The Shared Economy

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Introduction

The shared economy is an economic model in which consumers grant each other access to their underutilized assets. The shared economy can also be referred to as collaborative consumption i.e. the sharing of goods and services. The shared economy is enabled by developments in computer technology, and the use of apps and the internet. Hamari, Juho; Sjöklint, Mimmi; Ukkonen, Antti (2016). "The Sharing Economy: Why People Participate in Collaborative Consumption." Journal of the Association for Information Science and Technology. 67 (9): 2047-2059. doi:10.1002/asi.23552. An anticipated consequence of a shared economy is consumers will be more likely to rent or borrow, rather than buy and own goods.

When people are asked to name a shared economy or peer-to-peer company the most popular responses are Uber, Lyft, Airbnb, and, in the insurance industry, Lemonade and Slice which offers pay-per-use insurance product aimed at Uber and Lyft drivers. Additionally, K-based SafeShare has developed a blockchain-based insurance product for sharing economy platforms. But are these really shared economy entities? Could they, instead, simply be the results of advances in information technology? Clearly, without the advances in computer technology, the shared economy would not exist. However regulatory authorities have also had a major impact on this area as well. Initially, Uber defined itself not as a peer-to-peer or shared economy company but as a "... technology company that has developed an app that connects users (riders) with third party transportation providers." However, this definition has been deleted from all of its materials not because of its use of technology but because of its use of people. All of these forms of businesses are also optimizing resources already available to the consumer as well as the constant advances in technology, especially blockchain technology. A blockchain "is a growing list of records, called blocks, which are linked using cryptography. [Footnotes omitted]. Each block contains a cryptographic hash of the previous block, a timestamp and transaction data. [Footnotes omitted]." https://en.wikipedia.org/wiki/Blockchain.

In this article, we will use the term collaborative consumption ("CC") since the authors believe it to be not only more appropriate, but also because it encompasses peer-to-peer and shared economy.

Regulation

Since we are talking about innovative methods of providing services, the question becomes how and whether these methodologies should be regulated. For instance, the traditional methods of regulation can be divided into at least two major segments, commercial and individual consumers. However, CC blurs the lines between these two segments. Is the Uber driver the same as a commercial taxi driver and therefore someone who must comply with the same regulations as a commercial taxi driver? Is the passenger a "commercial passenger," as the individual would be in a taxi and protected by the same existing laws that protects a "commercial passenger" in a taxi? Clearly, Uber has been losing this battle with regulators since they are imposing more and more restrictions on them. For instance, in some cities such as Los Angeles and New York, Uber and Lyft are not allowed to pick up rides except at designated positions that are less convenient than taxis. They are also being heavily regulated in areas such as insurance and background checks of their drivers. New York City Council is proposing to regulate these vehicles in an aggressive form of command and control regulation: they plan to cap the number of vehicles allowed on the road at any one time.

Is the individual who rents a room or their whole house through Airbnb regulated and do they pay the same taxes as those imposed upon a hotel and conform to the rules regulating the traditional hospitality industry? And is the individual who stays at the Airbnb rental protected by the same regulations and laws as someone staying at a hotel? The answers to these questions are still not clear and vary by jurisdiction. What is clear is that CC is raising issues of what rules apply to these transactions and how existing rules should or could be applied.

Additionally, the difference in regulatory laws for online and offline services can lead to situations of unfair market competition. There is a need to solve two essential issues: How can we restore a level playing field? and what rules will promote fair competition?

Self-Regulation

An increasingly popular notion is that the most effective form of regulation of CC is self-regulation. *The Sharing Economy: Disruptive Effects on Regulation and Paths Forward*, Urs Gasser, June 6, 2016. Self-regulation is based upon the same theories used for the regulation of professions, such as the legal profession. *How to Regulate the Sharing Economy? Look to the Law Governing Lawyers*, The Huffington Post, Ray Brescia, February 10, 2016, updated February 10, 2017. The basic theories for self-regulation fall into the following: Adapted from *The Sharing Economy: Disruptive Effects on Regulation and Paths Forward*, Urs Gasser, June 6, 2016.

The CC entities have the incentives to self-regulate, since their success is based upon consumer trust. Consumers will not use the services of a CC company if they are not satisfied with its product and services. In fact, 64% of consumers surveyed by PWC for its April 2015 Consumer Intelligence Series, pwc.com/CISsharing, stated self-regulation is more important than government regulation. In addition, 69% stated they would not "trust sharing economy companies" unless the company was recommended by someone they actually trusted. Bottom line is that CC entities essentially profit by aiding in the transaction between the seller and buyer, and thus have the motivation to self-regulate. A lack of consumer trust can obstruct transactions, directly reducing the success of the platform or app.

In order to continually improve the technology necessary to provide their products or services, enormous amounts of data must be readily available. This data is more easily accessible by the CC entities than by the regulators;

Because the CC entities are driven by technology they are in the position to be able to quickly remove individuals that are not conforming to the requirements of the CC entity. Additionally, they can better regulate tax payments and monitor compliance with laws and regulations.

Applying Existing Regulations

However, regulatory authorities must continue to protect their constituents with the existing laws and regulations. As new industries, new technologies and new algorithms enter our, whether Airbnb or dockless bikeshares, communities get worried and believe there is a need to regulate any surges in use of these new industries. Therefore, it is important that CC entities ensure they are not solely engaging in self-regulation but are also working closely with the existing regulators to warrant they are in compliance with existing rules. This means it is also incumbent upon the regulators to think out of the box when necessary and not be viewed as hostile to technology and innovation. We are living in a quickly changing world and regulators must be willing to innovate and adapt.

On 11 May 2017, the European Court of Justice (ECJ) concluded that Uber is a transportation company and subject to stricter rules and obligations. Stricter regulation could lead the San Francisco company to suspend its application, through which unlicensed private drivers transport passengers using their own vehicles. In fact, this is something that the company has already done following bans by some national courts. It is the qualification of Uber as a transportation company instead of an information society service company that has broader ramifications. Information society service companies enjoy lighter regulatory regimes.

It has been observed by legal scholar Orly Lobel that those regulators and CC entities willing to work closely together and offer more flexible regulatory approaches will be most likely to address problems created by the CC economy while simultaneously encouraging the growth of the CC economy. The key in the search for balance must be the avoidance of a "one size fits all" regulation.

The Regulatory Sandbox

The National Association of Insurance Commissioners and various departments of insurance are exploring and developing a new concept they call the Regulatory Sandbox. The purpose of the Regulatory Sandbox is to allow insurance companies to test innovative strategies to market and create insurance products (mainly through the use of technology). To accomplish this goal the regulatory body, i.e., department of insurance, must waive a number of regulatory requirements, and the insurer in the Sandbox must be able to protect consumers from the risks being created by the lower regulatory framework and the innovative strategies. A number of the states department's of insurance have taken the position there is no need to form a Regulatory Sandbox. These regulators believe they can accomplish the same tasks under existing laws and it is much less cumbersome than a formal model. In fact some states are already implementing these techniques and insurance companies are offering coverage in new ways and providing new coverages after they have consulted with the department and received permission to proceed without complying with all of the insurance regulations.

A number of "incubators" and several states have tried the sandbox concept. However, due to the unknown consequences of its creations, it remains unclear whether the idea will succeed. Recently, U.S. insurance regulatory authorities are taking the position that a formal guideline or model act from the National Association of Insurance Commissioners ("NAIC") is not needed. The regulators have taken the position existing state laws already provide for them to allow insurance companies to innovate and provide experimental insurance policies. Clearly, this approach is being seen in other regulatory areas as well. As long as the innovator meets and discusses its concepts first with the appropriate regulator and works with the regulator their innovative product will likely be introduced.

The state of Arizona recently launched (August 2018) a regulatory sandbox program to enable financial products or services businesses to validate, test and prove their new technologies, products, services, business models and delivery mechanisms for up to 24 months, without regulatory costs and formal licensing. The sandbox is open to start-ups, entrepreneurs and established companies.

This article is co-authored by Florence Druguet and first appeared in Westlaw's publication entitled Sharing Economy.

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