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## REGULATING SHARING ECONOMY – INTERPLAY BETWEEN PRIVATE LAW AND PUBLIC LAW

### I. Introduction – The New Economy

Sharing Economy otherwise called *inter alia* collaborative economy, on-demand economy, access economy is often portrayed as one of the phenomena of the 21<sup>st</sup> century<sup>1</sup>. The term itself began to appear in the early 2000s but gained prominence during financial crisis<sup>2</sup>. The jury is still out on whether sharing economy boomed because “legacy” economy has failed, or whether new trend emerged parallelly to “traditional” economies<sup>3</sup>. Nevertheless, the number of businesses operating under label of sharing economy, or classified as such, is on the rise<sup>4</sup>.

This in turn raises regulatory challenges as many “legacy” operators are facing increased competition from these emerging entities operating under a new business model<sup>5</sup>. The incumbents claim that existing regulatory setup grants these new entities an unfair advantage (unintentionally to a large extent), because traditional businesses operate under public-law based models, while individuals offering services through sharing economy are operating under private law, and thus have the lower administrative burdens like taxation, licencing etc<sup>6</sup>. Additionally, although it is debatable, the argument runs: since sharing economy services

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<sup>1</sup> Sharing economy started to appear in the literature in early 2000s. See Y. Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, “The Yale Law Journal” 2002, No. 112, p. 369.

<sup>2</sup> I. Rudawska, *Ekonomia dzielenia się, czyli konsumpcja współdzielona i inne formy alternatywnego dostępu do dóbr*, “Studia Ekonomiczne” 2016, No. 254, pp. 181–189.

<sup>3</sup> J. Maurer, *Sharing Economy. Regulatory Approaches for Combating Airbnb's Controversy Regarding Taxation and Regulation*, GRIN Verlag 2016, pp. 6–8.

<sup>4</sup> Ibidem; I. Rudawska, *Ekonomia dzielenia się...*, pp. 181 et seq; J.E. Gata, *The Sharing Economy, Competition and Regulation*, “Competition Policy International”, November 2015, pp. 2 et seq.

<sup>5</sup> J.E. Gata, *The Sharing Economy...*, p. 4; K. Erickson, I. Sørensen, *Regulating the Sharing Economy*, “Internet Policy Review” 2016, No. 5(2), pp. 6–7.

<sup>6</sup> J.E. Gata, *The Sharing Economy...*, p. 4; J. Maurer, *Sharing Economy. Regulatory...*, pp. 6–8.

are not subject to the same certification/licencing requirement as legacy operators, they offer inferior service quality and level of customer protection<sup>7</sup>. These challenges are epitomised by Uber that has become the “poster child” of controversies arising from the sharing economy, although these issues are by no means limited to this one company.

Although the groups expressing the need for the amendments of the existing regulatory framework are quite vocal with their opinions, currently there are precious few initiatives dedicated to regulating sharing economy, at both the European and national levels. These activities remain in “grey zone” between private law governing relationships between individuals and public law primarily governing activities of professional market participants. This is largely because the term “sharing economy”, while understandable on an intuitive level, remains superfluous and vague<sup>8</sup>. It goes without saying that there is no single legal definition, which reflects the state of debate, with no common consensus about the precise meaning and scope of term in question. The boundary line between public and private law remains blurred and policymakers are still struggling with the dilemma which of these areas of law is best suited for regulation of this emergent and booming business.

To tackle the issue of regulatory approach towards sharing economy, this article will take the following line of inquiry: As a point of departure the analysis of the term sharing economy and its permutations will be undertaken to establish whether the concept is definable at all, and to attempt to construct a syntactic working definition. The scrutiny will also cover the legal status of sharing economy service provider in the light of mentioned distinction between public and private law. This will be followed by the analysis of the legal status of the customer. The discussion will cover the question of whether sharing economy offers a level of protection comparable to that of traditional businesses. This in turn allows the assessment of the issue of competition of sharing economy versus legacy undertakings.

## II. The Concept of Sharing Economy

It follows from the foregoing that the definition of the term is being contested<sup>9</sup>. On the very rudimentary level one can say that “sharing economy” is an umbrella term encompassing an extensive range of business activities involving matching individuals who wish to share its assets<sup>10</sup>.

<sup>7</sup> C.W. Lee, *The Sharer's Gently-Used Clothes* [in:] B. Juliet, J. Schor, T. Edward, E.T. Walker, C.W. Lee, P. Parigi, K. Cook, *Viewpoints. On the Sharing Economy, “Contexts”* 2015, Vol. 14, No. 1, pp. 12–19.

<sup>8</sup> K. Erickson, I. Sørensen, *Regulating the Sharing...*, pp. 2–3.

<sup>9</sup> R. Botsman, *Defining The Sharing Economy: What Is Collaborative Consumption- And What Isn't?* Fast-Company, 27.05.2015.

<sup>10</sup> J.E. Gata, *The Sharing Economy...*, p. 2. See also Commission Staff Working Document, European agenda for the collaborative economy – supporting analysis, SWD(2016) 184 final, Brussels 02.06.2016.

The primary feature of this model is that it entails multisided peer-to-peer exchange usually made possible by various online platforms<sup>11</sup>. Therefore, some authors suggest that the term “access economy” is more apt as the key issue of this business model is not necessarily as Rachel Botsman suggests “sharing of under-used assets” but rather the matchmaking allowing for supply to meet demand<sup>12</sup>. Therefore, some may suggest that this pairing services has no self-standing value in itself<sup>13</sup>. The argument runs that the sole reason why customers are willing to use these platform is gaining access to shared assets<sup>14</sup>.

There is an extensive body of scholarly works dedicated to fleshing out various defining features of sharing economy model. It is generally accepted that peer-to-peer services requires some kind of trust building mechanism since professional market participants are usually perceived as more trustworthy than previously unknown natural persons<sup>15</sup>. This is usually achieved through the review processes, registration requirements where certain credentials must be submitted (real name basis only registration for example)<sup>16</sup>. Some intermediaries – platforms - even offer in-house vetting services<sup>17</sup>.

It is also claimed that ownership of an asset or a certain skill set is required<sup>18</sup>. The author is of the opinion that this is not necessarily the case. It rather seems more appropriate to point out that a degree of control over the asset is required, so it can allow for monetization which would usually imply ownership although this is not a *conditio sine qua non*. To sum up the discussion elaborated above, sharing economy will encompass two sets of inextricably linked activities sharing underused assets and matchmaking services. To function properly, the operation must utilize online information exchange platform supported by a trust building mechanism<sup>19</sup>.

In this analysis the distinction between the go-between and the actual service provider becomes especially contentious. Uber is a textbook example of such controversies. As mentioned in the introduction, Uber is becoming an epitome of

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<sup>11</sup> S.P. King, *Sharing Economy: What Challenges for Competition Law?* “Journal of European Competition Law & Practice” 2015, No. 6(10), p. 729.

<sup>12</sup> R. Botsman, *Defining The Sharing...*

<sup>13</sup> See opinion of AG M. Szpunar in case C-434/15: *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:364.

<sup>14</sup> K. Erickson, I. Sørensen, *Regulating the Sharing...*, p. 8.

<sup>15</sup> W. Lee, *The Sharer’s Gently...*, pp. 12–19; L. Einav, C. Farronato, J. Levin, *Peer-to-Peer Markets*, “Annual Review of Economics” 2016, No. 8, pp. 615–635.

<sup>16</sup> L. Einav, C. Farronato, J. Levin, *Peer-to-Peer...*, p. 621.

<sup>17</sup> Airbnb is an example. Additionally, additional safety mechanisms may be introduced such as insurance requirements; Logged private messaging system; Secure payments (i.e. through PayPal); Security deposits; Verification of identity; Linking to social network accounts.

<sup>18</sup> Opinion expressed in: Deloitte Access Economics, *The sharing economy and the Competition and Consumer Act – Australian Competition and Consumer Commission* <[www.accc.gov.au/system/files/Sharing%20Economy%20-%20Deloitte%20Report%20-%202015.pdf](http://www.accc.gov.au/system/files/Sharing%20Economy%20-%20Deloitte%20Report%20-%202015.pdf)> [access: 11.09.2017].

<sup>19</sup> L. Einav, C. Farronato, J. Levin, *Peer-to-Peer...*, pp. 621 et seq.

all issues arising from sharing economy, and is often used as a case study, which certainly has the merit of clarity, because its business activities are universally known. However, it should be emphasised that the problems and controversies discussed here are not limited to this company, and are common to all entities operating according to a sharing economy business model. Uber provides pairing services between drivers and passengers, in essence offering services similar to taxis with online payments. As it has been said and written many times in the light of vehement protests of registered taxi companies accusing Uber of circumventing licensing requirements. Uber keeps claiming that they are merely an IT company, not a transport undertaking, and its up to the individual drivers to meet all criteria for carriage of passengers<sup>20</sup>. This approach was exploiting certain lacunae between private and public law and is disingenuous in the author's opinion, nevertheless it was not outwardly wrong (nor was obviously right).

If one would like to use a nomenclature drawn from competition law, one would have say that this is classic example of upstream and downstream market<sup>21</sup>. In the same vein, such a company will be considered as a vertically integrated entity controlling all chains leading to "producing" an end product<sup>22</sup>. Yet in competition law vertical integration exists either within one company's structure or through cooperative agreement between independent undertakings<sup>23</sup>. If this is the case, then all participants would fall within the scope of public law – competition rules, tax laws and so on. Relationships existing in sharing economy do not fit into this pattern. One can easily accept that an upstream entity (matchmaker – Uber in this example) is a professional entity, but the status of downstream entities is not so clear. As has been explained earlier the very essence of sharing economy is that resources are being shared by non-professionals, individuals acting outside the scope of their day to day work<sup>24</sup>. Although it must be noted that providing services through sharing economy model has become a principal occupation for some group of individuals<sup>25</sup>. This factor will become relevant in later stages of this analysis.

The working definition constructed on the basis of mentioned features aptly illustrates the practical problems with the delimitation of the scope of the notion,

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<sup>20</sup> Uber is registered in *Krajowy Rejster Sądowy* under no. 0000490069 with listed activities *Przygotowywanie i przetwarzanie danych* (SIC 73740000), and *Pozostała działalność usługowa w zakresie technologii informatycznych i komputerowych* (PKD 62.09.Z).

<sup>21</sup> The analysis presented is not country-specific, therefore the notion of competition law will not be used with recourse to the meaning of the concept in domestic law. The term will instead be used in a broad sense borrowed from an EU Law to describe law concerned with ensuring that undertakings operating in the free market economy do not restrict or distort competition in a way that prevents market from functioning optimally. See A. Jones, B. Sufryn, *EU Competition Law*, Oxford 2011, p. 11.

<sup>22</sup> Faull & Nikpay *The EU Law of Competition*, eds. J. Faull, A. Nikpay, Oxford 2015, pp. 1363 et seq.

<sup>23</sup> *Ibidem*.

<sup>24</sup> J.E. Gata, *The Sharing Economy...*, p. 3; K. Erickson, I. Sørensen, *Regulating the Sharing...*, pp. 3–5.

<sup>25</sup> It is impossible to establish the extent of this phenomenon due to insufficient data available as a result of lack of credible reporting.

yet there is no consensus what the optimal scope of mentioned definition should be. In other words, we can identify contentious issues, but lawmakers are essentially acting blindly in deciding on the optimal scope of this definition for market regulation.

### III. Professional versus Non-Professional Activity

The principal source of controversy stemming from definition presented above exists because it blurs the division between private and public law. The notion of „entrepreneur” [pol. *przedsiębiorca*] encapsulated in Article 43<sup>1</sup> of the Civil Code should be applicable in principle<sup>26</sup>. According to this definition, an entrepreneur is “a natural person, a legal person, an organisational unit without legal personality, who’s law grants legal capacity, which carries out an economic or professional activity on its behalf”<sup>27</sup>. The entity must carry out economic activity and must do it on its behalf<sup>28</sup>. The mentioned activity must be conducted in an “organized and continuous manner”, and be profit driven<sup>29</sup>. Furthermore, the linked activity must be carried on own behalf with all the economic consequences (business risk) thereof<sup>30</sup>. Provided that these criteria are met, the operation of such entity is governed on the one hand by competition rules – antitrust, merger control, State aids - and on the other hand by the consumer law regulating conduct in retail – relationships with consumers.

It stands to reason that many individuals active in the area of sharing economy fall outside this definition. If a person’s activity is sporadic, incidental, not carried out in an “organized and continuous manner” in the meaning of the said provision, then rules of the Civil Code are applicable<sup>31</sup>. Yet this interpretation hinges on two serious oversimplifications:

First, it is implicitly assumed that, *a contrario* from traditional operations, individuals engaged in sharing economy do it sporadically outside their main professions, and thus one can infer that such activities are not the main source of household income. This clear-cut division serves as a valid justification for existing regulatory approach, as the argument runs that sporadic non-professional activity should be less encumbered with administrative burdens than A professional business venture. This brings up the second of the said oversimplifications;

<sup>26</sup> Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (tekst jedn.: Dz. U. z 2017 r. poz. 459, ze zm.).

<sup>27</sup> See also M. Szydło, *Pojęcie przedsiębiorcy w prawie polskim*, „Przegląd Sądowy” 2002, nr 7–8, p. 95.

<sup>28</sup> T. Szanciło, *Przedsiębiorca w prawie polskim*, „Przegląd Prawa Handlowego” 2005, nr 3, p. 4.

<sup>29</sup> Ruling of the Supreme Court [pol. Sąd Najwyższy], 30.11.1992, III CZP 134/92, OSCP 1993, nr 5, poz. 79. On the interpretation of the notion of „organized manner” see Z. Radwański, *Prawo cywilne*, LexisNexis, Warszawa 2007, p. 208; And on the notion of „continuous manner” J. Odachowski, *Ciągłość działalności gospodarczej*, „Głosa” 2003, nr 10, pp. 30 et seq.

<sup>30</sup> M. Szydło, *Pojęcie działalności...*, pp. 25 et seq.

<sup>31</sup> *Kodeks cywilny. Komentarz*, t. 1: *Część ogólna*, red. A. Kidyba, Warszawa 2012, pp. 206–208; M. Jagodziński, *Pojęcie przedsiębiorcy i przedsiębiorstwa w świetle obowiązujących regulacji prawnych*, „Przegląd Prawa Egzekucyjnego” 2011, nr 2, p. 30.

as it is assumed (again, implicitly but clearly) that no competition exists between professionals and non-professionals. In the competition law parlance, sharing economy and “traditional” undertaking, even if these provide similar services or to a certain degree at least comparable, are in the different non-overlapping product markets<sup>32</sup>.

Yet the data suggests – Uber is again a textbook case here, although by no means the only one – that there is palpable competition, or at least considerable overlap between sharing economy and legacy segment – an older, traditional economy. Therefore, many incumbent operators claim that the fact that sharing economy do not have the same administrative burdens – licensing, taxation, labor laws – is fundamentally distorting a level playing field giving an undue competitive edge to these new entrants<sup>33</sup>.

The same holds true for consumer protection. Since persons providing services under sharing economy business model fall exclusively under private law, only civil law-based rules apply instead of more favorable rules governing relationship between undertakings and consumers. From its onset, the consumer protection law was based on the assumption that there is a radical imbalance between customers and professional market participants. It was correctly assumed that individuals are in underprivileged position *vis-à-vis* undertakings who has manpower, resources and expertise to protect its interest effectively. The ensuing bias towards customer rights was initially perfectly justified provided individuals and companies are operating in completely different non-overlapping capacities.

In this case, however, borders between these categories become blurred. The least problematic situation is in case of end users – these individuals, in principle, fall squarely into category of consumers<sup>34</sup>. Although some doubts remain who is the actual partner of this business relationship – a go-between or another individual actually providing given service<sup>35</sup>. This brings up the question of relation between parties of a typical relations existing in sharing economy when there are two non-professional individuals, and a professional matchmaker/intermediary. That is precisely where lays the problem of delimitation between private and public law because if one assumes that the actual provider of a service is acting in professional capacity the issue will fall under the regulatory ambit of public competition law. If, on the other hand, one assumes that these are transactions between two non-professional individuals, then general rules of civil law would be

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<sup>32</sup> *Faull & Nikpay...*, pp. 43 et seq. According to Naczelny Sąd Administracyjny providing sporadic transport is a separate service from taxi services (judgment 21.10.2009, II GSK 143/09).

<sup>33</sup> This is precisely the problem in pending CJEU case C-434/15: *Asociación Profesional Elite Taxi v Uber Systems Spain SL*.

<sup>34</sup> It is not entirely clear how to interpret services dedicated for businesses because the term “business” in this context usually relates to the quality of the service, not to the status of service recipient. If on the other hand only registered companies are eligible to use this service, the relationship would be considered a B2B.

<sup>35</sup> See J. Maurer, *Sharing Economy. Regulatory...*, pp. 28 et seq.

applicable<sup>36</sup>. Additionally, a separate legal relationship exists between professional intermediaries and respectively end-user and service provider<sup>37</sup>. Since former party is clearly a professional undertaking, these are regulated by the consumer law rather than civil law rules.

#### IV. The Position of the Consumer

In the light of foregoing one may question whether end users are consumers and clients of go-between, and here the answer seems obvious, and whether these are at the same time consumers of actual service providers or instead equal partners of private-law legal relationship. This brings up the question whether existing definition of consumer is still suitable and relevant and whether it reflects market changes brought about by the sharing economy.

The notion of consumer is defined in the Civil Code as is a natural person entering a legal relationship with an entity professionally engaged in an economic activity<sup>38</sup>. It contain prohibition of existence of a direct link with this person's economic or professional activity<sup>39</sup>. The argument runs that in case of business related services B2B (private) and competition (public) rules should apply, not the consumer protection provisions<sup>40</sup>. In reality distinction between professional end-users and non-professional is problematic. The case of passengers of various transportation services serves as a prime example. If a person is travelling on a business trip but is paying from his/her own pocket, and maybe later is getting reimbursement of expenses, is to all intents and purposes indistinguishable from non-professional passengers<sup>41</sup>. One can argue that the only relevant objective circumstance is the fact of using certain services and the reasons are of secondary importance<sup>42</sup>.

Additionally, if we assume that the actual service provider does not act in "a continuous and organized manner" then an individual entering legal relationship with it would not fall into category of consumer. As been said before the notion is question required one party to be fully professional. Of course, there exists a separate but inextricably linked issue of the relation with intermediar-

<sup>36</sup> *Kodeks cywilny. Komentarz*, t. 1..., pp. 206–208; M. Jagodziński, *Pojęcie przedsiębiorcy i przedsiębiorstwa...*, p. 30.

<sup>37</sup> C. Busch, H. Schulte-Nölke, A. Wiewiórowska-Domagalska, F. Zoll, *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?*, "Journal of European Consumer and Market Law" 2016, No. 1(5), p. 3.

<sup>38</sup> Definition is formulated in the Article 22<sup>1</sup> of the Civil Code.

<sup>39</sup> Z. Radwański, *Podmioty prawa cywilnego w świetle zmian kodeksu cywilnego przeprowadzonych ustaw z dnia 14 lutego 2003 r.*, „Przeгляд Sądowy” 2003, nr 7–8, p. 12.

<sup>40</sup> C. Busch, H. Schulte-Nölke, A. Wiewiórowska-Domagalska, F. Zoll, *The Rise of...*, p. 4.

<sup>41</sup> J. Kociubiński, *Kryterium interesu konsumenta w sprawach z zakresu prawa konkurencji UE dotyczących transportu lotniczego: o potrzebie definicji*, „Internetowy Kwartalnik Antymonopolowy i Regulacyjny” 2016, nr 2, pp. 42–55.

<sup>42</sup> *Ibidem*.

ies. While it can be assumed that an individual engaged in a relationship with intermediary would *prima facie* be considered a consumer, but how to interpret a situation when this individual is at the same time the actual service provider and may simultaneously be considered as a professional body?<sup>43</sup> As has been said in the previous section, the case here is far from clear and the mere fact that such divergent interpretations are possible is problematic in terms of regulatory policy.

It seems that defining consumers as natural persons - service recipients is more in-line with the jurisprudence of Court of Justice of the European Union where the notion in question is interpreted more broadly<sup>44</sup>. In the sphere of sharing economy, a person concluding a trade deal with non-professional is arguably not regarded as consumer even if that other party is acting for profit (which is nearly always the case)<sup>45</sup>. Therefore, one could venture to say that existing definition is ill-suited for sharing economy.

## V. Regulatory Policy Options

In the author's opinion, the underlying legal problem with regulation of sharing economy in the context of delimitation between private and public law boils down to competition. Incumbent or legacy businesses are trying to twist the narrative and present it as a customer service issue. Their argument runs that if individuals who do not have the same level of regulatory oversight as professional bodies and are thus operating under low burden regime of private law, provide a service, there are no safeguards to ensure quality of the service. This issue is presented as covering both the standard of actual service as well as of accountability of providers when it comes to warranty claims, product replacements etc.

It is true that initially public confidence in online trade was relatively lower than "traditional" sales. It was pointed out that a certain (often illusory) anonymity of sellers, lack of possibility to physically examine goods prior to purchase was to blame<sup>46</sup>. These are certainly valid points but has largely become outdated and lose their relevance as online markets becomes mature<sup>47</sup>. Additionally, there are increasing number of trust building features introduced into online markets like reviews, real name policies, etc. These successfully helped to overcome initial reluctance towards online trading platforms (or intermediaries).

<sup>43</sup> J.E. Gata, *The Sharing Economy...*, p. 5.

<sup>44</sup> Although understanding of the term „consumer“ stemming from CJEU's case-law is generally wider than national approach, the jurisprudence is not fully cohesive, and furthermore the EU legislator so far has not introduced a standardised definition. See details J.S. Hedegaard, S. Wrška, *The Notion of Consumer Under EU Legislation and EU Case Law: Between the Poles of Legal Certainty and Flexibility*, Springer, Singapore 2016.

<sup>45</sup> Commission Staff Working Document, 'A Digital Single Market Strategy for Europe – Analysis and Evidence', SWD(2015) 100, Brussels 06.05.2015.

<sup>46</sup> L. Einav, C. Farronato, J. Levin, *Peer-to-Peer...*, p. 621.

<sup>47</sup> *Ibidem*.



Portraying entities providing services under sharing economy business models as lacking professional expertise is understandable from the incumbents' – traditional businesses' – perspective. Provided this picture is entirely accurate, an alternative interpretation is possible as one can reasonably expect sharing economy to be in a separate product market because lower quality comes with lower prices and thus these offers are targeted at two different groups. While such mechanism is valid in theory, especially in case of more price-conscious consumers, there are no data supporting a claim that sharing economy is offering goods of inferior quality with only price as their selling points<sup>48</sup>.

However, in fact, there is a serious overlap in product substitutability which is indicative of a palpable competition. This brings up the key issue mentioned at the beginning of this paragraph: If such competition exists (and data supports it), there is a fundamentally uneven playing field since individuals providing services under sharing economy have lower costs as they are operating under generic civil law based rules and do not have the same amount of administrative and fiscal burdens imposed by the public competition rules on professional market participants<sup>49</sup>.

Again, backlash of registered taxi companies against Uber serves as an excellent example of stances taken in this conflict<sup>50</sup>. In the light of assumption that there is an uneven playing field, the opponents postulate that entities operating under sharing economy model should be moved from, depending on opinion, current "grey zone" between private and public law or from private law sphere, and placed firmly under competition rules. This would ensure a level playing field and prevent capitalizing on preferential regulatory environment.

This approach is, in the author's opinion, entirely justified from the incumbents' perspective but a case can be made that it is missing the crux of the matter. The author would like to argue that we are asking the wrong question. If a service can be provided on a competitive level without detriment to quality under sharing economy model, maybe burdens and restrictions imposed on "legacy" operators are excessive. There is no data supporting view that the quality is inferior in the former model, although it may be partially due to insufficient data aggregation<sup>51</sup>. Mistreatment in low value services is generally underreported, but the same holds true for traditional businesses.

From a policy standpoint, this issue consists of a set of separate sub-problems. First pertaining to taxation have no realistic perspectives for satisfactory solution. Differentiation in tax rates between individuals and professional market partici-

<sup>48</sup> Generally, the more goods are comparable the more important price becoming as a differentiating factor.

<sup>49</sup> J.E. Gata, *The Sharing Economy...*, p. 4; J. Maurer, *Sharing Economy. Regulatory...*, pp. 6–8.

<sup>50</sup> Case is best explained in official position of Urząd Ochrony Konkurencji i Konsumentów on Uber published on 05.05.2016, available at: [https://www.uokik.gov.pl/aktualnosci.php?news\\_id=12352](https://www.uokik.gov.pl/aktualnosci.php?news_id=12352) [access: 11.09.2017].

<sup>51</sup> See C. Busch, H. Schulte-Nölke, A. Wiewiórowska-Domagalska, F. Zoll, *The Rise of...*, pp. 4 et seq.

pants is perceived (and rightly so) as one of the major factor responsible for imbalance and competitive advantage of sharing economy<sup>52</sup>. Especially for natural persons acting outside their main employment/profession some income may be non-taxable (as with VAT below certain income threshold). One possible solution would be to level up taxation (or legally consider them to be a professionals) for all these individuals engaged in sharing economy to place them on proportionally equal footing with professional undertakings. This is problematic for two reasons: First, it would de-incentivise economic initiative – a drive that is pushing economy forward, but even if it would be found acceptable on the policy grounds (the decision will be purely political) the question remains, how effective such regulatory move would be. Additionally, it can be reasonably expected that fiscal authorities will struggle with problem of underreported income, and system will be difficult to enforce in practice especially in case of these people who are really offering services sporadically or on once-off basis<sup>53</sup>. This, however, can be ameliorated by making online platforms responsible for tax collection or tasking them to facilitate tax reporting (an approach that was pioneered by Estonia).

None the less, these small-scale providers are not why this whole regulatory initiative has been launched. Furthermore, if taxation for “legacy” companies is proportionally lowered, this will be certainly good for overall competitiveness, although there may be a budget revenues issues making such step unfeasible from fiscal perspective.

We see a direct link with to the second policy dilemma: It is rather blindly assumed that administrative and regulatory burdens imposed on various professional market participants are safeguarding services’ quality, consumer protection and other policy goals<sup>54</sup>. Such assumption was possible since these regulations were imposed universally. The emergence of sharing economy demonstrated that comparable services could be provided in an alternative way without palpable detriment in quality. This, in turn raises question whether existing bipolar policy approach based on strict division between individuals and professionals is sustainable.

## VI. Conclusions

The primary regulatory issue with sharing economy is that it does not fit into mentioned dichotomic division where activities of professional market participants are governed by public law while relationships between individuals falls under the ambit of private law. In sharing economy individuals are acting in a dual, or hybrid capacity fulfilling criteria of both professional and non-professional entities at the same time. Presented controversies pertaining to interpreta-

<sup>52</sup> S.P. King, *Sharing Economy: What...*, p. 729; J. Maurer, *Sharing Economy. Regulatory...*, pp. 6–8.

<sup>53</sup> J.E. Gata, *The Sharing Economy...*, p. 4.

<sup>54</sup> *Faull & Nikpay...*, pp. 11 et seq.

tion of the notions of consumer or entrepreneur seem to be indicating that this emerging sector do not fit into existing regulatory framework.

Yet, author believes efforts should not be focused on how to fit sharing economy into existing regulation but rather how to adjust existing rules to reflect changes in markets. Instead a downward pressure could and should lead to a revision of administrative and regulatory burdens of incumbent “legacy” businesses. Current regulatory approach based on a strict bipolar relation between professional and non-professional market participants seems to be outdated. In the same vein, some may argue that public competition rules, traditionally exclusively covering activities of professional market participants, should be applicable to sporadic individual initiatives, but more importantly consumer law should also be applicable to these activities. It stands to reason that dedicated consumer law is more favourable for end-users than generic rules encapsulated in Civil law, but at time meeting these standards may not be attainable for all non-professional service providers, and thus may thwart individuals’ entrepreneurship. The policy question therefore is: How far downward adjustment of existing rules to accommodate sharing economy, should go.

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## **REGULACJA GOSPODARKI WSPÓLDZIELENIA – MIĘDZY PRAWEM PRYWATNYM A PUBLICZNYM**

Gospodarka współdzielenia, której dynamiczny rozwój zbiegł się z kryzysem, jest uznawana za jedno z najistotniejszych zjawisk świata gospodarczego ostatnich lat. Prowadzi bowiem do zatarcia tradycyjnego podziału między profesjonalnymi uczestnikami rynku (przedsiębiorstwami) a nieprofesjonalnymi (konsumentami). W sytuacji gdy usługa może być świadczona na konkurencyjnych warunkach przez podmiot, dla którego dana czynność nie stanowi podstawowej działalności, pojawia się problem regulacji takiej sporadycznej aktywności, która jest wykonywana dla zysku, ale nie w sposób zorganizowany i ciągły.

Niniejszy artykuł przedstawia kontrowersje związane z wytyczaniem granicy między publicznoprawnymi regułami określającymi zasady funkcjonowania przedsiębiorstw a tymi prywatnoprawnymi określającymi stosunki między osobami fizycznymi w kontekście naszkicowanego powyżej zagadnienia. Przedstawione zostaną kwestie definicji pojęcia ekonomii współdzielenia i związane z tym problemy z interpretacją pojęć „przedsiębiorca” i „konsument”, jak również poddane analizie dylematy, przed którymi stoją organy regulacyjne, ochrony konkurencji i prawodawcy.

