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Building the future of work together

Work in the Sharing Economy. The Position of the EU Commission

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On the first days of June, the European Commission has issued the Communication COM(2016)356 – *A European agenda for the collaborative economy*. The Communication provides the Commission's position regarding the highly-debated topic of the so-called sharing economy, setting forth that "*legal guidance and policy orientation to public authorities, market operators and interested citizens for the balanced and sustainable development of the collaborative economy*".

Before analyzing the different aspects under scrutiny, with special reference to those of interest from a labour law perspective, it is worth noticing that the Commission has opted for a soft-law legal instrument to deal with a topic that is currently the subject of a lively debate. Therefore, as the Communication clearly states, the guidance is non-binding for Member States. Nevertheless, this guidance is extremely interesting because it does not only provide information on how "*existing EU law should be applied to the collaborative economy*", but it sets forth some guidelines for internal regulatory activities.

First of all, it is important to underline that in the text, the expression collaborative economy is used. Since the meaning of this wording is not commonly agreed, it is worth highlight the working definition used by the Communication. It states that "*the term "collaborative economy" 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*". Three actors are involved: service providers, users, and "*intermediaries that connect – via an online platform – providers with users*". Transactions can be both for-profits and not-for-profits.

Introducing the guidance, the Commission says that the collaborative economy could be an important factor for economic growth and for jobs creation, as well as for improving consumers' possibilities to choose services and goods and for making a sustainable use of resources in the direction of the circular economy. In the meantime, it emphasizes that the existing legal framework is uncertain and limits the development of the phenomenon; moreover, this uncertainty could be exploited to avoid the application of regulations aimed to preserve the public interest. The Communication, therefore, addressing the aspects of interest, seeks to keep a balanced position between an enabling approach (aimed to seize the opportunities and promises of this way of working) and a protectionist approach as far as the different subjects are concerned (market operators, consumers and workers).

Five key issues are outlined by the Commission. They relate to *market access requirements*, *liability regimes*, *protection of users*, the classification of the workers providing services through the platforms and *taxation*. There are several aspects of interest concerning workers and not only those involved in the businesses of the *sharing economy*.

Particularly relevant are those connected to market access requirements and to workers' classification (employee or self-employed?).
As for the requirements to enter the market, the main issue is their application to collaborative platforms and to the service providers.

Regarding the service providers, the Communication states that "*under EU law [...] are not to be subject to market access or other requirements, such as authorisation schemes and licensing requirements, unless they are non-discriminatory, necessary to attain a clearly identified public interest objective and proportionate to achieving this interest (i.e. imposing no more requirements than strictly needed)*".

The Commission prompts national authorities to take into account the peculiar features of this new economic model and comply with the principle for which "*absolute bans and quantitative restrictions of an activity normally constitute a measure of last resort*", while monitoring that the market access requirements are still justified by legitimate objectives. According to the Commission, a relevant element to assess the application of a market access requirement can be found in the distinction between professional providers and providers who offer the services on an occasional basis. Taking into account the different criteria used by Member States to draw the distinction, the Commission underlines that establishing a threshold (in terms of income and the regularity of the provision of services) can be useful.

Regarding collaborative platforms, the Communication says that the subjection to market access requirements depends on the nature of their activity: where the platform offers information society services, restrictions can be imposed exceptionally and under limited conditions. In certain cases, it can be found that the platforms are not only providing information society services, but also the underlying services. As a consequence, they "*could be subject to the relevant sector-specific regulation, including business authorisation and licensing requirements*".

To determine if a platform should be considered as the latter, it will be relevant to examine "*the level of control or influence that the collaborative platform exerts over the provider of such services*". To assess the level of control, particular attention should be given to whether the platform set the price, key contractual terms of the relationship between providers and users (such as mandatory instruction for the provision of the services and the obligation to provide it) and the ownership of the key assets. Additional criteria that can be taken into consideration are whether the platform "*incurs the risks and assumes the costs related to the provision of the underlying service*" and the existence of an employment relationship between the collaborative platform and the worker.

It is worth making a connection between the control argument related to the market access requirements and the key issue of the Communication regarding workers' classification in the sharing economy. Comparing the criteria proposed by the Commission in order to assess the existence of an employment relationship between the worker and the collaborative platform under EU law and those cited above related to the level of control exerted by the platform in order to assess the nature of the service, a high level of homogeneity can be found in the two reasonings. According to the Commission, subordination exists where the service provider "*acts under the direction of the collaborative platform, the latter determining the choice of the activity, remuneration and working conditions*".

It is possible to see some degree of continuity of this statement with the lawsuits that are flourishing against the companies of the sharing economy, both as far as labour regulation and competition law are concerned. The decision regarding the lawsuits is built around the assessment of the kind of service provided by the platform. The Uber case is the most famous one: does Uber provide an information society service or passenger transport services? In his statements, the Communication provides a pattern of analysis of the matter – the one regarding who determines remuneration is particularly meaningful for some platforms – and, at the same time, it highlights the genetic link that exists between competition law and labour law.

The Commission suggests two other criteria to assess the existence of an employment relationship: the nature of work and the existence of remuneration. The former excludes the relevance of services provided "*on such a small scale as to be regarded as purely marginal and accessory*" (it is a quantitative requirement, not decisive in itself). The latter criterion, using the words of the Communication, "*is primarily used for distinguishing a volunteer from a worker*": the criterion is not met if the service provider "*does not receive any remuneration or receives merely a compensation of costs incurred for his activities*".

The communication, however, while acknowledging the impact of the "sharing economy" on labour law, does not provide indication on the merits of the solutions to face the new challenges raised by this disrupting phenomenon. On the one hand, it recalls how the theme of the transformation of work and its effects on legislation is currently under analysis through the public consultation regarding the European Pillar of Social Rights. On the other hand, it stresses the need for the Member States to "*assess the adequacy of their national employment rules considering the different needs of workers and self-employed people in the digital world as well as the innovative nature of collaborative*

business models". They should also "*provide guidance on the applicability of their national employment rules in light of labour patterns in the collaborative economy*".

This attention is needed in order to make the economic model socially sustainable as the Commission hopes.
The issue related to work regulation is the one which has been told to be the weakest aspect while commenting on the Italian draft bill on the sharing economy (so-called, *Sharing Economy Act*). The guidance is, therefore, an important tool for the Italian policy-maker in order to check his proposal. While, in some respects, it offers greater solidity and interesting directions for the issues already under discussion (even beyond the draft: i.e. sector-specific regulation as for example in the transportation sector), the needs highlighted by the Communication on labour require that policy-makers give specific attention to labour law (broadly intended) in the collaborative economy.

Beyond the Italian case, it will be interesting to see if and how the different Member States will apply the guidance provided by the Communication.