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Consumer Protection in the Collaborative Economy-
A Comparative Analysis of the European Union and India

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*This PhD is dedicated to that one starry night in 2018 when I set off on this journey and to
all the young girls who want to pursue a life of research.*

List of Abbreviations and Acronyms

i.	Acquired Immunodeficiency Syndrome	AIDS
ii.	Before Christ Era	BCE
iii.	Business to Business	B2B
iv.	Business to Consumer	B2C
v.	Charter of Fundamental Rights of the European Union	CFREU
vi.	Collaborative Economy Platforms	CEPs
vii.	Consumer Rights Directive	CRD
viii.	Consumer to Business	C2B
ix.	Consumer to Consumer	C2C
x.	Coronavirus Disease	COVID-19
xi.	Court of Justice of the European Union	CJEU
xii.	Data Governance Act	DGA
xiii.	Digital Markets Act	DMA
xiv.	Digital Personal Data Protection Bill	DPDPB
xv.	Digital Personal Data Protection Act	DPDPA
xvi.	Digital Services Act	DSA
xvii.	Draft National E-Commerce Policy	DNEP
xviii.	European Commission	EC
xix.	European Convention on Human Rights	ECHR
xx.	European Economic Area	EEA
xxi.	European Union	EU
xxii.	Foreign Direct Investment	FDI
xxiii.	General Data Protection Regulation	GDPR
xxiv.	Human Immunodeficiency Viruses	HIV
xxv.	Indian Penal Code	IPC
xxvi.	Information Society Service	ISS
xxvii.	Information Technology (Intermediaries Guidelines) Rules	IT Rules
xxviii.	Information Technology Act	IT Act

xxix.	International Labour Organisation	ILO
xxx.	International Organisation for Standardisation	ISO
xxxi.	Joint Research Centre	JRC
xxxii.	Motor Vehicles Act	MV Act
xxxiii.	Peer to Peer	P2P
xxxiv.	Personal Data Protection Bill	PDPB
xxxv.	Ratings and Reviews	R&R
xxxvi.	Sustainable Development Goals	SDG
xxxvii.	Treaty on the Functioning of the European Union	TFEU
xxxviii.	Unfair Commercial Practices Directive	UCPD
xxxix.	Universal Declaration of Human Rights	UDHR
xl.	Unfair Terms in Consumer Contracts Directive	UCTD
xli.	United Kingdom	UK
xlii.	United Nations	UN
xliii.	United Nations Commission on International Trade Law	UNCITRAL
xliv.	United Nations Conference on Trade and Development	UNCTAD
xlv.	United Nations General Assembly	UNGA
xlvi.	Unique Selling Proposition	USP
xlvii.	United States of America	USA

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List of Legislation

European Union

- i. Charter of Fundamental Rights of the European Union 2012 (OJ C 326, 26102012)
- ii. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (European Treaty Series - No 108)
- iii. Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 1972000)
- iv. Council Directive 2000/78/EC on establishing a general framework for equal treatment in employment and occupation (OJ L 303, 2122000)
- v. Council Directive 2004/113/EU on implementing the principle of equal treatment between men and women in the access to and supply of goods and services 2004 (OJ L 373, 21122004)
- vi. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 2141993)
- vii. Directive (EU) 2016/ 943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157, 1562016)
- viii. Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) 2000 (OJ L 178, 1772000)
- ix. Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)
- x. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament

and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 1162005)

- xi. Directive 2006/123/EC on services in the internal market (OJ L 376, 27122006)
- xii. 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) (OJ L 204, 2672006)
- xiii. Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304 22112011)
- xiv. Directive 2015/1535/EU laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) 2015 (OJ L 241, 1792015)
- xv. Directive 2019/2161/EU amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules (OJ L 328, 18122019)
- xvi. Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23111995)
- xvii. Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 204, 2171998)
- xviii. Directive 98/6/EU on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 1831998)
- xix. Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access (OJ L 320, 28111998)
- xx. Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council (2020/C 424/01)
- xxi. Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data (COM(1990) 314 final1990)

- xxii. Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM (2008) 426 final 2008/0140 (CNS))
- xxiii. Proposal for a Directive on improving working conditions in platform work (COM (2021) 762 final 2021/0414 (COD))
- xxiv. Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (1999/C 30/04- COM (1998) 586 final - 98/0325(COD))
- xxv. Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) 2017 (OJ L 201, 3172002)
- xxvi. Proposal for a regulation For Digital Services (Digital Services Act) and amending Directive 2000/31/EC 2020 (COM (2020) 825 final 2020/0361 (COD))
- xxvii. Proposal for a regulation on contestable and fair markets in the digital sector (Digital Markets Act) 2020 (COM (2020) 842 final 2020/0374 (COD))
- xxviii. Proposal for a Regulation on European Data Governance (Data Governance Act) 2020 (COM(2020)767 final 2020/0340(COD))
- xxix. Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC 2018 (OJ L 60I, 232018)
- xxx. Regulation 2016/679/EU on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016 (OJ L 119, 452016)
- xxxi. Regulation 2018/1807 on a framework for the free flow of non-personal data in the European Union 2016 (OJ L 303, 28112018)

- xxxii. Regulation 2019/1150/EU on promoting fairness and transparency for business users of online intermediation services 2019 (PE/56/2019/REV/1, OJ L 186, 1172019)
- xxxiii. Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending directive 2000/31/EC (Digital Services Act 2016 (PE/30/2022/REV/1 OJ L 277, 27102022)
- xxxiv. Regulation 2022/1925 on contestable and fair markets in the digital sector and amending Directive EU 2019/1937 and (EU) 2020/1828 (Digital Markets Act) 2016 (PE/17/2022/REV/1 OJ L 265, 12102022)
- xxxv. The Treaty on the Functioning of the European Union (OJ C 326, 26102012)
- xxxvi. Treaty of Rome, 1957

India

- i. Draft National E-Commerce Policy- India's Data for India's Development, 2019
- ii. Electricity (Rights of Consumers) Rules, 2020
- iii. Indian Penal Code, 1860 (Act No 45 of 1860)
- iv. The Aadhar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (Act No 18 of 2016)
- v. The Competition Act, 2002 (Act No 12 of 2003)
- vi. The Constitution of India (One Hundred and Third Amendment) Act, 2019
- vii. The Constitution of India, 1950
- viii. The Consumer Protection (E-Commerce) Rules 2020
- ix. The Consumer Protection (Mediation) Rules, 2020
- x. The Consumer Protection Act, 1986 (Act No 68 of 1986)
- xi. The Consumer Protection Act, 2019 (Act No 35 of 2019)
- xii. The Consumer Protection Bill, 2015 (Bill No 226 of 2015)
- xiii. The Consumer Protection Bill, 2018 (Bill No 1 of 2018)
- xiv. The Digital Personal Data Protection Act, 2023 (Act No 22 of 2023)
- xv. The Digital Personal Data Protection Bill, 2022

- xvi. The Equal Remuneration Act, 1976 (Act No 25 of 1976)
- xvii. The Hindu Succession (Amendment) Act, 2005 (Act No 39 of 2005)
- xviii. The Hindu Succession Act, 1956 (Act No 30 of 1956)
- xix. The HIV and AIDS (Prevention and Control) Act, 2017 (Act No 16 of 2017)
- xx. The Indian Penal Code, 1860 (Act No 45 of 1860)
- xxi. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021
- xxii. The Information Technology Act, 2000 (Act No 21 of 2000)
- xxiii. The Mental Healthcare Act, 2017 (Act No 10 of 2017)
- xxiv. The Personal Data Protection Bill, 2018
- xxv. The Personal Data Protection Bill, 2019 (Bill No 373 of 2019)
- xxvi. The Rights of Persons with Disabilities Act, 2016 (Act No 49 of 2016)
- xxvii. The Sale of Goods Act, 1930 (Act No 3 of 1930)
- xxviii. The Transgender Persons (Protection of Rights) Act, 2019 (Act No 40 of 2019)

International Conventions

- i. Convention concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers (ILO-No 143, 1975)
- ii. Convention on the Elimination of All Forms of Discrimination against Women (UNGA Resolution 34/180, 1979)
- iii. Convention on the right of persons with disabilities and optional protocol (United Nations)
- iv. Discrimination (Employment and Occupation) Convention (No 111 of 1958)
- v. Equal Remuneration Convention (No 100 of 1951)
- vi. Equality of Treatment (Accident Compensation) Convention (UNESCO E/1996/98)
- vii. Equality of Treatment (Social Security) Convention (ILO- C118, 1962)
- viii. European Convention on Human Rights (Rome, 4XI1950)

- ix. International Convention on the Elimination of All Forms of Racial Discrimination, 1969 (United Nations)
- x. International Covenant on Civil and Political Rights (No 14668, 1966)
- xi. Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4XI 2000- ETS 177)
- xii. United Nations Commission on International Trade Law- Model Law on Electronic Commerce with Guide to Enactment 1996
- xiii. Universal Declaration of Human Rights 1948

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Abstract

The collaborative economy is one where service providers and consumers interact over a platform. The collaborative economy platform (CEP) intermediate and facilitate the sharing of underutilised resources of the service providers with consumers. This unique tripartite relationship provides for the flexible operations of parties, including business-to-consumer transactions (B2C) and peer-to-peer transactions (P2P). While consumers in B2C transactions are protected under EU consumer law, peer consumers are not protected by receiving similar services. Comparatively, Indian consumer law can be interpreted to include such transactions under the ambit of protection, thereby protecting peer consumers. Through the comparison, two different perspectives from the EU and India are provided, where though these platforms subsist, the differences in legislative protection create unique situations in the two jurisdictions.

The thesis also proposes a potential solution to protect such peer consumers from consumer jurisprudence. The principle of the duty of care, from common law precedent, is analysed in the context of modern context consumer law protection in the EU and India. Though these principles were created in a pre-internet world, the simplicity of these principles can be applied to current issues and protect parties. The duty of care is imposed on individuals providing services, requiring adherence to a duty of care to avoid acts that could foreseeably harm others. This thesis investigates the application of this duty in P2P transactions, providing peer consumers with a duty of care to be provided by peer service providers.

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CHAPTER 0

SHUNYA BINDU – STARTING AT ZERO

1. Summary of this Chapter

Shunya Bindu (शून्य-बिंदु) in Sanskrit translates to ‘zero dot’. Zero dot was used as a placeholder in the value system, and Brahmagupta and Aryabhata, two Indian astronomers, defined and conceptualized the computational aspects of zero.¹

The reason that this Chapter is called *shunya bindu* is twofold. Firstly, I recollect my 10th-grade mathematics teacher- who said Indians defined zero and liberally graded us with zeros.²

¹ PP Divakaran, *The Mathematics of India: Concepts, Methods, Connections* (Springer Singapore 2018) 19; Kim Plofker, *Mathematics in India* (Princeton University Press 2009) 16. Bhau Daji, ‘Brief Notes on the Age and Authenticity of the Works of Aryabhata, Varahamihira, Brahmagupta, Bhattotpala, and Bhaskaracharya’ (1865) 1 The Journal of the Royal Asiatic Society of Great Britain and Ireland 392.

² Inspired by KORE- a Korean clothing brand based in southern California with the moto of ‘keepin our roots eternal.’ Also inspired by Chimamanda Ngozi Adichie, *Dear Ijeawele, or A Feminist Manifesto in Fifteen Suggestions* (4th Estate 2017) 9th suggestion, 39. Give Chizalum a sense of identity. Living outside my country for 4 years now, I feel a deeper connection to my roots and all that India has to offer.

Taking similar liberties as an Indian, representing my culture proudly, this introductory Chapter is named to pay homage to every Indian researcher who has paved the path I now bravely tread. Secondly, the whole number system is incomplete without zero. Calculations would be impossible without zero, as zero forms the base of the number system, the point of origin of positive and negative numbers, and is the backbone of mathematics and science. Similarly, in Chapter 0, this thesis firmly grounds the research from which the analysis of consumer protection in the collaborative economy in the EU and India takes place. Just like the natural number system in the absence of zero, this thesis could be read and comprehended; however, the zero, just like this Chapter, is essential to understanding the research environment.³

This Chapter firstly discusses the background of the research that forms the foundation of the thesis. The background of literature and law in the EU and India is explored, and a position for this thesis is carved out. A thematic literature review of the collaborative economy in the EU, the collaborative economy in India, issues identified, comparative research, and the duty of care is conducted to paint the picture of the existing research.

The research questions concerning consumer protection in the collaborative economy in the EU and India are introduced in this Chapter. The first research question is, what is the legislative framework for consumer protection in the collaborative economy in the EU and India? The second research question is, what are consumer issues that arise in the collaborative economy in the EU and India? The third research question is, what are the means of mitigating these issues in the EU and India?

The comparative research methodology used in this thesis is also introduced. The reasons for choosing this methodology, the aims of using this methodology, and the different methods used in comparing, including the historical, conceptual, functional, and standard core comparative research methods, are utilised to answer the research question. This Chapter also

³ Divakaran (n 1) 126.

discusses the descriptive and normative framework used to investigate the research questions. The normative analytical framework is grounded in the duty of care. A deontological and teleological approach is conducted to analyse each research question in context. The Chapter also discusses the avenues for further research that may be conducted.

This Chapter goes on to describe the structure used in this thesis. The elements presented in the Chapter lay the groundwork upon which this thesis is built. Chapter 0 is not a mere notational necessity. However, it explains where this thesis fits into the existing sea of literature. This thesis carves out its niche by bringing a comparative perspective to analyse consumer protection in the collaborative economy by drawing from existing literature and research.

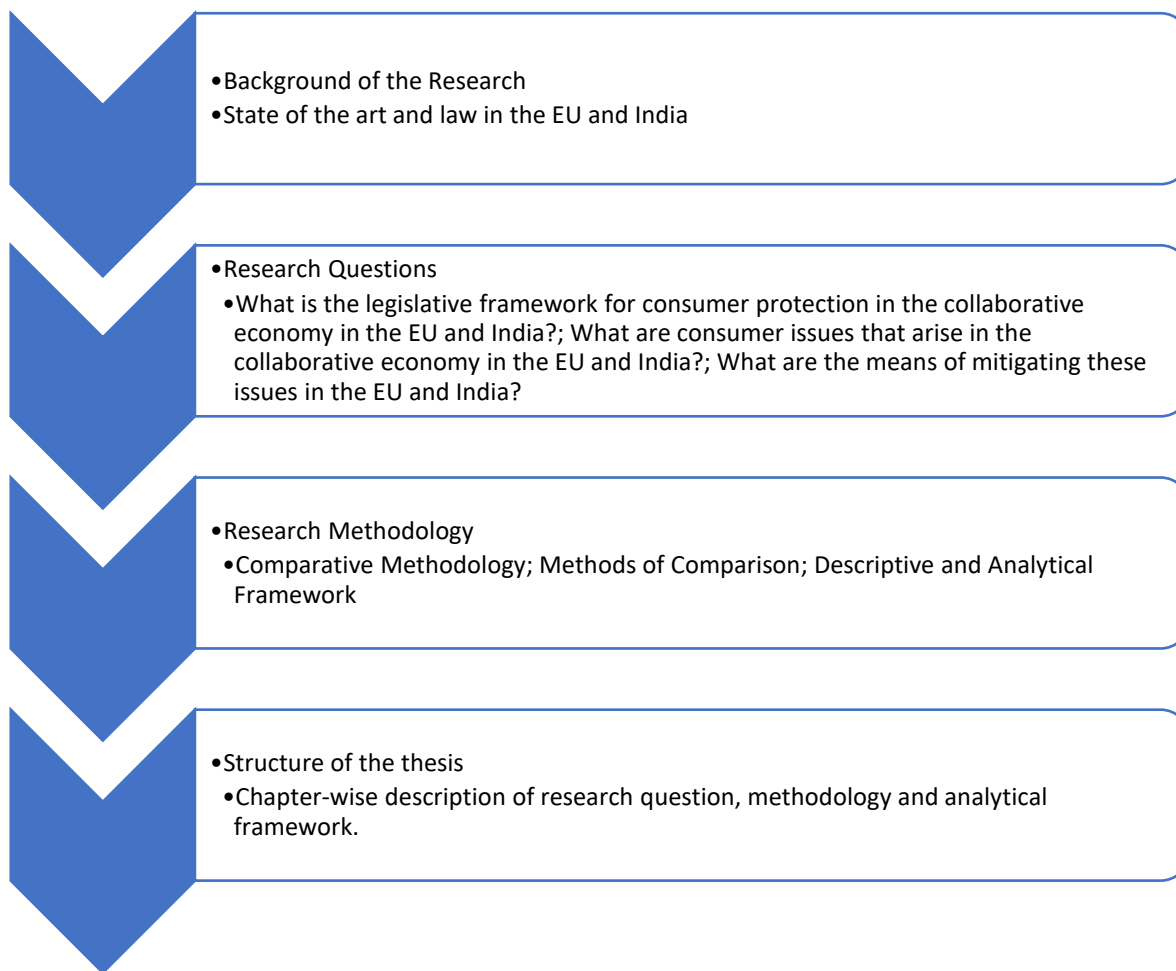


Figure 1: Contents and Structure of Chapter 0.

2. Background of the research

Some stories start at the beginning, and the beginning of our story is in the present. The pieces of literature discussed in the following sections are a few individual pieces of a jigsaw puzzle. These pieces are discussed to obtain an overall understanding of consumer protection in the collaborative economy. Just like these pieces of literature highlight crucial thematic elements, this thesis organizes its literature using a thematic literature review. The literature is structured with the specific focus of the description of the known and the normative of how it ought to be.⁴ The literature review is organized under the broad themes that run through this thesis, i.e., collaborative economy in the EU and the issues identified, collaborative economy in India and the issues identified, comparative research and the duty of care.

⁴ John Harrison, 'Thinking Big: Constructing, Defending and Advertising Key Research Ideas' [2017] Regional Studies Early Career Conference The Symmetry of paper writing.

2.1. Collaborative Economy in the EU

2.1.1. Growth and drivers of the collaborative economy

In 2016, the European Commission published an ambitious Communication to spur the development of Europe's collaborative economy.⁵ 'Collaborative economy' refers to the business models where the transactions and the provision of services are facilitated by platforms that give access to goods or services often provided by private individuals.⁶ It encouraged ride-hailing, home sharing, meal delivery, and other forms of digitally empowered task-sharing to create new opportunities for consumers and entrepreneurs that contribute to jobs and growth in the European Union. The growth of the platform economy is closely linked with the digitalization of products, services and business processes. Platforms are a challenge for existing business models and have given rise to regulatory controversy.⁷ This Communication serves as a starting policy flagpole for this thesis.

The rise of online platforms facilitating the sharing and pooling of everything from rooms to cars to food to money to clothes to people's skills and time is not only changing markets for goods and services. It can reduce resource consumption, promote the efficient use of underutilized assets, and provide affordable access to services. Additionally, it often fosters a sense of community and trust among users.⁸

The thesis also aims to elucidate the legal status of the parties involved in these multi-sided economies and their respective roles in providing services.⁹ The three parties are the

⁵ 'Communication from the Commission- A European Agenda for the Collaborative Economy' (2016) 3.

⁶ *ibid* 3.

⁷ Christoph Busch and others, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 5 *Journal of European Consumer and Market Law* 3.

⁸ Russell Belk, 'You Are What You Can Access: Sharing and Collaborative Consumption Online' (2014) 67 *Journal of Business Research* 1595.

⁹ Vassilis Hatzopoulos, *The Collaborative Economy and EU Law* (Hart Publishing 2018).

collaborative economy platforms (CEPs), service providers and consumers. The CEPs intermediate and facilitate transactions amongst the parties. Service providers share their underutilised resources with consumers. These can be private individuals (peers- peer-to-peer (P2P)) or service providers acting in their professional capacity- business to consumer (B2C). A **triangular representation** is used in the current research environment to represent the relationship among the parties, their relationship is far from a triangle.¹⁰

2.1.2. Legislative framework

A key challenge in regulating the collaborative economy is finding a balance between facilitating innovation and ensuring a level playing field for traditional businesses (Slee, 2017). The varying regulatory approaches across the EU make it challenging for platform operators to navigate the legal landscape. As Davidson et al. (2018) presented in their Handbook on the Law of the Sharing Economy, these CEPs and the individuals who use them also interact in often unforeseen ways with existing regulations and pose challenges for regulators.¹¹ Hatzopoulos (2018) states that the collaborative economy is shaking existing norms. It poses unprecedented challenges in terms of both material policies and governance in almost all aspects of EU law. In his book, he explores the application or inadequacy of existing EU rules in the context of the collaborative economy.¹² The thesis delves into a sector-specific examination of the relevant EU rules, especially on e-commerce, data protection, and consumer protection and comments on the uncertainties and lacunae produced therein.¹³ The reason for choosing these three arenas of legislation is to percolate from general to specific legislation applicable to consumers on P2P transactions in the collaborative economy.

¹⁰ Busch and others (n 6) 3; Hatzopoulos, *The Collaborative Economy and EU Law* (n 7) 44; Sanjeev Goyal, *Connections- An Introduction to the Economics of Networks* (Princeton University Press 2007) 143.

¹¹ Nestor Davidson, Michèle Finck and John Infranca (eds), *The Cambridge Handbook of the Law of the Sharing Economy* (Cambridge University Press 2018).

¹² Hatzopoulos, *The Collaborative Economy and EU Law* (n 9).

¹³ *ibid.*

The first arena is e-commerce legislation. With the rapid expansion of internet use, the European Commission set up a framework to remove cross-border obstacles in online services in the internet market. The E-Commerce Directive was enacted to ensure free online movement within the EU and the EEA.¹⁴ The transactions through electronic means attract the study of the applicability of e-commerce legislation to consumers on CEPs.

The second arena is data protection legislation. The history of data protection in the EU begins with the Data Protection Directive.¹⁵ This Directive was replaced by the global lighthouse of personal data protection legislation- GDPR.¹⁶ In EU law, GDPR is the Regulation of data protection and privacy and the transfer of personal data, providing individuals control of their data.¹⁷ The provisions of the GDPR include data subject's rights, data controllers or processors, transfers of personal data to third countries, supervisory authorities, cooperation among Member States, processing of personal data, free movement of personal data and free movement of personal data and free movement of non-personal data.¹⁸ The reason for choosing this legislative branch is because the data of the users are

¹⁴ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) 2000 (OJ L 178, 1772000).

¹⁵ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. (OJ L 281, 23111995).

¹⁶ Regulation 2016/679/EU on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016 (OJ L 119, 452016).

¹⁷ The GDPR is based on principles enshrined in the European Convention on Human Rights (ECHR) and the Treaty of the Functioning of the European Union (TFEU)- European Convention on Human Rights (Rome, 4XI1950) 34 Article 7 and Article 8; The Treaty on the Functioning of the European Union (OJ C 326, 26102012) Article 16(1). GDPR, OJ L 119, 4.5.2016 Article 1.

¹⁸ GDPR, OJ L 119, 4.5.2016 Recitals- 5,6,9,10,16,53,101,123,170, Article 4(24), Article 51, Article 58, Article 83. Regulation 2018/1807 on a framework for the free flow of non-personal data in the European Union. 2016 (OJ L 303, 28112018). 'Access to Consumers' Data in the Digital Economy- Position Paper' (The European Consumer Organisation- BEUC 2019) BEUC-X-2019-0. GDPR, OJ L 119, 4.5.2016. 'Data Protection Laws of the World' (DLA Piper).

collected, processed and stored by CEPs for their business purposes.

The third arena is consumer protection legislation. The Modernization Directive was enacted to increase transparency measures and enhance enforcement measures. The objective of this Directive is achieved by amending consumer protection Directives, including the Unfair Commercial Practices Directive, Unfair Contract Terms Directive, and the Consumer Rights Directive.¹⁹ The Directive attempts to modernize these Directives by introducing provisions including increasing enforcement powers, individual remedies for consumers, transparency on online marketplaces, ranking of offers, and transparency about consumer review.²⁰ The Directive on better enforcement and modernization is referred to as the Modernization Directive or the Omnibus Directive.²¹ The Modernization Directive introduces various changes in these Directives. These changes, as applicable to consumers in the collaborative economy, are discussed below.

¹⁹ Directive 98/6/EU on on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 1831998) 6; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts(UCTD) (OJ L 95, 2141993) 13; Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 1162005) 2; Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304 22112011) 25, 83.

²⁰ SAJN Nikolina, 'Modernization of EU Consumer Protection Rules- A New Deal for Consumers' Briefing-EU Legislation in Progress 11; Rachel Bell, 'Enforcement and Modernization Directive (EU) 2019/2161 (the Omnibus Directive)' (*Charles Russell Speechlys*, 28 August 2020).

²¹ Directive 2019/2161/EU amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules (Modernization Directive) (OJ L 328, 18122019) 1.

The Unfair Commercial Practices Directive (UCPD) protects consumers' economic interests against unfair business-to-consumer commercial practices.²² The application of the UCPD to CEPs is because CEPs engage in communication, advertising, and marketing of their services to consumers, which are B2C relationships legislated under the scope of this Directive. The second Directive amended by the Modernization Directive is the Unfair Contract Terms Directive (UCTD), which relates to unfair contract terms between a seller or supplier and a consumer.²³ This Directive states that contractual information provided to consumers must be in plain and intelligible language.²⁴ The Consumer Rights Directive (CRD) applies to any trader and a consumer contract.²⁵ CRD was amended for the applicability to instances in the collaborative economy. The Modernization Directive amendments to the CRD include definitions of personal data digital services, online marketplaces and providers of an online marketplace (CEPs and service providers), which attempts to make the directive more technology-neutral.²⁶

These three broad areas of legislation and their specific application to the collaborative economy, B2C transactions and P2P transactions are discussed in Chapter 2.

2.1.3. Issues raised

²² UCPD, OJ L 149, 11.6.2005 Article 1- Purpose; Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) Part II- Chapter 17- Willem H van Boom, Unfair Commercial Practices, 388.

²³ UCTD, OJ L 95, 21.4.1993 Article 1; Twigg-Flesner, *Research Handbook on EU Consumer and Contract Law* (n 22) Pg. 431, Part III- Contract Law.

²⁴ *ibid* Article 5; Kevin Litman-Navarro, 'Opinion | We Read 150 Privacy Policies. They Were an Incomprehensible Disaster.' *The New York Times* (12 June 2019) 150; Stanford Law School, 'We Read 150 Privacy Policies. They Were an Incomprehensible Disaster.' (*Stanford Law School*)

²⁵ CRD, OJ L 304 22.11.2011 Article 1- Subject Matter.

²⁶ *ibid* Article 2(4[a]), 2(16), 2(17), 2(18).

In 2017, The Fitness Check was conducted on consumer protection legislation.²⁷ Consumer protection legislation was reassessed based on technological developments. The possibility of extending the legislation beyond B2C transactions was considered.²⁸ This extension would mean that the existing consumer protection legislation, as applicable to B2C transactions, would be extended to apply to B2B, C2B, C2C or P2P transactions. The assessment concluded that the vast majority of Member States and stakeholders did not support an extension of the legislation to B2B transactions or C2B, C2C, or P2P.

Additionally, The Commission has published its exploratory study of consumer issues in online peer-to-peer platform markets to identify harms to consumers in the collaborative economy.²⁹ The 2017 study highlighted the issues in relation to transparency, reliability of rating and review systems, platform responsibility, access to redress and data use and protection. This study does not draw out the effect of these harms on consumers in B2C and P2P transactions. Furthermore, it recommended that further information regarding B2C and P2P transactions be provided for consideration.

The Modernization Directive states that consumers are to be provided with information on the nature and character of the transacting party. However, with this information requirement, though the identity and nature of the other party are disclosed, it is not apparent that EU consumer protection law do not apply when buying from a person who is not a professional seller.

Thus, two key questions were raised. Firstly, consumers in P2P transactions are not protected under existing consumer protection legislation. By dissecting the current legal frameworks and their applicability to P2P scenarios, vulnerabilities within these systems and areas where consumers are left exposed are researched, leading to the second question. The second

²⁷ ‘Commission Staff Working Document Report of the Fitness Check on Consumer Protection Directives.’ (2017) SWD(2017) 209 final.

²⁸ *ibid* 11.

²⁹ ‘Exploratory study of consumer issues in online peer-to-peer platform markets’ (n 282) 112.

research question takes the investigation further by concentrating on the specific issues consumers face within P2P transactions, which are left unaddressed by existing consumer protection legislation. By identifying these issues, a comprehensive picture of the challenges faced by consumers in P2P transactions is painted.

2.2. Collaborative Economy in India

2.2.1. Growth and drivers of the collaborative economy

In countries such as India, there is a significant push toward digitisation by the Government at central and local levels. This policy priority has led to a significant expansion in the scale and scope of digital businesses. New start-ups offering new products and services using digital platforms are registered weekly in India. This policy has proven to be enormously beneficial to the sharing economy.³⁰

The collaborative economy in India has experienced significant growth in recent years. Factors driving this expansion include the widespread availability of smartphones and the penetration of mobile internet has enabled the emergence of various online platforms that connect consumers with service providers, such as ride-sharing apps (Ola and Uber), food delivery services (Swiggy and Zomato), and home-sharing platforms (Airbnb and OYO Rooms).

India's large youth population, which is tech-savvy and open to alternative earning opportunities, has contributed to the growth of gig work and collaborative consumption.³¹ Rapid urbanization has increased demand for transportation, food delivery, and short-term accommodations in cities, creating a fertile ground for collaborative platforms.³² Indian

³⁰ Niam Yaraghi and Shamika Ravi, 'The Current and Future State of the Sharing Economy' [2017] Governance Studies at Bookings India 7

³¹ Arun Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (The MIT Press 2016) 87.

³² Arvind Malhotra and Marshall Van Alstyne, 'The Dark Side of the Sharing Economy ... and How to Lighten It' (2014) 57 Communications of the ACM 24.

landscape shows high adoption of the sharing economy in transportation and hospitality, though it is nascent.³³

2.2.2. Legislative framework

In order to recognize its full potential as a developing country in the sharing economy, India can leverage its rapid technological development with its historical precedents and legislative history to regulate such platforms. Though Indian legislation does not define the sharing or collaborative economy, promoting the start-up culture and reforms in India, focusing on self-reliance and sharing amongst communities, is a first step in legally recognizing the collaborative economy.³⁴

Similar to the EU, the e-commerce, data and consumer protection legislations are described. The first arena is e-commerce legislation. With India's technology and internet infrastructure rapidly developing, the Indian legislature is not far behind in legislating on them. Though there may not be specific legislation for specific issues, the common law heritage and the widely interpretable terminology create grounds for reading into legislation in light of rapidly developing technology.

The Information Technology Act was the first legislation in India to recognize transactions carried out by electronic data interchange, e-communication, and e-commerce and validate e-contracts.³⁵ Under the IT Act, the Central Government released the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules (IT Rules),

³³ Leena Ajit Kaushal, 'The Rise in the Sharing Economy: Indian Perspective' in Norhayati Zakaria, *Global Entrepreneurship and New Venture Creation in the Sharing Economy* (IGI Global 2018) 8

³⁴ Leena Ajit Kaushal, 'The Sharing Economy and Sustainability: A Case Study of India' (2018) 9 *Valahian Journal of Economic Studies* 7, 12.

³⁵ 'United Nations Commission On International Trade Law- Model Law on Electronic Commerce with Guide to Enactment, 1996'. The Information Technology Act, 2000 (Act No 21 of 2000) Sec.10A

creating a *lex specialis* for intermediaries.³⁶ In addition to the IT Rules, India has sought to provide a detailed policy on e-commerce, i.e., the Draft National E-commerce Policy (DNEP).³⁷ The use of data and algorithms in e-commerce transactions are a few significant policy aspects discussed in the DNEP.³⁸

The second arena is data protection legislation. The Digital Personal Data Protection Act (DPDPA) 2023 is India's first data protection legislation.³⁹ The landmark case of Justice K.S. Puttaswamy (Retd.) v Union of India guaranteed the right to privacy as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution of India.⁴⁰ Justice Srikrishna formed the Srikrishna Committee, releasing their White Paper and the Srikrishna Committee Reports that were the basis for the Act.⁴¹ The purpose of the DPDPA is to provide for the processing of digital personal data in a manner that recognises both the right of individuals to protect their personal data and the need to process personal data for lawful purposes.⁴² The application and the enforcement are yet to be observed.

The third arena is consumer protection legislation. *Kautilya's Arthashastra* is considered a treatise and a prominent source, describing various theories of statecraft and the rights and duties of subjects in ancient society. Though its primary concern is with matters of practical

³⁶ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

³⁷ The Consumer Protection (E-Commerce) Rules 2020; The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

³⁸ Draft National E-Commerce Policy- India's Data for India's Development, 2019 Page 13.

³⁹ Digital Personal Data Protection Act 2023 (Act No 22 of 2023).

⁴⁰ *Justice KS Puttaswamy(Retd) v Union of India* The Supreme Court of India (2017) 10 SCC 1 547. The Constitution of India, 1950 Fundamental Rights- Part III of the Constitution of India.

⁴¹ BN Srikrishna, 'White Paper of the Committee of Experts on a Data Protection Framework for India'; BN Srikrishna, 'A Free and Fair Digital Economy, Protecting Privacy, Empowering Indians- Committee of Experts under the Chairmanship of Justice B.N. Srikrishna'. The Personal Data Protection Bill, 2018; The Personal Data Protection Bill, 2019 Bill No. 373 of 2019. The Digital Personal Data Protection Bill, 2022; Digital Personal Data Protection Act 2023.

⁴² The Digital Personal Data Protection Bill, 2022.

administration, consumer protection occupies a prominent place in *Arthashastra*. The rules of consumer protection were in the form of weights used by traders at the markets. There were punishments for underweighting and cheating consumers. The colonisation of India by the British Empire brought with it the application of the common law system. Consumer Law in India draws from Indian history and precedents to create a working consumer protection system for its citizens.

The modern history of consumer laws in India began with The Consumer Protection Act 1986.⁴³ This Act attempted to address consumer issues, prevent harmful practices, and provide for consumer courts.⁴⁴ With the development of the internet, technology, consumer services, business and market models, and with the growth of the consumer protection movement, the Consumer Protection Bill was released to replace the Consumer Protection Act 1986.⁴⁵ Similar to the EU directives, Indian legislation protects consumers from unfair practices and unfair contract terms and provides consumer rights in a single piece of legislation.

2.2.3. Issues raised

Though the Consumer Protection Act was updated in 2018 to keep pace and protect consumers against technological developments, the Act does not explicitly apply to B2C or P2P transactions. The act is set to protect all consumers, and the lack of specificity could provide room for interpretation. This thesis studies the legislative framework applicable to consumers and the ambit of protection to peer consumers in the collaborative economy under the Indian legislative landscape.

⁴³ The Consumer Protection Act, 1986 (Act No. 68 of 1986)

⁴⁴ The Consumer Protection Act, 1986 (Act No 68 of 1986) Chapter III- Consumer Dispute Redressal Agencies- Sec.9- Sec.27A.

⁴⁵ The Consumer Protection Bill, 2015 (Bill No 226 of 2015).

Drawing parallels with the EU, the Market Study on E-commerce by the Competition Commission in India discusses harms to consumers in the collaborative economy. The issues highlighted in this research include rankings, personalization and algorithms. Though this study does not specifically research the collaborative economy, as a broad study of e-commerce and the collaborative economy being a part of the e-commerce economy, the issues can be extrapolated. The issues identified in this study apply to all e-commerce markets, including the collaborative economy.⁴⁶ This thesis intends to analyze these issues specifically in the collaborative economy and consumers in B2C and P2P transactions.

⁴⁶ 'Market Study on E-Commerce In India- Key Findings and Observations' (Competition Commission of India 2020) 20.

2.3. Comparative Studies

The beauty in the warmth of summer is felt on the coldest winter nights. Each, unique in its own right, is perceived and appreciated in greater detail while comparing two elements. This thesis uses a comparative research methodology as the collaborative economy is not limited to a specific jurisdiction to learn from the unique elements of protection of parties in the collaborative economy brought to the fore in the EU and India.

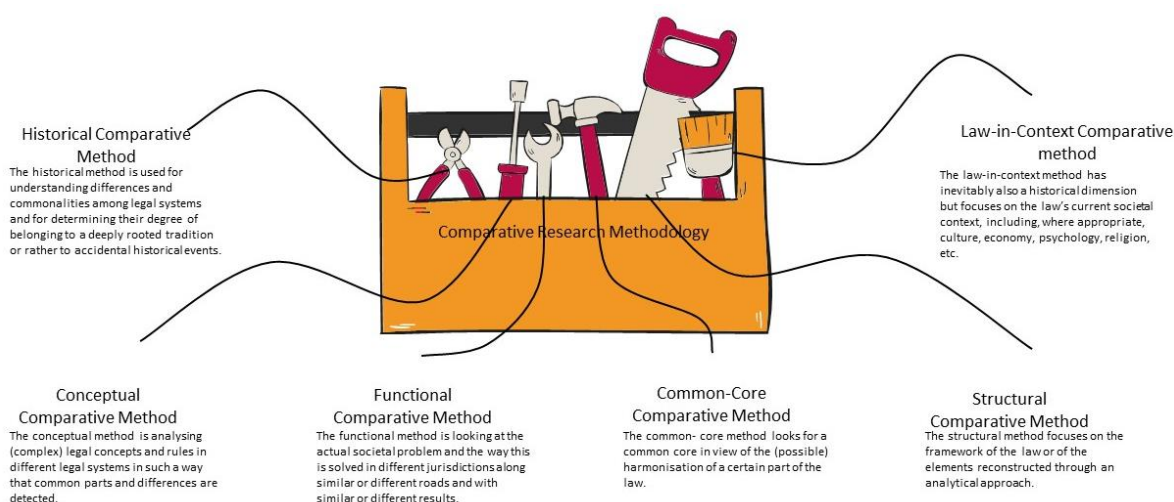


Figure 2: Toolbox of Comparative Methods.

This thesis adopts a comparative research methodology. A detailed explanation of the reasoning for using this comparative methodology is presented in the following sections of this Chapter. As stated by Esin Öürücü, there is no agreement on the kind of methodology to be followed, nor even on the methodologies that could be followed in undertaking a comparative methodology.⁴⁷

⁴⁷ A Esin Öürücü, 'Methodology of Comparative Law', *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2012) 560–576 Chapter 46; Esin Öürücü and David Nelkin (eds), 'Developing Comparative Law', *Comparative Law: A Handbook* (Hart 2007) 43–65.

Mark Van Hoecke provided a starting point: the need for a ‘toolbox’ approach rather than a traditional roadmap approach that could be applied. The benefits of using such a toolbox approach are using the tools of comparative research according to the situation, flexibility, and drawing out essential comparative elements rather than a traditional rule and case-oriented comparative law.⁴⁸

As of the writing of this thesis, there is no existing literature on a comparative study between the EU and India in relation to the collaborative economy. Existing literature on the collaborative economy is often based on a single jurisdiction, for example, EU Study or India Study, or is thematic, for example, labour law or management studies.⁴⁹

Xiao and Wu (2017) published their work on the sharing economy, comparing China and Europe.⁵⁰ This work highlighted the features of the sharing economy in both China and Europe. The Chinese sharing economy is generally more service-based and fast-moving than its European equivalent, which functions in a different framework based on concepts of community and sustainability. This paper studied the sharing economy and compared two jurisdictions. However, this paper was not set in the legal environment. This paper was aimed at businesses operating in China. Though this paper offers a comparative element, the current thesis is unique as it adopts this toolbox research method to analyse consumer protection in the collaborative economy. The various methods used in this thesis to analyze the research question are also discussed in the following sections of this Chapter.

⁴⁸ Mark Van Hoecke, ‘Methodology of Comparative Legal Research’ [2015] Law and Method 8 <<http://www.bjutijdschriften.nl/doi/10.5553/REM/.000010>>.

⁴⁹ European Commission, ‘Exploratory Study of Consumer Issues in Online Peer-to-Peer Platform Markets’ (European Commission 2017) 48; ‘Market Study on E-Commerce In India- Key Findings and Observations’ (n 46). Sundararajan (n 31); Lucia Šepel'ová, Jennifer R Calhoun and Michaela Straffhauser-Linzatti, ‘Sharing Economy Business Models: Informational Services Innovation and Disruption in Uber and Airbnb’ in Natalia Kryvinska and Aneta Poniszewska-Marańda (eds), *Developments in Information & Knowledge Management for Business Applications*, vol 376 (Springer International Publishing 2021).

⁵⁰ Shanxiang Xiao and Ti Wu, ‘The Sharing Economy- A Comparison between China and Europe’ (2017) 15.

2.4. Duty of care

While acknowledging the developments in the platform economy, Busch et al. (2016) highlight the possibility that consumers in such transactions are left without adequate consumer protection.⁵¹ They recommend a new EU legislative instrument – possibly a ‘Platform Directive’ – clearly defining the criteria for distinguishing whether the platform operator is only a ‘facilitator’ or the actual supplier. In addition, a legislative instrument should specify the duties and obligations of the platform operator, making it clear under which conditions the platform operator is liable for non-performance by the supplier. While this could be a potential solution for platforms that are partially vertically integrated, where the platform serves as an intermediary and a supplier, it does not account for the situations where the platform is the facilitator of transactions between a peer service provider and a peer consumer (or any other dynamic transactional relationships). Secondly, creating a ‘Platform Directive’ with this narrow focus would lead to a sea of plural legislative instruments and stepping on each other’s toes while enforcing such provisions on a platform that operates in complex business structures.

This research investigates a potential solution that would make the peer service provider reasonably responsible towards their peer consumers. This potential solution would protect the peer consumers under consumer protection legislation, while the peer service providers are to perform their actions with a duty of care. The concept of duty of care is derived from consumer law jurisprudence. The detailed chronology of case law and its integration with legislation is discussed in Chapter 4. The duty of care is a legal obligation imposed on an individual, requiring adherence to a standard of reasonable care to avoid careless acts that could foreseeably harm others. Tort law and consumer law jurisprudence refer to such a duty of care.⁵²

⁵¹ Busch and others (n 7).

⁵² Dr RK Bangia, *The Law of Torts Including Consumer Protection Laws India*; Catherine Elliott and Frances Quinn, *Tort Law* (Eleventh edition, Pearson 2017).

The duty was highlighted in the landmark case of *Donoghue vs Stevenson*, where Mrs Donoghue fell ill due to a snail in her bottle of ginger beer.⁵³ Lord Atkin stated that a duty of care exists between the parties. This precedent has been applied in various circumstances to apply the duty of care, leading to a sea of precedents. In applying the duty of care, the courts firstly consider whether a similar precedent exists and apply the ratio from the case. In the absence of precedent, the courts apply the three normative criteria the House of Lords set out in *Caparo Industries plc v Dickman*.⁵⁴ The three elements are, firstly, the harm must be a ‘reasonably foreseeable’ result of the parties’ action. Secondly, a proximate relationship must exist between the parties. Thirdly, the courts inspect whether it would be ‘fair, just and reasonable’ to impose liability on the party having the duty to take care of. These three criteria have been applied in subsequent cases as well.

As stated in the previous paragraph, the concept of duty of care exists in consumer protection jurisprudence. The concept is present in precedent and has been discussed in the context of the collaborative economy and peer-to-peer transactions in Chapter 4. The duty of care is the minimum standard of care between individuals entering into transactions, which has been embodied into tort law consumer law in the form of negligence.⁵⁵ The concept of duty of care can be interpreted in various aspects of legislation as it does not limit itself to categorizing parties as traders, businesses, or professionals but merely applies between individuals providing the service and individuals receiving the service. With the dynamic nature of the economy, the duty of care standard rises to the occasion. Whether the parties are termed as P2P, C2C, or any other name they are called in the technological future, this duty of care can be applied between parties. Lastly, the duty of care does not place the responsibility solely on platforms. Consider the Digital Markets Act (DMA); the Act focuses on gatekeeper platforms; the Fairness and Transparency Regulation between platforms and businesses

⁵³ *Donoghue v Stevenson* [1932] House of Lords [1932] UKHL 100 [1932] SC (HL) 31 [1932] AC 562 [1932] All ER Rep 1.

⁵⁴ *Caparo Industries PLC v Dickman* [1990] House of Lords [1990] ALL ER 568, [1990] 2 AC 605 18.

⁵⁵ This is further explored in Chapter 4.

places the onus of fairness and transparency on businesses; the Draft National E-Commerce Policy in India also places the responsibility of fairness on platforms. The duty of care of the peer service providers places specific responsibilities on them. This does not diminish the responsibilities of platforms but creates a responsibility of peer service providers to peer consumers.

As of the time this thesis is written, there is no precedent in applying the duty of care in the collaborative economy. This thesis seeks to apply the duty of care to establish a standard between parties in P2P transactions in the EU and India. Chapter 4 discusses the duty of care and its potential applicability in the EU and India to consumer issues in the collaborative economy.

3. Research question

Based on the background of the research, there are three questions this research seeks to investigate.

The first question seeks to identify the current state of protection of consumers in the collaborative economy in the EU and India. This research question is examined in Chapter 2. It seeks to highlight the protection of consumers in the EU and India in the collaborative economy and how they are different and similar. The reason for investigating this question is to highlight the existing legislative environment and the backdrop of protection that may be provided to consumers in the collaborative economy in the EU and India.

Based on the background of research, the second question seeks to highlight the issues consumers face in B2C and P2P transactions in the collaborative economy. The question raised is, what are the consumer issues that arise in the collaborative economy in the EU and India? The reason for investigating this research question is to highlight what issues arise for consumers and how they may be addressed with the existing legislative landscape (as from the previous Chapter). Further, this research question also highlights the issues that may not be addressed under the legislative framework in the EU and India.

Thirdly, this thesis investigates the mitigation of these issues to protect consumers in the collaborative economy in the EU and India. While existing literature may call for a newer Platform Directive placing responsibilities on platforms, this research examines the duty of care of peer service providers towards peer consumers as the core principle to address consumer issues in P2P transactions in the collaborative economy in the EU and India.

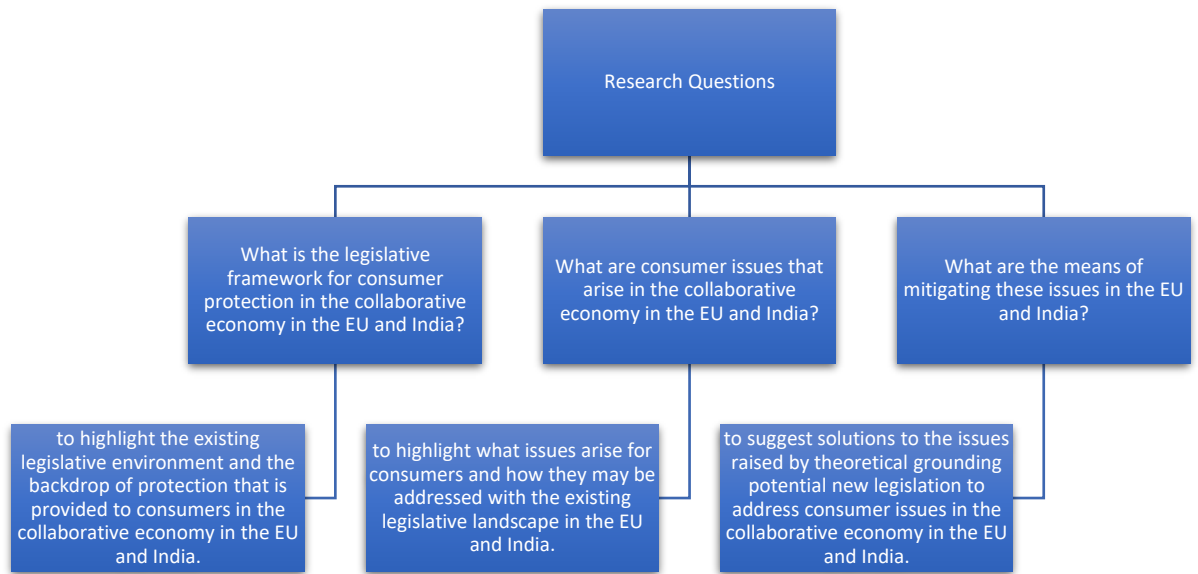


Figure 3: Research Questions and Reason for Research Questions.

4. Place of this thesis in the sea of research

This thesis is only one piece in the jigsaw puzzle that paints the picture of the collaborative economy. The comparative aspects from the EU and India paint a picture of the different paths of technologically and legislatively developed jurisdictions. The collaborative economy in these two jurisdictions with different approaches to protecting its consumers offers a perspective not present in the current literature.

By using a comparative methodology of law, the thesis aims to address, firstly, the **dearth of coverage and data** and information about countries like India in relation to the operations of CEPs. The conversation in regard to the collaborative economy is clustered around the actions in the global north. This thesis brings a perspective from one of the fastest developing countries and a view from one of the global south countries, which is not often observed in the collaborative economy literature.

Secondly, CEPs are prevalent in India. For example, CEPs like Uber, ride-sharing CEPs or their India equivalent of Ola, Airbnb, accommodation sharing and their Indian equivalent of Trivago, or Fiver, CEPs connecting handy persons with persons in need, or their Indian equivalent of Local Ramu or Urban Company exist in India; however, there is no discussion on **recognizing** or defining the collaborative economy.⁵⁶ An illustration of a lack of recognition can be noted from the definition used in this thesis. The EU's definition of the collaborative economy is the working definition used in this thesis.⁵⁷ There is no definition of the collaborative economy in India.

The concept of **duty of care** enables the use of a principle from consumer law jurisprudence to protect peer users in P2P transactions. The duty of care present in precedent can provide a

⁵⁶ For a description about the examples of CEPs refer to the Chapter 1. 'Market Study on E-Commerce In India- Key Findings and Observations' (n 46). The Market Study focuses on e-commerce markets in India as a whole, but does not deep dive into the collaborative economy in India.

⁵⁷ 'Communication from the Commission- A European Agenda for the Collaborative Economy' (n 4) 3.

technologically sound solution for users of the collaborative economy. This thesis is unique in analysing such consumer law jurisprudence and its applicability to the collaborative economy in the EU and India. The unique application of the duty of care concept to the collaborative economy lies in its potential to bridge the gap between traditional regulatory frameworks and the decentralized, peer-to-peer nature of these platforms. This approach can offer a more comprehensive and adaptable means of safeguarding consumers and addressing the dynamic challenges of the collaborative economy.

Lastly, as an Indian researcher, I want to showcase India not only as a country from the global south, with rapidly growing infrastructure but as an **equal competitor** on the global scale when the Indian markets are so important that companies change strategies to access the Indian market. The study of the Indian market in comparison with the EU market brings to light issues and solutions which may be unique to the jurisdiction.

This thesis also fits into the jigsaw puzzle by providing a technologically sound solution in a constantly dynamic technological landscape. With its foray into comparative research and the duty of care standard, this thesis opens its doors to future research.

5. Research Methodology

5.1. Research Methodology used in this thesis

5.1.1. Comparative Research Methodology

This thesis adopts a comparative methodology to answer research questions. Consumer protection in the collaborative economy in the EU and India is being compared. Consider a wine-tasting event, where multiple bottles and profiles of wine are tasted alongside each other. This exercise aims not to say if one is better than the other but to understand the flavour profiles of wine compared to another optimally. Similarly, the comparative methodology of law is adopted in this research. The methodology does not aim to state whether one legal system is comparatively efficient but to comprehend the nuances and intricacies of two legal systems in relation to consumer protection in the collaborative economy. The global expanse of the collaborative economy influenced this thesis to adopt a multi-jurisdictional, comparative approach.

5.1.2. Reasons for using the EU and India

The reason for choosing the EU and India lies in the similarities and differences between the two jurisdictions. The EU and India are two large jurisdictions with complex legislative systems. The EU is a union of multiple countries, and India consists of multiple states that attempt to maintain the balance between all members' individual and collective interests. However, the EU is a developed union, whereas India is a rapidly emerging union on the global stage. This thesis undertakes the risks of a comparative study in two jurisdictions with different legal systems and economies.

The reason for comparing the EU and India in the context of consumer protection on CEPs is because, firstly, a comparative approach between the EU and India is not uncommon. However, this thesis is unique because it provides a comparative approach in relation to

consumer protection in the collaborative economy. Existing research on CEPs is uni-jurisdictional. As CEPs are often multijurisdictional platforms, the study of a single jurisdiction is remiss on the nuances of legislative differences in multiple jurisdictions.

Secondly, the EU and India have different legal systems. Based on the study of the world's foremost legal systems, Prof. Rene David proposed a classification of legal systems and classified Western laws into civil and common laws according to the different ideologies inspiring each one.⁵⁸ The civil law system is intellectualized within the framework of Roman law and with core principles codified into a referable system, which serves as the primary source of law. Historically, the common law system's intellectual framework came from uncoded judge-made case law and gave precedential authority to prior court decisions.⁵⁹ The EU follows a hybrid law system shaped by case law and precedent from the European Court of Justice, creating a merger of elements from civil and common law. In comparison, Indian laws are based on common law principles, descending from the British colonization and elements of customary law.⁶⁰

Another reason for selecting the EU and India as two unions in this research is to investigate the protection of consumers in the collaborative economy in the global north versus the global south. The concept of the global north and global south is used to describe groups of countries based on socio-economic and political characteristics.⁶¹ The terms 'third-world' or 'developing' or 'colonized' countries do not encompass the nuances of difference in the nation-state.⁶² This research uses the concepts of the global north and global south to draw

⁵⁸ Emilio S Binavince, Rene David and John EC Brierley, *Major Legal Systems in the World Today*, vol 20 (1970) 1.

⁵⁹ *ibid* 7.

⁶⁰ *ibid* 53.

⁶¹ Jean Grugel and Wil Hout, *Regionalism Across the North-South Divide* (Routledge 1999) Chapter 1- Regions, regionalism and the South, 3.

⁶² Tanja A Börzel and Thomas Risse-Kappen (eds), *The Oxford Handbook of Comparative Regionalism* (First edition, Oxford University Press 2016) 885.

attention to the global digital divide. Where the internet is considered a basic necessity in the global north, in the recent past, the global south has been awakening to the internet and expanding its internet infrastructure.⁶³ One difference in relation to the collaborative economy between the EU and India is in relation to the digital infrastructure and digitalization. In India, where consumers do not have access to the internet, the provision of CEPs and their services and the protection of consumers need to be understood in a different light when studying the impact of the digital world and the collaborative economy in the digital space.

Fourthly, with a diverse legal system and digital growth worldwide, the laws in these two systems are also being drafted and enacted at different paces. For example, where the General Data Protection Regulation (GDPR), 2016 is considered a fundamental human right and is applied in every Member State in the EU, India has recently passed the Digital Personal Data Protection Act (DPDPA), 2023.⁶⁴ Another example is the Digital Services Act (DSA), 2022 which revamps the E-Commerce Directive 2000 to make it suitable for the modern world; India's Draft National E-Commerce Policy (DNEP), 2019, updating the Information Technology (IT) Act, 2000, is still in its policy stage.⁶⁵

These differences indicate that, though the EU and India are similar in providing data protection or legislating on e-commerce, they are crafted based on different rationales and the needs of the community they serve. With the rise of data generation, collection, and usage,

⁶³ Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 586.

⁶⁴ The first ever Directive on data protection in the EU was the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This was replaced by the GDPR. GDPR, OJ L 119, 4.5.2016; Digital Personal Data Protection Act 2023.

⁶⁵ E-Commerce Directive, OJ L 178, 17.7.2000; Draft National E-Commerce Policy- India's Data for India's Development, 2019; The Information Technology Act, 2000; Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending directive 2000/31/EC (Digital Services Act (PE/30/2022/REV/1 OJ L 277, 27102022)).

the EU has set the standard for data protection under the GDPR, and India is attempting to learn from the operations and legislative standards across the globe to craft its own standard of data protection.

Fifthly, where the jurisdictions are similar in having diverse languages, cultures and traditions, CEPs cater to these needs by providing access to different languages all over India and the EU. However, the population in India faces another challenge of literacy and accessibility to information and knowledge. This impacts the access and use of mobile phones, the internet, and CEPs. The average literacy rate in the EU is 95%, whereas, in India, this is 77%. This disparity in literacy rate impacts the access and usage of CEPs. This affects the reading and understanding of the information provided by CEPs to consumers.

5.2. Research Methods Used in this Thesis

5.2.1. Methods of comparative research.

The different methods of the comparative methodology of law are used to investigate the research questions. Although there is no fixed roadmap for comparative methodology, a toolbox of comparative methods is used.⁶⁶ This toolbox has collected various comparative research methods of law, including historical, analytical, functional, law in context, and common core comparative methods.⁶⁷ This thesis combines and complements these methods to investigate the research question.

5.2.2. Usage and Reasoning of Research Methods

Firstly, **the historical-comparative method** is used to understand differences and commonalities among legal systems and determine their degree of belonging to a deeply rooted tradition or historical event.⁶⁸ This thesis uses historical-comparative methods to trace the development of the traditional physical economy and from the pipeline to the platform economy in the EU and India. This method also traces the development of the collaborative economy in the EU and India. Through this method, the different advancements along the way to reach the modern iteration of CEPs are studied in light of historical factors and events.

Secondly, the analytical comparative method involves analysing legal concepts and rules in different legal systems to detect common parts and differences.⁶⁹ The research engages by presenting a comparative conceptual analysis of the parties in the collaborative economy.⁷⁰

⁶⁶ Hoecke (n 57) 1.

⁶⁷ *ibid* 8.

⁶⁸ *ibid* 18.

⁶⁹ *ibid* 13.

⁷⁰ This research is conducted by observing and analysing already present information on a given topic. This does not involve conducting any practical experiments

The concepts of CEPs, service providers, and consumers and their unique triangular relationship created in the collaborative economy are researched. A deep dive into consumers' relationship with service providers and CEPs is conducted. This conceptual understanding of service providers and consumers assists in providing well-rounded research and searching for potential harms and prospective solutions. This step also may highlight the need for different solutions based on the surrounding climate of the harm. The analytical comparative method is also used to compare the laws that apply to these transactional relationships and the harms that could arise in the triadic relationship.

For example, regarding consumer data protection in the collaborative economy, where the EU passed the GDPR in 2016, India has recently passed its DPDPA in 2023.⁷¹ The *tertium comparationis* is that these two pieces of legislation apply to protecting the personal data of the data subject or principal. However, there are fundamental differences, for example, the absence of the right of data subjects to be subject to automated processing and decision-making, which is a part of the operations of CEPs provided under the GDPR and not the DPDPA.⁷² Furthermore, in the EU, the Regulation of the free flow of non-personal data protects the free flow of any data that is not personal data of legal persons.⁷³ Though the Indian parliament discussed ways to draft legislation that includes personal and non-personal data, the DPDPA covers only personal data protection.⁷⁴ Specific provisions that apply to consumers in the collaborative economy are discussed in Chapter 2.

Thirdly, a functional comparative method is applied to look at an issue and the way this is solved in different jurisdictions along similar or different paths and with similar or different

⁷¹ GDPR, OJ L 119, 4.5.2016; Digital Personal Data Protection Act 2023.

⁷² This is further described in Chapter 2

⁷³ Regulation 2018/1807 on a framework for the free flow of non-personal data in the European Union.

⁷⁴ 'Report of the Joint Parliamentary Committee on Personal Data Protection Bill, 2019.' (Joint Parliamentary Committee) Recommendation 1, 2.

results.⁷⁵ The focus of this method is on the issue and the implications of the legal approach to that problem. For example, as discussed in Chapter 3, the issue in rankings systems impacts consumers in the EU and India. The differences in legislative approaches, for example, providing ranking transparency or information disclosures to consumers to address the problems in ranking systems in the EU and India, are discussed using the functional comparative method.⁷⁶

Fourthly, a common core comparative method is adopted to analyze the commonality of the two legislative systems.⁷⁷ For example, in applying the duty of care, where the EU is a jurisdiction with civil law and common law elements, India is a system with a common law jurisprudential history. Each jurisdiction has made advances in jurisprudence, based on priorities, in different areas affecting the consumer transaction in the collaborative economy. The common core comparison helps one attain a more profound knowledge of legal procedures and learn from the differences while considering the foundational principles. The common core methodology is essential to keep in mind the indispensable elements to address consumer issues in the collaborative economy.

⁷⁵ Ralf Michaels, 'The Functional Method of Comparative Law' (2010) 74 Duke Law School Legal Studies Research Paper Series Research Paper No. 87 November 2005 522 29; Hoecke (n 57) 9; Reimann and Zimmermann (n 74) 306; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method*, vol 11 (Hart Publishing 2014) 65.

⁷⁶ Detailed analysis regarding rankings is provided in Chapter 3.

⁷⁷ Hoecke (n 57) 16, 19, 28-29.

5.3. Analytical framework

The analytical framework used in this thesis involves using the comparative methodology and research methods to analyze the researched content. The analytical framework of the thesis involves a two-phase process. This framework is created first to analyze the law as is, i.e., in a descriptive manner and then analyze the law as it should be, i.e., in a normative manner.

5.3.1. Descriptive analysis

The descriptive framework uses comparative descriptions and illustrations to describe and analyze the comparative aspects of consumer protection in the collaborative economy in the EU and India. The descriptive analysis shows that though the platforms may exist in multiple jurisdictions, the history, background, and cultural growth are on different timelines. The descriptive analysis first shows legislative protection for parties on CEPs under e-commerce or data legislation, as discussed in Chapter 2. However, consumer protection law in the EU does not apply to P2P transactions. Secondly, The descriptive analysis discusses the issues plaguing peer consumers in the collaborative economy in the EU and India and the legislative framework that exists to resolve the issue, as discussed in Chapter 3. However, the issue persists, and such issues still affect peer consumers. The descriptive analysis also provides regulatory and legislative solutions to address the issues raised. The idea of a duty of care as the basis of regulation or legislation to protect consumers is also analyzed, as discussed in Chapter 4.

5.3.2. Normative analysis

The normative analysis in this thesis involves the creation of normative statements based on descriptive analysis. The normative analysis is based on the duty of care.

A deontological normative analysis based on the duty of care states that the appropriateness of an action should be based on whether that action is right or wrong rather than on the consequences of the action. On the other hand, a teleological normative analysis based on the duty of care is justified when the action serves as a function of its end, purpose, or goal. While deontological and teleological approaches may seem contradictory, they are not mutually exclusive. They are two sides of the same coin. These two argumentative techniques are used to explain normative statements.

In the application of the normative analysis based on the duty of care to consumer protection in the collaborative economy, this thesis will analyze why peer consumers ought to be in the same category as consumers under consumer protection law, what peer consumers ought to be protected from and why a duty of care ought to apply to protect peer consumers on CEPs.

5.3.3. Reasons for using the duty of care in normative analysis

The reasons for grounding normative analysis in the duty of care are because the standard is based on consumer law jurisprudence and draws from existing case law and juridical opinions. Applying such standards examines consumer law to protect consumers in the collaborative economy.

Secondly, an analysis using a standard of duty of care places the parties – consumers, service providers and CEPs at the centre of the study. The normative analysis using the duty of care analyses the treatment of consumers in the collaborative economy. This places the human element at the core rather than an algorithm or software CEPs use. This standard also means that a technology-neutral principle can be applied to other economies with parties, not restricted to technological or legislative development. The study of consumers in the collaborative economy in this thesis involves analysing the normative propositions from a duty of care perspective. Further justification and the detailed analysis of the duty of care are presented in Chapter 4.

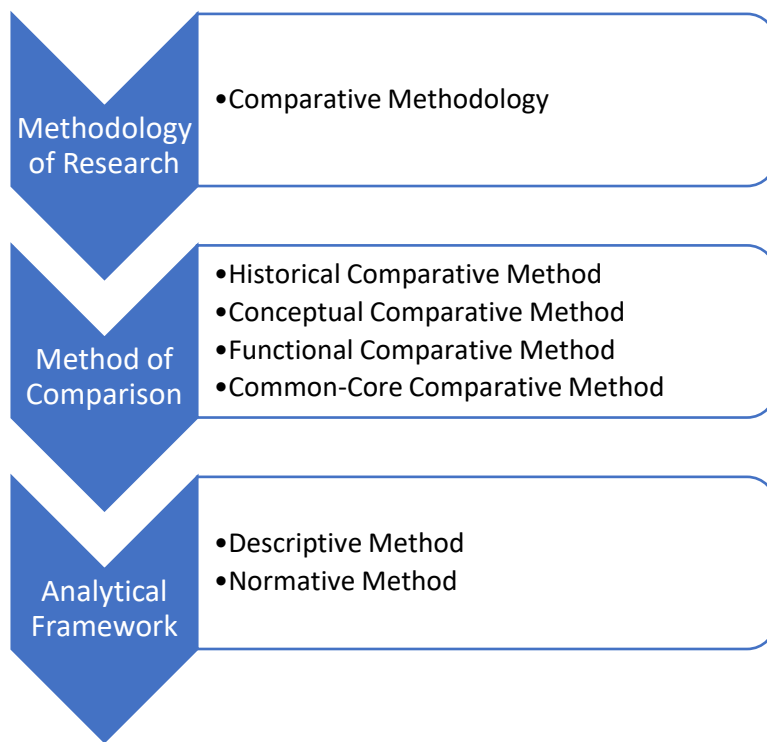


Figure 4: Research Methodology, Methods of comparison and Analytical Framework.

6. Scope of this thesis



Figure 4: Scope of the thesis.

The scope of the thesis answers the broad questions of the what, where, when, who, and how, as well as the gap in literature warranting this research. Each of these aspects is discussed to explain the scope of this thesis and its reasoning.

i. What?

The scope of this thesis is the collaborative economy. The definition and elements of the collaborative economy are discussed in the next Chapter. The reason for choosing the collaborative economy is the unique operations among the parties. Firstly, the tripartite relationship among the CEPs, service providers and consumers is a distinctive element of the platform economy. Secondly, the collaborative economy is unique as there is no transfer of property. CEPs facilitate and intermediate the utilization of underutilized resources. The service providers equipped with these resources use the CEP to connect with consumers who benefit from these resources. Thirdly, this economy is characterized by P2P transactions. These refer to

transactions between peer service providers and peer consumers. The combination of these factors forms the distinctive setting of the thesis, i.e., the sharing of resources in P2P transactions in the collaborative economy.

ii. When?

As is discussed in Chapter 1, the collaborative economy has existed throughout history. With the advent of technology and the impetus provided by the internet and mobile infrastructure, the collaborative economy is accessible in the palms of our hands. Consumer protection in the modern online world in the collaborative economy, with the three parties of CEPs, service providers and consumers, is the scope of this thesis. The online world has created a new reality and provided the impetus for the virality of the collaborative economy. This thesis is set in the current time and environment, and the proposed solutions can be applied to future dynamic technological developments.

iii. Who?

As described in detail in the next Chapter, the collaborative economy describes the tripartite transactional economy between CEPs, service providers and consumers. The relationship between service providers and consumers can be B2C or P2P transactions. As will be discussed in detail, P2P transactions do not fall under the ambit of EU consumer protection legislation. Thus, similar protection is not provided to such peer consumers as consumers in B2C transactions. The scope of this thesis extends to P2P transactions and the protection of peer consumers.

iv. Where?

The comparative analysis is conducted in the two jurisdictions of the EU and India. The EU and India are similar and different in their unique ways. In relation to the collaborative economy, the global north and global south jurisdictions are differently developed in terms of internet infrastructure and usage of platforms. They are also different regarding the legislation enacted and applied to CEPs. These two

jurisdictions are only examples of the different approaches to the CEP and possible issues. However, the learnings from different systems address consumer issues in the collaborative economy.

v. How?

As discussed in the following sections of this Chapter, a comparative research methodology is adopted to analyze consumer protection in the EU and India. A toolbox approach is used to analyze the specific elements comparatively. A descriptive and normative approach based on the duty of care is discussed to protect consumers in the collaborative economy.

vi. What is the gap in the literature that needs to be addressed?

The background of research describes the sea of existing research. From the existing research and studies conducted and the legislation enacted, it is ascertained that P2P transactions are not protected in the collaborative economy under EU consumer law. The study focuses on P2P transactions in the collaborative economy in the EU and India. It uses a descriptive and normative framework based on the duty of care to protect peer consumers in P2P transactions.

7. Avenues for further research

The Japanese phrase ‘*wabi-sabi*(わびさび)’ refers to the acceptance and appreciation of the impermanent, imperfect, incomplete nature of everything.⁷⁸ The researcher and the thesis accept limitations, and accepting these boundaries creates new avenues for future research.

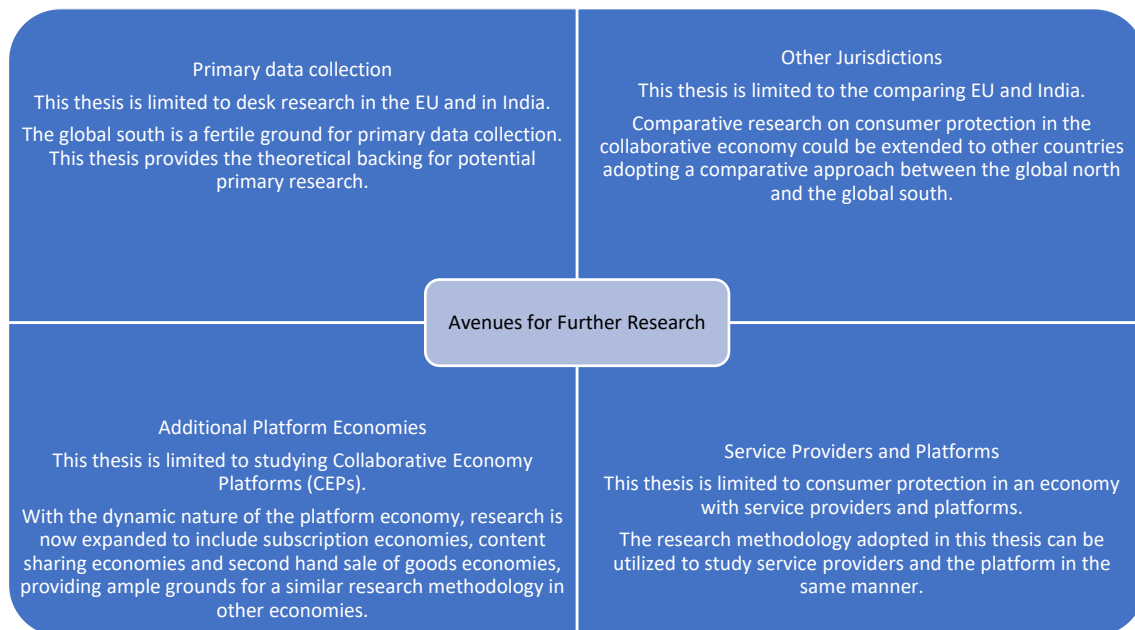


Figure 5: Avenues for further research.

- i. The data collected in this research is limited to desk research. This thesis follows in the footsteps of existing research. It attempts to carry the conversation forward by providing a conceptual and comparative analysis. The thesis does not undertake primary data collection and analysis methods. This may be a fertile ground for further research in other jurisdictions where CEPs rapidly evolve in various sectors.⁷⁹

⁷⁸ Beth Kempton, *Wabi Sabi: Japanese Wisdom for a Perfectly Imperfect Life* (2018) 5.

⁷⁹ Though CEPs are commonly observed in the hospitality or transportation sector, the presence of CEPs has expanded to other aspects of delivery of goods, sharing of information and skills.

- ii. Existing research is jurisdictional, and this thesis stands out as comparative. However, this thesis is limited to comparing the EU's and India's legislative landscapes. This approach views consumer issues on CEPs with a critical, comparative magnifying glass. Further research avenues could open similar discussions in other jurisdictions. As CEPs are not limited by jurisdiction, this thesis provides the latitude for a global study of this international phenomenon. The conceptual and comparative analysis also noted that certain aspects of this research might be elementary and redundant to readers well-versed in certain European or Indian law elements.
- iii. This thesis is limited to the study of consumers in the collaborative economy. As research has introduced newer platforms in this dynamic environment, the study of CEPs provides a firm basis for the future study of platforms. The acts of collaboration, sharing of resources and the growth of P2P transactions are elements that existed and have been catapulted to the mainstream through the creation of the internet. The limitation of this study to collaborative economy opens up paths of descriptive and normative research on other platforms.
- iv. This thesis is focused on the study of consumers; however, the collaborative economy involves interactions between service providers and CEPs. Focusing on consumers, though this is a perspective of this thesis, allows researchers to undertake their study from a different perspective of service providers or CEPs. For example, a similar descriptive and normative study can be conducted to explore the position of service providers vis-à-vis CEPs and consumers as employees or independent contractors.

8. Structure of the thesis

This thesis is structured into five Chapters.

Chapter 1 is divided into two sections. Section I traces the evolution and growth of the collaborative economy in the EU and India. The history and the growth of the collaborative economy are marked out to note the move from the dyadic relationship between parties to the novel triadic relationship created in the collaborative economy. This section also provides the working definition of the collaborative economy. It outlines the elements of the collaborative economy, i.e., sharing resources and the three parties and their relationship. Section II conceptualizes the parties in the collaborative economy: CEPs, service providers and consumers and their tri-partite relationship.

Chapter 2 focuses on the legislative framework in the EU and India as applicable to the tri-partite relationship in the collaborative economy. The legal framework of existing legislation is presented to highlight the laws applicable in these transactional relationships. The Chapter analyses the general horizontal e-commerce legislation applicable to consumers in the collaborative economy. Further, as CEPs process consumer data, data protection laws in the EU and India are examined. Thirdly, the specific consumer protection legislations applicable to consumers in the collaborative economy are discussed. The reason for selecting this specific order is the flow from general to specific legislation, protecting consumers in the collaborative economy in the EU and India. This Chapter explores the research question of the existing protections for consumers in the collaborative economy in the EU and India through a conceptual comparative methodology. The analytical framework involves a descriptive analysis of the laws in the EU and India and a normative analysis to analyze whether peer consumers ought to be protected on CEPs.

Chapter 3 examines the second research question of the issues consumers face in the collaborative economy in the EU and India. The issues highlighted are problems in ratings and reviews, rankings, personalization, and algorithmic discrimination, which are explored

under the matrix drawn below. Firstly, each issue is explained as a consumer issue prevalent in the collaborative economy. The issues of consumers based on their relationship with service providers and the CEP are analyzed to highlight the issues raised in this tripartite relationship. Secondly, the legislative landscape is relied upon to discuss the legal protection of consumers against issues. This comparison analyses the differential legislative approaches to consumer issues on CEPs. Thirdly, these issues will be explored in B2C and P2P transactions in the collaborative economy. Lastly, the persistence of consumer issues on CEPs is highlighted.

Chapter 4 investigates how to mitigate consumer issues discussed in Chapter 3 and measures to protect consumers in B2C and P2P transactions in the collaborative economy in the EU and India. This Chapter explores the duty of care as a potential mechanism to address consumer issues on CEPs.

As astronaut Captain Chris Hadfield sets off for his first-ever spacewalk from the International Space Station, he encounters a ridiculous dilemma – a square astronaut in a round hole, where he struggles to get his body in the spacesuit through a round hatch door of the spaceship.⁸⁰ He uses this metaphor to state that solutions to a problem might not always be the perfect fit or the best solution, as the solution can encounter hairpin curves, dead ends, and extra efforts to resolve the issue.

Similar is the dilemma legislators face while dealing with CEPs – square consumers, round legislations. The existing legislation may not always fit every issue encountered in the collaborative economy. It can encounter multiple issues, and in the end, the legislation can be interpreted to provide a potential solution through interpretations and guidance. However, is it appropriate for consumer issues faced in the collaborative to be pushed through existing round-holed legislation, or does this call for unique solutions custom-made for the situation?

⁸⁰ Chris Hadfield, *Astronaut's Guide to Life on Earth- What Going to Space Taught Me About Ingenuity, Determination, and Being Prepared for Anything* (Random House Canada 2013) 193.

This Chapter discusses the duty of care from a descriptive and normative analytical framework. The Chapter also discusses the ambit of existing consumer protection legislation that can be interpreted to include P2P transactions to protect parties. The Chapter also highlights the potential of new legislation to protect peer consumers based on a duty of care. The duty of care is based on the moral and equitable rationale of consumer protection. The potential new legislation to protect peer consumers offers a solution grounded in the duty of care arising from precedent.

Chapter 5 provides a conclusion on consumer protection in the collaborative economy in the EU and India. This Chapter provides a conclusion to this one story of consumer protection in the collaborative economy in the EU and India while realizing the many unsaid, unwritten stories.

Chapter o <i>Shunya Bindu - Starting at Zero</i>	•Introductory aspects of the research including research question, methodology and structure of the thesis
Chapter 1 An insight into the Collaborative Economy	•Traces the history and growth of CEPs; relationship amongst parties and the conceptual understanding of CEPs •Using an historical comparative methodology, and a descriptive and normative analytical framework
Chapter 2 Legislative Landscape in relation to Consumer Protection in the Collaborative Economy	•Legal framework as applicable to consumers in the collaborative economy •Three categories, from general e-commerce legislation and data legislation to consumer-specific consumer protection legislation •Using a conceptual comparative methodology; a descriptive analysis of the laws in the EU and India; and a normative analysis to analyse whether peer consumers ought to be protected on CEPs
Chapter 3 Consumer Issues in the Collaborative Economy	•Issues that peer consumers face on CEPs- ratings and reviews, rankings, personalization, and algorithmic discrimination •Using a functional comparative methodology; a descriptive analysis of the issues, the existing legislative protection and the persistence of issues towards peer consumers in the EU and India; and a normative analysis to analyse whether peer consumers ought to be protected from these issues based on the duty of care
Chapter 4 Resolution of Consumer Issues in the Collaborative Economy?	•Potential resolution of the consumer issues discussed in the previous Chapter- regulation or legislation based on a duty of care •Using a common-core comparative methodology; a descriptive analysis of the solution; and a normative analysis of whether peer consumers have to be protected under the consumer protection law based on a deontological and a teleological discussion grounded in the duty of care
Chapter 5 Conclusion	•Discussing each Chapter and the research methodology and analysis to investigate the research question •Contributions to the existing field of knowledge

Figure 6: Structure of the thesis.

CHAPTER 1

AN INSIGHT INTO THE COLLABORATIVE ECONOMY

*'It is the long history of humankind (and animal-kind, too) that those who learned to collaborate and improvise most effectively have prevailed.'*⁸¹

1. Summary of this Chapter

This Chapter provides insight into the evolution of the collaborative economy in the EU and India. The Chapter traces the evolution from the traditional to the collaborative economy in both jurisdictions to provide a comprehensive picture of it as it prevails today.

Section I traces the development of the modern comprehension of CEPs. The evolution from the physical to the online environment, the pipeline and the platform economy and the

⁸¹ Keith Francis, *Charles Darwin and The Origin of Species* (Greenwood Press 2007) 88.

advancements of the modern collaborative economy are described. This section also provides the working definition of the collaborative economy, which will be discussed throughout this thesis. This Chapter adopts a historical comparative approach to highlight the differences in historical development, providing insight into the current legislative framework of consumer protection in the collaborative economy in the EU and India.

Section II provides an insight into the three parties, i.e., CEPs, service providers and consumers and the tri-partite relationship among them. Existing research discusses a triangular relationship between the parties; however, this thesis puts forth a symbiotic relationship among the parties that is not triangular. This section focuses on the role of consumers and describes their position in the EU and India.

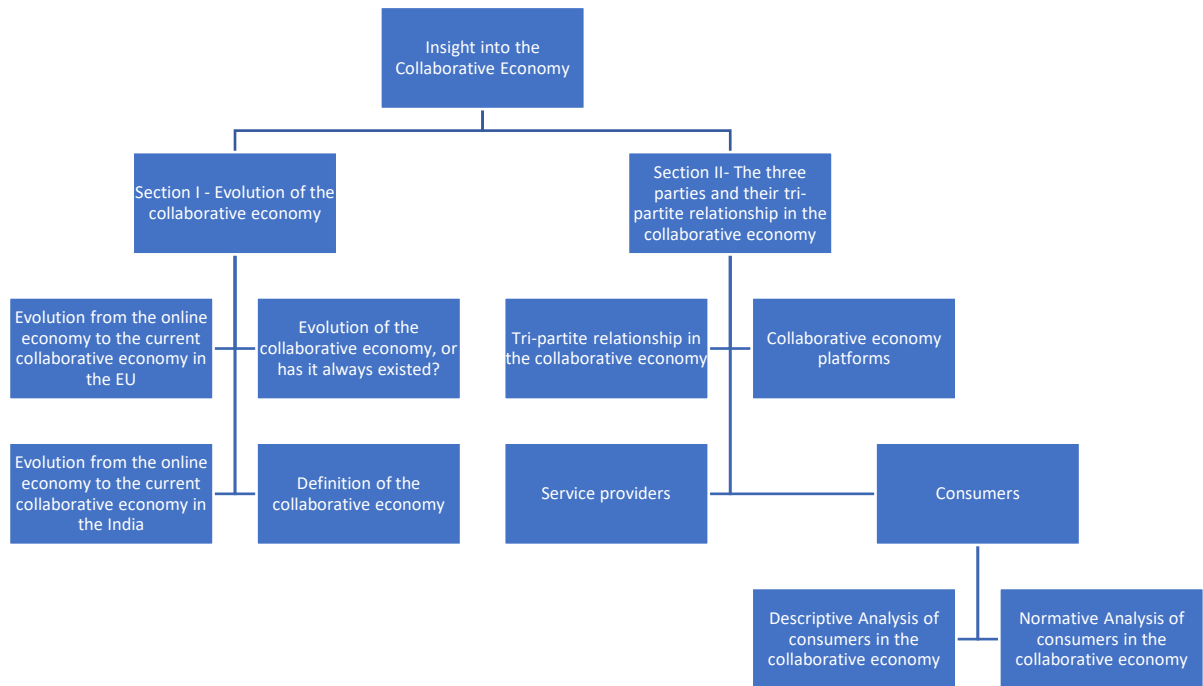


Figure 7: Structure of Chapter 1.

SECTION I

Evolution of the Collaborative Economy

1. Evolution from the online economy to the current collaborative economy in the EU

A vast network of collected networks whose work is complex and stuns humanity could perfectly describe the human brain or what the modern internet can do. The powers of the human brain stun us with discoveries across the sciences every day. The modern marvel of the internet is a wonder, too. The world has indeed fit into the palm of our hands.

The World Wide Web is a global information medium that users can access via computers connected to the Internet. The term is often mistakenly used as a synonym for the internet. However, the World Wide Web is a service that operates over the Internet. The internet's history dates back significantly farther than that of the World Wide Web. The United States Department of Defense developed the Internet in the 1960s to share files on a secure network.⁸² In the 1990s, this was significantly developed into the modern internet.

⁸² Simone Cirani and others, *Internet of Things: Architectures, Protocols and Standards* (First edition, Wiley 2019) 6.

Supported by the development of computational devices, the internet became commercialized.⁸³ The internet connects persons across the globe- from file-sharing, online music and movies to personal moments shared on social media; it is living up to its description of an interconnected global system. The internet in the EU became operational in 1992.⁸⁴

Websites for use by the general public began to emerge in 1994.⁸⁵ In 1995, new electronic commerce services using the world wide web began to have a global scope. During the early days of the online economy in the EU, consumers primarily acted as traditional online shoppers. They used the internet to purchase goods from e-commerce websites, participating in B2C transactions. Consumers were essentially buyers in this stage, and their primary role was to make online purchases securely and conveniently.

Services like Amazon.com and eBay were some of the most notable e-commerce websites to be widely used during this time.⁸⁶ With the advent of such online marketplaces, individuals could now sell their items and engage in transactions crossing the boundaries set in B2C transactions. Consumers who acted as sellers started to embrace entrepreneurship and e-commerce, using the platforms to reach a wider audience.

Digital transformation of the economy alters conventional notions about how businesses are structured, how consumers obtain products and services, and how states need to adapt to new regulatory challenges.⁸⁷ The digital economy encompasses the entire end-to-end business models of platforms, including the utilisation and monetization of the data collected from various stakeholders throughout the value chain in each transaction. E-

⁸³ *ibid* 79.

⁸⁴ Martin Peitz and Joel Waldfogel (eds), *The Oxford Handbook of the Digital Economy* (Oxford University Press 2012) 3.

⁸⁵ *ibid* 16.

⁸⁶ *Ibid* 61.

⁸⁷ Peitz and Waldfogel (n 97) Bundling Information Goods, Jay Pil Choi 205.

commerce is that segment of the digital economy that deals purely with selling products and services.⁸⁸ If e-commerce represents the ‘nuts and bolts’ of online selling, digital commerce represents the people, technology and data-driven processes that elevate retail to a new level.⁸⁹ Digital commerce covers content management, data interrogation and analytics, user design and experience, user engagement and retention, and the ability to adapt and roll out features to each user-facing endpoint quickly and easily. Digital commerce is user-centric and is concerned with optimizing consumers’ experience at every touchpoint along their journey.

Consider the example of Amazon.com. Though it started selling books, Amazon assists users every step of the way, from signing in to showing the day's offers and products recently purchased by other consumers and sending notifications regarding purchases or wish list items. It is not merely an e-commerce website and has imbibed the culture of the digital economy. Amazon.com is now a platform that enables sellers to connect with consumers across the globe, removing any middlemen, wholesalers or retailers. Consumers can purchase any item they think of from sellers across the globe or Amazon’s brand, Amazon Basics. The business model of Amazon.com shifted from selling books to enabling sellers to sell their products online.

The mid-2000s saw the emergence of online marketplaces and platforms that connected buyers and sellers. Companies like Airbnb (founded in 2008) and Uber (founded in 2009) began to disrupt traditional industries, such as hospitality and transportation. The change in business models was noted as the shift from the pipeline to the platform economy. In contrast to platforms, value-chain-oriented businesses are referred to in the literature as pipelines.⁹⁰ It is called a pipeline because the value stream is linear and flows from left to right. The flow

⁸⁸ *ibid* 24.

⁸⁹ Dhruv Nath, *The Nuts and Bolts of E-Commerce* (Tata McGraw-Hill 2002) 11.

⁹⁰ Geoffrey G Parker, Marshall W Van Alstyne and Sangeet Paul Choudary, *Platform Revolution- How Network Markets Are Transforming the Economy and How to Make Them Work for You* (1st Edition, WW Norton & Company) 11.

of value in this business chain is from the manufacturer/seller to the wholesaler, to the retailer, and then to the consumer.⁹¹ On the other hand, platforms do not have a value chain since value creation connects two sides of a market: the manufacturer or the seller to the consumer. With the changing business models, the challenges businesses face change rapidly. Since pipeline businesses follow a linear supply chain, strategies are often included to make each value chain step more efficient to generate a more efficient overall process.⁹²

Platforms aim to make interaction possible and valuable to all participants.⁹³ Platform businesses are disrupting nearly every industry, but that does not mean incumbent pipeline companies will capitulate and leave the market to the platforms. The platform economy is simply an economic activity facilitated by a platform. Platforms are here to stay, connecting people worldwide, surviving and thriving. For example, during the COVID-19 Pandemic, platforms enabled smaller businesses, like restaurants and grocery stores, to connect with consumers who could not visit them in person. Thus, platforms have evolved from niche services such as file sharing to a ubiquitous presence in multiple sectors.

The role of consumers

The emergence of such platforms introduced a significant shift in consumer roles. Consumers in the EU transitioned from being mere buyers and sellers to actively participating in transactions. By participating in transactions, persons with underutilised resources could share their resources (e.g., renting out their homes on Airbnb) or offer their skills and services (e.g., freelance work on platforms like Upwork). Individuals can now access a wide range of services, accommodations, and resources offered by their peers through various platforms.

⁹¹ *ibid* 34.

⁹² *ibid* 12.

⁹³ Parker, Alstyne and Choudary (n 109) 32.

As consumers began engaging with the platform and their peers, they became advocates for ensuring their safety, quality standards, and fair treatment when using collaborative platforms. With the COVID-19 pandemic, collaborative economy platforms are encouraging consumers in the EU to engage more actively within their local communities. Consumers are joining local sharing initiatives, participating in neighbourhood-focused platforms, and collaborating with others to reduce waste and improve resource efficiency.

2. Evolution from the online economy to the current collaborative economy in India

India's foray into the internet economy has its history entrenched in colonialism. Boycotting trade with the British and relying on national, locally manufactured products were crucial aspects of the Indian independence movement. In the post-colonial period, India opened its borders to the world in the 1990s. The Indian government initiated the Liberalisation, Privatisation and Globalisation policy in 1991, which reformed India's economic growth and foreign investments.⁹⁴ The Indian economy began integrating with the global economy. Videsh Sanchar Nigam Limited launched Internet services in India in 1995. In 1998, the Government opened the telecommunications sector to provide internet services by private operators.⁹⁵

The internet is omnipresent and now a necessity. As of 2022, 92% of EU households have access to the internet. In contrast, in India, in 2021, only 47% of households had access to the internet.⁹⁶ On the other hand, the EU reported a 12% growth in e-commerce in 2021, whereas India reported a 57% growth rate. This indicates the rapidly growing and expanding nature of the e-commerce sector in India and a steady increase in the EU.⁹⁷ This steady increase in internet and internet infrastructure also resulted in the slow percolation and use of services like Airbnb and Uber. As the users did not have access to the internet, the growth of such online economies was delayed. The digital economy is intertwined with the traditional economy, making a clear delineation difficult. The digital economy results from

⁹⁴ Dr Anju Garg, 'LPG Policy and Growth of India' (2020) 8.

⁹⁵ *ibid* 4.

⁹⁶ 'The Global Digital Divide- Cultural Anthropology' (n 75) 3; '2021 European E-Commerce-Report' (Ecommerce Europe and Euro Commerce) 3; 'Market Study on E-Commerce In India- Key Findings and Observations' (n 54) 5.

⁹⁷ '2021 European E-Commerce-Report' (n 102) 3; 'Market Study on E-Commerce In India- Key Findings and Observations' (n 54) 5.

billions of online connections among people, businesses, devices, data, and processes daily. It is based on the interconnectedness of people, organisations, and machines.⁹⁸

In the late 1990s to the early 2000s, similar to Europe, but later in the 1990s, Indian shoppers used the internet to buy products and services from e-commerce websites, often in B2C transactions. As online marketplaces like Flipkart, Amazon India, and Snapdeal gained prominence, consumers began embracing a dynamic nature.

As an Indian researcher, my first experience with the sudden need for online platforms was felt on 8 November 2016. The Indian government announced demonetization measures. Rupees five hundred and one thousand currency notes were banned from midnight and were no longer considered valid currency.⁹⁹ People had time to return their notes to the banks and exchange them for valid legal tender. However, with the implementation of this policy came the hurdles, where ATMs ran dry, and people had to stand in lines for hours at the bank hoping to exchange their now invalid money. This policy led to a massive spike in the use of payment applications on mobile devices. Everyone was now forced to have online payment/receipt options, from large grocery stores to small street vendors. With a fledgling internet infrastructure and a large part of the population that did not prefer doing banking transactions online, this was the shot of adrenaline to boost digital payment systems. People quickly realized the importance of secure online transactions and the ease of online payment platforms. The policy was meant to reduce black money in the market and, incidentally, brought about a boom in online payment platforms.

⁹⁸ Eric Brousseau, Meryem Marzouki and Cécile Méadel, *Governance, Regulation and Powers on the Internet* (Cambridge University Press 2012) Chapter 10- Online communities and governance mechanisms, Nicolas Auray 211.

⁹⁹ 'Withdrawal of Legal Tender Status for ₹ 500 and ₹ 1000 Notes: RBI Notice' (Reserve Bank of India 2016).

The evolution of the role of consumers

Consumers play a pivotal role in the collaborative economy. The emergence of such platforms introduced a significant shift in consumer roles.

Firstly, Consumers transitioned from being mere buyers to actively participating in transactions. As explored by Botsman and Rogers (2010), by participating in transactions, persons with underutilized resources could share their resources (e.g., renting out their homes on Airbnb) or offer their skills and services (e.g., freelance work on platforms like Upwork) consumers are becoming dynamic participants in the economy.¹⁰⁰ Individuals can now access a wide range of services, accommodations, and resources offered by their peers through various platforms.

Secondly, consumers in the collaborative economy also drive innovation. As illustrated by Eckhardt and Bardhi (2015), consumers now have a different perception towards accessing goods and services.¹⁰¹ While consumers prioritize renting, sharing, and borrowing over buying, many collaborative economy platforms, such as Airbnb and Uber, have evolved in response to user demands and suggestions, showcasing the co-creative nature of this economic model.

Thirdly, the shift to online economies has empowered consumers. Tapscott and Williams (2010) discuss the collaborative and participatory nature of the Internet and how it empowers individuals and consumers to actively engage in creating value and content.¹⁰² Individuals have more control over their choices and can actively engage with brands,

¹⁰⁰ Rachel Botsman and Roo Rogers, *What's Mine Is Yours: The Rise of Collaborative Consumption* (Harper Collins 2010) 54.

¹⁰¹ Giana M Eckhardt and Fleura Bardhi, 'The Sharing Economy Isn't About Sharing at All' [2015] *Harvard Business Review* <<https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all>>.

¹⁰² Don Tapscott and Anthony D Williams, *Wikinomics: How Mass Collaboration Changes Everything* (Expanded edition, Portfolio 2010) 112.

retailers, and fellow consumers through social media, online reviews, and forums. Before purchasing, consumers can research products, compare prices, and read reviews from other buyers, empowering them with more information.

Fourthly, the role of consumers in the collaborative economy also intersects with regulatory challenges as governments and institutions grapple with how to regulate these emerging markets. As discussed by Orsi (2010), the involvement of consumers in legal and regulatory aspects of the collaborative economy leads to calls for new laws and regulations to protect the rights and safety of participants.¹⁰³

Lastly, Schor (2014) emphasizes the role of community in the collaborative economy.¹⁰⁴ With the COVID-19 pandemic, this has become more evident than before. Consumers are joining local sharing initiatives, participating in neighbourhood-focused platforms, and collaborating with others to reduce waste and improve resource efficiency.¹⁰⁵

In summary, consumers are not passive players but active contributors and influencers in the collaborative economy. Their role extends beyond consumption, including shaping innovation, building trust, and influencing the regulatory environment. Their engagement and feedback are essential for the continued growth and sustainability of this economic model.

¹⁰³ Janelle Orsi, *Practicing Law in the Sharing Economy: Helping People Build Cooperatives, Social Enterprise, and Local Sustainable Economies* (American Bar Association 2013) 34.

¹⁰⁴ Juliet Schor, 'Debating the Sharing Economy' A Great Transition Initiative Essay 15.

¹⁰⁵ Zhifu Mi and D'Maris Coffman, 'The Sharing Economy Promotes Sustainable Societies' (2019) 10 *Nature Communications* 1214.

3. Evolution of the collaborative economy, or has it always existed?

In the *Mahabharata*, Arjuna, the *Pandava* prince, secured a successful collaboration with Lord Krishna. With Lord Krishna's brilliant strategic mind and Arjuna's unparalleled fighting skills, the *Pandavas* won the war.¹⁰⁶ The collaboration between these two highly talented individuals achieved military, political and moral victory for the *Pandavas*.¹⁰⁷ A similar example of collaboration is seen in the *Ramayan*, where the *Ram Setu* bridge was constructed by Lord Ram and the *Vanar Sena*, sent by Sugriva, to reach Lanka and rescue Sita from the clutches of King Ravana.¹⁰⁸

The principles of collaboration existed not only in epics and myths but also from the times of early men when collaborative hunting and gathering were conducted, and every man had a certain role. Human beings are herd animals intending to fit in, bond, survive and seek the approval of their peers. Evolutionary history describes humans as having lived in tribes, and being exiled was not conducive to survival. 'The lone wolf dies, but the pack survives.'¹⁰⁹

Darwin (1858) noted that in the long history of humankind, those who learned to collaborate and improvise most effectively have prevailed, engraving an evolutionary need to collaborate.¹¹⁰ Collaboration is, in fact, the first sign of civilization. When cultural anthropologist Mead (1943) was asked by a student about the first signs of civilization, expecting an answer in relation to clay pots or stones, Mead said that the first sign of

¹⁰⁶ Vyasa, *Bhagavad-Gita* (Bhaktivedanta Swami Prabhupāda tr, 1972) 13.

¹⁰⁷ *ibid* 55.

¹⁰⁸ Valmiki, *Ramayan* (Ralph T.H. Griffith tr, 1870) 2524.

¹⁰⁹ George R.R. Martin, *A Game of Thrones* (Bantam Spectra (US) Voyager Books (UK) 1996) Ned Stark to Arya Stark, 'When the snows fall and the white winds blow, the lone wolf dies, but the pack survives' 211; *Ramayan* (n 67) When Ram is sent into exile by Kaikeyi 586; Israr Qureshi, Babita Bhatt and Dharendra Mani Shukla (eds), *Sharing Economy at the Base of the Pyramid: Opportunities and Challenges* (Springer Singapore 2021) 3.

¹¹⁰ Francis (n 81).

civilization was a broken and healed femur (thigh bone). Mead explained that an animal that breaks its bone cannot run, hide, hunt for food, or search for water and will eventually die. The broken and healed femur was evidence that when a person had broken their bone, they were carried to safety, provided food and water, rested, healed and were assisted by others in this process.¹¹¹ Thus, collaboration is not an innovation by the digital economy but an evolutionary trait in humankind.

‘Collaboration’ refers to working together with others rather than working individually.¹¹² The term ‘economy’ refers to the inter-related production and consumption activities and allocation of resources.¹¹³ Understanding the collaborative economy involves the events in which one or more persons consume products and services and engage in joint activity. The **collaborative economy** is a socio-economic system built around the sharing of resources. It involves purchasing products and services that differ from the traditional business model of companies hiring employees to produce products to sell to consumers. It includes the shared creation, production, distribution, trade and consumption of products and services by different people and organizations.

The concept of a collaborative or sharing economy, where individuals and communities pool resources, share assets, and provide services to one another, has been present in various forms throughout human history. A few examples in the history of the collaborative economy include the barter system, where people often engaged in barter, where they exchanged goods and services directly without using currency. In many traditional societies, communities shared common resources like grazing lands, fishing rights, or communal spaces. These

¹¹¹ Margaret Read, *Primitive Economics with Special Reference to Culture Contact* (1943) 3-4.

¹¹² Amos H Hawley, ‘Human Ecology; a Theory of Community Structure’ (Ronald Press 1950).

¹¹³ Pia A. Albinsson and B Yasanthi Perera (eds), *The Rise of the Sharing Economy- Exploring the Challenges and Opportunities of Collaborative Consumption* Chapter 3- Marco Wolf and Wendy Ritz, When Sharing Was a Necessity: A Historical Perspective of Collaborative Consumption in East Germany 29 ; Tony Newton and Judith Perle, *The Network Effect- a Practical Guide to Making- and Keeping- The Connections That Can Make Your World Go Round* (Management Advantage Ltd 2013) 89.

practices promoted cooperation and resource-sharing within a community. Cooperative enterprises, where individuals collectively own and manage businesses for their mutual benefit, have existed for centuries. Examples include agricultural cooperatives, credit unions, and worker cooperatives. In small communities, people have historically helped each other with tasks like childcare, house repairs, or gardening. These informal exchanges of time and skills can be seen as a precursor to modern collaborative platforms.

These systems take various forms, often leveraging information technology (digital platforms) to empower individuals, corporations, non-profits and government with information that enables the distribution, sharing and reuse of excess capacity in products and services.¹¹⁴ For example, Wikipedia was established in 2001 and is an example of the collaborative creation of an encyclopedia. Instead of the traditional flow of information, Wikipedia volunteers sign up and create pages and posts on Wikipedia. Millions of people across the globe consume this knowledge. The establishment of Wikipedia enabled the easy sharing and consumption of information by people across the world. Another example was the peer-to-peer (P2P) file-sharing company Napster. Though the company is currently liquidated, Napster was the leader in sharing music files among people. It allowed peers to upload and download songs, and Napster was the first company to enable P2P transactions.

¹¹⁴ Juho Hamari, Mimmi Sjöklint and Antti Ukkonen, 'The Sharing Economy: Why People Participate in Collaborative Consumption' 28 67; Juliet B Schor and William Attwood-Charles, 'The "Sharing" Economy: Labor, Inequality, and Social Connection on for-Profit Platforms' (2017) 11 Sociology Compass 125.

4. Definition of the collaborative economy

The modern understanding of collaborative economies began to appear during the recession in 2008 when consumer demand was being satisfied by non-traditional providers by sharing their resources.¹¹⁵ The concept of collaborative economies began to appear around the Great Recession, enabling social technologies and an increasing sense of urgency around global population growth and resource depletion. The collaborative economy has come to mean a coming together of one who has and one who wants through the medium of a platform hosted online. Embodying the spirit and synergy and increased utilization of idle assets, a significant boost in sharing and collaboration stemmed from swift developments in social media, mobile technologies, cyber-currencies, and coproduction.¹¹⁶

The term ‘collaborative economy’ has many definitions and different terminology to explain the actions in such economies- including gig economy, P2P economy, sharing economy, shared economy, access economy, crowd-based capitalism, community-based economy, renting economy, and on-demand economy.¹¹⁷

¹¹⁵ Lawrence Lessig, ‘Two Economies: Commercial and Sharing’, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. (Bloomsbury Academic 2008) 118.

¹¹⁶ Dariusz Jemielniak and Aleksandra Przegalińska, *Collaborative Society* (Massachusetts Institute of Technology 2020) 20; Bram Devolder (ed), *The Platform Economy: Unravelling the Legal Status of Online Intermediaries* (1st Edition, Intersentia 2019) 7; Parker, Alstyne and Choudary (n 109) 14.

¹¹⁷ Lessig (n 124) 127. Robin Chase, *Peers Inc: How People and Platforms Are Inventing the Collaborative Economy and Reinventing Capitalism* (1st edition, Public Affairs 2015) 125. Nick Srnicek, *Platform Capitalism* 15. Laure Claire Reillier and Benoit Rellier, *Platform Strategy: How to Unlock the Power of Communities and Networks to Grow Your Business* (Routledge 2017) Chapter 1- Introduction to platform business, 4. Parker, Alstyne and Choudary (n 109) Chapter 1- Today- Welcome to Platform Revolution, 10; A. Albinsson and Perera (n 121) Part One- The Sharing Economy: How did we arrive here? Chapter 1 and 2, 3-97. Arun Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (The MIT Press 2016) 22; Rachel Botsman, *Who Can You Trust? How Technology Brought Us Together and Why It Might Drive Us Apart* (Penguin Group) 18; Rachel Botsman and Roo Rogers, *What’s Mine Is Yours: The Rise of Collaborative Consumption* (Harper Collins 2010) 10-13; Lene Pettersen, ‘Sorting Things Out: A Typology of the Digital Collaborative Economy’ (2017) 22 *First Monday- Peer-Review Journal*

One reason for the lack of consensus and multiple definitions is the economy's dynamic nature.¹¹⁸ The evolving and innovative nature of the economy makes it difficult, not impossible, to define inconcrete terms. A definition could act as a foghorn or make the definition watertight to exclude certain activities. On the other hand, a case-by-case determination of whether a particular transaction forms a part of the collaborative economy

on the Internet 16 3-5; Steven Kane Curtis and Matthias Lehner, 'Defining the Sharing Economy for Sustainability' (2019) 11 Sustainability 567 3; Vassilis Hatzopoulos, *The Collaborative Economy and EU Law* (Hart Publishing 2018) 4. Bram Devolder (ed), *The Platform Economy: Unravelling the Legal Status of Online Intermediaries* (1st Edition, Intersentia 2019); Juliet Schor, 'Debating the Sharing Economy' A Great Transition Initiative Essay (2014), 2; Dianne Dredge and Szilvia Gyimóthy, 'The Collaborative Economy and Tourism: Critical Perspectives, Questionable Claims and Silenced Voices' (2015) 40 Tourism Recreation Research 1-5; Francesco Russo and Maria Luisa Stasi, 'Defining the Relevant Market in the Sharing Economy' (2016) 5 Internet Policy Review 3; Niam Yaraghi and Shamika Ravi, 'The Current and Future State of the Sharing Economy' [2017] Governance Studies at Bookings India 4; 'EY Report- The Rise of the Sharing Economy- The Indian Landscape' (2015) 6-7; Leena Ajit Kaushal, 'The Rise in the Sharing Economy: Indian Perspective' in Norhayati Zakaria, *Global Entrepreneurship and New Venture Creation in the Sharing Economy* (IGI Global 2018) 5; Leena Ajit Kaushal, 'The Sharing Economy and Sustainability: A Case Study of India' (2018) 9 Valahian Journal of Economic Studies 7 9-10; Christoph Busch and others, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 5 Journal of European Consumer and Market Law 3 4; Meisam Ranjbari, Gustavo Morales-Alonso and Ruth Carrasco-Gallego, 'Conceptualizing the Sharing Economy through Presenting a Comprehensive Framework' (2018) 10 Sustainability 2336; William Echikson and Jesse Goldberg, 'Europe's Collaborative Economy: Charting a Constructive Path Forward: CEPS Task Force Report' (Centre for European Policy Studies 2020) 4; A. Albinsson and Perera (n 71) 5; European Commission. Directorate General for the Information Society and Media. and University of Surrey., *Online Platforms: Contrasting Perceptions of European Stakeholders: A Qualitative Analysis of the European Commission's Public Consultation on the Regulatory Environment for Platforms: Final Report*. (Publications Office 2014) 4. Maurizio Bruglieri (ed), *Multidisciplinary Design of Sharing Services* (Springer International Publishing 2018) 111; Mark Dodgson, David Gann and Nelson Phillips (eds), *The Oxford Handbook of Innovation Management* (First edition, Oxford University Press 2014) Chapter 32- Annabelle Gawer and Michael A Cusumano, Platform and Innovation 893.

¹¹⁸ Pettersen (n 126)2-3; Hatzopoulos, *The Collaborative Economy and EU Law* (n 7)4.

could increase the complexity of regulating the parties and their activities.¹¹⁹

In 2015, the European Commission released a public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing, and the collaborative economy. This consultation was one of the first steps to understanding the collaborative economy.¹²⁰ Based on this consultation, the Commission released A European Agenda for the Collaborative Economy.¹²¹ The EU defined the collaborative economy for the first time and raised critical issues, including market access requirements, liability regimes, protection of users, self-employment and workers' status, and taxation issues in the collaborative economy.

This thesis uses the European Commission's definition of 'collaborative economy' as a working definition. 'Collaborative economy' refers to the business models where the transactions and the provision of services are facilitated by platforms that give access to goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (1) service providers who share assets, resources, time, and/or skills- these can be private individuals offering services on an occasional basis (peers- peer to peer (P2P)) or service providers acting in their professional capacity 'professional services providers'- business to consumer (B2C); (2) consumers or users who

¹¹⁹ For example, as in the *Uber* case ECLI:FR: CCASS:2020:SO00374, and later in the *Airbnb* case ECLI:EU:C:2019:1112 [2019], as discussed further, the court discussed in each situation as to the nature of the parties and the application of legislation.

¹²⁰ 'Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy' (*Internal Market, Industry, Entrepreneurship and SMEs - European Commission*).; Annabelle Gawer, 'Online Platforms: Contrasting Perceptions of European Stakeholders: A Qualitative Analysis of the European Commission's Public Consultation on the Regulatory Environment for Platforms' (European Commission Directorate General for the Information Society and Media 2014) 2-3.

¹²¹ 'Communication from the Commission- A European Agenda for the Collaborative Economy' (n 4); Caroline Cauffman, 'The Commission's European Agenda for the Collaborative Economy (Too) Platform and Service Provider Friendly?' [2016] EuCML-Journal of European Consumer and Market 218.

are the beneficiaries of these goods and services; and (3) intermediaries that connect-via an online platform- providers with users and that facilitate transactions between them ('collaborative platforms'). Collaborative economy transactions do not involve a change of ownership (property transfer). They can be carried out for-profit or not-for-profit.¹²²

In India, though the term 'collaborative economy' is not defined, legislative discussions include the activities of the collaborative economy.

The reason for adopting this definition is firstly because of consistency and clarity. It provides a common understanding and reference point. The clarity of the collaborative economy and the parties are the starting point and the basis of discussion throughout this thesis.

Secondly, this definition defines the collaborative economy in terms of its elements and the relationship between parties. The definition clearly expresses elements of the collaborative economy to be analyzed. For example, Schlagwein, Schoder, and Spindeldreher (2019) define the sharing economy based on the consolidation and systemic conceptualization of the elements as 'the sharing economy is an IT-facilitated peer-to-peer model for commercial or non-commercial sharing of underutilized goods and service capacity through an intermediary without a transfer of ownership.'¹²³ Though this definition explains the nature of the economy as being an IT-facilitated sharing of resources through an intermediary, it does not explore the parties in such transactions and the relationship among them. Unlike the Commission's definition, it does not explore the transactional relationships and elements in the collaborative economy. Another example is the definition of peer-to-peer economy or gig economy, as Weil (2019) and Vallas and Schor (2020) focus on the peer-

¹²² 'Communication from the Commission- A European Agenda for the Collaborative Economy' (n 4) 3.

¹²³ Daniel Schlagwein, Detlef Schoder and Kai Spindeldreher, 'Consolidated, Systemic Conceptualization, and Definition of the "Sharing Economy"' (2020) 71 *Journal of the Association for Information Science and Technology* 817.

to-peer or the gig nature of the economy.¹²⁴ While this may be beneficial to comprehend the nature of the gig for employment purposes or to trace the history of the collaborative economy, these definitions do not comprehensively discuss the parties, their relationship and the elements of the collaborative economy.

Thirdly, some definitions are drafted based on specific characteristics. These definitions focus on the role of digital platforms in facilitating peer-to-peer transactions and resource sharing. For example, a platform-centric definition might describe the collaborative economy as an economic system of decentralized networks and marketplaces that unlocks the value of underused assets by matching needs and haves in ways that bypass traditional intermediaries.¹²⁵ Some definitions may also focus on the collaborative production and consumption aspects of the collaborative economy. For example, Botsman and Rogers (2010) discussed the shift from ownership to access in the context of collaborative consumption.¹²⁶ While these definitions are integral to highlighting the individual elements of the collaborative economy, they do not serve the purpose of comprehending the collaborative economy, the parties and their relationships as a whole, as they focus only on the collaboration and sharing aspect of the economy.

The Commission's definition provides a framework for the collaborative economy. It is a working definition that is adopted in this thesis to provide the basis for studying CEPs, service providers, and consumers and their relationships in B2C and P2P transactions in the context of the collaborative economy.

¹²⁴ David Weil, 'Understanding the Present and Future of Work in the Fissured Workplace Context' (2019) 5 RSF: The Russell Sage Foundation Journal of the Social Sciences 147; Steven Vallas and Juliet B Schor, 'What Do Platforms Do? Understanding the Gig Economy' (2020) 46 Annual Review of Sociology 273.

¹²⁵ Arun Sundararajan, *The Sharing Economy- The End of Employment and the Rise of Crowd Based Capitalism* (The MIT Press 2016) 24.

¹²⁶ Botsman and Rogers (n 100) 15.

5. Three parties in the collaborative economy

This thesis' definition of a collaborative economy is a working definition. This definition outlines a tripartite transaction online between CEPs, service providers, and consumers.

Consider the famous painting of the Great Wave off Kanagawa, a woodblock painting by Japanese artist Katsushika Hokusai between 1830 and 1833.¹²⁷ The painting comprises three key elements: the mountain (Mt. Fuji), the boats tumbling in the turbulent sea, and the great wave, similar to the three parties of CEPs, service providers and consumers in the collaborative economy.

Though a **triangular representation** is used in the current research environment to represent the relationship among the parties, their relationship is far from a triangle.¹²⁸ Instead, it is a complex painting with layers, imagery, and interdependent relationships; hence, it is chosen to highlight the multifaceted relationship among the parties in the collaborative economy.

The mountain, Mt. Fuji, in the background, is a central aspect of the 36 paintings of Fuji by Hokusai.¹²⁹ In this painting, the size of Mt. Fuji is outdone by the size of the wave. Mt. Fuji can be compared to CEPs as they are integral and stand in the background while the relationship between the consumers and service providers (the wave and the boats) is in the foreground. CEPs are integral as they place the consumers and service providers in context. CEPs create this tri-partite relationship amongst parties, where traditionally, a dyadic relationship existed.

¹²⁷ Christine M.E. Guth, 'Hokusai's Great Waves in Nineteenth Century Japanese Visual Culture', *Hokusai's Great Waves* 489; Robert T. Singer, 'Japanese Painting of the Edo Period' (2022) 39 *Archaeological Institute of America* 64.

¹²⁸ Busch and others (n 6) 3; Hatzopoulos, *The Collaborative Economy and EU Law* (n 7) 44; Goyal (n 8) 143.

¹²⁹ M.E. Guth (n 131) 490; T. Singer (n 131) 64-67.

Secondly, **the boats** are analogised to service providers. The boats in the picture are smaller and show their relation to the enormity of the great waves. The waves and the boats have a symbiotic relationship where both elements, similar to consumers and service providers, can be affected by the actions of the corresponding party. Just as the boats are navigating the wave, service providers navigate the collaborative economy platform and actively offer goods, services, or resources to meet the needs of consumers. They are the ones providing the services or assets being shared.

Thirdly, parallels can be drawn between **the great wave** and consumers. They are the central element of the painting and this thesis. Just as the wave propels the boat forward, being a dynamic and central element in the painting, consumers actively engage in transactions, share resources, and seek services within the collaborative economy, making them the central element of the collaborative economy and this thesis.

The **reason for choosing a painting** is to create a written picture inspired by the painting and to explore the relationship between the three parties. In the painting, the wave in isolation would not be called the Great Wave but a tsunami headed for Japan. Despite the turbulent sea, Mt. Fuji, featured in 35 other perspectives, including views from the forest, river, lake, village, and beach, did not draw the same international interest in Japanese Art.¹³⁰ The reason for drawing attention to this painting is the reciprocal relationship among the elements, similar to the collaborative nature amongst the parties in the collaborative economy. A study of consumers, service providers, or CEPs in isolation would not draw attention to the needs of consumers in the collaborative economy. It underscores the interconnectedness of these three elements and how they work together to create the collaborative economy's vibrant and dynamic landscape.

¹³⁰ JM Dudley, V Sarano and F Dias, 'On Hokusai's *Great Wave off Kanagawa* : Localization, Linearity and a Rogue Wave in Sub-Antarctic Waters' (2013) 67 Notes and Records of the Royal Society 159-160.

Secondly, the painting draws from European paintings of its time, which portrayed stillness and provided a single view. It includes elements of Japanese paintings that provide a panoramic view embodying the fluidity of the scene.¹³¹ Similarly, this research compares the EU and Indian law in relation to consumer protection in the collaborative economy, associating elements from both jurisdictions.

Thirdly, there is a sense of uncertainty in the painting, whether the great wave was a tsunami that struck the shores of Japan and whether the boats made it safely to shore. This trepidation is perceived with the still yet dynamic nature of the wave. Similarly, the dynamic nature of the collaborative economy with increased innovations and changes creates a gale of novelties and reorganisations in the collaborative economy.

Lastly, this painting used the new Persian blue colour alongside a focus on lines and shapes. This painting precipitated the modern art movement- focusing on lines, bold designs and colours. The *Starry Night* by Vincent Van Gogh in 1898 draws inspiration from Hokusai's colour and design choices.¹³² Though the *Great Wave* painting was created in Japan in the 1830s, similar paint elements were used in the West in the 1890s. Similarly, traditional geographic boundaries do not limit the collaborative economy and studying the collaborative economy, clarifying the concepts, and analysing the relationship among the parties is crucial to pave the way for future research and protection of parties.

The following section discusses the three parties in the collaborative economy – CEPs, service providers, and consumers – and their complementary relationship. The three parties present in the collaborative economy are:

(i) intermediaries that connect-via an online platform- providers with users and that facilitate transactions between them (CEPs);

¹³¹ M.E. Guth (n 131) 490; T. Singer (n 131) 66.

¹³² Andreas Marks, *Japanese Woodblock Prints 1680-1900* 90.

- (ii) service providers who share assets, resources, time, and/or skills- these can be private individuals offering services on an occasional basis (P2P) or service providers acting in their professional capacity ‘professional services providers’(B2C); and
- (iii) consumers or users who are the beneficiaries of these products and services.¹³³

The unique nature of the collaborative economy compared to the traditional economy is the triadic relationship among the parties. From the definition, the relations between CEP-to-serviceprovider, CEP-to-consumers, and service provider-to-consumer can be extracted. The relationship between CEPs and consumers is a business-to-consumer (B2C) relationship. The CEP is a business, and the consumers enter into contracts to provide intermediation services. From the definition, it can be extrapolated that there are two kinds of service providers – either professional or non-professional service providers(private individuals) entering into B2C or P2P relations with consumers.

¹³³ ‘Communication from the Commission- A European Agenda for the Collaborative Economy’ (n 4) 3.

SECTION II

The Three Parties and their Tri-Partite Relationship in the Collaborative Economy

1. Collaborative Economy Platforms

The collaborative economy is characterised by the movement from the pipeline to the platform economy.¹³⁴ This movement refers to the shift from the traditional linear business model of the sale of goods from manufacturer to wholesaler to retailer to consumer to a new wave of CEPs that connect any seller to a consumer. The **business model** of CEPs involves providing services, including intermediating, connecting users, and facilitating and enabling

¹³⁴ Parker, Alstyne and Choudary (n 109) 13. Reillier and Rellier (n 79) Chapter 5- Platforms as business models 41; Tereza Pertot and Martina D'Onofrio, 'Platforms – Business Models and Contracts' [2017] *Journal of European Consumer and Market Law* 171; Habat Duran, 'Digital Intermediaries in the French Code of Transport – An Example Based on Uber' [2021] *Journal of European Consumer and Market Law* 13; Thomas Zott, 'Regulating Airbnb – Economic Methods to Improve the Regulatory Framework for Home sharing Practices?' [2020] *Journal of European Consumer and Market Law* 494. Marie Jull Sørensen, 'Private Law Perspectives on Platform Services- Uber – a Business Model in Search of a New Contractual Legal Frame?' [2016] *Journal of European Consumer and Market Law* 15; Irene Kull, 'The Adequacy of Existing Estonian Laws for the Platform Economy' [2016] *Journal of European Consumer and Market Law* 52.

transactions. These services are provided to service providers and consumers using the CEP's services.¹³⁵ An example of an intermediary in the physical world could be a communal library. In this situation, the library does not own the books but provides a place where community members can share their books with other members of their community to be read and returned. Another example is in India, where hiring tractors from parties who have them during sowing or harvest season is common practice.

In the online world, for example, Uber is an intermediary that matches riders and drivers. CEPs offer these services through computer algorithms used to classify content, products, or services offered online or the connection of several parties for the sale of products, the provision of a service, or the exchange or sharing of content, products and services. CEPs also do not hold any inventory, providing intermediary services between service providers and consumers and facilitating these transactions.¹³⁶ As CEPs form one of the three parties in the collaborative economy, their role in the collaborative economy and their impact on service providers and consumers are examined in the following sections.

A few **examples** of CEPs include more prominent and global CEPs, including Uber, Airbnb and Deliveroo. However, these CEPs have different market penetration timelines in the EU and India, as discussed in Section 1, due to various historical factors. Additionally, certain CEPs are jurisdiction-specific and cater to local needs.

¹³⁵ Orly Lobel, 'The Law of the Platform' 101 Minnesota Law Review 87- 89; Juliette S  n  chal, 'The Diversity of the Services Provided by Online Platforms and the Specificity of the Counter-Performance of These Services — A Double Challenge for European and National Contract Law' [2016] Journal of European Consumer and Market Law 40.

¹³⁶ The paragraph is describing the business model of CEPs using the 4P or Marketing Mix model. This model helps achieve an understanding of CEPs useful for this research as the marketing mix model tests the tools used for marketing, used by businesses towards their target audience. As in this case the marketing model of CEPs towards service providers and consumers. James W Culliton, 'The Management of Marketing Costs' (1949) 13 Journal of Marketing 558; Philip Kotler and Kevin Lane Keller, *Marketing Management* (15 [edition], Pearson 2016) 48.

Airbnb and Oyo rooms are examples of accommodation CEPs. Airbnb was founded in 2008 in the United States of America. Airbnb's founders came up with the idea of renting out free space in their apartment and morning breakfast to the guests. Airbnb launched in the EU in 2010; however, Airbnb was introduced in India only in 2016.¹³⁷ In India, Oyo Rooms adopted a similar business model, facilitating affordable accommodation across India. However, there are other platforms as well. For example, shared living spaces facilitated by companies like Sharehome or Cohabs in Brussels. These platforms provide shared accommodations to people looking for affordable housing in Brussels. However, they are not CEPs, as the accommodation is leased to them by the landlords in exchange for services. Furthermore, consumers directly interact with the platform, like Sharehome, rather than the service provider, in this case, the landlord.

Uber, Ola, and BlaBlaCar are examples of ride-sharing CEPs. They do not own the cars and facilitate transactions between drivers and riders. After being founded in 2009 in the United States of America, Uber was launched in the EU in 2011 and India in 2013. BlaBlaCar, launched in 2006, is a local ride-sharing application operating only in the EU. Similarly, Ola, launched in 2010, operates in India. However, companies like Bolt or Lime in the EU or Meru Cabs in India own resources and assets like e-bikes and cars and are not CEPs under the working definition.

Another sector where CEPs are prevalent is the delivery sector. These CEPs connect businesses with consumers and provide facilitation services. They do not own any bikes or cars used for delivery. For example, Deliveroo and Dunzo are services that can deliver food and packages. During the COVID-19 Pandemic, smaller businesses and family-owned restaurants had to discover food delivery applications like UberEATS, Deliveroo, Zomato, FoodPanda, Swiggy, Grubhub, and Eat Takeaway and provide take-out/delivery options assisting communities and local businesses.

¹³⁷ Botsman and Rogers (n 126) 6-8.

Fiverr, Urban Company, Local Ramu and Home Triangle are some CEPs connecting handypersons to consumers who need specific tasks. CEPs like New Pharma or Medimart connect medical stores in the area to consumers who cannot access the stores physically. These services are provided locally to persons in the vicinity who require them. Some other CEPs are endemic to India (that are not prevalent in the EU), like matrimonial websites. CEPs like Shaddi.com, BharatMatrimony.com, and Jeevansaathi.com connect families of potential brides and grooms for arranged marriages. The profiles of potential brides and grooms form the application's object, shared amongst the parties.

2. Service Providers

From the working definition as used in this thesis, service providers who share assets, resources, time, and/or skills can be private individuals offering services on an occasional basis (P2P) or service providers acting in their professional capacity, i.e., 'professional services providers' - (B2C).¹³⁸

The development of the collaborative economy and CEPs have opened up the role of a service provider to include traders, businesses, and peers.¹³⁹ Service providers share the resources that they own. There is no transfer of property to the consumer, as the sharing allows service providers to take idle capital and resources and turn them into revenue sources.¹⁴⁰ As CEPs

¹³⁸ 'Communication from the Commission- A European Agenda for the Collaborative Economy' (n 4) 3.

¹³⁹ James Baginski and Edward J Malecki, *The Oxford Handbook of the Digital Economy*, Edited by Martin Peitz and Joel Waldfogel, vol 53 (2013) Online Versus Offline Competition Ethan Lieber and Chad Syverson 20.; Davidson, Finck and Infranca (n 21); European Commission, 'Shaping Europe's Digital Future' 7; European Commission. Directorate General for the Information Society and Media. and University of Surrey. (n 12); Antonio Aloisi and others, *European Legal Framework for 'Digital Labour Platforms'*. (Joint Research Centre of the European Commission 2018); Devolder (n 11) Part III- Chapter 4-Wouter Verheyen and Fiona Unz, And What About the Gig Worker? Transport law as a lifeline to gig workers falling outside labour law protection.

¹⁴⁰ Christopher Koopman, Matthew D Mitchell and Adam D Thierer, 'The Sharing Economy: Issues Facing Platforms, Participants, and Regulators' [2015] Mercatus Working Paper, Mercatus Center at George Mason University 17.

operate online, service providers also connect with potential consumers online. For example, during the COVID-19 Pandemic, service providers turned to CEPs to use their intermediation and facilitation services to connect with consumers to continue their service provision, like restaurants opting to use CEPs like Deliveroo, Takeaway or UberEATS to connect with consumers who are unable to come to the restaurants and to provide their services.

There are multiple **reasons service providers choose** CEPs. These include, firstly, smaller businesses and service providers that can now access a broader consumer market and are not geographically limited. Even if they cannot expand to have specific services of delivery and connection with consumers, CEPs provide these aspects of service so service providers can focus on sharing their resources rather than connecting with consumers. Secondly, service providers can now provide freelance labour and pick flexible working hours based on their current schedules and plans. They do not have to be bound by set structured employment contracts. Thirdly, they are flexible in choosing the consumers to whom they provide services. They are not forced to accept consumers and can reject work based on their needs. These are a few reasons service providers choose the collaborative economy and provide their services directly to consumers. The dynamic new collaborative platforms have enabled the rise of new roles for service providers, who are now not limited to the silo of being a professional business but could now choose to be a peer and directly engage with consumers or peer consumers.

Relationship between CEPs and service providers

Service providers are users of CEPs and the services provided by CEPs to connect with potential consumers. However, these service providers are not consumers of the platform's services. The understanding of consumers refers to the beneficiaries for non-business or professional reasons.¹⁴¹ The interpretation that service providers are also users of CEPs' services slightly differs from the working definition used in this thesis. The working

¹⁴¹ A detailed analysis of the term consumer in the EU and India is provided in the next section

definition considers only consumers as users of the CEP. The term consumer is discussed in detail in the next section. However, the reason for not considering service providers as consumers is that they operate for trade or business purposes. In the existing literature, the relationship between CEPs and service providers has scrutinized whether they are independent contractors or employees of a CEP.

2.1. Contract for Service - Service Providers as Independent Contractors

The first situation describes the relationship between CEPs and service providers in the contract for service.¹⁴² Contracts for service refer to the relationship between a person who requests the services (CEP) and a service provider. In this situation, the service provider is not an employee of the CEP but an **independent contractor or a self-employed service provider**. Unlike employees, they are not controlled by employment contracts by CEPs. They have the freedom of their schedule, location and provision of services. However, they are not covered by insurance, paid leave, benefits, welfare schemes, employee unions, or other employee perks. In the situation that they are independent contractors, they would be held liable for all their actions. The reason to classify service providers as independent contractors is the freedom given to service providers to operate their businesses without excessive control by CEPs as employees.¹⁴³ These independent contractors would be professional service providers, providing services on a professional basis (professional service providers) or non-professional service providers or individuals offering their services occasionally (peer service providers).¹⁴⁴

¹⁴² Douglas Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (1st edition, Oxford University Press 2005).

¹⁴³ Kristin Nemeth and Jorge Morais Carvalho, 'Current Challenges for Consumer Law' [2019] *Journal of European Consumer and Market Law*; Gert Straetmans, 'Misleading Practices, the Consumer Information Model and Consumer Protection' [2016] *Journal of European Consumer and Market Law*.

¹⁴⁴ Anne-Katrin Bock and others, 'The Future of the EU Collaborative Economy- Using Scenarios to Explore Future Implications for Employment' (Joint Research Centre (JRC) 2016) JRC102766 *The Treaty on the Functioning of the European Union*. John Rothchild, *Research Handbook on Electronic Commerce Law*

This difference between professional or peer service providers affects consumers (in B2C and P2P transactions) and is discussed in the next section.

2.2. Contract of Service - Service Providers as Employees

The second type of relationship between CEPs and service providers is a contract of service. **A contract of service refers to an employment relationship** between the employer and the employee, i.e., in this situation, CEPs and service providers.¹⁴⁵

In this situation, the service providers are employees of the CEP. They are entitled to the benefits as employees of leave, insurance, unionisation, and perks. Service providers are considered employees to provide them with the benefits of being an employee and transferring liability to the CEP. Further, service providers, being considered employees, transfer the liability of their actions to CEPs as they provide their services on behalf of CEPs.

In 2017, a petition was filed before the Delhi High Court to determine whether Uber drivers are employees or self-employed. It is still pending.¹⁴⁶

In November 2018, the French Supreme Court (*Cour de Cassation*) determined for the first time whether an employment contract existed between a deliveryman and Take Eat Easy, a company with a web platform and smartphone application that connects restaurants and consumers.¹⁴⁷ A delivery person alleged he was an employee of Take Eat Easy and brought

(Edward Elgar Publishing 2016) Section J- Chapter 14- Arianan R. Levinson Social Media and the National Labour Relations Board, 337.

¹⁴⁵ Brodie (n 142).

¹⁴⁶ *Kirti & Anr v Oriental Insurance Company Ltd* The Supreme Court of India, Civil Appeal No. 19-20 of 2021.

¹⁴⁷ *Mr B v Take Eat Easy* [2018] Cour De Cassation ECLI:FR:CCASS:2018:SO01737; Duran (n 134); Sørensen (n 134).

an action before the French Labour Court (*Conseil de Prud'hommes*) to claim employment benefits. The French Labour Court and later the French Appeals Court (*Cour d'Appel*) ruled that no employment contract existed and that the delivery person was not an employee. The case was then appealed to the French Supreme Court, which ruled that a valid employment relationship existed because Take Eat Easy directed the delivery person's activities and controlled how he worked. Since then, the Paris Labour Court and the Nice Labour Court have found that bike delivery drivers working for Take Eat Easy have valid employment contracts.¹⁴⁸

In March 2020, the *Cour de Cassation* said that Uber drivers are employees. The Court concluded that Uber drivers are employees and not self-employed because the driver joined a transportation service organisation that was entirely created and managed by Uber. In this context, the driver could not build up their clientele, freely set his rates and determine the terms and conditions of his transportation services; itineraries were put together by Uber and given to the driver, and his fares were adjusted if he did not stick to them; the final destination of the rides was sometimes not revealed by the application so that the driver was not in a position to freely choose where to go; Uber could temporarily disconnect the driver from the application if he had declined more than three rides and; and Uber could block access to the driver's account where an order cancellation rate was exceeded or in case of 'problematic behaviour'.¹⁴⁹

¹⁴⁸ The French Supreme Court looked at two important factors. First, the Supreme Court noted that Take Eat Easy equipped its smartphone application with a geolocation system with real-time tracking of the delivery man's location and the total number of kilometers he travelled, expanding the power of the platform beyond the delivery person's fulfilment of the customer's order from the restaurant. Also, the Court found that the company had the power to sanction the deliveryman.

¹⁴⁹ *Uber France* [2020] Cour de Cassation (France), FR : CCASS :2020 :SO00374, Paragraph 7.

The UK Supreme Court, in February 2021, stated that Uber drivers are workers, not self-employed.¹⁵⁰ Uber drivers James Farrar and Yaseen Aslam took Uber to an employment tribunal in 2016, arguing they worked for Uber. Uber said its drivers were self-employed and, therefore, were not responsible for paying any minimum wage or holiday pay. The drivers won their case at the employment tribunal. However, this case was appealed to the UK Supreme Court, which stated that drivers were subordinate to Uber, where the only way they could increase their earnings was to work longer hours. Based on the arguments of both parties, the UK Supreme Court concluded that Uber drivers are workers and not self-employed.

In India, approximately 90% of the labour work force in the unorganized sector do not have access to social securities. The total number of workers comprising organized and unorganized sectors is more than 500 million.¹⁵¹ The Central Government of India took a historical step of codifying 29 laws into 4 Codes so that workers can quickly get security, respect, health and other welfare measures.

The Code on Wages 2019 replaces the Payment of Wages Act 1936, the Minimum Wages Act 1948, the Payment of Bonus Act 1965, and the Equal Remuneration Act 1976.¹⁵²

The Occupational Safety, Health, and Working Conditions Code 2020 replaces the Factories Act of 1948, the Mines Act of 1952, the Dock Workers Act of 1986, the Contract Labour Act of 1970, the Inter-State Migrant Workers Act of 1979, The Plantations Labour Act, 1951, The Working Journalist and Other News Paper Employees (Conditions of Service and Miscellaneous Provision) Act 1955, The Working Journalist (Fixation of Rates of Wages) Act, 1958, The Motor Transport Workers Act 1961, The Sales Promotion Employees

¹⁵⁰ *Uber BV and others (Appellants) v Aslam and others (Respondents)* The Supreme Court of the United Kingdom [2021] UKSC 5 43; Habat Duran, 'Online Platforms under English Law – A General and a Specific Approach' [2021] Journal of European Consumer and Market Law.

¹⁵¹ 'Social Security for Unorganized Workers' (Ministry of Labour 2023)

¹⁵² The Code on Wages 2019 (Act No 29 of 2019).

(Conditions of Service) Act 1976, and The Beedi and Cigar Workers (Conditions of Employment) Act 1966.¹⁵³

The Industrial Relations Code Bill 2020 replaces the Trade Unions Act 1926, the Industrial Employment (Standing Orders) Act 1946, and the Industrial Disputes Act 1947.

The Code on Social Security 2020 replaces the Employees' Compensation Act, 1923, The Employees' State Insurance Act, 1948, The Employees' Provident Funds and Miscellaneous Provisions Act, 1952, The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959, The Maternity Benefit Act, 1961, The Payment of Gratuity Act, 1972, The Cine-Workers Welfare Fund Act, 1981, The Building and Other Construction Workers Welfare Cess Act, 1996, The Unorganized Workers' Social Security Act, 2008.¹⁵⁴

For the first time, the definition of 'gig worker' or 'platform worker' has been provided in the Code on Social Security, 2020 (the Code).¹⁵⁵ The Code envisages setting up a helpline and facilitation centre for gig and platform workers by the appropriate Government to assist them in obtaining registration and facilitating their enrolment in social security schemes. This would help extend comprehensive social security coverage, including employee provident fund, health insurance and medical benefits under respective schemes, disability benefits, maternity benefits and gratuity. This Code creates a Social Security Fund for 400 million unorganized workers, including gig and platform workers. The Fund is sourced by contributions from aggregators between 1 to 2% of the annual turnover of an aggregator subject to the limit of 5% of the amount paid or payable by an aggregator to such workers.¹⁵⁶ This helps provide gig workers with social security, which is contributed to by the CEPs. This social security is essential to protect peer service providers and recognize their

¹⁵³ The Occupational Safety, Health and Working Conditions Code, 2020 (Act No 37 of 2020).

¹⁵⁴ The Code on Social Security, 2020 (Act No 36 of 2020).

¹⁵⁵ *ibid* Chapter 1, Section 2(60) .

¹⁵⁶ *ibid* Chapter IX- Social Security for Unorganised Workers, Gig Workers and Platform Workers.

relationship with CEPs and their role in the labour force. However, this does not clarify the role of service providers towards the consumers, which is the focus of this thesis and is discussed in the following section. Nonetheless, it is a first step in recognizing peer service providers, which could eventually lead to a code of protection for peer consumers.

The EU recently has a Proposal for a Directive on improving the working conditions in platform work.¹⁵⁷ The new Proposed Directive is set to reform labour standards in the platform economy. The Proposed Directive increases transparency in using algorithms by digital labour platforms, ensures human monitoring of their respect for working conditions, and gives the right to contest automated decisions. These new rights will be granted to both workers and genuine self-employed. Algorithmic management, also known as algorithmic governance or algorithmic supervision, refers to using algorithms and data analytics to manage and oversee workers in various settings, including platforms. The rise of platform-based work has brought algorithmic management to the forefront of discussions around labour rights and regulations.

The Proposal seeks to ensure that people working through digital labour platforms, i.e., service providers, are granted the legal employment status corresponding to their work arrangements. It lists control criteria to determine whether the CEP is an employer. The Proposed Directive provides certain conditions, including frequency of services, profit motive, turnover and other factors, to determine a service provider. If the CEPs meet at least two of these criteria, they are legally presumed to be an employer.¹⁵⁸

As of May 2024, the directive has not come into effect. However, once implemented, the proposed directive seeks to ensure that people working through digital labour platforms are granted the legal employment status corresponding to their work arrangements. It lists control

¹⁵⁷ Proposal for a Directive on improving working conditions in platform work (COM(2021) 762 final 2021/0414 (COD)).

¹⁵⁸ Devolder (n 125) Part III- Chapter 2- Paul Schoukens, Alberto Barrio, Saskla Montebovi Social Protection of Non- Standard Workers: The Case of Platform Work, 141.

criteria to determine whether the platform is an ‘employer’. If the platform meets at least two criteria, it is legally presumed to be an employer. Therefore, the people working through them would enjoy the labour and social rights that come with the status of ‘worker’. For those being reclassified as workers, this means the right to a minimum wage (where it exists), collective bargaining, working time and health protection, the right to paid leave or improved access to protection against work accidents, unemployment and sickness benefits, as well as contributory old-age pensions. Platforms will have the right to contest or ‘rebut’ this classification, with the burden of proving that no employment relationship is resting on them.

However, the nature of CEP’s business model is a platform that connects service providers to consumers. As stated, one of the reasons that service providers were attracted to CEPs is the flexible working hours and the making of additional income outside their traditional jobs. They are often also referred to as gig workers. The court ruling classifying service providers as employees of CEPs could affect the flexible nature of the provision of services and dissuade service providers from using CEPs.

While a detailed examination of the distinction between employers and independent contractors on CEPs goes beyond the scope of this thesis, a related aspect is more relevant to the analysis of consumer issues, i.e., service providers’ relationship with consumers.¹⁵⁹

Towards the consumers, if the service provider is a professional service provider or an employee of CEPs (professional service provider), such transactions are B2C transactions. However, if the service provider is a non-professional service provider (peer service provider), such transactions are P2P transactions. The following section provides a detailed analysis of the service providers’ relations with consumers.

¹⁵⁹ The relationship between service providers and consumers is based on set terms and conditions laid out in standard contracts by CEPs. Consumers do not negotiate individual terms of service with service providers. Existing literature highlights instances where service providers face specific harms, for example, discrimination due to certain factors, removal from the CEP due to low rating and a lack of reputation portability.

3. Consumers

From the working definition, consumers in the collaborative economy are users or beneficiaries of these products and services.¹⁶⁰ The rapid growth of the internet and internet infrastructure has provided the impetus for expanding the collaborative economy that connects consumers, service providers and CEPs online. Consumers are beneficiaries of services from the CEP that match and facilitate transactions with service providers and the beneficiaries of services from service providers. The concept of the collaborative economy does not involve the transfer of property to consumers; for example, in accommodation sharing, the accommodation is not transferred to consumers, but they are enabled to use the services provided.

The concept of the consumer has been discussed under various legislations. In relation to consumer protection-specific legislation, the concept of consumer shares a common core in the EU. A consumer is a natural person acting for purposes outside of business, commercial, or trade activity. As discussed in the next Chapter, consumer protection legislation in the EU covers only B2C transactions.¹⁶¹

¹⁶⁰ *ibid* COM(2016) 356 final.

¹⁶¹ Hans Schulte-Nölke (ed), *EC Consumer Law Compendium- Comparative Analysis* (2008) 624; Twigg-Flesner, *Research Handbook on EU Consumer and Contract Law* (n 22) Part II- Chapter 9-Peter Cartwright, The consumer image within EU Law; Margus Kingisepp and Age Värvi, 'The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive- A Significant Change of Paradigm?' 46; Ward Schoenmaekers, 'The Notion "Consumer" in European Private Law' (2014) 7; Marco B.M.Loos, 'The Regulation of Digital Content B2C Contracts in CESL' [2014] *Journal of European Consumer and Market Law* 147; Michael R Solomon and others (eds), *Consumer Behaviour: A European Perspective* (3rd ed, Financial Times/Prentice Hall 2006) 35; Stefan Vogenauer, 'The Image(s) of the "Consumer" in EU Law' [2014] *Journal of European Consumer and Market Law* 62; Hans Schulte-Nölke, 'Customer Protection in Place of Consumer Protection' [2013] *Journal of European Consumer and Market Law* 3. UCPD, OJ L 149, 11.6.2005 Article 2(a) 'consumer' means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession; UCTD, OJ L 95, 21.4.1993 Article 2(b) 'consumer means any natural person who, in contracts covered by this Directive, is acting for purposes

In India, conversely, the definition of the term consumer has been unchanged since 1986.¹⁶² When the Consumer Protection legislation was revamped in 2019, the definition of a consumer was also updated to include recipients in online transactions as consumers. The term consumer means any person who buys products or avails services, online or offline, including the product user or the beneficiary of the service. It does not include a person who avails of such service for any commercial purpose, for earning their livelihood or for self-employment.¹⁶³ The law is enacted to protect consumer interests but is not limited to B2C transactions.

3.1. Relationship between CEPs and consumers

CEPs provide consumers with services based on the data collected. They provide intermediation services that connect consumers with service providers, for example, riders with potential drivers in the vicinity. CEPs use algorithms to list and match service providers and consumers, aggregate ratings and reviews, and provide rankings.

Consumers are often charged a fee for the use of CEPs. For example, on Airbnb, a separate charge is collected by Airbnb when a consumer books an accommodation. These charges are expressly stated. However, there are instances where consumers use the services for ‘free’, but the CEPs collect consumer data and convert it to usable information to provide these services.¹⁶⁴

which are outside his trade, business or profession ; CRD, OJ L 304 22.11.2011 Article 2(1) ‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.

¹⁶² The Consumer Protection Act, 1986 Section 2(1)(d)- Definition, Consumer.

¹⁶³ The Consumer Protection Act, 2019 (Act No 35 of 2019) Section 2(7)- Definition, Consumer.

¹⁶⁴ Carmen Langhanke and Martin Schmidt-Kessel, ‘Consumer Data as Consideration’ [2015] Journal of European Consumer and Market Law 219.

The relationship between CEPs and consumers is B2C transactions. The business is the CEP, and the consumers receive these products and services provided by CEPs. As CEPs provide consumer services, consumers are protected under consumer protection legislation. The inclusion of disclosure requirements by CEPs under consumer protection legislation indicates that CEPs provide services and that consumers must be protected. Similar to regulation in the traditional economy, where traders and service providers provide transparent information, disclosure is used as a regulatory tool to provide information to consumers on CEPs. The legislative protection awarded to B2C transactions in the collaborative economy is discussed in the next Chapter.

3.2. Relationship between service providers and consumers

3.2.1. B2C relationship between service providers and consumers

From the typology of service providers, there are three categories of service providers, (i) service providers who are employees of CEPs, (ii) service providers who operate in an individual professional capacity, and (iii) service providers who operate in a non-professional basis (peer-service providers)

Service providers in categories (i) and (ii) are professional service providers. They provide services to consumers as a part of their trade or business or in the course of employment. The service providers who are employees operate in a professional capacity on behalf of the CEP. Their relationship with CEPs affects their employment status, benefits and liabilities, but they are professional service providers to consumers. Consumers who are beneficiaries of these services are protected under consumer protection legislation.

The legislative protection of consumers in B2C and P2P transactions in the collaborative economy in the EU and India and potential issues are discussed in Chapters 2 and 3.

3.2.2. P2P relationship between service providers and consumers

As stated, the collaborative economy has opened the role of service providers to businesses, individual traders and peer service providers. **Peer service providers** are service providers who provide services on an occasional basis in a non-professional capacity. The term peer service provider indicates their non-professional status and relationship with peer consumers.

The reason for using the terms peer service provider and peer consumer is to indicate their status compared to service providers and consumers in B2C transactions. **Peer consumers** are recipients of services from peer service providers in P2P transactions.

However, are peer consumers considered consumers to apply consumer protection legislation? As discussed in the next Chapter, consumer protection legislation applies to B2C transactions in the EU. The collaborative economy creates opportunities for P2P transactions. The specific material scope of consumer protection legislation in the EU, not including P2P transactions, means that peer consumers in P2P transactions are not covered by protections offered by consumer protection legislation.

Taking a step outside the collaborative economy, consider one of the biggest food debates- is a hot dog a sandwich? From Will Smith, who garnered more than 60 million views on TikTok with his opinion that hot dogs are sandwiches, to beloved celebrity chef the late Anthony Bourdain, stating that hot dogs are not sandwiches, the etymology of what a hot dog is and what a sandwich is first to be clarified. The most straightforward decision in this debate was provided by a former Associate Judge of the United States Supreme Court and an icon for women lawyers and jurists worldwide, Justice Ruth Bader Ginsburg. Alongside her many landmark decisions, she also discussed whether a hot dog is a sandwich. In an interview in 2018 with late-night talk show host Stephen Colbert, she was asked whether a hot dog is a sandwich. She replied, ‘You tell me what a sandwich is, and I will tell you whether a hot dog is a sandwich.’ Based on the explanation provided by Stephen Colbert, she said, ‘based on your definition (of pieces of bread with meat inside, then a hot dog is a sandwich.’ The

internet was abuzz that Justice Ginsburg had opined on whether a hot dog is a sandwich; however, what failed to be noted was her note of ‘based on your definition’. Clarifying the terminology of a hot dog was first done in New York, where the question arose as to the taxing of hotdog vendors. The city of New York classified hot dogs as sandwiches for taxation purposes.

Consider another food debate of whether plant-based milk – like oats, almonds, or soy should be considered as ‘milk’ or merely as a beverage. Considering the definition of milk as an opaque white fluid rich in fat and protein secreted by female mammals for the nourishment of their young would exclude plant-based milk. However, coconut milk is the white juice from grinding and pressing coconuts in recipe books from the 1800s. The inclusion or exclusion of plant-based milk from the milk category can be at the dining table. However, from both illustrations, the point to be noted here is the terminology definitions.

Bringing it back to the collaborative economy, the concept of whether peer consumers are consumers under the ambit of consumer protection legislation depends on the definition of the terms ‘consumer’ and ‘service provider’. Definitions given in a dictionary are not arbitrary rules but derivatives of societal usage, similar to laws. Current legal systems reflect the society in which they are enacted and enforced.

Consumers in the collaborative economy enter into B2C and P2P transactions. This thesis argues that peer consumers ought to be considered as consumers for the application of consumer protection legislation. In order to be considered as consumers, there exist two potential paths. The first one is that they are a separate group to consumers in B2C transactions, or they are a part of the larger group of consumers who receive their services, either service providers who share these resources on an occasional basis or in a professional capacity.

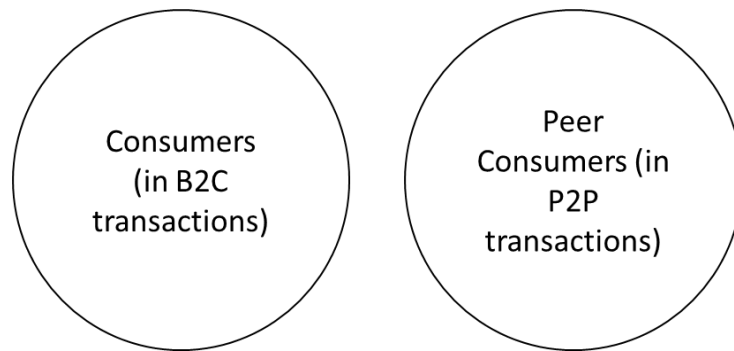


Figure 8: Hypothesis 1: peer consumers are a separate group from consumers

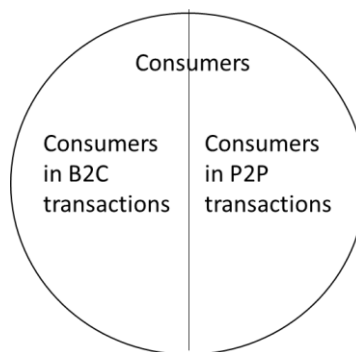


Figure 9: Hypothesis 2: peer consumers are (a category of) consumers.

The critical reason for peer consumers to be considered consumers under B2C transactions is to provide them protection under consumer protection legislation. While this section provides the reasoning based on the nature of peer consumers to be considered as consumers, the next Chapter discusses the implications of such consideration with reference to the application of consumer law.

This Chapter explores the evolution of the collaborative economy as it stands today and the various roles that it accommodates. The definition and the various elements of the collaborative economy were discussed in Section I, and a deep dive into the three parties and their relationship was conducted in Section II.

Chapter 2 discussed the legislative environment surrounding consumer protection in the collaborative economy in the EU and India. The legislations are analysed in light of platform-

to-business (CEP to service provider), B2C (CEPs to consumers and service providers to consumers) and P2P transactions in the collaborative economy. As will be seen in the next Chapter, consumer protection legislation in the EU is limited to B2C transactions from a professional service provider to a consumer. However, with an interpretation of Indian legislation, peer consumers could be protected under consumer protection legislation.

CHAPTER 2

LEGISLATIVE LANDSCAPE IN RELATION TO CONSUMER PROTECTION IN THE COLLABORATIVE ECONOMY

‘Two things fill the mind with ever new and increasing admiration and reverence, the more frequently and persistently one's meditation deals with them: the starry sky above me and the moral law within me.’¹⁶⁵

1. Summary of the Chapter

This Chapter examines the first research question, i.e., what is the existing protection provided to consumers in the collaborative economy in the EU and India? The reason for putting forth this question is to investigate and compare the current protection of consumers in B2C and P2P relations in the collaborative economy.

¹⁶⁵ Immanuel Kant, *Critique of Practical Reason* (Hackett Pub Co 2002) 203 Conclusion.

As from the previous Chapter, consumer relations in B2C transactions with CEPs and service providers and P2P transactions are highlighted. This Chapter outlines the legal protection of consumers in e-commerce legislation, as transactions in the collaborative economy take place online; data protection legislation, as consumer data is collected and processed to enable the services of CEPs; and consumer protection legislation, enacted to protect consumer interests. The legal framework of existing legislation is presented to highlight the laws applicable in these transactional relationships. The reason for selecting this specific order is the flow from general to specific legislation, protecting consumers in the collaborative economy in the EU and India. **A conceptual-comparative method** is used to analyze legal concepts and rules in different legal systems to detect common parts and differences.¹⁶⁶

The EU and the Indian legal system are unique in their particular way. Each jurisdiction has made advances in jurisprudence, based on priorities, in different areas affecting the consumer transaction in the collaborative economy. This descriptive analysis helps to attain a more profound knowledge of legal procedures and learn from the differences. The similar yet different nature of the two legal systems provides various approaches to tackling consumer issues that may arise in the collaborative economy.

Firstly, E-commerce legislation in the EU and India and their applicability to the collaborative economy are explained. E-commerce law in the EU is the E-commerce Directive, revamped by the DSA, the DMA, and the Fairness and Transparency Regulation. E-Commerce Law in India is the IT Act and the Information Technology Intermediary Guidelines applicable to service providers on CEPs. E-commerce law is a general law applicable to all e-commerce transactions. It is a general law that applies to the collaborative economy as well. The applicability of e-commerce legislation to CEPs, service providers and consumers in B2C and P2P transactions is investigated from the description of the legislation in the EU and India.

¹⁶⁶ Hoecke (n 57) 13.

Secondly, data protection legislation in the EU and India and their applicability to the collaborative economy are explained. In the EU, the GDPR protects the personal data of natural persons, and the Non-Personal Data Regulation protects the non-personal data of legal persons (in situations where service providers are legal persons). The DPDPA is India's only data protection act; no non-personal data legislation exists. From the description of the legislation in the EU and India, the applicability of data laws to CEPs, service providers and consumers in B2C and P2P transactions is examined.

Thirdly, consumer protection law, which applies to B2C transactions in the EU and India, is discussed. The UCPD, the UCTD, and the CRD in the EU are compared alongside the Consumer Protection Act and Rules in India that aim to protect consumers. However, the scope of the EU legislation is limited to B2C transactions. The lack of applicability of consumer protection laws between CEPs and service providers and between peer service providers and peer consumers in P2P transactions is examined.

From the research, existing consumer protection legislation in the EU protects consumers in B2C transactions. However, it does not apply to peer consumers in P2P transactions. In contrast, consumer protection legislation in India can be interpreted to include P2P transactions. The laws described and the applicability to B2C and P2P transactions discussed above present arguments about whether peer consumers should be protected under consumer legislation in the EU.

The normative analysis is conducted based on the duty of care. The analysis of why consumers ought to be protected on CEPs under consumer protection law is discussed from a deontological and a teleological perspective. The arguments to protect peer consumers under consumer protection law include, firstly, because they are inherently consumers as they are the beneficiaries of the service provided. Secondly, the market asymmetries that apply to consumers also apply to peer consumers. Thirdly, peer consumers ought to be protected because the change in the nature of the other party

has limited the application of the law and their rights.

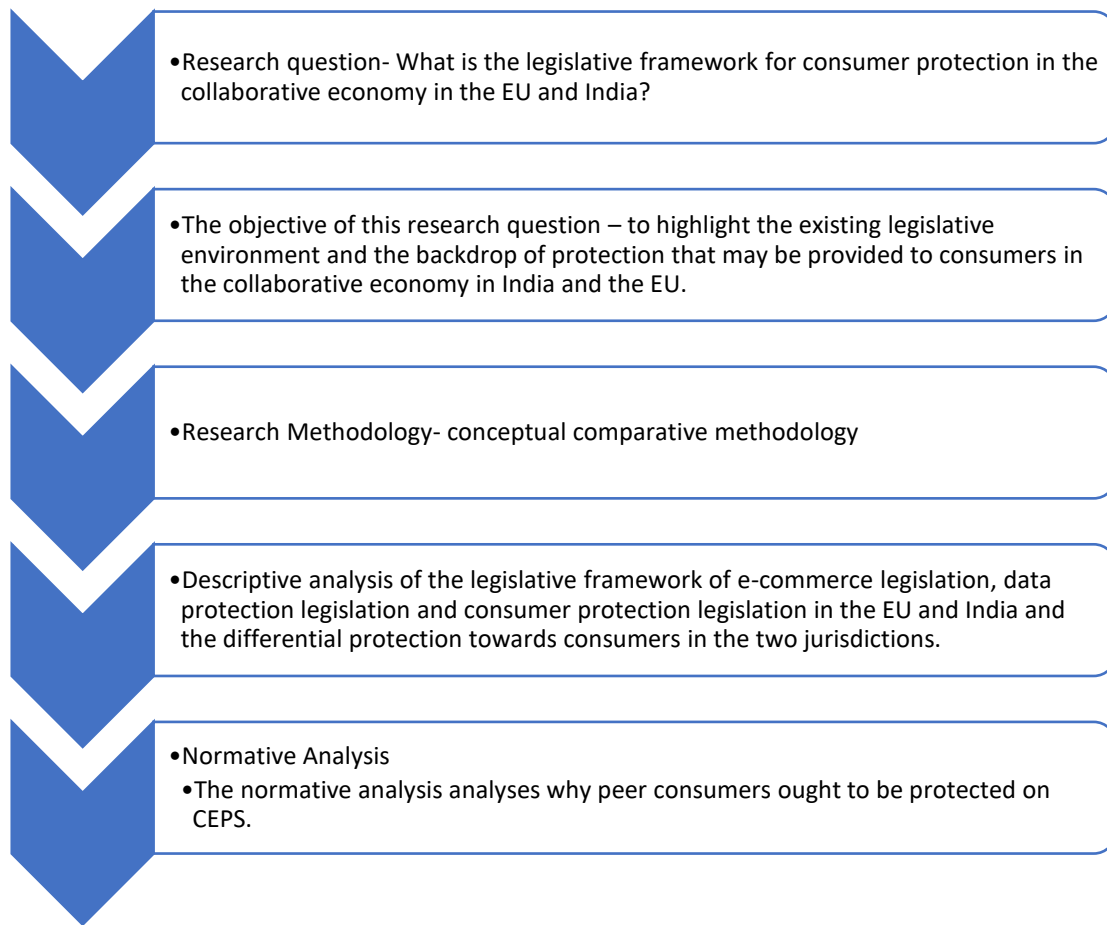


Figure 10: Structure of Chapter 2.

2. E-Commerce Legislation's applicability in the collaborative economy

E-commerce legislation describes legislation governing electronic commerce transactions. With the rise of the internet and cross-border trade online, e-commerce legislation aimed to establish a flexible, technology-neutral legal framework to promote electronic commerce and enhance competitiveness.¹⁶⁷ The reason for enacting specific legislation for online transactions is due to the nature of online transactions, which differs from traditional transactions. Online transactions include the use of data, digital payment methods, limited interaction between parties, and not being bound by geographic boundaries. The application of e-commerce legislation to CEPs is because their business model is based online, facilitating transactions between the service providers and consumers.¹⁶⁸

The EU's E-Commerce Directive and India's Information Technology (IT) Act were introduced in the early 2000s and recognised electronic commerce transactions.¹⁶⁹ The transactions through electronic means attract the study of the applicability of e-commerce legislation to consumers on CEPs. Various amendments and sector-specific developments have expanded the e-commerce legislative environment.

The study of e-commerce legislation provides the backdrop of applicable legislation to CEPs and their impact on consumers. In the EU, the focus on consumer protection under e-commerce legislation is on transparency and disclosure requirements, including algorithmic

¹⁶⁷ Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (1999/C 30/04- COM(1998) 586 final - 98/0325(COD)); Ian Walden and Julia Hörnle, *E-Commerce Law and Practice in Europe* (Woodhead Pub 2001) Section 4: Intermediaries.- Chapter 1- Rosa Julia-Barcelo, Liability for on-line intermediaries: comparing EU and US legal frameworks and Chapter 2- Apollonia Martinez Nadal Comments and critical reflections on the European directive on a common framework for electronic signatures and certification service providers. The Information Technology Act, 2000.

¹⁶⁸ The detailed description of CEPs and their business model is discussed in Chapter 1

¹⁶⁹ E-Commerce Directive, OJ L 178, 17.7.2000; The Information Technology Act, 2000. The EU's E-Commerce Directive came into force on 8 June 2000 and India's Information Technology Act came into force on 9 June 2000.

transparency, by CEPs in relation to the main parameters used to create rankings. In India, too, e-commerce legislation focuses on transparency and disclosure requirements towards consumers in relation to ratings and reviews by CEPs. The use of algorithms by CEPs requires data inputs collected from its users.

Arguments are presented that CEPs are amidst an identity crisis of their own making.¹⁷⁰ On the one hand, CEPs should not only be regulated like their ‘traditional’ businesses because they facilitate transactions between consumers and service providers. In other words, CEPs enable dyadic transactions between providers and consumers.¹⁷¹ On the other hand, it is also argued that CEPs exercise control over service providers and consumers, build a collaborative community, mediate consumer choice, and nurture relationships in a triadic transaction.¹⁷²

The current regulation of CEPs occurs under the existing legislative framework. Regulating CEPs like their traditional counterparts would require the application of existing legal protections under the e-commerce legislation to the parties in e-commerce transactions in the collaborative economy. In the absence of a CEP's specific legislation, the legal status of CEPs is based on current legislation.

¹⁷⁰ Davidson, Finck and Infranca (n 9) 449; Echikson and Goldberg (n 125) 27; Alberto De Franceschi, ‘Uber Spain and the “Identity Crisis” of Online Platforms’ [2018] *Journal of European Consumer and Market Law* 3.

¹⁷¹ Margherita Colangelo and Vincenzo Zeno-Zencovich, ‘Online Platforms, Competition Rules and Consumer Protection in Travel Industry’ [2016] *Journal of European Consumer and Market Law* 76.

¹⁷² Sabine Benoit and others, ‘A Triadic Framework for Collaborative Consumption (CC): Motives, Activities and Resources & Capabilities of Actors’ (2017) 79 *Journal of Business Research* 219-220.; Davidson, Finck and Infranca (n 9) 449.

2.1. European Union

2.1.1. E-Commerce Directive

With the rapid expansion of internet use, the European Commission set up a framework to remove cross-border obstacles in online services in the internal market. The E-Commerce Directive was enacted to ensure free online movement within the EU and the EEA.¹⁷³ The Directive harmonized rules on issues such as the transparency and information requirements for online service providers, commercial communications, and electronic contracts and limitations of liability of intermediary service providers.¹⁷⁴

CEPs engage in electronic commerce transactions, i.e., transactions conducted through electronic means. The legislation that recognises and applies to e-commerce transactions is the E-Commerce Directive.¹⁷⁵ The E-commerce Directive applies to Information Society Services (ISS). ISS are services provided for remuneration at a distance, by electronic means and at the individual request of a recipient of services.¹⁷⁶ So, are CEPs considered ISS under the E-Commerce Directive provisions?

The Court of Justice of the European Union (CJEU), in the Uber case in 2017, held that Uber is a transport service provider and not a digital intermediary providing ISS.¹⁷⁷ The Court

¹⁷³ E-Commerce Directive, OJ L 178, 17.7.2000.

¹⁷⁴ *ibid* Article 5- General Information to be provided, Article 6- Information to be provided in commercial transactions, Article 10- information to be provided in contracts concluded by electronic means.

¹⁷⁵ E-Commerce Directive, OJ L 178, 17.7.2000 Chapter 1, Article 1(2)- Objective and scope.

¹⁷⁶ *ibid* Recital 17 and Article 2(a) ; Directive 98/84/EC on the Legal protection of services based on, or consisting of, conditional access (OJ L 320, 28.11.1998, p 54–57) Article 2(a) ; Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 204, 21.7.1998,) Article 1(2). E-Commerce Directive, OJ L 178, 17.7.2000 Article 3(2) and (4)- Internal Market.

¹⁷⁷ *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981 [2017] Court of Justice of the European Union C-434/15 Paragraph 40. Directive 2015/1535/EU laying down a procedure for the

crafted what is now known as the two-pronged Uber test. The two prongs check if a platform is a *market maker*, create a market for the service providers and consumers, and exercise *decisive influence* over the terms of service provision. The service provided by Uber was regarded as a transportation service and thus cannot be classified as an ISS.¹⁷⁸ Uber's matching activity and the sharing (transportation) contract are economically dependent. Uber offers one 'composite service' of which the contract making by electronic means and factual transport are part.¹⁷⁹

In a contrasting decision, the CJEU, in the Airbnb case in 2019, decided that Airbnb is an ISS, passing the two-pronged Uber test.¹⁸⁰ The Court held that Airbnb intends to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services while also providing a certain number of services ancillaries to intermediation service and must be classified as an ISS.¹⁸¹

Uber and Airbnb are only two examples of CEPs in the ride-sharing and accommodation-sharing sectors. However, applying the E-Commerce Directive to these two CEPs in the EU

provision of information in the field of technical regulations and of rules on Information Society services (codification) 2015 (OJ L 241, 17.9.2015, p 1–15). Though the Directive of 2015/1535 was passed Directive 98/34 remained the applicable *ratione temporis* to the case.

¹⁷⁸ *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981 (n 177) Paragraph 40.

¹⁷⁹ *ibid* Paragraph 39.

¹⁸⁰ E-Commerce Directive, OJ L 178, 17.7.2000 Article 3; Information Society Services Directive, OJ L 241, 17.9.2015 Article 1(1)(b); *YA, Airbnb Ireland UC, Hôtelière Turenne SAS, Association pour un hébergement et un tourisme professionnel (AHTOP), Valhotel* ECLI:EU:C:2019:1112 [2019] Court of Justice of the European Union C-390/18 Paragraph 49. De Franceschi (n 168) 2; Apol lònía Martínez Nadal, 'Regulating Airbnb in Spain' [2019] *Journal of European Consumer and Market Law* 43; Vanessa Mak, 'Private Law Perspectives on Platform Services- Airbnb: Home Rentals between AYOR and NIMBY' [2016] *Airbnb: Home Rentals between AYOR and NIMBY* 20.

¹⁸¹ *YA, Airbnb Ireland UC, Hôtelière Turenne SAS, Association pour un hébergement et un tourisme professionnel (AHTOP), Valhotel* (n 122) Paragraph 69; Christoph Busch, 'The Sharing Economy at the CJEU: Does Airbnb Pass the "Uber Test"?' [2018] *EuCML-Journal of European Consumer and Market* 172.

differs. Based on the opinion CJEU of Uber not being and ISS and Airbnb being ISS, there is a fragmentation of the application of regulations to CEPs.¹⁸² If CEPs are fragmented, the legal framework is fragmented, i.e., certain CEPs are considered ISS and not others. There is no uniform application of the E-Commerce Directive to all CEPs, and similar transparency and information disclosure requirements would not be applied. For example, in the situation that Uber is not an ISS, under the CJEU judgement, the Fairness and Transparency Regulation, applying to ISS would not apply to Uber but would apply to Airbnb. The disclosure of the main parameters of the ranking, provided under the Fairness and Transparency Regulation, will apply to Airbnb, an ISS, but not Uber, when both CEPs provide rankings.¹⁸³ The lack of uniform application of the E-Commerce Directive to all CEPs introduces disparity in transparency and information disclosure requirements. This scenario, where the Fairness and Transparency Regulation applies differently to platforms like Uber and Airbnb based on their classification, raises concerns about inconsistent regulatory frameworks, potentially impacting consumers' interests in CEPs.

All electronic commerce transactions are built upon the E-commerce Directive's framework. With changes in the e-commerce environment, e-commerce legislation is being revamped under the Digital Services Act (DSA) and the Digital Markets Act (DMA).¹⁸⁴ The e-commerce legislation applicable to CEPs includes the Fairness and Transparency Regulation.¹⁸⁵

¹⁸² *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, ECLI :EU :C :2017 :981 (n 164) ; *YA, Airbnb Ireland UC, Hôtelière Turenne SAS, Association pour un hébergement et un tourisme professionnel (AHTOP), Valhotel* ECLI :EU :C :2019 :1112 (n 167) e ; E-Commerce Directive, OJ L 178, 17.7.2000; Martien Y Schaub, 'Why Uber Is an Information Society Service' [2018] *Journal of European Consumer and Market Law* 114.

¹⁸³ Regulation 2019/1150/EU on promoting fairness and transparency for business users of online intermediation services (Fairness and Transparency Regulation) 2019 (PE/56/2019/REV/1, OJ L 186, 11/7/2019).

¹⁸⁴ Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending directive 2000/31/EC (Digital Services Act; Regulation 2022/1925 on contestable and fair markets in the digital sector and amending Directive EU 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (PE/17/2022/REV/1 OJ L 265, 12/10/2022).

¹⁸⁵ P2B Regulation, OJ L 186, 11.7.2019.

2.1.2. Digital Services Act (DSA) and Digital Markets Act (DMA)

The DSA recognises the particular impact of large online platforms on the economy and society. It sets a higher standard of transparency and accountability on how the providers of such platforms moderate content, advertising, and algorithmic processes.¹⁸⁶ The DSA introduces new obligations on intermediary services to disclose to regulators how their algorithms work, how decisions to remove content are taken, and how advertisers target users.¹⁸⁷ Intermediary services need to provide information on restrictions they impose in relation to their service in their terms and conditions, including information on policies, procedures, measures and tools used for content moderation and algorithmic decision-making.¹⁸⁸

The DSA uses the term recommender systems, which include ranking systems, as rankings place the recommended products and services in a specific order.¹⁸⁹ The DSA provides disclosure requirements on large online platforms to set the main parameters for creating their recommender system.¹⁹⁰ The recommender system recommends similar products and services based on the data collected.¹⁹¹ CEPs use recommender systems to suggest specific

¹⁸⁶ Digital Services Act, COM(2020) 825 final 2020/036 2.

¹⁸⁷ *ibid* Recitals 57, 58, 60, 62, 64 and 99; Article 12- Terms and conditions, Article 54- Power to conduct on-site inspections and Article 57- Monitoring actions.

¹⁸⁸ *ibid* Article 12- Terms and Conditions.

¹⁸⁹ *ibid*.

¹⁹⁰ For example, the list seen on Amazon or Google are ranked in a certain manner- based on relevance, based on price, proximity etc. However, recommendations are based on preferences that the algorithm can understand based on previous use and is not necessarily ranked in any order. It is recommended based on previous transactions- for example the recommendations on TikTok, YouTube, Netflix would fall under the ambit of this Act, if they are considered as gatekeeper platforms

¹⁹¹ Digital Services Act, COM(2020) 825 final 2020/0361 (COD) Article 29- Recommender Systems.

information to recipients of the service, including a search initiated by the recipient or otherwise determining the relative order or prominence of the information displayed.¹⁹²

In this thesis and under the DSA, CEPs like Uber and Airbnb are intermediary services.¹⁹³ Under the decision by the CJEU, Uber is not an ISS, and the E-Commerce Directive is not applicable. On the other hand, Airbnb is considered an ISS and the E-Commerce Directive would be applicable. Under the DSA, this differentiation would not occur. The term intermediary service describes providing mere conduit service, caching service or hosting service.¹⁹⁴ CEPs of Uber and Airbnb provide intermediary services as they transmit, store, and process information between users. As stated, Uber and Airbnb are only two examples in the ride-sharing and accommodation-sharing sectors; however, the DSA on smaller CEPs with similar business models is to be tested over time.

The DSA proposed by the European Commission aims to establish a comprehensive regulatory framework for digital services, including online platforms, to ensure their accountability, transparency, and responsibility towards users. Article 29-35 of the DSA specifically addresses responsibilities of online platforms towards their users.¹⁹⁵

¹⁹² *ibid* Article 2(o)- Definition, Recommender System; Rossana Ducato and Alain Strowel, *Legal Design Perspectives- Theoretical and Practical Insights from the Field* 173.

¹⁹³ Digital Services Act, COM(2020) 825 final 2020/0361 (COD) Article 2(f)- Intermediary service.

¹⁹⁴ E-Commerce Directive, OJ L 178, 17.7.2000 Article 12- Mere conduit, 13- Caching and 14- Hosting respectively. Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending directive 2000/31/EC (Digital Services Act Article 3- Mere Conduit, Article 4- Caching and Article 5- Hosting.

A ‘mere conduit’ service that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network; A ‘caching’ service that consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request; A ‘hosting’ service that consists of the storage of information provided by, and at the request of, a recipient of the service.

¹⁹⁵ Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending directive 2000/31/EC (Digital Services Act Article 29-35.

The responsibilities, as outlined in the DSA, requires online platforms to proactively address illegal content, activities, or risks that may harm users or violate their rights. This includes implementing effective content moderation mechanisms, such as automated tools and human review processes, to detect and promptly remove illegal or harmful content. Additionally, online platforms must provide users with transparent and accessible reporting mechanisms to flag inappropriate content or activities and seek redress for any harm experienced.

These are all requirements for VLOPs or, in the case of the thesis, CEPs. The duty of care recommended in this thesis applies to P2P transactions, i.e., transactions between peer service providers and consumers. The CEPs act as oversight authorities and facilitate transactions. Peer service providers operating within P2P transactions facilitated by online platforms may not fall directly under the jurisdiction of the DSA. However, the principles embedded in Articles 29-35, particularly regarding content moderation, user safety, and consumer rights protection, can serve as guiding principles for these service providers' duty of care obligations.

Along the same lines of revamping the e-commerce legislative environment, the DMA was proposed by the European Commission. The DMA was passed to ensure higher competition in the European digital markets by preventing large companies from abusing their market power and allowing new players to enter the market, i.e., gatekeeper platforms.¹⁹⁶ CEPs like Uber and Airbnb have not been explicitly listed as gatekeeper platforms. If such CEPs meet the criteria of gatekeeper platforms, the provisions of the DMA will apply. Thus, the DMA forms part of the e-commerce legislation framework in this thesis.

¹⁹⁶ Regulation 2022/1925 on contestable and fair markets in the digital sector and amending Directive EU 2019/1937 and (EU) 2020/1828 (Digital Markets Act) Article 1- Subject matter and scope.

2.2. India

2.2.1. Information Technology Act and Rules

The information technology law in India was framed in light of the United Nations Commission on International Trade Law (UNCITRAL) Model Law of Electronic Commerce.¹⁹⁷ India enacted the Information Technology (IT) Act based on these Model Laws.¹⁹⁸ The IT Act was the first legislation in India to recognize transactions carried out by electronic data interchange, e-communication, and e-commerce and validate e-contracts.¹⁹⁹

In India, CEPs like Uber, Ola, Oyo Rooms, Airbnb, Local Ramu, and Urban Company are considered intermediaries under the IT Act.²⁰⁰ An intermediary refers to any person (legal or natural) who, on behalf of another person, receives, stores, transmits or provides any service

¹⁹⁷ ‘United Nations Commission On International Trade Law- Model Law on Electronic Commerce with Guide to Enactment, 1996’. ‘UNCITRAL Model Law on Electronic Commerce (1996) with Additional Article 5 Bis as Adopted in 1998 | United Nations Commission On International Trade Law’ <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce>. The principle of non-discrimination ensures that a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. The principle of technological neutrality mandates the adoption of provisions that are neutral with respect to technology used. In light of the rapid technological advances, neutral rules aim at accommodating any future development without further legislative work. The functional equivalence principle lays out criteria under which electronic communications may be considered equivalent to paper-based communications. Madhurima Khosla and Harish Kumar, ‘Growth of E-Commerce in India: An Analytical Review of Literature’ (2017) 19 IOSR Journal of Business and Management 91. ‘UNCITRAL Model Law on Electronic Commerce (1996) with Additional Article 5 Bis as Adopted in 1998 | United Nations Commission On International Trade Law’.

¹⁹⁸ The Information Technology Act, 2000.

¹⁹⁹ *ibid* Sec.10A.- Validity of contracts formed through electronic means. Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

²⁰⁰ *ibid* Section 2(w)- Intermediary.

with respect to the information provided. The IT Act is the *lex generalis* in relation to e-commerce law in India.

Under the IT Act, the Central Government released the Information Technology Rules (IT Rules) under the ‘Intermediary Guidelines and Digital Media Ethics Code’, creating a *lex specialis* for intermediaries.²⁰¹

The IT Rules address the due diligence by intermediaries and grievance redressal mechanisms, due diligence by significant intermediaries, a code of ethics concerning digital media, and a self-regulating mechanism by intermediaries of an independent association consisting of these intermediaries.²⁰² Analysing the IT Rules aims to understand the legislative framework applicable to CEPs and their disclosure mandates towards consumers. Though the rules aim to address information/content intermediaries specifically to reduce misinformation, these rules apply to all intermediaries and CEPs.²⁰³

²⁰¹ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

²⁰² *ibid* Part II- Due Diligence by intermediaries and Grievance Redressal Mechanism and Part III- Code of Ethics and Procedure and Safeguards in Relation to Digital Media. Kanika Satyan, ‘E-Commerce and Consumer Rights: Applicability of Consumer Protection Laws in Online Transactions in India’ SSRN Electronic Journal 3-4.

²⁰³ The Rules did not state what significant social media intermediaries were and gave the power to the Central Government to notify the same. On the same day, the Central Government notified that a social media intermediary would be considered a significant social media intermediary if they have fifty lakh (5 million) users in India. Ministry of Electronics and Information Technology Notification 2021 (SO 942(E)). Parallels can be drawn to gatekeeper platforms under the DMA. There are also sector specific legislations affecting specific accommodation sharing or ride sharing platforms. Common National Standards and Guidelines for Classification of Incredible India Bed & Breakfast Establishments and Incredible India Homestay Establishments (No4-TH-II(21)/2016-Pt-II-H&R). In this regard, the states of Karnataka, Maharashtra, Rajasthan and West Bengal issued such Rules -Karnataka On- demand Transportation Technology Aggregators Rules, 2016. (No SARIE 67 SAEPA 2015); Maharashtra City Taxi Rules, 2017 (No MVR 0315/CR109/TRA-2); Rajasthan On-Demand Information Technology Based Transportation by Public Service Vehicles Rules, 2016 (SNoF7(495)Rari/Trans/Rules/HQ/2013/21794); West Bengal On-Demand Transportation Technology

2.2.2. Draft National E-commerce Policy

In addition to the IT Rules, India has sought to provide a detailed policy on e-commerce.²⁰⁴ In 2018, a discussion paper on e-commerce in India was published, and recommendations were solicited.²⁰⁵ These recommendations and suggestions formed the foundation of the Draft National E-commerce Policy (DNEP). The use of data and algorithms in e-commerce transactions are a few significant policy aspects discussed in the DNEP.²⁰⁶ The DNEP stands as a policy made in the present for the future. It addresses the needs of consumers specific to e-commerce transactions, considering consumer protection legislation, e-commerce legislation, and data protection.²⁰⁷

E-Commerce Legislation

Aggregator Rules, 2016. Motor Vehicles (Amendment) Act, 2019 (No 32 of 2019); Motor Vehicle Aggregator Guidelines, Government of India, Ministry of Road Transport and Highways, 2020.

²⁰⁴ The Consumer Protection (E-Commerce) Rules 2020; The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.; Ashok Kumar Panigrahi, Ranjan Upadhyaya and PP Raichurkar, 'E-Commerce Services in India: Prospects and Problems' (2016) 2 International Journal on Textile Engineering and Processes 16; Devanshu Gupta, 'Digital Platforms and E-Commerce in India – Challenges and Opportunities' [2020] SSRN Electronic Journal 3.

²⁰⁵ Kumar Mangla and others (n 36) 9.

²⁰⁶ Draft National E-Commerce Policy- India's Data for India's Development, 2019 13.

²⁰⁷ 'Department for Promotion of Industry and Internal Trade Ministry of Commerce and Industry Government of India, Consolidated FDI Policy' (2020) 5.2.15.2.3- Guidelines for Foreign Direct Investment on E-Commerce Sector. IBEF, 'E-Commerce' (May 2021). Shrey Nougaraheya, Gaurav Shetty and Dheeraj Mandloi, 'A Review of E – Commerce in India: The Past, Present, and the Future' (2021) 6 Research Review International Journal of Multidisciplinary. 'Department for Promotion of Industry and Internal Trade Ministry of Commerce and Industry Government of India, Consolidated FDI Policy'. Gupta (n 37); Anjali, 'E-Commerce Laws and Regulations in India' (*VakilSearch*) <<https://vakilsearch.com/advice/e-commerce-laws-and-regulations-in-india/#:~:text=No>>. Kadam N Santosh and Suryawanshi D Santosh, 'Contemporary Issues of E-Commerce and Its Implications in Indian Economy' (2015) 4 International Multidisciplinary Research Journal 8.

E-Commerce Legislation in the EU	E-Commerce Legislation in India
E-Commerce Directive, Digital Services Act (DSA) and Digital Markets Act (DMA)	Information Technology Act (IT Act), Information Technology Rules (IT Rules) and Draft National E-Commerce Policy (DNEP)
<i>Tertium comparationis:</i> These legislations apply to e-commerce transactions, i.e., online transactions.	
Similarities	They legislate on e-commerce transactions and have been technology-neutral. Furthermore, they are being updated to keep pace with technological changes. These legislations apply to CEPs because these platforms and transactions occur through an online medium.
Differences	Though the DMA and the IT Rules apply to large platforms, the objectives of the regulation (for regulating competition and social media content) are different. These differences could impact CEPs if they reach the thresholds as prescribed under the legislation.
Recent Developments	The DMA and the DSA were recently adopted to keep pace with rapidly developing technologies, amending the

	e-commerce legislation and regulating platforms. Similarly, India has set out its policy for ramped e-commerce legislation in the Draft National E-Commerce Policy.
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Figure 11: E-Commerce Legislations in the EU and India.

2.3. Applicability to tri-partite relationships in the collaborative economy

2.3.1. Platform to business transactions – CEP to service provider transactions

The E-commerce Directive applies to CEP to service provider transactions as these transactions are conducted online. CEPs provide intermediation services and connect service providers to consumers.²⁰⁸ The material scope of the E-Commerce Directive would apply to information society services. In situations where CEPs are ISS and pass the tests set out by the judiciary, the e-commerce Directive would apply. However, in situations where the CEP does not pass the two-pronged test, for example, Uber, the E-Commerce Directive would not apply.

Further, the Fairness and Transparency Regulation applies to platforms to business transactions. The Fairness and Transparency Regulation regulates relationships between businesses using online intermediation services (CEPs) and service providers on CEPs.²⁰⁹ The Regulation seeks to ensure business users (service providers) are granted appropriate

²⁰⁸ Service providers are the recipient and users of the services provided by CEPs.

²⁰⁹ P2B Regulation, OJ L 186, 11.7.2019; Christian Twigg-Flesner, ‘Towards a European Law on Unfair B2B Trading Practices?’ [2018] Journal of European Consumer and Market Law 2; Christian Twigg-Flesner, ‘The EU’s Proposals for Regulating B2B Relationships on Online Platforms – Transparency, Fairness and Beyond’ [2018] Journal of European Consumer and Market Law 224; Christoph Busch, ‘The P2B Regulation (EU) 2019/1150: Towards a “Procedural Turn” in EU Platform Regulation?’ [2020] Journal of European Consumer and Market Law 134.

transparency, fairness and practical redress possibilities.²¹⁰ The Regulation also provides specific conditions related to restrictions, suspension, and terminations, which are essential to prevent the unwarranted removal of service providers from CEPs.²¹¹ Though this Regulation applies between CEPs and service providers(P2B), the network effect of the collaborative economy makes these provisions impact consumers.²¹²

However, similar to the E-Commerce Directive, this Regulation applies to online intermediation services that are information society services.²¹³ Thus, this Regulation does not apply to CEPs like Uber if it is considered not an ISS under the decision of the CJEU.²¹⁴ However, this regulation does not apply to this research and CEPs and ISSs like Airbnb.

The Regulation also provides that online intermediation services, CEPs, have to disclose the main parameters used to determine rankings and the reasons for the relative importance of those main parameters instead of other parameters.²¹⁵ Intellectual property rights protect the algorithm that conducts the business operations as disclosures occur without encroaching on

²¹⁰ P2B Regulation, OJ L 186, 11.7.2019 Article 3- Terms and conditions; Twigg-Flesner, ‘The EU’s Proposals for Regulating B2B Relationships on Online Platforms – Transparency, Fairness and Beyond’ (n 206) 134.

²¹¹ P2B Regulation, OJ L 186, 11.7.2019 Article 4- Restriction, suspension and termination; Twigg-Flesner, ‘The EU’s Proposals for Regulating B2B Relationships on Online Platforms – Transparency, Fairness and Beyond’ (n 206) 134.

²¹² Newton and Perle (n 120) 30.

²¹³ P2B Regulation, OJ L 186, 11.7.2019 Article 2(2)(a)- Definition of Online intermediation services, Article 1(2)- Subject matter and scope. Twigg-Flesner, ‘The EU’s Proposals for Regulating B2B Relationships on Online Platforms – Transparency, Fairness and Beyond’ (n 206) 134.

²¹⁴ *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981 (n 177).

²¹⁵ P2B Regulation, OJ L 186, 11.7.2019 Article 2(8)- Ranking, Article 5(1)- Rankings. Twigg-Flesner, ‘The EU’s Proposals for Regulating B2B Relationships on Online Platforms – Transparency, Fairness and Beyond’ (n 206) 134.

CEPs' intellectual property.²¹⁶ These parameters lay out the factors that affect the ranking of service providers on CEPs. This parameter description aims to improve predictability and help businesses improve the presentation of their products and services.²¹⁷ In light of the Regulation, the Commission developed further guidelines to assist intermediary services in applying the ranking transparency requirements and optimising the presentation of main parameters to service providers.²¹⁸

The Fairness and Transparency Regulation (and the guidelines on ranking transparency) seeks to create a balance of disclosure of parameters that create the ranking without disclosing algorithms or any information which could result in the deception of consumers or consumer harm through manipulation of results. As the Fairness and Transparency Regulation's ranking transparency requirements apply to service providers of CEPs, the Modernization Directive provides ranking transparency for consumers.²¹⁹ The Modernization Directive amended the UCPD to incorporate the ranking transparency principles provided under the Fairness and Transparency Regulation.²²⁰ A detailed analysis of algorithmic transparency about rankings is presented in Chapter 3.

In India, the DNEP states that CEPs must devise mechanisms to prevent fraudulent R&R by sellers and their affiliates.²²¹ The DNEP also states that CEPs should not adopt discriminatory business strategies, favouring one or a few sellers/traders (service providers) operating on

²¹⁶ Fairness and Transparency Regulation, OJ L 186, 11.7.2019 Recital 27 and Article 5(6)- Rankings ; Directive 2016/ 943/EU on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157, 15.6.2016) 943.

²¹⁷ P2B Regulation, OJ L 186, 11.7.2019 Recitals 24, 25, 26.

²¹⁸ *ibid* Recital 28; Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council. (2020/C 424/01).

²¹⁹ Modernization Directive, OJ L 328, 18.12.2019.

²²⁰ *ibid* Recitals 18,19,29,21,22,23 and 26 and Article 3- Amendments to Directive 2005/29/EC.

²²¹ Draft National E-Commerce Policy- India's Data for India's Development, 2019 Part III- E-Commerce Marketplaces- Authentic Ratings and Reviews 23.

the CEP.²²² Though this provision addresses algorithmic discrimination between CEPs and service providers, as the DNEP develops, the provision could also include the prevention of discrimination amongst consumers.

2.3.2. B2C transactions

CEPs provide intermediation, facilitation, and matching services to consumers. In the EU, the E-Commerce Directive applies to ISS. The term ISS refers to services provided for remuneration at a distance, by electronic means and at the individual request of a recipient of services. For this definition: (i) ‘at a distance’ means that the service is provided without the parties being simultaneously present; (ii) ‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means; (iii) ‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request.²²³

However, in the instances where CEPs, for example, Uber, are considered not to be an ISS, the E-Commerce Directive would not apply. This Directive would apply when CEPs, for example, Airbnb, are considered an ISS. Uber and Airbnb are examples, but other platforms could be tested against the same standard. For consumers, the applicability of the E-Commerce Directive would require the service provider, i.e., CEPs, to provide the name of the service provider, the geographic address at which the service provider is established, email addresses, registration of the service provider, is to be provided to the recipients of

²²² *ibid* 19-20.

²²³ Information Society Services Directive, OJ L 241, 17.9.2015 3, Article 1(b) Service.

services.²²⁴ This means that professional service providers would have to provide all the necessary information to their consumers.

In India, the DNEP states that marketplaces (CEPs) must ensure transparency and non-discrimination in publishing ratings and reviews.²²⁵ The DNEP emphasises CEPs' liability to ensure the genuineness of any information posted on their websites. The policy states that all R&Rs for verified purchases must be published as registered by the consumer, except those found promotional, abusive or inappropriate in a community setting.

2.3.3. P2P transactions

Similar to services provided under B2C transactions, peer service providers also provide services at a distance, by electronic means and at the request of the peer consumer.²²⁶ Amazon's Mechanical Turk, or Fiverr, where business processing can be outsourced to individuals, professional service providers or peers, are examples of peer-to-peer transactions provided at a distance. In relation to consumer protection, peer service providers would be subject to the provisions of the E-Commerce Directive as it applies to electronic communications and contracts, i.e., e-commerce transactions.

In India, similarly, the IT Act applies to transactions carried out by electronic data interchange and e-communication, e-commerce and validated e-contracts.²²⁷ The services

²²⁴ E-Commerce Directive, OJ L 178, 17.7.2000 Chapter II- Principles- Section 1: Establishment and information requirements, Section 2: Commercial Communications, Section 3: Contracts concluded by electronic means.

²²⁵ Draft National E-Commerce Policy- India's Data for India's Development, 201 .

²²⁶ Information Society Services Directive, OJ L 241, 17.9.2015 3, Article 1(b) Service.

²²⁷ The Information Technology Act, 2000 Sec.10A.- Validity of contracts formed through electronic means. Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic

peer service providers provide e-commerce transactions, and the IT Act and Rules provisions apply. Consumers are protected in B2C and P2P transactions by e-commerce legislation.

Applicability to Consumers on CEPs	
Applicability in B2C transactions	Applicability in P2P transactions
Does the EU E-Commerce Legislation apply to consumers on CEPs?	Does the EU E-Commerce Legislation apply to peer consumers on CEPs?
Provisions of the Fairness and Transparency Regulation, though only applicable between CEPs and service providers, require transparent information to be accessible to consumers. Further, as transactions in the collaborative economy are online, the provisions of this legislation apply to B2C transactions.	As P2P transactions – between peer service providers and peer consumers- occur online through electronic contracts, provisions of e-commerce legislation would apply. There may not be specific provisions in relation to P2P transactions, but the broad ambit of definitions provides interpretative space to include P2P transactions.
Does the Indian E-Commerce Legislation apply to consumers on CEPs?	Does the Indian E-Commerce Legislation apply to peer consumers on CEPs?
As the e-commerce legislation applies to electronic commerce transactions, the IT Act and the Rules provisions apply.	As the transaction on CEPs takes place online, the provisions of the e-commerce legislation would apply. Furthermore, the broad ambit of the legislation permits the interpretation to include P2P transactions.

record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

Figure 12: Applicability of E-Commerce Legislations to Consumers in B2C and P2P transactions on CEPs.

3. Data Protection Legislation's applicability in the collaborative economy

CEPs deal with various parties in various roles- consumers, service providers, peers, and businesses, and deal with their data. Data are understood as units of information.²²⁸ Data, when processed, becomes information. The sheer volume and variety of data provided by parties and collected by CEPs are termed big data. Big data refers to information assets characterised by a high volume and variety requiring specific technology and analytical methods to transform into value - data to information.²²⁹ Interactions on CEPs add to the velocity and variability of the collected data.²³⁰ CEPs analyse this data to provide helpful information.²³¹

This process of data analysis on CEPs is done through algorithms written by human data analysts and coders to process and generate value. Algorithms are used to process big data and provide helpful information for CEPs, which helps in decision-making and value creation.

For example, CEPs like Fiverr or Local Ramu require information about the location and the services solicited to facilitate intermediate transactions. Ride CEPs of Uber and Ola require the location of the rider, the destination and the type of car solicited to match with drivers in the vicinity. These are a few data points collected from consumers to use the CEP to facilitate transactions, apart from the data points of name and email addresses collected while signing

²²⁸ A single unit of data is datum. And hence data is plural.

²²⁹ Andrea De Mauro and others, 'In (Big) Data We Trust: Value Creation in Knowledge Organizations - Introduction to the Special Issue' (2018) 54 *Information Processing & Management* 755-757.

²³⁰ Mandeep Kaur Saggi and Sushma Jain, 'A Survey towards an Integration of Big Data Analytics to Big Insights for Value-Creation' (2018) 54 *Information Processing & Management* 758-790.

²³¹ Maurice Stucke and Allen P Grunes, 'Introduction to Big Data and Competition Policy', *Big Data and Competition Policy* (2016) 51. De Mauro and others (n 226) 755.; Hatzopoulos, *The Collaborative Economy and EU Law* (n 9). 67.- the acquisition, analysis and application of data on collaborative platforms.

into the platform. The data points collected and their usage are mentioned in the CEP's privacy policies or terms and conditions of service.

Data protection legislation is crucial to protecting the rights of consumers' data in the digital economy. Data protection refers to the protection of the data rights of a consumer. The name of the legislation is a misnomer, as it does not protect the data but protects the data subject as algorithms process the data automatically. The GDPR and the DPDPA are landmark personal data protection legislation in the EU and India.

3.1. European Union- General Data Protection Regulation

The history of data protection in the EU begins with the Data Protection Directive.²³² It stood as the Directive on personal data and the free data flow across the EU.²³³ This Directive was replaced by the global lighthouse of personal data protection legislation- GDPR.²³⁴ The GDPR is binding and applicable and allows individual Member States to adjust certain aspects of the Regulation.²³⁵ The GDPR provides a range of individual rights designed to protect consumers whose personal information is collected, processed, and stored by

²³² Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

²³³ Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data, 1990, COM(90) 314 final; Ian Walden and Julia Hörnle, *E-Commerce Law and Practice in Europe* (Woodhead Pub 2001) Section 5- Data Protection.

²³⁴ GDPR, OJ L 119, 4.5.2016. Make Data Better, 'GDPR: The Torchbearer for Better Data Privacy Laws' (*Medium*, 14 April 2020) '16 Countries with GDPR-like Data Privacy Laws' (*Security Scorecard*) <<https://securityscorecard.com/blog/countries-with-gdpr-like-data-privacy-laws>>. This balanced the *laissez-faire* approach in the United States(CCPA) and the regulatory approach in China. Srikrishna (n 16) 3-4. Alpert (n 16) 1219; 'CCPA and GDPR Comparison Chart' (n 16) 9; 'California Consumer Privacy Act (CCPA)- Practical Guide' (n 16) 2.

²³⁵ W Gregory Voss, 'Preparing for the Proposed EU General Data Protection Regulation: With or without Amendments' [2012] *American Bar Association* 2. Chase (n 14) 4.

corporations and other entities.²³⁶

In EU law, GDPR is the Regulation of data protection and privacy and the transfer of personal data, providing individuals control of their data.²³⁷ The provisions of the GDPR include data subject's rights, data controllers or processors, transfers of personal data to third countries, supervisory authorities, cooperation among Member States, processing of personal data, free movement of personal data and free movement of personal data and free movement of non-personal data.²³⁸ The GDPR's primary aim is to enhance individuals' control and rights over personal data and simplify international businesses' regulatory environment.

The GDPR is a standout legislation, and various nations are preparing similar legislation. Keeping with the digital environment and consumer protection background, the GDPR protects consumers' information online. Data provided by consumers online is their personal data, and thus, the GDPR is applicable.²³⁹

For example, CEPs used consumers' data and had to make a significant update after the enactment of the GDPR. CEPs like Uber and Airbnb, which operate in multiple countries,

²³⁶ M Victor (n 15) 513.

²³⁷ The GDPR is based on principles enshrined in the European Convention on Human Rights (ECHR) and the Treaty of the Functioning of the European Union (TFEU)- European Convention on Human Rights Article 7 and Article 8; The Treaty on the Functioning of the European Union Article 16(1). GDPR, OJ L 119, 4.5.2016 Article 1.

²³⁸ GDPR, OJ L 119, 4.5.2016 Recitals- 5,6,9,10,16,53,101,123,170, Article 4(24), Article 51, Article 58, Article 83. Regulation 2018/1807 on a framework for the free flow of non-personal data in the European Union. 'Access to Consumers' Data in the Digital Economy- Position Paper' (n 18). GDPR, OJ L 119, 4.5.2016. 'Data Protection Laws of the World' (n 18).

²³⁹ *ibid*, Article 4(1)- 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. Walden and Hörnle (n 165) Section 1: Introduction, 26.

have adopted different privacy policies and terms and conditions for different countries.²⁴⁰ These CEPs have a certain privacy policy that is GDPR compliant as applicable to European users and another policy for non-European users. The GDPR is the torchbearer in data protection legislation and has inspired other jurisdictions, one of them being India, to adopt a GDPR-style data protection policy.

3.2. India- Digital Personal Data Protection Act

The Digital Personal Data Protection Bill (DPDPA), 2023, is India's awaited data protection legislation.²⁴¹ Data protection can be traced back to 2017; in the landmark case of Justice K.S. Puttaswamy (Retd.) v Union of India, the right to privacy is an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution of India.²⁴² This judgment by the Supreme Court of India also placed the duty on the State to put in place a data protection framework to protect its citizens from dangers to their informational privacy.²⁴³

In light of the Puttaswamy judgement, the Committee of Experts under the Chairmanship of Justice B.N. Srikrishna was set up.²⁴⁴ The Srikrishna Committee published the Data Protection Framework (White Paper) for India in 2017.²⁴⁵ The White Paper was the first step in studying the various issues relating to data protection in India, raising questions on data

²⁴⁰ 'Privacy Policy - Airbnb Help Center' (*Airbnb*) <<https://perma.cc/9S42-XM9C>>; 'Outside of the United States Privacy Policy- Airbnb Help Center' (*Airbnb*) <<https://perma.cc/82BS-86AG>>.

²⁴¹ The Personal Data Protection Bill, 2019 Bill No. 373 of 2019.

²⁴² *Justice K.S. Puttaswamy(Retd.) v. Union of India* (n 40). This case overruled previous judgements of the Supreme court in *Kharak Singh vs State of UP and M.P Sharma vs Union of India* which had held that there was no right to privacy under the Constitution. Benjamin Wilson, 'Data Privacy in India: The Information Technology Act' [2010] SSRN Electronic Journal; The Constitution of India, 1950 Fundamental Rights- Part III of the Constitution of India.

²⁴³ *Justice K.S. Puttaswamy(Retd.) v Union of India* (n 185) 538.

²⁴⁴ Srikrishna (n 43) ii.

²⁴⁵ *ibid* i-ii.

protection, and calling for public comments from stakeholders to create a data protection framework specific to India.

Considering the White Paper and the comments from the stakeholders, in July 2018, the Srikrishna Committee published their report - ‘A Free and Fair Digital Economy- Protecting Privacy, Empowering Indians’ (Srikrishna Committee Report).²⁴⁶ This report formulated a legal framework relating to personal data and data protection. This report sought to create a distinct ‘fourth path’- different from the United States of America, the EU, and China- that could work as a template for the developing world.²⁴⁷

The White Paper and the Report published by the Srikrishna Committee considered various provisions of data protection legislation. They attempted to balance the benefits and consequences for a country like India- rapidly developing, balancing progress and privacy. While the Srikrishna Committee considered the mammoth in data protection legislation- the GDPR- the Committee believed that the transposition of the GDPR in India might pose certain drawbacks. The Committee recommended GDPR-style legislation, making it suitable for India.²⁴⁸

²⁴⁶ Srikrishna (n 16) 3.

²⁴⁷ *ibid* 4. *In the US, the laissez-faire approach to regulating data handling by private entities while imposing stringent obligations on the state is based on its constitutional understanding of liberty as freedom from state control. In Europe on the other hand, data protection norms are founded on the need to uphold individual dignity. China, on the other hand, frames its law with the interests of the collective as the focus, based on its own privileging of the collective over the individual. India’s path is not only to be relevant to India, but to all countries in the Global South which are looking to establish or alter their data protection laws in light of the rapid developments to the digital economy. After all, the proposition that the framework is based on is simple, commending itself to universal acceptability — a free and fair digital economy that empowers the citizen can only grow on the foundation of individual autonomy, working towards maximizing the common good.*

²⁴⁸ Anirudh Burman, ‘Will a GDPR-Style Data Protection Law Work for India?’ 8 Anu Bradford, ‘The Brussels Effect’ in Anu Bradford, *The Brussels Effect* (Oxford University Press 2020) 154.

From this committee report, the Personal Data Protection Bill 2018 was framed. However, this bill did not provide for certain crucial elements (for example, the right to erasure). The PDPB, 2019, replaced it.²⁴⁹ The PDPB 2019 aims to protect the privacy of individuals relating to their data, specify the flow and usage of personal data, create a relationship of trust between persons and entities processing the personal data, and protect the rights of individuals whose personal data are processed.²⁵⁰

In 2020, the Bill was analyzed by a Joint Parliamentary Committee (with both houses of Parliament) in consultation with experts and stakeholders.²⁵¹ As of 2021, the Joint Parliamentary Committee is attempting to introduce certain amendments and reintroduce the PDPB 2019 as the Data Protection Bill 2021, expanding the scope of the application to protect non-personal data.²⁵² As of October 2020, it was to be tabled for debate in the Budget session of the Parliament (usually between January and March of every year); however, this was delayed due to COVID-19 concerns.²⁵³

In August 2022, the PDPB 2019 was withdrawn from the Parliament.²⁵⁴ The withdrawal of the Data Protection Bill came with reports that a more comprehensive version may be introduced. As of November 2022, the Ministry of Electronics and Information Technology released the Digital Personal Data Protection Bill (DPDPB) 2022.²⁵⁵ This Bill was passed into an Act in August 2023.²⁵⁶ The purpose of the proposed Act is to provide for the

²⁴⁹ The Personal Data Protection Bill, 2018; The Personal Data Protection Bill, 2019 Bill No. 373 of 2019.

²⁵⁰ The Aadhar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (Act No 18 of 2016). The Personal Data Protection Bill, 2019 Bill No. 373 of 2019; Burman (n 45) 2.

²⁵¹ The Bill was set to be tabled in the Budget session of the Parliament in 2020- Usually between January and March. 'Personal Data Protection Bill: More Drama Ahead' (*Business Today*).

²⁵² Looking at "Bigger Umbrella", Personal Data Protection Bill Likely to Include Non-Personal Data' (*The Indian Express*, 5 October 2021).

²⁵³ Comment, 'Why India Has Introduced the New Personal Data Protection Bill' (*Data Centre Dynamics*) 1.

²⁵⁴ Lok Sabha Bulletin, August 2022 15.

²⁵⁵ The Digital Personal Data Protection Bill, 2022.

²⁵⁶ Digital Personal Data Protection Act, 2023.

processing of digital personal data in a manner that recognises both the right of individuals to protect their personal data and the need to process personal data for lawful purposes.²⁵⁷

Data Legislation	
Data Legislation in the EU	Data Legislation in India
General Data Protection Regulation (GDPR), Non-Personal Data Protection Regulation and Data Governance Act (GDA)	Digital Personal Data Protection Act (DPDPA)
<i>Tertium comparationis:</i> The commonality among these pieces of legislation is the application to protect the data and privacy of individuals. These legislations apply to the collaborative economy because individuals' data is collected and processed to facilitate transactions.	
Similarities	They apply to online transactions as well, and as CEPs facilitate transactions online, legislation on data protection would apply. The CEP is the party that processes the data from the users to facilitate intermediate transactions. Hence, the data protection legislation would be applicable in this regard.

²⁵⁷ The Digital Personal Data Protection Bill, 2022.

Differences	The Indian Legislation has recently been passed, and its enforcement is awaited. Where the EU has separate legislation for personal and non-personal data, the Indian legislation encompasses personal and non-personal data. In relation to processing data on CEPs, the GDPR provides for automated decision-making regarding the data collected, whereas in India, such a provision has not been included. When the final version of the legislation is passed, this provision will impact the processing of consumers' data in India.
Recent Developments	While the DPDPA has been recently passed, its application and enforcement are anticipated.

Figure 13: Data Protection Legislations in the EU and India.

3.3. Applicability to tri-partite relationships in the collaborative economy

3.3.1. Platform to business transactions – CEP to service provider transactions

Data protection under the GDPR and the DPDPA applies to protect the data rights of the data subject. A data subject is a natural person. Service providers are users of the CEP, and the CEP collects and processes their information to facilitate transactions. For example, the drivers' names and locations on Uber and Ola are collected and processed to connect with the riders.

Additionally, in the situation that service providers are employees, CEPs have the right to collect and process the data of the employees. Thus, the GDPR and DPDPA, as applicable to employees, would be applicable.

In the collaborative economy, the CEP is the controller (under the GDPR)/ data fiduciary (under the DPDPA), determining the purpose and means of processing and controlling personal data. These specifications are mentioned in the terms and conditions of service.²⁵⁸ Further, the CEP is the processor (under the GDPR)/ data processor (under the DPDPA) as they process the collected personal data.²⁵⁹ In the situation that a service provider is a legal person who uses the services of CEPs to connect with consumers, the data collected and processed by the CEP of the service provider would not be protected under the GDPR as it does not apply to legal persons.²⁶⁰

The Regulation on the free flow of non-personal data applies to professional users of the CEP operating during their business. In the case of service providers being legal persons, their

²⁵⁸ GDPR, OJ L 119, 4.5.2016 Article 4(7) 'controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law; The Personal Data Protection Bill, 2019 Section 3(13) "data fiduciary" means any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data.

²⁵⁹ GDPR, OJ L 119, 4.5.2016 Article 4(8) 'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller; The Personal Data Protection Bill, 2019 Section 3(15) "data processor" means any person, including the State, a company, any juristic entity or any individual, who processes personal data on behalf of a data fiduciary;

²⁶⁰ GDPR, OJ L 119, 4.5.2016 Recital 14, Article 1- Subject Matter and Objectives. The protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data. This Regulation does not cover the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person.

data collected and processed is not personal but non-personal data, i.e., any data other than personal data. The Regulation on the free flow of data applies to the relationship between CEPs and service providers when service providers are legal persons. In India, though, there is no separate regulation or legislation concerning non-personal data. The expansion of protection to be awarded to non-personal data under the Personal Data Protection Bill of 2019 was discussed; however, the current iteration of the DPDPA is limited to personal data, and there is no specific provision in this Act or any legislation in the pipeline for non-personal data protection. Consider this situation: a handy-person registered company, a legal person, uses a CEP of Fiverr or Local Ramu to connect with potential consumers in the area to provide them with services. In this situation, the relationship between the CEP and legal person in relation to data protection would be under the Regulation on free-flow of non-personal data and would not come under the ambit of the DPDPA, 2023.

3.3.2. B2C transactions

3.3.2.1. CEP to consumer transactions

CEPs are the controllers and processors of consumer data. The GDPR and the DPDPA apply to natural persons called data subjects (under the GDPR)/data principals (under the DPDPA).²⁶¹ The data points collected by the CEP are mentioned in the privacy policy or terms and conditions of use of the CEP.

Personal data is collected from the data subject or the data principal. The elements of personal data defined under the GDPR and the DPDPA are distilled into any data relating to an identified or identifiable natural person.²⁶² For example, consumers provide data about their

²⁶¹ *ibid* Article 4(1)- Definitions; Digital Personal Data Protection Act 2023 Section 2(j)- data principal" means the natural person to whom the personal data relates.

²⁶² GDPR, OJ L 119, 4.5.2016 Article 4 Definitions For the purposes of this Regulation: (1) 'personal data' means any ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in

name, email addresses, location, and preferences (on Tinder or matrimonial websites), provide their need for accommodation between certain dates on Airbnb or Oyo rooms and generate a profile based on these data points. This personal data of consumers is processed to generate information used by CEPs to intermediate and facilitate transactions on CEPs.

The GDPR and the DPDPA also similarly regulate the processing of data. Under the GDPR and the DPDPA, there are similar and different rights of the data subjects/data principals (consumers). Similar rights are the right to confirm and access the data, data portability, rectification (correction), and the right to transparency of information.²⁶³ There are crucial differences between the two frameworks: the right against automated decision-making. The right against automated decision-making is relevant to consumer transactions in CEP because CEPs use consumer data and process them to generate value for themselves and create rankings, personalization, and other services for consumers.

particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person; The Personal Data Protection Bill, 2019 Section 3(28) ‘personal data’ means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, and shall include any inference drawn from such data for the purpose of profiling.

²⁶³ GDPR, OJ L 119, 4.5.2016 Article 15 ; The Personal Data Protection Bill, 2019 Section 17. GDPR, OJ L 119, 4.5.2016 Article 20; The Personal Data Protection Bill, 2019 Section 19. ‘Article 29 Working Party- Guidelines on Transparency under Regulation 2016/679’ (Article 29- Data Protection Working Party) 17/EN WP260 rev.01 29; ‘BEUC Comments on the Article 29 Working Party Guidelines on Consent and on Transparency under the GDPR’ (The European Consumer Organisation- BEUC 2018) BEUC-X-2018-007 29. GDPR, OJ L 119, 4.5.2016 Article 16 ; The Personal Data Protection Bill, 2019 Section 18. M Victor (n 236). ‘My Personal Data, Nobody’s Business but My Own- Key Consumer Demands for the Trilogue on the General Data Protection Regulation’ (The European Consumer Organisation- BEUC 2015) BEUC-X-2015-085. W Gregory Voss, ‘European Union Data Privacy Law Reform’ (2016) 72 American Bar Association. A Comparative Guide To The GDPR And The PDPB’ (*Spiceroutelegal*); ‘Explained: How Data Protection Bill Compares with Its EU Counterpart’ (*The Indian Express*, 13 December 2019)

The right against automated decision-making under the GDPR applies only to decisions based solely upon automated processing.²⁶⁴ This provision means that data subjects have the right not to be subject to decisions made without human involvement. Such automated decisions must produce legal or similarly significant effects on the data subject. Neither term ‘legal’ or ‘similarly significant’ has been defined under the regulation, nor has any test or criteria been mentioned to assess the same. However, it is clear from the text that lawmakers wanted to include only those grave and substantial effects.²⁶⁵

The GDPR provides certain exceptions to the right against automated decision-making. The first exception allows the process of automated decision-making when it is necessary to enter into or perform the contract between a data controller and a data subject.²⁶⁶ The second exception is when such automated decision-making is authorized by Union or Member State law to which the controller is subject and lays down suitable measures to protect the rights of data subjects.²⁶⁷ The third exception is when such a process is based on the data subject's explicit consent. The term ‘explicit consent’ has not been defined in GDPR.²⁶⁸ However, the word explicit implies a clear-cut or emphatic expression of something in a literal sense.²⁶⁹

The GDPR mandates the controllers to adopt ‘*suitable measures*’ to protect the rights and freedoms of the data subjects. In the first and third exceptional situations where automated decision-making occurs, the GDPR provides the right to obtain human intervention on the part of the controller to express its point of view and contest the decision. The purpose of this

²⁶⁴ GDPR, OJ L 119, 4.5.2016 Article 22.

²⁶⁵ *ibid* Article 22(1).

²⁶⁶ *ibid* Article 22(2)(a).

²⁶⁷ *ibid* Article 22(2)(b).

²⁶⁸ *ibid* Article 22(2)(c).

²⁶⁹ Himanshu Arora, ‘Automated Decision Making: European (GDPR) and Indian Perspective (Indian Personal Data Protection Bill, 2018)’ [2019] SSRN Electronic Journal 8.

provision is to enable the data subject to contest and question the decisions taken by machines.²⁷⁰

The right to object to automated decision-making does not exist under the DPDPA. However, the Act recognizes privacy by design. The White Paper and the Srikrishna Committee report argued that if discrimination has ensued due to lawful yet discriminatory automated processing, individuals are always at liberty to go to courts for a breach of fiduciary duties.²⁷¹ Thus, a right against automated decision-making is not provided under the DPDPA.

The right against automated decision-making is a necessary data protection right recognized in the EU and not in India. This right is crucial for CEPs because algorithms automatically process data without manual intervention in the decision-making process. Algorithms receive data inputs, process them automatically, and provide information and decisions. Consumers are thus subject to automated decisions made by algorithms. They have the right against such automated decision-making in the EU, but not in India. The impact of this automated decision-making on consumers to generate rankings and personalised content is discussed in Chapter 3.

CEPs collect personal data from users to facilitate transactions. This data includes but is not limited to, names, addresses, financial information, and transaction history. Breaches in the security measures of CEPs can lead to unauthorized access to this sensitive information, putting users at risk of identity theft, financial fraud, and other forms of misuse. Service providers only use the collected data by CEPs and this data facilitates transactions. As Service providers do not have access to individual data, but only aggregated data for example, the

²⁷⁰ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (European Treaty Series - No 108); ‘Article 29 Working Party- Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679’ (Article 29- Data Protection Working Party) 17/EN WP251rev.01 29.

²⁷¹ The Personal Data Protection Bill, 2019 Chapter VI. Srikrishna (n 43) 125; Srikrishna (n 16) 81.

rating of the consumer, or their own rating, there are no instances of breach of data from the perspective of service providers.

However, there are instances of drivers of travel CEPs accessing address of their riders and proceeding to stalk them after dropping them at the mentioned address in India. Though the CEPs have specific rules of use of consumer information in providing their services, these acts indicate the misuse of consumer information for criminal and fraudulent purposes. These criminal acts are taken seriously by CEPs often removing the service providers from their platform and the laws taking its course.

3.3.2.2. Service provider to consumer transactions

CEPs operate for intermediate transactions between service providers and consumers. They collect and process the data, which the service provider would do in the absence of a CEP. For example, services provided by a non-CEP like Zara Home or Ikea, where service providers collect and process their consumers' data. In the collaborative economy, CEPs collect and process consumer and service provider data to reduce data processing by multiple service providers who can focus on providing service and not processing consumer data.

The consumer data is collected and processed by the CEPs and not by the professional or peer service providers. Service providers are provided with transactional information in relation to the consumer. For example, the driver on Uber or Ola is provided with the location and name of the rider. However, other information about the consumer shared with the CEP is not provided to the driver. The CEP collects data, for example, a rating or a review provided by riders and aggregates it to provide an average rating to drivers.

3.3.3. P2P transactions

In P2P transactions between peer service providers and consumers, the data is processed by CEPs. The CEPs collect, process and store peer consumer data and intermediate, connect,

and facilitate the transactions based on the data collected. The peer service providers do not collect or process data. Thus, GDPR and the DPDPA would be as applicable as in the case of a peer service provider to peer consumer transactions.

Applicability to Consumers on CEPs	
Applicability in B2C transactions	Applicability in P2P transactions
Does the EU Data Legislation apply to consumers on CEPs?	Does the EU Data Legislation apply to peer consumers on CEPs?
As the CEP collects and processes consumer data to facilitate transactions (whether as a data controller or a data processor), GDPR would be applicable.	As peer service providers do not collect and process the data of peer consumers and CEPs undertake this action, the data protection legislation would still protect peer consumers, providing their data to the CEP.
Does the Indian Data Legislation apply to consumers on CEPs?	Does the Indian Data Legislation apply to peer consumers on CEPs?
The Indian legislation uses the terms data fiduciary and data processor to describe the same function under the GDPR. Furthermore, similar to the GDPR, Indian	Similar to the GDPR, peer consumers providing their data to CEPs would be protected under the DPDPA.

legislation would apply to the CEP collecting and processing the data.

Figure 14: Applicability of Data Protection Legislations to Consumers in B2C and P2P transactions on CEPs.

4. Consumer Protection's applicability in the collaborative economy

Consumer protection legislation in the following part refers to specific legislation enacted to protect consumers. Though other pieces of legislation impact consumers, the legal framework discussed in this section refers to the legislative protection of consumers against actions and inactions in the collaborative economy.

4.1. European Union

4.1.1. Consumer Policy

The consumer policy in the European Union used to be drafted through strategy documents for prescribed periods.²⁷² In light of the growth of the internet, technology, and the digital economy, specific to this research, consumer *acquis* is researched.

The European Commission 2012 set out a European Consumer Agenda for boosting confidence and growth.²⁷³ This consumer policy recognised the fundamental changes in consumer consumption, innovating ways of organising and sharing information, including ratings and reviews, and novel business models in e-commerce. In 2017, The European Commission conducted a Fitness Check on various consumer protection Directives to test their effectiveness, efficiency, coherence, and relevance and identify excessive regulatory burdens, overlaps, gaps, inconsistencies, and obsolete measures. The Fitness check sought to

²⁷² 'Three Year Action Plan of Consumer Policy in the EEC(1990-1992)' (European Commission) COM(90) 98 final; 'Priorities for Consumer Policy (1996-1998)' (European Commission) COM(95) 519 final; 'Action Plan for Consumer Policy (1999-2001)' (European Commission) COM(2001) 486 final; 'Consumer Policy Strategy (2002-2006)' (European Commission) COM (2002) 208 final; 'EU Consumer Policy Strategy (2007-2013)' (European Commission) COM (2007) 99 final.

²⁷³ 'Communication from the Commission- A European Consumer Agenda - Boosting Confidence and Growth' (2012) COM(2012) 225 final.

improve the Directives' implementation and application or update their provisions for consumer protection Directives.²⁷⁴

In 2018, the European Commission released A New Deal for Consumers (New Deal).²⁷⁵ The New Deal aimed to strengthen enforcement of EU consumer law in light of the growing risk of EU-wide infringements and modernize EU consumer protection rules due to the new market developments. The New Deal advocated for increased transparency, improved redress, and the modernization of the consumer protection framework. It aimed to safeguard consumers in the rapidly advancing technological environment by modernizing the directive.²⁷⁶

²⁷⁴ 'Commission Staff Working Document Report of the Fitness Check on Consumer Protection Directives.' (n 27); European Commission (n 49); Consumers, Health, Agriculture and Food Executive Agency., 'Behavioural Study on the Transparency of Online Platforms' (Publications Office 2018) 2016 85 04. Specific to Platforms the Commission conducted an Exploratory Study and a Behavioural Study to understand the issues that consumers might face on online platform markets. European Commission (n 49); Consumers, Health, Agriculture and Food Executive Agency.; 'Fitness Check of EU Consumer Law, 2016- BEUC Position' (The European Consumer Organisation- BEUC 2017) BEUC-X-2016-081; 'Fitness Check of EU Consumer Law- Additional BEUC Policy Demands' (The European Consumer Organisation- BEUC 2017) BEUC-X-2017-040; Christian Twigg-Flesner, 'From REFIT to a Rethink: Time for Fundamental EU Consumer Law Reform?' [2017] Journal of European Consumer and Market Law.

²⁷⁵ 'Communication from the Commission- A New Deal for Consumers' (2018) COM (2018) 183 final 3; Christian Twigg-Flesner, 'From REFIT to a Rethink: Time for Fundamental EU Consumer Law Reform?' [2017] Journal of European Consumer and Market Law 189; Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (1st Edition, Routledge 2018) 10.

²⁷⁶ Modernization Directive, OJ L 328, 18.12.2019. 'Communication from the Commission- A New Deal for Consumers' (n 269); 'Proposal For a Better Enforcement and Modernization of EU Consumer Protection Rules- BEUC Response to the Commission Ex-Post Consultation' (The European Consumer Organisation- BEUC 2018) BEUC-X-2018-041; 'Communication from the Commission- A New Deal for Consumers' (n 269); Christian Twigg-Flesner, 'Bad Hand? The "New Deal" for EU Consumers' 16.

4.1.2. Consumer Protection Legislative Foundation

The Modernization Directive aims to increase transparency measures and enhance enforcement measures. The objective of this Directive is achieved by amending consumer protection Directives, including the UCTD, the UCPD and the CRD.²⁷⁷ The Modernization, also termed the Omnibus Directive, modernized the existing consumer protection directives by introducing provisions that addressed new consumer challenges with new technology developments.²⁷⁸ These provisions include individual remedies for consumers, increased enforcement powers, transparency on online marketplaces, ranking of offers, and transparency about consumer reviews.²⁷⁹ The Modernization Directive introduces various changes in these Directives and their application to consumers in the collaborative economy, which are discussed below.

4.1.2.1. Unfair Commercial Practices Directive

The UCPD protects consumers' economic interests against unfair business-to-consumer commercial practices.²⁸⁰ The application of the UCPD to CEPs is because CEPs engage in communication, advertising, and marketing of their services to consumers, which are B2C relationships legislated under the scope of this Directive.

²⁷⁷ Price Directive, OJ L 80, 18.3.1998 6; UCTD, OJ L 95, 21.4.1993 13; UCPD, OJ L 149, 11.6.2005 2; CRD, OJ L 304 22.11.2011 83. Howells, Twigg-Flesner and Wilhelmsson (n 275) 129. Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) 287 Part II- Chapter 13- Peter Rott Unfair Contract Terms, Wendehorst (n 19) 3.

²⁷⁸ Modernization Directive, OJ L 328, 18.12.2019 1.

²⁷⁹ SAJN Nikolina, 'Modernization of EU Consumer Protection Rules- A New Deal for Consumers' Briefing- EU Legislation in Progress 11 ; Rachel Bell, 'Enforcement and Modernization Directive (EU) 2019/2161 (the Omnibus Directive)' (*Charles Russell Speechlys*, 28 August 2020).

²⁸⁰ UCPD, OJ L 149, 11.6.2005 Article 1- Purpose; Twigg-Flesner, *Research Handbook on EU Consumer and Contract Law* (n 22) 388 Part II- Chapter 17- Willem H van Boom, Unfair Commercial Practices.

For a practice to be deemed fair, it has to pass several tests.²⁸¹ First, certain practices that fall under the blacklist in Annex I are always prohibited. Second, according to the general clause, a commercial practice is unfair if it is contrary to the requirements of professional diligence if it ‘materially distorts or is likely to distort the economic behaviour of the average consumer’. This means that to be considered an unfair commercial practice a certain action must either be present in the blacklist in Annex I or cause consumers to take a transactional decision they would not have taken otherwise.²⁸² Thirdly, a commercial practice could constitute a misleading action or omission or be regarded as aggressive by harassment, coercion, or undue influence.²⁸³

The Modernization Directive added to the list of unfair practices.²⁸⁴ Misleading omissions under the UCPD have been amended to include the provision of ranking information as material information, the absence of which is a misleading omission and an unfair commercial practice.²⁸⁵ Further, the Modernization Directive amends Annex 1- to state that providing search results in response to a consumer’s online search query without clearly disclosing any paid advertisement or payment specifically for achieving a higher ranking of

²⁸¹ Johann Laux, Sandra Wachter and Brent Mittelstadt, ‘Neutralizing Online Behavioural Advertising-Algorithmic Targeting with Market Power as an Unfair Commercial Practice’; Howells, Twigg-Flesner and Wilhelmsson (n 39).

²⁸² UCPD, OJ L 149, 11.6.2005 Article 2(e)- Definition, Article 5- Prohibition of unfair commercial practices.

²⁸³ *ibid* Article 6, Article 7, Article 8, Article 9.

²⁸⁴ Modernization Directive, OJ L 328, 18.12.2019 Article 3.

²⁸⁵ UCPD, OJ L 149, 11.6.2005 Article 7(4a). When providing consumers with the possibility to search for products offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions are ultimately concluded, general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented, on the main parameters determining the ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters, as opposed to other parameters, shall be regarded as material.

products within the search results shall be considered an unfair commercial practice.²⁸⁶ The Fairness and Transparency Regulation also regulates transparency requirements with regard to the main parameters determining ranking. However, the scope of application of the Fairness and Transparency Regulation is business-to-platform relations, and the UCPD is B2C relations.²⁸⁷ The ranking provisions under the UCPD apply to B2C transactions. The information provided by CEPs that collect and process consumer data to generate rankings is to be provided in a clear, comprehensible manner and in a way appropriate to distance communication. It is further specified that it has to be in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented.²⁸⁸ Disclosing this information in a specific section of the online interface, directly and easily accessible from the page where offers are presented, enhances visibility and empowers consumers to make informed decisions. This approach contributes to building trust between consumers and CEPs and safeguards consumer rights in the evolving landscape of digital transactions.

Annexe 1 has also been amended to include provisions in relation to ratings and reviews. Where reviews about the performance of ‘traders’ in that framework are used to promote their products, those reviews could also be considered material for the consumer in making the transactional decision regarding the products of that trader, in particular, where the reviews assess the service provider. On parameters such as quality, reliability or speed of delivery of products, such reviews can aim at or be intertwined with the promotion of the trader’s products. Consequently, Annex 1 has been amended in this regard. Annex 1 states that when consumers submit ratings and reviews of a product to the CEP, and the CEP

²⁸⁶ *ibid* Annex 1 Commercial practices which are in all circumstances considered unfair- 11(a); Howells, Twigg-Flesner and Wilhelmsson (n 19) 46.

²⁸⁷ UCPD, OJ L 149, 11.6.2005 Article 2(m)- Ranking. This fragmentation, though adds to the complexity of e-commerce and consumer protection legislations, is interesting to be analyzed in relation to platforms and regulation of platforms in other jurisdictions.

²⁸⁸ Commission Notice - Guidance on the interpretation and application of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (2021/C 526/01) 129 92.

publishes these ratings and reviews without taking reasonable and proportionate steps to check that they originate from genuine consumers (who have purchased the product or availed of the service), such a practice is an unfair commercial practice.²⁸⁹ Further, CEPs or service providers who commission another legal or natural person to submit false consumer reviews or endorsements or misrepresent consumer reviews or social endorsements, for example, bots or paid fake reviews to promote products, is an unfair trade practice.²⁹⁰

This thesis includes UCPD in its research on consumer issues on CEPs as the UCPD recognizes algorithmic usage in rankings and calls for the disclosures of main parameters. It also includes using false consumer reviews and promotions as an unfair commercial practice. A detailed analysis of these provisions is presented in Chapter 3.

4.1.2.2. Unfair Terms in Consumer Contracts

The second Directive amended by the Modernization Directive is the UCTD, which relates to unfair contract terms between a seller or supplier and a consumer.²⁹¹ This Directive states that contractual information provided to consumers must be in plain and intelligible language.²⁹²

The UCTD applies to contracts concluded in the collaborative economy as the material scope includes a contract that has not been individually negotiated and includes standard contract

²⁸⁹ UCPD, OJ L 149, 11.6.2005 Annex 1- 23(b) and 23(c).

²⁹⁰ Commission Notice- Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market 2021/C 526/01 49.

²⁹¹ UCTD, OJ L 95, 21.4.1993 Article 1; Twigg-Flesner, *Research Handbook on EU Consumer and Contract Law* (n 22) Pg. 431, Part III- Contract Law.

²⁹² *ibid* Article 5; Kevin Litman-Navarro, ‘Opinion | We Read 150 Privacy Policies. They Were an Incomprehensible Disaster.’ *The New York Times* (12 June 2019) 150; Stanford Law School, ‘We Read 150 Privacy Policies. They Were an Incomprehensible Disaster.’ (*Stanford Law School*)

terms.²⁹³ Contracts concluded on CEPs are standard contracts not negotiated by consumers, making the UCTD applicable to consumer contracts on CEPs. These standard contracts are in the form of privacy policies, terms and conditions or terms of service of the CEP. As the CEP intermediates transactions, the UCTD applies to B2C transactions between CEPs and consumers and service providers and consumers.

A standard contract on CEPs can be considered unfair if the contractual term contradicts the requirements of good faith and causes a significant imbalance in the parties' rights and obligations under the contract.²⁹⁴ This provision is supplemented by an inclusive list of examples of unfair terms. From the provisions of the UCTD, there is no typical unfair term in contracts but a general unfairness.²⁹⁵ Though there are no specific provisions in relation to CEPs in the UCTD, the UCTD applies to CEPs as consumer contracts on CEPs and falls within their ambit.

4.1.2.3. Consumer Rights Directive

The CRD applies to any trader and a consumer contract.²⁹⁶ CRD was amended for the applicability to instances in the collaborative economy. The Modernization Directive amendments to the CRD include definitions of personal data digital services, online marketplaces and providers of an online marketplace (CEPs and service providers), which

²⁹³ Howells, Twigg-Flesner and Wilhelmsson (n 262) 137; UCTD, OJ L 95, 21.4.1993 Article 3.

²⁹⁴ UCTD, OJ L 95, 21.4.1993 Article 3.

²⁹⁵ Carmen Appenzeller, 'Towards a More Effective Regulation of Unfair Standard Contract Terms in Europe: Of Cartels, Watchdogs and a "Gorilla in the Closet"' [2017] *Journal of European Consumer and Market Law*; Mónika Józson, 'Unfair Contract Terms Law in Europe in Times of Crisis: Substantive Justice Lost in the Paradise of Proceduralisation of Contract Fairness' [2017] *Journal of European Consumer and Market Law*.

²⁹⁶ CRD, OJ L 304 22.11.2011 Article 1- Subject Matter.

attempts to make the directive more technology-neutral.²⁹⁷ The scope of the CRD is also amended to include the supply of digital content on a digital service to the consumers.²⁹⁸

The Modernization Directive inserts Article 6a into the CRD, stating additional specific information requirements for contracts concluded on online marketplaces.²⁹⁹ In relation to the collaborative economy, the CRD directs the disclosure of more information to consumers about the nature of the service provider.³⁰⁰ The CRD places the onus on CEPs to disclose the status of the service providers based on service providers' declarations.³⁰¹

This information requirement for CEPs ensures that consumers always know from whom they buy products or avail services on a CEP, whether a professional or a peer service provider. An erroneous assumption that the service supplier is a professional can cause problems for the consumer if something goes wrong with the online purchase (for example, non-conformity of the products) and if it then turns out that consumer protection rules, such as the right to withdraw within fourteen days or the legal guarantee, actually do not apply to the contract. Both provisions in the CRD and UCPD specify that the information about the status of the service provider should be based on a declaration of that supplier that the CEP then transmits to the consumer. Therefore, the CEP may rely primarily on the declaration provided by the service provider. The information requirement aims to promote clarity for consumers shopping on online marketplaces. The self-declaration is a good indicator of the service provider's legal status.³⁰²

²⁹⁷ *ibid* Article 2(4[a]), 2(16), 2(17), 2(18).

²⁹⁸ *ibid* Article 3(1[a]). Modernization Directive, OJ L 328, 18.12.2019 Article 4(2).

²⁹⁹ Modernization Directive, OJ L 328, 18.12.2019 Article 4(3) and Article 4(4). Howells, Twigg-Flesner and Wilhelmsson (n 19) 94.

³⁰⁰ Commission Notice- Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights (2021/C 525/01) 6.

³⁰¹ CRD, OJ L 304 22.11.2011 Article 6a(1b).

³⁰² Commission Notice- Guidance on CRD, 2021/C 525/01 40.

The CRD also focuses on algorithmic transparency in relation to rankings in relation to algorithms. Similar to the UCPD, the Directive ensures that the main parameters considered in creating rankings are provided transparently to consumers.³⁰³ The obligation to inform about the ranking parameters arises when the CEP provides, following a consumer's search query, search results referring to products offered by different service providers hosted on the CEP. As regards the content of the information, the CEP must provide 'general' information about the main parameters determining the ranking of products and about the 'relative importance' of those parameters as opposed to other parameters. In addition to the general requirements as to its accessibility, the information about ranking parameters must be made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented. On CEPs, these are presented in terms of service or use of the CEP.

4.1.2.4. Services Directive

Including the analysis of the Services Directive under the ambit of consumer protection might shock EU lawyers and academics. The Services Directive applies to various services and includes the services provided by CEPs of intermediation and facilitation and services of service providers, with a few exceptions. In relation to applying the Services Directive to service providers to consumer relationships, all service providers (professional and peer service providers) are on the same terms with the platform. This differs from the limited application of consumer protection legislation to B2C transactions.

The reason for including the analysis under the umbrella of consumer protection legislation is to involve the Directive in comparative analysis alongside the Indian Consumer Protection Act. The different approaches to the regulation of services in the EU and India in light of consumer protection in the collaborative economy are discussed in this section. The EU Services directive is general to all services, whereas the Indian Act is limited to services

³⁰³ CRD, OJ L 304 22.11.2011 Article 6a(1a); Commission Notice- Guidance on CRD, 2021/C 525/01 38.

applicable to consumers in consumer protection transactions. This thesis limits the study of the Services Directive to services provided by CEPs to consumers and service providers (professional and peer) to consumers.

The objective of the Services Directive is to realise the full potential of services markets in Europe by removing legal and administrative barriers to trade. The simplification measures introduced by the Directive have increased transparency and made it easier for businesses and consumers to provide or use services in a single market.

At the same time, it codifies some obligations for service providers in terms of information that must be provided to consumers.³⁰⁴ CEPs provide intermediation, facilitation, and matching services between service providers and consumers. They provide services to service providers and consumers. Service providers provide their services to consumers. Though there is a difference between professional and peer service providers, for this Directive, there is no differentiation application of the Directive based on the professional capacity of service providers.³⁰⁵

The Services Directive applies to several services, but several sectors are excluded from its scope. Transportation, financial, healthcare services, temporary work agencies, and social services such as social housing and childcare are some of the activities excluded from the Directive.³⁰⁶

CEPs are becoming ubiquitous in several sectors; applying the services directive is increasingly crucial. Consider the example of transportation services. In the collaborative economy, these services are provided by ride-sharing CEPs like Uber and BlaBla Car in the EU. The courts have provided ambiguous interpretations of the concept of transportation

³⁰⁴ Directive 2006/123/EC on services in the internal market (OJ L 376, 27122006) Article 22- Information on providers and their services.

³⁰⁵ *ibid* Article-4 Definitions- 4(1)- Service, 4(2) Provider, 4(3) Recipient.

³⁰⁶ *ibid* Article 2(2)- Scope.

services. The Court has included rides on hot air balloons but excluded short cruises on the canals of Amsterdam from the ambit of application of this Directive.³⁰⁷ The Court also held that technical services regarding the control of vehicles. However, no direct transportation services come under the exception provided under this Directive, and such services would be excluded from the application of this Directive.³⁰⁸ Considering the services provided by Uber and BlaBla Car that are not direct transportation services, like service providers driving a car, under this opinion by the Courts, the services directive would not apply to CEPs providing transportation services or ancillary services.³⁰⁹

4.2. India

4.2.1. Consumer Protection Act

The history of consumer protection in India has deep roots in the rich soil of Indian civilization, dating back to 3200 BC. The *dharma shastras* and the *dharma sutras* (ancient Indian texts) deal with the ways of life and read along with the *Vedas*, forming India's first sources of moral and ethical rules. Between 400 and 300 BC, the *Manusmriti* and *Kautilya's Arthashastra* were written.³¹⁰ The moral and ethical trade practices have been described in *Manusmriti*, which is recognized as the first legal document in India. There are references to protecting consumers' interests against exploitation by trade and industry, underweight and measurement, and adulteration. *Manusmriti* also recognized the need for punishment.³¹¹

³⁰⁷ *RL Trijber v College van Burgemeester en Wethouders van Amsterdam and J Harmsen v Burgemeester van Amsterdam* ECLI:EU:C:2015:505 92; *Michael Neukirchinger v Bezirkshauptmannschaft Grieskirchen* ECLI:EU:C:2010:498 Paragraph 74.

³⁰⁸ *Grupo Itevelesa SL v OCA Inspección Técnica de Vehículos SA* ECLI:EU:C:2015:685 Paragraphs 48-50.

³⁰⁹ *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981 (n 177) Paragraphs 68-70.

³¹⁰ Pratibha Goyal, Mini Goyal and Shailja Goyal, 'Consumer Protection Law in Ancient India' (2013) 19 *Journal of Human Values* 147-148.

³¹¹ *ibid* 148.

Written after *Manu Smriti*, *Kautilya's Arthashastra* is considered a treatise and a prominent source, describing various theories of statecraft and the rights and duties of subjects in ancient society.³¹² Though its primary concern is with matters of practical administration, consumer protection occupies a prominent place in *Arthashastra*. Consumer protection was also a prime concern during the Muslim Rule in India (from Akbar to Alauddin Khilji). The rules of consumer protection included specifications of weights used by traders at the markets and punishments for underweighing and cheating consumers.

The modern history of consumer laws in India began with The Consumer Protection Act 1986.³¹³ This Act was enacted to address consumer issues, prevent harmful practices, and create consumer courts.³¹⁴ This Act protected consumers from unfair or restrictive trade practices, defective products, deficiency of services, price manipulations, and the sale of hazardous products.³¹⁵ The Act also established specific consumer courts to deal with consumer-related disputes, conflicts, and grievances based on the value of damages claimed.³¹⁶

With the development of the internet, technology, consumer services, business and market models, and with the growth of the consumer protection movement, the Consumer Protection Bill was released to replace the Consumer Protection Act 2015.³¹⁷ One of the justifications for this Bill's drafting is that the modern marketplace contains a plethora of increasingly

³¹² *ibid.*

³¹³ The Consumer Protection Act, 1986 (Act No. 68 of 1986)

³¹⁴ The Consumer Protection Act, 1986 Chapter III- Consumer Dispute Redressal Agencies- Sec.9- Sec.27A.

³¹⁵ *ibid* Sec.2(c)- Definition, Complaint; Akhileshwar Pathak, 'Amending the Consumer Protection Act, 1986' (2015) 50 Economic and Political Weekly 4 27; Satyan (n 199) 2-4.

³¹⁶ The Consumer Protection Act, 1986 Sec.2(e). *ibid* Sec.9- District Forum, State Commission, Nation Consumer Dispute Redressal Commission. The Consumer Protection Act, 2019 Chapter II- Sec.4-Sec.8B; Dr Aneesh V Pillai, 'Promises and Nuances of Consumer Protection Act, 2019: A Birds Eye View' 8 485. Sakuntala Narasimhan, 'Consumer Protection Act: An Unequal Fight' 50 Economic and Political Weekly 4.

³¹⁷ The Consumer Protection Bill, 2015.

complex products and services. The emergence of global supply chains, the rise in international trade, and the rapid development of e-commerce led to new delivery systems for products and services and provided new opportunities for consumers.³¹⁸ This Bill considered that these novel practices in e-commerce rendered consumers vulnerable to new forms of unfair trade and unethical business practices.³¹⁹ However, this Bill was not enacted into legislation. The suggestions from the 2015 Bill were considered in preparing the Consumer Protection Bill, 2018.³²⁰ This Bill, once passed, was once again set to replace the Consumer Protection Act. However, this Bill did not materialize either.

The Bill (now termed the Consumer Protection Bill, 2019) was again laid before the Parliament and enacted in 2019.³²¹ The Consumer Protection Act is the breakthrough legislation for consumer protection in recognizing e-commerce transactions and establishing effective administration and settlement of consumer disputes.³²²

The Consumer Protection Act 1986 was replaced by the Consumer Protection Act 2019.³²³ The new legislation includes definitions of e-commerce, electronic service provider, persons who electronically bought products as consumers, and separation of the definition of a service

³¹⁸ ‘Standing Committee on Food, Consumer Affairs and Public Distribution (2015-16), Ministry of Consumer Affairs, Food And Public Distribution (Department of Consumer Affairs), The Consumer Protection Bill, 2015’ (2016) 9th Report.

³¹⁹ Pillai (n 316) 485.

³²⁰ The Consumer Protection Bill, 2018 (Bill No 1 of 2018).

³²¹ Vipin Kumar and Adya Sharma, ‘Strengthening Consumer Rights: The Advent of Consumer Protection Act, 2019’ [2019] SSRN Electronic Journal; Pillai (n 173); Manoranjan Ayilyath, ‘Consumer Protection in E-Commerce Transactions in India – Need for Reforms’ [2020] SSRN Electronic Journal; Shalu Nigam, ‘From Caveat Emptor to Caveat Venditor: The Consumer Protection Act 2019 And the Consumer Rights’. The Consumer Protection Act, 2019, (Act No. 35 of 2019).

³²² The Consumer Protection Act, 2019 Preamble; Ayilyath (n 321).

³²³ The Consumer Protection Act, 1986; Pillai (n 316). The Consumer Protection Act, 1986 (Act No. 68 of 1986) The Consumer Protection Act, 2019, (Act No. 35 of 2019)

provider on a platform from the platform itself.³²⁴ The Act protects the rights of consumers, including the right to safety, the right to be informed, the right to choose, the right to be heard/represented, the right to redress, the right to consumer education, the right and awareness to basic needs and the right to a healthy environment.³²⁵

The Act has amended the list of unfair and restrictive trade practices to cover instances of lack of appropriate information, misleading advertisements, and manipulation of prices.³²⁶ A new provision of the legislation states the liability for endorsers; for example, influencers who indulge in misleading advertisements and provide false information to consumers can be penalized.³²⁷ The marketer and the endorser can be liable for false and misleading advertising.³²⁸ These provisions are similar to provisions under Annex I of the UCPD inserted by the Modernization Directive.³²⁹

The Act also establishes a Central Consumer Protection Authority to regulate matters relating to the violation of the rights of consumers, unfair trade practices, and false or misleading advertisements that are prejudicial to the interests of the public and consumers and to promote, protect, and enforce the rights of consumers.³³⁰

³²⁴ The Consumer Protection Act, 2019 Sec.2(7) Consumer, Sec.2(16) E-commerce, Sec.2(17) Electronic Service Provider, Sec.2(38) Product Service Provider. GIS Sandhu and Arvind Kaur, 'Consumer Protection in India- Some Areas of Illusion' (1996) 38 Journal of the Indian Law Institute 11.

³²⁵ Sheetal Sahoo and Aman Chatterjee, 'Consumer Protection - Problems and Prospects' <<https://ssrn.com/abstract=1452526>>. Shashi Nath Mandal, 'Protection of Consumers' Rights: A Socio-Legal Challenge in India' [2010] SSRN Electronic Journal. Sandhu and Kaur (n 324).

³²⁶ The Consumer Protection Act, 2019 Sec.2(9) Consumer Rights, Sec 2(41) Restrictive Trade Practice.

³²⁷ *ibid* Sec.2(46) Unfair Contract, Sec.2(47) Unfair Trade Practice. Section 2(47). Pillai (n 316) 485; Vivek Vilas Sable, 'Analysis of Consumer Protection Act, 2019' 2-3.

³²⁸ The Consumer Protection Act, 2019 Sec.89- Punishment for false or misleading advertisement. Vilas Sable (n 327) 2-3; Pillai (n 316) 485; Nigam (n 321) 2.

³²⁹ Modernization Directive, OJ L 328, 18.12.2019 Annex I of the UCPD. Refer to Chapter 1-Section I- 4.3.1.2.1

³³⁰ The Consumer Protection Act, 2019 Chapter II- Sec.3- Sec.9, Chapter III- Sec.10- Sec.27, Chapter IV- Sec.28- Sec.73; Vilas Sable (n 327) 2-3; Pillai (n 316) 485.

The Act provides that, to prevent unfair trade practices in e-commerce and protect the interest and rights of consumers, the Central Government may take such measures as prescribed.³³¹ The Consumer Protection (E-Commerce) Rules have been notified in light of this background, forming the *lex specialis* applicable to consumer protection to transactions on CEPs.³³²

4.2.2. Consumer Protection (E-Commerce) Rules

The Consumer Protection (E-Commerce) Rules were released to protect consumers in transactions occurring on all e-commerce models, including all marketplaces, inventory models of e-commerce, e-commerce retail, multi-channel single-brand retailers and single-brand retailers in single or multiple formats. These rules stipulate forms of unfair trade practices across all models of e-commerce.³³³

The Rules define e-commerce entities and categorize them as marketplace e-commerce entities and inventory e-commerce entities.³³⁴ An e-commerce marketplace entity means ‘an e-commerce entity that provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers.’³³⁵ For example, CEPs like Uber and Airbnb are considered marketplace e-commerce entities, not inventory e-commerce entities, as they do not own and transfer property.³³⁶

³³¹ The Consumer Protection Act, 2019 Sec.94, Sec.101.

³³² The Consumer Protection (E-Commerce) Rules, 2020.

³³³ Ayilyath (n 310) 4; Pillai (n 305) 485; Nigam (n 310) 2.

³³⁴ The Consumer Protection (E-Commerce) Rules Rule 3(b)- E-Commerce Entity, Rule 3(f)- Inventory E-Commerce Entity, Rule 3(g)- Marketplace E-Commerce Entity.

³³⁵ *ibid* Rule 2(g)- Marketplace E-Commerce Entity, Rule 3(k)-Seller. The term ‘seller’ means the product seller as defined in clause Sec2(7) of the Consumer Protection Act, 2019 and shall include any service provider.

³³⁶ Specifically not considered as e-commerce entities or inventory entities – Rule 3 (b) ‘e-commerce entity’ means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce

The Rules define ranking as the relative prominence or relevance given to the products or services offered through a marketplace e-commerce entity (CEPs) as presented, organized or communicated by such entity, irrespective of the technology used for such presentation organization or communication.³³⁷

The Rules state the liabilities of the CEPs, including the provision of an explanation of the main parameters which, individually or collectively, are most significant in determining the ranking of products or sellers on its CEPs and the relative importance of those main parameters through a readily and publicly available description drafted in plain and intelligible language.³³⁸ These requirements are similar to the disclosure requirements under the UCPD.³³⁹

entity;- like Facebook; Rule 3(f) ‘inventory e-commerce entity’ means an e-commerce entity which owns the inventory of goods or services and sells such goods or services directly to the consumers and shall include single brand retailers and multi-channel single brand retailers;- like brand specific online stores- in any industry

³³⁷ The Consumer Protection (E-Commerce) Rules Rule 3(j)- Ranking.

³³⁸ *ibid* Rule 5(3)(f). The rules also include the display of information in relation to exchanges, warranties, aggregated feedback, payment mechanism

³³⁹ UCPD, OJ L 149, 11.6.2005 Article 7(4).

Consumer Protection Legislation

Consumer Protection Legislation in the EU	Consumer Protection Legislation in India
Unfair Commercial Practices Directive (UCPD), Unfair Contract Terms Directive (UCTD), Consumer Rights Directive (CDR), and Modernization Directive.	Consumer Protection Act (COPRA) Consumer Protection (E-Commerce) Rules.
<i>Tertium comparationis</i> : protecting consumers from unfair conditions and practices while providing them with rights and protections.	
Similarities	-consumer protection, including unfair trade practices, contract terms, and consumer rights. -non-applicability to transactions between CEPs and service providers.

Differences	- EU legislation drafted to provide consumers with more information and protection in the European Single Market. Indian legislation was approached from a social welfare angle. -The EU has multiple pieces of legislation addressing specific concerns, while India has a singular legislation. -EU legislation regarding services is not consumer protection legislation, but the Indian legislation also covers aspects of services. -EU legislation applies explicitly to B2C transactions; however, there is no such specification in the Indian legislation. -Definition of consumer under the EU legislation is linked with the party providing the goods or services, i.e., the trader. In India, the definitions are not linked. This non-linkage permits the interpretation of the legislation to include transactions between peer service providers and peer consumers in P2P transactions on CEPs.
Recent Developments	The EU legislation has undergone a fitness test, leading to enacting the modernization directive to address newer challenges and technological developments, amending various pieces of EU consumer protection legislation. The Consumer Protection Act of 1956 was revamped in India, and the Consumer Protection Act of 2019 was passed. Various specific rules have also been passed under this legislation.

Figure 15: Consumer Protection Legislations in the EU and India.

4.3. Applicability to tri-partite relationships in the collaborative economy

4.3.1. Platform to business transactions – CEP to service provider transactions

Service providers (businesses) that use the CEPs' services are end users as they use the services of intermediation and facilitation by CEPs, which helps them connect to consumers. They are not consumers under EU law because the definition of a consumer under the UCPD, the UCTD and the CRD requires a consumer to act outside the purposes of trade, business, craft, or profession.³⁴⁰

However, under Indian law, the term consumer is defined using the term 'person' and not 'natural person,' i.e., it includes legal persons and service providers, whether natural or legal persons. However, service providers are not consumers, as they obtain products and services for commercial purposes.³⁴¹ In this regard, service providers, whether employees, independent contractors, or even peer service providers, are not consumers; thus, consumer law is not applicable. Nonetheless, service providers use the services of CEPs for intermediation, matching, and aggregation for their business purposes. The Services Directive would apply to the relationship between CEP and service providers.

³⁴⁰ Schulte-Nölke, *EC Consumer Law Compendium- Comparative Analysis* (n 161) Page 624; Twigg-Flesner, *Research Handbook on EU Consumer and Contract Law* (n 22) Part II- Chapter 9-Peter Cartwright, The consumer image within EU Law; Kingisepp and Värvi (n 161) Page 46; Schoenmaekers (n 161) Page 7; B.M.Loos (n 161) Page 147; Solomon and others (n 161) Page 35; Vogenauer (n 161) Page 62; Schulte-Nölke, 'Customer Protection in Place of Consumer Protection' (n 161) Page 3. UCPD, OJ L 149, 11.6.2005 Article 2(a) 'consumer' means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession; UCTD, OJ L 95, 21.4.1993 Article 2(b) 'consumer means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession ; CRD, OJ L 304 22.11.2011 Article 2(1) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.

³⁴¹ The Consumer Protection Act, 2019. Section 2(7)(i) and (ii)

4.3.2. B2C transactions

Distinguishing between individuals acting in a commercial/professional capacity and individuals acting in a private capacity is essential in determining whether or not consumer law applies to a specific transaction. The classification of one of the parties to a transaction as a ‘trader’ or a ‘consumer’ determines the applicability of the consumer rights outlined in consumer protection legislation, whose guarantees are tailored explicitly to consumers who are presumed to be in a ‘weaker’ position than the business counterparty.³⁴²

Consumer protection legislation in the EU applies explicitly to B2C transactions. In relation to consumers on CEPs, B2C transactions refer to transactions with CEPs and professional service providers. CEPs are businesses providing intermediary services for consumers. Professional service providers are businesses providing services solicited by consumers, like driving cars, hosting accommodation, and providing handy resources.

The consumer protection legislation on CEPs in the EU can be observed in relation to rankings. The UCPD and the CRD have specific provisions concerning disclosures of the main parameters used in creating rankings. Secondly, the UCPD has also included provisions about ratings and reviews and providing misleading information to consumers about promotions and sponsorships as unfair commercial practices.

Though not specified, unlike the EU consumer protection directives, the Consumer Protection Act, 2019 and the Rules apply to B2C relationships. The aim of the Act and the

³⁴² Hans-Wolfgang Micklitz, ‘The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic’ (2012) Working Paper; Guido Smorto, ‘Protecting Weaker Parties in the Platform Economy’ in Nestor Davidson, Michèle Finck and John Infranca (eds), *Cambridge Handbook on Law and Regulation of the Sharing Economy* (Cambridge University Press 2018). However debates have highlighted the market building objective taking precedence over protection of the consumer- Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (1st Edition, Routledge 2018).

Rules is to protect the interests of consumers. The Consumer Protection Act 2019 now defines electronic service providers and recognizes that platforms enable, intermediate, and facilitate transactions between service providers and consumers. Consumer Protection in India has also focused on preventing false and misleading advertising by influencers providing false promotions and ranking transparency under the Consumer Protection (E-Commerce) Rules.

The Consumer Protection Act and its Rules also apply to relationships between professional service providers and consumers as they provide service during their business, trade or profession. India does not have a separate Services Directive like the EU, and the provision of services is included under the Consumer Protection Act. Consumers on CEPs are protected under the Consumer Protection Act in B2C relationships, i.e., relationships between CEPs and consumers and professional service providers and consumers.

4.3.3. P2P transactions

Peer service providers share underutilised resources like tractors, lawnmowers, hand tools or rooms in their houses. They may not provide these services professionally like a handyperson but occasionally share their resources.

Under the current state of EU consumer law, the UCPD, UCTD and CRD expressly state that they apply to business consumer relations, which means that they do not apply to P2P relations. The protections provided to consumers under the UCPD, UCTD, and CRD cannot be availed by peer consumers in P2P transactions.

However, the Service Directive applies in P2P transactions as the term service provider is not limited to a professional service provider. However, the Services Directive is not specific to consumer protection. It is a more general law for all recipients of service. The application means that though peer consumers would be protected under the provisions of the Services Directive, protection of consumers in B2C transactions in the collaborative economy by

consumer protection legislation does not apply. As stated, the Services Directive is a horizontal legislation aimed toward the smooth functioning of the internal market.

The interpretation under consumer law in India is different. The purpose of the Consumer Protection Act in India is to protect consumers, and it does not specify the nature of the transactions to which they are applicable.³⁴³ The provisions of the legislation can be interpreted to include peer consumers as a consumer is a person who buys products or avails services, not for their business and service is defined as the service of any description which is made available to potential users, and a service provider is a person providing these services to potential users.³⁴⁴ It is to be noted that the term ‘potential users’ is used and not ‘consumer’, thereby widening the ambit of application to users and not restricted by the definition of ‘consumer’ under the law.

A service provider is defined under the term ‘product seller’ in relation to a product and means a person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains or otherwise is involved in placing such product for commercial purpose and includes a service provider.³⁴⁵ The Indian definition of consumer is broader as it does not rely on the trader as the professional service provider but requires a consumer to receive a product or a service in a non-professional capacity. This definition's flexibility, not limited to B2C relations, could include P2P relations as the peer consumer is the recipient of service in their non-professional capacity.

³⁴³ The Consumer Protection Act, 2019 Preamble.

³⁴⁴ *ibid* Section 2(42) “service” means service of any description which is made available to potential 2[users and includes, but not limited to, the provision of] facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, 3[housing construction,] entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

³⁴⁵ *ibid* Section 2(37).

Furthermore, a consumer dispute has been defined as a dispute where the person against whom a complaint has been made denies or disputes the allegations contained in the complaint.³⁴⁶ It is to be noted that the phrase ‘person against whom a complaint has been made’ is used and not service provider, seller, or trader, indicating that a consumer can complain against any person, including a peer service provider, affecting the protection of consumer interests. In the collaborative economy, this can be interpreted as CEPs, professional and peer-service providers against whom complaints could be filed.

This example of using the definition of consumer dispute highlights the broad nature of the definitions under the Consumer Protection Act and Rules, keeping the consumer's interests at heart and thus, the Consumer Protection Act and the rules in India could be interpreted to apply to protect consumers P2P transactions in the collaborative economy. The provision of the service is to a user and not only the consumer. Thus, the Consumer Protection Act in India can be interpreted to include P2P transactions under its ambit.

³⁴⁶ *ibid* Section 2(8) ‘consumer dispute’ means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint;

Applicability to Consumers on CEPs	
Applicability in B2C transactions	Applicability in P2P transactions
Does the EU Consumer Legislation apply to consumers on CEPs?	Does the EU Consumer Legislation apply to peer consumers on CEPs?
It is particular in that it applies to B2C transactions. Between the CEP and consumer: As the CEP provides consumers with facilitation and intermediation services and collects consumer data, the CEP is a business, and the consumer is the recipient of these services; thus, EU Consumer law applies. Between service provider and consumer: As the service provider provides the services and the consumer is the recipient of the service, EU consumer law applies.	It applies only to B2C transactions. It does not apply to P2P transactions. Peer consumers have not protected P2P transactions under consumer law.
Does the Indian Consumer Legislation apply to consumers on CEPs?	Does the Indian Consumer Legislation apply to peer consumers on CEPs?
The consumer is the recipient of the service, and the legislation applies to protect the recipient of such a service. The CEP and service provider provide such services, and the consumer receives them; thus, consumer protection legislation is applicable.	The legislation does not specify a scope of application to transactions. It can, therefore, be interpreted to apply to P2P transactions. Furthermore, the definitions of consumer and trader are not linked to each other. As a recipient of services, the consumer can be protected under Indian consumer law.

Figure 16: Applicability of Consumer Protection Legislations to Consumers in B2C and P2P transactions on CEPs.

4.3.4. Normative Analysis – Consumer protection law ought to apply to P2P transactions

From the above section, it can be extracted that the E-Commerce and Data Protection legislation is applicable to consumer interests in B2C and P2P transactions in the EU and India. Consumer protection legislation in the EU applies to B2C transactions but does not protect consumers in P2P transactions. There is no application specification for B2C or P2P transactions in India, so the legislation can be interpreted to apply to B2C and P2P transactions.

The lack of protection for peer consumers in the collaborative economy under EU consumer law raises three questions: should peer consumers in P2P transactions be provided similar protection as consumers in B2C transactions? What should peer consumers in P2P transactions be protected from? and how can peer consumers in P2P transactions be protected in the collaborative economy in the EU and India? The second and third questions are research questions discussed in Chapters 3 and 4.

The first aspect of this normative analysis is whether peer consumers can be considered consumers under consumer protection legislation warranting the application of consumer protection legislation. As alluded to in Chapter 1, to be considered as consumers, there exist two potential paths. The first one is that they are a separate group of consumers in B2C transactions or a part of the larger group of consumers who receive services from professional or peer service providers.

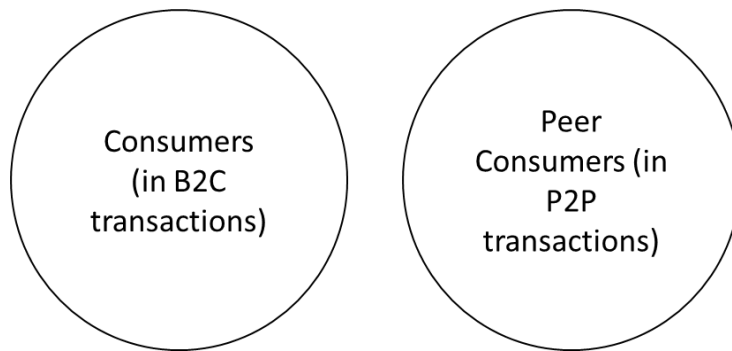


Figure 17: Hypothesis 1: peer consumers are a separate group from consumers

Hypothesis one: peer consumers are a separate group from consumers.

They can be considered a separate group because they engage in P2P transactions on CEPs that differ from B2C transactions. They are not consumers under the definition of consumers in B2C transactions where they receive their services from traditional businesses. They are unlike consumers based on their dynamic, collaborative economy interactions. This hypothesis will not work because they are the recipients of services and should be considered as a consumer, as discussed below.

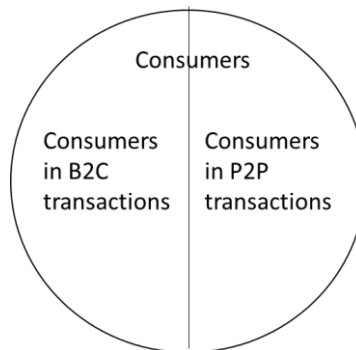


Figure 18: Hypothesis 2: peer consumers (are a category of) consumers.

Hypothesis two: peer consumers are (a category of) consumers.

The arguments to consider peer consumers as consumers are based on the reasoning of consumer protection legislation. Consumer protection legislation aims to protect consumer interests, providing them with information and remedies. Peer consumers are to be considered as consumers because they are the weaker party, and it is in the interest of

consumer protection legislation. Furthermore, while the current information provision requirement may apply to all consumers, consumer protection legislation does not apply to them, and they are to be provided remedies against consumer issues.

Firstly, consumers are traditionally considered the ‘**weaker party**’ in a transaction.³⁴⁷ The transactions on CEPs involve multisided relationships – among CEPs, service providers and consumers. Consumers are now faced with receiving services from CEPs and service providers. This tripartite relationship, the characteristic features of the collaborative economy, makes it unique. Consumer protection legislation focused on dyadic B2C relationships is not equipped to handle three-party relationships. The analysis in this Chapter shows that the three-party relationship is broken into two-party relationships in light of existing legislation. Furthermore, in addition to the challenges faced in traditional transactions, consumers face challenges on CEPs that they have not encountered before, including peer-service providers. Hesselink (2021) argued that weaker party protection refers to inequality between the contracting parties.³⁴⁸ In P2P transactions, peer consumer providers are not equal to the peer service providers as they are unbalanced in information, similar to consumers in B2C transactions. Consider this example: a person who is a guest in an Airbnb has the same information as any other guest (irrespective of the host they are transacting with) in relation to the service provided by the accommodation. They are also informed of the nature of the contractual party – a business or a peer service provider. This does not diminish or increase the quantity or quality of information provided to the guest in an Airbnb. They are the recipient of the service as a consumer in a B2C transaction or a peer consumer

³⁴⁷ Smorto (n 342); Hans-W Micklitz, ‘The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic’ (2012) 35 *Journal of Consumer Policy*. However debates have highlighted the market building objective taking precedence over protection of the consumer- Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (1st Edition, Routledge 2018).

³⁴⁸ Martijn W Hesselink, ‘Weaker Party Protection’ in Martijn W Hesselink (ed), *Justifying Contract in Europe: Political Philosophies of European Contract Law* (Oxford University Press 2021) 273.

in P2P transactions. They are not equal (in terms of information provided or bargaining power) to the peer service provider.

Secondly, peer consumers in P2P transactions should be provided similar protection as consumers in B2C transactions because consumer protection legislation aims to protect **consumer interests**.³⁴⁹ Consumers in B2C and P2P transactions are the recipients of services. They are natural persons receiving services in a non-professional or business capacity. The professional nature of the service provider impacts their protection. Firstly, peer consumers are inherently the recipients of the products or services. Secondly, as the recipient of services, their character has not been altered. The nature of the service provider has diversified from a professional to a peer service provider. Only the character of the other party has changed; the consumer has not changed. Clarifying the role and nature of service providers as professional or peer-service providers could encompass peer consumers under consumer-specific protection legislation.

Thirdly, peer consumers are to be considered consumers because the **current information disclosure and transparency requirement** in the EU states that consumers must be provided information whether they enter transactions with professionals or non-professionals.³⁵⁰ The implicit statement is that when they enter into transactions, they enter into B2C transactions protected under consumer protection legislation. When they enter transactions with non-professionals, they enter P2P transactions outside the consumer protection legislation's ambit. This statement is not explicitly stated to consumers. Peer consumers are given information that they are trading with a peer service provider, but the implications of such relationships are not clarified. Considering peer consumers as consumers under existing consumer protection legislation would protect them against issues

³⁴⁹ UCPD, OJ L 149, 11.6.2005 Chapter 1, Article 1- Purpose. The Consumer Protection Act, 2019 Preamble.

³⁵⁰ European Commission, 'Factsheet- New Consumer Rights- What Benefits Will I Get?' (European Commission 2022).

faced. There is a lapse of protection of peer consumers because they are provided with information about the nature of the transacting party, and based on this information, their protection and its absence thereof are implied. In India, the broad ambit of consumer interest protection creates a lack of clarity on the specificity of protection.³⁵¹ While P2P transactions can be included with interpretation, as discussed in Chapter 4, the plain reading of the consumer protection legislation does not protect peer consumers.

Fourthly, including peer consumers under consumer protection legislation would treat them equally to consumers in B2C transactions. In these situations, where consumer protection legislation could protect consumers in B2C transactions, consumers in P2P transactions do not have the same **level of protection**. In the *Mostaza Claro* case, the CJEU referred to Article 6(1) of the UCTD as a provision which, considering the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an adequate balance which re-establishes equality between them.³⁵² In other words, given that inequality is a matter of degree, the fundamental political question of consumer protection is not only a question of whether and whom to protect but also how much protection should be provided. The interactions changed in the move from the pipeline to the platform economy, and the parties evolved. However, placing similar requirements on professional service providers and peer service providers would impose a burden on peer service providers.³⁵³ While peer consumers are considered consumers and can be protected under consumer protection legislation, considering the unique nature of the transactional relationship between the parties, a potential lighter touch can be used to protect the peer consumers and peer service providers. This probable solution is discussed in Chapter 4. Chapter 3 discusses the second question raised and the second research question of what should peer consumers in P2P transactions be provided, similar to protection provided to consumers in B2C transactions.

³⁵¹ The Consumer Protection Act, 2019 Preamble.

³⁵² *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] Judgment of the Court (First Chamber) C-168/05 ECLI:EU:C:2006:675 Paragraph 36.

³⁵³ This is explored in the following section.

The second aspect of the normative analysis is whether peer service providers can be covered under the ambit of professionals under consumer protection legislation.

Categorizing them as professionals is incorrect for the following reasons. Firstly, the definition used throughout this thesis considers service providers as private individuals offering services on an occasional basis, ‘peers’ or service providers acting in their professional capacity as ‘professional services providers’.³⁵⁴ The difference between the two categories is the nature of the provision of service, which can be occasional by non-professional individuals or individuals acting in their professional capacity. Classifying them in a singular category would not be appropriate.

Secondly, if they were to be considered a singular category, peer service providers would have the exact compliance requirements as professional service providers under consumer protection law. Placing similar compliance and regulatory requirements on peer service providers and professional service providers could impose a burden on them due to several vital aspects. Firstly, Peer and professional service providers often operate in different business models. Imposing identical compliance and regulatory requirements may fail to account for the nuanced nature of their operations. What is suitable for a professional service provider, such as a professional house repair contracting company, might not be applicable or practical for a peer service provider sharing their underutilised lawnmower. Secondly, Peer service providers operate occasionally; in contrast, professional service providers often have established structures and dedicated compliance departments. Implementing the exact regulatory requirements for both types of providers may disproportionately strain the resources of peer service providers. Thirdly, professional service providers often operate at a larger scale and have greater organizational capacity compared to many peer service providers. Traditional regulatory requirements designed for larger entities may be

³⁵⁴ ‘Communication from the Commission- A European Agenda for the Collaborative Economy’ (n 5) 3.

disproportionately burdensome for smaller, peer-driven platforms or individual service providers. Compliance costs, administrative burdens, and the need for specialized staff to manage regulatory obligations can be more challenging for smaller players, potentially hindering their ability to compete and survive in the market.

Furthermore, as discussed further in Chapter 4, Member States of the EU did not support the extension of consumer protection legislation to B2B, C2B, C2C, or P2P transactions. Nonetheless, this does not absolve them of duties toward the individuals receiving their services. The duty of care discussed in Chapter 4 provides a minimum standard of protection to peer consumers while not being compliance burdensome on peer service providers.

CHAPTER 3

CONSUMER ISSUES IN THE COLLABORATIVE ECONOMY

1. Summary of this Chapter

The collaborative economy is at a crucial stage in its growth as it is becoming increasingly omnipresent in various sectors. The collaborative economy is not a utopian concept of the future but a vital presence of today.

This Chapter investigates the second research question of the consumer issues that arise in the collaborative economy in the EU and India. As stated in Chapter 0, this Chapter highlights the issues that arise and the protection, or lack thereof, of consumers in the collaborative economy. This Chapter adopts a functional comparative method applied to look at an issue and the way this is solved in different jurisdictions along similar or different roads and with similar or different results.

This Chapter examines the second research question of consumer issues in the EU and India collaborative economy. The issues highlighted are problems in ratings and reviews, rankings,

personalization, and algorithmic discrimination explored under the matrix drawn below. Firstly, each issue is explained as a consumer issue prevalent in the collaborative economy. The issues of consumers based on their relationship with service providers and the CEP are analysed to highlight the issues raised in this tripartite relationship. Secondly, the legislative landscape is relied upon to discuss the legal protection of consumers against issues. This comparison analyses the differential legislative approaches to consumer issues on CEPs. Thirdly, these issues will be explored in B2C and P2P transactions in the collaborative economy. Lastly, the persistence of consumer issues on CEPs is highlighted.

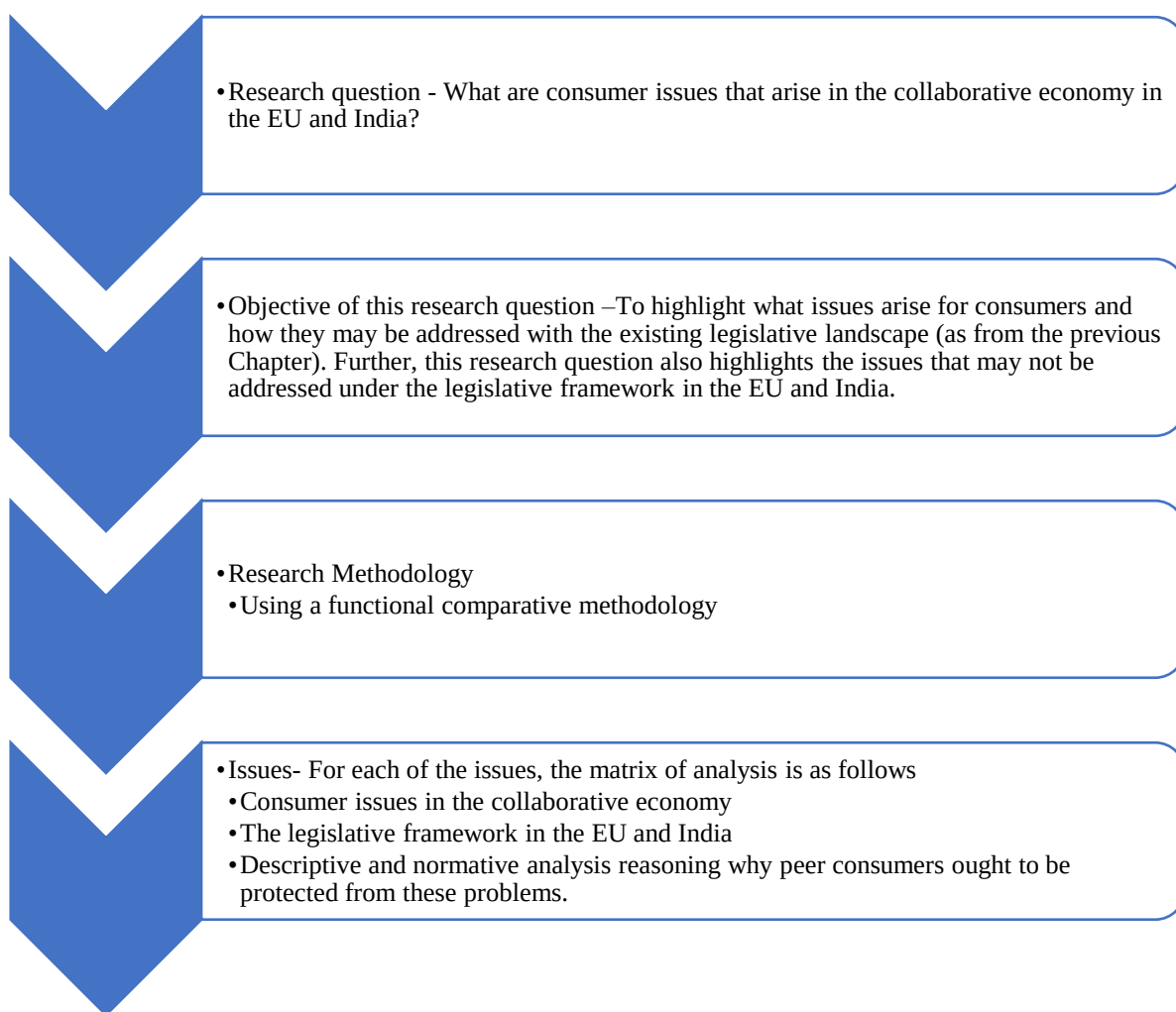


Figure 19:Structure of Chapter 3.

The harms identified in this research are based on existing research. In the EU, harms to consumers in the collaborative economy are identified from the Exploratory study of consumer issues in online peer-to-peer platform markets.³⁵⁵ The 2017 study highlighted the issues in relation to transparency, reliability of rating and review systems, platform responsibility, access to redress and data use and protection.

In India, the Market Study on E-commerce discusses harms to consumers in the collaborative economy. The issues identified in this study apply to all e-commerce markets, including the collaborative economy.³⁵⁶ The issues highlighted in this research include rankings, personalization and algorithms. As stated in Chapter 0, there is a dearth of information about the collaborative economy in India, though CEPs are prevalent. The Market study, though applicable to e-commerce transactions, does not specify the nature of the platforms studied.

The Exploratory Study and the Market Study do not draw out the effect of these harms on consumers in B2C and P2P transactions. This thesis adds value to the current body of research by delving into the issues, proposing legislative solutions, and examining their impact on consumers in B2C and P2P transactions. Secondly, it contributes by providing a functional comparative perspective between the EU and India to analyze whether these similar issues are resolved similarly or differently in these two jurisdictions. From these studies and existing pieces of research, consumer issues on CEPs are distilled as issues in rating and review systems, ranking, personalization and algorithmic discrimination.³⁵⁷

1.1. Ratings and Reviews

Existing research identifies two challenges in the ratings and reviews system for consumers. The first challenge is the presence of fake ratings and reviews provided by consumers or

³⁵⁵ ‘Exploratory study of consumer issues in online peer-to-peer platform markets’ (n 282) 112.

³⁵⁶ ‘Market Study on E-Commerce In India- Key Findings and Observations’ (n 54) 20.

³⁵⁷ Inspiration was also drawn from ‘Algorithms: How They Can Reduce Competition and Harm Consumers’ (n 55) Page 2; Busch and others (n 6) 3.

service providers to manipulate the algorithm to boost their products.³⁵⁸ Second is the presence of incentivized or paid ratings and reviews posted in exchange for benefits from service providers without disclosures such as sponsorships.³⁵⁹ In the era of fake news and alternate facts, consumers on CEPs are not immune from facing fake ratings and reviews.³⁶⁰

1.2. Ranking

Existing literature explains the lack of information transparency about rankings as a regulatory challenge. The call for transparent information on CEPs includes information about the parties, reputation criteria, expanded range of products and rankings.³⁶¹ Ranking

³⁵⁸ ‘Understanding Online Consumer Ratings and Reviews’, vol 289 (OECD 2019) OECD Digital Economy Papers 289.- A 2015 French study identified between 10% and 30% of reviews to be fake, with up to 45% of them suspicious. Other cross-country estimates range from 1% to 16% of the reviews to be fake

³⁵⁹ ‘Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market’ (2021) (2021/C 526/01).

³⁶⁰ European Commission. Directorate General for Justice and Consumers. and others, ‘Final Report: Exploratory Study of Consumer Issues in Online Peer-to-Peer Platform Markets’ (Publications Office 2017); ‘Market Study on E-Commerce In India- Key Findings and Observations’ (Competition Commission of India 2020).

³⁶¹ Busch and others (n 7). Beltrà (n 143) 19; Nemeth and Carvalho (n 143) 4; Straetmans (n 143) 16. Christopher Koopman, Matthew D Mitchell and Adam D Thierer, ‘The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change’ [2015] Mercatus Working Paper, Mercatus Center at George Mason University 15. ‘Ensuring Consumer Protection in the Platform Economy’ (The European Consumer Organisation- BEUC 2018) BEUC-X-2018-080 3. Cristiano Codagnone and Bertin Martens, ‘Scoping the Sharing Economy: Origins, Definitions, Impact and Regulatory Issues’ (JRC Technical Reports- Institute for Prospective Technological Studies Digital Economy Working Paper 2016) 01/2016 8. SAJN Nikolina, ‘Modernization of EU Consumer Protection Rules’ 11. ‘Online Platforms and the Digital Single Market’ (House of Lords- Select Committee on European Union) 10th Report of Session 2015–16. Davidson, Finck and Infranca (n 9) 434.

issues were exacerbated when CEPs placed their products and services above competitors.³⁶² The Exploratory Study in the EU and the Market Study in India highlighted that ranking criteria were too opaque and recommended that enhanced transparency increase consumers' trust in CEPs.

1.3. Personalization

Personalization is providing individualized products and services to consumers by collecting consumers' personal data and processing them using algorithms. For example, personalization is based on class or volume purchased, i.e., differential treatment. However, personalization can become a consumer issue when specific consumers or groups are discriminated against and denied service. The more specific the personalization becomes, the more discriminatory it becomes.³⁶³ While personalised pricing can improve business efficiency and benefit consumers who would otherwise be underserved, it can also lead to consumer issues.³⁶⁴

³⁶² *XYZ v Alphabet Inc, Google LLC, Google Ireland Limited, Google India Private Limited, Google India Digital Services Private Limited* Competition Commission of India Case No. 07 of 2020; AT39740 *Google Shopping.pdf*; Stibbe-Tjitske Kuiper and Floris ten Have, 'Google Shopping: Self-Preferencing Is a Form of Abuse of Dominance' (*Lexology*, 2 December 2021); Johannes Persch, 'Google Shopping: The General Court Takes Its Position' (*Kluwer Competition Law Blog*, 15 November 2021); Shrimi Choudhary, 'Competition Commission of India Orders Google Inquiry after News Publishers Complain' *The Economic Times* (7 January 2022); Aditya Kalra, 'India Antitrust Probe Finds Google Abused Android Dominance, Report Shows' *Reuters* (20 September 2021).- though these cases focus on the competition aspects of the abuse of dominance, under 102 TFEU and Section 4 of the Competition Act, 2002, India, this research focuses on the consumer aspect and how this ranked list poses issues for consumers. This is also discussed in the Behavioral study and market study by the CCI.

³⁶³ Joost Poort and Frederik Zuiderveen Borgesius, 'Personalised Pricing: The Demise of the Fixed Price?' in Uta Kohl and Jacob Eisler (eds), *Data-Driven Personalization in Markets, Politics and Law* (Cambridge University Press 2021).

³⁶⁴ Note Marc Bourreau and Alexandre de Streel, 'The Regulation of Personalised Pricing in the Digital Era' (Organisation for Economic Co-operation and Development 2018).

1.4. Algorithmic discrimination

Consumers can be discriminated against based on the information they provide by algorithms. Depending on whether users engage with professional or peer service providers, algorithmic discrimination on CEPs concerning access to services can manifest in differential treatment. Algorithms may unintentionally favour one category over the other, leading to disparities in the visibility, accessibility, or quality of services offered. For instance, if an algorithm systematically promotes professional service providers in search results or recommendations, it may disadvantage peer service providers, limiting their opportunities and customer reach. In relation to consumers, applying consumer law to protect people against discrimination arising from algorithmic systems is a relatively unexplored area compared with the role of anti-discrimination and data protection law.³⁶⁵

The issues highlighted are problems in ratings and reviews, rankings, personalization and algorithmic discrimination explored under the matrix drawn. Firstly, each issue is explained as a consumer issue prevalent in the collaborative economy. The issues of consumers based on their relationship with service providers and the CEP are analysed to highlight the issues raised in this tripartite relationship. Secondly, the legislative landscape is relied upon to discuss the legal protection of consumers against issues. This comparison is made to analyse the differential legislative approaches to consumer issues on CEPs. Thirdly, these issues will be explored in B2C and P2P transactions in the collaborative economy. Lastly, the persistence of consumer issues on CEPs is highlighted.

³⁶⁵ Frederik Zuiderveen Borgesius, 'Discrimination, Artificial Intelligence, and Algorithmic Decision-Making' (Council of Europe). 'Algorithms: How They Can Reduce Competition and Harm Consumers' (n 357).

2. Ratings and Reviews

2.1. Introduction

The term ratings are derived from the Dutch term *reten*, the late middle English term *ret* and the medieval Latin *rata* (from Latin *pro rata parte* (or *portione*) ‘according to the proportional share’. Ratings are non-narrative appreciations of products and services projected on a scale of numbers or stars (e.g. stars from 1 to 5).³⁶⁶ The term review is derived from the French word *revoir*, meaning to see again, review, or revise. Reviews are verbal representations of opinions. Ratings and reviews (R&R) are quality, standard, or performance assessments. They are often used together as they serve a similar function – to represent satisfaction or dissatisfaction.³⁶⁷ Hence, R&R are researched in tandem.

Throughout history, consumer feedback has existed through word of mouth to assess and evaluate their interactions.³⁶⁸ The growth of the internet and information technology offers

³⁶⁶ Rossana Ducato, Miriam Kullmann and Marco Rocca, ‘Customer Ratings as a Vector for Discrimination in Employment Relations? Pathways and Pitfalls for Legal Remedies’, *Assessing Worker performance in a Changing Technological and Societal Environment* (2018) 1.

³⁶⁷ ‘Understanding Online Consumer Ratings and Reviews’ (n 352) 6.

³⁶⁸ U Mahesh Balan and SK Mathew, ‘Online Word of Mouth Using Text Mining: A Review of Literature and Future Directions’, *2015 IEEE Workshop on Computational Intelligence: Theories, Applications and Future Directions (WCI)* (IEEE 2015); Supratim Kundu and Rajasekaran Sundara Rajan, ‘Word of Mouth: A Literature Review’ (2017) 06 *International Journal of Economics & Management Sciences*; Tiana Tucker, ‘Online Word of Mouth: Characteristics of Yelp.Com Reviews’ 6; Young Joon Park and others, “‘Worse Than What I Read?’” *The External Effect of Review Ratings on the Online Review Generation Process: An Empirical Analysis of Multiple Product Categories Using Amazon.Com Review Data* (2021) 13 *Sustainability* 10912. Ryan Hamilton, Kathleen D Vohs and Ann L McGill, ‘We’ll Be Honest, This Won’t Be the Best Article You’ll Ever Read: The Use of Dispreferred Markers in Word-of-Mouth Communication’ (2014) 41 *Journal of Consumer Research* 197.

consumers more information to come together and act on that information.³⁶⁹ Individual R&Rs are aggregated and published, reflecting the ‘voices of the consumers,’ as reflected in consumers’ R&Rs rather than manufacturers’.³⁷⁰ The R&R supplements rather than supplants managerial judgment by augmenting attributes and dimensions found through traditional surveys and focus groups.³⁷¹ Online consumers’ R&R are peer-generated product or service evaluations posted on company or third-party websites.³⁷² Online R&R are becoming an increasingly prevalent way for consumers to publish and share their personal experiences with products and services.³⁷³

Providers and CEPs introduce R&R systems for various reasons, including quality control, improving service, rectifying issues, and reducing information asymmetry.³⁷⁴ In addition, R&R are beneficial for consumers without physical contact with the service as it builds

³⁶⁹ Koopman, Mitchell, Thierer (2015) *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*

³⁷⁰ Baginski and Malecki (n 139) *Incentive- Centered Design for User-Contributed Content-* Lian Jian and Jeffrey K. MacKie-Mason. Thomas Y Lee and Eric T Bradlow, ‘Automated Marketing Research Using Online Customer Reviews’ (2011) 48 *Journal of Marketing Research*, Sage Publications, Inc. on behalf of American Marketing Association 881. Monic Sun, ‘How Does the Variance of Product Ratings Matter?’ (2012) 58 *Management Science* 696.

³⁷¹ Lee and Bradlow (n 370) Page 882. Susan M Mudambi and David Schuff, ‘Research Note: What Makes a Helpful Online Review? A Study of Customer Reviews on Amazon.Com’ (2010) 34 *Management Information Systems Research Center*, University of Minnesota 185.

³⁷² Mudambi and Schuff (n 365) 186.

³⁷³ Shrabastee Banerjee, Chrysanthos Dellarocas and Georgios Zervas, ‘Interacting User-Generated Content Technologies: How Questions & Answers Affect Consumer Reviews’ 56.

³⁷⁴ Sofia Ranchordás, ‘Online Reputation and the Regulation of Information Asymmetries in the Platform Economy’ [2017] *University of Groningen, Faculty of Law*; Vesna Lukovic, ‘Information Asymmetries in Algorithms at Digital Platforms: Motivations to Participate and EU Regulatory Approach’ (2021) 178; Botsman (n 68); Mareike Möhlmann and Andrea Geissinger, ‘Trust in the Sharing Economy: Platform-Mediated Peer Trust’ in Nestor Davidson, Michèle Finck and John Infranca (eds), *The Cambridge Handbook of the Law of the Sharing Economy* (Cambridge University Press 2018).

confidence and trust.³⁷⁵ Potential consumers trust the R&R while making purchasing decisions.³⁷⁶

R&R systems on CEPs are two-sided systems that benefit the service provider and the consumer.³⁷⁷ These systems provide the service provider and the consumer with a feedback mechanism. The feedback mechanism system is lopsided, where one party can provide recommendations about certain aspects, and the other party is not provided with the same option.³⁷⁸ For example, on Uber, Blablacar or Ola, riders and drivers can rate and review each other from one to five stars. They can view their aggregate R&R on their profile. This aggregated R&R are shared with other users on the CEPs and used to monitor the users' profiles and, in certain situations, deactivate profiles.³⁷⁹

R&Rs are one type of data used to evaluate workers' performance.³⁸⁰ R&Rs are used for consumer evaluation and to determine service providers' access to the CEPs.³⁸¹ For example, drivers on Uber and Ola and hosts on Airbnb and Oyo Rooms or Handypersons on Fiverr or

³⁷⁵ Rachel Botsman, *Who Can You Trust? How Technology Brought Us Together and Why It Might Drive Us Apart* (Penguin Group); Mareike Möhlmann and Andrea Geissinger, 'Trust in the Sharing Economy: Platform-Mediated Peer Trust' in Nestor Davidson, Michèle Finck and John Infranca (eds), *The Cambridge Handbook of the Law of the Sharing Economy* (Cambridge University Press 2018)

³⁷⁶ Anindya Ghose and Panagiotis G Ipeirotis, 'Designing Novel Review Ranking Systems: Predicting the Usefulness and Impact of Reviews', *Proceedings of the ninth international conference on Electronic commerce - ICEC '07* (ACM Press 2007) 1.

³⁷⁷ Consumers, Health, Agriculture and Food Executive Agency. (n 274); European Commission (n 49).

³⁷⁸ Simon Martin and Sandro Shelegia, 'Underpromise and Overdeliver? - Online Product Reviews and Firm Pricing' 33.

³⁷⁹ 'Legal | Uber- Uber Privacy Notice- Belgium' <<https://perma.cc/AW5E-6S8J>>; 'Legal | Uber- Uber Privacy Notice- India' <<https://perma.cc/TQ3U-N2ZZ>>; 'Terms of Service- Blabla Car' <<https://perma.cc/66SF-98J6>>; 'Terms and Conditions- Ola' <<https://perma.cc/M3WQ-73XN>>.

³⁸⁰ Alex Rosenblat and others, 'Discriminating Tastes: Uber's Customer Ratings as Vehicles for Workplace Discrimination: Customer Ratings and Workplace Discrimination' (2017) 9 Policy & Internet- Policy Studies Organisation 256 256.

³⁸¹ Ducato, Kullmann and Rocca (n 360) 13.

Local Ramu must maintain a certain average R&R (for example, above 4.5 stars) to continue providing services to consumers using the CEP. However, consumer bias in providing R&R could impact their access to the CEP, and service providers would be discriminated against. However, this thesis focuses on the challenges consumers and peer consumers face in B2C and P2P transactions due to lapses in R&R systems.

2.2. Consumer challenges in relation to R&R

Existing research identifies two challenges in the R&R system for consumers. First is the presence of fake R&R provided by consumers or service providers to manipulate the algorithm to boost their products and services. Second is the presence of incentivized or paid R&R posted in exchange for benefits from service providers without disclosures such as sponsorships.³⁸²

2.2.1. Fake R&R

In the era of fake news and alternate facts, consumers on CEPs are not immune from facing fake R&R. Fake R&R refers to R&R that is not genuine.³⁸³ These R&Rs do not contribute to the provision of information. These reviews can be provided due to bias, trolling behaviour, external factors, consumer error, personal reasons and significant consumer behaviour. Fake R&R can also be provided by non-consumers, traders, competitors, or bots.³⁸⁴

³⁸² ‘Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market’ (n 359).

³⁸³ ‘Understanding Online Consumer Ratings and Reviews’ (n 352) 14.- A 2015 French study identified between 10% and 30% of reviews to be fake, with up to 45% of them suspicious. Other cross-country estimates range from 1% to 16% of the reviews to be fake

³⁸⁴ Valant Jana, ‘Online Consumer Reviews: The Case of Misleading or Fake Reviews’ [2015] European parliament 10 Page 10; Sherry He, Brett Hollenbeck and Davide Proserpio, ‘The Market for Fake Reviews’ 57.

Based on the Exploratory Study in the EU and the Market Study in India, fake reviews are one market-distorting factor in the e-commerce sector.³⁸⁵ Another example might be that the provision of an R&R might be a condition to continue using the webpage. For example, Uber (and Ola in India) provide riders with a rating of their previous experience to continue using their services. So, the next time a consumer logs in to use the service, they are met to rate and review a service they used weeks ago. They might not remember their experience and provide an inaccurate R&R merely to continue to use the service. These may be non-genuine R&R provided by an actual consumer due to indifference to using the product or service.

The presence of fake R&R was seen to increase information asymmetry and cause market failures.³⁸⁶ The legislators took note of this, created legislation and placed the burden on CEPs to mitigate the spread of fake R&R generated by persons who are not actual consumers of the product and service.

2.2.2. Paid reviews

Another way R&R systems impact consumers are through the presence of paid reviews. Opinions provided by experts are an example of paid reviews. These opinions are provided by experts called to provide their opinions about subjects, for example, expert witnesses in trials. However, there could be situations where certain consumers are paid to provide untrue R&R in exchange for certain benefits.³⁸⁷ Paid real R&R serves its function, generates trust,

³⁸⁵ European Commission. Directorate General for Justice and Consumers. and others (n 53) 120; 'Market Study on E-Commerce In India- Key Findings and Observations' (n 54) 28.

³⁸⁶ Damian Clifford, 'Citizen-Consumers in a Personalised Galaxy: Emotion Influenced Decision-Making, a True Path to the Dark Side?' [2017] SSRN Electronic Journal; Ryan Calo and Alex Rosenblat, 'The Taking Economy: Uber, Information, and Power' [2017] SSRN Electronic Journal.

³⁸⁷ The trend of influencer marketing is on the rise, where influencers with substantial audiences online are incentivized to take up sponsorships or paid promotions and provide their opinion about certain products and services. Their audience base is influenced by these recommendations which may not be beneficial. For example, when influencer Khloe Kardashian promoted gummy vitamins which did not have a positive result.

and benefits reviewers and potential consumers.³⁸⁸ Paid non-genuine reviews are of concern as parties benefit from providing false opinions that influence purchasing decisions.³⁸⁹ Thus, colouring all paid reviews as real or fake would be improper.³⁹⁰ Legislators thus have turned to disclosures of such paid promotions where any advertisement or sponsorships must be clearly stated.

2.3. Legislative Protection concerning R&R

2.3.1. European Union

The Fairness and Transparency Regulation states that platforms (CEPs) must be transparent about the main parameters, including R&R, used to generate rankings. However, this regulation is applicable only between CEP and service providers.³⁹¹ The Modernization Directive amended the UCPD to make similar provisions in relation to consumers.³⁹²

The UCPD has included the non-provision of information to consumer R&R as a misleading omission.³⁹³ In situations where traders have access to consumer R&R, the trader must provide information regarding the origin of the R&R and publish only R&R that originates

Another example is the detox tea, which was rated very highly by influencers, but did not have the amazing weight loss results that they claimed.

³⁸⁸ European Commission. Directorate General for Justice and Consumers. and others (n 29) Page 112; ‘Market Study on E-Commerce In India- Key Findings and Observations’ (n 46) Page 20.

³⁸⁹ OECD, ‘OECD- Understanding Online Consumer Ratings and Reviews’ [2019] OECD Digital Economy Papers 28.

³⁹⁰ Jing Wang, Anindya Ghose and Panagiotis G Ipeirotis, ‘Bonus, Disclosure and Choice: What Motivates the Creation of High-Quality Paid Reviews?’, *33rd International Conference on Information Systems, Orlando* (2012).

³⁹¹ P2B Regulation, OJ L 186, 11.7.2019.

³⁹² Modernization Directive, OJ L 328, 18.12.2019.

³⁹³ UCPD, OJ L 149, 11.6.2005 Article 7(6).

from consumers who purchased such products or services, the absence of which is misleading omission.³⁹⁴

Further, Annex 1 states that when a platform uploads an R&R without taking the necessary measures to check if it originated from a consumer, it is an unfair trade practice.³⁹⁵ Such checking procedures were introduced to increase the likelihood that such R&R reflect actual consumers' opinions.³⁹⁶ The UCPD introduced provisions that expressly prohibit submitting or commissioning persons to submit fake R&R. This provision was introduced to check potential fake R&R from fake consumers or bots. In order to keep in check paid fake R&R, Annex 1 also prohibits the misrepresentation of consumer R&R used in sponsorships or paid promotions of products and services.³⁹⁷

For example, guests and hosts rate and review each other on Airbnb and Oyo Rooms. Airbnb provides community guidelines that must be adhered to while providing such R&R.³⁹⁸ Airbnb also states that such R&R is not verified and can be misleading. Consumers may be subject to misleading or incorrect information. The guests and hosts also do not guarantee the authenticity of an R&R. Further, R&R can be used, as one of the data points considered, to remove or suspend the users and their profiles on CEPs.

³⁹⁴ *ibid* Article 7(6)- Misleading Omission; Commission Notice- Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market 2021/C 526/01.

³⁹⁵ UCPD, OJ L 149, 11.6.2005 Annex 1 Point 23(b).

³⁹⁶ 'Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market' (n 359).

³⁹⁷ UCPD, OJ L 149, 11.6.2005 Annex 1 Point 23(c).

³⁹⁸ 'Terms and Policies - Airbnb Help Center' (*Airbnb*) <<https://perma.cc/6AJC-WSRV>>; 'Outside of the United States Privacy Policy- Airbnb Help Center' (*Airbnb*) <<https://perma.cc/82BS-86AG>>; 'Terms and Conditions- Oyo Rooms' <<https://perma.cc/2N8P-ASNV>>.

2.3.2. India

The Consumer Protection Act has included instances of provision of false information in relation to R&R.³⁹⁹ The Act has expanded the list of possible instances of unfair and restrictive trade practices to cover instances of lack of appropriate information, misleading advertisements and pricing.⁴⁰⁰ Further newly introduced provisions of this legislation include liability for endorsers, where celebrities/influences/performers who indulge in misleading advertisements can be penalized. The marketer and the endorser can be liable for false and misleading advertising.⁴⁰¹

Additionally, the Consumer Protection (E-Commerce) Rules state the liability of marketplace e-commerce entities (including CEPs), which state that they shall provide details about the seller and their R&R and any aggregated feedback.⁴⁰² Further, the rules also state the duties of sellers on the marketplace (service providers on CEPs), which states that such sellers shall not falsely represent themselves as consumers and post R&R or misrepresent the products or services.⁴⁰³

Further, the DNEP is a policy made in the present for the future. It addresses two critical aspects of disclosures of various information about consumer protection, the use of data and

³⁹⁹ The Consumer Protection Act, 2019 Sec.2(7) Consumer, Sec.2(16) E-commerce, Sec.2(17) Electronic Service Provider, Sec.2(38) Product Service Provider. Sandhu and Kaur (n 324). Sahoo and Chatterjee (n 325). Shashi Nath Mandal, 'Protection of Consumers' Rights: A Socio-Legal Challenge in India' [2010] SSRN Electronic Journal. Sandhu and Kaur (n 324).

⁴⁰⁰ The Consumer Protection Act, 2019 Sec.2(9) Consumer Rights, Sec 2(41) Restrictive Trade Practice. *ibid* Sec.2(46) Unfair Contract, Sec.2(47) Unfair Trade Practice. Section 2(47). Pillai (n 316); Vilas Sable (n 327).

⁴⁰¹ The Consumer Protection Act, 2019 Sec.89; Vilas Sable (n 327); Pillai (n 316); Nigam (n 321).

⁴⁰² Consumer Protection (E-Commerce) Rules, 2020 Rule 5(3)(a). Similar rules are also present for inventory e-commerce entities, but platforms like Uber and Airbnb are not categorized as inventory e-commerce entities, under Rule 7- Duties and liabilities of inventory e-commerce entities.

⁴⁰³ *ibid* Rule 6(2)- Duties of sellers on marketplace.

the display of R&R.⁴⁰⁴ The Policy states that marketplaces (including CEPs) must ensure transparency and non-discrimination in publishing R&R. The Policy emphasises the responsibility and liability of these platforms and social media to ensure the genuineness of any information posted on their websites. All R&R for verified purchases must be published as registered by the consumer, except those found promotional, abusive or inappropriate in a community setting. Marketplaces must devise mechanisms to prevent fraudulent reviews and ratings by sellers and their affiliates.⁴⁰⁵ The DNEP places the responsibility exclusively on the CEPs without providing appropriate enforcement mechanisms.

2.4. R&R in B2C and P2P transactions

Consumers face the challenges of ratings and reviews on CEPs. Fake and paid reviews impact consumers in B2C and P2P transactions. However, as discussed in Chapter 2, the UCPD is applicable in B2C transactions. These transactions include situations when CEPs or service providers provide remuneration to third parties like influencers or bots to provide misleading R&R. In situations where other consumers generate the incorrect R&R- there is no relief against potential consumers. The CEP must ensure that they originate from such a consumer. However, there is no way to check if the information is correct; only the identity of persons proving such R&R can be checked. Furthermore, the remedies under the UCPD can be availed only by consumers in B2C transactions and not P2P transactions.

In India, the challenges arising from R&R are addressed under the Consumer Protection Act and Rules. As discussed in Chapter 2, the Act and the Rules can be interpreted to apply to B2C and P2P transactions, as the legislation is aimed at the interests of consumers. The protection to consumers has been extended to the DNEP, which acknowledges the challenges of R&R and includes potential solutions in the e-commerce legislation, impacting peer

⁴⁰⁴ Draft National E-Commerce Policy- India's Data for India's Development, 2019 Part III- E-Commerce Marketplaces- Authentic Ratings and Reviews, 23.

⁴⁰⁵ *ibid* Part III- E-Commerce Marketplaces- Authentic Ratings and Reviews, 23.

consumers, even if they are not covered under the ambit of Consumer protection laws and applies to other non-CEPs.

The normative statement is that peer consumers ought to be protected from the issues in ratings and reviews. CEPs provide intermediation services between service providers and consumers. The distinguishing protection is provided under legislation protecting consumers in B2C transactions, not P2P transactions. Furthermore, the issues of R&R impact all consumers, but protection under consumer protection law is provided to consumers and not to peer consumers. The etymology of ratings and reviews also arises from providing opinions about a product or a service. It is not limited to specific individuals of consumer or peer consumers but merely opinions of individuals receiving the service. Where a standard of protection is provided to consumers, EU consumer protection law is not achieving its purpose of protecting consumers on CEPs as it does not apply to peer consumers.

2.5. Persistence of Consumer Issues and consumers and peer consumers

The Yankee Candle anecdote explains the impact of algorithms in R&R systems on consumers. Consider this research by Kate Petrova, a research assistant who analysed about 20,000 Amazon reviews for scented and unscented candles. Her research found that in 2020, the ratings of scented candles fell by an entire star (the average rating of the scented candle).⁴⁰⁶ In addition, reviews containing phrases like ‘cannot smell’ or ‘no scent’ increased from 2% in January to 6% in November.⁴⁰⁷ The finding offers ‘strongly suggestive’ evidence that Americans experiencing a loss of smell due to COVID-19 may be writing more negative candle reviews this year. This R&R does not relate to the product’s efficacy but to the users’ experience due to an external factor like COVID-19. Nonetheless, this has deceived potential consumers who believed the candles did not contain scent and manipulated their behaviours.

⁴⁰⁶ Christopher Ingraham, ‘What Negative Candle Reviews Might Say about the Coronavirus’ 2. Bean Mackenzie, ‘Spike in Negative Candle Reviews May Be Tied to COVID-19’.

⁴⁰⁷ ‘Kate Petrova | FlowingData’; Nathan Yau, ‘Scented Candle Reviews on Amazon and Covid-19’ (*FlowingData*, 2 December 2020).

Another example of consumer behaviour affecting R&R is the online flooding of fake reviews. The hacktivist group Anonymous encouraged people to leave R&R about businesses and restaurants, providing information about the situation in Ukraine.⁴⁰⁸ The R&R provide Russian citizens with information on the occurrences in Ukraine. These ratings and reviews were not in relation to the product or service provided but were to disseminate information. The ratings are five stars or one star, so the algorithm recognises these extremities and displays such information.

Another example of consumer behaviour contributing to issues in R&R systems was the case of cow-dung cakes. In India, cow dung cakes are burnt in religious functions. With traditionalism meeting technology, cow dung cakes have begun being sold online. A consumer who purchased these cow dung cakes reviewed them and stated they tasted ridiculous, grass-like, and muddy. He also stated that more attention should be paid to the product's taste and crunchiness. This led to further reviews stating that this was not nice to eat and led to diarrhoea. The seller had to state that this product was not meant to be eaten. As stated in the product description, a consumer who purchases cow dung cakes meant for religious purposes then proceeds to consume them and leaves a one-star rating affects the product's reputation. This reviewer is an actual consumer who has purchased the product and left a review. However, as this was not the product's intended use, the R&R provided cannot be considered a genuine R&R of the product used for its intended purpose. Such R&R are fake, untrue and irrelevant, affecting consumers' behaviour and purchasing decisions.

Further, after that first consumer review, there was a surge in the number of people who posted similar reviews, poking fun at the first reviewer. Currently, humorous information is what consumers receive when they search and want to purchase the product. What started as

⁴⁰⁸ Katie Collins, 'Google Restaurant Reviews Hijacked to Share News From Ukraine With Russian Citizens' (CNET); 'People Are Leaving Fake Google Reviews to Tell Russians What's Really Happening in Ukraine' (*The Big Issue*, 2 March 2022); 'People Are Writing Fake Google Reviews of Russian Restaurants to Spread Word of Ukraine Invasion' (*indy100*, 28 February 2022).

a joke/prank has snowballed into communicating untrue and irrelevant information to consumers. This case and effect create a loop of many untrue, non-genuine reviews perpetrating consumers' misinformation. In the absence of negative feedback (a corrective mechanism, in this case, would be an abundance of genuine, authentic, unbiased reviews), Non-genuine R&R can create and portray fake social preferences, and this causes harm to current and potential consumers by snowballing an untrue image of the product or the service.

The above examples are situations of fake and untrue reviews. These R&Rs do not always reflect the true nature of the product or service and skew the information provided to consumers. Algorithmic aggregation of R&R reflects how false consumer preferences can creep into R&R systems and may not always provide accurate information to consumers.

One of the suggested solutions to prevent fake reviews is identity disclosure.⁴⁰⁹ When the reviewer's identity is revealed, the reviewer might not provide fake reviews. Peer recognition is a powerful motivator in encouraging users to contribute online. Users must disclose their identities within an online community to achieve peer recognition. However, this might lead to the extremization of R&R and with the identity of the reviewer being disclosed, they may be less likely to provide their authentic R&R about the product or service. The intention of creating R&R systems is to encourage information generated by existing consumers for potential consumers. R&R are one of the pieces of consumer data collected and used by CEPs to generate rankings.

⁴⁰⁹ Xianwei Liu, Rob Law and Yukuan Xu, 'Does Identity Disclosure Affect Review Extremity?' (2019) 77 *Annals of Tourism Research* 171.

Ratings and Reviews			
Issue	Legislation applicable	Descriptive analysis	Normative Analysis
Issues with R&R - fake &R& or paid R&R. These challenges are faced by consumers and were studied in the Exploratory Study in the EU and the Market Study in India.	EU: The fairness and transparency regulation indirectly impacts consumers. The UCPD - misleading R&R is an unfair trade practice. India: The DNEP and The Consumer Protection (Rules) - place an onus on platforms about R&R.	Consumers in B2C transactions are protected from issues of R&R. Peer consumers – consumer protection law does not apply to them, and they are not protected in the EU and India.	The normative statement is that peer consumers ought to be protected from the issues in ratings and reviews. The issues of R&R impact all consumers, but protection under consumer protection law is provided to consumers in B2C transactions and not to peer consumers in P2P transactions.

Figure 20: Ratings and Reviews on CEPs.

3. Rankings

3.1. Introduction to Rankings

The noun ‘rank’ and the verb ‘to rank’ can be traced back to the 14th century.⁴¹⁰ ‘Ranking’ refers to the relationship between items where one item is ranked higher than, lower than, or equal to the second. Products and services are ranked in the physical world - from everyday purchases like toothpaste and occasional purchases like computers.⁴¹¹ This ranking can be on various bases – for example, the toothpaste ranked highest in teeth whitening may not be the same toothpaste that is ranked highest in terms of flavour. The parameters considered for ranking are integral to understanding the basis of the ranking system to know the best toothpaste in the market (for consumers’ needs).⁴¹²

3.1.1. Rankings online

Rankings are omnipresent online as well.⁴¹³ Search results are ranked in a particular manner, usually based on relevance but modified based on price (high-low, low to high), proximity (closest or farthest), or relevance to the searched terms. CEPs rely on the intellect of

⁴¹⁰ The noun rank originates from Old French *renc, ranc* ‘row, line’ (Modern French *rang*) and can be traced back to the early 14th-century meaning ‘row, line, or series’ and the verb ‘to rank’ is traced to its earliest usage in 1570, meaning to arrange in lines or to put in order, classify, assign a rank to, have a specific place in a hierarchy

⁴¹¹ Showing that ranking is present in everyday transactions too. Solomon and others (n 161) Page 98.

⁴¹² Parker, Alstyne and Choudary (n 60) 72; Ramin Bashir Khodaparasti, Aboulfazl Aboulfazli and Reza Isakhajelou, ‘Ranking the Most Effective Marketing Mix Elements on the Sales of Javid Darb Company Products: An AHP Technique’ (2015) 8 Journal of International Studies Page 164; Solomon and others (n 99) 98.

⁴¹³ Marcelo Corrales Compagnucci and others (eds), *Legal Tech and the New Sharing Economy* (Springer Singapore 2020) 127.

algorithms to decide which search result, product or service is ranked higher than or lower than based on the conditions selected.⁴¹⁴

In the collaborative economy, rankings are generated by CEPs that collect and process user data. Various data points are collected, and the CEP lists the rankings of the services provided. For example, Airbnb properties (and hosts) or Oyo Rooms are ranked when consumers search for particular accommodations in a specific location. The criteria can be changed based on the various parameters; however, a default ranking occurs on relevance to the search terms.⁴¹⁵ On the other hand, there is no ranking on Uber or Ola. When a rider requests a ride, the application automatically connects the rider with the driver who accepts the requested ride. There is no ranking (or list) of the driver.⁴¹⁶

3.1.2. Two parts of rankings

Rankings consist of a two-step process – aggregating the information and applying algorithms to list the products and services in a specific manner.

The aggregation of information is the first step to ranking. Aggregation involves compiling information to prepare the database for algorithmic processing.⁴¹⁷ The aggregation process

⁴¹⁴ Botsman (n 125) 104. The author refers to online systems as magic as the army of human beings, many of them single-minded maths nerds, involved in their operation are not seen. This is magical occurrences are known to be the work of algorithms. Alexandra J Ravenelle, *Hustle and Gig: Struggling and Surviving in the Sharing Economy* (University of California Press 2019) Page 54; Yonathan A Arbel, 'Reputation Failure: The Limits of Market Discipline in Consumer Markets' Wake Forest Law Review 1239. Identical platforms can be ranked differently on different platforms, based on various conditions.

⁴¹⁵ Airbnb Terms of Service- <https://perma.cc/EM58-WDYK> Lukovic (n 368) 169.

⁴¹⁶ Uber Legal- India <https://perma.cc/TQ3U-N2ZZ>, Uber Legal- Belgium <https://perma.cc/AW5E-6S8J>

⁴¹⁷ Note that aggregation of information to create rankings is different from ranking aggregation, which is the process of combining multiple ranked lists into a single ranking. Jiankun Ding and others, 'A New Hierarchical Ranking Aggregation Method' (2018) 453 Information Sciences 168; Xue Li, Xinlei Wang and Guanghua Xiao,

compiles data points and aggregates them (mathematical average) to provide aggregated information. For example, a 4.5-star rating (out of 5 stars) shown to consumers is the aggregate rating, created by aggregating ratings where individual ratings can be between 1 and 5.⁴¹⁸

Algorithms form the second part to create the rankings. Algorithms are specific instructions that use aggregated information to list the products in a specific manner.⁴¹⁹ Algorithms are unique to the CEPs and form a part of their intellectual property.⁴²⁰ For example, after aggregating the ratings, products and services with a 4.5-star rating (based on a single data point) may be placed higher products with an aggregate 3-star rating.

Ranking lists products and services based on aggregating consumers' preferences. The data of consumer preferences are aggregated and processed through algorithms.⁴²¹ If the data input into the algorithm is incorrect, the output will reflect the errors, i.e., if aggregation is skewed

'A Comparative Study of Rank Aggregation Methods for Partial and Top Ranked Lists in Genomic Applications' (2019) 20 Briefings in Bioinformatics 178.

⁴¹⁸ This can be a point-based system or a star-based system. Some online platforms also use emoticons to help the user describe their feeling of the product or service. Aggregation- Busch (2016) states aggregation of R&R is one of the data points that are used to create a ranking system.

⁴¹⁹ Andrey Fradkin, 'A Simulation Approach to Designing Digital Matching Platforms' [2019] SSRN Electronic Journal 24.

⁴²⁰ 'Algorithms: How They Can Reduce Competition and Harm Consumers' (n 55); Nieves Delgado, 'Algorithmic Transparency: Where Law Meets Technology' (College of Europe, Bruges Campus) Page 5; European Parliament. Directorate General for Parliamentary Research Services., 'A Governance Framework for Algorithmic Accountability and Transparency.' (Publications Office 2019); Reillier and Rellier (n 125); 'Algorithms: How They Can Reduce Competition and Harm Consumers' (n 55).

⁴²¹ G Charness and M Rabin, 'Understanding Social Preferences with Simple Tests' (2002) 117 The Quarterly Journal of Economics 817; Ernst Fehr and Urs Fischbacher, 'Why Social Preferences Matter - The Impact of Non-Selfish Motives on Competition, Cooperation and Incentives' 34; Jeffrey P Carpenter, 'Endogenous Social Preferences' (2005) 37 Review of Radical Political Economics Page 63. Reillier and Rellier (n 125) 98.

in any manner, ranking is also skewed.⁴²² For example, fake reviews and incorrect information on CEPs cause errors to creep into aggregation. Skewed aggregation leads to a skewed listing of products (as aggregation leads to the listing), reflecting incorrect consumer preference (which may skew consumer decision-making).⁴²³

Rankings will also be skewed if certain products and services are paid for and placed higher in the ranking list than similar products and services.⁴²⁴ Thus, incorrect information put into the system creates a domino effect—incorrect information leading to incorrect aggregation and a skewed ranking.

3.2. Consumer challenges in relation to rankings

Gestalt theory states that organisms perceive entire patterns or configurations, not merely individual components, i.e., the whole is more than the sum of its parts.⁴²⁵ Aggregation of information on CEPs assists in succinctly providing the information to consumers.

⁴²² Fei Long and Yunchuan Liu, 'Fake Sales and Ranking Algorithms in Online Retail Marketplace with Sponsored Advertising' [2022] SSRN Electronic Journal 10-12.

⁴²³ Vassilis Hatzopoulos, *The Collaborative Economy and EU Law* (Hart Publishing 2018) Page 12; Consumers, Health, Agriculture and Food Executive Agency. (n 272) 85. Chen Jin, Luyi Yang and Kartik Hosanagar, 'To Brush or Not to Brush: Product Rankings, Consumer Search, and Fake Orders' 105.

⁴²⁴ Hatzopoulos (n 15); 'Commission Staff Working Document- Impact Assessment- Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services' (Hart Publishing 2016). 'Opinion of the European Economic and Social Committee on "Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services" (COM(2018) 238 Final — 2018/0112 (COD))' 6. Jan Kraemer and Oliver Zierke, 'Paying for Prominence: The Effect of Sponsored Rankings on the Incentives to Invest in the Quality of Free Content on Dominant Online Platforms' (2020) SSRN Electronic Journal.

⁴²⁵ Barry Smith (ed), *Foundations of Gestalt Theory* Chapter 1- An Essay in Philosophy.

Consumers perceive the genuineness of a product or a service based on the average rating provided or when a specific product is placed higher than another.⁴²⁶

Rankings use aggregated information to provide a list of products and services that CEPs believe are beneficial for the consumer.⁴²⁷ Thus, the consumer is met with a list of products/services that a CEP believes would best suit consumers- based on relevance.⁴²⁸ On CEPs, there are two situations where rankings can occur- the ranking of products and services and the R&R.⁴²⁹ This section focuses on ranking products and services, not ranking of R&R.⁴³⁰

⁴²⁶ Consumers, Health, Agriculture and Food Executive Agency. (n 274).- Compared to having no information on the criteria for ranking search results, when informed that the ranking of is based on popularity, the probability of selecting the product is 115% higher, irrespective of its ranking position and visual prominence on the screen. Separately, when a product is ranked first on the screen the probability of selecting it is increased by 47%, irrespective of transparency about the basis of the ranking or visual prominence. It is plausible to argue that most consumers will read popularity as a signal that since many others have chosen the product it must be of good quality and from a trustworthy source. Anindya Ghose, Panagiotis G Ipeirotis and Beibei Li, 'Examining the Impact of Ranking on Consumer Behaviour and Search Engine Revenue' (2014) 60 *Management Science* 1632. Vassilis Hatzopoulos, *The Collaborative Economy and EU Law* (Hart Publishing 2018) Page 11-12. Negin Golrezaei and others, 'Learning Product Rankings Robust to Fake Users' 71 *Operations Research* 99. Dennis Brouwer, 'A Non-Discrimination Principle for Rankings in App Stores' (2020) 9 *Internet Policy Review*

⁴²⁷ P2B Regulation, OJ L 186, 11.7.2019. Raluca M Ursu, 'The Power of Rankings: Quantifying the Effect of Rankings on Online Consumer Search and Purchase Decisions' (2018) 37 *Marketing Science* 530. Christian Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016) 228.

⁴²⁸ Nikolina (n 361).- Products ranked top have a 47 % higher chance of being chosen and 80 % of consumers only look at the first page of results.

⁴²⁹ Sunil Saumya and others, 'Ranking Online Consumer Reviews' (2018) 29 *Electronic Commerce Research and Applications* 78.

⁴³⁰ Anindya Ghose and Panagiotis G Ipeirotis, 'Designing Novel Review Ranking Systems: Predicting the Usefulness and Impact of Reviews', *Proceedings of the ninth international conference on Electronic commerce - ICEC '07* (ACM Press 2007). Ghose, Ipeirotis and Li (n 426).

Existing literature explains the lack of transparency of information about rankings as a regulatory challenge. The call for transparent information on CEPs includes information about the parties, reputation criteria, expanded range of products and rankings.⁴³¹ Ranking issues were exacerbated when certain CEPs placed their products and services above competitors.⁴³² The Exploratory Study conducted in the EU found that enhanced transparency about rankings increased consumers' trust and confidence in online CEPs' decision-making.⁴³³ While the study indicates enhanced transparency would increase trust in the platform, the converse scenario is that inadequate transparency might result in consumers losing confidence and disengaging from the platform. The absence of transparency in rankings adversely impacts the overall well-being of the CEPs.

⁴³¹ Busch and others (n 7). Guillermo Beltrà, 'Collaborative Economy- BEUC Position' BEUC- The European Consumer Organisation- The Consumer Voice In Europe; Kristin Nemeth and Jorge Morais Carvalho, 'Current Challenges for Consumer Law' (2019) *Journal of European Consumer and Market Law*; Gert Straetmans, 'Misleading Practices, the Consumer Information Model and Consumer Protection' [2016] *Journal of European Consumer and Market Law*. Christopher Koopman, Matthew D Mitchell and Adam D Thierer, 'The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change' (2015) *Mercatus Working Paper*, Mercatus Center at George Mason University. 'Ensuring Consumer Protection in the Platform Economy' (n 361). Codagnone and Martens (n 361) Page 8. Nikolina (n 361). 'Online Platforms and the Digital Single Market' (n 361). Davidson, Finck and Infranca (n 9) 434.

⁴³² *XYZ v Alphabet Inc, Google LLC, Google Ireland Limited, Google India Private Limited, Google India Digital Services Private Limited* Competition Commission of India Case No. 07 of 2020; *AT39740 Google Shopping.pdf*; Stibbe-Tjitske Kuiper and Floris ten Have, 'Google Shopping: Self-Preferencing Is a Form of Abuse of Dominance' (*Lexology*, 2 December 2021); Johannes Persch, 'Google Shopping: The General Court Takes Its Position' (*Kluwer Competition Law Blog*, 15 November 2021); Shrimi Choudhary, 'Competition Commission of India Orders Google Inquiry after News Publishers Complain' *The Economic Times* (7 January 2022); Aditya Kalra, 'India Antitrust Probe Finds Google Abused Android Dominance, Report Shows' *Reuters* (20 September 2021).- though these cases focus on the competition aspects of the abuse of dominance, under 102 TFEU and Section 4 of the Competition Act, 2002, India, this research focuses on the consumer aspect and how this ranked list poses issues for consumers. This is also discussed in the Behavioral study and market study by the CCI.

⁴³³ European Commission. Directorate General for Justice and Consumers. and others (n 29) 86.86.

The Market Study in India highlights similar concerns about the lack of clarity on rankings. The study highlighted that ranking criteria were too opaque. The rankings were created based on clickthrough rates, consumer ratings and reviews, price, reputation and advertisements. The Market Study recommends that the main parameters of rankings and remuneration for rankings be disclosed.⁴³⁴ Similar to the EU, consumers in the global south should be given adequate information to aid decision-making.

In order to tackle issues of rankings in the EU and India, specific regulations concerning the transparency of information used to create rankings have been enacted.⁴³⁵ In order to balance the protection of the intellectual property rights of CEPs and the provision of information to protect consumers, regulations call for the disclosure of the main parameters used to create the rankings, i.e., the data points collected and processed to create rankings.⁴³⁶

In the EU Fairness and Transparency Regulation, The Ranking Guidelines and the Modernization Directive amending the UCPD state that the main parameters that create a

⁴³⁴ 'Market Study on E-Commerce In India- Key Findings and Observations' (n 46). Babur I De los Santos and Sergei Koulayev, 'Optimizing Click-Through in Online Rankings for Partially Anonymous Consumers' [2011] SSRN Electronic Journal.

⁴³⁵ Regulation 2019/1150/EU on promoting fairness and transparency for business users of online intermediation services; Consumer Protection (E-Commerce) Rules, 2020.

⁴³⁶ Delgado (n 376) 25. Can Simsek, 'Algorithmic Transparency in the EU' (Science Po- School of Public Affairs); European Parliament. Directorate General for Parliamentary Research Services. (n 376); Giovanna Di Toro, 'Algorithmic Transparency Between Legal and Technical Issues' (Department of Business and Management and Computer Science Chair of Business Cyberlaw, LUISS). Algorithmic Transparency can be understood as the factors that influence the decisions made by algorithms should be visible or transparent to the people who use, regulate, and are affected by systems that employ those algorithms. Jake Goldenfein, 'Algorithmic Transparency and Decision-Making Accountability'.

ranking system must be disclosed.⁴³⁷ In India, provisions of ranking transparency are enacted under the Consumer Protection (E-Commerce) Rules.⁴³⁸

3.3. Legislative Protection Concerning Rankings

3.3.1. European Union

3.3.1.1. Fairness and Transparency Regulation and the Guidelines on Rankings

In the EU, the Fairness and Transparency Regulation deals with ranking transparency between providers and service providers.⁴³⁹ The Regulation states that providers of online intermediation services (CEPs) shall set out in their terms and conditions the main parameters determining rankings and the reasons for the relative importance of those main parameters over other parameters.⁴⁴⁰ This parameter description aims to improve predictability and help

⁴³⁷ P2B Regulation, OJ L 186, 11.7.2019. Commission Notice Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council 2020/C 424/01, OJ C 424, 8.12.2020. Modernization Directive, OJ L 328, 18.12.2019; UCPD, OJ L 149, 11.6.2005.

⁴³⁸ Consumer Protection (E-Commerce) Rules, 2020 Rule 5(3)(f)- Liabilities of marketplace e-commerce entities.

⁴³⁹ P2B Regulation, OJ L 186, 11.7.2019. Christoph Busch, 'Towards a "New Approach" for the Platform Ecosystem- A European Standard for Fairness in Platform- to-Business Relations' (2017) 6 EuCML-Journal of European Consumer and Market; Busch, 'The P2B Regulation (EU) 2019/1150: Towards a "Procedural Turn" in EU Platform Regulation?' (n 209). P2B Regulation, OJ L 186, 11.7.2019 Article 2(8)- Ranking. Article 5. *'the relative prominence given to the goods or services offered through online intermediation services, or the relevance given to search results by online search engines, as presented, organized or communicated by the providers of online intermediation services or by providers of online search engines, respectively, irrespective of the technological means used for such presentation, organization or communication'*

⁴⁴⁰ P2B Regulation, OJ L 186, 11.7.2019 Article 5(1); Twigg-Flesner, 'The EU's Proposals for Regulating B2B Relationships on Online Platforms – Transparency, Fairness and Beyond' (n 209). Roberto Senigaglia, Claudia Irti and Alessandro Bernes (eds), *Privacy and Data Protection in Software Services* (Springer Singapore 2022)

businesses improve the presentation of their products and services or a characteristic of those products and services.⁴⁴¹

The Regulation also states that where direct or indirect remuneration service providers influence rankings, a detailed description of the effects of the remuneration on rankings is to be provided.⁴⁴² Specific products and services state that they are advertisements, i.e., they may not be the product or service searched for, but they are advertisements paid for by the product/service provider to be ranked first in the search results displayed to consumers.⁴⁴³ Further, when CEPs have altered the rankings or delisted any service providers, the service providers must be notified of such alteration.⁴⁴⁴

The Regulation seeks to achieve fairness and transparency without requiring CEPs to disclose algorithms or information that could deceive consumers by manipulating search results.⁴⁴⁵

Page 215. EISELE Katharina, 'Promoting Fairness and Transparency in the Online Platform Environment' 8; Brouwer (n 426).

⁴⁴¹ P2B Regulation, OJ L 186, 11.7.2019 Recitals 24, 25, 26, Article 5(5). Twigg-Flesner, 'The EU's Proposals for Regulating B2B Relationships on Online Platforms – Transparency, Fairness and Beyond' (n 209).

⁴⁴² P2B Regulation, OJ L 186, 11.7.2019 Article 5(3). 'Proposal for a Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services' COM(2018) 238 final 2018/0112 (COD).

⁴⁴³ Brouwer (n 426); Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 Yearbook of European Law 448. Marco Cian, 'Online Platforms as Gatekeepers to the Digital World – A Preliminary Issue on Business Freedom, Competition and the Need for a Special Market Regulation' (2018) 5 EuCML-Journal of European Consumer and Market 2. Hatzopoulos, *The Collaborative Economy and EU Law* (n 426) Page 11-12. Davidson, Finck and Infranca (n 9) 441-442, Chapter 32- Guido Smorto- The Protection of the Weaker Parties in the Platform Economy. Giovanni Compiani and others, 'Online Search and Product Rankings: A Double Index Approach' [2021] SSRN Electronic Journal.

⁴⁴⁴ 'Position Paper on Ranking Transparency Guidelines' SME United Page 2; Uria Menendez, 'European Commission's New Guidelines on Ranking Transparency Pursuant to Regulation 2019/1150 on Promoting Fairness and Transparency for P2B Relationships' Page 3. Graef (n 24) Page 493; Marco Inglese, *Regulating the Collaborative Economy in the European Union Digital Single Market* (Springer International Publishing 2019) 107. Brouwer (n 419) 5-6.

⁴⁴⁵ P2B Regulation, OJ L 186, 11.7.2019 Article 5(6)- Ranking. Ducato and Strowel (n 190) 167.

Intellectual property rights protect the algorithm that conducts business operations.⁴⁴⁶ Thus, providers are not required to disclose the detailed functioning of their ranking mechanisms, including algorithms. This lack of disclosure may lead to difficulty in discerning the ranking system's fairness and reliability, potentially exposing consumers to biased or manipulated results. Without adequate information, consumers may find it challenging to make informed decisions, hindering their ability to trust and fully engage with the platform.

In light of the Fairness and Transparency Regulation, the Commission has developed further guidelines to assist intermediary services in applying the ranking transparency requirements and optimising the presentation of the main parameters to the service providers.⁴⁴⁷ For example, Airbnb, in its terms of service, provides ranking transparency.⁴⁴⁸ The terms of service also state that Airbnb may allow Hosts to promote their Listings in search or elsewhere on Airbnb by paying an additional fee. This provision illustrates the differential treatment.⁴⁴⁹

As stated, aggregation and rating are two different yet related processes. For example, Uber does not provide such a ranking of its users. The CEP's operational structure does not call for rankings, as it matches drivers and riders. It does not provide a ranking of the closest drivers. Uber's privacy notice provides rating transparency, contributing to the average

⁴⁴⁶ P2B Regulation, OJ L 186, 11.7.2019 Recital 27 and Article 5(6)- Ranking; Trade Secrets Directive, OJ L 95, 21.4.1993 943.

⁴⁴⁷ P2B Regulation, OJ L 186, 11.7.2019 Recital 28, Article 5(7)- Ranking; Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council.; 'Position Paper on Ranking Transparency Guidelines' (n 437) 2; Menendez (n 437) 3.

⁴⁴⁸ Airbnb Terms of Service- <https://perma.cc/EM58-WDYK> Clause 6- Managing Your Listings. Andrey Fradkin, 'Search, Matching, and the Role of Digital Marketplace Design in Enabling Trade: Evidence from Airbnb' [2017] SSRN Electronic Journal 7.

⁴⁴⁹ P2B Regulation, OJ L 186, 11.7.2019 Article 7- Differentiated treatment; 'Consumer Protection (E-Commerce) Rules, 2020' (n 402) Rule 5(4)- Liabilities of marketplace e-commerce entities.

rating(aggregation).⁴⁵⁰ This average rating, as they disclose, is created only with the ratings provided by the rider/driver, which is visible to the rider/driver.

Uber's privacy policy, as applicable to its ride-sharing application, also applies to Uber's services, including UberEATS. UberEATS aggregates and ranks the restaurants it services, and the privacy notice is the same for Uber, the ride-sharing application, and UberEATS, the food delivery service. Though UberEATS provides rankings, it does not disclose the main parameters used for ranking.

Under the CJEU decision, Uber not being an ISS, the Fairness and Transparency Regulation, which applies to ISS, would not apply to Uber.⁴⁵¹ In this situation, Uber would not have to abide by the ranking transparency provisions under the Fairness and Transparency Regulation, which may lead to a fragmented approach to regulating CEPs.⁴⁵² However, Uber must comply with the ranking transparency requirements under the UCPD for its consumers. Uber provides services to its consumers.

Though the Fairness and Transparency Regulation applies to relationships between CEPs and service providers, the Regulation is enacted keeping in mind the impact on consumers, consumer interests, and the prevention of consumer harm through manipulating rankings, thereby complementing EU consumer laws.⁴⁵³

⁴⁵⁰ Uber Legal- India <https://perma.cc/TQ3U-N2ZZ>, Uber Legal- Belgium <https://perma.cc/AW5E-6S8J> A. Albinsson and Perera (n 120) 276.

⁴⁵¹ *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981 (n 177) Paragraph 40.

⁴⁵² Schaub (n 182) Page 114. This fragmentation, though adds to the complexity of e-commerce and consumer protection legislations, is interesting to be analyzed in relation to platforms and regulation of platforms in other jurisdictions.

⁴⁵³ P2B Regulation, OJ L 186, 11.7.2019 Article 5(6)- Ranking; Guidelines on ranking transparency pursuant to Regulation (EU) 2019/1150 of the European Parliament and of the Council. Guidelines 6, 25, 76, 84.

3.3.1.2. Modernization Directive and UCPD

The Fairness and Transparency Regulation's ranking transparency requirements apply between CEPs and service providers. The Modernization Directive amended the UCPD to incorporate the Fairness and Transparency Regulation principles to provide ranking transparency for consumers.⁴⁵⁴ The Modernization Directive introduced the definition of ranking in the UCPD, broadening ranking transparency (from the Fairness and Transparency Regulation, not limiting the application to ISS) to traders irrespective of the technological means used for presentation organization or communication.⁴⁵⁵

Consumers will have to be informed of the main parameters determining the ranking of products in searches and the relative importance of those parameters. Misleading omissions that are considered an unfair commercial practice under the UCPD have been amended to include ranking information as material information. The absence of such information is a misleading omission and an unfair commercial practice.⁴⁵⁶

⁴⁵⁴ Modernization Directive, OJ L 328, 18.12.2019 Recitals 18,19,29,21,22,23 and 26 and Article 3-Amendments to Directive 2005/29/EC . Graef (n 436) 495.

⁴⁵⁵ UCPD, OJ L 149, 11.6.2005 Article 2(m)- Ranking.- ranking' means the relative prominence given to products, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication;

⁴⁵⁶ *ibid* Article 7(4f)- Misleading omissions. When providing consumers with the possibility to search for products offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions are ultimately concluded, general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented, on the main parameters determining the ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters, as opposed to other parameters, shall be regarded as material. 'Communication from the Commission- A New Deal for Consumers' (n 275) Page 6. Nikolina (n 355) 3. Blanca Rodriguez Galindo, 'Developments in EU Consumer Law- The New Consumer Agenda, Legislative Changes and Policy Initiatives' 24. Christoph Schmon and Patrycja Gautier, 'Proposal for a Better Enforcement and Modernization of EU Consumer Protection Rules- "Omnibus Directive" - The BEVC Review 3.

Further, the UCPD is amended to state that providing search results to consumers without clearly disclosing any paid advertisement or payment specifically for achieving a higher ranking of products within the search results shall be considered unfair commercial practice.⁴⁵⁷ The underlying idea is that many consumers are guided by the order indicated by the search engine. They assume that the ranking is determined by the relevance of the product or service searched for unless it is made clear that the ranking is affected by paid placements.⁴⁵⁸

3.3.2. India

3.3.2.1. Consumer Protection (E-Commerce) Rules

In India, ranking is defined under the Consumer Protection (E-commerce) Rules.⁴⁵⁹ The Rules also define e-commerce entities and categorise marketplace e-commerce entities and inventory e-commerce entities.⁴⁶⁰ A marketplace e-commerce entity is an e-commerce entity that provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers.⁴⁶¹ CEPs are marketplace e-commerce

⁴⁵⁷ UCPD, OJ L 149, 11.6.2005 Annex 1 Commercial practices which are in all circumstances considered unfair-11(a).

⁴⁵⁸ Loos Marco B.M., ‘The Modernization of European Consumer Law: A Pig in a Poke?’ [2019] European Review of Private Law Page 123. Nikolina (n 361) Page 3. Galindo (n 456) Page 7. Schmon and Gautier (n 449) 3.

⁴⁵⁹ Consumer Protection (E-Commerce) Rules, 2020 Rule 3(j)- Ranking.- *means the relative prominence or relevance given to the goods or services offered through a marketplace e-commerce entity as presented, organized or communicated by such entity, irrespective of the technological means used for such presentation, organization or communication*

⁴⁶⁰ The Consumer Protection (E-Commerce) Rules Rule 3(b)- E-Commerce Entity, Rule 3(f)- Inventory E-Commerce Entity, Rule 3(g)- Marketplace E-Commerce Entity.

⁴⁶¹ *ibid* Rule 2(g)- Marketplace E-Commerce Entity, Rule 3(k)-Seller. The term ‘seller’ means the product seller as defined in clause Sec2(7) of the Consumer Protection Act, 2019 and shall include any service provider.

entities because they facilitate e-commerce transactions between service providers and consumers.⁴⁶²

The Rules specify the liabilities of the marketplace e-commerce entities (CEPs). The liabilities of CEPs include the provision of an explanation of the main parameters which, individually or collectively, are most significant in determining the ranking of products or sellers on its CEPs. The relative importance of those main parameters is to be made readily and publicly available.⁴⁶³ These Rules are a leap for consumer protection and e-commerce legislation in India. These Rules place the burden of ranking transparency on CEPs and protect consumers by calling for explanations of the main parameters used to create rankings. In India, for example, A CEP like Uber- the ride-sharing application- also complies with the provisions of the Consumer Protection (E-Commerce) Rules. However, UberEATS is not compliant, as it engages in the ranking of the restaurant but does not disclose the main parameters of rankings.⁴⁶⁴

As of September 2021, the Ministry of Consumer Affairs, Food and Public Distribution and the Central Consumer Protection Authority, under the Consumer Protection Act 2019, observed that certain marketplace e-commerce entities were not displaying the details mentioned in the Rules.⁴⁶⁵ Their advisory stated that any person violating these Rules would

⁴⁶² CEPs are not inventory e-commerce entities as they do not own property and transfer property.– Rule 3 (b) ‘e-commerce entity’ means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity;- like Facebook; Rule 3(f) ‘inventory e-commerce entity’ means an e-commerce entity which owns the inventory of goods or services and sells such goods or services directly to the consumers and shall include single brand retailers and multi-channel single brand retailers;- like brand-specific online stores- in any industry, Consumer Protection (E-Commerce) Rules, 2020.

⁴⁶³ The Consumer Protection (E-Commerce) Rules Rule 5(3)(f)- Liabilities of marketplace e-commerce entities.

⁴⁶⁴ ‘Legal | Uber- Uber Privacy Notice- India’ (n 379).

⁴⁶⁵ Advisory in terms of Consumer Protection(E-Commerce) Rules, 2020 for displaying information provided by sellers to marketplace e-commerce platforms 2021.

face action under the Consumer Protection Act.⁴⁶⁶ This advisory is a sign of enforcement of the Rules and heeding to issues raised by the Central Consumer Protection Authority.⁴⁶⁷

3.4. Ranking Transparency in B2C and P2P transactions

In the EU, consumers in B2C transactions are provided transparent information in relation to ranking under the UCPD. The main parameters provided by CEPs inform the consumers regarding the data points collected and used to generate rankings. Similarly, In India, Consumer Protection (E-Commerce) Rules protect consumers by providing information regarding the main parameters used to generate rankings.

However, in P2P transactions, peer consumers are protected slightly differently. The UCPD does not apply to P2P transactions. Peer consumers only benefit from the transparency mandate under the Fairness and Transparency Regulation. The ranking of the service provider or the peer service provider is generated based on consumer data. The main parameters are disclosed in the privacy policy or terms of service. In P2P transactions, the absence of information concerning rankings under the UCPD is not an unfair commercial practice, and peer consumers are not protected as consumers in B2C transactions.

In India, on the other hand, P2P transactions can come under the Consumer Protection Act and Consumer Protection (E-Commerce) Rules. Consumers in B2C and P2P transactions may be afforded similar protections. There is no current provision specifically addressing rankings in P2P transactions. While B2C transactions may be protected, peer consumers are left in the lurch.

3.5. Persistence of Consumer Issues

⁴⁶⁶ The Consumer Protection Act, 2019; Consumer Protection (E-Commerce) Rules, 2020.

⁴⁶⁷ The Consumer Protection Act, 2019 Chapter III- Central Consumer Protection Authority.

3.5.1. Absence of weightage of parameters

The EU Regulation and the Indian Rules provide ranking transparency and disclosure of the main parameters that create rankings. This provision means that the disclosed parameters are significant and outweigh certain other parameters, which may be considered in creating rankings but are not disclosed, i.e., implying that specific parameters are more critical than others. However, these main parameters have no weightage.

The disclosure of main parameters based on usage or importance (providing them weights) would enhance transparency, enabling users to comprehend the decision-making processes within the system better, foster trust, and empower informed interactions within the platform. Consumers would better understand the parameters and the important factors used to generate the rankings. They can decide whether they are relevant to them, similar to the toothpaste bought in the store.⁴⁶⁸ Weighted aggregation provides a more accurate ranking of products and services by providing weights for categories and aggregating them accordingly.⁴⁶⁹ For example, IMDB provides rankings using a weighted average system. Though the weights of each category are not disclosed, IMDB states that using a weighted average system makes the ranking provided more accurate than traditional ranking methods.

3.5.2. Misuse of algorithmic transparency

Knowledge is power, and providing this power to service providers could lead to misuse. If the service providers know that the ranking algorithm favours listings with a particular characteristic, they may either obtain or lie about having that characteristic – leading to the

⁴⁶⁸ See analogy at the beginning of the section on Rankings in Chapter 3.

⁴⁶⁹ ‘Position Paper on Ranking Transparency Guidelines’ (n 444) Page 2., Menendez (n 444) Page 3. Davidson, Finck and Infranca (n 11) Page 76. Mathematically, weighted aggregation provides a more accurate mean (average) than aggregation without weightage. Nipun Bhatia and Pratyus Patnaik, ‘Netflix Recommendation Based on IMDB’ Page 4; Warda Bristi, Zakia Zaman and Nishat Sultana, ‘Predicting IMDB Rating of Movies by Machine Learning Techniques’ Page 5.

manipulation of the aggregation and the ranking (clickbait), causing consumer deception.⁴⁷⁰ For example, hosts on Airbnb could focus on the main parameters that help them achieve a favourable ranking and not on other aspects of their treatment of consumers.⁴⁷¹

3.5.3. Information overload

The transparency provided under EU and Indian law provides for algorithmic transparency towards consumers. Consumers have limited information consumption capacity.⁴⁷² In addition to the information required to be processed while transacting on CEPs, consumers are provided supplementary information about rankings and the use of their data, which may lead to an information overload.⁴⁷³ They are provided all this information but not the knowledge of the operation of algorithms used to create the rankings.

3.5.4. Recommender System under the DSA

The DSA takes a broader approach in the EU by regulating recommender systems.⁴⁷⁴ The DSA states that very large online platforms that use recommender systems shall set out the main parameters used to create this system. The recommender system recommends similar products and services based on the data collected.⁴⁷⁵ CEPs use recommender systems to suggest specific information to recipients of the service, including a search initiated by the recipient or otherwise determining the relative order or prominence of the information

⁴⁷⁰ Codagnone and Martens (n 361) Page 8.

⁴⁷¹ Fradkin (n 448) Page 24. Inglese (n 444) Page 76, 107 .

⁴⁷² Ghose, Ipeirotis and Li (n 426); Consumers, Health, Agriculture and Food Executive Agency. (n 274); Solomon and others (n 161).

⁴⁷³ Assuming that all the consumers are rational consumers who take decisions based on the information provided to them. *Understanding Consumer Behaviour* Page 119.

⁴⁷⁴ Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending directive 2000/31/EC (Digital Services Act).

⁴⁷⁵ *ibid* Article 29- Recommender systems.

displayed.⁴⁷⁶ The recommender system includes ranking, as rankings place the recommended products and services in a specific order.⁴⁷⁷

Expanding the Digital Services Act (DSA) to encompass recommendations, rather than solely focusing on ranking transparency represents a positive stride in bolstering algorithmic transparency.⁴⁷⁸ This extension acknowledges the increasing influence of personalized recommendations on user experiences, providing a more holistic view of the decision-making processes employed by digital platforms. By doing so, the DSA aligns with the evolving dynamics of the digital landscape, promoting user empowerment through informed choices and mitigating potential biases in algorithmic practices. It adapts to the nuanced nature of personalized content delivery and fosters user trust by holding platforms accountable for their algorithmic decisions.⁴⁷⁹ As the Fairness and Transparency Regulation promotes fairness and transparency between CEPs and service providers, and the UCPD seeks to protect consumers from unfair commercial practices of businesses, the DSA aims to establish a comprehensive regulatory framework that addresses the evolving challenges in the digital landscape. It is still critical to remember that the DSA is not specific consumer protection legislation, nor does it specify the scope of transactions to B2C or P2P transactions.

⁴⁷⁶ *ibid* Article 2(o)- Recommender system; Ducato and Strowel (n 192) Page 173.

⁴⁷⁷ For example, the list seen on Amazon or Google are ranked in a certain manner- based on relevance, based on price, proximity etc. However, recommendations are based on preferences that the algorithm can understand based on previous use and is not necessarily ranked in any order. It is recommended based on previous transactions- for example the recommendations on TikTok, YouTube, Netflix fall under the ambit of this Act, if they are considered as gatekeeper platforms

⁴⁷⁸ Christoph Busch and Vanessa Mak, 'Putting the Digital Services Act in Context: Bridging the Gap between EU Consumer Law and Platform Regulation' [2021] *Journal of European Consumer and Market Law* Page 114. The literature states that there is a 'considerable need for consolidation to prevent an 'overkill' of algorithmic transparency rules that are currently in vogue'

⁴⁷⁹ Bengi Zeybek and Joris van Hoboken, 'The Enforcement Aspects of the DSA, and Its Relation to Existing Regulatory Oversight in the EU - DSA Observatory' 2.

3.5.5. Personalised rankings

CEPs provide their rankings service (in addition to aggregation and algorithms) by using consumer-specific information and additional algorithms to create personalised rankings.⁴⁸⁰ As CEPs increasingly utilize algorithms to tailor recommendations and rankings based on individual preferences, concerns arise regarding transparency, fairness, and user autonomy. The challenge lies in the potential for these personalized rankings to inadvertently reinforce biases or limit the diversity of choices, impacting the overall consumer experience. Additionally, the lack of clear visibility into the algorithms governing these rankings raises questions about accountability and the potential manipulation of user perceptions. Personalization and personalised rankings are discussed in detail in the next section.

⁴⁸⁰ Svend Alboek, 'Consumer Welfare in EU Competition Policy' 22.

Ranking			
Issue	Legislation applicable	Descriptive analysis	Normative Analysis
Issues - can arise in the aggregation of consumer data and the application of the algorithm to the aggregated data. These challenges are faced by consumers and were studied in the Exploratory Study in the EU and the Market Study in India.	EU: Fairness and Transparency Regulation- ranking transparency between platforms and service providers; UCPD – transparency provision for consumers in B2C transactions. India: Consumer Protection (Rules) - transparency of main parameters used to create rankings.	Consumers in B2C transactions are protected under EU consumer protection legislation. However, peer consumers in P2P transactions are not protected under consumer protection legislation.	Peer consumers are inherently not protected under consumer protection legislation. Consumers and peer consumers face similar issues, but consumers have protection; peer consumers do not have protection under consumer protection legislation.

Figure 21: Rankings on CEPs.

4. Personalization

4.1. Introduction

Personalization is derived from the Latin term *persona*, meaning person and *personalis*, meaning belonging to a person. Personalization means designing products and services for a person's requirements. Products and services can be personalised by customization, bespoke products in the physical world. For example, personalization by etching an individual's name on products; makeup can be personalised for skin colour, skin type, personalised birthday cakes, and bespoke suits.

Personalization online began with the growth of information technology. Companies like IBM, HP, Wipro, and Infosys created certain products personalised for home and office use and personalised software products for companies for specific purposes.⁴⁸¹ On CEPs, too, products and services can be personalised. On CEPs, this personalization occurs using algorithms applied to collect consumer data.⁴⁸² For example, the algorithm can personalise the advertisements viewed by individuals to show certain products previously searched.⁴⁸³

4.2. Kinds of personalization

4.2.1. Personalised advertisements and marketing

Personalization arose with marketing strategies developed by companies to use data and technology to provide individual products and services to current and potential consumers.

⁴⁸¹ Arun Sundararajan, *The Sharing Economy- The End of Employment and the Rise of Crowd Based Capitalism* (The MIT Press 2016) 43.

⁴⁸² A. Albinsson and Perera (n 120) 50.

⁴⁸³ *ibid* 84.

With this personalization marketing strategy, companies have certain advantages based on their data and technology.⁴⁸⁴

For example, CEPs like Uber and Airbnb engage in personalised advertising. As mentioned in their privacy policies, they use consumers' data to curate personalised advertising and marketing strategies for consumers.⁴⁸⁵ These targeted advertisements can be viewed on the CEP or other platforms.

4.2.2. Personalised and dynamic pricing

Existing research uses slightly different terminology that includes 'dynamic pricing' and 'personalised pricing'. Dynamic pricing, surge pricing, demand pricing, or time-based or peak pricing are pricing strategies where businesses set flexible prices for products or services based on current market demands. Businesses can change prices based on algorithms that consider competitor pricing, supply and demand, and other external factors in the market. For example, Uber utilizes a dynamic pricing strategy.⁴⁸⁶

Personalised pricing occurs when prices are personalised based on consumers. Personalised pricing that adopts a non-uniform pricing strategy amongst different consumption categories is acceptable in certain situations.⁴⁸⁷ Existing research explains the different situations of first-degree, second-degree and third-degree price discrimination. However, the researcher

⁴⁸⁴ *ibid* Page 146. Poort and Borgesius (n 357) 2-5.

⁴⁸⁵ 'Legal | Uber- Uber Privacy Notice- Belgium' (n 379); 'Legal | Uber- Uber Privacy Notice- India' (n 379); 'Outside of the United States Privacy Policy- Airbnb Help Center' (n 240); 'Privacy Policy - Airbnb Help Center' (n 240).

⁴⁸⁶ 'Legal | Uber- Uber Privacy Notice- Belgium' (n 308); 'Legal | Uber- Uber Privacy Notice- India' (n 308); VG James, 'Dynamics of Price Fixation: An Economic Analysis of Law' (1995) 37 *Journal of the Indian Law Institute* 42; Andre Stenzel, Christoph Wolf and Peter Schmidt, 'Dynamic Pricing in the Presence of Rating Systems' 11.

⁴⁸⁷ Poort and Borgesius (n 357) 2-5.

disagrees with the terminology of using discrimination for socially acceptable differential pricing policy.⁴⁸⁸ Volume-based pricing, differential prices for recurring or new consumers, specific group discounts (based on age or occupation), and peak or timing-based pricing (dynamic pricing) are personalised.

4.2.3. Personalised rankings and recommendations

Content that is viewed on platforms is personalised based on various parameters. For example, content viewed on platforms like YouTube, Netflix, Spotify, and TikTok is based on previous search results and algorithmic understanding of consumer behaviour.⁴⁸⁹ Algorithms personalise the recommended content, curate rankings, and a list of products consumers view. Personalised and curated content attracts potential consumers and retains existing consumers by suggesting content based on previous searches and preferences.

4.3. Benefits of personalization

Digital personalization is among the powerful tools that brands utilise for consumer engagement.⁴⁹⁰ Personalization benefits consumers as the algorithms use predictive intelligence using consumer behaviours and preferences to deliver better-personalised products and services.⁴⁹¹ For example, personalised education services could tailor user content based on time spent, performance, and exercises.⁴⁹²

⁴⁸⁸ Lan Xia, Kent B Monroe and Jennifer L Cox, 'The Price Is Unfair! A Conceptual Framework of Price Fairness Perceptions' (2004) 68 *Journal of Marketing* 18.

⁴⁸⁹ Ghose, Ipeirotis and Li (n 419) 12.

⁴⁹⁰ 'Insights | How Personalization Builds Trust and Loyalty' (*Kobe Digital*, 24 October 2020).

⁴⁹¹ Sundararajan (n 472) 84.

⁴⁹² A. Albinsson and Perera (n 120) 111 and 120.

The reason that personalization can succeed is that no consumer likes to feel like another statistic.⁴⁹³ This personalised approach fosters a stronger connection with existing consumers, who appreciate the individualized attention. It also serves as a compelling attraction for new consumers seeking a more personalised and meaningful engagement.⁴⁹⁴ The emphasis on catering to individual preferences creates a sense of authenticity and responsiveness, aligning with the evolving expectations of consumers who seek personalized, relevant experiences in their interactions with CEPs. However, consumers can leave CEPs if the personalization is too ‘creepy’.⁴⁹⁵ However, these personalizations, too, can lead to consumer issues.

4.4. Consumer challenges in relation to personalization

Consumer challenges in relation to personalization include automated decision-making processes that lead to personalization and discrimination in relation to personalization. The increasing reliance on automated decision-making processes driven by algorithms can raise consumer concerns. While the EU's right against automated decision-making is included in the GDPR, such a provision is not in the DPDPB.

Personalization also becomes a consumer issue where consumers are discriminated against based on data collection and usage. For example, personalization by providing discounts or free trinkets based on volume purchased or transaction frequency is differential treatment. However, personalization can become a consumer issue when specific consumers or groups are discriminated against, denied access to the product or service, charged a different price, or provided different recommendations.⁴⁹⁶ While personalised pricing can improve business

⁴⁹³ ‘Insights | How Personalization Builds Trust and Loyalty’ (n 490).

⁴⁹⁴ Botsman (n 125) 28.

⁴⁹⁵ Robert Moore and others, ‘Creepy Marketing: Three Dimensions of Perceived Excessive Online Privacy Violation’ [2015] 13.

⁴⁹⁶ Poort and Borgesius (n 357) 2-5.

efficiency and benefit consumers who would otherwise be underserved, it can also lead to consumer issues.⁴⁹⁷

4.5. Legislative Protection Concerning Personalization

4.5.1. European Union

4.5.1.1. Discrimination

As personalization on CEPs occurs through algorithms, any discrimination, personalised or not, is algorithmic discrimination. The following section discusses algorithmic discrimination. Though there is no specific anti-discrimination legislation in relation to personalization discrimination, the *lex-generalis* and *lex-specialis* can be interpreted to prohibit discrimination by algorithms.⁴⁹⁸

4.5.1.2. Data Law

Automated decision-making under the GDPR provides the data subject with the right not to be subject to solely automated decisions that have a legal or significant effect on them.⁴⁹⁹ The exceptions to the right against automated decision-making are the data subject's explicit consent, necessities for entering into a contract or laws of member states.⁵⁰⁰ Personalization on Uber and Airbnb occurs through automated decisions made by algorithms based on consumers' data. The occurrence of personalization is disclosed to consumers who consent

⁴⁹⁷ Bourreau and de Streel (n 358) 12.

⁴⁹⁸ *ibid.*

⁴⁹⁹ *ibid.*- processing of data, processing of sensitive data; Marco Botta and Klaus Wiedemann, 'To Discriminate or Not to Discriminate? Personalised Pricing in Online Market as Exploitative Abuse of Dominance' 26 Page 26. GDPR, OJ L 119, 4.5.2016 Article 22(1)- Automated individual decision-making, including profiling.

⁵⁰⁰ GDPR, OJ L 119, 4.5.2016 Article 22(2)- Automated individual decision-making, including profiling- Exceptions.

to personalization while signing into CEPs. Consent forms an exception to the right against automated decision-making.⁵⁰¹ When consumers willingly grant permission for their data to be utilized for automated decision-making processes, it forms an exception, emphasizing the significance of informed and voluntary agreement in shaping personalized experiences.

4.5.1.3. Consumer Protection

Under the UCTD, the contract terms, including the price, must be provided transparently to consumers.⁵⁰² The UCPD prohibits misleading and unfair practices in relation to the provision, calculation and existence of price and price advantages and imposes transparency obligations on traders and service providers.⁵⁰³ Under the CRD, consumers have the right to receive information about the price of services in online (off-premises) contracts.⁵⁰⁴ These are inclusive provisions about transparency and the provision of information to consumers.

However, there is no specific provision concerning sellers' obligations or consumers' rights regarding personalization.⁵⁰⁵ It is also not clear whether consumers are to be informed of a personalised price, i.e., the basic fact that consumers are being offered a personalised price, the parameters considered to determine this personalised price (similar to rankings).

⁵⁰¹ *ibid* Article 22(2)- Automated individual decision-making, including profiling- Exception.

⁵⁰² UCTD, OJ L 95, 21.4.1993.

⁵⁰³ UCPD, OJ L 149, 11.6.2005.

⁵⁰⁴ CRD, OJ L 304 22.11.2011.

⁵⁰⁵ Fabrizio Esposito, 'Making Personalised Prices Pro-Competitive and Pro-Consumers' [2020] CeDIE Working Paper. Bourreau and de Streel (n 364). Tycho de Graaf, 'Consequences of Nullifying an Agreement on Account of Personalised Pricing' [2019] *Journal of European Consumer and Market Law*.- A Dutch and Belgian perspective on the consequences of consumers exercising nullification and price reduction rights in cases of online personalised pricing infringing upon the UCPD and whether they are effective, proportionate and dissuasive; Christoph Busch, 'Implementing Personalized Law' (2019) 86 *The University of Chicago Law Review* 313.

4.5.2. India

4.5.2.1. Discrimination

In India, the *lex-generalis* regarding the right against discrimination is provided under The Constitution of India, prohibiting discrimination based on religion, race, caste, sex, or place of birth.⁵⁰⁶ The Constitution was amended to include exceptions to discrimination, where state governments can create special provisions for women, children, socially and educationally backward classes, scheduled castes and tribes, and economically weaker sections.⁵⁰⁷ Though the Constitution does not directly refer to ‘personalization’, various provisions of existing legislation can be interpreted through algorithms to prohibit discrimination due to personalization.⁵⁰⁸

4.5.2.2. Data Law

The processing of data and the right against automated decision-making have been discussed in Chapter 1.⁵⁰⁹ The right to object to automated decision-making does not exist under the DPDPA as the Act recognizes privacy by design and is monitored by the data processing authority.⁵¹⁰ If discrimination has ensued due to lawful yet discriminatory automated processing, individuals are always at liberty to go to court for a breach of duties by CEPs

⁵⁰⁶ The Constitution of India, 1950 Article 15- 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

⁵⁰⁷ The Constitution of India (One Hundred and Third Amendment) Act, 2019 Section 2- Amendment of Article 15.

⁵⁰⁸ Subir Kumar Roy, ‘Consumer Justice: A Symbol of Economic Prosperity and Social Progressiveness’ (2016) 1 Hasanuddin Law Review 170.

⁵⁰⁹ Bourreau and de Streel (n 358) 15.- processing of data, processing of sensitive data; Botta and Wiedemann (n 491) 7.

⁵¹⁰ Digital Personal Data Protection Act, 2023 Chapter VI- Transparency and Accountability Measures.

who provide privacy by design.⁵¹¹ This provision recognizes that though there is an inherent system of privacy by design, a fallback mechanism exists to provide redress to users. With the Act being enacted in August 2023, the enforcement of this provision is yet to be observed.

4.5.2.3. Consumer Protection

Under the Consumer Protection Act 2019, consumers have the right to be informed about the quality, quantity, potency, purity, standard and price of products or services, as the case may be, to protect the consumer against unfair restrictive trade practices.⁵¹² Manipulation of prices by e-commerce entities is a restrictive and unfair trade practice under the Consumer Protection (E-Commerce) Rules. The rules also require sellers to provide all contractual information about the prices of products and services, including the breakup of charges.⁵¹³ Though the Consumer Protection Act and its Rules state that specific information about prices is to be provided to consumers, there are no provisions in relation to personalization.

4.6. Personalization in B2C and P2P transactions

Consumers are informed about the collection and use of data for personalization purposes. Whether engaged in B2C or P2P transactions, users are under the ambit of personalization practices implemented by CEPs, as they are consumers availing themselves of the services provided by CEPs. For example, CEPs like Uber and Ola use the data collected to personalise

⁵¹¹ Srikrishna (n 43) 125; Srikrishna (n 16) 81. Under the Digital Personal Data Protection Act, 2023, a quasi-judicial authority of the Data Protection Board has been established as on August 2023, to perform the functions of a judicial body and listed to matters of data protection. Nonetheless, this does not prevent the data subject from approaching civil courts after exhausting the alternate quasi-judicial options.

⁵¹² The Consumer Protection Act, 2019 Section 2(9)- Consumer Rights Section 94- Measures to prevent unfair trade practices in e-commerce, direct selling, etc., Section 101- Power of Central Government to make rules. *ibid* Sec.94, Sec.101. The Consumer Protection (E-Commerce) Rules, 2020. Ayilyath (n 321) 4; Pillai (n 316) 485; Nigam (n 321) 2.

⁵¹³ Consumer Protection (E-Commerce) Rules, 2020 Rule 6- Duties of sellers on marketplace.

certain services, like the provision of discounts and upgrades on vehicles.⁵¹⁴ Consumers are given a choice to opt out of such personalization. Unlike Uber, Airbnb does not offer any opt-out mechanism.⁵¹⁵ This means that consumers do not have the option to decline or customize certain features or services, potentially limiting their control over their experience on the platform.

Under the GDPR, as consent is an exception to automated decision-making, consumers consent to their data being used for this automated decision-making through algorithms and personalizing their services when signing in to Uber. However, there is no right against automated decision-making in India, so consumers have no opt-out provision. The application of the DPDPA is still to be witnessed.

Personalization can be harmful because it is difficult to detect by consumers or others, targets vulnerable consumers or has unfair distributive effects. These harms often occur through manipulating consumer choices without the awareness of the consumer.⁵¹⁶

4.7. Persistence of Consumer Issues

4.7.1. Absence of a regulatory framework for personalization

Consumer protection laws in the EU and India require transparency through providing information to consumers. However, as consumers are the subject of personalization and are impacted by their data, there is no specific provision in consumer protection legislation regarding personalization. Consumer protection is essential if consumers are discriminated

⁵¹⁴ ‘Legal | Uber- Uber Privacy Notice- Belgium’ (n 379); ‘Legal | Uber- Uber Privacy Notice- India’ (n 379).

⁵¹⁵ ‘Privacy Policy - Airbnb Help Center’ (n 240); ‘Outside of the United States Privacy Policy- Airbnb Help Center’ (n 240). GDPR, OJ L 119, 4.5.2016 Article 22(2)- Automated individual decision-making, including profiling- Exception; The Personal Data Protection Bill, 2019. There is no right against automated decision making under the PDPB, 2019.

⁵¹⁶ ‘Algorithms: How They Can Reduce Competition and Harm Consumers’ (n 357) 3.

against or not provided information that aids them in making decisions on CEPs. Though there are general laws against discrimination and the provision of information, there is a dearth of consumer protection legislation in relation to personalization.⁵¹⁷ In navigating personalized services, consumers encounter challenges related to automated decision-making, transparency, and the fair use of their data. The absence of dedicated regulations in consumer protection laws pertaining to personalization leaves a gap in addressing the unique issues that arise in this context, necessitating the application of broader data protection regulations.

4.7.2. Personalization and discrimination

Personalization in certain situations is socially accepted. However, it becomes a consumer issue when personalization turns into discrimination. The availability of big data facilitates discrimination.⁵¹⁸ However, as discussed in the following section on algorithmic discrimination, discrimination in cases of personalization occurs through algorithms and big data. A monopoly or a significantly strong market power is not required.⁵¹⁹ Personalization can be achieved through algorithms, and algorithmic discrimination may arise from the data input into the algorithm, leading to a discriminatory output.⁵²⁰

⁵¹⁷ Bourreau and de Streel (n 364) Page 16. Christopher Townley, Eric Morrison and Karen Yeung, 'Big Data and Personalised Price Discrimination in EU Competition Law' [2017] Legal Studies Research Paper Series <<https://www.ssrn.com/abstract=3048688>> accessed 17 August 2021 10.

⁵¹⁸ Bourreau and de Streel (n 364) Page 25. Vijay Victor, Maria Fekete Farkas and Zoltan Lakner, 'Consumer Attitude and Reaction towards Personalised Pricing in the E-Commerce Sector' (2019) 4 GATR Journal of Management and Marketing Review Page 143. Baginski and Malecki (n 142) Drew Fudenberg and J. Miguel Villas-Boas- Price Discrimination in the Digital Economy 53.

⁵¹⁹ Alan M Searsl, 'The Limits of Online Price Discrimination in Europe' (2019) 21 Columbia Science and Technology Law Review 4.

⁵²⁰ Bourreau and de Streel (n 358) 16; Botta and Wiedemann (n 491) 6; Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016) Chapter 10- The Age of Perfect Price Discrimination 89.

Personalization			
Issue	Legislation applicable	Descriptive analysis	Normative Analysis
Personalization refers to making personal any goods or services supplied to consumers.	EU and India: Though anti-discrimination laws and data protection laws apply, consumer protection law does not specify provisions in relation to personalization.	Consumers in P2P transactions are not protected against the issues arising from the personalization issues that peer service providers provide.	Personalization becomes discriminatory when it occurs based on the data provided by consumers. Peer consumers ought to be protected against personalization harms.

Figure 22: Personalization on CEPs.

5. Algorithmic discrimination

5.1. Introduction

Algorithms are created and designed by and for humans. Discrimination that exists amongst people creeps into algorithms. Discriminatory output by an algorithm occurs through incorrect information provided to the algorithm to make discriminatory decisions (for example, improper sample selection, incorrect data input, incorrect voting census leading to improper drawing of voting district lines) or the discriminatory coding or assisted decision-making by the algorithm (where the algorithm is coded in a manner that leads to discrimination- for example, conversational artificial intelligence systems were accused of not understanding certain accents, image identification of photos leading to black users being identified as gorillas, cameras suggesting that Asian users were blinking their eyes, people who are categorised as rich receiving advertisements for breakthrough medical treatment, algorithms placing negative coefficient on women).⁵²¹

On CEPs, discrimination can occur amongst the parties, i.e., CEPs, service providers and consumers, having information in relation to the transaction and the other party, providing opportunities for discrimination.⁵²² For example, service providers have been accused of discrimination and denying services based on race.⁵²³ Algorithmic discrimination on CEPs

⁵²¹ Christoph Schmon, 'Automated Decision Making and Artificial Intelligence- A Consumer Perspective- BEUC Position Paper' (BEUC- The European Consumer Organisation: The Consumer Voice in Europe), page?. Bo Cowgill and Catherine Tucker, 'Algorithmic Fairness and Economics' 31.

⁵²² Susana Navas Navarro, 'Discrimination and Online Platforms in the Collaborative Economy' [2019] EuCML-Journal of European Consumer and Market 35-37; Shreya Atrey, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15' (2016) 16 The Equal Rights Review 161. Songül Tolan, 'Fair and Unbiased Algorithmic Decision Making: Current State and Future Challenges' (2018) JRC Technical Report- JRC Digital Economy Working Paper 2018–10 7.- bias in data and bias in algorithmic development

⁵²³ Christoph Busch, 'Self-Regulation and Regulatory Intermediation in the Platform Economy' in Marta Cantero Gamito and Hans Wolfgang Micklitz (eds), *The Role of the EU in Transnational Legal Ordering*

like Uber and Airbnb can also occur through automated decisions made by algorithms that remove users from CEPs and discriminatory advertising that deters certain class users from entering and using CEPs.

Good algorithmic discrimination is an oxymoron, and the term discrimination is in itself negative.⁵²⁴ There is no occurrence where certain discrimination is fair and appropriate, and exceptions are referred to as differential treatment.⁵²⁵ The following sections discuss algorithmic discrimination challenges toward users on CEPs.

5.2. Algorithmic discrimination challenges

5.2.1. Algorithmic discrimination toward service providers

On CEPs, it would be largely remiss if discrimination toward service providers is not discussed.⁵²⁶ Service providers on CEPs are discriminated against by CEPs and by consumers.⁵²⁷

CEPs algorithmically discriminate against service providers. For example, the automated identification system needed to drive did not identify certain driver providers based on race

(Edward Elgar Publishing 2020) Page 4. 'Non-Discrimination Policy - Airbnb Help Center' (*Airbnb*) <<https://perma.cc/9YWJ-P7PG>>; Benjamin G Edelman and Michael Luca, 'Digital Discrimination: The Case of Airbnb.Com' [2014] SSRN Electronic Journal 6.

⁵²⁴ Though other disciplines may interpret the term discrimination differently, the negative connotation refers to the etymological and legal meaning of 'discrimination'

⁵²⁵ Differential treatment includes provision of reservations, quotas for minority communities, representations.

⁵²⁶ 'Artificial Intelligence, Platform Work and Gender Equality' (European Institute for Gender Equality) 13.

⁵²⁷ Hatzopoulos, *The Collaborative Economy and EU Law* (n 7) Chapter 5- Page 156; Davidson, Finck and Infranca (n 9) Chapter 33- The Platform Identity Crisis- Responsibility, Discrimination, and a Functionalist Approach to Intermediaries 449.

Uber.⁵²⁸ Algorithms also discriminate between male and female drivers, recording gendered pay gaps amongst drivers.⁵²⁹ Service providers are also algorithmically discriminated by automated decisions based on biased consumer feedback (for example, ratings and reviews).⁵³⁰ Though Uber's community guidelines prohibit discrimination based on the rider's destination, drivers have been known to cancel rides based on the destination (destination discrimination) or the rider's name (African American sounding name).⁵³¹ These instances of non-algorithmic discrimination become algorithmic discrimination as these instances of discrimination are assisted by algorithms. The algorithms provide the information in relation to the destination of the rider or their names, which leads to this discrimination. Hence, the algorithm assists in the discrimination.⁵³²

⁵²⁸ Sarah Butler, 'Uber Facing New UK Driver Claims of Racial Discrimination' *The Guardian* (6 October 2021).

⁵²⁹ Cody Cook and others, 'The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers' 72 Miriam Kullmann, 'Platform Work, Algorithmic Decision-Making, and EU Gender Equality Law' 16; European Commission. Joint Research Centre., *European Legal Framework for "Digital Labour Platforms"*. (Publications Office 2018) 17.

⁵³⁰ Alex Rosenblat and others, 'Discriminating Tastes: Uber's Customer Ratings as Vehicles for Workplace Discrimination: Customer Ratings and Workplace Discrimination' (2017) 9 Policy & Internet 260; Ducato, Kullmann and Rocca (n 295) 3; Edelman and Luca (n 450) Page 7. Bryan Casey, 'Title 2.0: Discrimination Law in a Data-Driven Society' (2019) 2019 Journal of Law and Mobility 42.

⁵³¹ Yanbo Ge and others, 'Racial and Gender Discrimination in Transportation Network Companies' NBER Working Paper Series 49 2-3. Anne E Brown, 'Discrimination in Ridehail and Taxi Services' University of California 2. In India this can also be include caste or community based names. 'Uber's Community Guidelines: Safety and Respect for All' (*Uber*) <<https://perma.cc/KH5Y-T2SM>>; 'Did Uber Just Enable Discrimination by Destination?' *Bloomberg.com* (11 December 2019).

⁵³² 'Discrimination, Regulation and Design in Ridehailing' (Massachusetts Institute of Technology 2018); Benjamin V Hanrahan, Ning F Ma and Chien Wen Yuan, 'The Roots of Bias on Uber' College of Information Sciences and Technology at the Pennsylvania State University 14. Benjamin G Edelman and Michael Luca, 'Digital Discrimination: The Case of Airbnb.Com' [2014] Harvard Business School- Working Paper- 14-054 24.

5.2.2. Algorithmic discrimination toward consumers

CEPs can make design choices which fail to mitigate discrimination arising from aggregate user behaviour, particularly where platforms attempt to build trust and facilitate transactions by reducing anonymity and providing information about people providing services.⁵³³ CEPs, in their community guidelines or non-discrimination policy, specify the stance of the CEP on anti-discrimination based on their values.

For example, Airbnb has its anti-discrimination policy and different rules for Europe, The United States of America, and Canada, on the one hand, and the rest of the world on the other.⁵³⁴ Airbnb introduced an anti-discrimination policy and asked its rental hosts to agree to a ‘community commitment’ banning discriminatory treatment of other users. The introduction of the anti-discrimination policy responded to growing criticism over discrimination on Airbnb.⁵³⁵ The spectrum of behavioural rules included by CEPs in their ‘community guidelines’ ranges from simple rules of social courtesy to matters of strict morality.⁵³⁶ Airbnb hosts are responsible for non-discrimination, whereas the guests have no prescribed responsibility.

Though this may benefit consumers, this imbalance of responsibility creates an unhealthy CEP environment, as guests could discriminate against the hosts by providing inaccurate

⁵³³ ‘Algorithms: How They Can Reduce Competition and Harm Consumers’ (n 55) 4.

⁵³⁴ ‘Nondiscrimination Policy - Airbnb Help Center’ (n 4) <<https://perma.cc/9YWJ-P7PG>>.

⁵³⁵ Codagnone and Martens (n 355) Page 16; Edelman and Luca (n 515); Edith Ramirez, Maureen K Ohlhausen and Terrell P McSweeney, ‘The “Sharing” Economy - Issues Facing Platforms, Participants & Regulators- A Federal Trade Commission Staff Report’ (2016) 15; Hatzopoulos, *The Collaborative Economy and EU Law* (n 7) 198.

⁵³⁶ Christoph Busch, ‘Self-Regulation and Regulatory Intermediation in the Platform Economy’ in Marta Cantero Gamito and Hans Wolfgang Micklitz (eds), *The Role of the EU in Transnational Legal Ordering* (Edward Elgar Publishing 2020) Page 4. ‘Non-Discrimination Policy - Airbnb Help Center’ (n 523).

reviews, for instance.⁵³⁷ In contrast, Uber's non-discrimination policy applies to all users and prohibits discrimination.⁵³⁸ In relation to consumers, applying consumer law to protect people against discrimination arising from algorithmic systems is a relatively unexplored area compared with the role of anti-discrimination and data protection law.⁵³⁹

5.3. Legislative Protection Concerning Algorithmic Discrimination

5.3.1. Anti-discrimination legislation

The right against discrimination is a human right. It is enshrined in treaties, including the Universal Declaration of Human Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights.⁵⁴⁰ International organizations also prohibit specific instances of discrimination.⁵⁴¹

⁵³⁷ Davidson, Finck and Infranca (n 11) Chapter 35- Discrimination and Short-Term Rentals Page 472. 'Nondiscrimination Policy - Airbnb Help Center' (n 4) <<https://perma.cc/9YWJ-P7PG>>. This discrimination could also be in the form of rejecting potential hosts discriminatorily.

⁵³⁸ 'Legal | Uber- Uber Non-Discrimination Policy' <<https://perma.cc/KTL4-K96B>>.

⁵³⁹ Zuiderveen Borgesius (n 359) 7. 'Algorithms: How They Can Reduce Competition and Harm Consumers' (n 55) 12.

⁵⁴⁰ Universal Declaration of Human Rights 1948. International Convention on the Elimination of All Forms of Racial Discrimination 1969 (United Nations). International Covenant on Civil and Political Rights 1966 (No 14668).

⁵⁴¹ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4XI 2000- ETS 177); Equal Remuneration Convention 1951 (No 100 of 1951) 4; 'Convention against Discrimination in Education' 9; Discrimination (Employment and Occupation) Convention 1958 (No 111 of 1958) 4; Equality of Treatment (Accident Compensation) Convention (UNESCO E/1996/98); Equality of Treatment (Social Security) Convention (ILO- C118, 1962); Convention on the Elimination of All Forms of Discrimination against Women (UNGA Resolution 34/180, 1979); Convention concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers (ILO-No 143, 1975); International Convention on the Elimination of All Forms of Racial Discrimination (UNGA Resolution 2106, 1965); Convention on the right of persons with disabilities and optional protocol (United Nations).

While the anti-discrimination legislations in the EU and India are broad and general, their relevance lies in emphasizing the importance of anti-discrimination measures and legislative significance. These laws underscore the commitment to fostering equality and combating discrimination, acknowledging legislation's imperative role in promoting a fair and inclusive societal framework. These broad and general anti-discrimination legislations in the EU and India underline the crucial role of legal frameworks in promoting equality, with their application in CEPs serving as a cornerstone for fostering fair and non-discriminatory practices within these digital ecosystems.

5.3.1.1. European Union

In the EU, *lex-generalis* regarding the right against discrimination is provided under the European Convention on Human Rights, the Treaty Establishing the European Community adopted in the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union.⁵⁴² The EU has also enacted specific Directives to prevent discrimination in any manner, including the Racial Equality Directive, which prohibits discrimination based on racial or ethnic origin in many contexts; The Employment Equality Directive, which provides the right against discrimination on the grounds of religion or belief, disability, age, or sexual orientation in the employment context and the Recast Gender Equality Directive provides the right against discrimination based on gender in the employment context.⁵⁴³

⁵⁴² European Convention on Human Rights Article 14- Prohibition of discrimination. Treaty Establishing the European Community 1957 Article 12 and 13. Stephen Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2005) 3. The Treaty on the Functioning of the European Union Part Two- Non Discrimination and Citizenship of the Union Article 18 and 19. Charter of Fundamental Rights of the European Union 2012 (OJ C 326, 26102012) Article 21- Non Discrimination and Article 22- Cultural, Religion and Lingusitic Diversity; Twigg-Flesner, *Research Handbook on EU Consumer and Contract Law* (n 22) 116.

⁵⁴³ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 1972000). Council Directive 2000/78/EC on establishing a general

5.3.1.2. India

In India, the *lex-generalis* regarding the right against discrimination is provided under The Constitution of India. The provisions prohibit discrimination based on religion, race, caste, sex, or place of birth.⁵⁴⁴ The Constitution was amended to include exceptions to discrimination, where state governments can create special provisions for women, children, socially, educationally and economically backward classes like scheduled castes and tribes.⁵⁴⁵ India has also enacted specific legislation to prevent discrimination in any manner, for example, the Equal Remuneration Act that guarantees equal pay for equal work to men and women, the Indian Penal Code, which criminalises discrimination or violence against people based on race, caste, sex, place of birth, religion, gender identity, sexual orientation or any other category and other sector-specific legislations.⁵⁴⁶

framework for equal treatment in employment and occupation (OJ L 303, 2122000). The Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final 2008/0140 (CNS)). is proposed to enact the right against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace. 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) (OJ L 204, 2672006). Zuiderveen Borgesius (n 289) Page 7; Dr Frederik Zuiderveen Borgesius, 'Price Discrimination, Algorithmic Decision-Making, and European Non-Discrimination Law' 29.

⁵⁴⁴ The Constitution of India, 1950 Article 15- 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

⁵⁴⁵ The Constitution of India (One Hundred and Third Amendment) Act, 2019 Section 2- Amendment of Article 15.

⁵⁴⁶ The Equal Remuneration Act, 1976 (Act No 25 of 1976). The Indian Penal Code, 1860 (Act No 45 of 1860) Section 153A. The Mental Healthcare Act, 2017 which provides the right against discrimination and denial or refusal of mental healthcare facilities or services for people on the basis of race, caste, religion, place of birth, sex, gender identity, sexual orientation, disability or any other category- The Mental Healthcare Act, 2017 (Act No 10 of 2017)., the Hindu Succession Act(and its amendment in 2005) Abolished the "limited owner" status of women who owned property, amended in 2004 to give daughters equal inheritance rights with sons-The Hindu Succession Act, 1956 (Act No 30 of 1956); The Hindu Succession (Amendment) Act, 2005 (Act No 39

5.3.2. Data Protection

5.3.2.1. European Union

On CEPs, algorithmic discrimination occurs through automated decisions and profiling done by algorithms.⁵⁴⁷ In order to lawfully control or regulate the process of automated decision-making, the Data Protection Directive mandated Member states to prohibit automated decision-making that imposes significant effects on a data subject.⁵⁴⁸ This principle was incorporated into the GDPR.⁵⁴⁹ The rationale for such a provision was to protect the rights of the data subject by considering and minimising potential risks of discrimination of persons based on racial or ethnic origin, political opinion, religion or beliefs, trade union membership, genetic or health status or sexual orientation, or that result in measures having such an effect.⁵⁵⁰

of 2005)., the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act that prohibits discrimination and hate crimes on the basis of caste- The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act No 33 of 1989)., the Transgender Persons (Protection of Rights) Act that provides the right against discrimination and on the basis of their gender identity and gender expression-The Transgender Persons (Protection of Rights) Act, 2019 (Act No 40 of 2019)., the Rights of Persons with Disabilities Act that prohibits discrimination and violence against people with physical and/or mental disabilities- The Rights of Persons with Disabilities Act, 2016 (Act No 49 of 2016)., and the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 that prohibits discrimination and propagation of hate against people with HIV-The HIV and AIDS(Prevention and Control) Act, 2017 (Act No 16 of 2017).

⁵⁴⁷ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; ‘Article 29 Working Party- Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679’ (n 270) 29. Navarro (n 514) 35-37.

⁵⁴⁸ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data Article 15; Lee A Bygrave, ‘Automated Profiling- Minding the Machine- Article 15 of the EU Data Protection Directive and Automated Profiling’ (2001) 17 Computer Law & Security Review 17.

⁵⁴⁹ GDPR, OJ L 119, 4.5.2016 Article 22- Automated individual decision-making, including profiling.

⁵⁵⁰ *ibid* Recital 71.

Automated decision-making under the GDPR provides the data subject with the right not to be subject solely to automated decisions that have a legal or significant effect on them.⁵⁵¹ The exceptions to the right against automated decision-making are the data subject's explicit consent, necessities for entering into a contract or laws of Member States.⁵⁵² The provisions under the GDPR apply only to those decisions which are based 'solely' upon automated processing, i.e., this provision does not apply in the cases where a predominant part of the decision-making process is made by automated means or the cases where such automated processing only helps human to make informed decisions.⁵⁵³ However, safeguards exist, such as human intervention by the controller to contest automated decisions.⁵⁵⁴

5.3.2.2. India

The right to object to automated decision-making does not exist under the DPDPA.⁵⁵⁵ The arguments presented in the *documents préparatoires* state that the Bill recognizes privacy by design to be monitored by the data processing authority.⁵⁵⁶ The White Paper of the DPDPA acknowledges the requirement of having such a right in the law.⁵⁵⁷ The White Paper examined the GDPR provisions and argued that the criteria for rendering a provision inapplicable,

⁵⁵¹ *ibid* Article 22(1)- Application of right against automated decision making.

⁵⁵² *ibid* Article 22(2)- Automated individual decision-making, including profiling- Exception.

⁵⁵³ Arora (n 269) Page 3.

⁵⁵⁴ GDPR, OJ L 119, 4.5.2016 Article 22(3)- Automated individual decision-making, including profiling- Human Intervention. 'Article 29 Working Party- Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679' (n 208) Page 29; Lilian Edwards and Michael Veale, 'Slave to the Algorithm? Why a "right to an Explanation" Is Probably Not the Remedy You Are Looking For' (LawArXiv 2017) preprint; Goldenfein (n 364) 25.

⁵⁵⁵ Digital Personal Data Protection, Act 2023.

⁵⁵⁶ The *documents préparatoires* are the White Paper and the Srikrishna Committee Report. Srikrishna (n 43) Page 125; Srikrishna (n 16) 81.

⁵⁵⁷ Srikrishna (n 43) 124 and 125.

based on the degree of human involvement, and the requirements for establishing a significant effect were too restrictive.⁵⁵⁸

The Srikrishna Committee Report acknowledged the strong and legitimate reasons for GDPR, providing the right to object to automated decisions. However, it argued that the right to obtain human review is not an appropriate solution as it is not immune from prejudice either.⁵⁵⁹ The Srikrishna Committee Report suggested that avoiding harm and discrimination arising from automated decision mechanisms can be achieved by embracing accountability frameworks, requiring controllers to adopt processes that eliminate discrimination and promote neutral decisions, thus recognising privacy by design.⁵⁶⁰ The Srikrishna Committee Report also stated that the controller and the DPA could audit and monitor decision-making processes, especially when reporting discriminatory decisions.⁵⁶¹

⁵⁵⁸ GDPR, OJ L 119, 4.5.2016 Article 22(1); Srikrishna (n 43) 130.

⁵⁵⁹ Srikrishna (n 16) 72 and 73.

⁵⁶⁰ *ibid* 60.

⁵⁶¹ *ibid* 75.

5.3.3. Consumer Protection

5.3.3.1. European Union

The EU provides equal treatment for men and women in accessing and supplying products and services under the Gender Goods and Services Directive.⁵⁶² This nondiscrimination principle was expanded under the Geo-Blocking Directive that prohibits discrimination based on nationality, place of residence or establishment, and access of consumers to products and services, both online and offline and addresses un-justified geo-blocking.⁵⁶³ The Regulation addresses discrimination concerning access to products and services that cannot be objectively justified.⁵⁶⁴

As discussed, the UCPD provides for disclosing information about rankings concerning information fed into algorithms.⁵⁶⁵ However, the transparency standard does not include information about the underlying algorithms.⁵⁶⁶ The CRD provides that consumers have the right to pre-contractual information. However, there is no mention of information about the use of algorithms.⁵⁶⁷

Under the UCTD, the current provisions do not specify discrimination in big data processing or algorithms.⁵⁶⁸

⁵⁶² Council Directive 2004/113/EU on implementing the principle of equal treatment between men and women in the access to and supply of goods and services 2004 (OJ L 373, 21122004); Davidson, Finck and Infranca (n 9) 486, Chapter 36- The Sharing Economy and EU Anti-discrimination Law.

⁵⁶³ Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC 2018 (OJ L 601, 232018).

⁵⁶⁴ Inge Graef, 'Algorithms and Fairness: What Role for Competition Law in Targeting Price Discrimination towards Ends Consumers' (2018) 24 Columbia Journal of European Law 555.

⁵⁶⁵ UCPD, OJ L 149, 11.6.2005; Modernization Directive, OJ L 328, 18.12.2019.

⁵⁶⁶ Schmon (n 513) 4-5.

⁵⁶⁷ CRD, OJ L 304 22.11.2011.

⁵⁶⁸ Schmon (n 513) 4-5; UCTD, OJ L 95, 21.4.1993.

5.3.3.2. India

The Consumer Protection Act, similar to the CRD, provides that consumers have the right to information about the quality, quantity, potency, purity, standard and price of products or services to protect consumers against unfair trade practices and unfair contracts. However, there is no mention of the provision of information in relation to algorithms or discrimination that may occur.⁵⁶⁹

5.4. Algorithmic Discrimination in B2C and P2P transactions

In the EU, consumers in B2C transactions, consumer protection law acts as the primary level of protection for consumers, being the *lex specialis*. However, e-commerce and data protection apply in specific instances of discrimination based on the data collected and used.

However, in India, for all consumers, including peer consumers, the right against automated decision-making, which algorithms use to generate information, is not provided for under the DPDPA, as compared to the GDPR. The absence of provisions for the right against automated decision-making in the DPDPA, as compared to the GDPR, can be a limitation, potentially leaving individuals in India with less robust safeguards against the potential risks and biases associated with automated decision systems. In light of the rise of artificial intelligence, the right against automated decision-making plays a crucial role in regulating systems and protecting users.

Though consumers in P2P transactions are not protected against discrimination under consumer protection law in the EU, they are protected by the applicability of e-commerce, data, and anti-discrimination laws. This protection is not a substitute for protection awarded to consumers in B2C transactions under consumer law. In India, too, there is no specific

⁵⁶⁹ The Consumer Protection Act, 2019 Section 2(9)(ii)- Definition, Consumer Rights, Right to be informed.

provision in relation to algorithmic discrimination under consumer protection legislation for P2P transactions.

5.5. Persistence of Consumer Issues

5.5.1. Faulty humans and faulty algorithms⁵⁷⁰

An algorithm is only as intelligent as the data it is provided. If the data provided is discriminatory, the algorithm processing discriminatory information will produce algorithmically discriminatory decisions.⁵⁷¹ In certain situations, algorithms have increased discrimination because of the information provided to an algorithm.⁵⁷² Restricting an algorithm from using specific information, for example, would, at best, limit discrimination, but this is not feasible in the world of big data, where more data may lead to more discrimination.⁵⁷³

⁵⁷⁰ Omer Tene and Jules Polonetsky, 'Taming the Golem- Challenges of Ethical Algorithmic Decision Making' [2017] North Carolina Journal of Law and Technology 7.

⁵⁷¹ Raphaële Xenidis and Linda Senden, 'EU Non-Discrimination Law in the Era of Artificial Intelligence- Mapping the Challenge of Algorithmic Discrimination', *General Principles of EU law and the EU Digital Order* 4.

⁵⁷² Kevin Lang and Ariella Kahn-Lang Spitzer, 'Race Discrimination: An Economic Perspective' (2020) 34 Journal of Economic Perspectives 68 Page 70; European Commission. Directorate General for Justice., *Comparative Study of Anti-Discrimination and Equality Laws of the US, Canada, South Africa and India*. (Publications Office 2013) <<https://data.europa.eu/doi/10.2838/67250>> accessed 9 February 2022 21.

⁵⁷³ Koen Leurs and Tamara Shepherd, 'Datafication & Discrimination' in Mirko Tobias Schäfer and Karin van Es (eds), *The Datafied Society- Studying Culture through Data* (Amsterdam University Press 2017)219; Betsy Anne Williams, Catherine F. Brooks and Yotam Shmargad, 'How Algorithms Discriminate Based on Data They Lack: Challenges, Solutions, and Policy Implications' (2018) 8 Journal of Information Policy Page 81. Talia B Gillis and Jann L Spiess, 'Big Data and Discrimination' [2022] The University of Chicago Law Review 21.

5.5.2. Deactivation of consumers' profile

Deactivation is the removal of consumers' profiles from the CEP.⁵⁷⁴ On Uber and Airbnb, the reasons for deactivation are mentioned in the terms and Privacy Policy/Notice.⁵⁷⁵ The deactivation of the consumer profile occurs automatically once a specific (in)action occurs.⁵⁷⁶ Once the action occurs, the account is deactivated, and consumers cannot access their account or the CEP- being guilty until proven innocent. The consumers are permitted to raise their claims, resolve the issue, and reset the deactivation. If the reasons for deactivation are proven, the consumer is removed from the CEPs.

Deactivation occurs automatically by the algorithm that considers the users' information and actions. As this process is automatic, this provision calls for applying Article 22 of the GDPR. However, there is no right against this automated decision-making, as the user consents to this automation.⁵⁷⁷ This raises the question of whether consumers are aware of such consent under the blanket consent provided, the automated decisions performed by the algorithm, and the discrimination that could arise. Consumer awareness regarding the consent granted under a blanket consent model, the nature of automated decisions executed by algorithms, and the potential for resulting discrimination are often uncertain. The complexity of algorithmic processes and the nuances of data usage could make it challenging for consumers to fully

⁵⁷⁴ This thesis uses the term deactivation and not 'blacklisting' as it carries subtle undertones and a negative connotation.

⁵⁷⁵ 'Legal | Uber- Uber Privacy Notice- India' <<https://perma.cc/TQ3U-N2ZZ>>; 'Legal | Uber- Uber Privacy Notice- Belgium' <<https://perma.cc/AW5E-6S8J>>; 'Privacy Policy - Airbnb Help Center' (*Airbnb*) <<https://perma.cc/9S42-XM9C>>; 'Outside of the United States Privacy Policy- Airbnb Help Center' (*Airbnb*) <<https://perma.cc/82BS-86AG>>.

⁵⁷⁶ The reasons for the deactivation are mentioned on these platforms and can be a variety of reasons for not reaching the standards, misconduct, to protect its users.

⁵⁷⁷ GDPR, OJ L 119, 4.5.2016 Article 22 and Article 22(2)Automated Decision Making, Exceptions to Automated Decision Making.

comprehend the implications of their consent, raising concerns about transparency and the extent of understanding among users regarding the outcomes of automated decision-making.

Algorithmic Discrimination			
Issue	Legislation applicable	Descriptive analysis	Normative Analysis
Issues - with algorithms on CEPs occur when these algorithms discriminate against certain classes.	While discrimination, data protection, and consumer protection laws apply in the EU and India, there is no specific provision in relation to algorithmic discrimination.	India and EU: Consumers in B2C transactions are protected under consumer protection law, but such protection is not extended to peer consumers in P2P transactions.	Peer consumers should be protected from algorithmic discrimination, similar to consumers in B2C transactions.

Figure 23: Algorithmic Discrimination on CEPs.

6. Normative Analysis – Peer consumers ought to be protected from these issues in the collaborative economy.

The normative analysis analyses the proposition that peer consumers ought to be protected from the issues in the collaborative economy. The reasoning is twofold- firstly, because they are consumers and consumer law does not protect them and secondly, because they are integral parts of the collaborative economy and suffer from the issues.

Firstly, peer consumers should be safeguarded from issues in the collaborative economy, primarily because traditional consumer protection laws do not cover the issues they face. While peer consumers actively engage in transactions on CEPs, existing consumer protection laws have not evolved at the same pace to address the intricacies of these decentralized, peer-to-peer interactions. Furthermore, current consumer protection legislations have not accounted for the dynamic nature of CEPs, leaving peer consumers vulnerable to emerging issues such as biased algorithms, R&R, rankings or personalized services. Recognizing the distinct characteristics of the collaborative economy, policymakers and legal frameworks must evolve to encompass the specific challenges peer consumers face.

Secondly, peer consumers deserve protection from issues in the collaborative economy as they are vital contributors to the success and sustainability of these platforms, and their well-being directly influences the overall health of the collaborative ecosystem. The collaborative economy thrives on the active participation of peer consumers who share resources, services, and experiences. Issues such as R&R, rankings, opaque personalization, and algorithmic discrimination directly impact the satisfaction and trust of peer consumers. Acknowledging the integral role of peer consumers, peer service providers and CEPs operators should prioritize consumer protection measures to ensure a positive experience.

In conclusion, this normative analysis underscores the imperative to protect peer consumers in the collaborative economy. This protection is warranted both because existing consumer laws do not protect them from the issues they face and because they are an integral aspect of

the collaborative economy that faces these issues. Recognizing and addressing these reasons can guide the formulation of comprehensive and context-sensitive consumer protection measures in the collaborative economy. This measure to protect peer consumers in the collaborative economy is discussed in Chapter 4.

CHAPTER 4

RESOLUTION OF CONSUMER ISSUES IN THE COLLABORATIVE ECONOMY?

Square astronaut, round hole

- *Captain Chris Hadfield*⁵⁷⁸

1. Summary of this Chapter

This Chapter seeks to analyze possible legislative and regulatory measures that may be undertaken to resolve the consumer issues discussed in the previous Chapter. The third research question of mitigating these issues in the EU and India is discussed in the Chapter. The objective of investigating this research question is to suggest solutions to the issues raised from a regulatory and legislative perspective and provide a theoretical grounding for

⁵⁷⁸ Chris Hadfield, *Astronaut's Guide to Life on Earth- What Going to Space Taught Me About Ingenuity, Determination, and Being Prepared for Anything* (Random House Canada 2013) 193.

potential new legislation to address consumer issues in the collaborative economy (as from the previous Chapter).

This chapter discusses maintaining the status quo, a potential interpretative stance to include peer consumers under the ambit of existing consumer protection legislation and regulations by the industry. The chapter discusses why these do not protect peer consumers and analyses a new perspective on consumer protection based on a duty of care in the collaborative economy. The duty of care principle is established in moral principles and precedent. This Chapter discusses the application of such a duty of care to protect consumers in the EU and India. The problems with applying a standard of duty of care and the reasoning for considering this standard are discussed.

The Chapter discusses whether current consumer protection legislation in the EU and India can be interpreted to include peer consumers to resolve consumer protection issues in light of the suggested duty of care standard. The interpretation of the existing legislation or introduction of a lighter touch provision to peer-service providers and expansion of the scope of application to include peer-consumers, under consumer protection law, in the EU and activity, including P2P transactions under consumer protection law in India, is discussed.

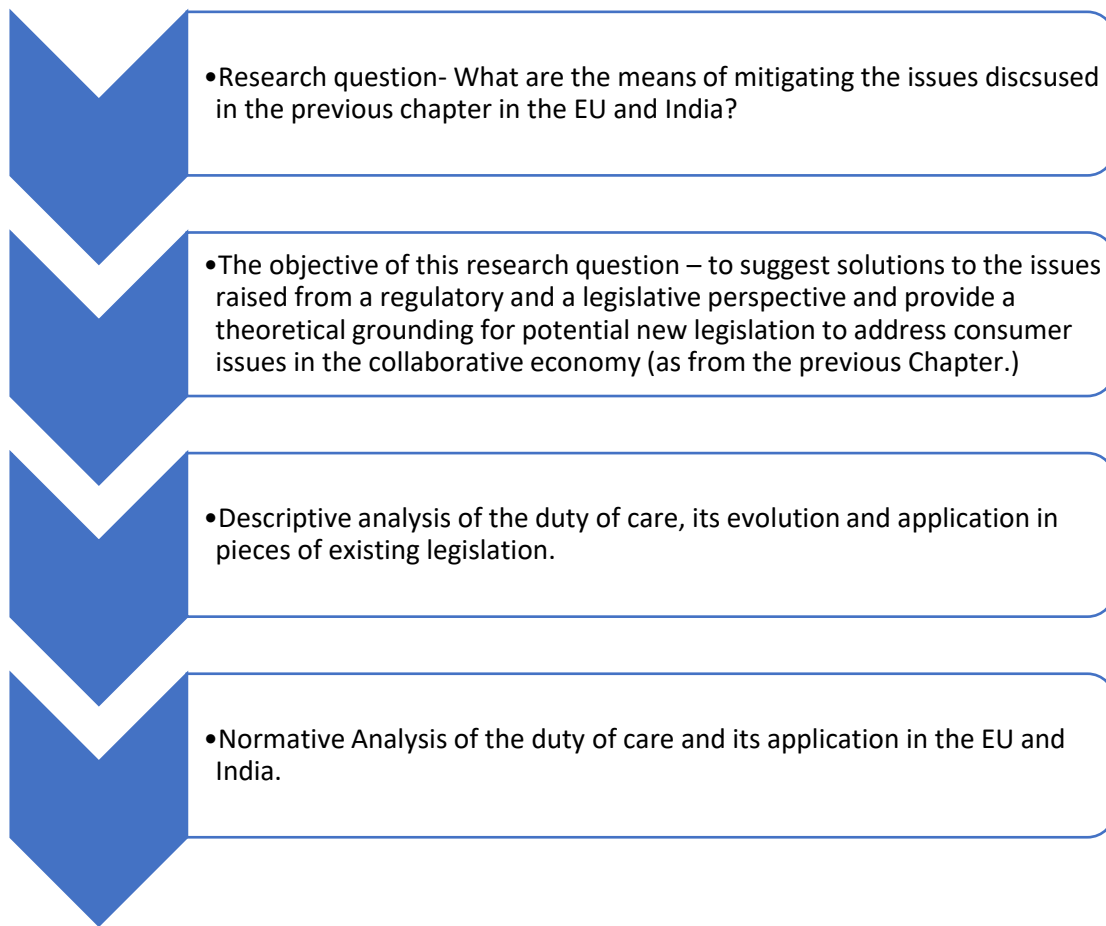


Figure 24:Structure of Chapter 4.

2. Maintaining *status quo*

Maintaining the *status quo* concerning laws in the collaborative economy implies continuing the current situation or policy despite existing issues. Maintaining the *status quo* in consumer protection legislation means keeping the current laws and regulations in place without making updates or adjustments to address the evolving needs and challenges of the P2P consumer environment. The laws that apply to the consumers in the collaborative economy and the issues they are met with are discussed in detail in Chapters 2 and 3.

Maintaining the *status quo* is not a viable solution as EU consumer law applies to B2C transactions and does not include P2P transactions, and peer consumers are not protected from consumer issues under consumer protection legislation. Similarly, in India, the consumer protection laws do not specifically mention application to P2P transactions. Maintaining a *status quo* would mean peer consumers are not protected under consumer protection legislation. As from the normative discussion in Chapter 2, they ought to be considered consumers, and from Chapter 3, they face harms that the consumer protection legislation does not protect. As maintaining the current situation is not a viable option, this Chapter considers other potential solutions and argues their applicability to protect peer consumers in the collaborative economy. These include interpreting existing legislations, considering industry and platform-specific requirements and a potential duty of care towards peer consumers.

3. Interpreting consumer protection legislation

“The essence of law lies in the spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlies it” –Salmond.⁵⁷⁹ This means that the essence of law is found in its spirit rather than its letter, as it merely represents the external manifestation of the underlying intention. Therefore, when interpreting statutes, the focus is not solely on the literal text but also extends to the purpose, intent, and context of the law. In striving for internal and external consistency, judges and legal scholars aim to ensure that statutes align with legislative intent and operate seamlessly within the broader legal framework.

One of the principles of interpretation is *ejusdem generis*. *Ejusdem generis* is a Latin term meaning ‘of the same kind and nature’. The principle of *ejusdem generis* is where general words follow an enumeration of persons or things by particular and specific words. These general words are not only construed but held to refer only to persons or things of the same general kind as those specifically enumerated.⁵⁸⁰ For example, if a statute refers to ‘automobiles, trucks, tractors, bicycles, and other motor-driven vehicles’, then a general term ‘other motor-driven vehicles’ would not include aircraft or ships because the preceding specific terms are of the land transportation type, and if the doctrine of *ejusdem generis* is applied, then the general term is limited to those things of the same category as the specific terms.

Moreover, in order for the principle of *ejusdem generis* to apply, there must be legislative intent. This means that if the specific words form a genus or a class followed by a general word, the intention of the legislator must be seen to restrict the general words to include the

⁵⁷⁹ John William Salmond, *The Theory of the Law* (London, Stevens and Haynes 1907) 54–60.

⁵⁸⁰ Kevin Tobia, Brian G Slocum and Victoria Nourse, ‘Statutory Interpretation from the Outside’ (2022) 122 Columbia Law Review 213.

matter of the same class as that of the specific words. Therefore, a clear intention of the legislature is necessary to interpret the provision using the principle of *ejusdem generis*.

Consumer protection legislation is to be interpreted within the framework of its objectives. For example, if interpreted sufficiently flexibly, considering the fundamental rights at stake by right holders, providers and users, a duty of care would also be capable of producing just results for the liability of intervening providers.⁵⁸¹ Choosing ‘*ejusdem generis*’ in legal interpretation for consumer protection legislation and P2P transactions ensures precise and adaptable definitions, aligning with evolving business models and legislative intent. This approach fosters fairness and comprehensive coverage, addressing the collaborative economy and promoting equitable treatment of all parties involved in transactions.

This principle can be interpreted to include the parties in P2P transactions and consumer protection legislation as the recipients of the service, who are the consumers of the service as they are receiving the services provided to them.⁵⁸² By expanding the definition of consumers to encompass peer consumers under the principle of *ejusdem generis*, this interpretation acknowledges the evolving landscape of transactions. It aligns with the foundational principles of consumer protection legislation. Such legislation aims to ensure fairness, transparency, and the protection of rights for all individuals involved in service transactions. In recognizing peer consumers as recipients of services within the broader category of consumers, the interpretation reflects a commitment to adapting legal frameworks to contemporary modes of exchange, such as P2P transactions. It underscores the need to safeguard the rights and interests of all parties engaged in these transactions, providing a more inclusive and comprehensive approach to consumer protection. This perspective acknowledges modern commerce's dynamic nature and individuals' diverse roles in service exchanges. Extending the protective umbrella of consumer protection legislation

⁵⁸¹ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 2262001, p 10–19) Article 8(3).

⁵⁸² As discussed in Chapter 2.

to peer consumers reinforces the commitment to equity. It ensures that the legal framework remains relevant and effective in addressing the complexities of today's interconnected and collaborative economic landscape.

While there are some common principles of legal interpretation that are broadly applicable across different legal systems, the exact approach to interpretation can vary from one jurisdiction to another. The legal principles and methods used for interpreting laws are often influenced by the specific legal traditions, historical context, and legal systems in each jurisdiction. The following section considers the interpretation of consumer protection legislation in the EU and India to include peer consumers under their ambit.

3.1. Interpreting Consumer Protection legislations in the EU

In the EU, consumer protection laws and regulations are created to ensure the interests and rights of consumers in various transactions. By using purposive interpretation, courts and regulators aim to ensure that the laws are interpreted according to the intent with which they were drafted.⁵⁸³

The principle of purposive interpretation can be applied to consider peer consumers as a category of consumers to apply consumer protection legislation in B2C and P2P transactions. As discussed in Chapter 2, peer consumers are to be considered a category of consumers. They are the recipients of service (consumers and peer consumers) from businesses, and peer service providers will be considered as consumers. They receive these services for non-commercial purposes and interact with the service provider. The interpretation of the purpose of consumer protection legislation of ‘protecting interests of consumers’ to include the interests of peer consumers would ensure that consumers engaging in P2P transactions are afforded a baseline of legal protection similar to what they would receive in B2C transactions. For example, if peer consumers were considered like consumers in B2C transactions, they would also receive information about the withdrawal process, rankings, and protection against the harms of ratings and reviews.

However, Member States did not support this interpretation and expansion of existing consumer protection legislation. In 2017, The Fitness Check was conducted on consumer

⁵⁸³ ‘The EU as a Community of Law- Overview of the Role of Law in the Union’ (European Parliament-Briefings) 6; Vijay Awana, ‘Jurisprudential Aspects and Significance of Rule of Purposive Interpretation’ (2020) 2 International Journal of Legal Science and Innovation 46; Koen Lenaerts and José A Gutiérrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’ [2013] EUI Working Paper AEL 2013/9 13; Elise Poillot, ‘The True Story of the Active Role of Courts in Consumer Litigation: Introduction to the Speech given by Etienne Rigal’ Introduction to the Speech given by Etienne Rigal 11.

protection legislation.⁵⁸⁴ Consumer protection legislation was reassessed based on technological developments. The possibility of extending the legislation beyond B2C transactions was considered.⁵⁸⁵ This extension would mean that the existing consumer protection legislation, as applicable to B2C transactions, would be extended to apply to B2B, C2B, C2C, or P2P transactions. However, the assessment concluded that the vast majority of Member States and stakeholders did not support an extension of the legislation for such transactions. Thus, an interpretation of existing consumer protection legislation to the ambit of P2P transactions would fail.

3.2. Interpreting Consumer Protection legislations in India

When two interpretations of a statute are possible, the Court may prefer and adopt the purposive interpretation with regard to the object and intent of such a statute. This approach emphasizes understanding and giving effect to the underlying purpose, intent, and objectives of the law rather than relying solely on the literal meaning of the text.⁵⁸⁶ The primary purpose of consumer protection legislation in India is to safeguard the rights and interests of consumers.⁵⁸⁷

As discussed in Chapter 2, unlike EU consumer protection legislation, the Indian Consumer Protection Act does not specify its application to B2C or P2P transactions. Furthermore, the definition of ‘consumer’ is independent of the service provider. Consumers are the recipients of the service for non-commercial purposes. The definition does not specify the service provider as a business or a non-professional.

⁵⁸⁴ ‘Commission Staff Working Document Report of the Fitness Check on Consumer Protection Directives.’ (n 27).

⁵⁸⁵ *ibid* 11.

⁵⁸⁶ Awana (n 583).

⁵⁸⁷ The Consumer Protection Act, 2019 Preamble.

The purposive interpretation could be applied to protect peer consumers in P2P transactions under consumer protection legislation in India because the legislation is written in a way that permits this interpretation and would achieve the purpose of protecting consumers. The courts of law have not currently interpreted the legislation in this manner. As discussed in Chapter 0, there is no definition of the collaborative economy or its parties in India. Once clarity is established, the purposive interpretation of P2P transactions under consumer protection in India is possible.

Navigating the intricacies of interpreting consumer protection legislation in the EU and India presents a formidable challenge due to the complexity and legal nuances involved. The complexities arise from the need to align established legal frameworks with the evolving dynamics of the collaborative economy, where peer consumers engage with peer service providers on platforms. Given the challenges posed by legislative interpretation, an alternative approach could involve industry or platforms taking on a regulatory role to establish standards and delineate the rights and duties of peer service providers.

In this scenario, the industry or CEPs could play a crucial role in self-regulation, proactively defining and enforcing guidelines that govern the conduct of peer service providers. By doing so, CEPs could bridge the regulatory gap and provide a structured framework for peer-to-peer transactions within the collaborative economy. Establishing industry-led standards and guidelines would necessitate collaboration among CEPs, industry stakeholders, and possibly regulatory bodies. Clear standards could include obligations related to transparency, dispute resolution mechanisms, and the duty of care owed by peer service providers to their consumer counterparts. Such an industry-led regulatory framework would be dynamic and able to adapt swiftly to the evolving landscape of peer-to-peer interactions while fostering a sense of responsibility and ethical conduct within the collaborative economy.

The following section analyses the industry-specific and platform-specific standards that could potentially address issues in P2P transactions.

4. Industry-specific standards and platform-specific standards

Another potential solution to addressing consumer issues is for the industry to regulate itself and prevent and address consumer issues in P2P from happening. This regulation could be in the form of industry-specific standards for providers of these services. For example, hairdressers or electricians who promote their services on CEPs must have adequate training and a license to register on the CEP, and such transactions with the consumers would then constitute B2C transactions as the providers of these services are operating in their professional capacity.

However, in cases of sharing of resources like tractors during harvest season, it does not require any specific licensing requirement on the provider of the service. The unique nature of the collaborative economy is the sharing of underutilized resources by persons, including peer service providers. Peer service providers do not have licenses or standards placed on them; thus, the industry does not regulate the operational practices of peer service providers.

The absence of licenses or established standards for peer service providers within the collaborative economy contributes to a regulatory gap, where the industry lacks formal oversight over the operational practices of these service providers. Unlike traditional professions or businesses that often require licenses to operate, peer service providers, who engage in various services through CEPs on a non-professional and occasional basis, typically do not face such regulatory prerequisites. As a result, there is a notable lack of standardized criteria or qualifications to assess their competency, reliability, or adherence to industry-specific norms.

In a regulated industry, licenses serve as a means to ensure that individuals or entities meet specific predefined standards, typically set by regulatory bodies or authorities. These standards are designed to safeguard the interests of consumers, maintain a minimum level of service quality, and ensure ethical conduct within the industry. In the context of peer service providers, the absence of licensing or standardizing mechanisms means there is no formalized

process to assess their qualifications or competence, leaving a void in industry-wide expectations.

Without a regulatory framework, the operational practices of peer service providers may vary widely, leading to potential inconsistencies in service quality or safety. Peer consumers, in turn, may face challenges in evaluating the credibility and reliability of individual peer service providers, as there are no industry-wide recognized benchmarks or certifications while transacting on CEPs. This lack of regulation further underscores the dynamic and evolving nature of the collaborative economy, where traditional regulatory approaches may not seamlessly fit the diverse range of peer-to-peer transactions.

An alternative approach to tackling consumer concerns could be CEP-specific standards. In this case, they could regulate themselves. As Smorto (2018) observed, legislation could not follow the pace of technology, and various groups established interests to obtain more favourable rules for themselves.⁵⁸⁸ Self-regulation of CEPs is when CEPs monitor themselves and adhere to the government's or themselves' legal and ethical standards.⁵⁸⁹

⁵⁸⁸ Guido Smorto, 'Regulating (and Self-Regulating) the Sharing Economy in Europe: An Overview' in Maurizio Bruglieri (ed), *Multidisciplinary Design of Sharing Services* (Springer International Publishing 2018). In addition, other familiar justifications in favor of self-regulation are usually raised. Legislators—it is often observed—cannot follow the pace of technology, running the risk to provide solutions fatally doomed to a rapid obsolescence (Bennett Moses 2013; Brownsword and Somsen 2009; Hadfield 2008).

⁵⁸⁹ Some ways that may occur are through concluded contracts, setting community guidelines, and providing the terms of use. Bruglieri (n 117) 5; Parker, Alstyne and Choudary (n 90) 139 Chapter 11- Policy- How Platform Should(and Should not) be Regulated. Devolder (n 116) 10 Chapter 1- Alain Strowel and Wouter Vergote Digital Platforms: To Regulate or Not to Regulate? Message to Regulators: Get the Economics Right First, then Focus on the Right Regulation; Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edition, Oxford University Press 2012) 137 Part II- Strategies Chapter 8- Self Regulation, Meta Regulation and Regulatory networks; Twigg-Flesner, *Research Handbook on EU Consumer and Contract Law* (n 22) 35 Part I, Chapter 2- Guido Comparato, Hans-W Micklitz and Yane Svetiev The regulatory character of European private law; Marco Cian, 'Online Platforms as Gatekeepers to the Digital World – A Preliminary Issue on Business Freedom, Competition and the Need for a Special Market Regulation' [2018] *Journal of European Consumer and Market Law* 210.

CEPs provide various standardised contracts amongst the parties. These include the terms of service, community guidelines, and privacy policies. These contracts provide various points of information to consumers and address certain issues of transparency and provision of information. They are also amended to keep pace with regulation changes, such as the Fairness and Transparency Regulation and the Modernization Directive calling for disclosure of ranking parameters or when CEPs have modified these contracts to provide for COVID-19 precautionary measures. However, these standard contracts between CEPs and their service provider are not subject to negotiations. They cannot change the terms when they sign up for the CEP. Furthermore, these terms are the same for businesses and peer service providers. The terms are not subject to change based on the nature of the party.

On the positive side, standardized contracts in CEPs can simplify the transaction process, providing clear terms and conditions and contributing to user confidence and ease of use. However, a potential drawback arises when these contracts, often drafted by the platform, may lack negotiation flexibility for consumers, leading to imbalances in rights and obligations, emphasizing the importance of robust consumer protection measures to ensure fairness and equitable terms.

CEPs employ mechanisms to establish a secure environment for multisided transactions while fostering trust in the economy. These mechanisms are constantly modified with the operations of parties and creating a trusted brand.⁵⁹⁰ However, these mechanisms are imperfect, as shown by the persistence of issues in Chapter 3. Peer consumers are still facing these issues, and the legislation and the CEPS cannot redress these issues.

Self-regulation by CEPs falls short of effectively addressing issues of peer consumers In P2P transactions, as raised in Chapter 3. Regarding the issues of R&R, while CEPs allow peer consumers to rate and review their experiences, these systems are susceptible to manipulation

⁵⁹⁰ Smorto (n 588).

and bias, with both service providers and consumers having the potential to submit fraudulent or biased feedback. Rankings within CEPs may not accurately reflect the quality or suitability of services, and peer consumers are not provided adequate information similar to consumers in B2C transactions. Personalization features in CEPs, while intended to enhance user experience, can inadvertently contribute to information asymmetry and algorithmic discrimination. Personalized recommendations may limit the diversity of options presented to peer consumers, potentially reinforcing existing biases and restricting exposure to a broader range of service providers.

While self-regulation by CEPs aims to create a balanced and efficient marketplace, it often falls short of effectively addressing the complex challenges peer consumers face. Issues such as unreliable ratings, misleading rankings, and algorithmic discrimination persist, necessitating external regulatory interventions and oversight to ensure fair and equitable practices within the collaborative economy.

Furthermore, it is not sufficient to place the responsibility solely on CEPs to regulate themselves and the parties in the collaborative economy. The following section thus investigates a potential new solution to address these issues, with the duty of care. The duty of care is not a panacea for all the issues, but this creates a duty of the peer service provider towards the peer consumers to mitigate issues.

5. A Path of Hope to Resolve Consumer Issues in the Collaborative Economy

5.1. Duty of Care

As Captain Chris Hadfield sets off for his first-ever spacewalk from the International Space Station, he encounters a ridiculous dilemma - a square astronaut in a round hole, where he struggles to get his body in the spacesuit through a round hatch door of the spaceship.⁵⁹¹ He uses this metaphor to state that solutions to a problem might not always be the perfect fit or the best solution, as the solution can encounter hairpin curves, dead ends, and extra efforts to resolve the issue.

Similar is the dilemma faced by legislators while dealing with platforms - square platforms, round legislations. The existing legislation may not always fit every issue encountered on the platform. It can encounter multiple issues, and in the end, they can, through interpretations and guidance, make the legislation fit the issue, but is it appropriate for consumer issues faced on CEPs to be pushed through existing round-holed legislation, or does this call for unique solutions, custom made for the situation?

The previous Chapter highlights the issues that peer consumers face and the dearth of protection under consumer protection laws. This thesis argues that any newer legislation, regulation, or reading of current legislation should be based on a duty of care. The duty of care is an obligation imposed on an individual, requiring adherence to a standard of reasonable care while performing any act that could foreseeably harm others. Duty of care may be considered a formalisation of the social contract, the implicit responsibilities held by individuals towards others within society.

⁵⁹¹ Chris Hadfield, *Astronaut's Guide to Life on Earth- What Going to Space Taught Me About Ingenuity, Determination, and Being Prepared for Anything* (Random House Canada 2013) Page 193.

The duty of care may be imposed by the operation of law between individuals who have no current direct relationship (familial, contractual, or otherwise) but eventually become related in some manner, as defined by common law (case law).

5.2. Duty of care in consumer protection – tracing case law

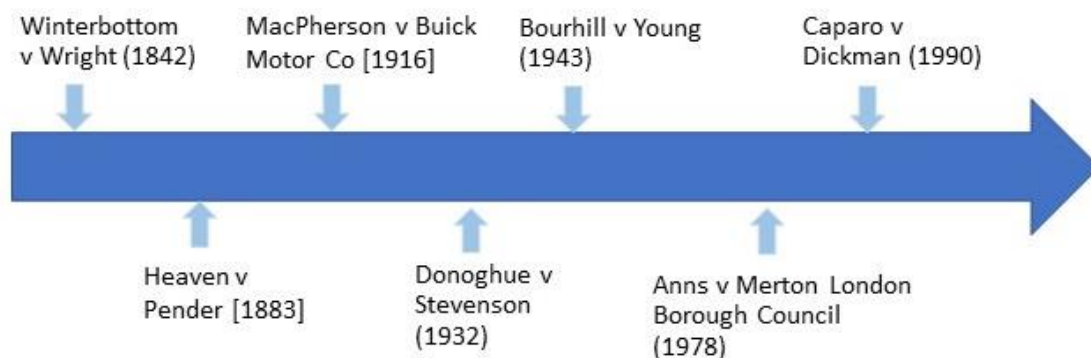


Figure 25: Evolution of the duty of care in precedent.

At common law, duties were formerly limited to those with whom one was in privity, as exemplified by cases like **Winterbottom v. Wright**.⁵⁹² The idea of a general duty of care that runs to all who could be foreseeably affected by one's conduct first appeared in the obiter of the judgment in **Heaven vs Pender** by MR William Brett.⁵⁹³ In this case, Heaven, a ship painter who was supported by ropes that were previously damaged, was injured. While there was no liability placed on Pender, MR William Brett opined that there was a wider duty to be responsible in tort to those who might be injured if 'ordinary care and skill' was not exercised.⁵⁹⁴

Although the rest of the court rejected MR Brett's formulation, similar formulations later appeared in the landmark U.S. case of *MacPherson v. Buick Motor Co.* and, in the UK, in *Donoghue v Stevenson*.⁵⁹⁵ Both *MacPherson* and *Donoghue* were product liability cases,

⁵⁹² *Winterbottom v Wright* (1842) [1842] Court of Exchequer (1842) 10 M & W 109; (1842) 152 ER 402 4 Lord Abinger.

⁵⁹³ *Heaven v Pender* [1883] Court of Appeal (1883) 11 QBD 503 504–505.

⁵⁹⁴ *ibid* 6 Minority Decision- Brett MR.

⁵⁹⁵ *MacPherson v Buick Motor Co* [1916] New York Court of Appeals 111 N.E. 1050, 217 N.Y. 382; *Donoghue v Stevenson* (n 53).

and both expressly acknowledged and cited Brett's analysis as their inspiration.⁵⁹⁶ In **MacPherson v. Buick Motor Co.**, Donald C. MacPherson, a stonecutter, was injured when one of the wooden wheels of his 1909 Buick Runabout collapsed.⁵⁹⁷ Judge Benjamin N. Cardozo Cited *Winterbottom vs Wright* as a precedent and removed the requirement of privity of contract for duty in negligence actions.⁵⁹⁸

In **Donoghue vs Stevenson**, also known as the 'Paisley Snail' or 'Snail in the Bottle' case, the case involved Mrs May Donoghue drinking a bottle of ginger beer in a café in Paisley, Renfrewshire. Unknown to her or anybody else, a decomposed snail was in the bottle. She fell ill and subsequently sued the ginger beer manufacturer, Mr Stevenson.⁵⁹⁹ The House of Lords held that the manufacturer owed a duty of care to her, which was breached because it was reasonably foreseeable that failure to ensure the product's safety would lead to harm to consumers.⁶⁰⁰ Lord Atkin observed “...*a manufacturer of products, which he sells...to reach the ultimate consumer in the form which left him...owes a duty of care to the consumer*”.⁶⁰¹ In other words, the manufacturer owes a duty of care to all their possible consumers. This precedent was thus able to initiate numerous avenues in consumer protection and consumer rights. The case laid the groundwork for product liability laws and consumer protection statutes, which empower consumers to seek compensation for injuries caused by defective or unsafe products. The ruling influenced the development of strict liability doctrines, making manufacturers legally responsible for defective products regardless of negligence. Furthermore, it paved the way for establishing agencies and regulatory bodies to ensure product safety and consumer rights.

⁵⁹⁶ *MacPherson v Buick Motor Co.* (n 595) 2; *Donoghue v Stevenson* (n 53) 22.

⁵⁹⁷ *MacPherson v Buick Motor Co.* (n 595) 1.

⁵⁹⁸ *ibid* 8.

⁵⁹⁹ *Donoghue v Stevenson* (n 53) 1–2.

⁶⁰⁰ *ibid* 17.

⁶⁰¹ *ibid* 15.

The parable of Good Samaritan from the Bible refers to the moral that people should love everyone, including their enemies, in Luke 10:29–37. This refers to a story in the Bible, specifically in the Gospel of Luke (10:29–37), where Jesus tells the story of a Samaritan who helps a stranger in need, even though the stranger was from a group traditionally hostile to Samaritans. The moral lesson drawn from this parable is that people should show compassion and kindness to everyone, including those who may be considered outsiders or enemies.

Lord Atkin iterated the parable of the Good Samaritan in the case of *Donoghue v Stevenson*.⁶⁰² He stated that people must take reasonable care not to injure others who could foreseeably be affected by their actions or inaction. He referred to the biblical Great Commandment (to love one's neighbour as oneself) and the Parable of the Good Samaritan. This concept of duty of care was informed by the biblical principle of loving one's neighbour as oneself, as well as the moral lesson of the Good Samaritan.

Lord Atkin's interpretation of the duty of care extended the concept of 'neighbour' to include anyone who might be foreseeably affected by one's actions. In the case of *Donoghue v Stevenson*, this broadened interpretation led to the manufacturer being held liable to Mrs Donoghue for harm caused by their product (a bottle of ginger beer with a decomposed snail inside).

While the broad idea of the Good Samaritan concept is recognized in legal principles, its application in medical law is more specific. In medical law, the Good Samaritan refers to an individual who voluntarily assists in an emergency, such as administering CPR, without expecting reward or compensation. Generally, these Good Samaritans are protected from liability for any unintended harm that may occur while providing aid.

⁶⁰² *Donoghue v Stevenson* (n 53); Richard Castle, 'Lord Atkin and the Neighbour Test: Origins of the Principles of Negligence in *Donoghue v Stevenson*' (2003) 7 Ecclesiastical Law Journal 210.

In the context of P2P transactions, the Good Samaritan principle can be applied as a duty of care between the parties involved. This suggests that individuals engaging in P2P transactions should exercise reasonable care to avoid causing harm to each other, just as the Good Samaritan showed care for the stranger in the biblical parable.

In the realm of P2P transactions, applying the Good Samaritan principle manifests as a duty of care between the parties involved. Unlike traditional commercial transactions, where businesses often have legal obligations to ensure their products or services safety and quality, P2P transactions typically lack such formal regulatory oversight. Consequently, the duty of care becomes pivotal in safeguarding the interests and well-being of both parties. For instance, in a P2P rental transaction, such as renting out a property or a vehicle, the owner has to ensure that the rented item is safe for use, adequately maintained, and accurately represented. Similarly, the renter must utilize the rented item responsibly without causing damage or harm. This reciprocal obligation mirrors the essence of the Good Samaritan principle, emphasizing mutual respect, responsibility, and consideration for the other party's welfare. Embracing the Good Samaritan principle in P2P transactions reinforces legal and ethical standards and fosters a climate of trust and reliability within the collaborative economy.

The duty of care standard was also applied to see whether such a duty exists without prior duty. In the case of **Bourhill v Young**, Mrs Bourhill (the claimant) was a pregnant passenger on a tram.⁶⁰³ Young was on a motorbike when he crashed and died. Mrs Bourhill did not see the accident, but she heard what happened. She later returned to the scene and saw the blood on the road, causing three things to happen: Firstly, she was thrown into a state of terror; second, she wrenched her back; and third, she delivered the child stillborn. The question for the court was whether or not Young owed a duty of care to Mrs Bourhill. Lord Wright held

⁶⁰³ *Bourhill v Young* [1942] House of Lords [1942] UKHL 5, [1943] AC 92.

that the claimant was completely outside the range of this collision: she merely heard a noise that upset her and did not see the accident scene until later. Therefore, no duty was owed.⁶⁰⁴

The duty of care standard was applied on a case-to-case basis. The *Anns* test was established in the case of **Anns v Merton London Borough Council**.⁶⁰⁵ In this case, there was a construction project involving the construction of a residential building. Allegations were made that the council failed to inspect the building, which meant the building was not stable. Over time, the building sloped, and cracks appeared in the walls. The claimant claimed the repair cost of each flat in the building. Lord Wilberforce proposed a two-stage test for the duty: Firstly, it must be established that there is a sufficient relationship of proximity between the defendant and the claimant, such that it was foreseeable that the claimant could be harmed if the defendant was careless. Secondly, the duty someone owes to another may be limited or negated on policy grounds.⁶⁰⁶

Following the establishment of the two-stage test for a duty of care, there was a marked judicial retreat from the test, which was widely seen as too inclusive and too easily applicable to cases contrary to public policy.⁶⁰⁷ The test was formally overruled in *Murphy v Brentwood District Council*, where the House of Lords invoked the Practice Statement to depart from the *Anns* test. A criticism of the *Anns* test had been that it combined the test for the proximity of relationship with the foreseeability of harm.⁶⁰⁸

Whether a duty of care exists depends firstly on whether there is an analogous case in which the Courts have previously held there to exist (or not exist) a duty of care. If there is an analogous case on duty of care, the court will apply that case to the facts of the new case

⁶⁰⁴ *ibid* 16.

⁶⁰⁵ *Anns v Merton* [1977] House of Lords UKHL 4, AC 728, 2 All ER 492, 2 WLR 1024.

⁶⁰⁶ *ibid* 44.

⁶⁰⁷ *Murphy v Brentwood* [1991] House of Lords UKHL 2, 1 AC 398, 2 All ER 908 11.

⁶⁰⁸ *Murphy v Brentwood* (n 607); Practice Direction - Judicial Precedent ([1966] 3 All ER 77 (HL)).

based on precedent.⁶⁰⁹ If there is no similar case that the court will determine whether there is a duty of care by applying the three normative criteria the House of Lords set out in **Caparo Industries plc v Dickman**.⁶¹⁰ Firstly, the harm must be a ‘reasonably foreseeable’ result of the defendant's conduct. The Courts must examine whether a reasonable person in the defendant’s position would have foreseen the risk of damage. Secondly, a relationship of ‘proximity’ must exist between the defendant and the claimant. The second requirement of proximity does not mean simple physical proximity. However, it extends to ‘such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act’.⁶¹¹ Thirdly, the courts inspect whether it would be ‘fair, just and reasonable’ to impose liability. As stated by Weintraub C.J. in *Goldberg v Housing Authority of the City of Newark*, ‘whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.’⁶¹²

5.3. Manifestation of the duty of care in the collaborative economy

CEPs have a duty of care in the collaborative economy. The consumer protection legislation discussed in Chapter 2 shows an underlying principle of duty of care. In the collaborative economy, the duty of care of CEPs is to foster a secure space for participants engaging in B2C and P2P transactions. This duty involves implementing measures that protect users from

⁶⁰⁹ Murphy Brentwood

⁶¹⁰ *Caparo Industries PLC v Dickman* (n 54) 18.

⁶¹¹ *Donoghue v Stevenson* (n 53) 8 Lord Atkin.

⁶¹² *Goldberg v Housing Authority of City of Newark* [1962] New Jersey Supreme Court 10 A.L.R.3d 595,38 N.J. 578,186 A.2d 291 3 Weintraub C.J.

physical and financial harm and addressing the unique challenges of collaborative and decentralized exchange models.

CEPs are responsible for establishing transparent guidelines and standards to ensure the safety and trustworthiness of interactions between users. This may involve verifying the identity of users, implementing secure payment systems, and providing clear terms of service. Additionally, CEPs must prevent and address any discriminatory practices, harassment, or harmful content within their ecosystems, contributing to a positive and inclusive user experience.⁶¹³ Furthermore, the duty of care in the collaborative economy involves effective communication and education about potential risks and best practices for users. CEPs provide information on safety features, dispute resolution mechanisms, and user rights, empowering participants to make informed decisions and navigate the collaborative space confidently.⁶¹⁴ The collaborative nature of CEPs also emphasizes the importance of community-building and fostering a sense of accountability among users. CEPs actively monitor and respond to feedback, concerns, and disputes, demonstrating a commitment to resolving issues promptly and fairly.

In the collaborative economy, service providers also bear a distinct duty of care towards consumers, necessitating a commitment to ensuring the safety, satisfaction, and fair treatment of individuals engaging in collaborative transactions. Service providers on CEPs prioritize the protection of consumers by implementing robust safety measures and transparent guidelines. This includes mechanisms for verifying the reliability and credibility of service providers, securing financial transactions, and establishing clear terms of service. The duty

⁶¹³ European Parliament, ‘Liability of Online Platforms- STUDY Panel for the Future of Science and Technology’ (European Parliament 2021) 23.

⁶¹⁴ European Parliament, ‘The Functioning of the Internal Market for Digital Services: Responsibilities and Duties of Care of Providers of Digital Services- STUDY Requested by the IMCO Committee’ (European Parliament 2020) 56. This report discusses the duty of care for platforms in light of the E-Commerce Directive.

of care extends to safeguarding consumers from potential risks associated with collaborative exchanges, such as ensuring the quality and safety of services offered. By doing so, service providers create a trustworthy and resilient collaborative environment, fostering positive and mutually beneficial interactions between them and their consumers.

The duty of care towards consumers under EU and Indian consumer protection laws is pivotal for establishing a fair and secure marketplace that prioritizes the well-being of consumers. For example, transparency and the provision of accurate information under consumer protection legislation manifest the duty to care about the minimum care to consumers. Businesses are mandated to furnish consumers with transparent, precise, and comprehensive information about their products and services. The mandatory disclosure and provision of information within business transactions embody a tangible expression of the duty of care towards consumers. By compelling businesses to transparently share essential details, this obligation ensures that consumers are empowered to make informed decisions. It represents a commitment to transparency, fairness, and accountability, addressing the duty of care by providing consumers with accurate, relevant, and comprehensive information.

For example, in EU consumer law, transparency and the provision of accurate information are fundamental components. The CDR mandates that businesses provide consumers with clear and comprehensive information before a purchase, including details about the product, price, delivery, and the right to withdraw from the contract.⁶¹⁵ Additionally, the UCPD targets misleading advertising and requires businesses to furnish transparent and accurate information to consumers.⁶¹⁶ In India, transparency and accurate information hold a crucial place in the Consumer Protection Act 2019. This legislation underscores the right to information, necessitating that sellers and service providers furnish precise and clear information about their offerings, including quality, pricing, and terms of service.⁶¹⁷ CEPs

⁶¹⁵ CRD, OJ L 304 22.11.2011 Chapter II- Article 5.

⁶¹⁶ UCPD, OJ L 149, 11.6.2005 Article 3(5).

⁶¹⁷ The Consumer Protection Act, 2019 (Act No 35 of 2019) Definition 2(42).

and businesses have the duty to care for the services they provide. The provision of information is only one of the many manifestations of this duty.

While a duty of care exists by CEPs towards peer consumers, there is no such duty of peer service providers towards peer consumers. The presence of a duty of care by CEPs toward peer consumers stands in contrast to the absence of a corresponding duty by peer service providers toward their peer consumers. In the EU, consumer protection legislation is tailored to business-to-consumer B2C transactions and does not include P2P interactions. Consequently, the legal framework encompasses rights and duties, such as the duty of care and does not extend its protective reach to peer consumers. In the Indian context, the scenario is nuanced, demanding interpretational acrobatics to potentially include peer consumers within the ambit of consumer protection legislation. The absence of explicit inclusion of P2P transactions in the legislation further complicates matters, leaving a gap in the regulatory landscape and raising questions about the extent of protection afforded to peer consumers in this jurisdiction. This disparity underscores the need for nuanced and context-specific regulatory approaches to address the intricacies of peer-to-peer interactions within the collaborative economy.

This thesis recommends specific rules and guidelines in the EU and India based on the duty of care towards peer consumers by peer service providers in the collaborative economy. The following section details the reasons for applying the duty of care in P2P transactions and proposed rules and guidelines are attached in Annex 1 and Annex 2.⁶¹⁸

⁶¹⁸ Annex 1- Draft Model Rules on Peer to Peer Transactions in the EU; Annex II- Draft Guidelines for the Regulation of Peer to Peer Transactions in India

5.4. Duty of care in P2P transactions

5.4.1. Duty of care by peer service providers

Including a duty of care by peer service providers would create a basic standard of protection in P2P transactions. The peer service providers would have the duty of care towards their consumers. Concerning peer service providers, this would mean a lighter touch with a duty to take reasonable care towards peer consumers without the burdens of the application of traditional consumer law. While traditional consumer law calls for compliance of businesses towards the authorities and towards their consumers, the duty of care provides a minimum standard.

As of the writing of this thesis, there is no precedent by courts on using a duty of care on CEPs. The application of the duty of care is by answering the three questions laid down by the court in *Caparo Industries PLC v Dickman*.⁶¹⁹ Firstly, the harm must be reasonably foreseeable. This means that the peer service providers reasonably foresee such harm. The peer consumer reasonably expects that the peer service provider would act in an appropriate manner, taking a certain standard of care towards them. Secondly, the relationship of proximity is established by the peer service provider, providing the peer consumer with the service. This relationship in a P2P transaction establishes proximity. The third question of ‘fair, just and reasonable’ involves weighing the relationship of the parties, the nature of the risk, and the public interest. This criterion is one that is dependent on the situation and facts of the case.

The duty of care balances the interests of peer consumers by providing a minimum standard of protection under consumer protection legislation and the interests of peer service providers, who are not professional businesses following stricter compliance standards.

⁶¹⁹ *Caparo Industries PLC v Dickman* (n 54) 18.

It is a reasonable duty to be provided to consumers. It is a lighter touch than the businesses, as it is a minimum standard of protection, with the introduction of a duty of care. In the context of peer service providers, this approach would entail a more flexible framework, where these providers are obligated to exercise reasonable care in their dealings with peer consumers. This adaptation would alleviate them from the more cumbersome regulatory burdens associated with traditional consumer protection laws.

5.4.2. Duty of care towards peer consumers

Concerning peer consumers, if peer service providers have a duty of care, peer consumers have the right to receive such care. Peer consumers are provided the right to receive a reasonable standard of care based on the duty of care. They are not protected under existing consumer protection legislation, and once such a provision is enacted, they can be protected under consumer protection legislation similar to consumers in B2C transactions.⁶²⁰ In the context of peer consumers, establishing a duty of care of peer service providers would confer upon peer consumers the entitlement to receive such care. The duty would mean that peer service providers would be obliged to exercise a reasonable degree of care and diligence when interacting with peer consumers, ensuring that the latter's rights and interests are respected and safeguarded. This reciprocal duty reinforces the principle of fair and ethical conduct in peer-to-peer transactions, fostering trust and accountability among all participants.

The reason for the duty of care towards peer consumers is because, as shown in Chapter 2, peer consumers are consumers and require their protection under consumer protection legislation based on their roles and actions. The weaker party in need of protection is the recipient of the service, i.e., in this case, consumers in B2C transactions or peer consumers in P2P transactions. The role of service providers has expanded to include both professional and non-professional individuals. Applying existing consumer protection legislation is not

⁶²⁰ This thesis has provided draft rules for P2P transactions in the EU and India. At this stage, there is no provision on P2P transactions or peer consumers in existing policy or legislation.

feasible, as evidenced in the previous section. In order to protect peer consumers, a lighter touch of the duty of care is recommended. A lighter-touch approach to duty of care does not imply neglecting safety or reducing accountability. Instead, it seeks to find a balanced approach that achieves the desired level of protection while allowing for peer service providers' flexibility and individual autonomy. It offers a balanced approach that maintains consumer safeguards while acknowledging the unique dynamics of peer-to-peer transactions and services.

The duty of care of peer service providers and the right of peer consumers to receive such care are examined under the Hohfeldian analysis.⁶²¹ The reason for such an analysis is to examine the different aspects involved in the duty of care of the peer service provider and the corresponding rights of protection of peer consumers. According to Wesley Newcomb Hohfeld, the term 'rights' is mistakenly applied to something that may be a privilege, a power, or immunity in some cases but is not a right in the strictest sense.⁶²² The correlative (and equivalent) 'obligation' provides a method for limiting the word 'right' to its specific and most appropriate meaning. Legal rights are always accompanied by legal obligations. This pair of phrases conveys the same legal relationship but from two different perspectives.⁶²³

Duty of Care (Primary Duty): This is the central obligation of a peer service provider to take reasonable measures to prevent harm or injury to the individual they are assisting. This duty represents a legally (when enacted) and ethically binding responsibility.

Right of Protection (Correlative Right): The person receiving peer service has a corresponding right to be protected from harm by the peer service provider. This right ensures

⁶²¹ Roy L Stone, 'An Analysis of Hohfeld' (1963) 48 University of Minnesota Law School Review Scholarship Repository 313; Alan D Cullison, 'A Review of Hohfeld's Fundamental Legal Concepts' (1967) 16 Cleveland State University Engaged Scholarship @CSU 559.

⁶²² Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied Judicial Reasoning' (1913) 23 Yale Law Journal 28.

⁶²³ Stone (n 621); Daniel Simão Nascimento, 'Hohfeld on the Duties in Privileges and Claims' (2018) 19 Filosofia Unisinos.

that the recipient can reasonably expect a certain level of safety and well-being while engaging in the P2P relationship.

No-Right (Counterpart to Right): Others do not have a right to interfere with the peer service provider's efforts to fulfil their duty of care. This concept highlights that the provider's duty is primarily owed to the recipient of the service. The CEP forms an integral aspect of the transaction with reference to the facilitation and intermediation of the transaction. However, in relation to the specific services provided, this transaction is solely between the peer service provider and the peer consumer.

Immunity from Liability (Counterpart to Duty): The peer service provider is protected from liability if they appropriately fulfil their duty of care and do not cause harm through negligence. The concept of immunity from liability recognizes that if a peer service provider acts in good faith, follows established standards of care, and takes reasonable precautions, it should not be held legally responsible for any unforeseen negative outcomes that might occur during the course of providing peer support.

5.5. Duty of care to address issues of peer consumers

The issues faced by the peer consumers are discussed in Chapter 3.⁶²⁴ Establishing the duty of care principle would address the issues by making the peer service provider responsible towards the peer consumer, which is not under the ambit of consumer protection legislation.

5.5.1. Duty of care addressing issues of ratings and reviews

Establishing a duty of care for service providers is instrumental in mitigating the challenges associated with ratings and reviews in peer-to-peer transactions on CEPs. This duty places a direct responsibility on individual peer service providers to ensure the accuracy, fairness, and integrity of the information disseminated through ratings and reviews. The duty of care in the context of ratings and reviews refers to the responsibility of peer service providers that host or publish ratings and reviews to ensure that the information provided is accurate, unbiased, and respectful. By prioritizing accuracy, peer service providers contribute to a more trustworthy system where peer consumers can rely on the authenticity of the feedback provided.

The duty of care also extends to promoting unbiased representations within the review ecosystem. Peer service providers are committed to providing unbiased data supplied to the algorithm, including all ratings and reviews, whether positive or negative while being aware of fake and harmful R&R. The duty of care framework encompasses creating and enforcing guidelines for respectful communication in reviews. Peer service providers set clear content guidelines to discourage offensive language or harmful content. By actively moderating and enforcing these guidelines, peer service providers contribute to a positive and constructive online environment. This enhances the overall user experience and ensures that reviews provide valuable insights without resorting to disrespectful behaviour.

⁶²⁴ Chapter 3 .

The duty of care for peer service providers is a pivotal solution to the challenges inherent in ratings and reviews in P2P transactions, aligning with the three tests of proximity, foreseeability, and the principles of fairness, justice, and reasonableness. Proximity, within the duty of care framework, highlights the close relationship between peer service providers and peer consumers. By acknowledging this proximity, peer service providers commit to actively monitoring and moderating the review ecosystem, ensuring it remains a space of trust and reliability. Foreseeability in the duty of care context entails anticipating the impact of R&R on peer consumers in the collaborative economy. Through the duty of care, peer service providers actively foresee potential issues such as biased reviews and fraudulent activities and their impact on peer consumers' trust. Lastly, the principles of fairness, justice, and reasonableness underscore the duty of care's commitment to upholding ethical standards in generating and disseminating reviews.

Peer service providers can build a trustworthy and reliable review system by committing to accuracy, unbiased representation, and respectful communication. This creates an ecosystem where peer consumers can make informed decisions based on authentic and meaningful peer feedback, fostering a more transparent, fair, and accountable collaborative economy. Through actively embracing a commitment to accuracy, unbiased representation, and fostering respectful communication, peer service providers play a central role in constructing a trustworthy and dependable R&R system.

5.5.2. Duty of care addressing issues of rankings

The establishment of a duty of care for service providers is pivotal in addressing concerns associated with rankings in peer-to-peer transactions. While CEPs disclose the main parameters utilized to generate rankings, peer service providers must be cognizant of the data inputs, criteria, and potential biases that may impact rankings.

By establishing a duty of care in relation to rankings, the peer service providers would have the duty to ensure that the information provided to generate the rankings is accurate and does

not manipulate the peer consumers. The concept of duty of care is particularly relevant when creating rankings that may influence decisions or perceptions. The duty of care in relation to the protection of peer consumers is similar to the ranking obligations under the current consumer protection legislation as applicable to B2C transactions. The duty of care in the context of rankings generally refers to the responsibility of publishing rankings to ensure that the information provided is accurate, fair, and unbiased. A duty of care obligation would place responsibility on the peer service providers to provide appropriate information and take reasonable care to rank their goods in a fair manner.

Regular self-assessments form a critical aspect of the duty of care, compelling peer service providers to scrutinize ranking outcomes, identify patterns of potential bias, and proactively address any unintended discrepancies. Upholding ethical data practices is imperative, requiring peer service providers to maintain transparency in how data is used to generate rankings and to avoid perpetuating biases that may affect the positioning of certain individuals or groups.

The duty of care for peer service providers addresses the challenges associated with rankings in P2P transactions, as evidenced by the three tests of proximity, foreseeability, and principles of fairness, justice, and reasonableness. Proximity is integral to this duty, emphasizing the close relationship between peer service providers and peer consumers. By actively engaging with the duty of care, peer service providers commit to monitoring and enhancing the ranking system. Foreseeability within this framework underscores peer service providers' ability to anticipate and address potential issues like biased rankings or unfair advantages, demonstrating a proactive approach to mitigating foreseeable concerns. Moreover, the duty of care aligns with fairness, justice, and reasonableness principles, ensuring that ranking algorithms prioritize unbiased representations. By actively implementing the duty of care, peer service providers contribute to a more equitable and user-centric ranking system, fostering trust and accountability within the collaborative economy.

By internalizing the principles of the duty of care, individual peer service providers contribute to active participation in CEPs where peer consumers can engage confidently, knowing that rankings are generated with fairness, integrity, and a clear understanding of the parameters.

5.5.3. Duty of care addressing issues of personalization

The duty of care for peer service providers in the context of personalization is instrumental in addressing concerns related to potential biases, lack of transparency, and the ethical implications of personalized services in P2P transactions. The duty of care in the context of personalization refers to the ethical and responsible handling of individuals' personal data and preferences when providing personalized experiences, services, or content. Though the algorithm is run through CEPs, the peer service provider uses consumer information and the CEPs algorithm to provide personalised transactions. Thus, they, too, must have a duty to use this algorithm and consumer data with a reasonable standard of care.

While personalization can enhance user experiences, there is a responsibility to ensure that it is done in a way that respects privacy, maintains transparency, and avoids potential harm. Introducing a duty to care by peer service providers towards peer consumers establishes a duty to utilize peer consumer information in a reasonable manner. Transparency and explainability are integral components of the duty of care in personalization. Peer Service providers must communicate clearly with peer consumers users about how their data is used and the purpose behind personalized recommendations.

The duty of care for peer service providers passes the three tests of proximity, foreseeability, and the principles of fairness, justice, and reasonableness. Proximity highlights the close relationship between peer service providers and consumers, emphasizing personalization's significance in shaping individual experiences. Proximity and personal information about the peer consumer are the keys to personalization. Foreseeability within the duty of care framework underscores providers' responsibility to anticipate and mitigate potential issues

arising from personalization, ensuring that users are not subject to unintended consequences or discriminatory outcomes. Furthermore, the principles of fairness, justice, and reasonableness are inherent in the duty of care, requiring providers to balance personalization with ethical considerations and to ensure just and reasonable outcomes for peer consumers.

5.5.4. Duty of care addressing issues of algorithmic discrimination

The duty of care in the context of algorithmic discrimination refers to the responsibility of peer service providers to ensure that the use of the algorithms and automated systems does not result in discriminatory or biased outcomes. Establishing a duty of care for peer service providers is paramount in addressing algorithmic discrimination in P2P transactions. As individual peer service providers use the services of CEPs and their algorithms to make decisions impacting peer consumers, the duty of care is to ensure that these algorithms are fair, unbiased, and devoid of discriminatory outcomes. The duty begins with awareness of data inputs, decision-making criteria, and potential areas of bias. Through this understanding, peer service providers can proactively identify and mitigate biases, fostering a commitment to fairness in algorithmic decision-making.

Transparency and explainability further fortify the duty of care. Peer service providers must communicate the factors influencing those decisions with peer consumers. This transparency builds trust and empowers individuals to comprehend and question algorithmic outcomes. Establishing feedback mechanisms and avenues for redress strengthens the duty of care, allowing peer consumers to provide input on algorithmic decisions and seek resolution if they believe they have experienced discrimination. Algorithms and automated decision-making systems have the potential to perpetuate or amplify biases, leading to unfair treatment and discrimination. This duty of care involves taking proactive steps to identify, prevent, and address algorithmic discrimination. By introducing a duty of care for peer service providers, they would be responsible for ensuring that they use the algorithm appropriately.

The duty of care for peer service providers aligns with the three tests of proximity, foreseeability, and the principles of fairness, justice, and reasonableness. Proximity highlights the intimate connection between peer service providers and consumers, emphasising algorithmic decisions' impact on individual experiences. The duty of care requires peer service providers to actively ensure their algorithms are fair and unbiased, thereby mitigating discriminatory outcomes. Foreseeability within the duty of care framework underscores the peer service providers' responsibility to anticipate and address potential algorithmic biases or discriminatory impacts. This proactive stance ensures that peer service providers take pre-emptive measures to rectify foreseeable issues. The principles of fairness, justice, and reasonableness oblige peer service providers to input data and use algorithms in a manner that contributes to a more equitable and non-discriminatory algorithmic landscape.

5.6. Problems of using duty of care – and overcoming these challenges

While the duty of care can be instrumental in addressing various challenges, it is essential to acknowledge that specific issues may still arise. These challenges could stem from the evolving nature of technologies, unforeseen circumstances, or the complexities inherent in navigating the dynamic landscape of peer-to-peer transactions.

Firstly, the duty of care standard is created under common law, developed through precedent and moral actions of parties and standards of courts. The person undertaking the duty of care must undertake a standard of care. The duty of care and its breach depends on the circumstances. Whether the standard of care has been breached is determined fact and is usually phrased in terms of the reasonable person. In certain industries and professions, the standard of care is determined by the standard exercised by the reasonably prudent manufacturer of a product or the reasonably prudent professional in that line of work. However, in P2P transactions, peer service providers do not have an industry or a professional standard to maintain; thus, establishing this standard could be difficult.

This standard of care, as exercised, leads to the second problem of the standard of a reasonable person. Under common law, a reasonable person is a hypothetical person of legal fiction crafted by the courts and communicated through case law and jury instructions.⁶²⁵ The reasonable person belongs to a family of hypothetical figures in law, including the ‘right-thinking member of society’, the ‘officious bystander’, the ‘reasonable parent’, the ‘reasonable landlord’, the ‘fair-minded and informed observer’, the ‘person having ordinary skill in the art’ in patent law, and stretching back to Roman jurists, the figure of the *bonus pater familias*.⁶²⁶ In the English version of the decision, this concept was translated as ‘that of a man of ordinary prudence in managing his affairs.’ While there is a loose consensus

⁶²⁵ *Regina v Smith* [2000] House of Lords 4 AER 289 2.

⁶²⁶ Stephen Gillers, ‘A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II’ (2007) 85 Washington University Law Review 215.

in black letter law, there is no accepted technical definition. Under any common set of facts, high courts decide this person's character and care conduct through the reasoning of good practice or policy—or 'learned' permitting a compelling consensus of public opinion. The standard does not exist independently of other circumstances within a case that could affect an individual's judgement.

Thirdly, whether a duty of care exists depends firstly on whether there is an analogous case in which the Courts have previously held there to exist (or not exist) a duty of care.⁶²⁷ Accordingly, if there is an analogous case on duty of care, the court will apply that case to the facts of the new case. If there is no similar case that the court will determine whether there is a duty of care by applying the three criteria as set out in *Caparo Industries PLC v Dickman*.⁶²⁸ As discussed above, the three test criteria were analyzed for each issue. This theoretical discussion could be used by courts to examine the duty of care in P2P transactions in the absence of current court cases or legislative frameworks.

This thesis recommends rules for peer service providers to provide a duty of care that protects peer consumers. There are currently no rules in place that address P2P transactions in the collaborative economy, and thus, these rules address that gap. As discussed in Chapter 1, the relationship among the parties in the collaborative economy is complementary. Thus, the rules recommended are not to be comprehended in isolation but alongside other rules for platforms, including CEPs, businesses and consumers. Secondly, there has been only one other example of regulation of peer-to-peer transactions in the financial sector. These rules involving peer lending and peer transactions are enforced through a multiple-layer mechanism with oversight by multiple bodies. Similarly, P2P transactions in the collaborative economy cannot be subject to only a singular point of

⁶²⁷ This test is based on the various precedents on the duty of care. The case laws discussed above highlight the evolution of the duty of care. This principle has been applied in various cases creating precedents.

⁶²⁸ *Caparo Industries PLC v Dickman* (n 54) 18.

supervision. The recommended rules, thus, provide for a layered approach to enforce the duty of care of peer service providers.⁶²⁹

The following sections discuss the framework of the preparation of such rules of duty of care based on guidelines and structures and the test of constitutionality in the EU and India. The reason for this discussion is to provide evidence that rules or guidelines on P2P transactions comply with the broader legislative agenda of the two jurisdictions.

⁶²⁹ Please see Annexe I and II for the specific rules for the EU and India.

5.7. Inclusion of duty of care in legal systems

In legal systems, the duty of care can be incorporated to ensure that peer service providers act responsibly towards peer consumers.

The duty of care is often established through common law principles, where courts develop legal precedents based on previous cases. In common law jurisdictions like the United Kingdom, judges interpret statutes and legal principles to determine whether a duty of care exists in specific circumstances. For example, the landmark case *Donoghue v Stevenson* established the modern concept of duty of care in negligence law, stating that manufacturers owe a duty of care to consumers to produce safe products.

Secondly, legislatures can enact laws that explicitly define and impose duties of care in certain situations. These statutes outline the responsibilities that individuals or organizations have towards others in specific contexts. For instance, consumer protection laws may mandate that businesses owe a duty of care to their customers to provide safe products and accurate information.

Thirdly, regulatory agencies may establish rules and regulations that impose duties of care on certain industries or professions. These regulations set standards for conduct and require compliance to ensure the safety and well-being of individuals affected by the actions of these entities. For example, healthcare regulators may require healthcare providers to adhere to standards of care to ensure patient safety.

Fourthly, duties of care can also be incorporated into contractual agreements between parties. When parties enter into a contract, they may include provisions that outline the responsibilities and obligations each party owes to the other. Breaching these contractual duties may lead to legal remedies for the aggrieved party. For example, service contracts often include clauses that require providers to perform their services with reasonable care and skill.

Lastly, certain professions have established codes of conduct or ethics that impose duties of care on practitioners within those fields. These codes outline the expected standards of behaviour and professionalism for professionals and may include obligations to act in the best interests of clients or patients. Violations of these codes may result in disciplinary action by professional bodies. Examples include the Hippocratic Oath for medical professionals and the Bar Council of India's Rules of Professional Conduct for lawyers.

This thesis in the draft rules recommends that a duty of care in P2P transactions be incorporated through the rules, as case law may provide different results on a case-to-case basis; secondly, as peer service providers are not professionally organized, such rules cannot be applied.⁶³⁰ Incorporating the duty of care into legal systems through these mechanisms helps promote accountability, protect peer consumers from harm, and ensure reasonable care in P2P transactions.

5.8. Manifestation of Liability Towards Consumers in the EU and India

Liability towards consumers in the EU and India is governed by laws, judicial precedents, and regulatory frameworks. These laws protect consumers from harm caused by defective products and services. The liability can manifest in several forms, including fault and no-fault, strict, vicarious, and product liability. Duty of care is a fundamental concept that fits into the liability framework in the EU and India, establishing the basis for determining liability.

⁶³⁰ These rules are presented in Annex I and II of this thesis.

5.8.1. Strict and Vicarious Liability

In the EU, strict liability under the Product Liability Directive means that manufacturers are liable for product defects regardless of whether they exercised all possible care in production and distribution.⁶³¹

India's Consumer Protection Act similarly imposes strict liability on manufacturers and service providers for defective products and services. This means liability is established based on the defect and resulting harm without needing to prove fault.

CEPs have strict and vicarious liability on behalf of the actions of the service providers, peers or professionals. In the EU, CEPs are subjected to strict and vicarious liability for the actions of service providers, peers, or professionals operating within their systems. This liability framework ensures that CEPs maintain high compliance standards, data protection, and consumer rights. The EU's GDPR and the DSA are key regulatory instruments that impose such liabilities, emphasizing accountability and transparency.⁶³² In India, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules establish similar responsibilities for intermediaries, including CEPs, to monitor and control content and activities on their platforms.⁶³³ These rules mandate that intermediaries exercise due diligence and bear liability for any unlawful activities facilitated through their services.

Vicarious liability in the EU typically applies in employer-employee relationships. An employer can be held liable for the wrongful acts of their employees if these acts occur in the course of employment. This principle ensures that companies are responsible for the actions of their employees while performing their duties. Employers have a duty of care to supervise

⁶³¹ European Parliament, 'Liability of Online Platforms- STUDY Panel for the Future of Science and Technology' (n 613) 62.

⁶³² GDPR, OJ L 119, 4.5.2016; Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending directive 2000/31/EC (Digital Services Act).

⁶³³ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

and ensure their employees perform their duties safely and responsibly. The underlying principle is that employers must hire, train, and supervise employees to prevent harm. Failures in this duty can lead to vicarious liability.

Indian law also follows the doctrine of vicarious liability. Employers in India can be held liable for the acts of their employees if such acts were conducted in the course of employment. This principle is recognized under various laws, including tort and specific consumer protection regulations.

In the context of P2P transactions, strict liability is less commonly applied directly to peer service providers unless specific regulations impose such standards. However, certain sectors (e.g., food safety or health services) may have stricter regulations where strict liability could be invoked. Vicarious liability typically applies to employer-employee relationships and is less applicable to independent peer service providers. However, CEPs might face vicarious liability in the context of the EU Proposed Directive on Platform which when passed would effectively create an employer-employee relationship.⁶³⁴

5.8.2. Product Liability

The EU's Product Liability Directive provides a comprehensive framework for product liability.⁶³⁵ It holds producers (manufacturers, importers, and suppliers) strictly liable for damages caused by defective products. The directive covers both personal injuries and property damage. A product is considered defective if it does not provide the safety which a person is entitled to expect. This includes design, manufacturing, and marketing defects (such as inadequate instructions or warnings).

⁶³⁴ Proposal for a Directive on improving working conditions in platform work.

⁶³⁵ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. The Proposal for a Directive on liability for defective products (COM/2022/495 final) has not been passed yet and the previous legislation is still in force.

The duty of care informs the overall standards and practices that manufacturers should follow to ensure product safety. Products must meet safety expectations, indirectly reflecting the manufacturer's adherence to a duty of care during design, production, and distribution.

The Consumer Protection Act outlines the product liability regime in India. It imposes liability on manufacturers, sellers, and service providers for any harm caused by defective products or services.⁶³⁶ Similar to the EU, a product in India is deemed defective if it is not of the standard that persons are generally entitled to expect. The law considers design defects, manufacturing defects, and marketing defects. The Consumer Protection Act emphasizes product safety and quality, linked to the manufacturer's duty of care. Adhering to a high duty of care in manufacturing processes helps avoid defects and potential liability.

The Product Liability Directive, or the Consumer Protection Act, could apply if peer service providers offer products. This liability would not be applicable to the ambit of CEPs and the sharing of services.

5.8.3. Fault and No-Fault Liability

Fault-based liability in the EU requires the claimant to prove the defendant was negligent. This liability is common in tort law, where the consumer must demonstrate that the harm suffered was due to the manufacturer's or service provider's negligence.⁶³⁷ The duty of care is crucial in the EU in fault-based liability claims. It requires individuals and organizations to exercise reasonable care to avoid causing harm to others. To succeed in a negligence claim,

⁶³⁶ The Consumer Protection Act, 2019 Section 2(10)-Defect.

⁶³⁷ Giorgio Riso, 'Product Liability and Protection of EU Consumers: Is It Time for a Serious Reassessment?' (2019) 15 *Journal of Private International Law* 210; European Parliament, 'Liability of Online Platforms- STUDY Panel for the Future of Science and Technology' (n 613); 'New Product Liability Directive' (Briefing- EU Legislation in Progress); 'Updating Liability Rules for Defective Products- Impact Assessment (SWD(2022)316, SWD(2022)317 (Summary)) Accompanying a European Commission Proposal for a Directive of the European Parliament and of the Council on Liability for Defective Products (COM(2022) 495)' (Briefing- Initial Appraisal of a European Commission Impact Assessment).

the claimant must prove that the defendant owed them a duty of care, breached this duty, and caused harm as a direct result of this breach. For example, a manufacturer must ensure that their products are safe for consumers. If a consumer is harmed due to the manufacturer's negligence (e.g., failing to test a product properly), the manufacturer can be held liable.

In P2P transactions, peer service providers (e.g., an individual renting out their apartment on Airbnb) have a duty of care towards peer consumers. This duty requires them to ensure their services or goods are safe and meet reasonable expectations. If a peer service provider negligently provides a service or product that causes harm, they can be held liable. For instance, if a host on a home-sharing CEP fails to maintain their property, leading to an injury, they should be liable for negligence under the duty of care.

In India, fault-based liability is also prevalent. Under the Consumer Protection Act, consumers can claim compensation for damages caused by the negligence of manufacturers or service providers.⁶³⁸ Proving negligence involves showing that the duty of care owed to the consumer was breached. Indian courts apply the duty of care standard in consumer protection cases. For example, if a service provider fails to deliver services with reasonable care and skill, leading to consumer harm, they can be liable for negligence.⁶³⁹

Similarly, in India, peer service providers with the duty of care must exercise reasonable care in offering their goods or services. The Consumer Protection Act can be interpreted to apply to peer service providers, imposing a duty of care. Liability for peer service providers arises if a breach of duty leads to consumer harm. For example, if a ride-sharing driver operates a vehicle recklessly, causing an accident, they can be liable for negligence.

⁶³⁸ The Consumer Protection Act, 2019 Section 2(11)- Deficiency.

⁶³⁹ *Smt Uma Deepak vs Maruti Udyog Limited and Ors* Monopolies and Restrictive Trade Practices Commission I(2003)CPJ90(MRTP) Para 9.

The EU has adopted a no-fault liability regime under the Product Liability Directive.⁶⁴⁰ This directive establishes that producers are liable for damage caused by defective products, irrespective of fault. Consumers do not need to prove negligence; they only need to show that the product was defective and caused harm. Under the Product Liability Directive, the duty of care is not directly relevant because liability is established without proving fault.⁶⁴¹ Instead, the focus is on whether the product is defective.

CEPs facilitating P2P transactions also have a duty of care. The CEP's role can influence liability whether it is merely an intermediary or actively involved in the transaction. CEPs have a duty of care and could be liable for failing to ensure safety standards. The EU's DSA, for example, increasingly place responsibilities on platforms to monitor and ensure the safety of services offered through their platforms.

India also recognizes no-fault liability under the Consumer Protection Act. This Act introduces provisions for product liability claims where manufacturers, service providers, and sellers can be held accountable for defective products without the need to prove negligence. Indian law is evolving regarding platform liability.⁶⁴² CEPs could be held accountable under consumer protection laws if they fail to ensure that the services meet safety and quality standards.⁶⁴³

5.9. Implementation of the duty of care in the EU in P2P transactions

While maintaining the *status quo* is not possible, interpretation of existing legislation to include P2P transactions would require conceptual and interpretive gymnastics, and industry

⁶⁴⁰ Product Liability Directive, OJ L 210, 7.8.1985. The Proposal for a Directive on liability for defective products (COM/2022/495 final) has not been passed yet and the previous legislation is still in force.

⁶⁴¹ Risso (n 636).

⁶⁴² Draft National E-Commerce Policy- India's Data for India's Development, 2019 24.

⁶⁴³ Christoph Busch, 'When Product Liability Meets the Platform Economy: A European Perspective on Oberdorf v. Amazon' (2019) 8 EuCML-Journal of European Consumer and Market 173.

and CEP standards do not protect consumers in P2P transactions; this thesis proposes the introduction of the duty of care in P2P transactions.

The duty of care test is based on the precedents and morality set in English common law courts.

Revisiting Chapter 0 and the characteristics of EU legal systems, it becomes evident that EU law, despite appearing grounded in civil law principles, draws its roots from common law principles, rendering it a distinctive jurisdiction with a civil-common hybrid legal framework. The element of the duty of care inherent in common law systems has been underscored through precedent-setting case laws, as discussed earlier. EU law is not alien to the common law system.⁶⁴⁴ One of the ways to incorporate the duty of care into EU law is to read this principle into regulation. Various principles of common law have been read into treaties, directives, and regulations.⁶⁴⁵ As Grosswald Curran (2001) argued, the European Union succeeded in its objective of legal uniformity despite encompassing the two distinct legal traditions of the common law and the civil law.⁶⁴⁶ While the two systems of common and civil law traditions may be unique, they establish the rule of law over the territory. The EU is distinctive for blending these two traditional systems and adopting common law principles into regulatory frameworks.⁶⁴⁷

In Chapter 2, the *Mostaza Claro* case considered the uneven power balance between people involved in a transaction.⁶⁴⁸ Consumer protection laws aim to create fairness by giving rights and responsibilities to those involved. However, this is not limited to determining the parties

⁶⁴⁴ As discussed in the following section.

⁶⁴⁵ ‘Communication- EU Regulatory Fitness’ COM(2012) 746 8.

⁶⁴⁶ Vivian Grosswald Curran, ‘Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union’ (2001) 7 *Scholarship @ Piitsburgh Univeristy School of Law* 63.

⁶⁴⁷ René Brouwer, ‘On the Meaning of “System” in the Common and Civil Law Traditions: Two Approaches to Legal Unity’ (2018) 34 45; Paula Giliker, ‘The Influence of EU and European Human Rights Law on English Private Law’ (2015) 64 *The International and Comparative Law Quarterly* 237.

⁶⁴⁸ *Elisa María Mostaza Claro v Centro Móvil Milenium SL* (n 347) Paragraph 36; See also Chapter 2, 172.

that receive protection but also figuring out how much protection they must be provided. EU lawmakers have the authority to introduce and enact specific legal provisions that establish a duty of care for parties involved in P2P transactions, determining the parties to receive protection, their liabilities and rights, and the extent of this protection. Such provisions could define the responsibilities and obligations of individuals and businesses engaged in P2P transactions to ensure the safety, fairness, and protection of consumers. Busch et al. (2016) recommend defining the criteria for identifying the parties' nature, rights and obligations. This thesis recommends that the duty of care be used as the basis of consumer protection legislation, as it offers a lighter touch approach to the service providers and protects consumers, as discussed in the previous section.⁶⁴⁹

The introduction of a duty of care provision in EU law would require careful drafting and consideration to ensure that it aligns with the broader principles of EU consumer protection and legal coherence.⁶⁵⁰ It must also be implemented consistently across all EU Member States to maintain a level playing field for businesses and consumers.

5.9.1. The Duty of care in light of the Better Regulation Framework

The European Commission prepares regulations to achieve their objectives in the most efficient way. It ensures that the EU's policies align with the overarching principles of subsidiarity and proportionality, i.e. only where necessary and in a way that does not go beyond what is needed to address specific problems.⁶⁵¹ The EU's Better Regulation initiative ensures that the recommended policies remain fit for purpose, are future-proof, and are open

⁶⁴⁹ Busch, 'Towards a "New Approach" for the Platform Ecosystem- A European Standard for Fairness in Platform- to-Business Relations' (n 439); Hatzopoulos, *The Collaborative Economy and EU Law* (n 9) 54.

⁶⁵⁰ Annexe I- Draft Model Rules on Peer-to-Peer Transactions in the EU provides a set of draft rules in this context. The following section discusses the theoretical proof called for, for introducing such rules.

⁶⁵¹ 'Better Regulation: Joining Forces to Make Better Laws' (European Commission 2021) 3.

to innovative solutions in a context of ever more rapid technological, societal, and environmental change.⁶⁵²

The Better Regulation Framework provides a holistic framework to analyse whether any regulation can be compatible with its objectives. This framework involves a comprehensive, coherent, proportionate approach that learns from experience and assesses current problems and solutions.⁶⁵³ A regulation based on the duty of care must serve as a regulation fit for tomorrow.

The Better Regulation Framework firstly requires **future regulation to be open to innovative solutions and rapid societal and environmental changes**.⁶⁵⁴ A duty of care-based regulation does not limit or define the nature of peer service providers. The discussion about whether service providers should be classified as employees or independent contractors is mentioned in Chapter 1. The relationship between professional service providers, businesses or employees and consumers is protected by consumer protection legislation. In this scenario, the duty of care used to benchmark the relationship between service providers and consumers can be extended to P2P transactions to ensure consistent care for peer consumers. The duty of care standard is not confined by specific terms like business, trader, seller, professional, or consumer, demonstrating its broad applicability beyond conventional definitions.

Additionally, drawing from consumer law jurisprudence, the duty is proposed to protect consumers.⁶⁵⁵ However, the broad concept of the duty of care being applied to providers and recipients of service means that this research and the application of a regulation based on the duty of care can be drafted to be applied to other current and future situations like the circular

⁶⁵² ‘Better Regulation Toolbox’ (European Commission 2021) 3; ‘Better Regulation Guidelines’ (European Commission 2021) 5.

⁶⁵³ ‘Better Regulation Guidelines’ (n 651) 7.

⁶⁵⁴ *ibid* 5.

⁶⁵⁵ *ibid* 7.

economy or the second-hand goods market, where goods are purchased from persons who are not professional sellers or service providers, could be covered under the ambit of the duty of care. Furthermore, the duty of care is also technology-neutral. This neutrality means that such a principle can be applied to future technological developments and changes in the platform economy.

Secondly, one of the critical aspects of creating a regulation is to **evaluate existing regulations**.⁶⁵⁶ From Chapter 2 of this thesis, consumer protection regulation and its application to the collaborative economy and the non-applicability of P2P transactions have been discussed. Although horizontal e-commerce and data protection legislation offer protection in certain aspects, consumer law does not apply to P2P transactions. The non-application of consumer protection legislation to P2P transactions in the collaborative economy means that recipients of similar services in B2C transactions are protected, but not P2P transactions. As discussed in this Chapter, the REFIT evaluated existing legislation, and Member States opined against including P2P transactions within the current framework of consumer protection legislation applicable to B2C transactions. Thus, a new consumer protection regulation, based on the duty of care, would protect the peer consumers and provide the duty to care to peer service providers, balancing their interests.

Thirdly, in addition to the comprehensive and coherent approach, the duty of care-based regulation also would have to be **proportional to the parties in the transactions**.⁶⁵⁷ In the collaborative economy, if peer service providers are treated as employees, they lose their flexibility in work schedules, a critical element of the gig economy. If they are independent contractors, they are to be held as professional business providers and to the standards set under consumer protection legislation. The duty of care standard proposes a minimum standard to be maintained between parties in P2P transactions regardless of the nature of the parties. Thus, peer service providers are treated proportionally to their relation with their peer

⁶⁵⁶ *ibid* 8.

⁶⁵⁷ *ibid*.

consumers in P2P transactions. As discussed in the previous section, the duty of care is a lighter-touch approach that balances the interests of peer service providers and peer consumers.

Fourthly, the EU also considers an **evidence-based approach** in framing regulation. The duty of care is not an alien element in EU regulation as there is evidence of adopting the duty of care in EU regulation. The French National Assembly adopted a law entitled '*Devoir de vigilance des entreprises donneuses d'ordre*', whose title has been translated into English as a 'duty of vigilance' or 'duty of care'.⁶⁵⁸ The objective of this plan is to identify, anticipate, and prevent human rights violations that might result from the activities of the parent company, its subsidiaries and controlled affiliates, and suppliers and subcontractors. Another example is the *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*, or the German Supply Chain Due Diligence Act, which will enter force in 2023.⁶⁵⁹ The key aspect of the duty of care under this act involves companies identifying risks of human rights violations and environmental destruction at direct suppliers and, if necessary, also at indirect suppliers. The duty of care is evidenced in national and EU legislation in the Corporate Sustainability Reporting Directive.⁶⁶⁰ This Directive establishes a corporate due diligence duty. The core elements of this duty are identifying, ending, preventing, mitigating and accounting for negative human rights and environmental impacts in the company's operations, subsidiaries and value chains.

Based on the Better Regulation Framework, the duty of care can be applied to future regulation in a comprehensive, coherent, proportionate approach that learns from experience.

⁶⁵⁸ Companies: duty of vigilance of ordering companies- *Devoir de vigilance des entreprises donneuses d'ordre* 2017 (National Assembly).

⁶⁵⁹ *Gesetz über die unternehmerischen Sorgfaltspflichten Lieferketten* translated to Act on Corporate Due Diligence Obligations in Supply Chains- Federal Ministry of Labour Social Affairs 2023.

⁶⁶⁰ Directive (EU) 2022/2464 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting 2022 (OJ L 322, 16122022, p 15–80).

Thus, a regulation on the duty of care can address the issue of protecting peer consumers in P2P transactions in the collaborative economy (within the scope of this thesis) but can also be applied to evolutions in technology and economies.

5.9.2. The Duty of care in light of the General Principles of EU law

The interaction between the concept of duty of care and the general principles of EU law is characterized by a harmonious alignment of individual protection and overarching values.⁶⁶¹ Duty of care obligations, which emphasize the responsibility to prevent harm and ensure well-being, resonate with the general principles of fundamental rights, non-discrimination, and proportionality enshrined in the EU legal system. These interactions emphasize that duty of care must be interpreted and applied to uphold individual rights, promote fairness, respect the balance of competing interests, and contribute to legal certainty and effective remedies. As such, duty of care serves as a conduit through which the fundamental principles of the EU legal framework are actualized in practice, fostering a just and rights-focused legal environment within the European Union.

Alignment with Fundamental Rights

Duty of care obligations often align with the fundamental rights principles enshrined in the EU Charter of Fundamental Rights.⁶⁶² These principles establish a baseline for protecting individuals' rights, dignity, and well-being. When interpreting duty of care requirements, EU

⁶⁶¹ Chantal Mak, 'Book Review General Principles of EU Civil Law' (2015) 52 Common Market Law Review 591. Arthur S Hartkamp, 'The General Principles of EU Law and Private Law' (2011) 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 241. With the entry into force of the Lisbon Treaty, the EU Charter of Fundamental Rights became a legally binding source of primary law and highlights, together with the General Principles of EU law, the importance of fundamental rights in the legal system of the Union. Though these texts do not explicitly deal with the duty of care, they discuss the General Principles of EU Law.

⁶⁶² 'Council of the European Union- The Charter of Fundamental Rights in the Context of Artificial Intelligence and Digital Change' 11481/20 FREMP 87 JAI 776.

institutions and Member States must ensure that they do not infringe upon the fundamental rights of individuals, such as the right to privacy, non-discrimination, and due process.

Non-Discrimination and Equal Treatment

The general principle of non-discrimination resonates strongly with the concept of duty of care. Duty of care implies that individuals should be treated fairly and without bias, aligning with the EU's commitment to equal treatment.⁶⁶³

Proportionality and Balancing of Interests

The principle of proportionality plays a role in the duty of care and the general principles of EU law. Duty of care obligations must be proportionate to actions, professionalism and potential harm involved. Similarly, in cases where the duty of care obligations intersect with other legal requirements of disclosures or economic freedoms, the principle of proportionality guides the balancing of competing interests to ensure that the duty of care does not unduly restrict other rights or principles.⁶⁶⁴ The interactions between the duty of care and general principles of EU law underscore the harmonious integration of individual protection and collective values within the EU legal framework. Duty of care obligations are to be interpreted and applied to uphold fundamental rights, ensure fairness and respect proportionality, and contribute to a just and balanced legal environment for all individuals within the EU.

⁶⁶³ European Union Agency for Fundamental Rights., European Court of Human Rights., and Council of Europe (Strasbourg)., *Handbook on European Non-Discrimination Law :2018 Edition*. (Publications Office 2018) 56.

⁶⁶⁴ Hartkamp (n 660).

5.10. Implementation of the duty of care in India in P2P transactions

The duty of care standard can be applied in India because, firstly, India follows a common law system and can apply the duty of care standard principle based on case law in its legislation. The duty of care has been imbued into the tort of negligence.⁶⁶⁵ Duties in tort are fixed by the law, and such duties are owed in rem or to the people. Such wrongs can be remedied by filing for liquidated damages.⁶⁶⁶ There may also be cases where concurrent liability may exist under tort and contract. For instance, if a contract exists between a patient and a doctor, then the doctor, for his negligence, will be liable under the contract.⁶⁶⁷

India has a set rule of precedent and has followed UK cases and English court precedents. The Supreme Court of India has recognised precedents from other jurisdictions, and in relation to the duty of care, the court has considered *Donoghue v Stevenson* in its judgements.⁶⁶⁸

5.10.1. The Duty of care in P2P transactions in light of the Constitution

In the instance that specific legislation is enacted based on the duty of care to protect peer consumers in P2P transactions, the specific legislation would have to meet the test of constitutionality under the Constitution of India.⁶⁶⁹ Drawing from the duty of care standard in legislation and consumer protection legislation, such legislation would be constitutionally sound. The constitutional validity is called only after legislation has been enacted and has to be ascertained by the High or Supreme Court in India.

⁶⁶⁵ Bangia (n 52) 145; Elliott and Quinn (n 52) 15.

⁶⁶⁶ Bangia (n 52) 72.

⁶⁶⁷ Jenny Steele, *Tort Law Text, Cases, and Materials* (Third Edition, Oxford University Press) 53.

⁶⁶⁸ *Central Inland Water v Brojo Nath Ganguly & Anr* [1986] Supreme Court of India 1986 AIR 1571, 1986 SCR (2) 278 37.

⁶⁶⁹ The Constitution of India, 1950.

The constitutionality test in India requires that every legislation has to be *intra vires* to the basic principles of the Constitution. Any legislation or provision of legislation that is *ultra vires* the Constitution is struck down. The basic principles against which constitutionality is checked are often called the golden triangle.⁶⁷⁰ The golden triangle is the three principles of equality, freedom, and liberty. These are enshrined in Article 14 (the right to equality), Article 19 (the right to freedom), and Article 21 (the right to life and liberty) of the Constitution.⁶⁷¹

Equality

The duty of care in P2P transactions is consistent with the principle of equality. It should ensure that all parties, consumers and providers, are equally protected from fraudulent, unfair, or harmful practices. This duty upholds the constitutional commitment to equal protection under the law and ensures that no particular group is unfairly disadvantaged. Furthermore, consumers in B2C and P2P transactions are protected as the recipients of services under consumer protection legislation or specific rules for P2P transactions.

Freedom

The duty of care in P2P transactions within CEP should promote fraternity by fostering a sense of shared responsibility and mutual care among the parties involved. It encourages cooperation, ethical conduct, and responsible business practices. While the CEP acts as an intermediary and facilitator, the peer service provider has the duty of care to foster transactions and prevent harm with reasonable actions in P2P transactions. The duty of care aligns with the spirit of the Constitution's call for unity and solidarity in society.

Liberty

⁶⁷⁰ Dr Durga Das Basu, *Introduction To The Constitution Of India*, pp 85–112; *Pt Parmanand Katara vs Union Of India & Ors* on 28 August, 1989 Supreme Court of India 1989 AIR 2039, 1989 SCR (3) 997.

⁶⁷¹ The Constitution of India, 1950 Article 14- Right to equality; Article 19- Right to freedoms; Article 21- Right to life and Liberty.

The duty of care respects individual liberty and the freedom of contract within P2P transactions. It permits individuals to make voluntary agreements while safeguarding them from deceptive or harmful practices. Striking a balance between consumer protection and individual liberty is vital to ensure that people can exercise their freedom to transact, balancing the interests of peer service providers and peer consumers.

The constitutional validity of the duty of care is further evidenced by its **presence in existing legislation**. The duty of care is a foundational concept in tort law, particularly in negligence cases.⁶⁷² It establishes the obligation to exercise reasonable care to prevent harm or injury to others. Indian courts have consistently applied the duty of care principle in cases involving personal injury, property damage, and other civil wrongs. Furthermore, the Consumer Protection Act 2019 embodies the duty of care principle by imposing obligations on manufacturers, sellers, and service providers to ensure the safety, quality, and accuracy of information on services offered to consumers.⁶⁷³ It establishes consumer rights and provides legal remedies for breaches of duty of care in consumer transactions. Professionals such as lawyers, architects, and accountants owe a duty of care to clients, ensuring that their services meet a reasonable standard of competence and care. The existing duty of care also applies to online platforms, including CEPs, requiring them to protect consumer data, prevent fraud, ensure accurate product information, and provide secure online transactions as they are the providers of services.

While this duty exists for CEPs, there is no such duty for peer service providers, calling for the drafting of specific rules in this regard. The duty of care respects all aspects of the Constitution of potential legislation for P2P transactions in India.⁶⁷⁴

⁶⁷² Ratanlal and Dhirajlal, *Ratanlal Dhirajlal The Law Of Torts* (LexisNexis) 54.

⁶⁷³ The Consumer Protection Act, 2019 Chapter VI, Section 84.

⁶⁷⁴ The specific rules for P2P transactions are drafted in Annexe II- Draft Guidelines for the Regulation of Peer-to-Peer Transactions in India.

6. Rules for Peer-to-Peer Transactions in the EU and India

Drafting the rules on the duty of care for peer-to-peer (P2P) transactions within the collaborative economy is a comprehensive initiative aimed at establishing a structured and ethical framework that prioritizes the protection and well-being of both peer service providers and peer consumers. This regulatory endeavour acknowledges the unique challenges and dynamics inherent in P2P interactions, recognizing the need for guidelines that foster a fair, transparent, and secure environment for all parties involved. With the duty of care, these rules aim to balance promoting innovation within the collaborative economy and safeguarding the interests of peer participants.

Chapter 1 of this thesis acknowledges that the relationship among parties in the collaborative economy is not individualistic but symbiotic and complementary. The rules recognize that the success of the collaborative economy relies on cooperation and benefit among the parties. Therefore, they must be interpreted holistically, considering their interdependence with other regulatory frameworks and rules specific to other parties, including data and consumer protection. This approach ensures that the rules seamlessly integrate with existing regulations, enhancing the overall efficacy of the legal landscape governing P2P transactions.

While the immediate focus of these rules lies in transactions involving CEPs, their inherent flexibility allows for the potential expansion of these rules to involve other parties and different transactional scenarios. This adaptability is crucial in the face of the digital economy's ever-evolving nature and ongoing technological advancements. By providing a versatile framework, the rules anticipate and accommodate changes in the landscape of peer-to-peer transactions, ensuring their relevance and effectiveness in a dynamic environment.

Chapter 2 of this thesis recognises the absence of specific legislation catering to P2P transactions and peer service providers. These rules underscore the distinctive nature of this regulatory initiative. It is not an instance of legislative pluralism, where multiple legal sources may govern the same area, but rather a targeted response to address the existing regulatory

gap, i.e., the absence of legislation concerning peer service providers. By crafting rules specific to the collaborative economy, this thesis seeks to fill a void in the legal framework, providing clarity and guidance where none currently exists.

Proposing two distinct rules tailored to the specific requirements of the EU and India reflects a nuanced understanding of the diverse legal landscapes and consumer protection priorities in these jurisdictions. In the EU, where member states prefer to keep P2P transactions outside current consumer protection regulations, these rules function as model guidelines designed to be read alongside other applicable rules. Conversely, in India, the rules operate as subordinate legislation under the Consumer Protection Act, ensuring a solid legal foundation on the duty of care in P2P transactions.

Beyond addressing the immediate concerns faced by peer consumers, as analysed in Chapter 3, the rules are designed to recognize the expansive nature of the duty of care. This foundational principle can address a spectrum of issues that may arise in the future. For example, the duty of care can be analysed in the context of dark patterns to delineate the responsibilities of the platforms and the parties and the care they must undertake. By emphasizing responsibility and accountability, the rules provide a resilient framework that extends beyond current instances, laying the groundwork for a sustainable and trustworthy collaborative economy. This forward-thinking approach positions the duty of care as a dynamic concept adaptable to emerging challenges in the evolving landscape of P2P transactions. These rules are presented in Annex I and Annex II.

CHAPTER 5

CONCLUSION

*पिक्चर अभी बाकी है*⁶⁷⁵

One of the greatest debates in cinematic history is whether Rose and Jack could have fit on the piece of wood, saving Jack's life.⁶⁷⁶ Hours of footage review, research, approximations of the dimensions of the door, physics experiments, recreations, and even the director's opinion all formed the backdrop of this debate. A different adaptation of this story would have changed the course of cinematic history. Nevertheless, as it stands today, Rose is on the door in the cold at the end of Titanic, and Jack is lost to the elements. This story has been written, told and etched in cinematic history. However, the story of CEPs is still being iterated

⁶⁷⁵ A dialogue from the 2007 Hindi language movie 'Om Shanti Om', translating to mean 'the movie is still remaining.'

⁶⁷⁶ Plotline of the 1997 James Cameron masterpiece movie – 'Titanic.'

and is contemporary. The research into CEPs is only beginning. The stories of the parties on CEPs are yet to be told from different perspectives. This thesis examines one of the perspectives on CEPs, i.e., from the perspective of consumers on CEPs. This Chapter does not provide a conclusion to the story of CEPs but concludes the story of consumer protection on CEPs. This conclusion is written keeping in mind the hours of research yet to be done in this field of study.

The conclusion summarises each of the research questions raised, the methodology of investigation, a review of the analysis conducted, and the contribution to the existing field of research. This Chapter provides the key points of the research and the take-home messages to the reader.

Chapter 0 provides the integral structure of the thesis. 0 is the basis of number systems, essential to mathematics, sciences, economics, and everyday life. The objective of this Chapter was to provide the necessary backdrop for the research to be conducted. This Chapter describes the existing research and literature in relation to consumer protection in the collaborative economy. From the description of the research environment and the lacunae identified, this thesis carves out a place in the existing sea of research.

The existing research studied consumer protection in the collaborative economy, highlighting economic inefficiency issues. This thesis is unique as it provides a comparative perspective of the EU and India, two jurisdictions with CEPs with different scopes of legislative protection while providing a descriptive and normative analytical framework. The comparative perspective is distinctive as it provides similar and different opinions from two jurisdictions at different paces of acceleration in the development of CEPs, the role of consumers and the application of legislation to this economy.

Chapter 0 also provides the background of research on the collaborative economy and the issues discussed in the literature in the EU and India. Based on the existing literature, two issues were identified, i.e., the applicability of consumer protection legislation to consumers in B2C and P2P transactions and the specific issues faced by consumers within P2P transactions, which are left unaddressed by existing consumer protection legislation.

This thesis is also unique in offering a new perspective by potentially resolving consumer issues through the duty of care. While existing literature calls for newer legislation and clear identification of parties, the duty of care seeks to enable the service provider to take reasonable care towards the peer consumer in P2P transactions in the EU and India. This Chapter ends with the structure of the thesis, providing a transition to the meat of the thesis.

The objective of Chapter 1 was to describe the evolution of the physical to digital marketplace and the pipeline to platform economy and to understand the three parties and their relationship. The Chapter was divided into two sections. Section I provides a description of

the evolution from the physical to the online environment, from the pipeline to the platform environment and the development of the modern world of the collaborative economy in the EU and India. While there is no definition of the collaborative economy in India, this thesis uses the definition provided by the European Commission as a working definition.

Though this definition was promulgated in 2016, the concept of collaborative economies has existed throughout history. The next section of the Chapter discusses the parties in the collaborative economy- CEPs, service providers and consumers. The literature often discusses the triangular relationship among the parties. This thesis purports that a triangular relationship is insufficient to describe the intricacies of the relationship among the parties in the collaborative economy and iterates a more symbiotic, complementary relationship. The study of these parties segues into the specific study of consumers in the collaborative economy. The Chapter highlights the evolution of the role of consumers from the physical to the online economy. Furthermore, this Chapter also analyses the two kinds of transactions they may enter into in the collaborative economy- B2C and P2P transactions.

Chapter 2 enumerates the legislative protections for consumers in the collaborative economy in the EU and India. The legislative framework is explained from a general horizontal application of the e-commerce legislation and the data legislation to the specific protection under consumer protection legislation. The objective of this Chapter was to highlight the existing legislative environment and the backdrop of protection that may be provided to consumers in the collaborative economy in India and the EU. Furthermore, essential concepts, including consumer, service provider, and data protection, were compared in the two jurisdictions. The descriptive analysis detected that peer consumers in the EU are protected under e-commerce and data protection legislation; however, consumer protection legislation lacks protection for peer consumers on CEPs.

In the EU and India, e-commerce legislation is applicable to B2C and P2P transactions. As transactions in the collaborative economy occur online, the provisions of this legislation apply to B2C transactions. As P2P transactions – between peer service providers and peer

consumers, take place online through electronic contracts, provisions of e-commerce legislation would apply.

In the EU and India, data protection legislation is applicable, as the CEP collects and processes consumer data to facilitate transactions (whether as a data controller or a data processor). GDPR would be applicable. The Indian legislation uses the terms data fiduciary and data processor to describe the same function under the GDPR. Furthermore, similar to the GDPR, Indian legislation would apply to the CEP collecting and processing the data. In P2P transactions, as peer service providers do not collect and process the data of peer consumers and CEPs undertake this action, the data protection legislation would still protect them, providing their data to the CEP.

Under consumer protection legislation, for B2C transactions, EU consumer law is particular in that it applies to B2C transactions. Between the CEP and consumer: As the CEP provides consumers with facilitation and intermediary services and collects consumer data, the CEP is a business, and the consumer is the recipient of these services; thus, EU consumer law applies. Between service provider and consumer: As the service provider provides the services and the consumer is the recipient of the service, EU consumer law applies. In India, the consumer is the recipient of the service, and the legislation applies to protect the recipient of such a service. The CEP and service provider provide such services, and the consumer receives them. Thus, consumer protection legislation is applicable in B2C transactions.

Peer consumers in collaborative economy transactions face unique challenges, including receiving services from both CEPs and peer service providers. This tripartite relationship is unique to the collaborative economy, and existing consumer protection legislation is insufficient for peer-to-peer relationships. The notion of weaker party protection refers to inequality between contracting parties. As peer consumers do not have information or bargaining power similar to that of the peer service provider, they are not equal, and thus, peer consumers are the weaker party. Secondly, peer consumers in P2P transactions should be provided similar protection as consumers in B2C transactions, as they are natural persons

receiving services in a non-professional or business capacity. Specifying the nature, rights and duties of peer service providers could include peer consumers under peer consumer-specific protection legislation.

Thirdly, the EU's information disclosure and transparency requirement states that consumers should be informed about transactions with professionals or non-professionals, implying they enter B2C transactions protected under consumer protection legislation. However, this is not explicitly stated to consumers. In India, the broad ambit of consumer interest protection creates a lack of clarity on the specificity of protection. Including peer consumers under consumer protection legislation would treat them equally to consumers in B2C transactions, but this would impose a burden on peer service providers. A potential lighter touch could be used to protect both parties, considering the unique nature of the transactional relationship, as discussed in Chapter 4.

In the absence of legislative protection under consumer protection law, peer consumers face certain issues. Chapter 3 sets out what issues consumers face in the collaborative economy in the EU and India. The objective of the Chapter was to highlight what issues arise for consumers and how they may be addressed with the existing legislative landscape (as from the previous Chapter). The issues highlighted are problems in ratings and reviews, rankings, personalization and algorithmic discrimination. Further, this research question also highlights the issues that may not be addressed under the legislative framework in the EU and India. The functional comparative methodology examines these issues in both jurisdictions, comprehensively analysing the gaps and divergences in their legal frameworks.

The descriptive analysis discusses the issues that plague peer consumers in the collaborative economy in the EU and India and the legislative framework that exists to resolve the issue. However, the issue persists, and peer consumers are still affected by such issues.

Firstly, ratings and reviews highly influence peer consumers in P2P transactions. Negative reviews can deter consumers, serving as a form of peer-regulated quality control. However,

challenges arise when fake reviews or manipulated ratings distort the accuracy of this feedback, potentially misleading consumers. While consumers in B2C transactions are protected under consumer protection legislation, peer consumers are not protected under such legislation.

Secondly, rankings play a significant role in shaping consumer behaviour in P2P transactions. When platforms or marketplaces display listings, high-ranking items or service providers typically attract more attention and, consequently, more business. Peer consumers are more likely to engage with sellers or service providers who are prominently ranked, as these rankings are often seen as an indicator of quality or popularity. Where consumer legislation requires the main parameters of rankings to be disclosed by businesses, such protection is not present for peer consumers.

Thirdly, personalization can significantly affect the P2P transaction experience for peer consumers. On the one hand, personalization is designed to enhance user experiences by tailoring recommendations to individual preferences, transaction history, and browsing behaviour. This personalization can be beneficial as it helps consumers discover relevant offerings more efficiently. However, excessive personalization can create filter bubbles, where consumers are only exposed to content or sellers that align with their existing views or preferences. Peer consumers who interact with peer service providers are not protected against such actions under consumer protection legislation.

Fourthly, algorithmic discrimination is a growing concern in P2P transactions. Algorithms are used to optimize user experiences but can inadvertently perpetuate biases and discriminate against certain groups. Addressing algorithmic discrimination is critical to ensure fairness and equal opportunities for all peer consumers. Addressing such discrimination cannot be the sole task of the CEPs, as the data input into the algorithm is provided by parties in the collaborative economy, including CEPs. While consumers in B2C transactions may have redress under consumer protection legislation, no such protection exists for peer consumers in P2P transactions.

Chapter 4 investigates how to mitigate consumer issues discussed in Chapter 3 and measures to protect peer consumers in transactions in the collaborative economy in the EU and India. The objective of this Chapter was to suggest solutions to the issues raised in the regulatory and legislative framework and provide a theoretical grounding for potential new legislation to address consumer issues in the collaborative economy (as from the previous Chapter.)

This Chapter critically examines the impracticality of sustaining the status quo, which is attributed to the absence of consumer protection legislation and the persistence of consumer-related challenges within the P2P transaction landscape. Additionally, it scrutinizes the impediments hindering the interpretation of existing consumer protection laws to encompass P2P transactions within their purview. Furthermore, the Chapter explores the potential role of industry stakeholders and collaborative economy platforms CEPs in addressing these challenges. The proposed duty of care framework posits that peer service providers should bear reasonable responsibility for their actions.

A descriptive analysis of the duty of care and the ability to apply to CEPs is discussed in Chapter 4. The duty of care is derived from legal precedent and set on the principle that parties in a transaction owe a standard of care towards proximate parties against harms that are foreseeable in a fair, just and reasonable manner. Originating from common law, this principle holds applicability in both the EU and India, owing to the presence of common law elements and established legal principles evident in case law. It constitutes an integral facet of the legal systems in these jurisdictions.

The duty of care would benefit all parties and create a healthy CEP. The core objective of a CEP is to facilitate the shared utilization of resources in a collaborative fashion, and establishing a sense of duty of care towards all participants emerges as a suitable legislative approach for CEPs. The duty of care is descriptively traced from precedent to its current application. The collaborative economy is not alien to the duty of care, as it manifests itself through existing provisions of care taken by the CEPs and service providers under existing

legislation. However, no such provision exists for peer service providers in P2P transactions. The Chapter considers normatively the reasoning for applying the duty of care by peer services towards peer consumers. The duty of care is also studied in light of potential legislation in the EU and India under the between regulation framework and the general principles of EU law in the EU and the constitutional validity of such a principle in India.

Chapter 4 sought to provide a new perspective on the issues of consumer protection in the collaborative economy, often approached from an economic efficiency perspective, with a different point of view based on the duty of care.

The thesis, as set out in Chapter 0, intended to contribute to the existing sea of literature. The contributions of this thesis include, firstly, an extensive study of the collaborative economy and the parties, highlighting a new non-triangular symbiotic relationship. This aspect of the research was crucial for two reasons- firstly, establishing the environment of research and secondly, noting that the relationship between parties was a complex, multifaceted one. This complexity is the basis for a deficiency of a clear understanding of the roles of the parties and, thereby, a lack of protection for certain kinds of parties.

Secondly, the thesis provides perspectives from the EU and India. CEPs are prevalent in the economy in both jurisdictions. However, the legislative approaches to CEPs are different. As discussed, though the legislations are similar, there are nuances of the legislation that impact its implementation and, thereby, the protection of the parties in the collaborative economy.

Thirdly, focusing on consumers provides the thesis with a unique viewpoint. Firstly, this thesis conducts a deep dive into the nature of the parties in the collaborative economy. From this, it is highlighted that consumers, just like the great wave (Chapter 1), are the main focus of the thesis and of the operations on CEPs. Secondly, the thesis provides offerings from the legislative approaches of the two jurisdictions. The discussion and analysis of the legislative frameworks reveal that though the legislation may seem similar, the protection

provided to peer consumers differs. This difference calls for the need to protect such peer consumers, who are not protected under EU consumer protection legislation. Thirdly, the issues that impact peer consumers are discussed. Though the issues may be the same, the analysis shows that the protection offered is different.

To summarise, the comparative analysis of consumer protection in the collaborative economy within the EU and India reveals a complex interplay of legislative frameworks. The thesis has underscored the pivotal role of the duty of care in shaping the relationships between peer consumers and peer service providers.

The European Union's comprehensive legal arsenal includes the GDPR, consumer protection laws, and e-commerce legislation, establishing a solid foundation for safeguarding consumer interests. These regulations emphasize transparency, data protection, and fair treatment, embodying a proactive approach to consumer protection. On the other hand, India's legal landscape exhibits a dynamic response to the collaborative economy, balancing consumer rights with the evolving nature of digital transactions. The Consumer Protection Act 2019 and the Information Technology Rules 2021 address the challenges posed by peer-to-peer interactions.

The comparative methodology also highlights the balanced dualism of the two legislative systems. While the EU's definitions are watertight on the terms of consumer and business, the Indian legislation provides a more comprehensive interpretative approach. However, while both jurisdictions are moving towards a similar goal of regulating platforms in their unique way, an aspect that is neglected is the parties in the peer-to-peer transactions themselves. The comparison leads to a nuanced understanding that the legislative systems are unique with reference to consumer protection in the collaborative economy. While the EU system is not perfect as it does not currently include provisions to protect parties in P2P transactions, the Indian system is not perfect as its broad definitions are not interpretively clear. This thesis, though highlighting these differences, also highlights one commonality:

the insufficient protection of peer consumers in peer-to-peer transactions in the collaborative economy.

The duty of care engages the peer service provider in their transactional relationship with peer consumers to provide them with a basic standard of reasonable care. The comparison shows that in India, as common law is prevalent, the duty of care has been laid down in precedent and entrenched in legislation, including the Consumer Protection Act 2019. In the EU, which is not alien to the common law system, Member States have also used the concept of duty of care in their laws.

The collaborative economy has changed the economy's landscape and the parties' nature and interactions. Current legislation places the responsibility must be on platforms, as highlighted. Nevertheless, as argued in this thesis, the peer service provider must also be responsible based on the duty of care. In conclusion, this comparative analysis contributes valuable insights to policymakers, scholars, and practitioners seeking a nuanced understanding of the intricate dynamics surrounding consumer protection in the collaborative economy. By scrutinizing the duty of care within the legal frameworks of the EU and India, this thesis offers a foundation for future research and policy development in the ever-evolving landscape of peer-to-peer transactions.

The protection of peer consumers in the collaborative economy is not a distant utopia. The call for peer consumer protection is spot-lit in this thesis, and potential solutions, based on morality and learnings from the past, are applied to this dynamic environment. As the story of consumer protection in the collaborative economy, with a comparative research methodology in the EU and India and a normative framework founded on the duty of care, is narrated, there are yet stories to be explored and written.

Chapter	Research Question	Objective of the chapter or the research question	Summary of the Chapter	Methodology Adopted	Descriptive Analysis	Normative propositions	Deontology	Teleology
Chapter 0- <i>Shunya Bindu</i> - Starting at Zero		To provide a backdrop to research	Discusses the existing literature, the research question, the research methodology and the analytical framework and lays down the structure of the thesis.					
Chapter 1- An insight into the Collaborative Economy		To describe the evolution of from the physical to digital marketplace and the pipeline to platform economy and to understand the three parties and their relationship.	Traces the history and growth of CEPs; relationship amongst parties and the conceptual understanding of CEPs.	Using an historical comparative methodology, and a descriptive and normative analytical framework.	The descriptive analysis shows that though the platforms my exist in multiple jurisdictions, the history, background, cultural growth are on different timelines.			
Chapter 2- Legislative Landscape in relation to Consumer Protection in the Collaborative Economy	What is the legislative framework for consumer protection in the collaborative economy in the EU and India?	To highlight the existing legislative environment and the backdrop of protection that may be provided to consumers in the collaborative economy in India and the EU.	Legal framework as applicable to consumers in the collaborative economy 3 categories, from general e-commerce legislation and data legislation to consumer-specific, consumer protection legislation.	Using a conceptual comparative methodology; a descriptive analysis of the laws in the EU and India; and a normative analysis, to analyse whether peer consumers ought to be protected on CEPs.	Descriptive analysis shows that there is legislative protection for parties on CEPs under e-commerce or data legislation. However, consumer protection law in the EU does not apply to P2P transactions.	The normative analysis analyses the 'ought' proposition that peer consumers ought to be protected on CEPs by consumer protection law.	Consumer law does not protect peer consumers That is inherently a problem. This party on the CEP consumers services is a consumer and are to be protected.	Consumer law does not protect peer consumers This is a problem at every step. Consumer protection law is not achieving its purpose from a moral, social value rationale.

Chapter	Research Question	Objective of the chapter or the research question	Summary of the Chapter	Methodology Adopted	Descriptive Analysis	Normative propositions	Deontology	Teleology
Chapter 3- Consumer Issues in the Collaborative Economy	What are consumer issues that arise in the collaborative economy in the EU and India?	To highlight what issues arise for consumers and how they may be addressed with the existing legislative landscape (as from the previous chapter). Further, this research question also highlights the issues that may not be addressed under the legislative framework in the EU and India.	Issues that peer consumers face on CEPs- ratings and reviews, rankings, personalisation, and algorithmic discrimination.	Using a functional comparative methodology; a descriptive analysis of the issues, the existing legislative protection and the persistence of issues towards peer consumers in the EU and India, and a normative analysis to analyse whether peer consumers ought to be protected from these issues based on moral theory.	Descriptive analysis provides discusses the issues that plague peer consumers in the collaborative economy in the EU and India and the legislative framework that exists to resolve the issue. However, the issue persists and peer consumers are still affected by such issues.	The normative analysis analyses the 'ought' proposition that peer consumers ought to be protected from the issues in the collaborative economy	Ratings and Reviews, Rankings and personalisation are not inherently an issue. The lack of protection of peer customers and the provision of them information and similar disclosure rules to other consumers is the issue. The issue of algorithmic discrimination is inherently immoral and thus is an issue for peer consumers.	The issues of ratings and reviews and rankings and personalisation are because they are not achieving their purpose of benefiting the consumers and facilitating and sharing resources. The act may be good, but it is not morally efficient to share the resources. The consequence of this act is that peer consumers are harmed; therefore, the action is wrong.
Chapter 4-Resolution of Consumer Issues in the Collaborative Economy?	What are the means of mitigating these issues in the EU and India?	To suggest solutions to the issues raised from a regulatory and legislative perspective and provide a theoretical grounding for potential new legislation to address consumer issues in the collaborative economy (as from the previous chapter.)	Potential resolution of the consumer issues discussed in the previous chapter. – Regulation or legislation, but grounded in a 'duty of care'	Using a common-core comparative methodology; a descriptive analysis of the solution and a normative analysis of whether peer consumers have to be protected under the consumer protection law based on a deontological and a teleological discussion grounded in moral theory.	The descriptive analysis provides regulatory and legislative solutions to address the issues raised. A newer idea of a duty of care as the basis of regulation or legislation to protect consumers is also analysed.	The normative analysis analyses the 'ought' proposition that peer consumers be protected by regulation or legislation imbued with morality	Regulations and legislations are enacted with the society and a set of morals in mind. Rather than an external standard borrowed from another society or economy, an internal standard of morality based on a duty of care towards all parties on CEPs could protect peer consumers.	The duty of care morality would benefit all parties and create a healthy CEP. The purpose of the CEP is to share resources in a collaborative manner, and a sense of duty of care towards all parties is the way to regulate or legislate on CEPs.
Chapter 5- Conclusion		To provide a conclusion to the narrative of consumer protection in the collaborative economy in the EU	Discussing each chapter and the research methodology and analysis to investigate the research question.					

Figure 26: Summary of the thesis.

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Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4XI 2000- ETS 177)

Rajasthan On-Demand Information Technology Based Transportation by Public Service Vehicles Rules, 2016 (SNoF7(495)Rari/Trans/Rules/HQ/2013/21794)

Regulation 2016/679/EU on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016 (OJ L 119, 452016)

Regulation 2018/1807 on a framework for the free flow of non-personal data in the European Union. 2016 (OJ L 303, 28112018)

Regulation 2019/1150/EU on promoting fairness and transparency for business users of online intermediation services 2019 (PE/56/2019/REV/1, OJ L 186, 1172019)

Regulation 2022/1925 on contestable and fair markets in the digital sector and amending Directive EU 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (PE/17/2022/REV/1 OJ L 265, 12102022)

Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC 2018 (OJ L 60I , 232018)

Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending directive 2000/31/EC (Digital Services Act 2016 (PE/30/2022/REV/1 OJ L 277, 27102022)

The Aadhar(Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (Act No 18 of 2016)

The Code on Social Security, 2020 (Act No 36 of 2020)

The Code on Wages 2019 (Act No 29 of 2019)

The Constitution of India, 1950 1950

The Constitution of India (One Hundred and Third Amendment) Act, 2019

The Consumer Protection Act, 1986 (Act No 68 of 1986)

The Consumer Protection Act, 2019 (Act No 35 of 2019)

The Consumer Protection Bill, 2015 (Bill No 226 of 2015)

The Consumer Protection Bill, 2018 (Bill No 1 of 2018)

The Consumer Protection (E-Commerce) Rules 2020

The Digital Personal Data Protection Bill, 2022

The Equal Remuneration Act, 1976 (Act No 25 of 1976)

The Hindu Succession Act, 1956 (Act No 30 of 1956)

The Hindu Succession (Amendment) Act, 2005 (Act No 39 of 2005)

The HIV and AIDS(Prevention and Control) Act, 2017 (Act No 16 of 2017)

The Indian Penal Code, 1860 (Act No 45 of 1860)

The Information Technology Act, 2000 (Act No 21 of 2000)

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.
2021

The Mental Healthcare Act, 2017 (Act No 10 of 2017)

The Occupational Safety, Health and Working Conditions Code, 2020 (Act No 37 of 2020)

The Personal Data Protection Bill, 2018

The Personal Data Protection Bill, 2019

The Rights of Persons with Disabilities Act, 2016 (Act No 49 of 2016)

The Transgender Persons (Protection of Rights) Act, 2019 (Act No 40 of 2019)

The Treaty on the Functioning of the European Union (OJ C 326, 26102012)

Treaty of Rome 1957

United Nations Commission On International Trade Law- Model Law on Electronic Commerce with
Guide to Enactment, 1996 2010 692

Universal Declaration of Human Rights 1948

West Bengal On-Demand Transportation Technology Aggregator Rules, 2016

Annexe I- Draft Model Rules on Peer-to-Peer Transactions in the EU

Draft Recitals

1. In 2016, the European Commission released ‘A European Agenda for the Collaborative Economy’ that explored the nuances of the collaborative economy and highlighted dynamic transactions in such economies.⁶⁷⁷ The definition provided by the Commission included transactions between professional service providers and consumers, constituting business-to-consumer (B2C) transactions, and peer service providers and consumers, constituting peer-to-peer (P2P) transactions.
2. While the definition included B2C and P2P transactions on such collaborative economy platforms, the consumer protection *acquis* did not permit peer-to-peer transactions to be covered under consumer protection legislation.
3. Peer consumers are the recipients of services from peer service providers. Their nature has not been altered due to the change of the party providing the service, i.e., from a professional service provider to a peer service provider.
4. Consumer protection laws apply only to business-to-consumer transactions. For example, the Unfair Commercial Practices Directive (UCPD) concerns unfair business-to-consumer commercial practices, thus applying only to B2C transactions.⁶⁷⁸
5. In 2017, a Fitness Check was conducted on the consumer protection legislation.⁶⁷⁹ The Fitness Check looked into the possibility of extending the consumer protection legislation

⁶⁷⁷ ‘Communication from the Commission- A European Agenda for the Collaborative Economy’ COM(2016) 356 final 3.

⁶⁷⁸ UCPD, OJ L 149, 11.6.2005.

⁶⁷⁹ ‘Commission Staff Working Document Report of the Fitness Check on Consumer Protection Directives.’ (n 27).

beyond B2C transactions. It concluded that the vast majority of Member States and stakeholders did not support an extension of the consumer protection legislation to B2B, C2B, C2C, or P2P transactions. The Commission, therefore, considered that there was no case for such an extension at the time.

6. While the current legislative framework does not permit the inclusion of P2P transactions within its ambit, the proposed rules include specific rules in relation to the relationship between parties in P2P transactions.
7. While existing legislation places the burden on the platform or other intermediaries, these rules place the duty of care on the peer service providers, in addition to the existing legislative framework on transparency and disclosures by platforms. These rules are not to be read in isolation but alongside other rules.
8. Duty of care is a minimum protection standard as it does not require as high a level of statutory compliance as for businesses under consumer protection law. This duty of care standard is weighed through the three-pronged test. Firstly, if peer service providers' actions impact consumers' decision-making through an unfair or manipulative practice, resulting in harm that would be reasonably foreseeable, the duty of care would apply. Secondly, proximity exists between peer service providers and peer consumers. The collaborative economy platform is an intermediary and a facilitator in the transaction. Nonetheless, a proximate relationship exists between the two parties in the peer-to-peer transaction. Thirdly, the actions of peer service providers must be fair, just and reasonable.
9. These tests can be applied to specific actions between the parties in peer-to-peer transactions. The duty of care is the duty of peer service providers towards peer consumers. The instances of duty of care discussed in these rules are inclusive and can be applied to a reasonable standard of care between the parties.

10. Peer service providers have the duty of care to provide transparent and accurate information regarding pricing, deliverables and any costs. This transparency duty extends to providing information regarding the payment for rankings on the collaborative economy platform or personalizing prices to their peer consumers. The transparency duty extends to informing the peer consumer of the data the service provider uses to generate personalized prices. These requirements are in addition to the disclosure requirements of the platform.
11. The duty of care also extends to a reasonable standard of service and skill to be provided by the service provider. As peer service providers are not professional service providers, no professional standard of service is required of them. However, a reasonable standard of care, skill, and service is required.

Draft Rules

Chapter I: Scope and Definitions

Article 1: Purpose and Scope

1. The purpose of the Draft Rules is to provide a set of rules that contribute to a duty of care in the relations between peer service providers and peer consumers. They serve as a model for national, European, and international legislators as well as a source of inspiration for self-regulation and standardization.

2. These rules are intended to be used in relation to peer service providers who:

- a. Provide services to peer consumers; and
- b. Provide these services on online platforms that act as intermediaries.

These rules should not be considered in isolation but complementary to existing consumer protection legislation.

Article 2: Definitions

1. For the purpose of these rules:

- a. “peer consumers” include any natural person who, in contracts covered by these rules, is acting for purposes that are outside their trade, business, craft, or profession;
- b. “peer service provider” includes any person providing a service to a peer consumer using the intermediation services of a platform; and
- c. “peer to peer transaction” includes any exchange of goods, services, or funds between peer consumers and peer service providers through a platform.

Chapter II: Duty of care of Peer Service providers towards peer consumers

Article 3: Duty of care of peer service providers

1. Peer service providers have a duty of care to provide clear and accurate information about the nature, scope, and terms of the services they offer on the peer-to-peer platform.
2. Peer service providers must ensure transparency in pricing, deliverables, and any additional costs associated with their services, in addition to such disclosures by platforms.
3. Peer service providers have a duty of care to provide accurate information in relation to payments for rankings, in addition to such disclosures by platforms.
4. Peer service providers have a duty of care to provide accurate information in relation to the use of information of peer consumers, including but not limited to the generations of rankings or personalization of prices, in addition to such disclosures by platforms.
5. Peer service providers must accurately represent their skills, qualifications, and experience on the platform, upholding a duty of care to ensure that consumers can make informed decisions.
6. Peer service providers owe a duty of care to deliver services that meet the standards represented during the transaction, ensuring consumer satisfaction.
7. Peer service providers have a duty to maintain open and honest communication with consumers regarding the progress, changes, or challenges related to the services being provided.

Article 4: Rights of peer consumers

1. Peer consumers have the right to demand a duty of care from peer service providers.
2. Failure to comply with the duty of care would constitute negligence in providing services.

Chapter II: Compliance, Penalties and Redress

Article 5: Compliance of Peer Service Providers

1. Peer service providers are to be compliant with these rules and have a duty of care towards their peer consumers.
2. The primary level of compliance with these rules will be enforced by the platform by
 - a. Regular Reporting: Peer service providers must submit regular reports to platforms detailing compliance with the rules for protecting peer consumers.
 - b. Assessment: Encourage platforms to conduct assessments of compliance with the rules by peer service providers, fostering a proactive approach to consumer protection.
3. The secondary level of enforcement would be by the appropriate national consumer protection authority of every Member State by
 - a. Audits and Inspections: The national consumer protection body of every Member State is empowered to conduct regular audits and inspections of peer service providers and platforms in adherence to the established rules.
 - b. Regulatory Oversight: The national consumer protection bodies can create a separate branch of operation to oversee and enforce compliance with these rules.
4. The tertiary level of enforcement of these rules is through Continuous Monitoring and Adaptation by:
 - a. Dynamic Regulations: Establishing a framework for continuously monitoring and adapting these rules to address emerging challenges and technological advancements in the peer-to-peer transaction space.

- b. Stakeholder Collaboration: Encourage collaboration between regulatory bodies, peer-to-peer platforms, consumer advocacy groups, and other stakeholders to address evolving consumer protection needs collectively.

Article 6: Penalties

1. Penalties for the peer service provider for non-compliance with these rules
 - a. Financial Penalties: Peer service providers will be imposed with a substantial financial penalty when found to be non-compliant with these. The penalties should be proportionate to the severity and frequency of violations. The platform or the national consumer protection body may impose these penalties.
 - b. Account Suspension: The platform may temporarily remove the peer service provider from the platform in cases of repeated breaches, ensuring a strong deterrent against non-compliance. The national consumer protection body may request for such suspension as well.
 - c. Account Revocation: The platform or the regulatory body may permanently block the peer service provider from the platform for persistent and egregious violations, safeguarding consumers from unscrupulous practices. The national consumer protection body may order such revocation.
 - d. Public Disclosure: The platform and the national consumer protection body are to publicly disclose instances of non-compliance and the corresponding penalties imposed, promoting transparency and informing consumers.

Article 7: Consumer Redress

1. Consumers may seek redress with the platform under these rules for the non-compliance of these rules by the peer service provider for damages caused.
2. Consumers may also seek redress with the national consumer protection body of every Member state for the non-compliance of these rules by the peer service provider for damages caused.

Annexe II- Draft Guidelines for the Regulation of Peer-to-Peer Transactions in India

Central Consumer Protection Authority

Notification

New Delhi. 20th December, 2023

In exercise of the powers conferred by section 18 of the Consumer Protection Act 2019 (35 of 2019), the Central Consumer Protection Authority hereby issues the following guidelines for the regulation of peer-to-peer transactions namely:-

1. Short title and commencement

- 1) These guidelines may be called the Guidelines for the Protection of Consumers in P2P transactions.
- 2) It shall come into force on the date of its publication in the Official Gazette.

2. Definitions

- 1) In these guidelines, unless the context otherwise requires,-
 - a. “Act”- means the Consumer Protection Act 2019 (35 of 2019);
 - b. “marketplace e-commerce entity” shall have the same meaning as defined under Consumer Protection (E-Commerce) Rules 2020;
 - c. “platform” shall have the same meaning as defined under Consumer Protection (E-Commerce) Rules 2020;
 - d. “peer consumer” shall have the same meaning as “consumer” defined under the Consumer Act 2019 (35 of 2019);
 - e. “peer service provider” includes any person providing a service to a peer consumer using the intermediation services of a platform.
 - f. “peer to peer transaction” includes any exchange of goods, services, or funds directly between peer consumers and peer service providers through a peer-to-peer platform.
 - g. “peer consumer dispute” means a dispute where the person against whom a complaint has been made denies or disputes the allegations contained in the complaint;

- 2) The words and expressions used in these guidelines but not defined, and defined in the Act, shall have the same meaning as respectively assigned to them in the Act.

3. Application

- 1) These guidelines shall apply to –
 - a. all platforms, systematically offering goods or services in India;
 - b. all peer service providers on any platform providing intermediation services.
- 2) The guidelines are complementary to the Consumer Protection (E-Commerce) Rules 2020 and The Consumer Protection (Mediation) Rules 2020

Chapter I

Duty of Care of Peer Service Providers

4. Duty of Care in Transparency

- a. Peer service providers have a duty of care to provide clear and accurate information about the nature, scope, and terms of the services they offer on the peer-to-peer platform.
- b. Peer service providers must ensure transparency in pricing, deliverables, and any additional costs associated with their services, in addition to such disclosures by platforms.
- c. Peer service providers have a duty of care to provide accurate information in relation to payments for rankings, in addition to such disclosures by platforms.
- d. Peer service providers have a duty of care to provide accurate information in relation to the use of information of peer consumers, including but not limited to the generations of rankings or personalization of prices, in addition to such disclosures by platforms.

5. Duty of Care in Skill Representation

- a. Peer service providers must accurately represent their skills, qualifications, and experience on the platform, upholding a duty of care to ensure that consumers can make informed decisions.

- b. Misrepresentation of skills and qualifications should be considered a breach of duty and may lead to penalties as per the Consumer Protection Act 2019.

6. Duty of Care in Service Quality

- a. Peer service providers owe a duty of care to deliver services that meet the standards represented during the transaction, ensuring consumer satisfaction.
- b. In case of dissatisfaction or failure to meet agreed-upon standards, service providers must engage in fair and transparent dispute resolution processes.

7. Duty of Care in Communication

- 3. Peer service providers have a duty to maintain open and honest communication with consumers regarding the progress, changes, or challenges related to the services being provided.
- 4. Timely responses to consumer inquiries and updates on service delivery must be a priority to fulfil the duty of care.

Chapter II

Supplementary Rights of Peer Consumers

8. Supplementary right of peer consumers

- a. In addition to the rights of consumers under the Consumer Protection Act 2019, peer consumers have an additional right to demand the duty of care.
- b. Failure to comply with the duty of care would constitute negligence of the provision of services, amounting to a “deficiency” of services by the peer service provider under the Consumer Protection Act 2019.
- c. Such a deficiency of services is an unfair trade practice or a violation of consumer rights.

9. Interpretation- In case of any ambiguity or dispute in the interpretation of the guidelines, the decision of the Central Consumer Protection Authority shall be final.