC.

⁷⁹ Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

⁸⁰ Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

2.3 Directive 2004/113/EC

In cases where the supply of goods and services in the collaborative economy are involved, Directive 2004/113/EC seems to be the most suitable instrument.

Directive 2004/113/EC is the first EU legislative instrument that brings the principle of equal treatment between men and women beyond the strict confines of the workplace to the access to and the supply of goods and services. It was adopted in recognition that discrimination, including sexual harassment, occurring outside the labour market can be equally damaging, constituting a barrier to the full and successful integration of men and women into economic and social life (recital 9). The Directive prohibits both direct (Article 4(1)(a)) and indirect (Article 4(1)(b)) discrimination, including less favourable treatment of women for reasons of pregnancy and maternity (Article 4(1)(a)), as well as harassment and sexual harassment (Article 4(3)). The Directive applies to ‘all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors’ (Article 3). While the Directive does not define ‘goods’ or ‘services’, Recital 11 states that they should be taken to mean those within the meaning of the provisions of the Treaty establishing the European Community. In this respect Article 57 TFEU (previously Article 50 EC) states that services are those ‘normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons’, and established case law of the CJEU refers to goods as ‘products which can be valued in money and which are capable, as such, of forming the subject of commercial transaction’.⁸¹

The Directive does however contain some exclusions or exceptions. Media, advertising and education are expressly excluded from its scope (Article 3(3)), as are matters of employment and occupation (Article 3(4)). Article 3(1) specifically excludes those goods and services which are offered within the sphere of private or family life, covering only those that fall within the public sphere. In addition, the Directive does not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 4(5)). Originally, Article 5(2) contained an exception that permitted, for the purpose of insurance and related financial services, differences in individuals’ premiums and benefits where sex was used as a determining factor in the assessment of risk. This exception has since been declared invalid by the CJEU’s ruling in the *Test-Achats* case.⁸²

A study compiled for the European Parliament⁸³ in July 2016 highlights that Directive 2004/113/EC could in fact be the most suitable instrument to address (at least aspects of) the collaborative economy, but concludes that more information is necessary as the situation is indeed rather complex. This study raised three particular concerns: whether or not a collaborative platform could fall within the definition of a ‘service’, whether collaborative platforms are excluded from the scope of the Directive due to falling within the private sphere, and questions of liability.⁸⁴ As to the first, the study notes that services are provided against a fee, which constitutes consideration for the service. However, it questions whether cost-sharing (for example, BlaBlaCar) would constitute or amount to consideration, noting that many Member States do not consider pure cost-sharing activities as involving remuneration. As to the second, the study highlights the interplay between the factors that influence an individual’s decision to lease their personal apartment, namely economic considerations and, on the other hand, proximity to their personal sphere. It could not conclusively determine whether a service provided under a collaborative platform (such as Airbnb) would fall within the private or public sphere. As to the third, the study highlights the

81 See Case 7/68 *Commission of the European Communities v Italian Republic* ECLI:EU:C:1968:51 423 at 428.

82 C-236/09, *Association Belge des Consommateurs Test-Achats and Others*, ECLI:EU:C:2011:100.

83 European Parliament Research Service (2016) *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment* available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf).

84 Werner H., Caracciolo di Torella E. (2017), *Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment*, European Parliament Research Service available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf), at pp. I-26- I-30.

uncertainty surrounding liability for sex discrimination or sexual harassment and suggested possible scenarios as regards the liability of platforms or service providers, vicarious liability of the employer (*if* an employment relationship is established) and liability for third-party harassment. The study provides an insight into the extent to which Directive 2004/113/EC may be used to regulate the collaborative economy. However, it does not assess the extent to which Member States regulate gender-related aspects of the collaborative economy, either of their own accord or through the domestic legislation implementing Directive 2004/113/EC. This report seeks to fill this gap.

3 Regulating gender equality in the collaborative economy at national level: summary of the findings

In order to assess how Member States have reacted to this emerging business model and whether there are specific concerns relating to gender, questionnaires were distributed to the national gender experts in the EU Member States and three associated states (**Iceland, Liechtenstein and Norway**) of the European Network of Legal Experts in Gender Equality and Non-Discrimination, containing questions pertaining to the collaborative economy and gender equality in each respective State. Questions were formulated in thematic groups, including the basic structure of the domestic legal system as regards the collaborative economy, the extent to which the domestic legislation implementing Directive 2004/113/EC addresses issues of gender equality in the collaborative economy, rights awareness and access to information, enforcement procedures and sanctions for violations of gender equality, remedies, and the presence of national literature addressing gender equality and the collaborative economy.⁸⁵ The responses of the national gender experts, received by mid-September 2017, were collated and are presented in this section.

Considering that the collaborative economy is a very recent development, it is not surprising that the majority of the national experts have stated that their country does not explicitly regulate it.⁸⁶

In some cases the reason for lack of specific regulation is the fact that the current legislation has been deemed to already provide an adequate framework.⁸⁷ This is the case, for example, in **Norway**, where a White Paper of February 2017 of the Ministry of Finance found that current legislation covers many of the challenges related to the collaborative economy, including the applicability of the current definitions of employer and employee to workers in the collaborative economy, and has identified only a few gaps.⁸⁸

However, the lack of provisions has also led some experts to note that platforms might operate in a 'regulatory vacuum'. In **Croatia**, for example UBER operates in several cities 'illegally'. This is because, although the platform itself is not illegal, it is illegal to provide car-transport services without proper licensing. On a positive note, some of the national experts did comment that while specific regulation has not yet been introduced there has been some legal discussion on the question of regulating the collaborative economy.⁸⁹ Such discussion may yet lead to future developments in this field.

When some regulation is in place, the level varies considerably across the Member States. In the main, rather than the collaborative economy as a whole, Member States have regulated specific platforms, in particular those relating to transport⁹⁰ and tourism⁹¹ (mainly UBER⁹² and Airbnb). Also, some Member States have regulated specific areas without explicit reference to any particular platforms.⁹³ For example, **Denmark** has regulated the collaborative economy in the field of consumer protection, so that any trade between partners by the use of a digital platform is to be considered a consumer sale and is therefore included in the general protection of consumers.⁹⁴ **Estonia** and **Norway**, for example, have attempted to regulate taxation. The **Estonian** Tax and Customs Board have been working with UBER

85 See Annex II for the full questionnaire.

86 Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, Germany, Hungary, Ireland, Latvia, Liechtenstein, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, and the UK.

87 Ireland and Norway.

88 White paper, NOU 2017: 4 *Delingsøkonomien – muligheter og utfordringer* (The Collaborative Economy – possibilities and challenges).

89 Germany, Ireland, Poland and the UK.

90 Lithuania; Italy has introduced a legislative Bill on car-pooling, which would apply to platforms such as BlaBlaCar.

91 Greece, Iceland and Italy.

92 Estonia and the Netherlands.

93 Belgium (taxation) and Denmark (consumer protection). In Belgium, the Income Tax Code 1992 (as amended by the Multipurpose Act 2016) provides a 10 % flat tax rate to the service provider where certain conditions are met.

94 Act of Sales 1978, Section 4.

since October 2015 to develop a new e-tax system that simplifies tax declaration, announcing a simplified tax declaration form in January 2017 which will see a decrease in taxes paid by UBER drivers.

France has sought to address the collaborative economy in a more comprehensive fashion, by focusing on labour law. This is a very proactive approach that acknowledges that the position of service providers, although they do not fall within the traditional employment relationship, must be regulated. The Labour Act of August 2016 includes a new title in the Labour Code on workers using a platform providing services. The provisions apply to independent workers and address the issue of 'social responsibility' of platforms. It mainly concerns insurance for accidents at work and access to vocational training. It also grants collective rights to those workers by recognising the right to join trade unions and the right to strike.

In the same vein, in the **UK** a report commissioned by the Government, the Taylor Review, published in July 2017, has proposed a series of changes aimed at regulating this new business model, including the creation of a new employment status of 'dependent contractor'. Such workers would be entitled to holiday and sick pay and be treated as employees for tax purposes whilst retaining some flexibility regarding the payment of the minimum wage.⁹⁵

3.1 Problems experienced in relation to the collaborative economy in the Member States

On a general level, this emerging business model is raising a variety of problems and complaints have been registered across the Member States. In the main these concentrate in specific sectors, in particular transport or tourism. In **Denmark**, where it is a requirement to have formal approval before entering the taxi market, the national expert reported that Østre Landsret⁹⁶ found that a person was violating the regulation covering taxi services because he was driving passengers against payment without formal approval. The contact between the passengers and driver was organized through UBER, although UBER was not a party to the case. A similar case occurred in **the Netherlands**, where the platform UBERPop engaged drivers who did not hold an official taxi permit.⁹⁷ In **Poland**, although no case has yet been brought before the national court, taxi drivers have demanded the de-legalisation of UBER as it is perceived as engaging in unfair competition and perpetrating unequal treatment of persons providing the same driving service. Finally, in the **UK**, cases that have arisen have been related to the employment status of the parties involved. Cases have been brought against many economy platforms, including UBER⁹⁸ and to a certain extent Pimlico Plumbers,⁹⁹ which have been found in favour of the service providers, holding that they were in fact workers and therefore entitled to some employment rights¹⁰⁰ under UK labour laws. Conversely, a recent judgment of the UK Central Arbitration Committee has found that Deliveroo riders are in fact self-employed, due to their freedom to 'substitute', allowing others to take their place on a job.¹⁰¹ This decision came merely one week

95 See the Taylor Review, <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>, accessed on 14 December 2017.

96 S206600C-KSJ of 18 November 2016. Transcript (EN) from the record of judgments available at http://fptaxi.pt/images/documentacao/dimarca_uber.pdf, accessed on 14 December 2017.

97 See the decision of 08 December 2014 at <http://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:CBB:2014:450>, accessed on 14 December 2017.

98 *Aslam and Farrar & Others v Uber B.V, Uber London Ltd and Uber Britannia Ltd*, 2202550/ 2015 & Others, decision of 28 October 2016, available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>, accessed on 14 December 2017. For a further incident concerning Uber in the UK, see 'Uber concealed huge data breach', BBC News 22 November 2017, available at <http://www.bbc.co.uk/news/technology-42075306> accessed on 14 December 2017.

99 *Pimlico Plumbers Ltd and Charlie Mullins v Gary Smith* [2017] EWCA Civ 51, decision of 10 February 2017, available at <https://www.judiciary.gov.uk/wp-content/uploads/2017/02/pimlico-plumbers-v-smith.pdf>, accessed on 14 December 2017. This decision has now been appealed and will be heard in 2018.

100 These rights include, inter alia, 5.6 weeks' paid annual leave each year, a maximum a 48-hour average working week, rest breaks, the national minimum and the national living wage as well as protection from whistleblowing legislation.

101 *Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo* TUR1/ 985 (2016), decision of 14 November 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/659481/Acceptance_Decision.pdf.

after the Employment Appeal Tribunal upheld an earlier decision of the Employment Tribunal which found that UBER drivers were entitled to workers' rights.¹⁰² These examples strengthen the argument that the domestic legal order needs to address all the challenges arising from the collaborative economy model with specifically tailored legislation.

In the vast majority of the Member States¹⁰³ there is evidence of *some form* of discrimination connected with the collaborative economy. Such discrimination ranges from indirect discrimination of the service provider as a consequence of atypical working relationships, to outright exclusion of a consumer from accessing services; it may therefore affect those who offer as well as those who use the service.¹⁰⁴ However, in the majority of cases, discrimination, rather than because of gender, occurs for reasons linked to race, ethnicity, disability and age.¹⁰⁵ Indeed, when asked if specific issues concerning *gender* discrimination in the context of the collaborative economy had been experienced, with only a few exceptions, the national experts reported that this had not been the case.

To date, there have only been a few, indirect, examples of gender discrimination that affect both the service provider and the consumer.

As for the service provider, in the **UK**, the Equality and Human Rights Commission has expressed concern about the potential impact of the collaborative economy on those most vulnerable to exploitation.¹⁰⁶ It suggests that atypical working relationships (where women are disproportionately over-represented) can disadvantage workers in a number of ways, including low pay, difficulty in transferring to permanent work, under-employment and lower well-being from managing unpredictable work/income, and lack of redress.

In these cases, depending on whether an employment or a self-employment relationship is established, the relevant legislation would be Directive 2006/54/EC (and/or Directive 79/7/EEC or 2010/41/EU).

As far as discrimination against the consumer is concerned, an interesting example is that of **Iceland** where tourism, in particular house-sharing (Airbnb),¹⁰⁷ is where gender equality discrimination in the collaborative economy is more likely to occur. In an attempt to regulate this area, **Iceland** has recently passed a law capping the amount of time someone can rent out a private property and the gross income that may be earned from private rental of property.¹⁰⁸ The national expert suggests that women constitute a large section of those providing services on Airbnb. This means that the newly introduced legislation may result in indirect discrimination of women, due to the fact that the cap on both rental period and rent earnings limits the amount they can earn from it, which puts them at a disadvantage. In **Latvia**, discussion in the media has brought to light evidence that families with smaller children, single mothers and Roma suffer from discrimination when attempting to rent apartments. Some advertisements expressly state that apartments will only be rented to couples who do not have children.¹⁰⁹ The national expert argues that this indicates a high level of prejudice when offering certain services, which is probably also an issue when the services are provided in the context of the collaborative economy.

102 *Uber BV, Uber London Ltd and Uber Britannia Ltd v Aslam, Farrar, Dawson & Others*, UKEAT/0056/17/DA, decision of 10 November 2017, available at https://assets.publishing.service.gov.uk/media/5a046b06e5274a0ee5a1f171/Uber_B.V._and_Others_v_Mr_Y_Aslam_and_Others_UKEAT_0056_17_DA.pdf accessed on 14 December 2017. UBER applied to 'leapfrog' the appeal to the Supreme Court but the appeal has been refused. The possibility to leapfrog is only granted in a tiny minority of extremely important cases. The case will now be heard by the Court of Appeal in 2018.

103 Except for Denmark and Romania, where there has been no research.

104 The Irish expert highlights that those who *offer*, as well as those who *use*, the service can be at risk.

105 Germany, the Netherlands and the Czech Republic.

106 See EHRC (2016) Written Submission to the Taylor Review, available at: <https://www.equalityhumanrights.com/en/legal-responses/consultation-responses>, accessed on 14 December 2017.

107 More than 1,600 locations listed on the Airbnb site; see <https://grapevine.is/news/2016/12/30/new-airbnb-law-going-into-effect-supervision-still-unclear/>, accessed on 14 December 2017.

108 Law No. 67/2016 of 31 May 2016 amending the Act on Restaurants, Lodging and Entertainment No. 85/2007 (Private Accommodation, Restaurants without Alcoholic Beverages, Indefinite Operating Licence).

109 See for example, Saimnieki pazemo dzīvokļu meklētājus (Owners humiliate persons in search of renting apartment), 7 March 2013, portal www.tvnet.lv available in Latvian at http://www.tvnet.lv/zinas/tava_balss/455954-saimnieki_pazemo_dzivokla_mekletajus.

In **Estonia**, a case regarding stalking by a person providing a taxi service under the collaborative platform Taxify is currently under investigation.¹¹⁰ While the main issue is stalking, rather than the collaborative economy, Taxify made a public announcement stating that collaboration of Taxify with the defendant had been suspended. Taxify expressed their regret for what had happened and publicly explained their driver selection procedures, while also encouraging other customers to provide feedback on their ride and driver.

In this case, if the relevant platform is not considered to be the employer, the relevant legislation is Directive 2004/113/EC.

In light of the above, it may be argued that at the moment the argument that the collaborative economy has an impact on gender might appear weak. In our view the situation is more complex, however. It is not true to say that there are no issues involving gender discrimination, but such issues have not been reported. Indeed, the national experts have remarked that it might be difficult to identify issues of gender discrimination because these are not normally brought to public attention (**Iceland**). This is true because this specific element of the debate has not attracted much attention in public discourse (**Sweden**). For example, an issue of sexual harassment was identified in **Germany** in the areas of car sharing and room renting, yet the national expert reported a lack of discussion in the legal discourse, in the media and in general public debate. As a consequence of the lack of attention, neither the authorities nor the general public are aware that gender equality issues *might* arise in the first place (**Croatia**). The lack of discussion may also be due to the fact that the collaborative economy is a recent development and there has not been the time to 'build' a set of cases. The **Swedish** expert has also remarked that users do not identify such discriminatory acts as discrimination, but as something else instead – such as unfriendly behaviour or treatment.

3.2 The national laws implementing Directive 2004/113/EC and the collaborative economy

When arising, issues of gender discrimination in the context of the collaborative economy can be addressed by diverse legislative instruments.¹¹¹ Directive 2004/113/EC is the most suitable instrument to protect individual consumers. With that said, when it came into force, no issues had arisen relating to the collaborative economy; therefore neither the Directive nor the domestic implementing legislation specifically addressed it.

3.2.1 Scope of application of the Directive

The national laws implementing Directive 2004/113/EC in the majority of Member States are general enough to cover all parties involved in the collaborative economy. In other words, by ensuring equal treatment between men and women in the access to and provision of goods and services, most of them implicitly cover, or rather do not explicitly exclude, the collaborative economy within the material scope of the implementing law.¹¹² **Austria** ensures equal treatment in all legal relationships concerning property, which implicitly covers the entering into of contracts on online platforms and the exchange of services and payments,¹¹³ while **Germany** limits the scope of the implementing law by explicitly restricting its application to 'mass contracts'.¹¹⁴ According to the German national expert, mass contracts are concluded in great numbers, under comparable conditions and typically irrespective of the identity of the other contracting party, the implication being that occasional service providers are not bound by the prohibition

110 However, information about cases under investigation is not available. This case was made public through weekly newspaper *Eesti Ekspress*, known for their investigative journalism practice; see Tuul, M. (2017), Väsimate sariahistaja Leo jälitab ühe ja sama ettevõtte naistöötajaid (Serial stalker Leo is harassing women from one certain enterprise), *Eesti Ekspress*, 13 September 2017, <http://ekspress.delfi.ee/kuum/vasimatu-sariahistaja-leo-jalitab-uhe-ja-sama-ettevotte-naistootajaid?id=79464034>, accessed 14 September 2017.

111 See above, Section 2.2 of this report.

112 Austria, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Norway, Romania, Poland, Slovenia, Spain, Sweden and the UK.

113 Equal Treatment Act Private Sector (*Gleichbehandlungsgesetz, GlBG*), para 30, Section 1.

114 General Equal Treatment Act, §19(1)(1).

of sex discrimination. In addition, **Germany** limits the prohibition of sexual harassment to the area of employment only,¹¹⁵ in contravention of Article 4(3) of Directive 2004/113/EC. **Poland** also limits the implementing laws' material scope by explicitly excluding from its application advertisements aimed primarily or exclusively at one sex.¹¹⁶

A few national experts however have taken a step further by commenting specifically on the applicability – or potential applicability – of domestic law to instances of sex discrimination in the context of the collaborative economy in their country. According to the national expert, in **Ireland** the collaborative platform would not be likely to be held responsible for discrimination as the platform does not regulate the prices set by the service provider and the service user has the choice in deciding which service to purchase. The **Lithuanian** expert contends that emphasis is placed on the contractual agreement between service provider and service user as it is an agreement that binds the two parties. It does not extend to the platform whose rights and obligations are not elaborated by law. On the other hand, under the **UK's** Equality Act 2010 Code of Practice, a website may itself constitute a service where it delivers information or entertainment to the public, as the website provides access to goods and services.¹¹⁷ This means that the collaborative platform could be held responsible for discriminatory content on its online platform. However, there are provisions as to territorial extent and further details are required as the relevant law was not drafted with collaborative forms of economic business models in mind.

A limited number of Member States also restrict the personal scope of the implementing law to differentiate between professional providers and occasional peers. Both **Latvia** and **Lithuania** limit the application of the implementing law to situations where the service provider acts in a commercial capacity, thereby exempting occasional peers from its scope.¹¹⁸ However, the presumption that an occasional peer is exempt from the scope could be overturned by a court on the grounds that they are providing services to natural persons and are therefore businessmen. According to the national gender expert, the recent forced closure of an online website in **Latvia** due to professional persons selling cars as private persons via a platform,¹¹⁹ thereby evading taxes, highlights the complexity in controlling and distinguishing between private and business transactions. Conversely, in **Sweden** prior to the entry into force of the implementing law, the prohibition of discrimination only applied where the service provider was acting as a professional. According to the Swedish expert, the implementing law broadened the scope by including occasional peers, whilst providing an exception for the private sphere.¹²⁰

3.2.2 Exemptions

In accordance with Article 3(1) of Directive 2004/113/EC,¹²¹ some Member States have exempted the application of equal treatment to goods and services in the area of private and family life.¹²² However, each Member State has its own interpretation of this exception, leading to diverse approaches. For example, under **Finnish** law a legal action is considered to occur in the private sphere when it concerns a person's personal sphere of life, such as a property that is used by that person or their family.¹²³ Following

115 General Equal Treatment Act, s3(4).

116 JoL 2010 No. 254 Item 1700 with amendments, unified text JoL 2016 Item 121; hereafter Antidiscrimination Law, Article 5(2).

117 Equality Act 2010 Statutory Code of Practice: Services, public functions and associations, Section 11.8.

118 The Protection of Consumers' Rights Law, *Patērētāju tiesību aizsardzības likums*, OG No.104/105, 1 April 1999 (Latvia); Equal Opportunities Act (Lithuania).

119 See, for example, VID apturēs «ss.lv» darbību par atteikšanos sniegt informāciju par neregistrētiem auto tirgotājiem (The Revenue Office will block functioning of 'ss.lv' on the grounds of the rejection to provide the information on unregistered sellers of the cars, 3 August 2017, portal FinanceNet.lv available in Latvian at http://www.tvnet.lv/financenet/finansu_zinas/671488-vid_apatures_sslv_darbibu_par_atteiksanos_sniegt_informaciju_par_neregistretiem_auto_tirgotajiem, accessed on 14 December 2017.

120 Discrimination Act SFS 2008:567.

121 Article 3(1) states that 'Within the limits of the powers conferred upon the community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context'.

122 Denmark, Finland, Iceland, Italy, the Netherlands, Poland, Romania, Spain and Sweden.

123 See the Act on Equality between Men and Women (609/1986), in particular the preparatory works to Section 2(1).

this interpretation, it would seem that a person who lets an apartment through Airbnb where s/he does *not* ordinarily live would fall within the public sphere, whilst a person who lets their *own* private apartment would fall within the private sphere instead. The **Italian** expert offers a different opinion, namely that a literal interpretation of Italian law¹²⁴ would imply that a service offered through an online platform is not likely to be automatically excluded from the private sphere as the service is offered publicly – irrespective of the living arrangements of the service provider. **Romania** provides a broader exemption by exempting services provided in the private sphere *and* ‘independent activities’;¹²⁵ the effect of which is to remove all persons involved in the collaborative economy from the scope of the implementing law, unless there is an employment contract with the platform. This is inconsistent with Romanian legislation adopted prior to the implementing law, and currently still in force, which ensures equal treatment and non-discrimination without any exception or exemption. The implication is that it is uncertain which law will prevail in the event of a conflict.

3.2.3 Justifications for unequal treatment

In addition to limiting either the material or the personal scope of the Directive, some Member States have permitted limited exceptions to the principle of equal treatment in accordance with Article 4(5) of Directive 2004/113/EC.¹²⁶ This is the case in **Croatia**,¹²⁷ **Germany**,¹²⁸ **Italy**¹²⁹ and **Spain**,¹³⁰ which have permitted differences in treatment when they are justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Others provide similar exceptions, permitting certain goods or services to be reserved exclusively or primarily for persons belonging to one sex, provided such differential treatment is justified and proportionate (**Belgium**,¹³¹ **Bulgaria**,¹³² **Latvia**,¹³³ **Poland**¹³⁴ and the **UK**).¹³⁵ Interestingly, **Latvia** also permits differential treatment if ensuring equal treatment would impose a disproportionate load on the trader or service provider.¹³⁶ It is important to note that these exceptions are not specific to the collaborative economy but cover goods and services in general and are, by and large, similarly-worded reproductions of Article 4(5) of the Directive.

3.2.4 Application of the implementing law to gender equality issues in practice

In spite of the fact that a legislative framework may exist across the Member States, the implementing law in most Member States has not been used yet in practice to address gender equality issues in relation to the collaborative economy. The national experts emphasise that this is not necessarily due to a limited scope of application of the implementing law, but simply because issues have not yet arisen in this field.¹³⁷

124 Decree No.196/2007, implementing Directive 2004/113/EC which adds ten articles to the Code of Equal Opportunities (Decree No. 198/2006).

125 Government Emergency Ordinance No.61/2008 on the implementation of the principle of equal treatment between women and men with respect to access to goods and services and providing goods and services (*Ordonanta de Urgenta a Guvernului nr.61/2008 privind implementarea principiului egalitatii de tratament intre femei si barbati in ceea ce priveste accesul la bunuri si servicii si furnizarea de bunuri si servicii*), Article 3.

126 Article 4(5) states that: ‘This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.

127 Anti-Discrimination Act 2008, Article 2(2).

128 General Equal Treatment Act, Section 20(1). Note that the permitted exception is broader than the one permitted under Directive 2004/113/EC, by merely requiring an ‘objective reason’ for the differential treatment.

129 Decree No. 196/2007, which adds 10 Articles to the Code of Equal Opportunities (Decree No. 198/2006).

130 Law on Effective Equality between Women and Men, Law 3/2007 of 22 March 2007, Article 69(3).

131 Federal Act of 10 May aimed at fighting discrimination between men and women (hereafter ‘Gender Act’), Article 9(1). Note that Article 9(2) requires that those services which may be reserved exclusively or primarily for one sex be listed in an exhaustive list in an ancillary Royal Decree. This list has not yet been promulgated.

132 The Law on Protection from Discrimination, Article 7(1).

133 Protection of Consumers’ Rights Law, Article 3(2).

134 Law of 3 December 2010 on the Implementation of (some) EU Provisions on Equal Treatment, JoL 2010 No. 254 Item 1700 with amendments, unified text JoL 2016 Item 121 (hereafter Antidiscrimination Law), Article 5(5).

135 Equality Act 2010, Schedule 3 Part 7.

136 Protection of Consumers’ Rights Law, Article 3(2).

137 See Section 3.1 of this report.

Were gender equality issues to arise in the future in relation to the collaborative economy, the national experts are confident that the implementing law could be used to address them. Some experts do note however that, depending on which party needs protection (the service provider or the consumer) and on the employment relationship with the platform, issues of gender discrimination could be dealt with under other legislative instruments;¹³⁸ although they go on to conclude that gender issues are primarily dealt with under the national law implementing Directive 2004/113/EC. Similarly, the limited scope of the implementing law has not been relied upon by national decision-makers or judicial bodies, except in **Cyprus** in relation to the use of gender information by insurance companies.¹³⁹ The national expert for **Germany** does note however that the limited scope of application of the implementing law has been relied upon to some extent by Airbnb in narrowing its anti-discrimination guidelines, although those guidelines do not make reference to the implementing law.¹⁴⁰

3.3 Rights awareness and dissemination of information

It follows that Directive 2004/113/EC may be an adequate instrument to address the collaborative economy, or at least one aspect of it – namely the supply of goods and services. This potential, however, is ‘hindered’ by the fact that at domestic level there is little awareness of the rights and obligations in this area. In **Croatia**, for example, in 2016, only 2.4 % of all complaints made to the Ombudsperson for Gender Equality concerned the access to and supply of goods and services.¹⁴¹ This situation is similar in **Belgium** where the *Activity Reports* of the Institute for Equality of Women and Men¹⁴² reported that in 2015 only 45 complaints concerning Directive 2004/113/EC were filed and none of them concerned the collaborative economy.¹⁴³ In **Norway**, there is no research analysing whether recipients of services, providers and/or intermediaries are aware of their rights/obligations under Directive 2004/113/EC and the national implementing laws. However, the national gender expert reports that women from ethnic minorities are generally not aware of their rights both because of their lack of understanding of the language and because of the societal structure. Even in countries such as **Sweden**, where individuals’ awareness of the protection against discrimination in general is rather high,¹⁴⁴ there is less knowledge regarding how to claim redress in case of gender discrimination occurring in the context of the collaborative economy.

In general, the national experts suggest that in many Member States there is not even specific research into the level of awareness of the right to be protected against discrimination in the field of goods and services, let alone if connected with the collaborative economy.

Good Practice:

In **Malta**, the National Commission for the Promotion of Equality (NCPE) carried out research on the under-reporting of incidences of discrimination, including gender discrimination in the provision of goods and services.¹⁴⁵ Through its Facebook page and website,¹⁴⁶ NCPE also provides information on rights and obligations emanating from Directive 2004/113/EC and its national implementing legislation.

138 Croatia, Romania and the UK. Alternative legislative instruments include the Act on Maternity and Parental Benefits and the Labour Act (Croatia), Government Ordinance No.137/2000 regarding the prevention and sanctioning of all forms of discrimination and Law 202/2002 regarding equal opportunities between women and men (Romania), and the Equality Act, part 5 (UK).

139 Law 89(I)/2013.

140 Airbnb guidelines on antidiscrimination, available at <https://www.airbnb.de/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect>, accessed October 2017.

141 Ombudsperson for Gender Equality (2017) Annual Report for 2016, http://www.prs.hr/attachments/article/2188/IJZJESCE_2016_Pravobraniteljica_za_ravnopravnost_spolova_CJELOVITO.pdf, accessed on 14 December 2017.

142 Established in conformity with Article 12 of Directive 2004/113/EC.

143 *Activity Report*, 2015 (in French and Dutch), available at www.igvm-iefh.belgium.be, accessed on 14 December 2017.

144 61 % of Swedish respondents would know their rights should they fall victim to discrimination or harassment. European Commission Special Eurobarometer 437, *Discrimination in the EU in 2015*, October 2015, p. 72, http://www.equineteurope.org/IMG/pdf/ebs_437_en.pdf, accessed on 14 December 2017.

145 https://ncpe.gov.mt/en/Documents/Projects_and_Specific_Initiatives/Strengthening_Equality_Beyond_Legislation/underreporting.pdf, accessed 15 September 2017.

146 https://ncpe.gov.mt/en/Pages/NCPE_Home.aspx, accessed 15 September 2017.

Member States are increasingly disseminating information regarding the rights of those involved (either as providers or consumers) in the collaborative economy, in particular in relation to the possible employment relationship. They often do so via specific bodies, such as the Defender of Rights in **France**.¹⁴⁷ However, the dissemination of information tends to more generally concern the rights that providers and consumers may or may not have,¹⁴⁸ rather than focusing on the role that e.g. Directive 2004/113/EC may play in the collaborative economy. For example, the **Estonian** gender expert reports that the Estonian Sharing Economy Union (*MTÜ Eesti Jagamismajanduse Liit*) considers that service providers may not have access to social security as they are not considered to be employees of the online platform and therefore do not benefit from statutory labour rights and obligations.

Good Practices:

The **Austrian** Trade Union Federation and Chamber of Labour, the **German** Metalworkers' Union and the **Swedish** white collar union 'Unionen' jointly established the campaign 'Fair Crowd Work', aimed at 'crowd workers' concerning their labour and social rights and the integration of new forms of work into the existing framework. The campaign is aimed at initiating comprehensive legislation concerning 'work in the gig economy'.¹⁴⁹ This initiative also has the effect of raising awareness of the relevant rights amongst those involved.

In **Malta**, the National Commission for the Promotion of Equality (NCPE) regularly provides training to stakeholders. It awards the 'Equality Mark Certification' to employers who prove to comply with non-discrimination legislation and policy. It also covers goods and services offered by employers.¹⁵⁰

Overall, however, the link between the collaborative economy and the rights protected under Directive 2004/113/EC in the information disseminated is not always clear and could be considerably strengthened.

3.4 Monitoring the application of Directive 2004/113/EC to the collaborative economy

It follows from the above discussion that in the majority of the Member States, Directive 2004/113/EC is not used as a tool to specifically address the collaborative economy. Therefore, monitoring of the Directive in relation to the collaborative economy is done as part of the general duty to monitor the application of national anti-discrimination law (e.g. **Sweden**).

In some Member States, specific reports on the collaborative economy have been commissioned. The national gender expert reports that in **Ireland**, for example, the Workplace Relations Commission has requested the Economic and Social Research Institute to report on the collaborative economy, with the report due at the end of 2017.

Good Practice:

In **Malta**, the National Commission for the Promotion of Equality (NCPE) is tasked with monitoring the application of Directive 2004/113/EC, including in relation to the collaborative economy, by investigating any complaints that are forwarded to it.¹⁵¹

147 See the website of the Défenseur des droits, <https://www.defenseurdesdroits.fr/>, accessed on 14 December 2017.

148 For example, Norway, Sweden and the Czech Republic.

149 See the website of 'Fair Crowd Work', <http://faircrowd.work/>, accessed on 14 December 2017.

150 See the website of the National Commission for the Promotion of Equality, https://ncpe.gov.mt/en/Pages/NCPE_Home.aspx, accessed on 14 December 2017.

151 To date, however, no complaints have been submitted in relation to the collaborative economy. This lack of complaints may be explained in light of the lack of awareness (see Section 3.3 in this report).

3.5 Enforcement procedures and sanctions in case of violation of the rights under Directive 2004/113/EC

In line with Chapters III and IV of Directive 2004/113/EC, the vast majority of Member States¹⁵² have mechanisms in place to address the violation of rights under Directive 2004/113/EC. Not surprisingly, however, these are not specifically directed at the breach of gender equality and the collaborative economy. Indeed, many experts have remarked that whilst sanctions exist (at least, for the time being) they have not been imposed in situations concerning the collaborative economy (**Belgium, Czech Republic, Iceland, Italy, Luxembourg, the Netherlands, Norway, Spain and Sweden**).

In **Poland**, it is difficult to assess the effectiveness of the sanctions as their limited practical application does not allow a proper assessment. In the same vein, in **Romania**, administrative fines are minimal and compensation for moral damages is very low, thereby rendering the mechanism ineffective. In the **UK**, whilst on the face of it the legal mechanism to impose sanctions seems effective, in practice these laws are difficult to enforce and this would be no different for the collaborative economy. Significant barriers are created by the risk of expensive litigation and the possibility that an individual's claim could fail. A further barrier is the lack of affordable and experienced advice, and of course lack of clarity and awareness of rights and the willingness to pursue an action.¹⁵³

3.6 The role of parties other than the State

At domestic level¹⁵⁴ a variety of stakeholders play a role in shaping the key issues related to direct or indirect discrimination based on sex in accessing goods and services, with particular reference to the collaborative economy. These stakeholders are traditional players such as Trade Unions (**Austria**), the National Equality Bodies such as Ombudsperson (**Croatia**), social partners (**Cyprus, Estonia, Ireland**), NGOs (**Sweden**) and Consumer Protection Bodies (**Sweden, Cyprus**). Overall the level of involvement of the different stakeholders will vary from Member State to Member State. In some countries stakeholders give priority to specific issues, such as, for example, taxes (**Finland**).

Good Practice:

In **Hungary** in March 2017, the 'Sharing Economy Association' was established to support the development of the collaborative economy by providing professional support and establishing close cooperation with lobbyists. The Constitution of the Association¹⁵⁵ states that the Association will develop and maintain the professional ethical standards of the collaborative economy, will ensure compliance among its members, and will take steps against entrepreneurs who violate such standards. While the Association does not specifically mention the issue of equal treatment, its dedication to ensuring that ethical standards are maintained leads the Hungarian expert to believe that should they face the challenge, the Association would be open to taking the right steps to promote equal treatment.

In the **UK**, stakeholder engagement in assessing the impact of the collaborative economy on gender equality is notable for its absence. For the most part, commentators on the collaborative economy have tended to raise support for the potential negative impact of the collaborative economy on workers in general and have raised concerns about the lack of protection afforded to all workers, which does include protection against discrimination based on sex. On a positive note, the body responsible for challenging discrimination and protecting human rights, the Equality and Human Rights Commission (EHRC), has the

152 Only Estonia, Finland, Liechtenstein, Slovakia and Slovenia have answered that enforcement procedures and sanctions are not provided.

153 See also P. Foubert, The enforcement of the principle of equal pay for equal work or work of equal value (2017) Thematic Report, available at <https://www.equalitylaw.eu/downloads/4466-the-enforcement-of-the-principle-of-equal-pay-for-equal-work-or-work-of-equal-value-pdf-840-kb>, accessed on 14 December 2017.

154 Austria, Croatia, Cyprus, Estonia, Hungary, Ireland, Italy, Norway, Poland and Sweden.

155 Available (in Hungarian only) at https://www.dropbox.com/s/8bvrsanu7glcgbr/Sharing%20Economy%20Szovetseg%20Alapszabaly_2017.03.20_FINAL.pdf?dl=0, accessed on 14 December 2017.

competence to provide assistance to victims, to conduct surveys/produce reports and to utilise statutory investigation powers in order to tackle serious and systematic breaches of rights.¹⁵⁶ Funding constraints have, however, resulted in increasing limitations on the effective functioning of the Commission. The EHRC in its role as both information provider and policy influencer may also make submissions to papers or reports that could contain elements relating to gender equality and sex discrimination. It recently made a submission towards a government-commissioned report that proposes a series of changes to how the collaborative economy is regulated in the UK, known as the Taylor Review.¹⁵⁷ The EHRC in its examination highlighted concerns for vulnerable workers generally while also noting how women are disproportionately represented in atypical work and the potential disadvantages this creates.¹⁵⁸ However, at the time of writing (November 2017), nothing had yet come of it.

In other Member States¹⁵⁹ stakeholders are not involved in shaping issues relevant to the collaborative economy. This may be due to a lack of interest in the collaborative economy (**Belgium**) or a lack of interest in the relationship between gender equality and the collaborative economy (**Germany, Iceland, the Netherlands, and Czech Republic**). Many national experts, however, suggest that the limited involvement of stakeholders is likely to change and increase, in particular in light of monitoring duties of the Gender Equality Bodies.

Traditional stakeholders are not the only ones involved: the intermediary (collaborative) platforms themselves can be involved in shaping the debate in this area. These platforms send mixed messages, however. For example, on the one hand, Airbnb includes a non-discrimination policy on its website, where it pledges its commitment to inclusion and respect and to create an environment where ‘people from every background feel welcome and respected, no matter how far they have travelled from home’. Accordingly, it expressly prohibits the promotion of discrimination, bigotry, racism, hatred, harassment or harm against any individual or group...¹⁶⁰ and requires all users to comply with local laws and regulations. However impressive, this policy makes no reference to indirect discrimination or sexual harassment. On the other hand, the platform GoWorkaBit in **Estonia** advertises a ‘fresh’ view of capitalization and additional income possibilities, but avoids references to social protection and safety: it simply promises temporary and fast-paying positions whilst advertising ‘no commitments, no worries’.¹⁶¹

3.7 Remedies for breaches of gender equality in the collaborative economy

In the majority of Member States¹⁶² there are no specific remedies for the breach of gender equality in the context of the collaborative economy. This may be because the issues related to the collaborative economy fall within the sphere of private life (**Finland**) which is specifically exempted by the application of Directive 2004/113/EC. In general, the remedies available are those covered in the national legislation on gender equality (**Cyprus, Hungary**).

156 See the Equality and Human Rights Commission Strategic Plan 2016-2019, available at https://www.equalityhumanrights.com/sites/default/files/strategic_plan_-_web_accessible.pdf, accessed on 14 December 2017.

157 UK Department for Business, Energy & Industrial Strategy, *Good Work: the Taylor review of modern working practices*, 11 July 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf, accessed on 14 December 2017.

158 Equality and Human Rights Commission, *Written Submission to the Taylor Review*, 26 April 2016, available at <https://www.equalityhumanrights.com/en/legal-responses/consultation-responses>, accessed on 14 December 2017.

159 Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Iceland, Latvia, Liechtenstein, Malta, the Netherlands, Romania, Slovakia, Slovenia, Spain and the UK.

160 See Airbnb’s non-discrimination policy on its website (UK), available at <https://www.airbnb.co.uk/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect?topic=250>, accessed on 14 December 2017.

161 <https://goworkabit.com/simple-jobs-to-earn-money>.

162 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Sweden and the UK.

In some Member States¹⁶³ it is possible to organise an alternative way to achieve a specific remedy. In **Finland** the onus to reach a settlement is on the parties; no specific dispute resolution is available, nor do platforms offer procedures through self-regulation. In **Ireland**, the Equal Status Act 2000 provides that there may be mediation between the parties¹⁶⁴ and in **the Netherlands** the same alternative resolutions that apply in the traditional economy, namely arbitration, filing a complaint or engaging a mediator, are available.

3.8 Responsibilities between the provider and the platform at national level in the case of violation of the principle of equality

To determine *who*, whether the service provider or the platform, is responsible in case of gender discrimination in the collaborative economy is crucial. However, as highlighted in the European Parliament Study,¹⁶⁵ it is also complex.

For example, can Airbnb be held liable for any discrimination as occurs between the host and the guest? If Airbnb were a housing agent dealing with a landlord this would well be the case. The relationship between a housing agent and a landlord, however, is not directly comparable to that between a collaborative platform and a service provider. Yet, in the specific case of Airbnb, it provides a Host Guarantee for damage to property in the event of damage by a guest. It could, therefore, be argued that as Airbnb has assumed a relationship with the host which surpasses that of a mere facilitating platform, the platform could be held liable for the host's discrimination.

Under EU law,¹⁶⁶ collaborative platforms, when they act as intermediary services to provide information, are exempt from liability for the information that they store. Whether or not and to what extent collaborative platforms are liable under contractual and extra-contractual laws is to be determined by each Member State. This includes laws relating to vicarious liability and third-party harassment. The circumstances under which an employer may be held liable inevitably varies across Member States, although common provisions require that the act is committed during the course of the employment and provide exceptions for whether the employer took reasonable steps to prevent the employee from committing the act.¹⁶⁷

The question therefore is whether the platform can be regarded as an employer. If the platform is acting purely as a provider of information or intermediary services it would not fall within the definition of 'employer'. The lines, however, become blurred where the collaborative platform is also the provider of the service or has significant control over the service provider, such as in the case of UBER. In its Communication, the Commission noted the increased blurring of lines in the traditional employment structure and set guidelines for determining when a service provider in the collaborative economy becomes a 'worker'; the essential criteria being (i) the existence of a subordination link, (ii) the nature of the work and (iii) the presence of remuneration.

Arguably, Directive 2004/113/EC could be interpreted to apply to the liability cases of gender discrimination arising from the supply of or access to a service. Discrimination in this instance could be where an UBER driver does not cater for mothers with young children, or a passenger is sexually harassed by a driver of the opposite sex. Equally, where a driver faces discrimination or harassment from the passenger, UBER could be held liable for the third-party harassment, depending on the applicable national law.

163 Finland, Ireland and the Netherlands.

164 Section 24, Equal Status Act 2000 (as amended).

165 European Parliament Research Service, Gender Equal Access to Goods and Services Directive 2004/113/EC European Implementation Assessment, at p. I-30, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU\(2017\)593787_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf), accessed on 14 December 2017.

166 Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178, 17.7.2000, pp. 1-16.

167 See, for example, Equality Act 2010 (UK) s109, Employment Equality Acts 1998-2011 (IE) s 15(1) and (3).

It is for each Member State to determine when and to what extent vicarious liability or third-party harassment may apply outside the employment relationship.¹⁶⁸ In the absence of a strong employment-like relationship or a relationship of control and subordination, permitting such liability would likely impose too great a burden on the collaborative platform. This is particularly so where the collaborative platform is merely providing intermediary services, as there is little to no element of control. Generally speaking it is assumed that national anti-discrimination laws of individual Member States would apply. For example, in **Belgium** any person involved in accessing or supplying goods and services is liable under the Gender Act.¹⁶⁹ This is similar in **Malta**, where the general rules of letting and sale under national law apply.

However, as the collaborative economy is not expressly regulated in the Member States, who is responsible (the platform or the service provider) varies across the Member States.

In some other Member States, such as **Croatia**¹⁷⁰ and **Latvia**,¹⁷¹ it is the *service provider* that is deemed responsible for any violation of gender equality under the applicable national law. Many experts are of the opinion that this would be the case, even if this is not explicitly stated in their national legislation.¹⁷²

In other Member States, both the *service provider* and the *platform* would be responsible. Again, also in this case some experts believe that the national legislation could be interpreted as considering responsible both the service providers and the platform for their individual acts: the former for differentiating between customers and the latter for offering a discriminatory mode of providing services.¹⁷³

In other Member States the situation depends on the facts of the specific case and the type of relationship.¹⁷⁴ In **Ireland**, depending on the facts of the case, the responsibility might also be shared between the platform provider and the service provider.

An example of a platform setting the rules (and therefore placing the responsibility on the service provider)¹⁷⁵ is that of AirBnB discussed above,¹⁷⁶ which states in its anti-discrimination policy that it 'prohibit[s] content that promotes discrimination, bigotry, racism, hatred, harassment, or harm against any individual or group ...' and that all users are required to comply with national laws and regulations.

These different approaches may lead to differences in levels of information on responsibilities and access to rights in relation to gender discrimination in the collaborative economy.

In turn this may hamper the correct application of anti-discrimination law at the national level, emphasising the need for a comprehensive approach.

168 In Belgium, for example, with the exception of liability within the teacher-student relationship, vicarious liability outside the field of employment is not permitted. European Network of Legal Experts in the non-discrimination field, *National protection beyond the two EU Anti-discrimination Directives: The grounds of religion and belief, disability, age and sexual orientation beyond employment* (Report for the European Commission, September 2013), page 45. See also *Cox v Ministry of Justice* [2016] UKSC 10 where vicarious liability can also be found in employment-like relationships, not only as between employer and employee.

169 See also in Malta where the general rules of letting and sale under national law apply.

170 See Section XII of the Gender Equality Act 2008. Note that the section holds liable the person committing the discriminatory act.

171 Protection of Consumers' Rights Law 2011 (as amended). Note that the Law applies to the service provider only as it is the service provider who is considered to be a performer of an economic activity under that law.

172 In the Czech Republic the national expert would expect that it is the service provider who would be responsible for a breach of gender equality.

173 This is the case in Finland, France and Norway.

174 Liechtenstein, Estonia.

175 It is also the opinion of the Equality Ombudsman who, in relation to AirbnB, has stressed that in relation to AirbnB and ethnicity, the responsibility lies on the service provider alone.

176 See Section 3.6 of this Report.

3.9 Relevant national literature

The collaborative economy is a topic of growing interest and many aspects of it are increasingly becoming the subject of academic scholarship.¹⁷⁷ Much of the literature available, however, focuses on aspects of the contractual relationship, including workers' protection.¹⁷⁸ There are very few articles that address the issue of gender equality.¹⁷⁹

Apart from academic debate, there is also a growing number of government reports that add to our understanding of the collaborative economy. In **Poland**, for example, the Agency for Market Analysis (*Agencja Badania Rynku*) *SESTA* carried out a study on the collaborative economy which aimed at describing the condition of the market of the collaborative economy, as well as the level of cooperation and familiarity of potential users with such services. In the **UK** in 2014, the Government commissioned an independent review of the 'sharing economy'. Although it did not cover the relationship between gender and the collaborative economy, it did raise concerns regarding the employment status of the parties involved. Since then a specific report on modern working practices has been commissioned.¹⁸⁰ This report, however, has been criticised, for the lack of gender analysis.¹⁸¹

In **Norway**, there is an on-going study about the collaborative economy, commissioned by the Ministry of Children and Equality.¹⁸² Furthermore, there is a project organised by the Norwegian research foundation FAFO that analyses the collaborative economy in the Nordic countries.¹⁸³ The first Norwegian report in this series was published in 2016.¹⁸⁴ Neither of these projects specifically addresses gender equality issues, although the FAFO report analyses the suppliers by gender and age. Among their respondents there were no significant differences based on gender, but significant differences based on age, as the older age group was nearly non-existent. The report also found that work in collaborative platforms is mainly carried out by young men, particularly immigrant men. In **Denmark**, the national expert reported that the potential impact on human rights has been noted.¹⁸⁵

The existing national literature, however, does not expressly refer to the relationship with gender equality and the national experts have indicated that across the Member States there is a varying level of interest and engagement. Accordingly, there are no references to Directive 2004/113/EC and in some countries there is no literature in this respect.¹⁸⁶

177 See the bibliography, in Annex I of this Report.

178 For example, Hatzopoulos H., Roma S. (2017) 'Caring for Sharing? The Collaborative Economy under EU Law' Common Market Law Review 81-128.

179 Renan Barzilay A., A. Ben-David A., (2017) 'Platform Inequality: Gender in the Gig-Economy', 47 Seton Hall Law Review, 393-431.

180 *Good work: the Taylor review of modern working practices*, at p. 110 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf, accessed on 14 December 2017.

181 The gender 'gap' is noted elsewhere in terms of the Taylor Review – see <https://www.closethegap.org.uk/news/blog/the-taylor-review-what-does-it-mean-for-women/>, accessed on 14 December 2017.

182 See Slettenes D., Kjørstad I. *Delingsøkonomien i Norge (Collaborative economy in Norway)*, SIFO report No. 3/2016 at <http://www.hioa.no/Om-HIOA/Senter-for-velferds-og-arbeidslivsforskning/SIFO/Publikasjoner-fra-SIFO/Delingsoekonomi-mien-i-Norge>, accessed on 14 December 2017.

See Pettersen L., Ingrid Kjørstad I., Grav Rosenberg T., *Delingsøkonomi, et kvalitativt øyeblikksbilde fra Norge* SIFO/ HIOA, oppdragsrapport nr 17/2016 at <http://www.hioa.no/Om-HIOA/Senter-for-velferds-og-arbeidslivsforskning/SIFO/Publikasjoner-fra-SIFO/Delingsoekonomi-et-kvalitativt-oyeblikksbilde-fra-Norge>.

183 Available at <http://www.fafo.no/index.php/en/research/projects/active-projects/item/Sharing%20economy%20-%20a%20Nordic%20pilot%20study>, accessed on 14 December 2017.

184 Nergaard K., Tilknytningsformer i norsk arbeidsliv – nullpunktsanalyse Fafo-rapport 2016:07, at <http://www.fafo.no/images/pub/2016/20569.pdf>, accessed 13 October 2017.

185 Policy brief (2016), *Ligestilling i priser og service*, https://menneskeret.dk/sites/menneskeret.dk/files/policy_briefs_final/policy_brief_ligestilling_i_priser_og_service.pdf.

186 E.g. Belgium, Ireland, Czech Republic.

4 Conclusions

This report has analysed the relationship between the collaborative economy and the principle of gender equality. This relationship is a complex one for several reasons.

To start with, the collaborative economy in itself is a recent development that comprises a vast and 'complex ecosystem of on-demand services and temporary use of assets based on exchanges via on-line platforms'.¹⁸⁷ Indeed, there are many forms of collaborative economy.¹⁸⁸ The common element of this 'ecosystem' is that it is a fast-growing business model that has challenged and fundamentally altered the traditional way in which people work; it has created what this report has termed a '21st century workplace'. The collective economy has rapidly expanded across key economic sectors and many aspects of our lives; it has been driven by, and in a way it has been a logical consequence of, ongoing changes, such as the development of technology and the rise of social networks. For all of these reasons, it is becoming so deeply embedded in our lives, that, although at the moment it is still not the norm,¹⁸⁹ it is a phenomena that is not to be ignored as it will most probably develop further. In other words: the collaborative economy is here to stay. There is no doubt that this 21st century workplace has the potential to bring exciting opportunities for both providers and users.¹⁹⁰ For example, it has the potential to offer service providers some sort of 'flexibility', a source of additional income,¹⁹¹ as well as enabling certain people to work who otherwise would not have the possibility to do so because they are, for example, house-bound. It may also help small businesses to reach a wider market. To consumers it offers a wider choice of products and services at a lower price.

At the same time, this 21st century workplace also presents risks. For providers it does not usually offer job and/or social security, while consumers are faced with uncertainty as regards the applicable national consumer protection rules, due to the multi-faceted relationship between the parties involved in this business model. They may also have difficulty organising themselves with consumer protection organisations, and there may be a lack of protection against discrimination or harassment by fellow consumers or service providers.

In the recent Communication *A European agenda for the Collaborative Economy*, the Commission identified five areas in which concerns in this area have arisen, namely market-access requirements, liability regimes, protection of users, employment matters and taxation.¹⁹² The focus of this report has been on an aspect that has so far been overlooked, namely the impact of the collaborative economy on gender equality. Simply put: what would happen should an issue of gender discrimination arise? What are the relevant legal provisions, at both EU and national level, to address this situation?

This brings us to the second reason why the relationship between the collaborative economy and the principle of gender equality is a complex one: on the face of it, gender discrimination does not appear to be an issue. Although the national experts across Europe have reported several issues that have arisen in the context of the collaborative economy,¹⁹³ gender discrimination was rarely mentioned. Does this simply mean that there have been no cases where gender equality was at stake? The situation is more complex than this. It clearly appears that across Europe issues related to gender discrimination are simply not reported. This may be because these are not normally brought to public attention because, at the time of writing, this specific element of the debate has not yet attracted much attention in public

187 European Commission Communication, *Upgrading the Single Market: More opportunities for People and Business* COM (2015) 550 final. At 2.1., accessed on 14 December 2017.

188 See Section 1.1 of this Report.

189 CIPD, Survey Report 92017) *To Gig or not to Gig?* Available at https://www.cipd.co.uk/Images/to-gig-or-not-to-gig_2017-stories-from-the-modern-economy_tcm18-18955.pdf, accessed on 14 December 2017.

190 See Section 1.3 of this Report.

191 But see the discussion in Section 1.3 of this Report that highlights that the income is often too low to make a living out of it. In many cases, it is probably rather an additional income.

192 See also Section 2.1 of this Report.

193 See Section 3.1 of this Report.

discourse. As a consequence of the lack of attention, neither the authorities nor the general public are aware that gender equality issues may arise in the first place. One of the reasons might be that users identify discriminatory acts as unfriendly behaviour or treatment. On the contrary, it is submitted that the collaborative economy can have an impact on the principle of gender equality. This appears, *inter alia*, in the Commission Communication: although the five areas identified do not include gender equality, they all have a clear 'gender element'.

Having established that gender can well be an issue for the collaborative economy, the next step is to identify which legislative instrument can be used to address any potential issues.¹⁹⁴ This depends on the party concerned (the service provider or the consumer) and by their relationship with the platform. If the discrimination affects the service provider, for example if an UBER driver is denied maternity leave, depending on whether the UBER driver is regarded as employed or self-employed, Directive 2006/54/EC or Directive 79/7/EC might apply.

This relationship, however, was not the subject matter of this report. This report has sought to focus on the case of sex discrimination in the *absence* of an employment relationship. For example, if there is a case of sexual harassment in an UBER taxi, who would be responsible: the driver (service provider) or the platform (UBER)? In the absence of an employment relationship, the authors argue that the relevant instrument is Directive 2004/113/EC.¹⁹⁵ This could (and, in our view, should) be used in this area. Applying this Directive to the collaborative economy is complex, but not impossible. One of the main reasons for this complexity, as highlighted in this report, is that only a few Member States have identified Directive 2004/113/EC as a suitable instrument to address situations arising in the context of the collaborative economy.¹⁹⁶ This might well be the case because, at the time of the entry into force of the Directive, the collaborative economy was not foreseen. The first challenge, therefore, is to strengthen the link between gender equality and Directive 2004/113/EC on the one hand, and the collaborative economy on the other hand. More work is necessary to raise awareness of how to identify and access relevant rights at national level.

When discrimination occurs, a further issue is to determine the relevant liability: if an Airbnb customer is denied a room on the ground of his/her sex or is sexually harassed, who is responsible? The platform (in this case Airbnb) or the service provider (the host)? The response differs across the Member States depending on the service involved (taxi or a room), which does not constitute a cohesive EU response.

Finally, Directive 2004/113/EC itself does contain some exceptions. Article 3(1) specifically excludes those goods and services that are offered within the sphere of private or family life, covering only those that fall within the public sphere. The exceptions under Article 3 may play a role in specific sectors of the collaborative economy such as, for example, Couchsurfing and Airbnb, where people offer accommodation in their home. Is it possible for a home owner to refuse to rent a room in the property where s/he lives to a specific gender?

Apart from the above scenario, the collaborative economy can also have 'unintended' consequences for gender equality. This could arise from the fact that this new model will affect traditional business models; for example platforms such as Couchsurfing and Airbnb will have an impact on the hotel market. Many women work in the traditional hotel business as chambermaids or waitresses: how will these changes affect them?

In conclusion, the collaborative economy is an emerging model that may affect the principle of gender equality in many respects. Even if the relationship between the collaborative economy and gender equality, at the time of writing, may appear marginal, the more the collaborative economy develops, the

¹⁹⁴ Section 2.2 of this Report.

¹⁹⁵ Section 2.3. of this Report.

¹⁹⁶ Section 3.1 of this Report.

more this is likely to become apparent. It is our view that it is time to expressly acknowledge and regulate the potential impact that the collaborative economy may have on gender equality. This report has argued that legislation that could be used for this purpose already exists. The type of legislation used will depend on the existence (and the type) of an employment relationship. If such a relationship is not in place, Directive 2004/113/EC can and should be applicable.

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Annex II: Questionnaire on the relationship between the collaborative economy and gender equality

THE COLLABORATIVE ECONOMY AND GENDER EQUALITY

This section aims to establish the basic structure of the national legal system in the area of the collaborative economy.

1. Does your country specifically regulate the collaborative economy?
Yes/no
If yes,
 - briefly explain how and to what extent the national legal system specifically regulates the collaborative economy. Please describe any gaps in national legislation relating to the collaborative economy.
2. Are you aware of any examples of gender equality issues arising from sharing platforms (such as Airbnb and UBER) in your country?
Yes/no
If yes,
 - in which sector are they likely to take place (for example, transport/car sharing, housing/room sharing, care giving, sharing of financial assets, collaborative production, ...)? Please provide examples of how gender equality issues arise within that sector.
 - which type of sex/ gender discrimination do they refer to? Direct/indirect discrimination, harassment, sexual harassment or gender reassignment?
3. Are you aware of any domestic case law on sex/gender discrimination in the area of the collaborative economy?
Yes/no
If yes,
 - do they involve issues of discrimination or the absence of protective rules? Please describe relevant case law and provide their references.

DIRECTIVE 2004/113/EC

This section aims to assess in how far Directive 2004/113/EC plays a role to address issues of gender equality in the area of the collaborative economy.

General

4. Does the implementing law of Directive 2004/113/EC cover the collaborative economy in your Member States?
Yes/no
5. Does the implementing law limit its scope of application with a non-coverage of service provided within the private sphere?
Yes/no
If yes
 - could you give explanations and provide examples?

6. Has the limited scope of application been relied upon by a sharing platform or applied by national decision-makers or judicial bodies?

Yes/No

If yes,

- please describe how

7. Has the implementing law of Directive 2004/113/EC been used in your country in order to address gender equality issues related to the collaborative economy?

Yes/no

If yes,

- please describe the scope and to what type of discrimination (eg. gender, harassment ...) it applies.
- How has this been achieved? Has its application resulted in any changes to national law or best practices? Please provide examples.

If no,

- are gender equality issues dealt with under other instruments? If so, which ones?

8. In the specific context of the collaborative economy, have differences in treatment if services provided primarily or exclusively to members of one sex been justified under Article 4(5) of Directive 2004/113/EC?

Yes/no

If yes,

- for which legitimate aim?

Rights awareness and access to information (from the consumer point of view, the provider and the intermediary)

9. Does research (this does not necessarily need to be legal) exist in your country which shows whether recipients of services, provider and intermediary are aware, or ignorant, of their rights/obligations under Directive 2004/113/EC and the national implementing laws?

Yes/ no

If yes,

- please give a brief summary of findings and their references.

10. What, if anything, has been done in your country in terms of disseminating adequate information to all stakeholders regarding their rights?

Yes/ no

11. Is there evidence that some categories of persons are at a particular disadvantage with regards to these rights?

Yes/no

If yes,

- please remember that answers might include consideration of women/men of ethnic minorities, of lower economic backgrounds, with disabilities, women/men in precarious or atypical employment.

Implementation

12. Does your country ensure/monitor the application of Directive 2004/113/EC in relation to the collaborative economy?

Yes/no

If yes,

- please explain how and who is in charge.
- please explain specific issues raised in this context.

13. Are there enforcement procedures and sanctions in case of violation of the rights under Directive 2004/113/EC?

Yes/no

If yes,

- are the sanctions effective?
- in your view, are these remedies helpful for the 'victims', and/ or effective deterrents for the 'perpetrators' (see Article 8) under the collaborative economy?

COLLABORATIVE ECONOMY AND THE DOMESTIC FRAMEWORK

14. Are you aware of any relevant domestic case law/complaint in relation to the collaborative economy?

Yes/no

If yes,

- please describe that case/ complaint.

15. In your view, what is the involvement of other parties/stakeholders in shaping the key issues related to direct or indirect discrimination in accessing goods and services, in relation to the sharing economy? Please briefly describe the type of involvement of any private or public stakeholders (besides that of legislator and government) that play a particularly positive role in your country. In particular consider the role of:

- national equality bodies
- social partners (e.g. collective agreements)
- NGO/civil societies
- consumer protection bodies.
- intermediary platform with self-regulation

Remedies

16. Does your country provide any specific remedies for the breach of gender equality within the context of collaborative economy?

Yes/no

If yes,

- is there alternative dispute resolutions? Or self-regulations by the platforms?

17. Responsibilities between the provider and the platform at national level in case of violation of the principle of equality?

Relevant national literature

18. Please identify the main relevant national academic literature in this area, including research on situations and cause-effect relationships that could result in indirect discrimination.

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