



## Opinion of the National Consumers Council on digital sharing platforms

No. NOR: EINC1602960V

### 1. Introduction

#### 1.1. The concept of collaborative consumption

Collaborative consumption can be defined as “an economic model based on sharing, swapping, trading, or renting products and services, enabling access over ownership”<sup>1</sup>.

This novel form of economy has expanded significantly in recent years, particularly in France which is one of the countries where it is the most widespread. A study conducted by Nomadeis<sup>2</sup> shows that collaborative practices are highly prevalent in the French economy, both among new structures and traditional operators, who have taken up these practices. Key stakeholders across a wide variety of sectors are involved. In addition, nine French citizens out of ten claim to have participated in collaborative consumption at least once.

It can be hard to trace the outline of this economy, on one hand because it covers a multitude of sectors touching on all aspects of daily life (transportation, housing, services, etc.), each with its own characteristics, and, on the other, as the players and practices are highly varied (selling, swapping, lending, giving).

Not all collaborative practices require use of digital technologies. These include local agriculture and short food supply chains<sup>3</sup>, car sharing arrangements organised by local authorities or equipment rental offered by retailers.

**Nevertheless, digital technology has allowed the sharing economy to mushroom in recent years, driven by platforms that match supply with demand.**

The sharing economy is underpinned by a legal model based on a three-way relationship between a digital operator, the platform, an individual, who offers goods and services online, and the end consumer of these goods and services.

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<sup>1</sup> Rachel Botsman and Roo Rodgers, *What's Mine Is yours: the rise of Collaborative Consumption*, 2011.

<sup>2</sup> *Enjeux et perspectives de la consommation collaborative –July 2015– PIPAME, DGE, PICOM*

<sup>3</sup>

These platforms' key role in the sharing economy raises the question as to how their operations should be regulated. Numerous French, European and international studies have recently been devoted to the question with an eye to pinpointing the economic, tax and labour repercussions, and to informing discussions on a suitable regulatory framework.

## 1.2. Background

Article 134 of the **Growth, Economic Activity and Equal Economic Opportunity Act no. 2015-990 of 6 August 2015** added a new Article to the French Consumer Code (Article L.111-5-1) to heighten information obligations for digital intermediaries:

*Without prejudice to the information obligations set out in Article 19 of Act no. 2004-575 of 21 June 2004 on Confidence in the Digital Economy, any person who establishes contact, by electronic means, between several parties for selling goods, providing services, or swapping or sharing goods or services, is bound to provide fair, clear and transparent information on the **general terms of use of the intermediation service and on the conditions for listing, ranking and delisting online offerings.***

*When **only consumers or non-professionals** are put into contact with each other, the person referred to in the first paragraph of this Article is also bound to provide fair, clear and transparent information on the **offerer's status and the parties' rights and obligations from a civil and tax standpoint.***

*When professionals, sellers or service providers are put into contact with consumers, the person referred to in the first paragraph of this Article is also bound to set aside a space for them on which to provide consumers with the information set forth in Article L.121-17.*

*The content of this information and the conditions for its communication are set by **decree.***

Moreover, the Act added the following to Article L.111-6-1 of the Consumer Code: “any breach of [Articles L.111-5 and L.111-5-1](#) shall be subject to **an administrative fine** of no more than €75,000 for an individual and €375,000 for a legal entity”.

Concomitantly, there have been other recent Government measures to regulate the sharing economy in general and platforms' operations in particular:

- Presentation, on 26 September, of the Digital Republic Bill, with a section on “[online] platform fairness”
- Report on the sharing economy commissioned by the Prime Minister from Pascal Terrasse, MP for the Ardèche *département*, on 8 October 2015
- As part of the Digital Single Market Strategy for Europe, on 24 September 2015, the European Commission initiated a public consultation on platforms, the role of online intermediaries in tackling illegal content, the free flow of data, cloud computing and the collaborative economy. Relevant legislative proposals could be put forward during H1 2016.

### 1.3. The National Consumers Council's mandate

In May 2015 the National Consumers Council (CNC) was tasked with providing an opinion on the “operations of digital sharing platforms”. It took several months to spell out the obligations in terms of providing information as well as the conditions for its communication. This will enable the Government to draw up the decree provided for in Article 134 of the Growth, Economic Activity and Equal Economic Opportunity Act of 6 August 2015.

The members of the working group first decided to stipulate the scope of the mandate to analyse the relevant and tailored information to be produced by the platforms.

Although discussions focused on the original purpose of sharing platforms, namely intermediation for individuals, some of the interviews with the platforms revealed that the same website may provide intermediation services for professionals and consumers (BtoC) and for individual “offerers” and individual “requesters” (CtoC).

**As a result, the working group elected to consider all digital sharing platforms whether intermediation between individuals is their sole business activity or not, as they are all bound by the wording of the first two paragraphs of Article L.111-5-1 of the Consumer Code<sup>4</sup>. The group therefore tried to pinpoint ways and means of improving and bolstering information for users of digital sharing platforms, including as regards the liability of the various stakeholders during transactions on such platforms.**

The CNC is obviously aware of the labour and tax issues raised by the growth of the sharing economy, which were highlighted in an Information Report from the Senate, dated 17 September 2015<sup>5</sup>. However, and to remain within the confines of the mandate, it was decided to focus our work on consumer information considerations. Although the circumstances of some platforms, such as crowdfunding platforms, that are already governed by specific legislation, were mentioned, they were ultimately excluded from this working group's discussions.

## **2. Current legal framework**

### 2.1 Digital platforms

Digital platforms put users into contact with each other by hosting offers and requests and, in certain cases, by offering additional services.

The legislation that currently governs digital sharing platforms arises from the implementation of Directive 2000/31/EC on electronic commerce (maximum harmonisation) in the form of the Act on Confidence in the Digital Economy (LCEN) of 21 June 2004.

The responsibilities of platforms vary according to their role as online technical intermediaries or as providers of services to their users.

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<sup>4</sup> The recommendations set out in this opinion are not intended to cover the other types of platforms referred to, to date, in the Digital Republic Bill.

<sup>5</sup> [Information Report](#) by Messrs Michel Bouvard, Thierry Carcenac, Jacques Chiron, Philippe Dallier, Jacques Genest, Bernard Lalande and Albéric de Montgolfier, on behalf of the Finance Committee; no. 690 (2014-2015) - 17 September 2015.

- a) When they **host digital content, digital sharing platforms have limited responsibilities** and are not obliged to check whether the goods and services put online match the offerings posted and the expected service, nor to ensure the legality of the offerings. This means that the platforms are under no obligation to verify the information provided by the offerer or the requester unless they were aware of illegal actions by the Internet user relating to use of the website<sup>6</sup>.
- b) At the same time, the platform, in its capacity as a professional, is bound to its users by a **service agreement (BtoC)** with variable content and scope. Under the agreement, it must comply with information obligations, especially vis-à-vis individual users. The platform is also automatically responsible for the due and proper performance of the agreement that it has executed with users pursuant to Article 15 of the LCEN (carrying on an e-commerce business).

## 2.2 The agreement between the offerer and the requester

Again, in respect of effective legislation, the CNC reiterates that:

- Consumer law only covers relationships between professionals and consumers (BtoC), **and not CtoC relations**
- The French Civil Code (general contract law and liability in tort and contractual liability) governs all cases of transfers of goods, their use and exchanges of services. These provisions apply to agreements executed on digital sharing platforms.

The legal framework is therefore strictly defined and, as highlighted by the *Conseil d'Etat* (French Supreme Administrative Court)<sup>7</sup>, any changes to the liability of Internet service providers would require a revision of Directive 2000/31/EC.

**In any event, the CNC members agree that the EU is often the most suitable level for regulating the digital economy without generating distortions of competition to the detriment of the French market.**

In light of blanket application of the provisions of the LCEN, in compliance with Directive 2000/31/EC on electronic commerce, it does not seem advisable to extend Consumer Code rules to CtoC relationships (understandability of law, danger of compromising the expansion of the sharing economy, etc.). Consequently, **the CNC believes that the only action that the regulating authorities should take at this point in time is to establish a clear, understandable and easily-accessible mandatory information framework to better inform sharing platform users as both offerers and requesters.**

## 3. Mandatory information

As mentioned above, the CNC's mandate is to table a clear, understandable and easily-accessible mandatory information framework to better inform sharing platform users.

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<sup>6</sup> In all cases, platforms roll out adequate means (alerts, filter systems, etc.) to help counter the dissemination of illegal items/services/views on the platform.

<sup>7</sup> The *Conseil d'Etat's* 2014 annual survey on digital technology and fundamental rights.

Article L.111-5-1 of the Consumer Code has general scope and applies to any platform that “*establishes contact, by electronic means, between several parties for **selling goods, providing services, or swapping or sharing goods or services***”<sup>8</sup>.

The group’s discussions were concentrated on general wording that is non-sector specific (automobile, housing, etc.) or applies to a specific type of agreement (loan, sale, swap, etc.).

The CNC identified four issues surrounding information to users:

- The platform’s target audience
- The nature of mandatory information
- Timeline for providing the information to users
- Presentation of the information

### **3.1 The platform’s target audience**

Sharing economy platforms may host both offers of products or services by individual offerers to individual users, and by professional offerers to individual users.

The CNC believes that the question of whether or not to allow access to professionals as offerers is key and must be clearly settled when entering the platform as it conditions the legal rules applying to the contract of sale or service agreement to be executed.

**If the platform also accepts professionals, the CNC considers that the offerer’s status (individual or professional) must be stated in a manner that is clear and identifiable for users** (see point 3.4. below on presentation of this information).

If the platform allows professionals to post their offers, it is a marketplace within the usual meaning of the term. As a result, it must comply with the third paragraph of Article L.111-5-1 of the Consumer Code and set aside a space for professionals allowing them to provide the pre-contractual information for which they are responsible<sup>9</sup>.

**The CNC recommends that when the offerer chooses his/her/its status, the platform should inform him/her/it of the conditions for reclassifying “individual” statuses as “professional” statuses, and of the related repercussions in terms of social security contributions, taxation, professional qualifications, etc.** The reclassification criteria include the legality of the activity, the intention to make a profit and to carry on a business activity (“badges of trade”) in the form of commercial transactions and organised arrangements for distance selling<sup>10</sup>. The criteria are assessed on a factual basis.

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<sup>8</sup> This Article therefore does not apply to websites and applications hosting information and comments put online by users (social network websites or applications) and which, in the vast majority, are not intended to display offers or requests with an eye to selling goods, providing services or swapping or sharing goods or services.

<sup>9</sup> Under Article L.121-17 of the Consumer Code.

<sup>10</sup> In this respect, the CNC suggests consulting a Recommendation from the Internet Rights Forum of 8 November 2005, “*Commerce entre particuliers sur l’internet : quelles obligations pour les vendeurs et les plates-formes de mise en relation ?*”.

(<http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/064000055.pdf>).

## **3.2 Mandatory information**

### 3.2.1. Mandatory information to be provided by the platform to all potential users<sup>11</sup>

- The platform's operating conditions, especially those relating to **listing, delisting and ranking of offers**. Broadly speaking, offers are ranked according to users' choices (they choose the conditions on the results page). Otherwise (no choice or selection of all the conditions), the default ranking conditions must be explained and shown using suitable means such as pop-ups or icons.
- **Price**: full information on the platform's compensation must be provided. It must state whether it is the offerer or the requester (or both) who pays the platform and whether or not it is included in the price of the good or service being offered.
- Rules on **processing personal data**.

### 3.2.2. Mandatory information to be provided by the platform to the parties

In addition to the information set out above (point 3.2.1.):

- **The type of offer**: sale, service, hire, loan, donation, etc.
- **The total price for the consumer**. Where applicable, this price includes commission, delivery and payment costs<sup>12</sup>. Information concerning the payment must also be given (means of payment accepted, role of the intermediary payment platform, etc.).
- **The governing law** (regarding both the relationship and the relevant good or service): the following information must be provided:
  - ✓ Requesters (buyers) are informed that consumer law does not apply to sales between individuals (CtoC) and, in particular, that there is no right of withdrawal or legal warranty as to the compliance of the products. Where applicable, the platform may have links to a government website containing the rules applying to the relevant sector(s)<sup>13</sup>
  - ✓ **Individual offerers** are informed of the liability of all distance sellers/lessors/service providers for due and proper performance of the contract or agreement (Article 15 of the LCEN), and warned about their own liability in respect of the product or service offered (warranty for latent defects, deception, qualifications required for some activities<sup>14</sup>, etc.)
- The platform must advise individual offerers of the **tax obligations** resulting from online transactions. Acting as a trusted third party, the platform must provide users with a yearly statement of the amounts received for online activities so that the latter can comply with their statutory tax obligations.

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<sup>11</sup> This means users who visit the platform's website without having previously registered.

<sup>12</sup> Under Article 2 of the Order of 3 December 1987 on information on prices "*consumers shall be fully informed of the amount of delivery costs, by any suitable means, prior to execution of the contract*". Moreover, Article L.114-1 of the Consumer Code provides that "*prior to the execution of a contract of sale or service agreement, the professional shall ensure that he/she/it has the consumer's express consent for any payment in addition to the price of the contract/agreement's main subject matter*".

<sup>13</sup> Example: As regards renting a main residence, the maximum period in Paris is four months per year, etc.

<sup>14</sup> The CNC reiterates the fact that qualifications and accreditation (including professional) may be required to offer and use certain goods and services – refer, in particular, to Articles 16 and 24 of Act no. 96-603 of 5 July 1996 on the development and promotion of commerce, trades and crafts. However, digital sharing platforms are not responsible for checking such qualifications and accreditation.

- Information on **insurance**:
  - ✓ the platform must always suggest that both the offerer and requester check if the planned use complies with insurance policies already taken out, by drawing their attention, where applicable, to any potential specific requirements<sup>15</sup>
  - ✓ if applicable, the insurance offered by the platform
- In the event of disputes, the contacts and procedure.

### **3.3 Timeline for providing the information to users**

The CNC has identified several stages when using a sharing platform and believes that users should be provided with specific information at each of these stages.

#### **3.3.1. Before creating an account, for all potential users**

The website is accessible to everyone and must inform potential users about its operating conditions before the user creates an account and provides his/her personal information to use the platform's services.

#### **3.3.2. During use of the platform, for offerers or requesters**

When using the platform, depending on whether he/she/it is an offerer or requester, the user must be informed at each phase of the customer process of the legislation governing the contract of sale/lease/service agreement to be executed, including when the transaction is being concluded – see above, point 3.2.

If both the transaction and payment are carried out on the platform, certain information must be provided to the consumer-buyer **when the payment is made**. The platform must specify whether or not it is a payment intermediary<sup>16</sup>.

### **3.4 Presentation of the information**

The CNC considered the presentation of the information referred to in point 3.2.

The CNC reiterates the requirement for sharing platforms to supply easily-accessible, understandable, clear, fair and transparent information to users.

The working group concludes that sharing economy platforms should comply with the following presentation conditions:

- Using suitable means, the website should clearly mention whether it is also accessible to professionals. **The status of offerer (individual or professional) should be plainly set out and be able to be identified by users.** Platforms should decide how they present this information (special spaces, distinctive signs such as colour coding or icons, filters for users, or other).

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<sup>15</sup> See the Financial Sector Advisory Committee (CCSF) opinion of 24 September 2015 on insurance issues raised by the sharing economy (in French): [http://www.banque-france.fr/ccsf/fr/publications/telechar/avis\\_r/ccsf\\_avis\\_assurance\\_economie\\_collaborative.pdf](http://www.banque-france.fr/ccsf/fr/publications/telechar/avis_r/ccsf_avis_assurance_economie_collaborative.pdf)

<sup>16</sup> When it acts as such (without the involvement of a technical partner, such as PayPal, with which the user has a contractual relationship), the platform has sole responsibility for providing secure transactions and sole liability for disputes concerning use of these means of payment.

- **A special informative and pedagogical section**, containing all the mandatory information on the platform's **functioning** (e.g.: FAQ, "about us" tab, etc.). This section should be directly and easily accessible from all the website's pages, should be identified by wording or a distinctive sign and refer to the information set out in point 3.2.
- **A special section** containing the **legal rules** governing the contract/agreement for **individual offerers and requesters (buyers)** (see point 3.2. above), with a reminder that consumer law does not apply to CtoC transactions (no right of withdrawal or warranty as to the compliance of the products).

The CNC recommends that this information and these sections be presented or posted on the websites separately from the **General Terms of Use**, which are too long and technical to provide consumers with effective information.

#### **4. Final comments**

The CNC suggests that future discussions on the sharing economy be conducted by a follow-up working group which could draw up and disseminate best practices to bolster trust by, for example, displaying the number of sales or services carried out via the platform.

It reiterates that sharing platforms should be governed by EU law and, in this respect, would like this opinion to be translated into English and sent to the European Commission.

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