

**IMPULSE PAPER ON THE BUSINESS
AUTHORISATION/LICENSING REQUIREMENTS IMPOSED
BOTH ON PEER-PROVIDERS AND PLATFORMS

BARCELONA, BERLIN AND AMSTERDAM**

May 2016

RATING LEGIS

EXECUTIVE SUMMARY

The Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs of the European Commission commissioned this paper as part of its reflection about collaborative economy business models. The paper assesses the regulatory framework for the collaborative economy in the accommodation/tourism sector (i.e. short-term rental of rooms or apartments for touristic use offered through online platforms, and home swapping activities) in Barcelona, Berlin and Amsterdam, respectively.

The paper consists of an introduction and four sections: (i) section II sets out the rules and regulations, both in force and proposed; (ii) section III focuses on the restrictions to the freedom to provide services that we have identified in the existing regulations, their possible justifications and whether these justifications would stand a proportionality assessment in view of the EU legislation and case-law on the internal market; (iii) section IV offers a comparison of the findings in all three cities; and (iv) section V contains references and materials.

The **conclusions** of the paper may be summarised as follows:

- Home swapping activities attract no interest from regulators in either city. Therefore, none has specific rules for home swapping. This seems to be in line with the Services Directive and ECJ case law on the freedom to provide services stating that ‘services’ are normally provided against remuneration.
- In all three cities, the touristic rental of private dwellings and/or private rooms has been regulated both by local zoning authorities and by tourism regulators. These regulations include several measures which may qualify as restrictions to the freedom to provide services within the internal market. Therefore, each such measure may need to be assessed under the necessity and proportionality tests established in the applicable EU case-law.
- The following **justifications** for regulating seem to be at the core of all three systems:
 - to address the scarcity of affordable housing for citizens;
 - to address the unrest generated by the coexistence of tourists and citizens;
 - to address tax fraud and tax evasion;
 - to distinguish the activity from traditional accommodation activities, specifically addressing the interaction of intermediate on-line platforms in the new sharing economy business models; and
 - to ensure touristic services of a certain quality, thereby protecting the user of those services as a consumer.

- From a **suitability** perspective, some justifications seem more solid than others and more likely to be considered necessary to protect a legitimate State interest according to EU case-law on the internal market. For example, guaranteeing food security and/or safety in touristic dwellings (e.g. fire prevention) could justify several restrictions. Conversely, to prevent intrusiveness is not a legitimate end. In any event, stakeholders argue that a different regulatory approach to these new business models is needed.
- A **proportionality** assessment requires a more nuanced approach to each restriction. The test is whether any less restrictive means would serve the same purpose, and in the light of this test some measures do seem disproportionate. For example, a complete ban on new market entry hardly squares with EU internal market rules and case-law. Also, certain requirements imposed on on-line platforms seem at odds with the E-commerce Directive and related ECJ case-law. One way to sort the wheat from the chaff might be to distinguish a platform's role as a pure marketplace from its role as a service provider.

While the above considerations are relevant to all three cities reviewed, the extent to which each of them addresses such considerations differs greatly. Nevertheless, their rules are the result of policy choices usually based on ample social consensus.

Neither the German NCA (*Bundeskartellamt*) nor the Dutch NCA (*Autoriteit Consument & Markt*) have even considered intervening in the market for touristic rentals. Conversely, the Spanish NCA (*Comisión Nacional de los Mercados y la Competencia*) and the Catalan regional authority (*Autoritat Catalana de la Competència*) have both rather strongly opposed attempts to restrict the offer of tourist dwellings in several Spanish regions and cities, including Barcelona. Meanwhile, Spanish regional and local authorities are planning swift regulation to protect fundamental social interests.

Whatever the final policy and regulatory choices may be, some existing regulations do seem disproportionate under the EU internal market and competition rules, while some others may be absolutely necessary to address the externalities of the new sharing economy business models.

How to strike the right balance is far from clear, and this paper only aims at contributing to the discussion.

RATING LEGIS

I. INTRODUCTION

This paper is issued at the request of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (“DG GROW”) of the European Commission, within the framework of several initiatives to correctly address regulatory issues arising from collaborative economy business models.

Under the Terms of Reference of the contract awarded to Rating Legis, S.L.P. (“Rating Legis”), this paper is one of a total of three impulse papers, the aim of which is gathering expertise on how different national regulations deal with collaborative economies. Each impulse paper targets a different set of three cities.

This impulse paper shall focus on the existing regulatory framework for the collaborative economy in the accommodation/tourism sector (i.e. short-term rental of rooms or apartments for touristic use offered through online platforms and home swapping activities) in Barcelona, Berlin and Amsterdam, respectively.

The paper is divided into the following sections: (i) section II is devoted to the identification of existing rules, both in force and proposed; (ii) section III focuses on the restrictions to the freedom to provide services that we have identified in the existing regulations, their possible justifications and whether these justifications would stand a proportionality assessment in view of the EU legislation and case-law on the internal market; (iii) section IV offers a comparison of the findings in all three cities; and (iv) a list of references and materials can be found at section V.

II. IDENTIFIED LEGISLATION IN FORCE AND DRAFT LEGISLATION

This Section sets out the relevant existing legislation and draft legislation in all three cities. Please note at the outset that the activities considered in this paper may be affected by laws and regulations from very different areas (e.g. tourism, tax, planning and zoning, etc.). Having regard to the Terms of Reference, we have mainly focused on the touristic aspects related to the activity and, therefore, we only discuss regulations in other areas where such regulations are particularly relevant and/or where touristic sectorial rules refer to such regulations.

1. Barcelona

1.1 Legislation in force

We have identified the following legislation applicable to the short-term rental of rooms or apartments for touristic uses offered by peer-providers, usually through online platforms; and home swapping activities.

- Spanish Constitution¹
 - Article 47 foresees the right to a decent housing for all Spanish citizens.
 - Article 148(1) provides that Autonomous Communities (i.e. regions) may assume competences in the fields of territorial organisation; urban planning/zoning and housing (148(1) No. 3); and tourism promotion and regulation (148(1) No. 18).
- Autonomy Statute of Catalonia, i.e., Organic Act 6/2006 of 19 July 2006 on reform of the Autonomy Statute of Catalonia²
 - Article 137 states the exclusive competence of the Catalan Government in housing matters.
 - Article 171 states the exclusive competence of the Catalan Government in tourism matters.
 - Article 149 states the exclusive competence of the Catalan Government as regards the general principles/concepts of urban planning and zoning. In parallel, Article 81 states that urban planning and zoning (territorial organization and specific zoning regime) is a competence of local administrations in Catalonia.

¹ Spanish Official Journal ([*Boletín Oficial del Estado*; “BOE”](#)) No. 311, 29 December 1978, pp. 29313 to 29424.

² [BOE No. 172, 20 July 2006.](#)

- Act 29/1994 of 24 November 1994 on Urban Rentals (“LAU”)³

Article 5(e) LAU excludes from its scope of application *“the temporary transfer of a whole dwelling, furnished and equipped for immediate use, commercialised or promoted through touristic channels for profit, when such dwelling is governed by a specific regime derived from sectorial regulations”* (own translation).

Indeed, Catalonia issued sectorial regulations applicable to touristic dwellings. Nevertheless, the LAU remains applicable when dwelling rentals for touristic purposes exceed the maximum rental period set forth in the Catalan regulations.⁴

- Act 18/2007 of 18 November 2007 on the Right to Housing (“Housing Act”)⁵

Article 2 of the Housing Act lists the goals of the act, which include ensuring decent housing that meets quality and habitability requirements, social cohesion and the protection of the social function of housing.

- Organic Act 4/2015 of 30 March 2015 on the protection of public safety (“Organic Act on public safety”)⁶

Article 25(1) of this Act states the obligation for touristic accommodation owners to keep a registry of visitors.

- Regional Order IRP/418/2010 of 5 August 2010 on the obligation to register and communicate to the General Directorate of Police certain data on hosts of accommodation establishments located in Catalonia (“Order IRP/418/2010”)⁷

The Order sets out what information must be communicated to the Directorate-General of Police and the procedure to do so. Any kind of accommodation establishment is under the obligation to provide this information.

³ [BOE No. 282, 25 November 1994.](#)

⁴ Confirmed by the Directorate-General of Tourism of the Catalan Government by e-mail of 15 February 2016.

⁵ [BOE No. 50, 27 February 2008, pp. 11653 to 11696.](#)

⁶ [BOE No. 77, 31 March 2015, pp. 27216 a 27243.](#)

⁷ Catalan Official Journal (*Diari Oficial de la Generalitat de Catalunya*; “DOGC”) No. 5693, 16 August 2010.

- Regional Act 13/2002 of 21 June 2002 on Tourism in Catalonia (“Catalan Tourism Act”)⁸

Article 3 of the Catalan Tourism Act defines the objectives of the Act, which are relevant to this Paper where we discuss justifications for the restrictions that we identified (see section III.1.2 below).

Section One of Chapter III of Title III of the Catalan Tourism Act refers to the concept (Article 38) and different types (Article 39) of touristic establishments. Alongside these types, Section Two thereof introduces the concept of touristic dwellings (Article 50).⁹

- Act 2/2014 of 27 January of tax, administrative, financial and public sector measures¹⁰

Article 208 amended the Catalan Tourism Act. In particular, Article 208(4) introduced the obligation of touristic companies to display the dwelling’s Tourism Registry number in any promotional material.

- Act 3/2015 of 11 March of tax, financial and administrative measures¹¹

Article 93 modified the Catalan Tourism Act. In particular, Article 93(4), (11), (12) (13) and (15) introduced infringements and sanctions, particularly focused on intermediaries’ activities.

- Regional Decree 159/2012 of 20 November 2012 on touristic establishments and touristic dwellings (“Decree 159/2012”)¹²

⁸ [BOE No. 169, 16 July 2002, pp. 25810 to 25829.](#)

⁹ Article 50 of the Catalan Tourism Act defines “touristic dwelling” as follows:

“1. Touristic dwellings are those dwellings which are assigned to third parties by the owner, either directly or indirectly, recurrently and for consideration, for the purposes of a temporary stay, with immediate availability and with the characteristics specified by a regulation.

2. Touristic dwellings require prior communication to the relevant municipality of the start of the activity.

3. Municipalities may establish periodical control procedures on touristic dwellings under the terms and conditions established in applicable municipal ordinances. Should controls result in unfavourable findings, they may entail the termination of the administrative title [to perform the activity]” (own translation).

¹⁰ [DOGC No. 6551, 30 January 2014.](#)

¹¹ [DOGC No. 6830, 13 March 2015.](#)

¹² [DOGC No. 6268, 5 December 2012.](#)

RATING LEGIS

Title II (Articles 66 seq.) of Decree 159/2012 regulates touristic dwellings.

- Regional Act 5/2012 of 20 March 2012 on tax, financial and administrative measures and the creation of the tax on stays in touristic establishments (“Catalan Tourist Tax Act”)¹³

Title III (Articles 98 seq.) regulates the tax on stays in touristic establishments.

- Municipal Ordinance of 14 December 2015 on general municipal taxation and on the municipal tax on several services for 2016 and subsequent years¹⁴

Annex 4.1 of this Ordinance regulates the tax on commercial waste collection.

- Municipal Ordinance of 29 December 2015 on the final approval of tax ordinances for 2016.¹⁵ Among such tax ordinances
 - Ordinance No. 1.4 regulates the tax on economic activities; and
 - Ordinance No. 3.3 regulates the tax on the prior declaration of economic activities.
- Municipal Ordinance of 30 March 2001 on activities and intervention of the environmental administration of Barcelona (“OMAIIA”);¹⁶ and Decision of 15 October of 2008 of the Board of Government of the City of Barcelona, amending the OMAIIA (“Decision of 15 October 2008”)¹⁷

Article 4.1 of the OMAIIA obliges owners of any activities included in Annex III.3 thereof to submit a prior declaration.

Decision of 15 October 2008 added touristic dwelling activities to Annex III.3 of the OMAIIA.¹⁸

- Decision of 10 March 2016, adopted by the Managing Board of Ecology, Urban Planning and Mobility of the City of Barcelona, extending the

¹³ [BOE No. 83, 6 April 2012, pp. 27915 to 28021.](#)

¹⁴ [Barcelona Province Official Journal \(*Butlletí Oficial de la Província de Barcelon*; \(“BOPB”\), 14 December 2015.](#)

¹⁵ [BOPB of 31 December 2015.](#)

¹⁶ [BOPB No. 113, 11 May 2001.](#)

¹⁷ [BOPB No. 265, 4 November 2008.](#)

¹⁸ The Municipality’s technical staff orally confirmed this interpretation on 7 March 2016.

suspension of specific derived urban plans and urban planning projects and licences)¹⁹ initially established by Decision of 2 July 2015 (the “Moratorium”).²⁰

The Decision of 2 July 2015 suspended the granting of touristic licences (including activities governed by a communication regime, such as touristic dwellings²¹) in the city areas defined in an Annex during a maximum of one year. According to the Decision of 2 July 2015, the suspension expired on 3 July 2016. However, because of the extension imposed by Decision of 10 March 2016, the Moratorium will expire on 3 July 2017.

1.2 Draft legislation

- Draft regional Decree on a Tourism Regulation of Catalonia (“Draft Decree”)²²

The Draft Decree foresees a new regulation of touristic dwellings.

- Draft Special Plan on Touristic Accommodation [*Pla especial urbanística d’allotjaments turístics (PEUAT)*]²³

This is a municipal zoning proposal initially approved on 10 March 2016 and submitted to public consultation until 14 June 2016.²⁴

As regards touristic dwellings, the Draft Special Plan on Touristic Accommodation envisages: (i) a general prohibition on new touristic dwellings in the city (this is referred to as a “0 increase” on the total number of touristic dwellings); (ii) a substitution rule which enables the opening of a new dwelling in a non-overcrowded area provided that an existing touristic

¹⁹ [BOPB of 14 March 2016](#).

²⁰ [BOPB of 2 July 2015](#).

²¹ While the wording of the Moratorium is not particularly clear, this broad scope covering touristic dwellings has been confirmed orally by the City’s Licences Department on 23 February 2016.

²² There is no public official version of the Draft Decree for the moment, but the text can be found at: http://fevitur.com/images/20150730_Projecte_de_decret.pdf.

²³ [BOPB of 14 March 2016](#).

²⁴ All the official documents concerning the Draft Special Plan may be found at: <http://w10.bcn.es/APPS/secwebambit/detallAmbitAc.do?reqCode=inspect&referencia=B1463>.

dwelling ceases its activity in another area;²⁵ and (iii) a maximum number of hosts per area.

- Review process of sectorial legislation in order to regulate aspects related to the sharing economy business models.²⁶

On 5 April 2016 the Catalan Government announced a review of sectorial legislation so as to adapt it to the new sharing economy business models. A legislative proposal shall be submitted to the Catalan Parliament within a one-year term.

The stated aim is to amend existing sectorial laws in order to introduce defining criteria, obligations and sanctioning regimes for the sharing economy agents. New rules shall guarantee greater legal certainty; ensure compliance with consumer, employment and tax laws; and avoid unfair competition in each specific sector.

The Government shall also promote the elaboration of a Code of Good Practice for the sharing economy business models. Producers, users and on-line platforms may voluntarily adhere.

As regards on-line platforms, the Government shall promote collaboration agreements regarding the information to be provided on the activities of users. Furthermore, the Government might table specific legislation for on-line platforms.

9

1.3 Unregulated aspects

We have not identified any specific rule regulating home swapping or couch surfing activities. Since these activities are not for consideration they do not attract the

²⁵ On 2 April 2014, the Catalan High Court (TSJ) declared a similar system of substitution to be incompatible with the Spanish administrative legislation, since it increased discretionality in a regulated area such as the right of access to an activity (judgment No. 199/2014, Appeal No. 380/2010, upheld by the Spanish Supreme Court on 17 December 2015 in Appeal No. 2696/2014, on the Uses Plan of the Ciutat Vella district).

Purportedly, the difference with the new Draft Special Plan on Touristic Accommodation might be that the new substitution rule does not require a swap (between a touristic dwelling exiting the market and a new dwelling entering the market), but a decision which the Municipality is to take upon request on a first come first served basis. If this were the case, the Spanish judiciary would have to take a clear view on this new aspect.

²⁶ http://premsa.gencat.cat/pres_fsvp/AppJava/notapremsavw/291907/ca/govern-revisara-normativa-sectorial-actualitzar-regular-leconomia-collaborativa.do

attention of regulators.²⁷ Home swapping and couch surfing activities are therefore governed by the provisions on lending of the Spanish Civil Code.²⁸

²⁷ Orally confirmed by the City's Licences Department and by the Directorate-General of Tourism of the Catalan regional Government. The latter added both at the joint Catalan Competition and Spanish Competition Authorities event "New challenges for competition", 16 and 17 July 2015 (available at: <http://acco.gencat.cat/ca/detall/article/VIII-Jornadas-Defensa-de-la-Competencia-esp>) and during our meeting on 23 February 2016 that it has no interest in regulating activities that are not for consideration. The City also shares this view, as confirmed at our meeting of 29 February 2016.

Interestingly enough, however, the Catalan Competition Authority indicated during our meeting on 1 March 2016 that this kind of activities should also be considered within the total offer when assessing the impact of tourism in particular cities.

For further reference, it is worth noting that [Article 2\(1\) of Act 17/2009 of 23 November 2009 on free access to services activities and their provision](#) ("Act 17/2009", which implements the Services Directive into Spanish law) only includes within its scope of application the services activities which are provided for consideration. The wording does not derive from the equivalent Article 2 of the Services Directive, even if Article 4 thereof and the relevant case law of the European Court of Justice indicate that "services" are normally provided for consideration.

²⁸ Book Four regulates Obligations and Contracts and, in particular, Chapter 1 of Title X of the Spanish Civil Code regulates the lending of non-fungible goods.

2. Berlin

2.1 Legislation in force

We have identified the following legislation applicable to the short-term rental of rooms or apartments for touristic use offered through online platforms and home swapping activities.

- German Federal Constitution²⁹

Article 74 states the concurrent legislative powers as regards land distribution (paragraph 30) and regional planning (paragraph 31).

- Berlin Constitution³⁰

Article 28 states the right to adequate housing. The Land shall promote the creation and maintenance of adequate housing.

- German Civil Code (*Bürgerliches Gesetzbuch*, “BGB”)³¹

Pursuant to Article 540(1) BGB, the lessee shall not allow a third party to use the leased property, in particular not sublet it, without the lessor’s permission. If the lessor refuses permission, the lessee may terminate the lease with the statutory notice period, unless the identity of the third party justifies such refusal.

Article 540(2) adds that a lessee allowing a third party to use the property is responsible for that third party’s use of the property regardless of the lessor’s permission.

- Rental Law Improvement Act [*Gesetz zur Verbesserung des Mietrechts und zur Begrenzung des Mietanstiegssowie zur Regelung von Ingenieur- und Architektenleistungen* (*Mietrechtsverbesserungsgesetz - MRVerbG*)] of 4 November 1971.

²⁹ Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette (*Bundesgesetzblatt*, “BGBl.”) Part III, classification number 100-1, as last amended by the Act of 11 July 2012 (BGBl. Part I, p. 1478). English version available at: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0320.

³⁰ Regional Official Journal (*Gesetz- und Verordnungsblatt*, “GVBl.”) of 23 November 1995, p. 779. English version available at: <https://www.berlin.de/rbmskzl/en/the-governing-mayor/the-constitution-of-berlin/>.

³¹ In the version promulgated on 2 January 2002 (BGBl. 2002 Part I, p. 42, 2909; and BGBl. 2003 Part I, p. 738).

Article 6 § 1 of the MRVerbG empowers German regions or *Länder* – of which Berlin is one – where an adequate housing supply for the population is in danger to prohibit the use of dwellings for purposes other than residential use.

In a landmark judgment, the German Federal Constitutional Court³² held that remedying scarce housing supply is strictly the only legitimate use of such empowerment. Conversely, the social tissue in a given area, gentrification, or pauperisation are issues which do not warrant legislation pursuant to the MRVerbG.

- Regional Construction Act (*Bauordnung für Berlin*; “BauO Bln”) of 29 September 2005³³

While the BauO Bln does not define a “touristic dwelling”, the latter is a “home” (Article 49 BauO Bln) according to the official indications regarding the BauO Bln (hereinafter, “BauO Bln Indications”).³⁴

The BauO Bln Indications expressly state that a building with touristic dwellings is considered to have a residential use. Thus, the requirements for standard buildings apply to such building.

According to the above it must be concluded that, from a construction law perspective, house dwellings do not need to meet additional requirements.

- Regional housing surveillance Act [*Gesetz zur Beseitigung von Wohnungsmissständen in Berlin (Wohnungsaufsichtsgesetz - WoAufG Bln)*] of 3 April 1990³⁵

Pursuant to Article 8 WoAufG Bln, the housing supervisory authorities may remedy housing grievances in Berlin when the (holiday) flats are used in a way that could disturb or harass residents and neighbours.

³² <http://www.kanzlei-wenderoth.de/app/download/5798903892/BVerfG+1975+Verfassungsm%C3%A4%C3%9Figkeit+%2C+Genehmigung.pdf>.

³³ <http://www.stadtentwicklung.berlin.de/service/gesetzestexte/de/download/bauen/BauOBln.pdf>.

³⁴ See page 105 of the BauO Bln Indications, available at: <http://www.stadtentwicklung.berlin.de/bauen/bauaufsicht/download/ehb-print.pdf>.

³⁵ http://www.stadtentwicklung.berlin.de/service/gesetzestexte/de/download/bauen/woaufg_16.10.2001.pdf.

- The law prohibiting the misuse of dwellings (*Gesetz über das Verbot der Zweckentfremdung von Wohnraum*; “ZwVbG”) of 29 November 2013, by means of which Berlin used the empowerment of the MRVerbG³⁶

The requirements and details of this law are specified by:

- the ZwVbG Regulation (*Verordnung über das Verbot der Zweckentfremdung von Wohnraum – Zweckentfremdungsverbot-Verordnung*; “ZwVbVO”) adopted on 4 March 2014, as last amended on 22 March 2016;³⁷ and
- implementing regulations (*Ausführungsvorschriften über das Verbot der Zweckentfremdung von Wohnraum*; “AV-ZwVb”) of 23 June 2014.³⁸
- Regional law on administrative fees (*Verwaltungsgebührenordnung*; “VGebO”) of 24 November 2009, as last amended on 16 July 2013³⁹ (namely tariff number 6004).
- Federal Income Tax Act (*Einkommensteuergesetz*; “EStG”), restated on 8 October 2009 and last amended on 21 December 2015.⁴⁰
- Federal Trade Tax Act (*Gewerbsteuergesetz*; “GewStG”), restated on 15 October 2002 and last amended on 2 November 2015.⁴¹

13

2.2 Draft legislation

- Draft Amendment Act prohibiting the misuse of living space (hereinafter; “Amendment Act”).

³⁶http://gesetze.berlin.de/jportal/portal/t/a5/page/bsbeprod.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&docid=jlr-WoZwEntfrGBErahmen&doc.part=X&doc.price=0.0#focuspoint

³⁷

http://gesetze.berlin.de/jportal/portal/t/fd6/page/bsbeprod.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&docid=jlr-WoZwEntfrGBErahmen&doc.part=X&doc.price=0.0#focuspoint

³⁸http://www.stadtentwicklung.berlin.de/wohnen/zweckentfremdung_wohnraum/download/abl_2014_28_1285_1332.pdf

³⁹<http://gesetze.berlin.de/jportal/?quelle=jlink&query=VwGebO+BE&psml=bsbeprod.psml&max=true&aiz=true>

⁴⁰<https://www.gesetze-im-internet.de/bundesrecht/estg/gesamt.pdf>

⁴¹<http://www.gesetze-im-internet.de/gewstg/BJNR009790936.html>

According to a press release published on 24 March 2016,⁴² the House of Representatives (*Abgeordnetenhaus*) approved the amendment on 17 March 2016.⁴³1

Section III.2.1.2 of this Report includes the main issues covered by this Amendment Act. Although the current ZwVbVO already includes these amendments we shall analyse them, separately, under Section III.2.1.2.

2.3 Unregulated aspects

According to the information orally provided by the City (Senate Department for Urban Development and the Environment), there is no specific regulation regarding home swapping and couch surfing activities.

Moreover, pursuant to indication 8.9 of the AV-ZwVb home swapping cannot be construed as a misuse of living space. Consequently, we understand that the general rules of the German Civil Code may apply to these activities.

Likewise, online platforms are not covered by any specific legislation. Nevertheless, according to information provided by the City and taking into account the wording of the Amendment Act, this Act deals with online platforms to the extent necessary for controlling the activities (Article 1.3 of the Amendment Act).

14

⁴²

http://www.stadtentwicklung.berlin.de/aktuell/pressebox/archiv_volltext.shtml?arch_1603/nachricht5959.html

⁴³ The Amendment Act was published on 5 April 2016 (see page 3, ‘Gesetz- und Verordnungsblatt für Berlin’):

http://www.stadtentwicklung.berlin.de/wohnen/zweckentfremdung_wohnraum/download/GVB_Nr9_05.04.2016_aenderungZwVbG.pdf

3. Amsterdam

3.1 Legislation in force

The City of Amsterdam distinguishes three different forms of short-term rental, which are subject to separate sets of regulation: (i) bed & breakfast (B&B), which is the technical term for renting out single rooms in a given home; (ii) holiday rental (*vakantieverhuur*) of entire homes for periods ranging from one (1) night to two (2) months; and (iii) short stay in entire homes whose rules applies to rentals from seven (7) nights to six (6) months.

Each of these three modalities is subject to specific rules as well as to certain general rules applying to all three, namely:

- Dutch General Planning Act of 20 October 2006 [*Wet van 20 oktober 2006, houdende nieuwe regels omtrent de ruimtelijke ordening (Wet ruimtelijke ordening)*];⁴⁴ and any Zoning Plan which the City establishes pursuant to such Act (*bestemmingsplan*);⁴⁵
- Dutch Housing Act of 4 June 2014 [*Wet van 4 juni 2014, houdende nieuwe regels met betrekking tot de verdeling van woonruimte en de samenstelling van de woonruimtevoorraad (Huisvestingswet 2014)*]⁴⁶ and its rules on withdrawing housing from the market (*woningonttrekking*), which are complemented by
- Amsterdam's Regional Housing Regulation of 15 December 2009 as restated on 19 December 2012 (*Regionale Huisvestingsverordening Stadsregio Amsterdam 2013*);⁴⁷
- Dutch Building Decree of 29 August 2011 as last amended on 12 November 2015 [*Besluit van 29 augustus 2011 houdende vaststelling van voorschriften met betrekking tot het bouwen, gebruiken en slopen van bouwwerken (Bouwbesluit 2012)*], notably imposing certain conditions of security and fire-resistance;⁴⁸

⁴⁴ <http://wetten.overheid.nl/BWBR0020449/2015-07-01>.

⁴⁵ www.bestemmingsplannen.amsterdam.nl.

⁴⁶ <http://wetten.overheid.nl/BWBR0005674/2014-04-15>.

⁴⁷

http://decentrale.regelgeving.overheid.nl/cvdr/XHTMLoutput/Historie/Haarlemmermeer/326981/326981_1.html.

⁴⁸ <http://vrom.bouwbesluit.com/Inhoud/docs/wet/bb2012>.

- Local Building Regulation of 4 July 2013 (*Bouwverordening Amsterdam 2013*);⁴⁹
- Local Fire-Safety Regulation of 18 November 2013 (*Brandbeveiligingsverordening 2011*);⁵⁰
- Local Tourist Tax Regulation as last amended on 6 November 2014 (*Verordening toeristenbelasting 1999*) imposing a flat local tax on any rent paid by tourists staying in Amsterdam;⁵¹
- Amsterdam Ordinance on inland waterways of 1 February 2010 [*Verordening op het binnenwater 2010 (VOB)*], which was amended on 30 June 2015 to insert a new Article 2(3)(6) expressly prohibiting touristic rentals of houseboats subject to implementing rules by the City;⁵² and
- fines which the City imposes for infringements of the Housing Act and implementing regulations pursuant to a Communication on sanctions published in October 2009 (*Beleidsnotitie Bestuurlijke boete Huisvestingswet*),⁵³ which range from €405 to €18,500, regardless of whether the culprit is a private individual or a corporation.

3.1.1 *Bed&Breakfast*

Rentals of individual rooms in private homes for consideration are subject to the same quantitative restrictions as hotels, applied by each borough (*stadsdeel*) through the applicable Zoning Plan.

On 16 February 2016, the City complemented its existing rules with a set of conditions specifically designed for houseboats (*Toeristische verhuur van woonboten. Beleidsregels voor de toeristische verhuur van een woonboot*),⁵⁴ under which touristic rentals are allowed as an exception to Article 2.3.6 VOB (see above).

⁴⁹ http://www.regelgeving.amsterdam.nl/bouwverordening_amsterdam_2013.

⁵⁰ http://www.regelgeving.amsterdam.nl/brandbeveiligingsverordening_2011.

⁵¹ <http://decentrale.regelgeving.overheid.nl/cvdr/XHTMLoutput/Actueel/Amsterdam/73023.html>.

⁵² <https://zoek.officielebekendmakingen.nl/gmb-2015-77220.html>.

⁵³ <https://www.amsterdam.nl/publish/pages/412634/beleidsnotitiebestuurlijkeboete.pdf>.

⁵⁴ https://www.amsterdam.nl/publish/pages/593837/beleidsregels_toeristische_verhuur_van_een_oonboot.pdf.

3.1.2 Holiday rental

Holiday rental was regulated with a double aim of integrating such rental in the social environment (no nuisance, no withdrawal of housing from the market) and keeping it “human” (no excesses or security risks).

After broad consultation of stakeholders, the City published a Notice in June 2013 which set out such objectives in detail (*Toeristische verhuur van woningen* (“*vakantieverhuur*”) in Amsterdam).⁵⁵ On this basis, the City approved a specific ‘Guest Rooms’ Regulation on 7 January 2014 [*Ruimte voor Gasten, een uitwerking van de notitie toeristische verhuur van woningen* (*vakantieverhuur*)],⁵⁶ which expressly allowed occasional rentals during vacations “under strict conditions.”

The City’s Notice for houseboats, mentioned at section 3.1.1 above, also contains rules for holiday rentals.

3.1.3 Short Stay

A survey in 2008 found that Amsterdam lacked a sufficient offer of apartments for short-term rentals. The City published a first regulatory Notice in 2009, which included a low quota by borough, then increased the quota as of 1 November 2012 while at the same time exempting newly built apartments from the licence requirement.

The 2013 Regional Housing Regulation dedicated its Section 4 (Articles 38 to 41) to Short Stay, empowering the City to (i) make an exception to the ban on withdrawing dwelling from the market on condition of weighing stakeholders’ interests against each other; and (ii) establish quotas.

In 2014 the City published a new Notice (*Beleidsnotitie short stay 2014*),⁵⁷ which regulates rentals of entire dwelling units for at least seven (7) nights and up to six (6) months with an aim to addressing the increasingly blurred distinction between holiday rentals, Short Stay and regular hotels.

⁵⁵https://www.amsterdam.nl/publish/pages/593837/notitie_toeristisch_verhuur_van_woningen.pdf.

⁵⁶ https://www.amsterdam.nl/publish/pages/593837/raadsvoordracht_februari_2014.pdf.

⁵⁷ https://www.amsterdam.nl/publish/pages/590213/notitie_short_sty_2014.pdf.

3.2 Draft legislation

There is no draft legislation awaiting adoption now that the houseboat Regulation was adopted on 16 February 2016.

However, the City did publish an “Action Plan Sharing Economy”⁵⁸ (*Actieplan Deeleconomie*) on 8 March 2016, emphasising its view that “the Sharing Economy is not a question of prohibiting or allowing, but of an active influence, intensive monitoring and using chances wherever possible” (p. 2).

The plan sets out the following “challenges for laws, regulations and administrative action”: explosive growth; creating a level playing field; disruption of existing markets; social security and labour rights; and changing values (p. 9). It also asks ten questions to determine the impact of a given initiative within the sharing economy:

- 1) Does the initiative relate to the sharing economy?
- 2) Does the initiative fit into the City’s vision of the sharing economy?
- 3) Does the initiative adhere to the City’s targets?
- 4) What are the benefits of the initiative?
- 5) What is the scope of the initiative?
- 6) Does the initiative aim at an existing market?
- 7) Do any regulations apply and, if so, which are they?
- 8) What is the aim of such existing regulations?
- 9) In what regard does the initiative not fit within existing regulations?
- 10) Does the initiative entail danger, fraud, worries or nuisances?

18

Along these lines, the City assessed how the three types of tourstic dwellings discussed above work in practice and recently published a report on its findings (the ‘Assessment Report’).⁵⁹

The Assessment Report relies on a wide array of data summarised as follows (p. 10):

- In 2015, a total of 22,000 dwellings were rented out at least once, which is a 33% increase from 2014. Bed&Breakfast increased by 83%; holiday rental by 38%; and Short Stay by 10%, respectively.
- This means that an estimated 5% of total dwellings is used by tourists at some stage, which is 2 percentage-points more than in 2014.
- Offer data do not reveal actual rentals. A dwelling may be offered for one day, one week or 365 days a year.

⁵⁸ <http://www.sharenl.nl/nieuws/2016/03/09/actieplan-deeleconomie>.

⁵⁹ “Assessment of Home Rentals to Tourists” (*Evaluatie toeristische verhuur van woningen*): https://www.amsterdam.nl/publish/pages/766047/evaluatie_toeristische_verhuur_van_woningen.pdf, published on 18 March 2016.

- Approximately 7% of all tourist bookings in 2015 occurred via an Internet platform, which is 2 percentage-points more than in 2014 (5%).⁶⁰
- A new line of business has arisen, known as “key companies” (*sleutelbedrijven*). These are a separate target group for the City, both in terms of communications and of management.⁶¹

Based on such findings, the Assessment Report sets out three main conclusions:

3.2.1 Holiday rental calls for limits

The City is prepared to allow holiday rental of private dwellings but is aware of overcrowding and ensuing nuisances. Therefore an annual 60-day cap is in force. Based on the findings of the Assessment Report, the City will (i) propose Federal legislation on mandatory notification of dwellings rented to tourists; (ii) devote more resources to enforcement; and (iii) assess whether it is legally admissible to reduce the annual cap below 60 days.

3.2.2 Short Stay is outdated

Short Stay was designed in 2009 to increase the offer of lodgings, which was insufficient at the time (see section 3.1.2 above). The Assessment Report shows that there is now sufficient offer due to holiday rental and apartment hotels. Moreover, the City has found massive infringements of the Short Stay rules, leading to overcrowding in certain districts. Therefore, the City will strive to gradually reduce Short Stay in residential areas and not extend or grant any permits in existing buildings.

3.2.3 Cooperation with platforms must improve

The Assessment Report only mentions by name Airbnb, that honoured all its commitments towards the City. However, the City intends to more actively fight illegal offers on Airbnb. Therefore, further cooperation with Airbnb will be conditional on reducing illegal offers on the latter’s website.

3.3 Unregulated aspects

The Dutch authorities have refrained from regulating two aspects that are relevant to this paper.

⁶⁰ Of this total, 75% were bookings via Airbnb and 25% via other platforms (p. 8).

⁶¹ This term is used by companies offering outsourcing services to lessors of dwellings, from check-in to clean-up. The individual portfolio varies from 10 to over a hundred dwellings, and so does the precise scope of services offered (p. 11).

3.3.1 *Digital platforms*

Much effort was made to ascertain the need for regulating digital platforms, expressly bearing in mind the economic importance of two such platforms on the holiday rental market, Airbnb and Wimdu. In 2014, the Dutch Minister of Economy commissioned a study to this end,⁶² whose results he summarised in a letter of 18 December 2015 to the Second Chamber of Dutch Parliament.⁶³

The Minister's conclusion is that every platform is unique and, in the event of problems, best regulated at the sectoral, regional or management level where this problem arises. Also, platforms may contribute to public interest by improving market functioning through more transparent prices or improving reputational issues.

A report jointly commissioned by this Minister and the Ministry of Infrastructure and the Environment found that a major risk associated with platforms in the sharing economy is failing consumer protection. This includes the lessor using the platform to market their dwelling, who perceives the platform as "safe" yet is unaware of the legal consequences of using such platform, especially of liability issues.⁶⁴

3.3.2 *Home-swapping*

Home-swapping is not regulated either by the City of Amsterdam or at any other level of the Dutch hierarchy of norms. According to the City, this is due to the "very marginal" importance of a phenomenon defined as an exchange of dwellings not involving consideration.⁶⁵

⁶² "Digital platforms: an analytical framework for identifying and evaluating policy options" (2015) by a consortium the consultants TNO, Ecorys and IVIR, which is available in English at: <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2015/11/09/digital-platforms-an-analytical-framework-for-identifying-and-evaluating-policy-options/digital-platforms-an-analytical-framework-for-identifying-and-evaluating-policy-options.pdf>.

⁶³

<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/12/18/kamerbrief-over-toekomstbestendige-wetgeving-digitale-platforms-en-de-deeleconomie-waaronder-particuliere-verhuur-aan-toeristen/kamerbrief-over-toekomstbestendige-wetgeving-digitale-platforms-en-de-deeleconomie-waaronder-particuliere-verhuur-aan-toeristen.pdf>.

⁶⁴ shareNL: "Innoveren in de Deeleconomie. Een inventarisatie van kansen en belemmeringen die innovatieve investeringen in de deeleconomie, op het gebied van groene groei, (on)mogelijk maken" (2015), p. 22.

⁶⁵ Interview with the City of Amsterdam on 4 March 2016.

III. FINDINGS - LEGAL ASSESSMENT

This section focuses on the restrictions to the freedom to provide services that we have identified in the existing regulations, their possible justifications and whether these justifications would stand a proportionality assessment in view of the EU legislation and case-law on the internal market.

Given the scarcity (virtually non-existence) of EU case-law on the impact of sharing economy business models in the EU internal market,⁶⁶ the task undergone in this paper is necessarily limited to our own interpretation of judgments concerning different business models and different regulations from the ones analysed herein. Nonetheless, as required in the Terms of Reference, we have signalled the case-law that could uphold our statements wherever it has been feasible. Obviously, this approximation is necessarily subjective and only future judgments will allow a more objective positioning on this matter.

1. Barcelona

1.1 Restrictions identified

1.1.1 Legislation in force

The short-term rental of touristic dwellings in Barcelona is expressly foreseen in Article 50.bis of the Catalan Tourism Act and Article 66 of Decree 159/2012.⁶⁷

Our assessment of the rules applicable to short-term rental of dwellings for touristic purposes identified the following legal requirements as eventually capable of limiting or discouraging the provision, commercialisation or use of the rental service.

a) Features of the touristic dwelling

Pursuant to Articles 66, 67, 68(5) and 68(10) of Decree 159/2012, touristic dwellings are subject to the following limitations:

⁶⁶ On 5 October 2015 a question for a preliminary ruling was put to the European Court of Justice ("ECJ") by the Rechtbank van koophandel Brussel (Belgium) on the compatibility of a local regulation of the taxi service which is said to include Uber-type services, with the rules of the internal market. The case is pending under the reference C-526/15, *Uber Belgium BVBA v Taxi Radio Bruxellois NV*.

⁶⁷ Some relevant stakeholders consider that, in practical terms, it is difficult to develop regional regulation at local level.

- The rental must refer to the entire dwelling. Room rental for touristic uses is therefore prohibited.⁶⁸
- The dwelling must be rented at least twice per year and none of the rentals shall exceed 31 consecutive days.
- The dwelling must hold an occupancy certificate; the rental must not exceed the occupancy capacity stated in the occupancy certificate; the dwelling must meet all technical and quality requirements mandatory for any dwelling; it must be fully furnished and in perfect hygienic conditions, and the owner of the dwelling must provide the hosts and the neighbours with a telephone number to be contacted in case of emergency related to the dwelling, as well as with a dwelling maintenance service.
- Inside the dwelling the following must be displayed: information on the availability of consumer complaint forms; a telephone number where the owner may be contacted in an emergency related to the dwelling; and the official number of the prior declaration as assigned upon submission.
- The owner of the dwelling may not impair inspection of the touristic dwelling alleging its residential nature.

b) Urban plans and the relevant homeowners' association must not prohibit the touristic use of the dwelling

Pursuant to Article 68(6) of Decree 159/2012, renting a touristic dwelling is only possible if such use is not prohibited either by zoning regulations⁶⁹ or by the homeowners' association by-laws of the building of which the dwelling is a part.

⁶⁸ The Directorate-General of Tourism of the Catalan regional Government confirmed this in a meeting on 23 February 2016. This is one of the aspects of the current legislation that the Draft Decree may change (see Section III.1.1.2 below).

Some relevant stakeholders consider, however, that refraining from applying the touristic legislation to room rental does not outlaw this activity, which ought to be covered by general civil legislation on urban rentals. This issue remains controversial.

⁶⁹ Recital 9 of the Services Directive indicates that urban planning and zoning regulations are not within the Directive's material scope of application. However, such regulations must not constitute an indirect means of subverting internal market rules. Actually, town and country planning may be a legitimate general interest justifying restrictions to the fundamental freedoms, but, as such, planning must be suitable and proportionate to the aim it seeks to protect. ECJ Judgment of 24 March 2011, C-400/08, *Commission v Spain*, ECLI:EU:C:2011:172, § 74

In this connection, it is worth highlighting that the exclusion of urban planning instruments from the scope of the freedom to provide services (and, specifically, the Services Directive) was one of the rationales that led both the Catalan Superior Court of Justice and the Spanish Supreme Court to (partially) uphold the Uses Plan of Ciutat Vella approved by the City Council of Barcelona on 23 July

c) Administrative requirements

- Prior declaration

Pursuant to Article 11 of the OMAIIA, Article 50.bis(2) of the Tourism Act and Article 68(1) of Decree 159/2012, owners of touristic dwellings must submit a prior declaration of their rental activity to the City of Barcelona.⁷⁰ Additionally, if the dwelling is managed by a third person, that third person must also submit a prior declaration.⁷¹

The presentation of the prior declaration is currently taxed €227.⁷²

According to Article 11(1) of the OMAIIA and Article 68(2) of Decree 159/2012, the prior declaration must contain the following information/documentation:

- 1- technical description of the activity and certification of the means of waste collection (private collector company or City public collection);
- 2- identification of the dwelling and its maximum capacity;
- 3- identification of the owner of the dwelling;
- 4- telephone number for an immediate response to any matter related to the rental of the dwelling;
- 5- identification of the company in charge of the maintenance of the dwelling; and
- 6- the owner's statement confirming (i) the dwelling's occupancy certificate; (ii) the absence of prohibitions on touristic rental of the dwelling under the by-laws of the homeowners' association; and (iii) the prior communication to the homeowners' association of the use for touristic rental.

- Registration in the Catalan Tourism Registry

2010 (*Pla especial d'establiments de concurrència pública, hosteleria i altres serveis del districte de Ciutat Vella*). See footnote 25 above.

The Draft Special Plan on Touristic Accommodation (see Section II.1.2 above), initially approved by the City of Barcelona on 10 March 2016, may be especially relevant in this regard as well, since its legal basis is also local planning and zoning competences.

⁷⁰ Since the Services Directive prohibited general authorisation schemes, prior communication or a statement is currently the general regime foreseen in Act 17/2009 for acceding to services activities in Spain (Article 7).

⁷¹ We understand that the term "manager" of touristic dwellings does not include on-line intermediary platforms, since the latter only promote and commercialise the dwelling, without interfering in the actual rental activity. This was confirmed by the Directorate-General for Tourism of the Catalan regional Government in the interview on 23 February 2016.

⁷² Point 2.5 of Section II of the Annex of Ordinance 3.3 of the Municipal Ordinance of 29 December 2015, on the definitive approval of tax ordinances for 2016.

Both the Tourism Act (Article 73) and Decree 159/2012 (Article 68(8)) require the owners of touristic dwellings to register with the Catalan Tourism Registry. Registration is actually done *ex officio* once the City verifies that the owner's declaration complies with all requirements. Moreover, there is an obligation to display the registry number (i) inside the dwelling; and (ii) in any promotional material referring to the dwelling. This second obligation concerns the owner and any eventual intermediary that commercialises or promotes the touristic dwelling (e.g. an online platform).

- Communication of the hosts' identities to the Police

Both the Tourism Act (Article 29) and Decree 159/2012 (Article 70) require the owners of touristic dwellings to keep a host registry and to forward it to the Directorate-General of Police on the basis of the obligations contained in the Organic Act on public safety (Article 25). Owners of touristic dwellings must forward the information within a 24-hour deadline from the arrival of the hosts (Article 6 of Order IRP/418/2010).

- Obligation of the owner of the dwelling to provide consumer complaint forms

Article 68(9) of Decree 159/2012 obliges the owners of touristic dwellings to have complaint forms from the Consumers Authority and provide hosts with them in case of request.

- Fines

Chapter I of Title VI of the Tourism Act foresees three types of infringements: minor infringements, serious infringements, and very serious infringements, which are regulated as follows:

Minor infringements (Article 87) are those that do not have serious economic implications or do not cause serious damages to the users of the dwelling, such as minor maintenance deficiencies, for instance. Minor infringements are sanctioned with fines that may amount up to €3,000 (Article 94(1)(a)).

Serious infringements (Article 88) refer to cases where the dwellings meet the necessary material requirements to carry out the rental activity, but do not meet the formal ones, such as having submitted the prior declaration (Article 88(a)), display the dwelling registry number when promoting or commercialising the dwelling (Article 88(u).ter), or provide the users with consumers' complaint forms (Article 88(p)). In these cases, the activity may be legalised if the formal requirements are complied with. Serious infringements are sanctioned with fines ranging from

€3,001 to €30,000 and/or the cease of the activity for a maximum period of one year (Article 94(1)(b)).⁷³

Very serious infringements are cases where the dwellings do not meet the necessary material nor the formal requirements (Article 89(a)), such as renting or commercialising a dwelling without an occupancy certificate. In these cases, the activity may only be legalised if the owner makes the necessary changes to the dwelling in order to satisfy the material requirements. Very serious infringements are sanctioned with fines ranging from €30,001 to €600,000 and/or the temporary (two years) or definitive cease of the activity (Article 94(1)(c)).

According to Article 72 of Decree 159/2012, where a person other than the owner manages the dwelling, both the owner and the manager shall bear joint responsibility for any infringement.

d) Requirements particularly affecting intermediaries such as online platforms

Article 208(4) of Act 2/2014 of 27 January of tax, administrative, financial and public sector measures modified the Catalan Tourism Act and introduced the obligation to display the dwelling's Tourism Registry number in any material promoting its rental.

Later on, Act 3/2015, of 11 March, of tax, financial and administrative measures amended again the Catalan Tourism Act introducing some other new rules specifically addressed to intermediary platforms:

- Obligation to collaborate with inspectors

Article 80.bis of the Catalan Tourism Act foresees the obligation of legal and physical persons to provide tourism inspectors with any required information related to their own activities and the activities of any person bearing touristic obligations, and highlights that this collaboration obligation concerns, in particular, intermediaries and whoever intervenes in the promotion, offer, or mediation of a touristic service or activity.

- Fines

The promotion of dwellings without displaying the Tourism Registry number and the promotion of dwellings that have not obtained the necessary approval (i.e. submitted the prior declaration and obtained a Registry number) are to be

⁷³ Please note that owners have been sanctioned with the closure of the rental activity and economic fines. See for instance: http://ccaa.elpais.com/ccaa/2016/01/18/catalunya/1453126523_925887.html.

considered serious infringements (Article 88(u)ter and (u)quarter of the Catalan Tourism Act). These infringements are sanctioned with fines ranging from €3,001 to €30,000 and/or the cease of the activity for a maximum period of one year (Article 94(1)(b) of the Catalan Tourism Act).⁷⁴

The commercialisation of touristic dwellings that do not meet the necessary requirements in order to obtain approval of the activity⁷⁵ constitutes a very serious infringement (Article 89(g) of the Catalan Tourism Act). Such infringement is sanctioned with fines ranging from €30,001 to €600,000 and/or the temporary (two years) or definitive cease of the activity (Article 94(1)(c) of the Catalan Tourism Act).⁷⁶

Furthermore, Article 91(1) of the Catalan Tourism Act foresees the joint liability of legal or physical persons that may intervene in the rental activity and whose responsibility cannot be clearly individualised.⁷⁷

e) *Tax obligations*

- Touristic user's night tax

⁷⁴ Please note that sanctions have been imposed on platforms. Airbnb and HomeAway have recently been fined €60,000 each for promoting and commercialising touristic dwellings without displaying the Catalan Tourism Registry Number (which is a serious infringement pursuant to Article 88(u)ter of the Tourism Act) and for opposing to collaborate with public authorities during inspections (a serious infringement under Article 88(m) and 88(t) of the Tourism Act). See for instance: <http://www.lavanguardia.com/local/barcelona/20151221/30951426389/barcelona-sanciona-airbnb-homeaway.html>.

⁷⁵ Touristic dwellings do not strictly need to obtain approval, but owners must submit a prior declaration and will be registered at the Catalan Tourism Registry if the prior declaration complies with the legal requirements. These are listed in Article 68(2) of Decree 159/2012 and concern the obligation to provide a telephone number to be contacted in case of emergency related to the dwelling, the obligation to provide identification of the company providing a dwelling maintenance service and the obligation to hold an occupancy certificate.

⁷⁶ As orally confirmed by the technicians of the Directorate-General for Tourism of the Catalan Government, an online platform does not infringe this provision if the dwellings it commercializes do have a registration number. Registration formally ensures compliance with requirements and no further verification is required from intermediaries.

⁷⁷ Joint liability is also foreseen in Decree 75/2015 of 15 May 2015, on hotel establishments in the Autonomous Community of Valencia. The first additional provision in this Decree (amendment of Article 10 of Decree 92/2009 of 3 July 2009, on touristic dwellings and management companies, legal entities or individuals) foresees joint liability of online platforms that do not comply with the provisions on the publicity of touristic dwellings. Spanish version available at: http://www.docv.gva.es/portal/ficha_disposicion_pc.jsp?sig=004536/2015&L=1

Pursuant to the Catalan regulations,⁷⁸ the owner of a touristic dwelling is required to collect the touristic user's night's tax. The tax amounts to €0.65 per night.⁷⁹

- Tax on commercial waste collection

Pursuant to Barcelona's municipal regulations,⁸⁰ the owner of a touristic dwelling is required to pay the tax of commercial waste collection. The tax may amount up to €951.93 (depending on the dwelling's surface) and is due annually.⁸¹

- Registration with the Tax Agency and Economic activities tax

Since the rental of a touristic dwelling is considered an economic activity, its owner and any intermediary must register with the Tax Agency and pay the tax on economic activities if (i) they are legal persons; and (ii) their annual income exceeds €1 million.⁸²

f) *Suspension of touristic licences*

The Moratorium suspended the granting of touristic licences in Barcelona (in the area defined in an Annex to the municipal Decision of 2 July 2015) during one year,⁸³ which has now been extended one more year (until 3 July 2017). The suspension affects prior declarations of new touristic dwellings and entails an absolute restriction (i) for the owner of the dwelling, to provide the rental service; (ii) for the intermediary, to commercialise new dwellings; and (iii) for the user of the service, to access the rental service.

27

1.1.2 *Draft legislation*

The Draft Decree introduces few changes to the current regulation of touristic dwellings. The administrative obligations of dwellings' owners remain essentially the same, with the particularity that the prior communication required by the

⁷⁸ Article 105 of the Catalan Tourist Tax Act.

⁷⁹ Article 107(3) of the Catalan Tourist Tax Act.

⁸⁰ Article 2(3) and Annex IV of the Municipal Ordinance of 14 December 2015, on general municipal taxation and on the municipal tax on several services for 2016 and subsequent years.

⁸¹ Articles 5, 7 and 9 of Annex IV of the Municipal Ordinance of 14 December 2015.

⁸² Article 6(1)(c) of Ordinance 1.4 of Municipal Ordinance of 29 December 2015, on the definitive approval of tax ordinances for 2016.

⁸³ On the same grounds, the City had already suspended in [October 2014](#) the granting of licences for touristic dwellings in Barcelona. The City's Licences Department orally confirmed that the 2015 suspension annuls the 2014 licences and applies to touristic dwellings.

current legislation is replaced by a responsible declaration, which is mandatory to all forms of touristic activity (Article 121-2(1) of the Draft Decree).

Article 221-2 of the Draft Decree sets forth the mandatory features of the dwelling (to hold an occupancy certificate; to meet technical and quality requirements mandatory for any dwelling; to be fully furnished and in perfect hygienic conditions; an obligation on the owner to provide hosts and neighbours with a telephone number for any emergency related to the dwelling; as well as a dwelling maintenance service) and Articles 221-4(1) and 221-6 relate to administrative requirements (prior communication and host registry data to be forwarded to the Police). According to Article 221-4(8), the emergency telephone number and the official identification number must be displayed at the dwelling. Also, the owner of the dwelling and the manager, if there is one, are jointly liable for any infringement related to the rental (Article 221-8(1)).

The Draft Decree removes some of the limitations mentioned in the previous section. In particular, the Draft Decree does not impose an obligation to provide users with consumer complaint forms; allows the partial rental of the dwelling (by introducing a room rental regime); and removes restrictions relating to the frequency and duration of the rental. Actually, as regards the duration of the rental, the Draft Decree states that if the dwelling is commercialised through touristic offer channels, there are no duration limitations. Conversely, if the dwelling is commercialised through any other channel, the duration of the dwelling rental is limited to a maximum of 31 days (Article 221-1).

28

a) *New room rental regime*

Room rental is allowed under Article 222.1 of the Draft Decree.

Moreover, under this new regime, the owner of the dwelling and the lessee of the dwelling, if authorised by the owner, may both engage in the rental activity (Article 222-2.1).

Although room rental is allowed, the owner or lessee of the dwelling may not:

- rent the room for more than thirty-one (31) consecutive days if it is commercialised through non-touristic channels (Article 222-1);
- rent more than two (2) rooms of the same dwelling (Article 222-3(1));
- rent rooms for more than four (4) months per year, whether consecutive or not (Article 222-3(2)); and
- offer any meals other than breakfast (Article 222-4(2)).

Additionally:

- the room rental activity must be expressly permitted by the applicable municipal regulations (Article 222-5(5));⁸⁴
- the owner or lessee of the dwelling must be permanently registered as a resident of such dwelling (Article 222-2(1));
- the owner or lessee of the dwelling must sleep in the dwelling (Article 222-2(2));
- rooms must be fully furnished and have external ventilation (Article 222-3(3)); and
- users must have access to a bathroom (Article 222-4).

Note that the owner of the dwelling and the lessee, if there is one, are jointly liable for any infringement related to the room rental (Article 222-2(3)).

b) *Obligations of intermediary companies.*

Article 232-2 of the Draft Decree establishes the following requirements for companies that promote or commercialise touristic dwellings (including, for instance, on-line platforms):

- obligation to provide inspectors with any required information or documentation (Article 232-2(a));
- obligation to display the Catalan Tourism Registry number of the touristic dwelling in any commercial or promotional material (Article 232-2(b)); and
- prohibition to commercialise or promote touristic dwellings that do not hold the relevant administrative title to the activity (Article 232-2(c)).

The Draft Special Plan on Touristic Accommodation entails important restrictions to provide touristic dwelling services. To a lesser extent, it also prevents users from access to dwelling rentals.

The Draft Special Plan on Touristic Accommodation only allows the creation of new touristic dwellings (i) when a pre-existent one ceases its activity, (ii) when the touristic dwelling is in a different area than the one qualified as “natural decrease zone” and (iii) when such area has not covered the maximum hosts places assigned yet.

As regards this second requirement, it may be useful to clarify that the Draft Special Plan on Touristic Accommodation distinguishes four areas in the city of Barcelona. Zone 1 is called “natural decrease zone” and no new touristic dwelling may be

⁸⁴ Please be aware that, in the case of Barcelona, the Draft Special Plan on Touristic Accommodation may prohibit new touristic accommodation (including touristic dwellings) in certain areas of the city (see Section II.1.2 above).

allowed, irrespective of whether pre-existent ones cease their activity or not. Zone 2 is called “maintenance zone”, and zones 3 and 4 are called “limited growth zones.” In these zones, new touristic dwellings may only be opened if the maximum accommodation places have not been met.

1.2 Possible justifications

a) Limitations regarding the characteristics of the touristic dwelling (current and draft legislation)

First, some of the limitations regarding the characteristics that define a touristic dwelling in the current legislation (such as the rental of the entire dwelling or the maximum rental period) and the Draft Decree (e.g. prohibition to offer meals other than breakfast or limitation on the maximum rooms to be rented⁸⁵) may be grounded on the alleged need to distinguish touristic dwelling activities from traditional accommodation services, thereby guaranteeing that each of the services complies with its particular requirements.⁸⁶ The ones applicable to traditional accommodation services are more burdensome than the ones applicable to touristic dwellings, for instance requirements related to fire and emergency prevention measures or food safety measures.

30

Were these regulatory differences between activities –allegedly based on their intensity and professionalization– not accepted, the traditional debate on the risks of a “regulatory race to the bottom” may arise again as regards these new business models. Within the domain of free movement of goods,⁸⁷ this debate led the ECJ to expressly uphold regulatory distinctions provided that they were not discriminatory and were based on mandatory requirements in the general interest. Indeed, it is settled case-law that restrictions on the freedom of establishment and the freedom to provide services which are applicable without discrimination on grounds of nationality may be justified by overriding reasons relating to the general

⁸⁵ The Draft Decree only allows two (2) rooms to be put for rent under the new rental regime. Even if this figure is clearly discretionary, it allegedly serves the purpose of differentiating a touristic dwelling from a hostel.

⁸⁶ The Directorate-General of Tourism of the Catalan Government confirmed at a meeting on 23 February 2016 that differentiating touristic dwellings from other accommodation activities and guaranteeing quality and security standards were the main reasons behind this sort of restrictions.

The City also explained at a meeting held on 29 February 2016 that distinguishing professional tourism services from new tourism services provided by individuals in the framework of sharing economy business models may indeed be a regulatory need if safety and quality standards must be preserved.

⁸⁷ ECJ Judgment of 20 February 1979, 120/78 - *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [“Cassis de Dijon”], ECLI:EU:C:1979:42).

interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective.⁸⁸

In any event, as is well known, this argument cannot be used with the aim of protecting a particular economic model or existing businesses. Pure economic objectives have never been accepted as mandatory requirements in the general interest justifying a restriction on access to the right of establishment or the provision of a service.⁸⁹

To our mind, the rationale behind the requirements to the activity present in the Catalan Tourism legislation may be challengeable in some particular cases and acceptable in some others. For example, on the one hand, the current limitation on room rental (interpreted as a complete ban by the competent authorities) or the prospected limitation on renting a maximum of 2 rooms in a dwelling are unlikely to stand a necessity test under the current EU case-law on the matter. These limitations are very close to complete bans and it is difficult to see other legitimate ends than protecting existing activities. On the other hand, food security concerns may indeed be a valid reason behind the general prohibition on serving food in touristic dwellings.

Another aim of the legislation is to prevent the scarcity of affordable residences for Barcelona's citizens. However, it is difficult to see how a requirement to rent out the entire dwelling contributes to achieving this end. Quite the reverse, as it would seem that this requirement can be met by investors and undertakings while precluding small owners who actually live in the dwelling –and are presumably more conscious of social concerns affecting the neighbourhood– from renting one or more rooms in their residences on a non-permanent basis.

Considering evolving social demands, the Catalan Parliament suggested that the regional Government reconsider these limitations.⁹⁰ The latter has proposed their partial removal in the Draft Decree, and the proposed regime also covers room rentals.

However, the Draft Decree limits the duration of the rental to up to 31 consecutive days if the dwelling (or room) is commercialised through non-touristic channels.

⁸⁸ ECJ Judgment of 24 March 2011, C-400/08, *Commission v Spain*, ECLI:EU:C:2011:172, § 73.

⁸⁹ ECJ Judgment of 11 March 2010, C-384/08, *Attanasio Group Srl v Comune di Carbognano*, ECLI:EU:C:2010:133, §§ 55 and 56; ECJ Judgment of 24 March 2011, C-400/08, *Commission v Spain*, ECLI:EU:C:2011:172, §§ 74, 97 and 98; ECJ Judgment of 14 November 2013, C-221/12, *Belgacom NV v Interkommunale voor Teledistributie van het Gewest Antwerpen (Integan) et al.*, ECLI:EU:C:2013:736, § 41.

⁹⁰ [Motion 145/X of the Catalan Parliament on the touristic model, Official Journal of the Parliament of Catalonia n. 413, 20 October 2014](#) (page 24 of the hyperlink).

This distinction between commercialisation through touristic channels and non-touristic channels may entail a restriction for owners or intermediaries that commercialise the dwelling through non-touristic channels.

Secondly, the obligations contained in the current and in the draft legislation regarding the obligations to hold an occupancy certificate, to maintain the dwelling in good technical conditions, to rent a fully furnished dwelling, to provide users with an emergency telephone number and to respect the maximum capacity stated in the occupancy certificate, as well as the obligations of intermediaries introduced in the Draft Decree to provide inspectors with information they may hold, to display the registry number in promotional materials and to avoid the commercialization of dwellings that do not meet the minimum requirements, seem to be justified by the general principles governing the duties of touristic operators, which seek to protect user rights and to promote acceptable quality standards of any touristic accommodation offer.⁹¹ The justifications are mentioned, among others, in the Preamble to the Tourism Act.

Finally, it may be worth noting that the Catalan Competition Authority has analysed the restrictions introduced by the Draft Decree in a Report.⁹² The Authority thinks that many of the requirements contained in the dwelling and room rental regimes limit the ability of service providers to access the market and therefore restrict competition. According to the Authority, several obligations and prohibitions imposed on owners of touristic dwellings and rooms constitute unjustified barriers to the provision of the rental service.

b) Restriction caused by the necessary non-prohibition of the touristic use of the dwelling by the homeowners' association

We have found no express justification of this restriction in the legislation. However, it is difficult to see how this restriction could qualify as a “State measure” in light of the ECJ case-law on the internal market. Admittedly, the measures attributable to a State or, in broader terms, a public administration have been periodically expanded

⁹¹ Consumer protection has been consistently accepted as a valid overriding reason in the general interest. See, for example, ECJ Judgment of 18 November 2010, C-458/08, *Commission v Portuguese Republic*, ECLI:EU:C:2010:692, § 89 (under a different factual basis, this case specifically recognised the legitimacy of protecting “the soundness and safety of buildings” as well as “consumers and users of buildings”); ECJ Judgment of 24 March 2011, C-400/08, *Commission v Spain*, ECLI:EU:C:2011:172, § 74; and ECJ Judgment of 12 July 2012, C-176/11, *HIT hoteli v Bundesminister für Finanzen*, ECLI:EU:C:2012:454, § 23.

However, the ECJ has also made it clear that the consumer should not be overprotected when the simple and unriskey nature of the activity does not justify the administrative intervention. ECJ Judgment of 25 July 1991, C-76/90, *Säger v Dennemeyer*, ECLI:EU:C:1991:331, §§ 18-21.

⁹² Catalan Competition Authority (ACCO), [Report on the Draft Decree on a Tourism Regulation of Catalonia](#), 9 September 2015.

by the ECJ case-law.⁹³ Nevertheless, recalling a right of a homeowners' association, the exercise of which is completely independent from the Administration's action or inaction, does not seem to fit within the concept of "State measure" even in the broad terms of the applicable case-law.

Without prejudice to the above, this restriction must be interpreted in light of the social concerns arising from touristic rentals in the city of Barcelona. It has now been several years that many resident citizens complain on the negative impact of the proliferation of touristic dwellings in their daily life.⁹⁴ Touristic dwellings may entail distortions of the city's social life. This has raised concerns about the noise, the insecurity and the building degradation effects associated to these rental activities.

Moreover, several cases have been reported regarding extortion and mobbing in order to expulse resident citizens from their dwellings in cases where a hotel or other touristic rental activities were envisaged in a particular building.⁹⁵ In some of these cases, the alleged mobbing started with the opening of a touristic dwelling in the building in order to create unease and discomfort amongst other residents.

Some relevant stakeholders claim that these are only isolated cases that are sometimes exaggerated for political purposes.

Whichever the case, the by-laws of the homeowners' association may indeed be a means of restricting touristic activities when the majority of owners is against this use and a means to ensuring an effective right to decent housing. However, the situation remains unresolved in those cases where the providers of touristic activities have already achieved a majority within the homeowners' association.⁹⁶

⁹³ The most famous examples of such case-law can also be found within the framework of the free movement of goods. See, ECJ Judgment of 24 November 1982, C-249/81, *Commission v Ireland* ("Buy Irish"), ECLI:EU:C:1982:402; and ECJ Judgment of 9 December 1997, C-265/95, *Commission v France* ("Spanish strawberries"), ECLI:EU:C:1997:595.

⁹⁴ <http://www.elpuntavui.cat/article/1-territori/10-administracions/171516-els-veins-de-ciutat-vella-reclamen-que-es-tanquin-tots-els-apartaments-turistics.html>;
http://ccaa.elpais.com/ccaa/2015/01/17/catalunya/1421520693_976861.html.

⁹⁵ Cocola Gant, A., *Apartamentos turísticos, hoteles y desplazamiento de población, Informe para el debate sobre el nuevo Plan Especial Urbanístico de Regulación de los Alojamientos Turísticos*, February 2016, available at: <http://agustincocolagant.net/apartamentos-turisticos-hoteles-y-desplazamiento-de-poblacion/>.

⁹⁶ The residential and economic implications of touristic dwellings have been highlighted in the recent [Report by the City of Barcelona on Social and Solidary Economy in Barcelona, January 2016](#). At pages 123 seq., the report points out that the proliferation of touristic dwellings in the Barceloneta borough raised concerns regarding (i) the price of residential dwellings; and (ii) the substitution of local resident population by touristic population.

Likewise, this provision does not allow a homeowners' association to ban *ex post* a touristic dwelling that was already existent in the building.⁹⁷

Aware of this situation, one of the City's projects consists of adopting measures to strike the correct balance between the economic benefits brought by touristic activities and the citizens' quality of life. This debate is open since the adoption of the Moratorium and remains open up to the date of this impulse paper.⁹⁸

c) Restrictions deriving from the administrative requirements

The quality of touristic services and the protection of tourists' rights are two goals and principles governing touristic regulations. The Preamble and Article 3 of the Catalan Tourism Act, in addition to the Catalan Strategic Tourism Plans for 2005-2010⁹⁹ and 2013-2016¹⁰⁰ put forward the aim to create a competitive touristic sector that guarantees the quality of the services offered and provides tourists with the necessary rights and information to protect their interests.

Administrative requirements such as the obligation to submit a prior declaration and to register the touristic dwelling in the Catalan Tourism Registry allegedly constitute a means to guarantee a minimum standard of quality of the touristic dwellings. Based on the information to be submitted to the administration, the prior declaration and subsequent registration in the Catalan Tourism Registry intend to guarantee that the dwelling is fit for human habitation; that users may reach the owner in case of emergency; and that maintenance of the building is ensured. Also, the obligation to submit a prior declaration under the OMAIIA is justified on environmental grounds.¹⁰¹

The obligation to register touristic dwellings at the Catalan Tourism Registry and to display the registration number in any promotional material is said to constitute a means (i) for public administrations, to effectively control that touristic dwellings exist and operate in compliance with the minimum quality requirements; and (ii) for users, to have a guarantee on the legality and basic conditions of a touristic dwelling.¹⁰² In line with this, the obligation to provide consumer complaint forms to

⁹⁷ Confirmed by City officials at a meeting held on 29 February 2016.

⁹⁸ <http://premsa.bcn.cat/2015/07/02/ada-colau-destaca-que-barcelona-obre-un-debat-col%C2%B7lectiu-per-fer-sostenible-el-turisme-i-posar-hi-ordre/>.

⁹⁹ [Catalan Strategic Tourism Plan for 2005-2010](#), pp. 7, 14, 15 and 17.

¹⁰⁰ [Catalan Strategic Tourism Plan for 2013-2016](#), pp. 4, 13, 15 seq.

¹⁰¹ The OMAIIA requires communication of any economic activity in the city of Barcelona in order to assess its environmental impact.

¹⁰² Meeting with the Directorate-General of Tourism of the Catalan regional Government on 23 February 2016.

the hosts may be understood as a means to enforce respect of tourists' rights.¹⁰³ Some stakeholders claim that peer reviews on social media ensure the same level of consumer protection (see the following point and point 1.3. (c), page 41 seq., of this section below). However, peer reviews have no bearing on legal complaint procedures.

Additionally, security concerns justify the obligation to keep a host registry and to provide information to the Directorate-General of Police. According to Article 25 of the Organic Act on public safety, lodging activities are relevant when it comes to protecting citizens.

d) Restrictions particularly affecting intermediaries such as online platforms

As mentioned in Section III.1.2(c) above, the quality of touristic services and the protection of tourists' rights are two goals inspiring the touristic legislation. Authorities are concerned by the conditions in which the dwellings are rented and the effects that these may cause.

In this regard, the obligations of intermediaries to provide tourism inspectors with information on their own activities and the activities of any person bearing touristic obligations, as well as the sanctioning regime affecting intermediaries (obligations to display the Catalan Tourism Registry number in any promotional material and to commercialise dwellings that meet the formal and material requirements to operate) were allegedly set in order to ensure that dwelling rentals meet the legal requirements that protect minimum quality standards. Reportedly, by restricting the possibility to promote and commercialise dwellings that have not been registered, the Authorities aim at eliminating these from the market thereby attacking consumers' fraud and tax evasion.

In the same line, the obligation of intermediaries to collaborate with touristic inspections is deemed necessary in order to properly ensure the effectiveness of inspections, inasmuch as intermediaries gather the relevant information concerning the dwelling and its owner.¹⁰⁴

¹⁰³ Actually, even if the wording sometimes differs and guaranteeing a minimum quality of touristic services may be interpreted diversely, it is our understanding after reading the whole package of regulations that the aim is basically protecting the user of touristic services, which is akin to protecting the consumer. Consumer protection, as already said, has been consistently held by EU Courts to be a valid overriding requirement in the general interest.

¹⁰⁴ The City and the Directorate-General of Tourism of the Catalan Government put forward this justification during the meetings held on 23 and 29 February 2016.

Allegedly, the Catalan legislator considered some other means, but it reached the conclusion that the least burdensome means of addressing the problem of illegal offer, which necessarily required the collaboration of online platforms, consisted of displaying the Registry number in any commercialization materials. The online platform is thereby not obliged to check compliance with

As regards these restrictions, the question of compatibility with the E-commerce Directive¹⁰⁵ inevitably arises. This Directive expressly indicates that, in principle, no general obligation to monitor should be imposed on service providers of the information society as regards the information they transmit or store (Article 15). However, the question further develops then on whether this provision applies only under the condition that the service provider does not intervene in the underlying transaction but merely acts as a “marketplace”. This seems to be the recurrent allegation of some of the Internet platforms involved in the new sharing economy business models.

The ECJ has already ruled on the scope of some provisions of the E-commerce Directive and the extent to which platforms should be held liable for the activities/transactions they somehow host. In particular, the *Google* case¹⁰⁶ concerned Article 14 and some of the considerations therein may also be relevant for the present analysis by way of analogy. The ECJ held that there is a difference – for the purposes of the restriction of liability foreseen in Article 14, which is not the case here– between (i) the service provider who actively intervenes in the contents of the data it transmits; and (ii) the “pure intermediary” whose activities are of a “mere technical, automatic and passive nature”. The former can be held liable for the data it has stored whereas the latter cannot. The reasoning of the Court is particularly self-explanatory:

*“114 Accordingly, in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is **necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.***

115 With regard to the referencing service at issue in the cases in the main proceedings, it is apparent from the files and from the description in paragraph 23 et seq. of the present judgment that, with the help of software which it has developed, Google processes the data entered by advertisers and the resulting display of the ads is made under conditions which Google controls. Thus, Google

material conditions of the touristic rental but it only needs to ask for the registration number. Authorities consider that this is the least burdensome way to track illegal activities and ensure the effectiveness of the sanctioning regime.

¹⁰⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16.

¹⁰⁶ ECJ Judgment of 23 March 2010, joint cases C-236/08, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA*, C-237/08, *Google France SARL v Viaticum SA and Luteciel SARL* and C-238/08, *Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others*, ECLI:EU:C:2010:159, §§ 109-120.

determines the order of display according to, inter alia, the remuneration paid by the advertisers.

116 It must be pointed out that the mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31.

117 Likewise, concordance between the keyword selected and the search term entered by an internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server.

*118 **By contrast**, in the context of the examination referred to in paragraph 114 of the present judgment, **the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant**" (emphasis added).*

As already indicated, the provision relevant to our purposes remains Article 15 of the E-commerce Directive and, admittedly, the *Google* case was different in several regards from the one analysed here (e.g. recital 42 of the E-commerce Directive, on which the ECJ based part of its reasoning, expressly refers to Article 14 and there is no similar recital regarding Article 15). Notwithstanding this caveat, it is our understanding that the reasoning is equally applicable to the present analysis. It seems indeed reasonable that no monitoring obligation is imposed to truly intermediary service providers that they do not intervene in the terms of the underlying transaction, whereas a certain control is imposed on intermediary service providers that do play a relevant role in the underlying transaction.

The question of whether intermediary service providers who are active in Barcelona (i.e. who offer touristic dwellings located in Barcelona) do or do not intervene in the underlying transaction is a technical question that falls outside the scope of this legal paper.

The requirements imposed by the Catalan Tourism Act on intermediary platforms may be compatible with the E-commerce Directive provided that such platforms do intervene in bringing about and configuring the service at issue. Conversely, where platforms do not play such a role, the requirements may be excessively burdensome and may amount to a monitoring obligation incompatible with Article 15 of the E-commerce Directive.¹⁰⁷

¹⁰⁷ A general filtering system has been considered contrary to Article 15 of the E-commerce Directive. ECJ Judgment of 24 November 2011, C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, §§ 38-40.

Allegedly, the Catalan Tourism Act requires the platform to ask for a registration number (no need to check the actual conditions of the dwelling is imposed on the platform) in order to facilitate inspection operations. The relevant authorities consider that the obligation is thus proportionate to the aim pursued –i.e. tracking illegal offer.

Some relevant stakeholders retort, however, that this legislation shifts the burden of controlling administrative illegalities from the Administration to online platforms. Online intermediaries may operate globally and should not be obliged to check ex ante regulatory compliance by tourist service providers. Such a shift in regulatory requirements is moreover disproportionate, they may add, since the Administration already has the information on the Internet and can, therefore, easily track illegal activities without imposing any additional burden on platforms. Obligations imposed on platforms should be limited to an ex-post commitment to expel illegal activities already detected and sanctioned by the Administration from their platforms.

In our opinion, the conflict may be solved going back to the basis of the *Google* case and deciding whether a platform acts as a “pure marketplace” or actually intervenes in configuring the service it commercializes. In the former case, imposing additional administrative obligations may contravene Article 15 of the E-commerce Directive, whereas in the latter, such an obligation may be legitimate since the platform would act as a service provider. In any event, a proportionality analysis must consider the existence of “less restrictive means” to achieving such end. And from this angle it would indeed seem that the administrative duties of investigating and fining illegal activities should not be transferred, either completely or partially, to private operators.

e) *Limitations derived from tax obligations*

According to Articles 98 and 100 of the Catalan Tourist Tax Act, creating the touristic overnight stay tax aims at (i) taxing the economic capacity of individuals who stay in any touristic establishment; and (ii) contributing to the Fund for the development of tourism.¹⁰⁸

Also, since the rental of touristic dwellings is considered an economic activity generating waste, the owner of the dwelling is subject to the payment of the

¹⁰⁸ The Fund for the development of tourism was created by the Catalan Tourist Tax Act to promote, encourage and preserve touristic infrastructure and activities in Catalonia. The money collected is shared by the Catalan Government and local entities, which must invest the money in touristic promotional activities:
http://premsa.gencat.cat/pres_fsvp/AppJava/notapremsavw/196648/ca/govern-aprova-reglament-fons-foment-turisme.do.

commercial waste collection tax, as opposed to the tax levied on private individuals.¹⁰⁹

Finally, the obligation to register with the Tax Agency is designed for public authorities to know and control the development of economic activities in the municipality. Actually, one of the problems identified as regards the illegal touristic activities –including the rental of touristic dwellings without complying with the applicable legislation– is tax fraud and tax evasion.¹¹⁰

f) *Restrictions caused by the Moratorium*

The text of the Moratorium provides the reasoning behind the decision. The aim is to assess the impact of accommodation activities in order to appropriately regulate them in the City of Barcelona.

Following serious social conflicts and complaints,¹¹¹ the City has issued several decisions and press releases on the need to (i) guarantee the quality of touristic offers; (ii) avoid the distortions that the uncontrolled rental of touristic dwellings may cause in social life; and (iii) protect citizens' fundamental right to a decent housing.¹¹²

The City is reflecting on whether to adopt its own municipal regulation on this matter. It is currently working on a Strategic Tourism Plan for the city and a Draft Special Plan for touristic dwellings.¹¹³

¹⁰⁹ <http://ajuntament.barcelona.cat/hisenda/ca/explicaci%C3%B3-del-preu-p%C3%B0Ablic-la-recollida-de-residus>.

¹¹⁰ This is reportedly the same goal as the one sought with the obligation imposed on platforms (see Section III.1.2.d above). An argument could be made on the need for further coordination between different Administration, thereby avoiding additional unnecessary burdens on private operators.

¹¹¹ A Decision of the Ombudsman of Barcelona of 12 June 2015 analysed the impact of tourism in Barcelona and recommended that the City suspend touristic licences and elaborate a new regulation striking a balance between citizens' quality of life and touristic activities ([Decision of the Ombudsman referring to the *ex officio* intervention in tourism and its impact in the quality of life of Barcelona's citizens](#)).

¹¹² <http://premsa.bcn.cat/2014/04/30/lajuntament-impulsa-un-pla-dordenacio-dhabitatges-dus-turistic-per-preservar-la-convivencia-veinal-i-la-qualitat-de-loferta/>; <http://premsa.bcn.cat/2014/09/03/el-govern-municipal-impulsa-un-nou-paquet-de-mesures-per-millorar-la-regulacio-i-control-dels-habitatges-dus-turistic-i-garantir-la-convivencia>.

¹¹³ See Section II.1.2 above.

Likewise, it is worth noting that Article 50.bis(3) of the Catalan Tourism Act allows municipalities to establish further requirements for the control of touristic dwellings by ordinance. This ordinance does not currently exist in Barcelona and is not even drafted, but the City confirmed at our meeting on 29 February 2016 that it is exploring this possibility.

In a press release published on November 2015, the City clearly stated that the need to regulate touristic accommodation in the city of Barcelona was due to reasons of public interest, namely: (i) meeting the demand for residential use in the real estate market; (ii) minimising the negative impact of touristic dwellings into the life of the city and; (iii) ensuring the quality of the touristic offer in Barcelona.¹¹⁴

Indeed, over the last four years, registered touristic dwellings have exponentially increased from 2,683 (2011) to 9,480 (2015).¹¹⁵ Furthermore, most of the touristic dwellings are highly concentrated: for instance, 60% of Airbnb's touristic dwellings are located in only two Barcelona boroughs (*Ciutat Vella* and *Eixample*),¹¹⁶ where the impact of touristic dwelling activities has notably intensified.

The Municipality justified extending the Moratorium as a means to properly assess the impact of accommodation activities and the development of a new regulation, that is, that no further activity is developed until the Draft Special Plan on Touristic Accommodation is definitively approved.¹¹⁷

Notwithstanding these justifications, the fact remains that the Moratorium amounts to a complete ban on access to these activities. Such a prohibition is clearly at odds with the EU case-law on restrictions to the fundamental freedoms, since it would most probably not stand a proportionality assessment (see below).

40

g) Restrictions caused by the Draft Special Plan on Touristic Accommodation

In line with the City's justifications of the Moratorium, the Draft Special Plan on Touristic Accommodation is accompanied by a report explaining the reasoning behind the regulation.¹¹⁸ According to this and to the press conference by which the

¹¹⁴ <http://premsa.bcn.cat/2015/10/23/lajuntament-clou-lanalisi-de-licencies-dallotjaments-turistics-afectades-per-la-suspensio-i-inicia-el-proces-participatiu-del-pla-especial/>.

¹¹⁵ <http://premsa.bcn.cat/2015/10/23/lajuntament-clou-lanalisi-de-licencies-dallotjaments-turistics-afectades-per-la-suspensio-i-inicia-el-proces-participatiu-del-pla-especial/>.

According to the information gathered in our meetings with the relevant Administrations, approximately half of the offer in Barcelona is deemed to be illegal.

¹¹⁶ <https://guanyembarcelona.cat/tu-a-boston-y-yo-a-airbnb-un-analisis-urbanistico-de-barcelona/>.

¹¹⁷ Mentionned in the press conference by which the Municipality presented the extension of the Moratorium and the initial approval of the draft Special Plan on Touristic Accommodation: <http://premsa.bcn.cat/2016/03/09/janet-sanz-i-agusti-colum-presenten-la-proposta-de-pla-especial-urbanistic-dallotjaments-turistics-peuat/?s=peuat>.

¹¹⁸ See document "B1463_APROVACIOINICIAL_MEMORIA.pdf" in: <http://w10.bcn.es/APPS/secwebambit/detallAmbitAc.do?reqCode=inspect&referencia=B1463>.

Municipality communicated the initial approval of the Draft Special Plan on Touristic Accommodation,¹¹⁹ the latter seeks:

- to preserve the quality of life of the citizens of Barcelona, in particular, their right to a decent housing;
- to ensure the quality of public spaces and to avoid their distortion because of uncontrolled tourism; and
- to guarantee a sustainable economic development.

Indeed, the distinction between different zones within the city of Barcelona reflects their different features and the ensuing disparate touristic impact such zones face. For instance, Zone 1 has been qualified as “natural decrease zone” and deprived from the possibility to open new touristic dwellings because it is the most affected area, where tourism is more concentrated, and where the impact has allegedly caused more distortions of social life. Zones 2, 3 and 4 have been accorded different qualifications according to their respective characteristics.¹²⁰

Therefore, it is our understanding that the legal question here is more related to the proportionality of the measure (see below) than to the legitimate nature of the objectives pursued.

1.3 Proportionality assessment

a) Characteristics of a touristic dwelling

Some of the mandatory requirements for a touristic dwelling in order to guarantee minimum living standards and the quality of the service provided might be adequate and proportionate to their end. Holding an occupancy certificate, requirements to maintain a dwelling in technical and quality conditions, to offer a fully furnished dwelling, to guarantee hygienic conditions, etc., do not seem especially burdensome for the owner of the dwelling nor do they affect the intermediary or user of the rental service.¹²¹

¹¹⁹ The press conference is available at: <http://premsa.bcn.cat/2016/03/09/janet-sanz-i-agusti-colom-presenten-la-proposta-de-pla-especial-urbanistic-dallotjaments-turistics-peuat/?s=peuat>.

¹²⁰ See a summary of the characteristics of each area at: <http://premsa.bcn.cat/wp-content/uploads/2016/03/160310-PPT-AI-RDPREMSA.pdf>.

¹²¹ These measures seem to be clearly founded on consumer protection grounds (which is, as already said, a valid overriding reason in the general interest). Arguably, there could be other means to protect the same interest. However, the ECJ has made it clear that “*although it is for the Member State relying on an overriding reason in the public interest as justification for a restriction on freedom of movement to demonstrate that its legislation is appropriate and necessary to attain the legitimate objective pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same*”

However, the fines foreseen in Articles 86 to 92 of the Tourism Act could be considered particularly oppressive. The infringements of the mentioned minimum requirements are defined as a very serious infringements and may carry fines ranging from €30,001 to €600,000 and/or with the temporary (2 years) or definitive closure of the rental activity.¹²²

Limitations regarding the new room rental regime under the Draft Decree (such as the prohibition to rent more than two rooms and to offer meals other than breakfast meal; or the obligation on the owner or lessee to spend the night in the dwelling where the room is rented) may seek to avoid that private individuals offer the same services than traditional accommodation services providers.

Intrusiveness prevention is not a legitimate end.¹²³ Therefore, a careful analysis of the actual aims and extent of each particular restriction would be needed to ascertain if there is another legitimate reason (e.g. safety) underlying such provisions or whether they are really only aimed at protecting traditional businesses.

Nevertheless, when security is behind a particular restriction (e.g. fire prevention or food safety measures) and touristic dwellings are not realistically in a position to comply with such regulations (an obligation to comply with them would probably amount to a disproportionate burden), these restrictions may be proportionate to the aim they seek.

Officials at the Spanish NCA argue that safety concerns do not depend on whether a dwelling is lent occasionally, for instance to a member of the owner's family, or frequently for consideration. Likewise, they see no need to ask for any requirements other than a certificate that the dwelling is fit for human habitation. Quality or furnishing criteria, they say, are not for the authorities to set but for tourists to choose according to their own private preferences.¹²⁴

conditions". ECJ Judgment of 24 March 2011, C-400/08, *Commission v Spain*, ECLI:EU:C:2011:172, § 75.

With this in mind, it is our understanding that the measures included in the Catalan Tourism Act concerning the minimum characteristics of touristic dwellings are, in general terms, targeted at protecting consumers and do not seem to go beyond what is necessary to attain that objective.

¹²² The definitive closure of the activity may not stand a proportionality assessment. The ECJ has consistently held that "*penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality*". ECJ Judgment of 26 September 2013, C-418/11, *Texdata Software GmbH*, ECLI:EU:C:2013:588, §§ 51 and 52. Nevertheless, this assessment ought to be done for each particular infringement with due consideration to its seriousness.

¹²³ See footnote 89 above.

¹²⁴ Meeting with the CNMC on 15 February 2016.

Likewise, relevant stakeholders consider that these limitations may prevent regular citizens from occasionally renting spare rooms in their homes. In other words, the regulation is indirectly preventing access to an economic activity.

Admittedly, therefore, one could solidly argue the number of rooms that can be rented has been fixed discretionarily and may be subject to debate or that the need to spend the night at the dwelling is not indispensable to protect security concerns, but only to distinguish professional from not professional activities, thereby limiting access to the new sharing economy business models.

b) Non-prohibition of the touristic use of the dwelling by the homeowners' association

Limitations regarding the need of non-prohibition by the homeowners' association of the touristic use of the dwelling in order to provide touristic rental services in one's own house may be proportionate to their end. On the one hand, it is true that such limitation may be deemed to restrict the right to property (Article 33 of the Spanish Constitution) and the right to engage in economic activities (Article 38 of the Spanish Constitution). On the other hand, however, it is, in the first place, highly doubtful that any such restriction could be attributed to the Administration¹²⁵ and, secondly, the right of neighbours to peacefully and securely live in their own residences should also be placed on the scale.

Based on conflicts with neighbours arising from touristic rentals, and taking into consideration the constitutional right to a decent housing,¹²⁶ to require the neighbours' non-opposition to touristic rentals could be an acceptable restriction necessary to ensure the effectiveness of such constitutional right.

The question here could be whether to require express non-opposition in the homeowners' association by-laws to allow the rental activity or to accept that allowing the rental activity unless there is such opposition is a less restrictive means of achieving the same end. Considering the general ECJ case-law on proportionality, the latter seems a more proportionate measure. Up to the date of the present report, current legislation has indeed opted for the latter, but the debate has included shifting to the former.¹²⁷

c) Administrative requirements

¹²⁵ See footnote 93 above.

¹²⁶ Article 47 of the Spanish Constitution.

¹²⁷ The City has shown interest in modifying legislation so as to require the permission of the homeowner's association in order to obtain authorisation to run a touristic dwelling. See: <http://premsa.bcn.cat/2014/10/24/barcelona-elabora-el-pla-especial-urbanistic-per-a-la-regulacio-dels-habitatges-dus-turistic/>

Administrative requirements do not impair (i) the dwelling's owner from providing the rental service; nor (ii) the user from accessing a touristic dwelling rental. Reportedly, the Catalan regional Government has assessed several means to guarantee compliance and publicity of compliance of minimum quality standards and it reached the conclusion that the obligations of the owners and of the intermediaries to obtain and display a Registry number is the less restrictive means to do so.¹²⁸

Some of the obligations seeking to protect public security/order and users' rights (i.e. identification information, complaint forms, etc.) entail no important costs for the dwelling's owner nor for the intermediary or the users and they seem appropriate to achieving their envisaged ends. On the one hand, the procedure to forward host information to the Directorate-General of Police is relatively simple.¹²⁹ The information to be provided is basic identification information, and communication is to be done by electronic means, filling in a form. On the other hand, the obligation to provide complaint forms to the hosts makes it easier for users to enforce their rights as consumers at no cost for the owner.¹³⁰

However, as regards administrative requirements justified on the basis of quality standards, two main reasons lead us to believe that these obligations could be replaced by other less intrusive means.

On the one hand, the economic cost of these obligations could eventually discourage access of the dwelling's owner to the rental activity, especially in cases where the owner rents the dwelling from time to time or, in any case, not many times per year.¹³¹ It must be recalled that (i) submission of the prior declaration is taxed €227; and (ii) non-compliance of such obligations may entail fines ranging from €3,001 to €30,000 or the closure of the activity for a maximum period of one year.¹³²

On the other hand, it has been asserted that quality standards of the dwellings do not need to be guaranteed by public means (understood as obligations to

¹²⁸ Meeting with the Directorate-General of Tourism of the Catalan Government on 23 February 2016.

¹²⁹ According to Article 2 of Order IRP/418/2010, owners must fill in and submit a form available on the https://www14.gencat.net/mossos_hotels/AppJava/fitxaviatger.do?reqCode=create# website.

¹³⁰ Owners may get the complaint forms from different official institutions: http://consum.gencat.cat/empreses/tinformem/fulls_oficials/index.html

¹³¹ In this regard, the Report of the Catalan Competition Authority (ACCO) stands for the non-submission to the touristic regulations of touristic dwellings and rooms that are only sporadically rented ([Report on the Draft Decree on a Tourism Regulation of Catalonia](#), 9 September 2015).

¹³² Articles 88(a), 88(u) quater and 94(1)(b) of the Catalan Tourism Act.

communicate the activity to public administrations and register in a public registry such as the Tourism Registry).

One of the characteristics of new business models based on the collaborative economy is the reputation and trust gained through different users' opinions on the services.¹³³ The Catalan Competition Authority, for instance, noted that new technologies play nowadays a crucial role in this regard, and that users of touristic dwellings rely on each other's opinions in order to assess a dwelling's appropriateness and its standard living conditions.¹³⁴ Additionally, the Authority pointed out that public administrations could have access to data on touristic dwellings' existence based on tax declarations, and that eliminating the current administrative requirements while maintaining tax requirements could be a sufficient means of controlling the touristic activity. A less intrusive means to guarantee minimum quality standards may be to remove the administrative obligations while maintaining sanctions for the non-compliance of the minimum standards.

Regarding the prior declaration required by the OMAIIA, we consider that it could be removed. Pursuant to Article 4(1) and Annex III of the text, touristic dwelling activities are considered innocuous for the environment. This being the case, we see no need to make a prior declaration to assess the environmental impact of an activity that is considered innocuous by the law itself. As indicated in the previous paragraph, tax declarations and/or the registration of the activity could be sufficient to be aware of the existence of the activity and it would be for the different Administrations (regional and local) to coordinate on the sharing of such information.¹³⁵

To sum up, whereas the obligation to submit a prior declaration and to register in the Catalan Tourism Registry may not be the least restrictive means to effectively control compliance with quality or environmental standards, a certain control of the activity (knowing its existence) seems necessary if an effective system of fines in case of fraud, misuse or abuse is to be put in place. The question of whether this

¹³³ [Opinion of the European Committee of the Regions on the local and regional dimension of the sharing economy, 115th plenary session, 3-4 December 2015.](#)

¹³⁴ ACCO, [Report on the Draft Decree on a Tourism Regulation of Catalonia](#), 9 September 2015; and [Peer to peer transactions and Competition](#), July 2014.

Upholding this view, we could mention the *Italian tourist guides* case, in which the ECJ held –long before the new sharing economy business models emerged– that reputation might indeed be a factor to balance when assessing the proportionality of a restriction to the freedom to provide services. ECJ Judgment of 26 February 1991, C-180/89, *Commission v Italy*, ECLI:EU:C:1991:78, § 23.

¹³⁵ Based on the Single Contact Point principle, established in Article 6 of the Services Directive, and Article 18 and the 2nd Additional Provision of Act 17/2009, the different information requirements could be merged.

control is already achieved through tax mechanisms (i.e. by entrusting the Tax Agency with spotting illegal activities) remains open and requires policy decisions.

d) *Restrictions particularly affecting intermediaries such as online platforms*

At first sight, the obligations imposed on intermediaries (provided that they truly intervene in the configuration of the service and do not act as pure marketplaces¹³⁶) do not prevent them from carrying out their activities, nor do they seem able to discourage them to do so.

Intermediaries are required to collaborate with tourism inspections, to display the dwellings' Catalan Tourism Registry numbers in any promotional material, and not to commercialise dwellings that do not meet the requirements established by the legislation. As mentioned, the Catalan Government assessed several means of controlling and limiting the rental of dwellings that do not meet the minimum formal and material requirements and came to the conclusion that getting the intermediary to display a registry number is the less restrictive means to do so.

However, sanctions for non-compliance with promotion obligations are non-negligible (namely a serious infringement, with fines ranging from €3,001 to €30,000),¹³⁷ and it is not clear that the obligations imposed on intermediaries would stand a proportionality assessment.

On the one hand, the need to display the Catalan Tourism Registry number of the dwelling and the prohibition to commercialise dwellings that do not meet the necessary material requirements do not entail the need to verify the real conditions of the dwelling, or the need to submit a declaration for performing the activity. Formally, the intermediary only has to ask for a number to be displayed in its promotional material (mainly its website).

On the other hand, as mentioned in the Section III.1.3(c) above, there could be less restrictive means to ensure quality standards of the dwellings. In particular, the peer to peer trust built on the platforms and the possibility to maintain sanctions for non-compliance with basic requirements while removing the obligation to register and display a registry number could also ensure protection of such minimum quality standards.

¹³⁶ See Section III.1.2(d) above.

¹³⁷ Please note that, as mentioned at section III.1.1.1.d) above, such sanctions have already been imposed on both owners of touristic dwellings and intermediary platforms such as Airbnb and HomeAway for commercialising and/or promoting touristic dwellings without displaying the registry number.

Again, the debate arises on whether it is reasonable to shift the burden of administrative control to globally operating platforms. The participation of the on-line platform in the configuration of the service may be the distinctive criterion according to the case-law on the E-commerce Directive.¹³⁸

Finally, the obligation to provide tourism inspectors with information related to the touristic dwelling may give rise to data protection concerns for the intermediary company (since it is obliged to provide information on the dwelling that the owner, who is the platform's client, may not be willing to provide). However, it does not seem especially burdensome for the intermediary provided that any data protection necessary consents are always gathered prior to exercising the activity (i.e. commercializing a particular dwelling through the website).

e) Tax obligations

Tax obligations constitute a limitation to the free performance of the activity. However, the general interest pursued with the current tax regime is twofold, namely (i) preventing tax evasion, i.e. the income generated by the touristic activity is taxed regardless of the means of exercising the activity –hotel or private dwelling; and (ii) ensuring that the activity contributes to the social costs it generates, e.g. through the waste collection tax. The current tax scheme seems proportionate to achieve these ends.

The ECJ case-law on this particular matter has made it clear that tax obligations may indeed constitute a measure discouraging the activity, but provided the amount reasonably responds to the aim pursued (e.g. covering the cost of an administrative procedure or a social externality) the measure stands a proportionality assessment.¹³⁹

Actually, the Spanish NCA argues that if social security and public order concerns arise from touristic rental activities, a less restrictive means of addressing such concerns would consist of increasing taxes on these activities.¹⁴⁰ In other words, if the City aims to (i) ensure a reasonable amount of residential housing at affordable prices; and (ii) minimize insecurity, noise and degradation of private housing, it

¹³⁸ See the discussion on the *Google case* in Section III.1.2(d) above.

¹³⁹ ECJ Judgment of 24 March 2011, C-400/08, *Commission v Spain*, ECLI:EU:C:2011:172, § 127-129.

In that case, the ECJ analysed an administrative tax for obtaining a licence, calculated on the basis of a fix fee per square metre. It held in that regard that “*that method of calculating the fees due reflects overall costs reasonably accurately and is likely to deviate little from actual costs in individual cases. In addition, that method of calculation, corresponding to an amount per square metre, has the advantage of allowing the cost of the procedure to be estimated beforehand in complete transparency*” (paragraph 129).

¹⁴⁰ Meeting with the Spanish NCA (“CNMC”) on 15 February 2016.

should consider a substantial increase of taxes on touristic activities, most notably the tourist tax payable by foreign visitors, instead of directly or indirectly limiting the number of dwellings that can be placed on the market for touristic purposes.

In this regard, the City understands that taxes may indeed be increased but they should then not only envisage the user of touristic services (as the overnight tax does), but also the provider of the service (e.g. by means of an increase of the tax on local real estate (*Impuesto sobre Bienes Inmuebles*) due to the heavier impact their activity implies for the city; or by means of an increase of the owner's income).¹⁴¹ Otherwise, the Municipality argues, the social concerns arising from the activity shall not be correctly addressed.

f) Suspension of touristic licences

The Moratorium constitutes an absolute barrier to entry into the market until 3 July 2017. An absolute ban on access to the market is clearly at odds with the EU case law on restrictions to the fundamental freedoms. Nevertheless, it seems worthwhile to highlight the reasons for and against the Moratorium.

On the one hand, the reasons pleading in favour of the Moratorium can be summarised as follows:

- The serious social and urban problems caused by the proliferation of touristic dwellings in Barcelona ask for a deep analysis in order to come up with sensible proposals to regulate the situation. According to the wording of the Moratorium, the suspension seeks to give public authorities time to work out a public strategy to strike the best possible balance between social and touristic needs while stopping the negative effect the fast grow of touristic dwellings is causing.
- The suspension is temporary. The City says that it decided to extend the Moratorium to allow for the definitive approval of the Draft Special Plan on Touristic Accommodations.
- The holistic nature of the suspension is a means to ensure that the partial geographic prohibition did not entail the flux of touristic dwellings to the boroughs where licences were not suspended.

On the other hand, the Catalan Competition Authority (ACCO) published a note commenting on the effects of the Moratorium from a Competition Law perspective, in which it deemed the suspension measure disproportionate.¹⁴² ACCO pointed out

¹⁴¹ Opinion shared at the meeting held on 29 February 2016.

¹⁴² The note is available at: http://www.diba.cat/documents/479934/60665050/12.2+ATI-38-2015-suspensio-licencies-BCN_WEB_versio-CAT.+Alfred+Lacasa.pdf/485ea61a-767a-4398-a858-8ede7c9b4ade.

that the suspension entails (i) competition concerns inasmuch as it implies a clear barrier to entry into the market to the detriment of consumers' welfare; and (ii) legality concerns, inasmuch as Article 14 of the Services Directive prohibits to make licences conditional on market demand. Allegedly, the reason behind the suspension was an excess of demand and the Services Directive prohibits that authorities condition access to provide a service to the existence of demand (thereby ensuring a certain turnover to existing competitors).¹⁴³

As far as we are aware, Spanish Competition authorities do not intend, for the moment, to seek judicial review of the Moratorium.

In our view, it is clear that problems arising from touristic dwelling activities do exist in Barcelona and that they require a solution from a regulatory perspective.¹⁴⁴ It also seems clear that the traditional regulatory approach to touristic activities may not be a good solution for the new sharing economy business models. Taking the time to consider the best regulatory option may be necessary but a complete regulatory ban, even if temporary –recently extended for one more year– is unlikely to stand a proportionality assessment under the EU case law on the internal market.

g) *The Draft Special Plan on Touristic Accommodation*

The model envisaged by the Draft Special Plan on Touristic Accommodation undoubtedly entails restrictions on the touristic dwelling rental activity. The general prohibition to open a new dwelling unless a pre-existent one is closed is an intense restriction that turns into an absolute restriction wherever the potential

¹⁴³ In this regard, it may be worth highlighting again the *Attanasio Group* case, where the ECJ indicated that the aim of protecting existing competitors is not an overriding reason in the general interest (since it is a purely economic objective). Nonetheless, other reasons –*in casu*, consumer protection, road safety, etc.– may also justify the very same measure. In *Attanasio Group*, the ECJ clearly argued against the measure at issue but left it for the national court to decide on its proportionality. In our opinion, this can only be understood as implying that other overriding interests were indeed at stake in the case at hand. Since the analysis on the existence of a valid justification precedes the proportionality assessment, had there been no other valid interests the proportionality assessment would have been redundant. See, ECJ Judgment of 11 March 2010, C-384/08, *Attanasio Group Srl v Comune di Carbognano*, ECLI:EU:C:2010:133, §§ 55 and 56.

¹⁴⁴ Barcelona is not the only region concerned by the impact of touristic dwelling activities. It seems that there are more authorities working on regulating touristic dwellings. For instance, the Community of Madrid passed Decree 79/2014, of 10 July, of the Board of Government, on the touristic apartments and touristic dwellings in the Community of Madrid ([Official Journal of the Community of Madrid No. 180, 31 July 2014](#)) and the Canary Islands passed Decree 113/2015 of 22 May 2015 on the Regulation of touristic dwellings of the Autonomous Community of the Canary Islands ([Official Journal of the Canary Islands No. 101, 28 May 2015](#)). Both have been challenged by the Spanish NCA for including restrictions on dwelling or room rental (namely duration and geographic restrictions, obligation to submit responsible declaration, prohibition to partially rent the dwellings, strict furniture obligations).

new dwelling activity is located in the area that the Special Plan defines as “natural decrease zone” (where, even if a pre-existent dwelling is closed, no new one shall be allowed).

Even if local zoning powers may fall out of the scope of the Services Directive, the debate has arisen on whether a complete barrier to entry into the market strictly respects zoning powers or constitutes a disproportionate restriction to economic activities. Whereas the measure may indeed protect certain neighbourhoods from a “touristic overload”, conditioning the opening of new dwellings to the closure of pre-existent ones may unduly protect existent activities, which are not necessarily the more efficient or the more respectful with other regulatory legitimate aims such as consumer protection or safety measures.

The Catalan Competition Authority (ACCO) has actually issued a note on the initial approval of the Draft Special Plan on Touristic Accommodation.¹⁴⁵ In its note, ACCO warned on the difficulties the new regime would entail for new entrants, with the corresponding harmful effects for competition and consumers. It also asserted that the restrictions imposed may raise necessity and proportionality concerns. In this sense, ACCO suggests an alternative to the approach chosen for the Draft Special Plan on Touristic Accommodation, namely a scheme based on a scholarly proposal to create “transferable rights”.¹⁴⁶

50

In any event, note that the Draft Special Plan on Touristic Accommodation has only received initial approval and is still under public consultation. Hence, the rules contained therein may be modified before final approval.

¹⁴⁵ The note is available at:

http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/Observacions-26-2016-PEUAT-Barcelona-versio-angles.pdf.

¹⁴⁶ In this regard, see footnote 25 above, on the Spanish Supreme Court’s position as regards the admissibility of “substitution schemes”. Considering that case-law, we are not sure that a “transferable rights” system would be considered admissible under Spanish Administrative Law. In any case, the ACCO’s proposal is highly interesting for further discussion.

2. Berlin

2.1 Restrictions identified

2.1.1 Legislation in force

We have identified several restrictions in the legislation applicable to the short term rental of dwellings for touristic purposes in Berlin. It is important to put them into context.

The ZwVbG includes a general prohibition of the use of any residential property for purposes other than its intended use. Pursuant to Article 2(1)(1) ZwVbG, such other use includes making available residential property repeatedly (i.e., on more than one occasion) in exchange for a daily or weekly payment, for periods of less than two months.

Applicability of the ZwVbG hinges on whether there is effectively a shortage of dwellings on the Berlin market. As said above, the Federal MRVerbG empowers regions to restrict an owner's freedom only to address such shortage, not to achieve any other goals, as legitimate as they may be.

Pursuant to constant jurisprudence up to the Federal Constitutional Court (*Bundesverwaltungsgericht*), it is primarily for the region having regulated the real-estate market to regularly check whether a shortage remains and to ease or abolish its regulation if appropriate. However, where the shortage clearly ended and any restrictions of the owner's freedom are, therefore, unnecessary such regulation is automatically void because it infringes Article 14 of the German Constitution, regardless of whether the authorities formally abolished such regulation.¹⁴⁷ This means that any addressee of a restrictive administrative decision may challenge the existence of a real-estate shortage before the courts.

To establish whether there is a shortage, the courts use a statistical tool known as the Methodological concept to calculate the supply of dwellings in the municipalities of Bavaria.¹⁴⁸ The courts contrast the results of this method with any other relevant data, such as studies, the evolution of rental prices and housing prices, demographic data or the availability of dwellings for rent. In 2002, a combination of all these data led the Berlin Supreme Administrative Court to conclude that there was no shortage on the Berlin market and, therefore, that it was unlawful for the City to order a

¹⁴⁷ References in the judgment of the Berlin Supreme Administrative Court of 13 June 2002 at point I.B: <http://www.ferienwohnung-zimmer-berlin.de/Unterkuenfte/Vermieter/OVG%20Berlin.pdf> (page 7 of the document).

¹⁴⁸ *Fürnrohr, König*, Methodisches Konzept zur Berechnung der Wohnungsversorgung in den Gemeinden Bayerns, in: *Bayern in Zahlen* 12/1997.

tourist flat lessor to pay a fee until he had provided additional lodging space as compensation for withdrawing his dwelling from the market.¹⁴⁹

The Court also held that shortage must be assessed for a given city overall, not by boroughs or neighbourhoods, as the MRVerbG (and, therefore, also the ZwVbG) are not designed as tools for policies targeted at specific areas of a city. This is why the City of Berlin in 2000 proposed to amend Article 6 § 1 MRVerbG and make this instrument more “flexible”. The initiative was not successful.¹⁵⁰

The general prohibition under the ZwVbG applies to rentals of residential property both as a holiday home and to tourists.

With regard to the above some clarifications seem useful:

a) Features of the touristic dwelling

The implementing regulations AV-ZwVb differentiate between touristic dwellings (*Ferienwohnung*) and short-term rental of rooms (*Fremdenbeherbergung*) according to their characteristics:

- Touristic dwellings (*Ferienwohnung*):
 - Constantly changing guests
 - Temporary stay
 - Self-sufficiency facilities
 - Cooking facilities
- Short-term rental of rooms (*Fremdenbeherbergung*):
 - Short stay
 - No cooking facilities
 - If necessary (not obligatory), additional services are offered (i.e. breakfast)
 - The implementing regulations AV-ZwVb indicate some examples: room rental (*Zimmervermietung*), i.e. one furnished room; and sleeping accommodation (*Schlafstelle*).

In any event, since the objective of this legislation is not to ensure a sufficient quality of accommodation to the tourists there are no minimal facilities to be provided or minimal services which have to be offered by the owners/lessees of the apartments.

b) Administrative requirements

¹⁴⁹ <http://www.ferienwohnung-zimmer-berlin.de/Unterkuenfte/Vermieter/OVG%20Berlin.pdf>; judgment of 13 June 2002.

¹⁵⁰ *Idem* (page 20).

1. Authorisation

- Description

Pursuant to Article 3(1) ZwVbG, an authorisation may be granted if overriding public interests or legitimate private interests have priority over the public interest in maintaining the residential property for residential purposes.

The ZwVbG considers that there is an overriding legitimate private interest where a person's livelihood is at risk. The burden of proof is on the applicant, who must provide evidence to show that his or her livelihood will unavoidable be at risk unless the property at issue is used for very specific occupational or commercial purposes.

Notwithstanding the above, a person's livelihood cannot be deemed to be at risk if they are putting residential property to another use than the one for which such property simply to increase income (Indications 13.1-13.2 AV-ZwVb). This criterion is very demanding: there must really be no other way for the owner to make ends meet than to rent their property in this particular way.

According to the Indication 10 AV-ZwVb, the administrative decision on whether to grant an authorisation is discretionary and it is, as such, revocable.

- Transitional period

Pursuant to Article 2(2)(1) ZwVbG, residential accommodation can be used as a holiday dwelling until 30 April 2016 for those who were renting their dwelling when the ordinance ZwVbVO came into force (i.e., on 1 May 2014).

This transitional period of two years only applies if the district office (*Bezirksamt*) was notified within the three-month period after the ZwVbVO came into force (i.e. 31 July 2014) of the fact that a particular dwelling would be used as a holiday dwelling.

Absent such notification, such dwelling does not benefit from the transitional period and requires authorisation according to the current legislation.

- Application form

An application form must be submitted to the district office.¹⁵¹ The application must contain the following information/documentation:

- Administrative form.
- Detailed justification specifying the reason for the request and relevant supporting documents.
- Proof of ownership (extract from the Land Register).
- Power of representation (in the event that the application is not done by the owner, a power of attorney must be provided).
- Lease contract if the apartment is rented. If it is not rented, proof that the apartment is legally free.
- Proof of Berlin residence. If necessary, proof must be attached that the dwelling's owner is/will be a Berlin resident.
- Surface calculated according to the Regulation on housing-related calculations of 17 October 1957 [*Verordnung über wohnungswirtschaftliche Berechnungen nach dem Zweiten Wohnungsbaugesetz (Zweite Berechnungsverordnung – II. BV)*]¹⁵² if such calculation predates 31 December 2003; or according to the Regulation on living-space calculation of 25 November 2013 [*Verordnung zur Berechnung der Wohnfläche (Wohnflächenverordnung - WoFlV)*]¹⁵³ thereafter.

54

According to the VGebO this application is currently taxed €225.

According to Article 5 ZwVbG, the district office is entitled to request all relevant data from the users/inhabitants of the homes or flats. Furthermore, district office officials are entitled to enter the dwelling in order to examine in which way it is being used.

2. Compensation

In Berlin a permit is only granted in exchange for the landlord or dwelling user to pay monthly up to €5,00 per square meter as compensation for the misuse of the dwelling (Article 4(3)(1) ZwVbVO). This compensation is not due in the event of an overriding public interests (Article 4(2)(2) ZwVbVO).

¹⁵¹ Administrative form available at:

<https://senstadtfms.stadt-berlin.de/intelliform/forms/Wohnen/berlin/BW601/index>.

¹⁵² https://www.gesetze-im-internet.de/bvo_2/BjNR017190957.html.

¹⁵³ <http://www.gesetze-im-internet.de/woflv/BjNR234610003.html>.

c) Private permission: lessor's permission

Article 540 BGB expressly requires the lessor's authorisation for any subletting. Therefore, subletting without such authorisation enables the lessor to immediately terminate the lease according to Article 543(2) BGB without notice.

Article 3 ZwVbVO states that the lessor's express authorisation must be attached to the application form filed at the district office.

Moreover, the Civil Chamber of the Berlin Court, in its judgement Az. 67 T 29/15 of 3 February 2015, considered that the lessor can terminate the lease with immediate effect if the lessee does not desist from renting the dwelling through Airbnb to tourists in spite of prior warning.¹⁵⁴

d) Tax obligations

Even if the owner/lessee rents only occasionally via on-line platforms and, hence, has small revenues, these must be reported to the Tax Agency (Article 21(1) EStG). However, depending on the individual situation actual tax due will differ.

Since the rental of a touristic dwelling is an economic activity, the owner of such dwelling is subject to the tax on economic activities if their income exceeds €24,500 (Article 11(1)(1) GewStG).

55

2.1.2 Draft legislation

According to the information orally provided by the Senate Department for Urban Development and the Environment, press releases published by the Mayor on 29

¹⁵⁴ Judgment and press release available at:

http://www.berlin.de/imperia/md/content/senatsverwaltungen/justiz/kammergericht/2015_67_t_29_15_beschluss_vom_03.02.2015.pdf?start&ts=1423226728&file=2015_67_t_29_15_beschluss_vom_03.02.2015.pdf

<https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2015/pressemitteilung.426343.php>

September 2015,¹⁵⁵ on 9 February 2016¹⁵⁶, on 24 March 2016¹⁵⁷ and on 20 April 2016¹⁵⁸, respectively, summarise every issue included in the Amendment Act, namely:

- Second homes cannot be rented out without a permit as a touristic dwelling;
- Online platforms must collaborate with investigation procedures tracking the illegal use of holiday dwellings. They will be obliged to provide information about the provider of the dwelling. According to the information orally provided by the Senate Department for Urban Development and the Environment there is no specific legislation currently in force regarding intermediary companies. The Amendment Act only deals with online platforms to the extent necessary for controlling the dwelling activities.

Moreover, at the request of the competent authority, service providers (online platforms) have to remove offers and advertising of their websites that may constitute an administrative offense under Article 7(2) ZwVbG.

- Since processing all expected applications for a licence to change the dwelling's use or the review of possible violations is costly and time-consuming, such applications will not be deemed approved through administrative silence ("fictitious approval" or *Genehmigungsfiktion*) until two years after the entry into force of the Amendment Act, namely in spring 2018. Fictitious approval means that touristic use is automatically considered approved if the district office does not answer the request within fourteen (14) weeks.

The new authorisation regime does not affect the transitional period until 30 April 2016, during which dwellings may be used as holiday homes. After this date, these dwellings must enter the 'normal' rental market again.

155

<https://www.berlin.de/rbmskzl/aktuelles/pressemitteilungen/2015/pressemitteilung.379622.php>.

156

<https://www.berlin.de/rbmskzl/aktuelles/pressemitteilungen/2016/pressemitteilung.442656.php>!

157

http://www.stadtentwicklung.berlin.de/aktuell/pressebox/archiv_volltext.shtml?arch_1603/nachricht5959.html

158

http://www.stadtentwicklung.berlin.de/aktuell/pressebox/archiv_volltext.shtml?arch_1604/nachricht5993.html

Finally, according to the press release published on 20 April 2016, the Senate Department for Urban Development and the Environment seems to have implemented a centralised control system through which any citizen has the opportunity to inform anonymously the Administration about possible violations of the prohibition of misuse.¹⁵⁹

2.2 Possible justifications

2.2.1 Legislation in force

a) Limitations regarding the touristic dwelling activity

Some of the limitations on the touristic dwelling activity, such as the maximum rental period (less than two months), do not seem to be justified. In our view, any decision on the length of rental periods appears to be discretionary, but must be put in context.

Berlin's current legislation does not focus on providing high-quality touristic services or protecting tourists' rights as, for instance, Barcelona's does. Berlin is more concentrated on the housing market and urban development. The main challenge seems to ensure the availability of affordable housing in the city.¹⁶⁰

It is important to bear in mind that there are less than two millions residential units in Berlin, 86% of which are rental flats: the highest percentage in all Germany. In addition to that, the housing market in the capital is in no way uniform. Prices vary considerably depending on the district.¹⁶¹ The policy of preserving the social composition of Berlin is motivated by the fear of gentrification.¹⁶²

¹⁵⁹

https://ssl.stadtentwicklung.berlin.de/wohnen/zweckentfremdung_wohnraum/formular/adresswahl.shtml

¹⁶⁰ We have identified no ECJ case-law dealing with a "housing shortage" as an overriding general interest, from an internal market perspective. However, since the list of overriding reasons in the general interest is *numerus apertus* provided that national measures are indistinctly applicable (non-discriminatory), it is our understanding that this justification of the Berlin regime could indeed stand a suitability assessment. Proportionality, as in the case of Barcelona, requires analysis of each particular measure.

¹⁶¹ <http://www.stadtentwicklung.berlin.de/planen/stadtentwicklungskonzept/en/statusbericht/>.

¹⁶² Kholodilin, Konstantin A., Discussion Paper 'Fifty Shades of State: Quantifying Housing Market Regulations in Germany', *Deutsches Institut für Wirtschaftsforschung*. November 2015, available at: https://www.diw.de/documents/publikationen/73/diw_01.c.521370.de/dp1530.pdf, p. 12 seq.

In this connection, the House of Representatives in its Resolution Proposal referring to ZwVbG¹⁶³ indicated that without this law the existing housing shortage situation in the city would be ignored: planning Law and building regulatory instruments are insufficient to stop the undesirable development in the housing market in Berlin.

Berlin's main objective is to ensure sufficient and affordable housing supply for the city's permanent residents. People should not be forced to leave their neighbourhood for economic reasons, (e.g. rent increases due to higher profits from touristic uses). In short, the aim is to maintain the social structure of certain residential areas, in order to protect the character of certain boroughs.

Considering the above, it is important to highlight that this regulation as well as the former one (no longer in force) are said to respond to the housing shortage situation. There is no national case law assessing the validity of this restriction and the general interest behind it. Nevertheless, we have been informed that some decisions of the Berlin Appeal Court (*Oberverwaltungsgericht Berlin*), especially judgement 5 B 22.01 of 13 June 2002,¹⁶⁴ dealt with this justification already included in the former legislation. The Court considered that the justification as such may be valid but the effective existence of a housing shortage must be periodically reassessed. In other words, should the housing shortage of Berlin get better, the authorisation regime included in the ZwVbG would no longer be considered necessary. Administrative requirements must be coherent with the corresponding market situation.

58

b) Restrictions deriving from the administrative requirements

We infer from the list of information to be submitted to the administration that the authorisation intends to guarantee that the proposed dwelling activity meets the conditions for an exception to the general prohibition. Likewise, the payment intends to compensate for the withdrawal of living space from the general rental market in Berlin.

The applicant's individual interest in showing that his or her livelihood would unavoidably be at risk unless the property is used for commercial purposes needs to be balanced with the general interest of addressing the housing shortage situation in Berlin. Allegedly, this burden on a particular applicant is a means of relaxing the general prohibition in exceptional cases where the particular conditions of the applicant justify an exception to the general rule.

c) Private permission: lessor's permission

The limitation referred to the lessor's permission and the threat of an immediate termination of the lease described in the previous section would seem to be justified.

¹⁶³ <http://www.parlament-berlin.de/ados/17/IIIPlen/vorgang/d17-1057.pdf>

¹⁶⁴ <http://www.ferienwohnung-zimmer-berlin.de/Unterkuenfte/Vermieter/OVG%20Berlin.pdf>

We understand that the intention is to safeguard the rights of owners against the lessees not respecting the contract or the general BGB provisions on housing rental.

2.2.2 Draft legislation

The number of advertisements and infringements shows that the misuse prohibition is a necessary and useful tool to counteract the increasing housing shortage in Berlin. In this sense, the authorities have to date registered about 6,300 apartments and found about 1,200 cases of possible misuse. There are also around 2,800 indications from the population regarding possible misuse, which are currently under review.¹⁶⁵

The centralised control system may be a means for the City to control that touristic dwellings operate in compliance with the ZwVbG. Considering that it is a newly implemented system it is still difficult to analyse the practical problems that may arise from the everyday implementation of such system.

In a nutshell, the Amendment Act is designed to further ensure adequate housing supply for the population and to facilitate the enforcement of the ZwVbG by district offices.

59

2.3 Proportionality assessment

2.3.1 Legislation in force

a) Touristic dwelling activity

According to the public statistics regarding housing stock, in 2013 there were 1,883,161 apartments in Berlin.¹⁶⁶ On the other hand, the House Report elaborated by the *Forschungsinstitutes GEWOS* indicates that in 2012 there were approximatively 12,000 touristic dwellings in Berlin.¹⁶⁷

¹⁶⁵ <https://www.berlin.de/rbmskzl/aktuelles/pressemitteilungen/2016/pressemitteilung.442656.php>.

¹⁶⁶ https://www.statistik-berlin-brandenburg.de/publikationen/otab/2014/OT_F01-01-00_312_201300_BE.pdf. We understand that these figures include both apartments for touristic and residential purposes since there are no further specifications thereto.

¹⁶⁷ *Indikatorensystem zur kleinräumigen Wohnungsmarktanalyse*, GEWOS Institut für Stadt-, Regional- und Wohnforschung GmbH, April 2012, p.18. There are no more recent official figures regarding the number of touristic dwellings in Berlin although the City ombudsman understands that the number (12,000) may have increased due to the proliferation of Internet platforms. Other (non official) sources of information suggest indeed a higher number of touristic dwellings:

Moreover, the Senate Department for Urban Development and the Environment stated in its Resolution Proposal to the House of Representatives referring to ZwVbVO that several indicators highlighted that the housing shortage situation in Berlin has recently worsened.¹⁶⁸

As said above, to require an authorisation is a restriction designed to enable the authorities to assess whether there are sufficient reasons to grant an exception to the general prohibition of ‘misuse’ of dwellings.

Provided that the procedure is not particularly burdensome for the owner of the dwelling and does not affect the intermediary or final user of the rental service, the authorisation requirement as such would seem proportionate to its objective.

However several issues related to the activity, as will be explained in subsection b) below, do seem particularly oppressive.

b) Administrative requirements

1. Authorisation

As stated above, administrative proceedings that are quite simple might be considered a proportionate restriction.¹⁶⁹ However, some administrative requirements justified on the basis of the housing shortage in Berlin might be replaced by other less intrusive means.

First, the cost could eventually discourage access of the dwelling’s owner/lessee to the rental activity, especially in cases where the owner rents out the dwelling only from time to time. As described above, (i) the application is taxed €225;¹⁷⁰ and (ii) non-compliance with administrative requirements (authorisation) entails fines ranging from €500 to €1,500 per month/dwelling.

<http://www.berliner-zeitung.de/berlin/knapper-wohnraum-in-berlin-berliner-vermieten-17-500-illegale-ferienwohnungen-22764544>.

¹⁶⁸ <http://www.parlament-berlin.de/ados/17/Haupt/vorgang/h17-1473-v.pdf#search=%2217%2F1518%22> (pages 7 seq.).

¹⁶⁹ An ex-ante control through an administrative authorization may stand a proportionality assessment if a control ex-post would clearly be insufficient to attain the general interest objective. ECJ Judgment of 24 March 2011, C-400/08, *Commission v Spain*, ECLI:EU:C:2011:172, § 92.

Addressing the housing shortage and avoiding gentrification may indeed need prior measures in order to be effective.

¹⁷⁰ This particular tax would not seem unreasonable. See footnote 139 above.

Indication n°22.6.1 of the AV-ZwVb specifically emphasises that renting rooms (*Zimmervermietung*) and sleeping accommodation (*Schlafstelle*) without authorisation must be fined.

This may be a means to control the abuse of the “room rental activity”. Rooms on Airbnb are more and more frequently rented on a commercial level since owners (or lessors) can make higher profits with short-term rentals than with regular tenants.

2. Compensation

The compensation may also discourage access of the dwelling’s owner/lessee to the rental activity. Compensation obligations (as well as tax obligations) clearly constitute a limitation to the free performance of the activity.

However, the general interest pursued with this compensatory regime is to ensure that the activity contributes to the costs it generates for the city (i.e. shortages in the housing market). The current compensatory scheme may be proportionate to achieve its purpose.

c) Private permission: lessor’s permission

The requirement of the lessor’s permission also seems to be a proportionate restriction. As stated above, the BGB provisions and recent case law on this matter intend to safeguard the rights of owners against the lessees not respecting the contract or the general provisions included on the BGB with regard to house renting.

2.3.2 Draft Legislation

The three measures described at section 2.1.2 above seem to be proportionate taking into account (i) the current necessity to counteract the increasing housing shortage in Berlin; (ii) the number of cases evidencing infringements of the ZwVbG; and (iii) the difficulty of the administration to manage all pending authorisation requests.

3. Amsterdam

3.1 Restrictions identified

The three rental modalities regulated in Amsterdam are subject to the following restrictions:

3.1.1 Zoning Plans

Like any Dutch municipality, the City of Amsterdam has established Zoning Plans pursuant to the General Planning Act, which require broad consultations among neighbours and stakeholders.

These Plans establish detailed usage conditions for a given zone, including limits on the number of hotels.

3.1.2 Withdrawal of housing from the market

Pursuant to Article 21 of the Housing Act, the following requires a City licence:

- any use of dwellings other than as the owner's residence, office or practice;
- joining two dwelling units other than for joint use as the owner's residence, office or practice;
- turn dwellings into an annex to another dwelling unit; or
- turn dwellings into two or more dwelling units.

Under Article 22 of the Housing Act dividing dwellings into Apartments also requires a City licence. All such licences are valid for one year.

This strict regulation of private residential housing means that any use which is not expressly covered by the exceptions in one of the three applicable specific regimes is illegal.

3.1.3 Fire-safety

Article 2(1)(b) of the City's Fire-Safety Regulation imposes a specific fire-safety permit for any "installation" (*inrichting*) commercially offering night-stays to more than four (4) people at a time. The main requirement for this permit is to install either a fire-alarm system or interconnected smoke detectors in every rented room and in common areas.

The City reads "installation" as meaning the entire building, e.g. four is the maximum number of tourists simultaneously lodged in the building, regardless of the number

of dwellings in such building. In other words, four dwellings affected to B&B or shortstay are enough for the building to require a fire-safety permit.

Commercially (*bedrijfsmatig*) seems to refer, apart from hotels, only to B&B and ShortStay, not to holiday rental. City officials, however, were less clear about the latter, although they say that all buildings that they have so far encountered with more than four dwellings lodging tourists without a licence and a fire-safety permit were in fact illegal hotels.

3.1.4 Taxes

Pursuant to Article 5 of the Tourist Tax Regulation, a flat tax of 5% is levied on any rental fees paid by tourists aged three or more (Article 7). Article 2 of the Regulation defines a tourist as any person who is not registered as a resident with the local administration, while Article 7(2) exempts inmates of hospitals, homes for the elderly and the like. The tax is payable by the lessor, although Article 3(2) of the Regulation expressly enables a passing-on to the lessee.

Moreover, any individual renting their dwelling must pay income tax on 70% of the rent received, net of any cost incurred.¹⁷¹ However, a study jointly commissioned by the Ministry of Infrastructure and the Environment and the Ministry of Economy identified not the actual tax burden but uncertainty about the applicable tax rules as the main obstacle. This is particularly true of VAT, given the blurred distinction between a professional lessor and a private individual.¹⁷²

63

3.1.5 B&B

B&B must be in accordance with the borough's Zoning Plan and meet the following conditions:

- no more than four (4) guests at any given time;
- total rented surface 40% or less of the dwelling's total surface;
- prior communication of the business to the borough;
- prior communication to the City's environmental authorities;
- implementation of measures against legionella;
- a licence to serve alcoholic beverages (where applicable);

¹⁷¹

http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/prive/woning/eigen_woning/u_hebt_een_woning/tijdelijke_verhuur_eigen_woning/gevolgen_verhuur_eigen_woning_via_internet.

¹⁷² shareNL, "Innoveren in de deeleconomie. Een inventarisatie van kansen en belemmeringen die innovatieve investeringen in de deeleconomie, op het gebied van groene groei, (on)mogelijk maken" (2015), p. 22.

- obligation to keep a register of arrivals and departures, including the guest's name, address and ID-type; and
- tourist tax is paid.

As to B&B on houseboats, the 2016 Notice imposes the following conditions:

- maximal surface devoted to B&B services is 40%;
- the lessor is the boat's registered main resident;
- no more than four (4) guests at any given time;
- prior communication to the borough;
- obligation to keep a register of arrivals and departures, including the guest's name, address and ID-type;
- the boat meets applicable fire-safety conditions;
- tourist tax is paid; and
- no sale of alcoholic beverages.

Pursuant to Article 6.21 of the Bouwbesluit 2012 read in conjunction with Article 4.1 of Amsterdam's Building Regulation, compliance with fire-safety regulations as set out in section 3.1.3 above means that the dwelling must either be equipped with a fire-alarm system or with connected smoke detectors in each rented room and along the evacuation route if the four-person limit is exceeded in the building (not in an individual dwelling therein).

64

3.1.6 Holiday Rental

Under the February 2014 Notice, the conditions for holiday rental are that

- the lessor is the dwelling's main resident;
- rentals do not add up to more than sixty (60) days p.a.;
- the entire dwelling unit is rented;
- rental is occasional, not structural or professional, which would infringe general regulations including the Zoning Plan;
- no more than four (4) tourist lessees at any given time;
- the owners' association or the main resident's lessor have allowed the rental; this is not a legal condition but might be a requirement under the statutes of a given association, which the City mentions as a warning;
- the dwelling complies with fire-safety conditions;
- tourist tax is paid; and
- there is no nuisance to neighbours, for which the tourist's lessor is responsible.

As to holiday rentals on houseboats, the 2016 Notice imposes the following conditions:

- the lessor is the boat's registered main resident;
- rentals do not add up to more than sixty (60) days p.a.;
- rental is occasional, not structural or professional;
- no more than four (4) lessees at any given time;
- tourist tax is payed;
- the boat meets applicable fire-safety conditions; and
- neither its lessees nor their guests are a nuisance.

Non-compliance with these rules entails the risk of (i) a fine of up to 18,000 euros; (ii) proceedings to recover the tourist tax due; and (iii) loss of the dwelling or the houseboat if the tourist's lessor is renting the dwelling and did not get previous authorisation from their lessor.

3.1.7 Short Stay

Under the 2014 Notice, short stay

- is limited to contracts with the same lessee for a minimum of seven (7) nights and a maximum of six (6) months at a time;
- requires a licence which is valid for ten (10) years;
- must be in accordance with the borough's Zoning Plan;
- is limited to a quota of 800 apartments distributed among some of Amsterdam's boroughs; the City decided in 2014 not to issue any new licences for short stay rentals, regardless of whether a given borough had established a quota; and
- is no longer possible without a licence for newly-built apartments in Amsterdam's city centre; elsewhere, any newly constructed dwelling may be used for short stay without a licence as long as it was never used as the home of a registered resident.

Also, the City may declare that buildings entirely devoted to short stay become apart-hotels for regulatory purposes, which might require changes to the Zoning Plan.

As with holiday rental, infringements carry a fine of up to 18,000 euros per dwelling. The record fine imposed to date is 264,000 euros for operating an illegal hotel.¹⁷³

¹⁷³ <http://hotel.blog.nl/algemeen/2014/10/31/eigenaar-illegaal-amsterdams-hotel-krijgt-megaboete-264-000-euro>.

3.2 Possible justifications

3.2.1 Zoning Plans

The Netherlands are the EU's second most densely populated Member State after Malta.¹⁷⁴ Therefore, a prime goal of the countries legislators down to local authorities is to ensure sufficient offer on the housing market. This is why the *Huisvestingswet* does the reverse than the German MRVerbG described above (i.e., free disposal of dwellings unless real-estate shortages require restrictions), namely to generally allow residential uses of dwellings only, subject to regional and local regulation.

Zoning Plans are an instrument at the local level to avoid uncontrolled use of [potential] dwellings for non-residential purposes.¹⁷⁵ Such plans are adopted with broad participation of the public and are therefore perceived as the expression of bottom-up social consensus rather than top-down bureaucracy.

3.2.2 Withdrawal of housing from the market

Same justification as under section 3.2.1 above.

3.2.3 Fire-safety

The City justifies with empirical facts its restrictive rules on lodgings rented out to more than 4 strangers at a time and the reading of such rule, for the purposes of fire-safety requirements, as applying to an entire building rather than to each dwelling therein.

Indeed, according to the City's fire-brigade the statistical likelihood of fire in in such dwellings was (and still is) much higher than in any other type of housing. The 2013 Fire-Safety Regulation was developed in consultation with Amsterdam's fire department.

City officials say that in most of Amsterdam's buildings there is only one escape route through the main door. It is crucial that not too many people who are unfamiliar with the premises queue up to evacuate or clog escape routes in the case of a fire.

¹⁷⁴

<http://ec.europa.eu/eurostat/tgm/mapToolClosed.do?tab=map&init=1&plugin=1&language=en&pcode=tgs00024&toolbox=types>.

¹⁷⁵ As regards the general exclusion of zoning measures from the scope of the Services Directive and the limits of such an exclusion, see footnote 69 above.

3.2.4 *Tourist Tax*

We know of no specific justification in the law for the 5% tourist tax nor indeed of any ear-marking of revenue from such tax. However, as discussed for Barcelona and Berlin above, the City argues that touristic rental activities generate a social and economic cost, and that it seems only fair to ask market players to contribute to such cost.

3.2.5 *B&B*

Any professional lodging offers are strictly regulated in the Netherlands. They are capped under the applicable Zoning Plan, which is the result of a very participative process. It is a major goal of Amsterdam's policy that "normal" (permanent) residents are not displaced from certain neighbourhoods nor suffer the nuisances from frequently changing tourists.

Specific restrictions are justified by identifiable concerns, such as the cap on guests and rented surface (as a distinction from hostels and for safety reasons); the need to keep a host register (since B&B is a professional and recurrent lodging activity, like hotels and unlike holiday rental or short stay); or the prohibition to sell alcoholic beverages on houseboats (where the potential nuisances due to excessive consumption of such beverages are worse than in a confined dwelling).

3.2.6 *Holiday Rental*

The City considers it to be legitimate for an owner to earn some money during their own absence from their main residence, especially considering that thanks to holiday rental that residence will not remain vacant.

However, the City's two main aims are (i) avoiding nuisance to neighbours; and (ii) preventing the operation illegal hotels. For this reason, much of the February 2014 notice is devoted to the 60-day maximum rental period during any year.

3.2.7 *Short Stay*

This exception to the general prohibition on "withdrawing" dwellings from the market was created specifically because the City's offer for businessmen staying more than a week was insufficient.

The exception being tailor-made and the City considering that there are no more shortcomings at present the quota is reduced to zero, while respecting the duration of any 10-year licences granted up until 14 January 2014. As said above, this quota refers to licences, which are only necessary if the dwelling was at one stage used as a permanent residence, i.e. if such residence is withdrawn from the market.

Investors are free to build new dwellings and use them only for short stay rentals without a licence, except in Amsterdam's city centre, where a licence is required and will be refused ever since 14 January 2014.

3.3 Proportionality assessment

3.3.1 Zoning Plans / Withdrawal

It seems disputable whether Dutch rules designed to ensure public control over the offer on the country's housing market qualify as "restrictions" for the purposes of this report. In any event, zoning rules –provided that they stick to their purposes and do no illegitimately interfere with the market– are not within the scope of the Services Directive.¹⁷⁶

In our view, regardless of whether these measures are adequate and proportional to the aim pursued, they are not targeted at holiday rentals. Any use other than the owner's as residence, office or practice requires a licence just as holiday rentals do. Therefore, these limits at least on paper are as restrictive for holiday rentals as they are for opening shops or simply for normal rental.

Conversely, one might argue that the very fact that the City of Amsterdam has made exceptions to the general prohibition in three particular instances, namely B&B, holiday rental and short stay, means that any rules governing such exceptions will always be more proportionate than the mere prohibition.

In this connection, any current thinking on limiting Short Stay (see section II.3.2.2 above) is expressly taking into account the overall need for tourist accommodation other than in hotels and indeed linking the planned phase-out of Short Stay to the fact that the need for this particular modality has decreased thanks to the increased B&B and holiday rental offers. In other words, the City is launching a public debate on Short Stay as only one of an array of different offers for non-permanent residents and tourists.

As we have said, the Netherlands are, after Malta, by far the EU's most densely populated Member State. Therefore, some regulation seems necessary, and regulating at the level of each borough seems an appropriate means of doing so.

As to proportionality, one must bear in mind that the holiday rental phenomenon is more contained in Amsterdam than, say, in Barcelona for the simple fact that 60% of housing on the market is owned by public housing corporations and not available for holiday rental, as such corporations' lease agreements typically exclude any type

¹⁷⁶ See footnote 69 above.

of sublease and provide for termination in this event.¹⁷⁷ The figure for public housing in Barcelona is around 1%.¹⁷⁸

3.3.2 *Fire-safety*

While it might be disputable whether the threshold for a fire-safety permit requirement for rentals should be four, five or six strangers, there is an empirical link between rentals and fire hazard. Therefore, establishing a quantitative threshold seems necessary and four seems a reasonable figure.

Given that the ‘correct’ threshold is not obvious, the City of Amsterdam should probably be given the benefit of doubt.

This seems equally true from a competition law perspective, since hotels, pensions and private individuals treated alike (B&B) all must comply with strict fire-safety requirements.

However, as discussed above in the case of Barcelona, some regulators dispute that such requirements may legitimately be imposed at all on private lessors.

3.3.3 *Tourist Tax*

Again, the tax is not a restriction on holiday rentals, since it is levied on any consideration paid for staying overnight in Amsterdam.

According to some regulators, a tourist tax is not only proportional but should be the instrument of choice for local authorities wishing to regulate tourist flows. Rather than limiting rental offer, these regulators argue, the tourist tax should be increased to the requisite level to deter the tourist flows regarded as excessive.

Amsterdam has taken two measures to ease the burden on touristic lessors. Financially, it has expressly stated that lessors may pass on this tax to their tourist lessee. Logistically, the City has signed a Memorandum of Understanding (MoU) on 18 December 2014 with the by far largest on-line platform operating in Amsterdam (Airbnb, with roughly 75% of the market) and its competitor Wimdu. Under the terms of the MoU, it is for the platforms to collect the tax from tourists renting through them and to pay the City. The City is negotiating similar MoUs with other on-line platforms.

In other words, lessors offering their dwelling through such platforms, i.e. the vast majority, will not have to bother about the tourist tax at all, let alone pay it. Given

¹⁷⁷ Figures provided orally by the City of Amsterdam.

¹⁷⁸ Figure provided orally by the City of Barcelona.

the logistic means at the platform's disposal, the MoU makes the tourist tax restriction even more proportionate.

3.3.4 B&B

It is difficult to think of a regulatory objection to a broadly supported policy objective such as maintaining the residential character of given areas. Amsterdam's Zoning Plans are the result of participative processes and include a limitation of professional accommodation services.

These services include B&B, which must be distinguished from hostels, the latter being subject to much more stringent regulation. Therefore, a quantitative limitation (i.e. 4 guests and 40% of total surface per household) seems a reasonable means and proportionate to attain the objective. So is the notification requirement, which is compatible with the Services Directive and necessary to ensure control.

The remainder of conditions on B&B services providers are the result of horizontal regulation which it seems proportionate to apply to such services.

3.3.5 Holiday Rentals

70

As stated above, it is general policy in the Netherlands to protect permanent residents both in terms of individuals (from nuisances as well as from a scarce and overly expensive offer) and as the sociologically dominant group in inner cities. By means of comparison, fifty per cent (50%) of Barcelona's so-called Gothic Quarter is now "floating", i.e. non-resident.¹⁷⁹

Accepting this objective as a legitimate choice to make through broadly participative processes (namely through the Zoning Plans), none of the four restrictions currently imposed on holiday rental seem disproportionate to the aim of improving the accommodation offer in Amsterdam during vacation periods while allowing owners to draw some income from their property during their absences:

- capping annual rentals at sixty (60) days p.a. provides a wider margin than most potential lessors' annual holidays;
- imposing a rental of the entire dwelling unit draws a line between B&B and holiday rent, making enforcement easier;
- prohibiting structural or professional rentals is not a specific restriction but a consequence of the general Zoning Plan, which puts a lid on any type of accommodation for non-residents, including a pied-à-terre (which is prohibited if the dwelling unit's rent is below a certain threshold);

¹⁷⁹ Figure provided orally by the City of Barcelona.

RATING LEGIS

- capping lessees at any given time at four (4) is certainly not ‘scientific’ but hardly arbitrary if the aim is that holiday rent does not alter the normal way of living together in any given neighbourhood;
- levying tourist tax is neither discriminatory nor - at 5% and normally paid by the lessee - disproportionate; and
- income tax rules provide for a 70% cap on net taxable rental income for private occasional lessors.

This compares to a general prohibition in Berlin as described above which is more restrictive and relates purely to overall scarcity, excluding borough-specific policy objectives.

IV. FINAL REMARKS – COMPARISON OF THE FINDINGS FOR EACH CITY

The analysis at previous Sections of this impulse paper certainly calls for some conclusions, derived from comparing existing regulations in the three cities.¹⁸⁰ Convergences and divergences are analysed in turn below.

First of all, it may be worth noting that **home swapping activities attract no interest from regulators in any of the three cities**. Therefore there are currently no specific rules regarding home swapping in any of these three cities. This seems to be in line with the Services Directive and the ECJ case law on the freedom to provide services, under which services are normally provided against remuneration.

Secondly and conversely, the **touristic rental of private dwellings and/or private rooms does entail regulatory interest** and has been dealt with in the three cities, both by local zoning authorities and tourism regulators.

The following justifications seem to be at the core of all three systems:

- **Address the scarcity of affordable housing for citizens.** The right of permanent residents to decent housing is allegedly jeopardised by the outstanding rise in touristic lodging.

Therefore, in all three cities, zoning authorities have somehow limited new access to this economic activity in order to ensure a minimum amount of rental offer in the real estate market at affordable prices for citizens. All three cities have passed (Berlin and Amsterdam) or are planning to adopt (Barcelona) zoning regulations that simply prohibit new touristic residences in certain areas of the cities concerned.

¹⁸⁰ During our meetings with the relevant stakeholders, the argument has been made that, due to the limited scope of this impulse paper, the findings may not sufficiently reflect other touristic realities from other parts of the country. In Spain, for example, the touristic situation may differ substantially between large cities like Barcelona, Madrid or Valencia and other areas which are also touristic hot spots, like the Balearic Islands or the Canary Islands. For further reference see:

- (i) the report ‘Second Barometer of Holiday Rental in Spain, 2015’) jointly prepared by HomeAway and the University of Salamanca (only available in Spanish):

https://www.homeaway.es/info/files/live/sites/es/files/shared/HomeAwayLab/pdf/INFORME_HA15_Fdig.pdf; and

- (ii) the final conclusions of the report ‘Economic and Social Impact of Touristic Dwellings in Spain’, June 2015, jointly prepared by HomeAway and ESADE Business School (only available in Spanish):

http://www.fevitur.com/images/Esade_FEVITUR_executive_medios_Versi%C3%B3n_Prensa_ESADE_26junio.pdf

This is an obvious limitation for access to the activity. The legal basis for its adoption is the zoning and planning powers of local governments, which are in principle excluded from the scope of the Services Directive, provided that they do not illegitimately interfere with the EU rules on the internal market.

Zoning and planning instruments are normally subject to broad consultations among the population and are, therefore, the result of an ample social consensus. However, completely banning access to these new touristic rental activities (e.g. Barcelona's Moratorium) or adopting legal instruments that directly or indirectly tend to protect pre-existent activities may not stand the suitability and proportionality assessments associated to the EU fundamental freedoms.

- **Address the unrest generated by the coexistence of tourists and citizens.** Noise, insecurity and building degradation effects seem particularly disruptive in Barcelona, where several cases of discomfort and harassment of permanent residents have been reported.

Zoning regulations and limitations are also the means of preventing such social disorders. Barcelona's regime has the particularity of adding the non-opposition of the homeowners' association as a precondition for rental activities. Likewise, Amsterdam actively encourages transparency of any touristic rental activity, notably vis-à-vis neighbours at the same building.

- **Address tax fraud and tax evasion.** The taxation regimes applicable in all three cities have the aim of making the activity pay for the social costs it generates (waste collection and tourist overnight tax in Barcelona; compensatory regime in Berlin; and a 5% tourist tax in Amsterdam).

In our interviews with the relevant Administrations, some of them (Competition authorities) have pleaded in favour of increasing such taxes as a less restrictive way of modulating the number of tourists and, indirectly, access to the activity. In other words, if social disruptions are normally linked to low cost tourism, taxation of tourism may be a means to indirectly lower the offer and demand of such services.

On the other hand, the argument has been advanced that making life in the cities dependent on the income of tourists and citizens does not seem an adequate means of preserving European cities from the gentrification phenomena present in all three cities.

One different concern that has also been raised during the interviews with the relevant administrations refers to the need to tax on-line platforms in the place where they generate business. In the case of Airbnb, for instance, the argument has been made that it paid no taxes in Spain in 2015, due to the

corporate structure it chose in Europe.¹⁸¹ Nevertheless, whether or not taxing this on-line activity is a legitimate end falls outside the scope of our analysis, since we have not identified any relevant regulatory restriction specifically aiming at this objective.

- **Distinguish the activity from traditional accommodation activities.** Tourism regulations in all three cities (with a particular emphasis in Barcelona and thereafter in Amsterdam) also seem to seek a distinction between the new sharing economy lodging options and the traditional accommodation activities.

As stated in other sections of this paper, intrusiveness prevention is not a legitimate end. Conversely, when security is behind a particular restriction (e.g. fire prevention or food safety measures) it may be proportionate.

In this connection, some limitations in the identified legislation may seem more reasonable than others. For example, temporary limitations on rental activities are not necessarily justified under security or public health concerns and are only a means of differentiating the touristic rental of dwellings from traditional hotels or hostels. To the contrary, limiting the possibility of serving food in touristic dwellings may be based on food safety grounds.

From another perspective, interestingly enough the new sharing economy models imply the interaction of **intermediate on-line platforms**. Allegedly, these on-line platforms should be responsible for the services they offer to a certain extent. Several Administrations argue that these intermediate on-line platforms may not act as mere “marketplaces”, but as real service providers (they are commercializing the apartments they offer through their websites) and, as such, they must also comply with the relevant legislation. In other words, even if they cannot be obliged to check the particularities of each and every accommodation that they market through the Internet, they do offer services that must be legal and comply with the applicable regulatory standards.¹⁸²

¹⁸¹ Please note that we have not verified the accuracy of this statement, to which we only refer here in general terms.

¹⁸² During our interviews with the Catalan Tourism Authorities, the comparison was made with illegal activities (i.e. if an on-line platform offered illegal drugs, no defence based on the intermediary character of the platform would be accepted to exclude the responsibility of the latter).

In addition to that, one concern that arose during our meeting with the City of Barcelona is how to address their recurrent defence that they do not share the identity of the apartments’ owners on data protection grounds. Without access to these data, the Municipality argues, it becomes virtually impossible to identify and eventually sanction the illegal offer. Relevant stakeholders contest such a statement and consider that tracking illegal activities is an administrative duty that should not be shifted to platforms.

In Barcelona, this has been addressed by requiring the platform to include the Registry number in any commercialization activities, thereby including on-line commerce. In Amsterdam, the authorities reached an agreement with Airbnb so that the latter collaborates in inspection activities and, more importantly, takes responsibility for collecting the tourist tax from its tourist lessees.

Whichever the regulatory option chosen, the activities of on-line platforms are clearly a new phenomenon that challenges the appropriateness and effectiveness of current regulatory models. One way of tackling this new phenomenon may be adopting the approach of the *Google* case discussed in this paper,¹⁸³ and regulate differently the activities of, respectively, pure marketplaces and the activities of Internet operators that intervene in the configuration of the service. Another way may simply be to take distance from current regulatory models and configure new legislative proposals covering this new reality. Policy choices and subsequent case-law will undoubtedly follow.

- **Ensure touristic services of a certain quality, thereby protecting the user of those services as a “consumer”.** This also seems a common concern for tourism authorities in all three cities, although the intensity of the regulation diverges among them. This is actually a particular concern in the Catalan Tourism legislation, which specially focuses on the need to guarantee that tourists have access to the relevant authorities in case of bad quality services being provided.

As regards this type of considerations, the argument has been made that peer reviews and general consumers legislation should suffice. The Catalan Tourism authorities disagree, however, thinking that the neutrality of such reputational models cannot be guaranteed. Moreover, these authorities add, considering the short duration of most touristic visits, general consumer legislation is neither an effective means for managing users’ complaints in case of deceit.

The reverse argument has also been made, namely that it is not for public authorities to decide on quality standards, except where security concerns (e.g. fire prevention, food safety, etc.) are at stake. As seen in this paper, some of the restrictions identified in the legislation seem to respond to such legitimate objectives in a proportionate way, while some others simply do not (e.g. current prohibition on room rental in Barcelona).

¹⁸³ See footnote 106 above.

While the above considerations are relevant to all three cities reviewed, the extent to which they address such considerations differs greatly. Nevertheless, the different legislations are the result of policy choices and normally reflect the results of an ample social consensus.

In Amsterdam, for example, authorities have made every effort to ensure transparency of holiday and Short Stay rentals, (i) creating a central information point for neighbours to report any problems; (ii) campaigning to invite lessors to inform their neighbours, even designing a standard notice form to inform of holiday rental and agreeing with Airbnb to post this form on its website; and (iii) committing platforms, through bilateral conventions, to contributing to transparency.

As to enforcement, fines for non-compliance are rather high and thus dissuasive for an average private lessor. As to the actual rules, renting single rooms occasionally is hardly profitable, while rentals of private dwellings without a licence are limited to two months per year.

Interestingly, whereas the German NCA (*Bundeskartellamt*) and the Dutch NCA (*Autoriteit Consument & Markt*) have not considered intervening in the market for touristic rentals, the Spanish NCA and the Catalan regional authority (ACCO) have rather strongly opposed attempts to restrict the offer of tourist dwellings in several Spanish regions and cities, including Barcelona. On the other hand, regional and local authorities clearly consider that regulatory intervention is of outmost necessity for guaranteeing respect for fundamental social interests.

Whichever the final policy and regulatory choices, the debate certainly demonstrates that some of the existent restrictions may not hold a proportionality assessment under the EU internal market and competition rules, while some others may be absolutely necessary to address the externalities of the new sharing economy business models. The right balance is far from clear and this paper only aims at providing a modest contribution for further discussion.

V. REFERENCES AND MATERIALS

We summarise hereinafter the relevant materials –other than legislation and case-law– used for drafting this paper. References also include interviews with Administrations and some relevant stakeholders. Please note that any opinions expressed in this paper are only attributable to Rating Legis and our own interpretation of any matters discussed with third parties.

1. General overview on the sharing economy

(a) Articles

- Federal Trade Commission, *The Sharing Economy Workshop*, 9 June 2015, recorded version, available at: <https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators>
- European Committee of the Regions, *Opinion on the local and regional dimension of the sharing economy*, 115th plenary session, 3-4 December 2015, available at: <http://cor.europa.eu/en/activities/opinions/pages/opinion-factsheet.aspx?OpinionNumber=CDR%202698/2015>
- Miller, S. R., *Transferable Sharing Rights: A theoretical model for regulating Airbnb and the Short-term rental market*, 24 October 2014, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514178
- Quattrone, G. et al., *Who benefits from the “sharing” economy of Airbnb?*, 6 February 2016, available at: <http://arxiv.org/abs/1602.02238>

(b) Interviews or contacts with relevant stakeholders

- Telephone conference with HomeExchange representatives, on 18 March 2016.
- Meeting with Airbnb representatives, on 13 April 2016.
- Telephone conference with HomeAway representatives, on 27 April 2016.

2. Barcelona

(a) Articles

- Cocola Gant, A., *Apartamentos turísticos, hoteles y desplazamiento de población, Informe para el debate sobre el nuevo Plan Especial Urbanístico de Regulación de los Alojamientos Turísticos*, February 2016, available at: <http://agustincocolagant.net/apartamentos-turisticos-hoteles-y-desplazamiento-de-poblacion/>.
- Cuscó Puigdemívol, E., and Font Grolera, J., *Nuevas formas de alojamiento turístico: comercialización, localización y regulación de las 'viviendas de uso turístico' en Cataluña*, October 2015, available at: <http://www.ub.edu/geocrit/b3w-1134.pdf>

(b) Reports

- City of Barcelona, Report on Social and Solidary Economy in Barcelona, January 2016, available at: http://www.ajuntamentbarcelonaprensa.info/download/essb_def4.pdf
- Catalan Competition Authority, Report on the Draft Decree of a Tourism Regulation of Catalonia, Report n. 22/2015, 9 September 2015, available at: http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/IR-22-2015-Projecte-decret-de-reglament-de-turisme-de-Cat_CAST.pdf
- Catalan Competition Authority, Note on the suspension by the City of Barcelona of licences for touristic accommodations, Ref. n. OB 20/2015, 21 July 2015, available at: http://www.diba.cat/documents/479934/60665050/12.2+ATI-38-2015-suspensio-licencies-BCN_WEB_versio-CAT.+Alfred+Lacasa.pdf/485ea61a-767a-4398-a858-8ede7c9b4ade
- Catalan Competition Authority, Peer to peer transactions and Competition, July 2014, available at: http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/ES_7_2014_TRANSACTIONS_BETWEEN_EQUALS_AND_COMPETITION_ENG.pdf

HomeAway and the University of Salamanca, Second Barometer of Holiday Rental in Spain, 2015, available at: https://www.homeaway.es/info/files/live/sites/es/files/shared/HomeAwayLab/pdf/INFORME_HA15_Fig.pdf

- HomeAway and ESADE Business School, Economic and Social Impact of Touristic Dwellings in Spain, June 2015 (final conclusions): available at: http://www.fevitur.com/images/Esade_FEVITUR_executive_medios_Versi%C3%B3n_Prensa_ESADE_26junio.pdf

(c) Interviews or contacts with Administrations

- CNMC, interview held with the Department of Competition Advocacy, on 15 February 2016.
- Directorate-General of Tourism of the Catalan Government, interview held with the Deputy Directorate of this Department, on 23 February 2016.
- City of Barcelona, interview held with the Municipal Directorate on Tourism, on 29 February 2016.
- Catalan Competition Authority, on 1 March 2016.
- Telephone clarifications:
 - City of Barcelona, Department of urban licences, 11 February 2016, 23 February 2016
 - City of Barcelona, Department of Tax, 11 February 2016, 24 February 2016
 - Directorate-General of Tourism of the Catalan Government, 11 February 2016, 23 February 2016

79

3. Berlin

(a) Articles / Books

- Kholodilin, K. A., Discussion Paper 'Fifty Shades of State: Quantifying Housing Market Regulations in Germany', *Deutsches Institut für Wirtschaftsforschung*, November 2015, available at: https://www.diw.de/documents/publikationen/73/diw_01.c.521370.de/dp1530.pdf
- Sodan, H., *Verfassungs- und andere Rechtsprobleme von Berliner Regelungen über das Verbot der Zweckentfremdung*. Duncker & Humblot, December 2014.

(b) Reports

- Housing Market Report Berlin 2015, Berlin Hyp AG and CBRE GmbH, 11th edition.
- *Indikatorensystem zur kleinräumigen Wohnungsmarktanalyse*, GEWOS Institut für Stadt-, Regional- und Wohnforschung GmbH, April 2012.

(c) Interviews or contacts with Administrations

- City of Berlin: several telephone calls with several civil servants of the Senate Department for Urban Development and the Environment on 23, 26 and 29 February 2016.

4. Amsterdam

(a) Reports/News

- Letter by the Minister of Economics, Mr Henk Kamp, to the Speaker of the Dutch Parliament on 18 December 2015: “Work on future-proof legislation on digital platforms and the sharing economy, particularly tourist rental (Airbnb)” [*Werken aan toekomstbestendige wetgeving: digitale platforms en de deeleconomie, waaronder particuliere verhuur aan toeristen (Airbnb)*]:
<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2015/12/18/kamerbrief-over-toekomstbestendige-wetgeving-digitale-platforms-en-de-deeleconomie-waaronder-particuliere-verhuur-aan-toeristen/kamerbrief-over-toekomstbestendige-wetgeving-digitale-platforms-en-de-deeleconomie-waaronder-particuliere-verhuur-aan-toeristen.pdf>
- Annex to the letter by the Minister with additional information point-by-point: <https://www.rijksoverheid.nl/ministeries/ministerie-van-economische-zaken/documenten/rapporten/2015/12/18/toelichting-bij-onderdelen-van-kamerbrief-over-toekomstbestendige-wetgeving-digitale-platforms-en-de-deeleconomie>
- Report by TNO, Ecorys and IVIR of 9 November 2015, “Digital platforms: an analytical framework for identifying and evaluating policy options” (in English):
<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2015/11/09/digital-platforms-an-analytical-framework-for-identifying-and-evaluating-policy-options/digital-platforms-an-analytical-framework-for-identifying-and-evaluating-policy-options.pdf>
- Report by shareNL, November 2015, “Innoveren in de Deeleconomie. Een inventarisatie van kansen en belemmeringen die innovatieve investeringen in de deeleconomie, op het gebied van groene groei, (on)mogelijk maken”:

<https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2015/11/01/innoveren-in-de-deeleconomie/innoveren-in-de-deeleconomie.pdf>.

- Interview with Amsterdam legislator Mr Freek Ossel and Airbnb's Ms Molly Turner for the *Fast Moving Targets* channel (2014): https://youtu.be/YmqZ_OK9Aa4.
- Outline of the City's reflections about the way ahead in relation to the sharing economy, "Action Plan Sharing Economy" (*Actieplan Deeleconomie*) <http://www.sharenl.nl/nieuws/2016/03/09/actieplan-deeleconomie>, published on 8 March 2016.
- Report on a study conducted by the City, "Assessment of Home Rentals to Tourists" (*Evaluatie Toeristische verhuur van woningen*): https://www.amsterdam.nl/publish/pages/766047/evaluatie_toeristische_verhuur_van_woningen.pdf, published on 18 March 2016.

(b) Interviews or contacts with Administrations

- City of Amsterdam: several telephone calls with officials in the housing administration.
- Dutch NCA (ACM): telephone calls on 25 and 29 February 2016.
- Dutch Ministry of Economy.

RATING LEGIS

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
I. INTRODUCTION	3
II. IDENTIFIED LEGISLATION IN FORCE AND DRAFT LEGISLATION.....	4
1. Barcelona	4
1.1 Legislation in force	4
1.2 Draft legislation	8
1.3 Unregulated aspects.....	9
2. Berlin	11
2.1 Legislation in force	11
2.2 Draft legislation	13
2.3 Unregulated aspects.....	14
3. Amsterdam.....	15
3.1 Legislation in force	15
3.2 Draft legislation	18
3.3 Unregulated aspects.....	19
III. FINDINGS - LEGAL ASSESSMENT.....	21
1. Barcelona	21
1.1 Restrictions identified.....	21
1.2 Possible justifications.....	30
1.3 Proportionality assessment.....	41
2. Berlin.....	51
2.1 Restrictions identified.....	51
2.2 Possible justifications.....	57
2.3 Proportionality assessment.....	59
3. Amsterdam.....	62
3.1 Restrictions identified.....	62
3.2 Possible justifications.....	66
3.3 Proportionality assessment.....	68
IV. FINAL REMARKS – COMPARISON OF THE FINDINGS FOR EACH CITY	72

RATING LEGIS

V. REFERENCES AND MATERIALS	77
1. General overview on the sharing economy	77
2. Barcelona	77
3. Berlin	79
4. Amsterdam	80