First things first: what is the collaborative phenomenon?

It is an impossible task to define the legal framework (whether by matching with existing provisions and their scope or by providing for new ones) without first understanding and delimiting the subject matter to be regulated.

The fundamental feature appears to be an amateur individual (an economy built upon peer interactions), rather than a professional (traditional economic models built through business to consumer interactions).

This phenomenon is referred to through numerous terms such as for instance sharing economy, collaborative economy, gig economy, mesh economy and associated definitions are similar yet not identical, thus creating vagueness concerning the exact boundaries of this phenomenon along with a legal grey zone.

For the sake of clarity, we do favour the term “collaborative phenomenon” as an umbrella term enveloping all of the concepts used in relation to

1. distributed networks of individuals making resources available and/or performing activities (hereafter “providers”)  
2. with or without reciprocity for the benefit of one another (hereafter “end-users”),  
3. against or without remuneration,  
4. yet for purposes which are outside their trade, business or profession.

Identifying liabilities and ensuring protection in the Collaborative Phenomenon

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Premises of the phenomenon are to be found in the preexisting myriad of peer interactions being the result of casual matchmaking and falling under common definitions of sharing (to partake of, use, experience, occupy, or enjoy with others) and collaborating (to work jointly with others in some endeavour). They range from for instance lending tools, swapping toys, accepting hitchhikers, to carrying grocery bags for elderly people, are mainly non-profit activities and remain limited in scope within small communities. Movements such as the cooperative one apprehended these interactions by providing centralisation as to facilitate matchmaking. The digital revolution yet transformed these interactions even more by means of digital platforms ensuring matchmaking at a greater scale and pace. Instead of ringing at a neighbour’s doorbell to ask for a drilling machine, a request for one is sent out to thousands of people in a second. At first platforms aggregated networks to facilitate sharing of digital contents, then to facilitate project financing by crowds, yet the rise of the collaborative phenomenon is mainly associated with the apparition of digital platforms, mainly third-party platforms, intermediating transactions involving tangible goods and real-life services. The pioneer of the idea of a collaborative movement as currently known, Rachel Botsman, distinguishes between collaborative consumption and collaborative economy, defining the latter as “an economy built on distributed networks of connected individuals and communities versus centralised institutions, transforming how we can produce, consume, finance, and learn”. Along with others, she depicts it as a disintermediation movement although nowadays, the proliferation of third-party intermediaries on the contrary, illustrates an increase in triangulation of peer interactions. Nonetheless, decentralised activities do further exist, less noticeable though, and therefore often excluded from the regulatory debate concerning the collaborative phenomenon, despite raising some of the same issues as intermediated activities do.
Caveat!
No regulatory approach will be satisfactory unless it takes into account the following points

#1 Mind the dichotomies!
Principles aimed at the collaborative phenomenon as a whole face criticism as firstly, they rely on flawed definitions of the said phenomenon and secondly, harm distinct branches thereof by being either too restrictive or too lenient.

Dichotomy #1: genuine providers (i.e. peers “sharing” with others without any professional purpose) versus professionalised providers (read caveat #3);
Dichotomy #2: intermediated peer interactions versus non-intermediated peer interactions;
Dichotomy #3: third-party intermediation platforms (i.e. web based systems providing services for providers and end-users) versus cooperative platforms (i.e. web based system providing services to providers and end-users yet co-owned and co-governed by the providers and/or end-users themselves).

#2 Do not rethinking the regulatory framework through the lens of platforms: it is like putting the cart in front of the horse.
In order to ensure a socially optimal result, regulating platforms should solely be done in light of what applies at providers’ level as to sufficiently yet excessively complement it, especially since: (a) among concerned activities some are non-intermediated activities and therefore do not even allow intervention at that level and (b) some platforms are cooperative ones, thus based on co-governance and co-control. Therefore, they do not have the potential to perform efficient third-party control yet merely auto-control.

#3 Professionalized providers!
Some providers denature the collaborative phenomenon at their individual level by performing services regularly and against proper remuneration as to pursue a professional purpose without admitting it. It is necessary to acknowledge their peculiar case being the one of providers (1) acting in an environment devoted to non-professionals, (2) being often without qualifications professional providers would have yet (3) having “professionalized” their activities over time. These fall outside the scope of the collaborative phenomenon and ought to be subject to the same regulatory requirements as professionals.

Are solely acceptable to remain unregulated earners of top-over income with clear identification thereof as performing services as a non-professional side occupation (read infra). It is indeed hardly admissible that some providers may act similarly to professionals but under relaxed conditions. Should there exist some entry requirements making it hard for anyone to perform specific services as a professional (for instance taxi services or hotel industry services), an evaluation of their relevancy and adequacy at the present date constitutes a separate debate. Under the assumption these entry requirements are stringent solely when necessary and otherwise allow anyone willing to make a living out of service provision to enter the market as a professional, there is no plausible justification to allow providers to operate unregulated.

#4 Sharewashed platforms!
Sharewashing can be defined as “a marketing strategy which deceives people by trying to suggest that a business is motivated by principles of sharing rather than conventional profits”. Notably, sharewashed platforms “may be seeking to have their cake and eat it by using self-employed contractors (outsourcing firms) to cut costs, while at the same time trying to maintain a level of control over people that are more appropriate for a more traditional employment relationship” (Peter Cheese, Chief Executive of the CIPD in UK). Many regulatory reactions to the collaborative phenomenon do in reality seem to target sharewashed enterprises although those are to be classified as falling outside the scope of the collaborative phenomenon, considering they ought often to be qualified as employers and should it not be the case, they nevertheless involve exclusively professionalized providers rather than genuine ones (business model requiring minimum frequency from each provider).
From a legal perspective, the collaborative phenomenon, i.e. genuine providers and platforms intermediating their interactions, require **redefining liability principles** since (1) those principles are not always satisfactory when it comes to **non-professionals** and (2) the intervention of a platform triggers debates regarding **secondary liability**.

**What do we mean by liability?**

When debates refer to the liability to be borne by actors of the collaborative phenomenon, they seldom specify what type of liability they refer to. Surely, legal liability refers to an **obligation to comply or compensate** yet it comes in different forms and shapes according to circumstances. There is thus not one liability but the following to be differentiated:

1. **Contractual liability.** Its objective is ensuring compliance by parties with contractual provisions and thus for instance, adequate service or good provision understood as meeting parties’ expectations.
2. **Tort liability in daily life.** Its objective is damage avoidance by imposing an obligation to repair any damage caused to another with whom no contractual relation existed.
3. **Liability to comply with existing regulations,** notably tax, social security, commercial, safety measures, professional requirements etc. Its objective is ensuring a fair and safe business market through compliance with the said regulations.

**From an independent provider perspective**,

1. Subject to tort liability like any other individual
2. Subject to contractual liability as offer to provide a service or good meets a request from an end-user and they accordingly enter a contractual relation
3. **Uncertain whether subject to existing regulations** as providers do not necessarily fit definitions defining their scope of application and/or the said regulations are not necessarily adapted to performance by non-professionals

Tort and contractual liability are **not always satisfactory when it comes to seeking compensation** should they fail to deter harm and non-performance. The end-user often has to demonstrate the reality of a fault and/or subsequent harm in light of vague principles such as notably good faith and due diligence. The procedure thus involves **case-by-case assessments and consequently provides no guarantee of success.** Besides, in relation to small claims, many will give up considering the potential difficulty and length of proceedings. Finally, some will end up facing a provider unable to financially bear the cost of a compensation.

This however is nothing new. Non-professional individuals were doing this before, right? True. Yet nowadays there are a few elements changing the game.
Within this collaborative phenomenon, we have a gargantuan amount of non-digital activities. The qualification as collaborative emerged already several years ago in relation to digital peer interactions being notably peer to peer file sharing and peer generated news yet direct risks generated thereby where confined to the digital sphere. The new wave of collaborative occurrences is on the contrary grounded in the off-line world triggering tangible effect on one’s body and assets.

The non-digital activities can be related to both provision of goods and services. Although the collaborative movement made its debut through initiatives involving sharing of goods (under for instance lending, barter and access arrangements), the digitalisation of the said movement led to a multiplication of initiatives where people share time and skills rather than tangible goods. Lately these represent a remarkable share of existing initiatives along which many of the key platforms (ride sharing Lyft, TaskRabbit for various small services, and InstaCart for grocery shopping). Their functioning triggers greater safety concerns and risks of damage compared to good provision as individuals interact directly in real life and have an immediate effect on one another.

To illustrate

Let us mention the example of Ted. In his free time, Ted hosts strangers in his tiny flat located in the Belgian capital by offering to sleep on his sofa against a token remuneration. He also enjoys being their city guide should they accept to pay an additional token remuneration. If Ted’s flat has a defective electric system and his guest get electrocuted, there is some tangible body harm. Further, if Ted guides his guests to dangerous areas and they get robbed, there is some tangible harm on their assets as well.

The crux in this case?

Activities offered by Ted do not necessarily fall under the definition of services and further, Ted does not necessarily qualify as a professional in the meaning of the law. Accordingly, Ted is not subject to regulations aiming at ensuring safety of service provision, and especially not subject to consumer protection regulations (where prohibition of unfair terms and specifications of information duties are enshrined). Nonetheless if Ted offers the said services through a platform, the said platform is a third-party and a professional one offering possibilities of imposing secondary liability.

To be considered as a “service” in the meaning of law, activities ought to be performed by self-employed (versus employees) against remuneration. Sometimes, providers fall outside the scope thereof as they do request no compensation at all or solely strict compensation of expenses based on expense claims.

To be considered as a “professional” (or “trader” or any other term used in specific regulations), a provider ought to perform activities for purposes related to his trade, business or profession. Yet this is contrary to the very definition of the collaborative phenomenon and is the case only for professionalized providers.

Both notions involve a case-by-case assessment!
How to adapt the legal framework?

**STEP 1: DETERMINE WHICH PROVIDERS ARE UNREGULATED?**

Adopt a framework where Providers acting for professional purposes would be acknowledged as professionals, subject to specific regulations applying to service provision; and Providers acting for non-professional purposes would be acknowledged as “genuine” collaborative providers, operating in a peer to peer environment where no unequal power relations threaten the parties and no protective measures are thus necessary.

Regardless whether they operate through a platform or not considering:

(1) a platform does not immediately transform one into a professional, it does simply facilitate matchmaking and/or service provision by handling certain services (scheduling, payment etc).

(2) handling differently peers using platforms and those not, would create discrimination and simply incentivise a shift from one environment to the other, depending on which is subject to a less restrictive legal framework.

Instead of contemplating the too stringent option of integrating all peer relations within the scope of existing regulations and thus subject them to the same regulations as traditional businesses or the too lenient option of considering all providers claiming to be part of the collaborative phenomenon (notably because acting through a collaborative intermediary) as to be left outside the scope of regulations applicable to traditional businesses. Regardless whether they operate through a platform or not considering:

(1) a platform does not immediately transform one into a professional, it does simply facilitate matchmaking and/or service provision by handling certain services (scheduling, payment etc).

(2) handling differently peers using platforms and those not, would create discrimination and simply incentivise a shift from one environment to the other, depending on which is subject to a less restrictive legal framework. Because case-by-case assessment is an unworkable solution, especially considering the increase in peer interactions digitalisation brought along. Besides complexity of such assessments is probably the reason of claims in favour a provider categorisation performed per platform. It is thus necessary to elaborate a system based on joint thresholds of frequency, remuneration (i.e. distinction between proper income and top-over one) and number of end-users. Such system would allow automatic and easy identification of providers directly by platforms and facilitate the task for authorities should the provider use no platform. It would allow foreseeability from a provider standpoint but also from an end-user standpoint, should platform accordingly label providers as professionalized as to inform them about who they are interacting with and what they can expect.

**CONCRETE TOOL**

Requires clarification of the concept of “professional purpose” as used to identify a professional and accordingly, the concept of “top-over income” versus “proper remuneration” as a distinctive feature.
**ADVANTAGES? YES**

1. Acknowledge the collaborative platform is merely an intermediary and ought not to be unduly forced into bearing liability for professionalized providers obliged to conform with regulations directly at their level.

2. In respect to professionalized providers, allow avoidance of problems (ex ante) rather than blaming (ex post) platforms allowing (or sometimes encouraging) such providers to disregard regulations and by doing so, tarnishing the image of the collaborative phenomenon as well as diminishing trust of end-users towards this phenomenon.

3. Determine which providers are genuine non-professionals subject to a regulatory “void” (i.e. being subject to solely general contract and tort law provisions) in turn potentially justifying imposing regulation at intermediary level.

**DISADVANTAGE? NOT REALLY**

Professionalized providers may struggle to comply with some requirements stemming from regulations applicable to professionals as they have less resources and qualifications. Therefore, it must be **ensured thresholds are set at an adequate level** and those landing above the said thresholds can be nevertheless expected able to comply considering the importance of their activity.

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**STEP 2: CLARIFY WHICH PLATFORMS COULD BE GATEKEEPERS**

Adopt a framework where platforms mediating provision of services are protected from being held liable for damage caused by providers, whether professionalized or not. Nonetheless, a framework acknowledging the regulatory void surrounding provision of services by non-professionals and therefore entrust platforms with control at entry of clear-cut requirements to be determined at sectorial level as to reduce risk of damage. Third-party platforms taking the risk of creating a market for non-professionals and generating revenues out of it, ought to be held liable solely should they fail to monitor these requirements. Such as system would neither let them thrive without being accountable for side-effects of their business model, neither unduly refrain their activity by requesting monitoring at an unfeasible level.

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**PART 1: from a platform perspective**

Currently only merely passive and purely technical platforms benefit from the safe harbour (protection against secondary liability and being subject to monitoring obligations) granted to information society services. Based on case law, it appears platforms easily fall outside this category as soon as they edit and promote content. **Collaborative platforms** by nature promote offers as to enhance network effects on markets they create and often further advertise. Consequently they would systematically fall outside the scope of the safe harbour, in turn allowing creation of monitoring obligations in relation to non-digital activities (unrealistic) and secondary liability based on contract and tort law as enacted having non-digital intermediaries in mind (unduly burdensome).

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**PART 2: from an end-user perspective**

If we extend the scope of the safe harbour, end-users enter transactions at their own risk as they face genuine providers subject to no specific regulations as applicable to similar professional services, and a platform being protected from being secondary liability for as well. Concerning a cooperative platform this appears acceptable because there is no third entity having gatekeeper potential, peers acts similarly as with hitchhiking. Concerning third-party platforms this is less acceptable because of the existence of a third party distinct from peers active on the market and able to detect certain anomalies and prevented damages. It is a deluxe version for hitchhiking as known until now.
CONCRETE TOOLS

#1
Determine an admissible level of platform interference allowing for collaborative platforms to benefit from the safe harbour yet excluding therefrom sharewashed platforms as well as those voluntarily intruding peer interactions at an excessive level.

#2
Besides the “passive/active” distinction, use a “governed by a third-party/co-governed” criterion allowing taking into account gatekeeper potential understood as ability to enforce effective control and no longer the mere exercise of some active interference in mediated transactions.

#3
Identify clear-cut regulatory requirements gatekeeper platforms can verify at entry in an automated way, such requirements being preferably sectorial.

Even actively intervening and with gatekeeper potential, collaborative platforms do still fall under the rationale of the safe harbour rendering impossible monitoring understood as constant control of activity, especially off-line activities, by a digital platform because of (1) economic inefficiency of such monitoring, (2) asymmetric information making it hard to justify why a platform ought to be held liable for defects it could not foresee compared to the provider of the service being better aware and (3) externalities making authorities inclined to encourage intermediation platforms. Yet this does not apply is we understand monitoring as an obligation to control specified and clear-cut features at entry.

Considering the non-professional character of providers and the risk of tangible damage service provision generates, it is a minimum to be done. Imposing these requirements at provider level in general does not guarantee compliance and effective control by authorities is unrealistic considering each individual is a potential provider in the collaborative phenomenon. In turn the intervention of an intermediation platform creates an opportunity for effective ex ante control. Further, by providing additional guarantees to end-users, such control would incentivise peer providers to always operate through intermediation platforms, accordingly increasing effectiveness of compliance control. Platforms are an opportunity not a threat and ought to be promoted not overly subject to requirements causing providers to flee and platforms to shut down.