
Home-Sharing in the Digital Economy:
The Cases of Brussels, Stockholm, and Budapest

Impulse Paper prepared for the
European Commission, DG GROW

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Executive Summary

1. The emergence of digital platforms has disrupted traditional consumption paradigms. This disruption has been particularly visible in the context of the collaborative economy where ownership has been replaced by temporary, on-demand, and mediated access to goods which are shared by multiple individuals. The collaborative economy is based on the idea that idle capacity (*e.g.*, a spare bedroom or spare time) should be shared with other individuals. The quality of the services provided is guaranteed by reputational mechanisms that allow peers to rate and hence trust each other. The digital collaborative economy relies upon four central elements: idle capacity, power parity, trust, and platform intermediation.

2. While the collaborative economy can deliver multiple benefits such as lower prices, efficient use of underutilized assets (*e.g.*, empty house while owners are on vacation), more diversity and choice, its unregulated expansion can also produce a number of negative externalities. In the case of home-sharing, regulators have received multiple complaints from neighbors, landlords, and long-term residents. Common concerns are the nuisance caused by tourists, higher rents, fire safety and privacy preoccupations. Furthermore, in the last years professional service providers have tried to use these digital services to circumvent local regulations. This has been visible in the home-sharing sector where some individuals have multiple listings. This is contrary not only to existing regulations but also to the collaborative and informal dynamics that underlie the collaborative economy. Multiple European cities have however responded to these problems, applying existing regulations on professional services to the collaborative economy or enacting new regulatory provisions in order to guarantee a common level-playing field and the protection of the public interest.

3. This paper analyzes the home-sharing sector in Europe by delving into three case studies: Brussels, Stockholm, and Budapest. It examines how these three cities are regulating home-sharing and whether existing national and local regulations comply with EU law, namely with the Services and the E-Commerce Directives. This paper scrutinizes first the definition of home-sharing platform. This step is relevant not only to understand local restrictions to home-sharing services but also to inquire whether collaborative economy platforms can be qualified as information society services. Second, the paper describes in detail the most relevant housing and hospitality regulations in Brussels, Budapest, and Stockholm. The paper also provides an overview of general housing challenges, local culture, and tax policies in these capitals in order to provide a better understanding of local restrictions to home-sharing practices and their underlying public interest claims. Third, this paper examines the compatibility of these local regulations with EU law, in particular by analyzing whether the described national restrictions are indeed justified by legitimate public interests and can be considered proportional in light of European case-law. This paper concludes with some general suggestions on the regulation of home-sharing practices at the national and European levels.

4. Brussels-Capital has recently amended its regulations on tourist accommodation so as to impose new regulations on home-sharing. Local regulations require hosts to comply not only with new registration obligations but also with highly detailed provisions including on how tourists should be welcomed and how the leased bedrooms should be furnished. Shared spaces in the collaborative economy are to a great extent compared to hotel rooms and hosts are expected to offer similar hospitality services. The 2014 *Ordonnance* and its Implementation Decree (March 2016) entered into effect in April 2016.

5. Stockholm has not adopted any specific regulations on the regulation of offline or online home-sharing. Sweden has stringent housing regulation and short-term leasing requires the authorization of housing associations. Hotel regulations do not appear to apply directly to home-sharing. However, in August 2015, the first case involving Airbnb was tried before the Rental Tribunal (“*Hyresnämnden*”) in Stockholm. The court considered that the Airbnb host who had asked permission to the housing association to sublease her unit through this platform, was managing an illegal hotel. The regulatory situation of home-sharing platforms in Stockholm is at the time of writing unclear. Stockholm authorities are nonetheless very concerned with the expansion of human trafficking and illegal brothels in houses leased through Airbnb as contrary to hotels which have been cooperating with the police in this context for years, hosts might easily expose themselves and their neighbors to the dangers associated with illegal prostitution.

6. In Budapest, home-sharing has been regulated for a number of years under a category designated “other accommodation”. Hosts must register at the local notary before they can rent their spare rooms or entire home to tourists, comply with very detailed regulations (*e.g.*, furniture, cleaning services, receipts issued to guests), provide detailed information to local authorities for the purpose of registration, and send frequent tax-collection statements to tax authorities. The Hungarian registration procedure is very complex but it has not been intensified due to the emergence of digital platforms. The strict requirements imposed by Hungarian legislation on home-sharing are justified by the need to combat tax evasion and the thriving black economy. These requirements do not appear to have constrained offline or online home-sharing as the legal compliance rate is very low.

7. The Services Directive is applicable to the digital home-sharing sector and the abovementioned national and local legislation state explicitly that they implement the Directive in the national legal order. The Services Directive aims to promote the simplification of authorization schemes and the limitation of national restrictions to requirements strictly justified by the public interest and in compliance with the principle of proportionality. While the general regulation of home-sharing in Brussels and Budapest could be justified by the public interest (*e.g.*, fire certificate, first-aid kit), namely by the interest in protecting the safety and health of guests, a number of regulatory requirements appear to be excessive and not strictly necessary to protect the mentioned goals (*e.g.*, daily cleaning requirements by the host without allowing for alternative arrangements which are common in the collaborative economy). National and local restrictions in Brussels and Budapest do not appear to be directly discriminatory as they do not distinguish between national or foreign providers. However, the authorization schemes in Budapest and Brussels are complex and burdensome for home-sharing hosts. In addition, not all of the national restrictions can be clearly justified by a public interest. Rather, dispositions on available furniture and decoration (*e.g.*, number of chairs, tables, clothes hangers) do not appear to be justified and attempt to regulate hotels and home-sharing with similar rules. Such dispositions disregard however the specific character of the collaborative economy and its potential benefits.

8. Home-sharing platforms are primarily “matchmakers” or digital intermediaries: They do not provide accommodation, they match supply and demand, by allowing third-parties to post advertisements and peer-review comments on their websites or mobile applications. They are therefore information society services. While the E-Commerce is applicable to home-sharing platforms, it is doubtful whether they should always be exempt of liability for third-party content (Article 14, E-Commerce Directive) since platforms often play more than a mere “hosting” role in the collaborative economy, providing guidelines on the type of content to be posted.

Home-Sharing in the Digital Economy:
The Cases of Brussels, Stockholm, and Budapest

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1. Introduction

The emergence of digital platforms has changed the way we provide, consume, and perceive products and services as well as our understanding of ownership and property.⁴ While the previous generation collected goods and preferred ownership over access, the current generation gives priority to the collection of experiences and access to a larger number of goods and services. Digital platforms such as Airbnb (home-sharing), Blablacar (long-distance transportation) or Eatwith (meal-sharing) have challenged not only existing capitalist and hyper-consumption models but also longstanding national and in particular local law. Local law and regulations impose complex authorization schemes justified by the public interest. Individuals seeking to provide for example hospitality or local transportation services must fulfill a number of fire safety and public health requirements and respect zoning regulations.⁵ However, in the digital age, it is worth asking whether these national requirements are still justified and whether these platforms are providing services or simply mediating supply and demand. In this paper, we analyze the home-sharing sector in light of recent developments in the collaborative economy in the European Union. This paper focuses on the regulation of home-sharing by three cities: Brussels, Stockholm, and Budapest.

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⁴ See Shelly Kreiczer-Levy, 'Consumption Property in the Sharing Economy' (2015) 43 *Pepperdine Law Review* 61, 63.

⁵ See Thorstein Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* (New York: The Macmillan Company, 1899). Sangeet Paul Choudary and Marshall W. Van Alstyne, *Platform Revolution: How Networked Markets Are Transforming the Economy—And How to Make Them Work for You* (New York: Norton Press, 2016).

(i) *Home-sharing and Home-ownership*

While unlicensed home-sharing practices appear to be controversial in most countries, these practices have a long history. Ownership of single-family dwellings is a fairly recent phenomenon which came to be a symbol of economic success: affluent individuals did not need to share their spare space.⁶ Although sharing has been a means to guarantee survival or to show kindness toward strangers since the beginning of humankind,⁷ in the last century the sharing of goods started being stigmatized as home-ownership granted a better status as citizen, neighbor, or parent.⁸ Home-ownership was also a form of wealth display that was facilitated in many European countries after World War II with the development of the banking sector, the differential tax treatment of owner-occupied dwellings.⁹ However, as the number of single-family owned dwellings increased, so did the idle capacity of the housing sector as well as the need to enact zoning regulations in order to safeguard the value of houses.¹⁰ In the last decade, Airbnb and other platforms have capitalized this idle capacity and facilitated the sharing of spare bedrooms with tourists. While in some cities these platforms only recently started helping locals cover a part of their mortgage while they are away on vacation, in Budapest, for example, the emergence of home-sharing platforms has allowed residents to digitalize the longstanding “Zimmer Frei” practice, that is, illegal bed and breakfasts. In other words, in some cities, the expansion of home-sharing economy platforms reinvented already existing and thriving black-economy practices.

In the collaborative economy, ownership is replaced by temporary access to underutilized assets and by the perception that, within a solid network, any added user of an

⁶ Jana Carp; Charles Hoch; and George Hemmens (eds), *Issues and Innovators in Shared Housing* (Albany: S.U.N.Y. Press 1996), 2.

⁷ Russell Belk, 'You Are What You Can Access: Sharing and Collaborative Consumption Online,' (2014) 67 *Journal of Business Research* 1595.

⁸ Fleura Bardhi and Giana M. Eckhardt, 'Access-based Consumption: The Case of Car Sharing,' (2012) 39 *Journal of Consumer Research* 881, 883.

⁹ Matthew Chambers, Carlos Garriga, and Don E. Schlagenhauf, "Accounting for Changes in the Homeownership Rate," (2009) 50(3) *International Economic Review* 677.

¹⁰ See, e.g., Edward L. Glaeser, Joseph Gyourko and Raven Saks, 'Why is Manhattan So Expensive? Regulation and the Rise in Housing Prices,' (2005) 48(2) *Journal of Law and Economics* 331; Edward L. Glaeser and Bryce A. Ward, 'The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston,' (2009) 65(3) *Journal of Urban Economics* 265.

existing asset will have a very reduced marginal cost.¹¹ This temporary and often immediate access is guaranteed by digital platforms which provide primarily intermediation services. They offer lower prices as well as a wide array of accommodation services and experiences, ranging from a stay in a treehouse, a windmill to a regular guestroom. The majority of these digital platforms are originally not national platforms but subsidiaries of US-based companies (primarily Silicon Valley) companies with secondary establishments in the Member States. In some cases (*see section 2*), these platforms have adopted local names and formats to obtain the trust of more skeptical European consumers.

(ii) *Digital Intermediaries*

Home-sharing platforms are primarily “matchmakers” or intermediaries: They do not provide accommodation, they match supply and demand, by allowing third-parties to post advertisements and peer-review comments on their websites or mobile applications. However, they are by no means regular “peer-to-peer marketplaces” (*e.g.*, Ebay) or typical information society providers (“ISPs”) that store and distribute information. Rather, they impose quality and pricing requirements on users and often have a significant influence on the service provided. They do not accept much liability in case of damages and delegate compliance with local laws to the users, providing them with an overview of national and local rules governing the temporary lease of rooms to tourists (*e.g.*, Airbnb’s help center), landlord-tenant law (*e.g.*, need to seek landlord’s permission), and general guidelines on registration and authorization schemes. Needless to say that many hosts turn a blind eye to these rules, and so do platforms.

National and local regulators, often under the pressure of national incumbents (hotels, hostels, B&B) as well as long-term residents and neighbors for example of Airbnb-hosts, have been however the most prominent skeptics of the “collaborative economy.” With the expansion of unlicensed home-sharing, local authorities in different EU Member States have underpinned the enforcement of local law by conducting raids in Airbnb listings or enacting new provisions in response to these platforms. Such new provisions seek to address the specific challenges of

¹¹ See generally Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-for-Experience* (Putnam Books, 2001); Jeremy Rifkin, *The Zero Marginal Cost Society: The Internet of Things, the Collaborative Commons, and the Eclipse of Capitalism* (St. Martin’s Griff, 2015).

digital home-sharing by limiting the number of days a host is allowed to rent a unit to a tourist and by imposing a minimal set of safety obligations.

In a recent open letter to the European Union, forty-seven platforms have asked EU institutions to intervene as multiple national and local governments are trying to limit the provision of collaborative (or sharing services) by establishing national restrictions.¹² While in Paris and Amsterdam, Airbnb hosts are allowed to rent their residences on this and other platforms for a limited number of days per year,¹³ in Barcelona stricter positions have been adopted to curb the expansion of home-sharing and its effect on housing shortage.¹⁴ As of May 1st, new legislation prohibits individuals from renting entire units in Berlin on Airbnb, Wimdu, 9Flats or similar platforms. This is justified by the concern that home-sharing platforms are driving up the prices of rents.¹⁵

As this paper describes, Brussels and Budapest are also part of the group of cities that impose restrictions on home-sharing practices. The existing regulatory limits are thus far not directed at digital platforms. Rather, national and local regulations often impose onerous obligations on their users (*e.g.*, registration, inspections, complex authorization schemes) which, as the literature has thoroughly described, will necessarily have an impact on how users utilize these platforms.¹⁶ The analysis of alleged restrictions to the development of the digital economy is more complex than suggested by digital platforms. National governments invoke public interest reasons to erect new obstacles to unlicensed home-sharing.

¹² Alex Hern, 'Uber and Airbnb Call on EU to Support 'Collaborative Economy'', *The Guardian*, February 11, 2016, available at <http://www.theguardian.com/technology/2016/feb/11/uber-airbnb-eu-support-collaborative-economy> (last accessed March 1st, 2016).

¹³ Although Amsterdam was considered an Airbnb-friendly city in 2014, the city recently reviewed its position in light of recent research (March 2016) showing that Amsterdam residents were very displeased with the expansion of Airbnb. The municipality that had signed a Memorandum of Understanding with Airbnb defining the terms of cooperation with the city. However, on March 18, 2016, the city disclosed that it will review existing rules so as to limit the amount of days hosts are allowed to rent their houses.

¹⁴ For a comparative overview of city regulation see Michele Finck & Sofia Ranchordas, 'Sharing and the City' (Working Paper, March 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741575

¹⁵ See this discussion in the German media for example in: Yannic Rehm, 'Bußgelder ab Mai: Berlin schränkt Airbnb-Vermietungen radikal ein', *Der Spiegel*, 08.04.2016, available at <http://www.spiegel.de/reise/aktuell/bussgelder-ab-mai-berlin-schraenkt-airbnb-vermietungen-radikal-ein-a-1086167.html>

¹⁶ The literature has agreed on the need to adopt careful measures as far as the direct or indirect regulation of online intermediaries is concerned due to the potential discouraging on users, see, *e.g.*, Margot Kaminsky, 'Positive Proposals for Treatment of Online Intermediaries', (2012) 28(1) *American University International Law Review* 203, 205.

In this paper, we seek to understand (i) what the collaborative economy is, in particular, in the case of home-sharing; (ii) the nature of the national restrictions implemented in three beforehand selected cities with different regulatory frameworks: Brussels, Stockholm, and Budapest; (iii) their compatibility with EU Law, namely the Treaty on the functioning of the European Union (TFEU) dispositions on the internal market, the Services Directive, and the E-Commerce Directive. Drawing on the literature and best practices from other local and national governments, this paper also provides suggestions on how some of the current challenges of the regulation of the collaborative economy should be addressed.

In this first section, we analyze the definition of the collaborative economy, provide an introductory overview of the implications of the collaborative economy for the existing EU framework on the internal market and electronic commerce, and the potential reasons why some national and local governments have felt the need to further regulate and restrict home-sharing.

In this paper, we emphasize that home-sharing platforms are primarily intermediaries which allow hosts to advertise their units and read reviews about tourists interested in them. The platform also allows tourists to find advertised units and read peer-reviews on the quality of the accommodation and the responsiveness of the host. In the first part of the paper we address the definition of the collaborative economy in the context of home-sharing and its implications for its legal qualification. As this paper underlies, these platforms are *sui generis* intermediaries and not estate services or hotels.

First, digital platforms that promote home-sharing do not provide accommodation. Rather, they allow individuals to rent their spare rooms or entire apartments to tourists by providing user-friendly websites, mobile applications, and relying on social media for additional information about the users. They facilitate peer-to-peer collaborative transactions and thus the so-called ‘prosumerism’.¹⁷ This phenomenon does not fit within the traditional economic model that underlie existing regulations, instead it is indicative of an alternative market model.¹⁸ In the model of industrial capitalism, professionals provided services to consumers. In the collaborative

¹⁷ Alvin Toffler, *The Third Wave: The Classic Study of Tomorrow* (Bantam Publishers, 1984); Philip Kotler, ‘The Prosumer Movement : A New Challenge for Marketers,’ in Richard J. Lutz, (eds), *NA-Advances in Consumer Research* (Provo, UT: Association for Consumer Research, 1986), 510-513.

¹⁸ Rashmi Dyal-Chand, ‘Regulating Sharing: The Sharing Economy as an Alternative Capitalist System,’ (2015) 90 (2) *Tulane Law Review* 241.

economy, consumers share their underused skills, time, and assets to provide services to their peers. Platforms allow regular individuals to share their houses with strangers, by securing payments, providing peer-review mechanisms, matching them with tourists looking for temporary accommodation, and solving potential conflicts.¹⁹ The first section of this paper analyzes the definition of ‘collaborative economy’ and the operation of home-sharing platforms.

Second, while convenient, affordable for those seeking accommodation, and a good source of income for those with a spare room, home-sharing has become a source of concerns for national and local governments. At a time when the European Commission seeks to consolidate the Digital Single Market, we observe that some local and national regulators (in particular, municipalities) might be creating obstacles to the uncontrolled development of digital home-sharing. These regulations have targeted mostly users. However, some municipalities in Europe have also tried to impose some obligations on home-sharing platforms by signing memoranda of understanding with Airbnb (e.g., Amsterdam) and are now requiring this platform to take action in the monitoring illegal listings.²⁰

In addition, national competition authorities are also concerned with the proliferation of Airbnb and other collaborative economy platforms. These digital platforms can pose, for example, potential competition law problems, not only because they allegedly facilitate unfair competition between hotels and individual providers (e.g., hotels comply with complex and onerous licensing scheme while Airbnb hosts do not), but also because they rely on big data which can facilitate collusion.²¹ This concern has been recently raised in the context of ride-sharing with the use of pricing algorithms by Uber drivers who, according to the platform’s claim, are independent contractors and not employees, and may therefore be engaging into price fixing with the assistance of the platform.²² To the best of our knowledge, no similar competition investigation or lawsuit involving home-sharing platforms and the use of algorithms has been

¹⁹ See David Evans and Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Boston: Harvard Business Review Press); Marina Krakovsky, *The Middleman Economy: How Brokers, Agents, Dealers, and Everyday Matchmakers Create Value and Profit* (New York: Palgrave MacMillan).

²⁰ The Memorandum of Understanding between the municipality of Amsterdam and Airbnb is available online at https://www.amsterdam.nl/publish/.../2014_12_airbnb_ireland_amsterdam_mou.pdf

²¹ Ariel Ezrachi & Maurice E. Stucke, ‘Online Platforms and the EU Digital Market,’ University of Tennessee Legal Studies Research Paper No. 283 (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2677267.

²² Meyer v Kalanick, U.S. District Court, Southern District of New York, No. 15-09796.

initiated in the European Union. However, the literature has underlined that the abundant sharing of information regarding the services provided, the use of the same algorithms by competitors, and disclosure of cost structures and prices raise serious competition concerns in light of national competition law and European law (article 101 of the TFEU). The expansion of some platforms can also raise potential concerns regarding the risk of abuse of dominant position.²³ However, it has also been argued that collaborative economy platforms can also have a number of benefits for consumers as they increase competition, offer a wider variety of options (for example, with Airbnb tourists can rent from a bed in a shared dorm to a castle) and lower prices in some markets.²⁴

The second part of this paper analyzes the local legal perspectives on home-sharing in Brussels, Stockholm, and Budapest. These three cities have adopted different approaches to home-sharing: the city-region of Brussels-Capital has amended its regulations on tourist accommodation to impose new regulations on home-sharing, imposing new registration obligations and rules on individuals wishing to rent their spare rooms to tourists. On March 24, 2016, the government of Brussels-Capital approved the enactment of new and stricter implementation regulations for the hospitality sector including transitory provisions for hosts already leasing their homes before the entering into effect of this piece of legislation.

Stockholm does not regulate directly digital home-sharing practices and although local authorities are concerned with the proliferation of illegal brothels and human trafficking in Airbnb and other home-sharing facilities, there is currently uncertainty regarding the applicable regulations. There are not any specific legislative restrictions on the provision of sharing economy intermediation information services in Sweden.

In Budapest, unlicensed home-sharing has been regulated for a number of years under a category designated “other accommodation”. Hosts must register at the local notary before they can rent their spare rooms or entire home to tourists and provide detailed information to the local and tax authorities. The registration procedure is complex but it has not been intensified due to

²³ See Guy Lougher & Sammy Kalmanowicz, ‘EU Competition Law in the Sharing Economy’ (2016) 7 *Journal of European Competition Law & Practice* 87.

²⁴ See, e.g., Vera Demary, ‘Competition in the Sharing Economy’ (2015) IW Policy Paper 19/2015, Institut der deutschen Wirtschaft Köln, available at <https://www.iwkoeln.de/>.

the emergence of digital platforms. Rather, as the second part of this paper explains, the existing regulations were thought to be necessary in order to combat the black economy, a longstanding but still growing problem in Hungary. The digitalization of home-sharing does not appear to have changed the existing legal scenario but only modernized an already existing peer-to-peer sector which has long been a source of concern for Hungarian tax authorities.

In the third part of this paper we analyze the compatibility of the mentioned national restrictions with the applicable EU legal framework applicable to the collaborative economy. In this context we delve into the direct and indirect restrictions to home-sharing platforms and assess their legality and proportionality in light of the public interest. On the one hand, it is true that existing restrictive regulations are associated with the permanence of outdated regulations that do not make sense in the 21st century. In the digital age, reputational mechanisms along with other technological means (*e.g.*, GPS) address many market failures (*e.g.*, information asymmetries regarding the quality of the services or the location of the accommodation).²⁵ In addition, it is also true that in particular new regulations on home-sharing are the result of intense lobbying and the conflicts of interests between incumbents (*e.g.*, hotels) and the platforms (*e.g.*, Airbnb). Legislative obsolescence and “sharing wars,” as they have been called in the literature, and the protection of national hotel associations, are not valid grounds for the national restriction of digital platforms.²⁶ On the other, national and local authority also have legitimate public interest justifications, given the interest in protecting fire safety, public health, or, in the specific cases of Sweden and Hungary, combat human trafficking and control the proliferation of black economy.

This paper is based on an extensive study of the literature, case-law, and relevant national and local legislation and regulations on home-sharing both in the contexts of housing law, tourist accommodation, and online intermediaries. While we originally planned to conduct interviews

²⁵ See Molly Cohen & Arun Sundararajan, ‘Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy’ (2015) 82 *The University of Chicago Law Review Dialogue* 116 (arguing that the technology underlying the sharing economy makes the existence of many regulations unnecessary since sharing economy platforms already solve many market failures).

²⁶ Daniel E. Rauch & David Schleicher, ‘Like Uber, But for Local Government Policy: the Future of Local Regulation of the “Sharing Economy,”’ (2015) 76 *Ohio State Law Journal* 901 (describing the “sharing wars” between taxi-drivers and Uber drivers, as well as the conflicts of interests between hotels and Airbnb and their influence on local policy and regulation).

with city officials, this was not possible since local authorities did not appear to be available to answer our questions. This paper is based on the analysis of the literature, policy reports, legislation, and media news at the time of writing.

2. Home-Sharing in Europe: Overview

2.1. The Collaborative Economy

Collaborative economy practices have been praised for their innovative nature, ability to provide lower prices, broader choice provided to consumers, work flexibility or more social contact for those seeking to “share” their free time. “Sharing economy” or “collaborative economy” practices lack nonetheless a common definition as well as an accurate image of what they stand for.²⁷

While the collaborative economy translates in many circumstances the mere digitalization of the practice of “borrowing a cup of sugar” from the neighbor, collaborative economy practices have however been captured by the negative publicity attached to platforms like Uber and Airbnb.²⁸ The literature, the media and courts have thus far focused on the analysis of platforms such as Uber and Airbnb and their ongoing lawsuits.²⁹ In addition, the sharing of underutilized goods—though efficient—has traditionally been stigmatized and associated with poor quality goods.³⁰ In the digital age, the “collaborative economy” is no longer a set of practices limited to

²⁷ Russell Belk, *"You Are What You Can Access: Sharing and Collaborative Consumption Online,"* (2014) 67 *Journal of Business Research* 1595.

²⁸ Providing a broader focus of the collaborative economy, see Rachel Botsman and Roo Rogers, *What's Mine is Yours. How Collaborative Consumption is Changing the Way we Live* (HarperCollins 2010).

²⁹ See for example, in the literature, Benjamin Means & Joseph A. Seiner, “Navigating the Uber Economy” (2016) 49 *U.C. Davis Law Review* (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2663350 (discussing the case law on the misclassification of Uber and Lyft drivers as independent contractors); See in the media, for example, Rob Killide, “Sharing Economy” Companies Like Uber and Airbnb Aren’t Really “Sharing” Anything”, *Business Insider* (6 October 2015) <<http://www.businessinsider.com/sharing-economy-companies-like-uber-and-airbnb-arent-really-sharing-anything-2015-10>> (last accessed on February 2, 106).

³⁰ See Robin Chase, *PeersInc: How People and Platforms Are Inventing the Collaborative Economy and Reinventing Capitalism* (New York: Public Affairs, 2015).

the exchange of secondhand goods which no one took care of in the context of poor, working-class, and minority urban communities.³¹ Digital sharing practices now transcend social classes as affluent college-educated individuals driven by sustainability concerns wish to “collect badge experiences, not badge products.”³² Moreover, the global economic crisis required once prosperous individuals to rethink their consumption values.³³ These narrow perceptions of the collaborative economy have generated mixed feelings among consumers and national regulators.

The collaborative economy has become a multi-million-euro exchange model with significant growth potential, which offers multiple economic and social benefits to European consumers (lower prices, varied choice, sustainable consumption).³⁴ The collaborative economy enhances consumer welfare since it has the potential to increase access to products without increasing investments in resources or infrastructure. This effect is particularly visible in the case of consumers who otherwise would not have the ability to afford a specific asset or service such as tourist accommodation.³⁵ In addition, as a response to the expansion of home-sharing platforms, many hotels have lowered their prices in order to compete with the accommodation offered on Airbnb and other platforms.³⁶

Home-sharing platforms are also celebrated for their ability to solve information asymmetries that existed in traditional businesses thanks to their reliance on reputational instruments and social media.³⁷ In this paper, we delve into collaborative practices supported by

³¹ Juliet Schor, “Debating the Sharing Economy,” (2014) Great Transition Initiatives, available at http://www.greattransition.org/images/GTI_publications/Schor_Debating_the_Sharing_Economy.pdf, 5.

³² Dara O’Rourke and Niklas Lollo, “Transforming Consumption: From Decoupling, to Behavior Change, to System Changes for Sustainable Consumption,” (2015) 40 *Annual Review of Environment and Resources* 233.

³³ Fleura Bardhi, and Giana M. Eckhardt, “Access-based Consumption: The Case of Car Sharing” (2012) 39 *Journal of Consumer Research* 881, 883.

³⁴ See Michael Luchs, Rebecca Naylor, Randall Rose, Jesse Catlin, Roland Gau, Sommer Kapitan, Jenny Mish, et al., ‘Toward a Sustainable Marketplace: Expanding Options and Benefits for Consumers,’ (2011) 1(19) *Journal of Research for Consumers* 1–12; Ellen McArthur, ‘Many-to-many Exchange without Money: Why People Share their Resources,’ (2015) 18 *Consumption Markets & Culture* 239, 241.

³⁵ See Saif Benjaafar, Guangwen Kong, Xiang Li, ‘Peer-to-Peer Product Sharing: Implications for Ownership, Usage and Social Welfare in the Sharing Economy,’ Working Paper (October 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2669823

³⁶ For a thorough study on the impact of home-sharing platforms on the hotel industry, see Georgios Zervas & Davide Proserpio, ‘The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry’ (2016) Boston U. School of Management Research Paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898

³⁷ See, e.g., Adam Thierer, Christopher Koopmans, et al., ‘How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve “Lemons Problems”’ (Mercatus Working Paper, May 2015), available at

digital platforms such as Airbnb and HomeAway. Collaborative economy practices can be nonetheless found outside the digital world beyond the realm of commercial platforms. This phenomenon is far from being new and can encompass offline collaborative practices within local communities (for example, co-living and the sharing of facilities in buildings for senior citizens, the development of micro-living) implying (or not) a remuneration. However, the collaborative economy can also be found at the international level, when facilitated by global digital platforms. The digital collaborative economy might also not involve the payment of a fee (e.g., international hospitality networks such as Couchsurfing or Warm Showers, or community time-banks)³⁸ but rather rely upon other types of consideration (home-swapping).

In this Section, we offer a working definition of collaborative economy, we distinguish it from similar concepts, and we provide an overview of the benefits and concerns of this new exchange model.

2.1.1. Definition

Both “sharing economy” and “collaborative economy” have been used interchangeably in the literature and the media. These concepts are currently associated with a number of practices which translate a non-conventional exchange model which relies on temporary access to assets rather than on the ownership thereof, peer-to-peer rather than business-to-consumer transactions, and on-demand and uncommitted services rather than longstanding business relationships. The term “sharing economy” has recently been included in the Oxford English Dictionary which defines it as “an economic system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the Internet.”³⁹

https://www.researchgate.net/profile/Adam_Thierer/publication/277286905_How_the_Internet_the_Sharing_Economy_and_Reputational_Feedback_Mechanisms_Solve_the_Lemons_Problem/links/5565c1b008ae94e95720e605.pdf

³⁸ On time-banks and their social benefits, see David Boyle, ‘The Potential of Time Banks to Support Social Inclusion and Employability’ (2014) European Commission, JRC Scientific and Policy Reports, available at <http://ftp.jrc.es/EURdoc/JRC85642.pdf>

³⁹ Oxford Dictionaries, <http://www.oxforddictionaries.com> [“sharing economy”] (last accessed on February 9, 2016).

The European Commission has thus far preferred the term “collaborative economy” and defines it as “a complex ecosystem of on-demand services and temporary use of assets based on exchanges via online platforms.”⁴⁰ In this paper, we also adopt this terminology, and avoid the common but at times vague concept of “sharing economy”.

This paper starts with a brief overview of the different but somewhat overlapping collaborative and non-collaborative practices that might be included or excluded from the universe of the “collaborative economy”, depending on how broad this exchange is defined.

2.1.2. Collaborative and Professional Practices in the Platform Economy

Alongside the concept of “collaborative economy”, there are many other similar terms that are often used interchangeably in the literature, policy documents, and the media. Examples are “collaborative consumption”, “on-demand economy”, “peer-to-peer economy”, or, more derogatively, the “gig economy”.⁴¹ These analogous but slightly dissimilar concepts share overlapping features (see diagram below) but also place the emphasis of the underlying exchange model on different aspects of the modern phenomenon of the “collaborative economy”:

- a) “collaborative consumption” refers to the (i) online, (ii) sustainable, and (iii) shared consumption of goods and services.⁴² The term “collaborative consumption” appears to have been used for the first time in the literature in 1978 and since then this consumption model has been defined in different ways.⁴³ For example, Lamberton and Rose defined collaborative consumption as “a system which provides customers with the opportunity to enjoy product benefits without ownership.”⁴⁴

⁴⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Upgrading the Single Market: More Opportunities for People and Businesses, COM(2015), 28.10.2015.

⁴¹ See Rachel Botsman & Roo Rogers, *What's Mine is Yours: The Rise of Collaborative Consumption* (Harper Collins: 2010).

⁴² Juho Hamari, Mimmi Sjöklint, Antti Ukkonen, *The Sharing Economy: Why People Participate in Collaborative Consumption*, Working paper, available on www.ssrn.com.

⁴³ See Marcus Felson, and Joe Spaeth, ‘Community Structure and Collaborative Consumption A Routine Activity Approach,’ (1978) 21(4) *The American Behavioral Scientist* 614.

⁴⁴ Cait Lamberton and Randall Rose, ‘When is Ours Better Than Mine? A Framework for Understanding and Altering Participation in Commercial Sharing Systems,’ (2012) 76(4) *Journal of Marketing* 109.

Collaborative economy expert, Rachel Botsman has argued that the concept of “collaborative consumption” should be distinguished from that of “sharing economy” since the latter is largely the person-to-person practice of sharing underutilized assets such as spaces and skills for both monetary or non-monetary benefits. In the case of collaborative consumption, the emphasis lies primarily in the idea of sharing, swapping, trading or renting products enabling *access over ownership*.⁴⁵ Collaborative consumption (e.g., swap-trading online platforms) often implies a temporary or permanent transfer of ownership which might typically not fit within a narrower concept of collaborative economy (e.g., Snappcar represents the collaborative economy since only temporary access to someone’s car is provided, while some collaborative consumption imply the permanent exchange of assets like clothes).

- b) “peer-to-peer economy” (“P2P”) is a broad term which refers to “consumers-to-consumers” transactions, that is, contrary to our traditional economic and legal models which distinguish between professionals and consumers, in the P2P model, consumers engage in the sporadic provision of services, further developing their underused talents or time. This phenomenon has been described as “prosumerism”.⁴⁶ While “Etsy-prosumers”⁴⁷ might be in many cases hobby-entrepreneurs selling wedding or graduation gifts, the production of goods and provision of services without adequate skills can be a serious source of risks.
- c) “on-demand economy” refers to the immediate availability of services through digital platforms. This is a very broad term which includes a wide array of both professional and amateur services which are provided through digital platforms on a sporadic basis, when the consumer needs them and not based on a longstanding or continuous business relationship.
- d) “gig economy” refers to the derogative model according to which unskilled individuals try to “make an extra buck” by providing sporadic services or by performing small tasks.

⁴⁵ Rachel Botsman & Roo Rogers, *What’s Mine is Yours: The Rise of Collaborative Consumption* (Harper Collins: 2010).

⁴⁶ George Ritzer, *Prosumer Capitalism*, 56 SOC. Q. 413 (2015) (analyzing the relationship between presumption and capitalism). On the concept of “prosumer” see, e.g., Alvin Toffler, *The Third Wave* (Bantam, 1984); Philip Kotler, *The Prosumer Movement: a New Challenge For Marketers*, in Richard Lutz (ed), *NA-Advances in Consumer Research* (1986) 510 – 513.

⁴⁷ Etsy is a website that allows individuals to sell their handcrafted products.

The positive side of the gig economy refers to the possibility of having a flexible schedule, an element which is increasingly valued by young generations.⁴⁸ Amazon's "Mechanical Turk" or Share5 are examples of platforms where simple tasks can be executed in exchange for a low remuneration. The low wages and the lack of benefits paid to these independent contractors have been criticized as many service providers work full time for these platforms, are subject to their instructions, and are highly unprotected under the category of independent contractors.

In this paper we focus on collaborative economy platforms, notably in the context of home-sharing, and we analyze their defining features.

The first common element to collaborative transactions is the concept of providing access to an *underutilized asset* (clothes, housing, food, or even time) either for monetary or non-monetary benefits.⁴⁹ This form of access or exchange typically implies the shared access to underused goods or a swap which can take up different forms in practice: an apartment in Stockholm that is swapped for two weeks for a vacation house in the Belgian Ardennes on the platform LoveHomeSwap, or leasing a sofa-bed in a shared apartment in Budapest.

The second element common to collaborative economy is the underlying *technological infrastructure* that supports collaborative economy practices. Home-sharing transactions are facilitated by the multiple technological and economic elements which have been developed or improved in the last decade: the improvement of interactive online platforms, Web 2.0, high Internet penetration, affordability of smartphones, increasing accuracy of GPS-operated systems, and different smartphone features (*e.g.*, camera, microphone). Digital platforms are the key

⁴⁸ See on this subject: Kate Taylor, 'Why Millennials Are Ending the 9-to-5', *Forbes*, 23.08.2013, available at <http://www.forbes.com/sites/katetaylor/2013/08/23/why-millennials-are-ending-the-9-to-5/> (in times of crisis it might not be surprising to read that "freelancing and self-employment are on the rise." However, this article also reports that this might not just be a result of the economic crisis but also a reflection of a new approach to work: "millennials will choose work flexibility over pay."). See also PricewaterhouseCoopers, 'Millennials at Work: Reshaping the Workplace' (2011), available at <https://www.pwc.com/gx/en/managing-tomorrows-people/future-of-work/assets/reshaping-the-workplace.pdf>

⁴⁹ On the general idea of using underused goods in the context of social networks, see Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Harvard University Press, 2006).

actors in the collaborative economy as they act as intermediaries (“or bridges”) between supply and demand.⁵⁰

The digital platforms behind the collaborative economy provide services similar to that of brokers in the real estate market or in other mediated sectors. The “platform economy” is indeed the overarching concept behind all the abovementioned terms that nowadays provide a broad array of on-demand services. Examples of these platforms are Airbnb, HomeExchange, HomeAway in home-sharing; Uber, Lyft, Blablacar in private transportation; Ebay, the Dutch Marktplaats in the context of peer-to-peer marketplaces; Eatwith in food-sharing; or RentezVous in the clothing sector. The expansion of online platforms as vehicles for different types of transactions has generated additional interest in their operation. However, the diversity of their business model has prompted DG Laitenberg to note in September 2015 that: “there’s no single business model for platforms. Instead, there’s a whole range of models from search to app stores, from marketplaces to social-media platforms.”⁵¹

Regardless of the sector in which they operate, collaborative economy platforms typically provide *mediation services* (supply/demand matching, use of multiple algorithms to define preferences, advertisement, secure payment, conflict mediation) and not transportation, food delivery or clothes. They provide an online service—the platform—while the peers provide the service or good demanded but they also impose quality requirements on the services provided and give specific guidelines to hosts as how to welcome their guest, set a price for their accommodation, or even what to do when rating other users. While platforms primarily provide ancillary information society services (*e.g.*, payment transactions, intermediation, conflict mediation), some platforms such as Airbnb are slowly generating downstream markets which offer ancillary services in order to maximize the sharing potential for hosts that might have less time or not be home to welcome their guests or change linens: for example, *Proprly* provides cleaning services and key delivery, and *Guesty* facilitates check-ins and key return.⁵²

⁵⁰ See Marina Krakovsky, *The Middleman Economy: How Brokers, Agents, Dealers, and Everyday Matchmakers Create Value and Profit* (Palgrave MacMillan, 2015) p. 25, 26-29.

⁵¹ Speech DG Competition Johannes Laitenberg, The Digital Single Market, Consumers, and EU Competition Policy, 21 September 2015, available at http://ec.europa.eu/competition/speeches/text/sp2016_01_en.pdf (last accessed March 1, 2016).

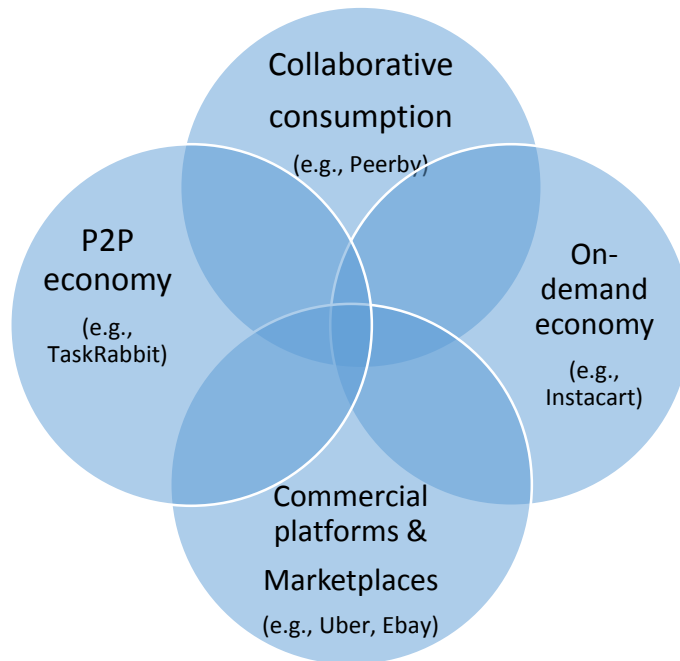
⁵² PricewaterhouseCoopers, p.24, <http://www.pwc.com/us/en/industry/entertainment->

Alongside with the collaborative economy, we are currently witnessing the expansion of purely commercial platforms that appear to be part of the collaborative economy since they do not operate the traditional lines of existing business sectors, but in reality they typically offer “business-to-consumer” services. This is the case of professional fresh vegetables and recipes delivery to one’s doorstep with HelloFresh.

There are many platforms that can only be categorized in one of these categories while others fit two or more of these categories (see diagram). On the grounds of the similarities and dissimilarities between these categories, it is important to underline that a narrow definition of “collaborative economy platforms” will encompass (i) any technology-based (ii) collaborative (iii) peer-to-peer practice that involves (iv) either the temporary access to an asset (*e.g.*, platforms such as Peerby that allow peers to share tools) or the provision of services (*e.g.*, BlaBlaCar). This narrow concept of collaborative economy excludes:

- (i) *the use of platforms by professionals or in a professional manner*, that is, the underlying idea of the collaborative economy is to maximize the use of a private good or underused time, and not to convert one’s house into an unlicensed bed & breakfast. It is thus important to determine where to draw the line between professional and peer-to-peer services (see *infra* Section 5).
- (ii) *Purely commercial platforms* which provide more than mere mediation services between supply and demand, by delivering directly or through their fully-owned subsidiaries goods or services, namely as ancillary services (see above).

[media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf](#) (last accessed on February 22, 2016). For more information on these ancillary services, see <https://www.guesty.com/academy/third-party-airbnb-key-exchange-services/> (last accessed on February 22, 2016).



Although the collaborative economy poses significant challenges to national and local regulators, collaborative consumption has existed for centuries, particularly in urban agglomerations.⁵³ To illustrate, before the creation of licensed hotels or guest-houses, pilgrims and other travelers would be lodged at strangers' places, would be provided with food and would give in return a gift to the host or pay a fee.⁵⁴ There have always existed critical counterforms of capitalist production and consumption which were studied in the context of the so-called "gift economy".⁵⁵ With the development of Web 2.0 where the sharing of information and data is the main underlying activity, and a generation of users that is used to sharing (videos, images), the collaborative economy re-emerged under new metaphors.⁵⁶ The development of these

⁵³ For an extensive analysis of the intrinsic and historical tendency of urban agglomerations to share facilities and living spaces, see Jamila Jefferson-Jones, 'Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?', (2015) 42 *Hastings Cons. L. Q.* 557, 561; Dolores Hayden, *The Grand Domestic Revolution. A History Of Feminist Designs For American Homes, Neighborhoods, And Cities* (1982) (describing how women in cities created women's cooperatives, shared kitchens, and developed collaborative communities to prevent isolation);

⁵⁴ See generally Janelle Orsi, *Practicing Law in the Sharing economy: Helping People Build Cooperatives, Social Enterprise, and Local Sustainable Economies* (ABA: 2012).

⁵⁵ Nicholas A. John, 'The Social Logics of Sharing,' (2013) 16 *The Communication Review* 113, 119.

⁵⁶ *Id.* at 120.

collaborative practices through digital platforms brings however a number of benefits and challenges along. In the next sections of this paper we analyze digital home-sharing and home-exchange.

2.2. Home-Sharing and Key Players

In the last five years a growing number of “home-sharing platforms” have emerged. These platforms intermediate the temporary peer-to-peer leasing of accommodation. In the home-sharing sector, there are three types of sharing practices: home-sharing, home-exchange, and solidarity networks. Within home-sharing the best well-known platforms are Airbnb and Wimdu. HomeAway and LoveSwapHome are popular platforms in the home-exchange or swapping sector and, in the niche markets, Onefinestay (luxury accommodation) and SabbaticalHomes (home-sharing or exchange among academics) are often heard references. Within the hospitality-networks, we can mention Couchsurfing and WarmShowers. In the two last types of home-sharing, no fee is paid in principle for accommodation and related services (breakfast or tour guide). Instead, hosts swap houses either at the same time or compromise to host each other in the future. In some cases, platform users can “win” nights at someone else’s place within the network if they host other users (*e.g.*, NightSwapping).

2.3. Benefits and Concerns

2.3.1. Benefits

The literature and different institutions, including the European Commission have acknowledged the myriad of real and potential benefits offered by the collaborative economy and its disruptively innovative services,⁵⁷ including home-sharing: greater choice, lower prices, growth opportunities for SMEs (namely, innovative start-ups), greater sense of social belonging,⁵⁸ potential for employment increase, enhanced work flexibility, and

⁵⁷ See Daniel Guttentag, ‘Airbnb: Disruptive Innovation and the Rise of an Informal Tourism Accommodation Sector’ (2015) 18 *Current Issues In Tourism* 1192 (exploring Airbnb’s potential to significantly disrupt the traditional accommodation sector and the positive and negative impacts of the platform).

⁵⁸ Ellen McArthur, ‘Many-to-many Exchange without Money: Why People Share their Resources,’ (2015) 18 *Consumption Markets & Culture* 239.

entrepreneurship.⁵⁹ Also the OECD has underlined the importance of promoting sustainable sharing initiatives, in particular in cities where many resources are scarce.⁶⁰ A recent report prepared for the European Parliament's Committee on Internal Market and Consumer Protection suggested that sharing practices could result in a potential economic gain of € 572 bn in annual consumption across Europe.⁶¹

Shared access to underused assets tends to favor sustainable and efficient consumption.⁶² Housing in European cities is underutilized when inhabitants go on vacation and when children move out of their parents' large properties, leaving them with spare rooms. According to Eurostat, the average underutilization percentage of accommodation in the twenty-eight Member States, based on the frequency with which owners are absent from their main residence is 3%. For example, Belgium has an under-utilization rate of 3% while in Hungary this percentage is only of 1%.⁶³ However, home-sharing has also shed some light on how to solve housing shortage, namely social or low-income housing. Airbnb's success revealed that there was excess capacity in the housing market and that many families were willing to share their homes with strangers, as long as they were compensated and there were minimal guarantees regarding the protection of their property.⁶⁴ Relying on these insights, Barcelona's mayor who has tried to curb home-sharing platforms and other competitive platforms offering cheap tourist accommodation,

⁵⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Upgrading the Single Market: More Opportunities for People and Businesses*, COM(2015), 28.10.2015.

⁶⁰ OECD, *Cities for Citizens, Improving Metropolitan Governance* 18 (2001), at http://www.oecd-ilibrary.org/governance/cities-for-citizens_9789264189843-en (accessed February 28, 2016) (claiming that cities should be 'developed, not only to meet the needs of the economy, but also to help fulfil the aspirations of people for a higher quality of life through measures that can also maintain and enhance the attractiveness and livability of cities').

⁶¹ *Id.* at 5.

⁶² See, e.g., Dara O'Rourke & Niklas Lollo, 'Transforming Consumption: From Decoupling, to Behavior Change, to System Changes for Sustainable Consumption', 40 *Annual Review of Environment and Resources* 233.

⁶³ European Parliament, *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities*, European Parliament Research Advice (2016), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777) (accessed on February 29, 2016), based on Eurostat, *Number of nights spent at hotels*, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Tourism_statistics_-_nights_spent_at_tourist_accommodation_establishments (last accessed February 28, 2016).

⁶⁴ Ingrid Gould Ellen, 'Housing Low-Income Households: Lessons from the Sharing Economy,' (2015) 25 *Housing Policy Debate* 785, 786.

has suggested that unlicensed platforms should either pay a fine or transform this accommodation into social housing.⁶⁵

2.3.2. Potential Barriers

The delivery of the multiple benefits offered by the collaborative economy is currently impeded (or on the verge of being impeded) by a number of legal and non-legal obstacles.

First, there are technological, economic, and social barriers to the expansion of sharing economy platforms. These obstacles include internet penetration, affordability of smartphones, digital skills (*e.g.*, the elderly tend to have more limited digital skills). Other barriers emerge from the lack of trust in online transactions,⁶⁶ the actors and platforms involved in the home-sharing economy and the absence of a “sharing mentality” that privileges access over ownership.⁶⁷ In most EU Member States, technological barriers are however not relevant obstacles to the expansion of the sharing economy. According to Eurostat, Sweden, Belgium, and Hungary have high rates of internet access (75% or more in 2014).⁶⁸

According to a recent report commissioned by the European Parliament, low population density and high transaction costs incurred for sharing practices can also impede the development of the sharing economy. Urban agglomerates are typically regarded as spaces of sharing since the concentration of housing, resources, and active population facilitates the sharing of knowledge and infrastructure.⁶⁹ In the case of home-sharing, the typical features of

⁶⁵ ‘Barcelona Draws up Battle Lines to Curb Airbnb Type Tourism Boom’, *The Local*, August 28, 2015, available at <http://www.thelocal.es/20150828/barcelona-should-follow-example-of-paris-and-accept-tourism-tax-says-airbnb> (last accessed on February 20, 2016).

⁶⁶ For an empirical study on the importance of trust versus lower prices, see H. Kim, H., Y. Xu, and S. Gupta, ‘Which is more important in internet shopping, perceived price or trust?’ (2012) 11 *Electronic Commerce Research and Applications* 241–252.

⁶⁷ See Yannis Bakos and Chris Dellarocas, *Cooperation Without Enforcement? A Comparative Analysis of Litigation and Online Reputation as Quality Assurance Mechanisms*. 57 *MGTM. SCI.* 1944 (2011) (discussing the role of reputation mechanisms and how these instruments are replacing traditional legal instruments, notably enforceable contracts).

⁶⁸ Eurostat, Internet Access of Households, 2009 and 2014 (% of all Households), [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Internet_access_of_households_2009_and_2014_\(%25_of_all_households\)_YB15.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Internet_access_of_households_2009_and_2014_(%25_of_all_households)_YB15.png)

⁶⁹ European Parliament, *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities*, European Parliament Research Advice (2016), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777) (accessed on February 4, 2016) (Annex I, Chapter 4).

cities can be more attractive to tourists, but contrary to other collaborative economy sectors (clothing, transportation, energy-sharing), close geographic proximity between users might not be essential (or might be undesirable in the case of home-swapping).

Second, concerns about damages to the host's property or moral hazard constitute a common obstacle to collaborative economy practices.⁷⁰ Traditional insurance policies for individuals do not respond to the potential risks of home-sharing to strangers, while commercial insurance might come at a very high price.⁷¹ Larger platforms have arranged for their own insurance policies to cover platform users (Airbnb, for example, covers up to \$1m), but smaller platforms might have insufficient means to provide for this additional insurance. Sufficient insurance coverage has also been a concern of national and local regulators not only in Europe but also elsewhere: Amsterdam has nonetheless issued guidelines suggesting that home-sharing hosts should inform their insurance companies,⁷² and, as Section 3 explains, also Brussels has been concerned with this potential problem.

Third, national and in particular local governments in Europe (as well as in the United States) are also erecting legal barriers to the development and expansion of home-sharing platforms. Digital platforms, traditional businesses, and consumers have complained about the existence of regulatory uncertainty regarding the applicable rules, notably on consumer protection, taxation, licensing, health, fire, health norms, social security and employment protection.⁷³

Across Europe, national and local governments are currently either enforcing existing legislation designed for professional accommodation or real estate businesses or adopting new

⁷⁰ See Thomas A. Weber, 'Intermediation in a Sharing Economy: Insurance, Moral Hazard, and Rent Extraction' (2014) 31 *Journal of Management Information Systems* 35.

⁷¹ In a recent Position Paper drafted by the Dutch Association of Insurance Companies, the Association warns against the limits of insurance policies in the case of Airbnb. In most cases, any thefts or damages will only be insured by Airbnb's Insurance Policy as most private insurance policies only provide insurance for the private use of property, see Verbond van verzekeraars, 'Deeleconomie=Kansen/Risico's-Position Paper (2014), available at <https://www.verzekeraars.nl/Verzekeringsbranche/Publicaties/Publicaties/Position%20paper%20'Deeleconomie'.pdf> (in Dutch). For a thorough discussion of how the collaborative economy is disrupting the insurance market, see Michael Abramowicz, 'Cryptoinsurance' (2015) 50 *Wake Forest Law Review* 671.

⁷² Gemeente Amsterdam, 'Mag ik mijn woning verhuren als ik op vakantie ben?' [Can I rent my home while I am on vacation?] Gemeente Amsterdam at <https://www.amsterdam.nl/veelgevraagd/?caseid=%7B9B2C2273-F797-460B-AD20-05DFB9F6F39F%7D> (last accessed March 1st, 2016) (simplified overview of municipal rules for short-term home-sharing).

⁷³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Upgrading the Single Market: More Opportunities for People and Businesses, COM(2015), 28.10.2015, p.3.

and somewhat hasty legislation or regulations in an attempt to respond to the mentioned regulatory uncertainty and the risks generated by the lack of a level-playing field, unfair competition between licensed and unlicensed operators, and potential market fragmentation.⁷⁴

The central motivations for the adoption of these restrictions on home-sharing appear to be:

- a) the need to control excessive tourism facilitated by affordable and unlicensed tourist accommodation due to the housing shortage, rising rents, and negative externalities (*e.g.*, noisy tourists) that affects permanent residents. This argument has been put forward in Barcelona and Berlin.⁷⁵
- b) the protection of property values and the character of the neighborhood. Although Stockholm still does not have specific restrictions on digital home-sharing (see below), Swedish housing typically reflects the perception that residents should adhere to maintaining a “gold standard of single-family ownership,” ties with the local community and being a good neighbor;⁷⁶
- c) taxation and revenue (see below the case of Budapest);
- d) public-safety (see below the case of Brussels);
- e) privacy, and more broadly human dignity values of tourist accommodation (see the case of Brussels);
- f) level-playing field and competition with licensed lodging. In the cities where Airbnb and other platforms are active, the hotel industry has tried to lobby local governments to respond to unlicensed accommodation.

2.3.3. Risks

Despite the multiple benefits of the sharing economy, the literature and policy officials have expressed their concern regarding potential risks. Common concerns include the danger that the

⁷⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Upgrading the Single Market: More Opportunities for People and Businesses, COM(2015), 28.10.2015, p.3.

⁷⁵ Barcelona Draws up Battle Lines to Curb Airbnb Type Tourism Boom, *The Local*, August 28, 2015, available at <http://www.thelocal.es/20150828/barcelona-should-follow-example-of-paris-and-accept-tourism-tax-says-airbnb> (last accessed on February 20, 2016). *See also* footnote 4.

⁷⁶ *See* Ngai Pindell, ‘Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability’ (2009) 29 *St. Louis University Public Law Review* 41, 46-48; c

sharing economy might exacerbate wealth inequality instead of reducing it by helping hosts to find additional sources of income and the negative impact of collaborative economy on urban housing policy (e.g., housing shortage, rising rents) and third parties (neighbors of home-sharing platforms hosts).

a) Regulatory concerns and the public interest

Although this paper is focused on European cities and specifically on Brussels, Stockholm, and Budapest, it is worth noting that legal restrictions on home-sharing and home-exchange practices have been criticized outside Europe. Zoning regulations and other local regulations impeding home-sharing are justified by the need to preserve property values and neighborhood character. In the United States, the literature has criticized municipal restrictions on short-term leasing, arguing that they are unconstitutional takings of private property without just compensation.⁷⁷ While this argument would seem far-fetched in many European jurisdictions, it raises the question of whether municipal bodies should be allowed to restrict sharing economy practices and why they do so.

b) Reduction in the supply of housing to locals

The opponents of Airbnb and other home-sharing platforms have argued that these sharing practices have resulted in the reduction of supply of housing to local inhabitants. This argument has been advanced in different European capitals, namely in Berlin, Paris, and Barcelona, but a potential correlation between the growth of home-sharing platforms in these cities and rising rents has not been proven by independent studies. In 2014, Airbnb commissioned a study that found that in Berlin only 0.06 per cent of the housing market was being rented on Airbnb for more than 120 days a year. In addition, this research report found that most hosts benefited from the additional income to afford living expenses.⁷⁸ This report also found that this percentage of houses rented on Airbnb did not have a significant impact on the Berlin housing market. This

⁷⁷ Jamila Jefferson-Jones, 'Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconditional Taking?', 42 *Hastings Constitutional Law Quarterly* 557 (2015).

⁷⁸ Airbnb Report available at <http://publicpolicy.airbnb.com/airbnb-berlin-housing-market/>

position has however been criticized by long-term residents and has been disregarded in Berlin's policy and regulations that as mentioned earlier in this paper, do not allow for the lease of entire units due to the generalized concerns of rising rents.

c) Deficiencies of reputational mechanisms

The operation of home-sharing platforms is based on the use of peer-review instruments that promote the transparency of transactions, provide additional information about the hosts and tourists, the house being leased and its neighborhood. This system is a source of advantages and disadvantages. To begin with, first-time users on Airbnb or other platforms might have to offer lower prices until they have a sufficient number of positive reviews. Not all reputational schemes are as thorough and reliable. In addition, a study commissioned by the European Parliament also warns against the risk of social exclusion since reputational systems and negative peer-reviews can impede certain actors from participating in the sharing economy and reestablishing their reputation.⁷⁹ A recent Harvard Business School study has also pointed out that in the United States, African-American users were less likely to be accepted for example by Airbnb hosts than white users.⁸⁰

d) Long-term effects on supply of shared assets

Shared access promotes in the short-term sustainable and efficient consumption of underutilized assets, notably vacant houses during the owners' absence or spare rooms. Since the fixed costs have already been incurred, the marginal costs of renting this space are quite low. However, as a recent report commissioned by the European Parliament pointed out, peer-to-peer home-sharing might decline in the long-run as individuals might tend to replace or repair the assets they own

⁷⁹ European Parliament, *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities*, European Parliament Research Advice (2016), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777) (accessed on February 4, 2016).

⁸⁰ See Benjamin G. Edelman, Michael Luca & Dan Svirsky, "Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment," Harvard Business School NOM Unit, Working Paper No. 16-069, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701902

left often as they reach the end of their natural life.⁸¹ In a context in which peers start having a shrinking pool of assets to share, home-sharing platforms supported by businesses might have an advantage in the long-run. While this is true in theory, this position does not take into account three considerations: first, the existence of divergent consumer preferences, that is, there will continue to be consumers who will prefer to own rather than simply share existing housing. This might guarantee a continuous flow of peer-to-peer supply. Second, the existence of peer-to-peer home-sharing can exist alongside commercial accommodation. The first type also includes solidarity networks and home-exchange. Third, the expressed concerns are particularly applicable to other assets such as tools or vehicles. The “lifespan” of houses is in principle longer.

In the next section, we analyze the expansion of home-sharing platforms in Brussels, Stockholm and Budapest and we describe the respective local regulations affecting collaborative economy practices.

⁸¹ European Parliament, *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities*, European Parliament Research Advice (2016), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777) (accessed on February 4, 2016).

3. Case studies

In this paper, we analyze the development of home-sharing platforms and their legal frameworks in three cities with different regulatory regimes: Brussels, Stockholm, and Budapest.

Brussels (region of Bruxelles-Capitale) has recently amended the regulation of tourist accommodation in order to respond to the proliferation of the collaborative economy, by enacting more stringent regulations. The existing 2014 regulation on tourist accommodation was further regulated on March 24, 2016 by an Implementation Decree that guaranteed its entering into force (*Arrêté du Gouvernement de la Région de Bruxelles-Capitale portant exécution de l'ordonnance du 8 mai 2014 relative à l'hébergement touristique*) on April 24, 2016.

In Stockholm, there are not any specific regulations for peer-to-peer home-sharing practices but there is already restrictive case-law, comparing Airbnb to unlicensed hotel practices. Home-sharing in Stockholm is currently in a limbo between the application of landlord-tenant law which currently requires individual authorizations for every single short-term lease and the application of hotel regulation which does not appear to cover sporadic peer-to-peer sublets.

Budapest regulated peer-to-peer home-sharing practices a number of years ago in an attempt to legalize the “Zimmer Frei” culture that reigns both in Budapest and in other touristic areas of the country and tackle the thriving black economy. These regulations are detailed and considered applicable to the collaborative economy, but there are no signs that they have been actively enforced specifically against home-sharing platforms.

3.1. Brussels

3.1.1. Introduction

The collaborative economy is increasingly popular in Belgium, particularly in the Brussels region: from local collective gardening and agriculture cooperatives and sharing initiatives like SAGAL to the sharing and exchange of underused items on platforms such as Wijdelen or Tournevie, the collaborative economy appears to be present in multiple economic sectors.⁸² Home-sharing is one of the most common types of collaborative initiatives, which has been regarded with suspicion by Brussels officials who have recently further regulated the tourist accommodation sector in order to respond to the concerns generated by the expansion of diverse home-sharing platforms and the pressure exerted by the Brussels Hotel Association.⁸³ In this case-study we study the regulations and policies city of Brussels—considered here as the city-region of Bruxelles-Capitale (hereinafter “Brussels”)—regarding home-sharing and home-exchange practices.

3.1.2. Background information

The city-region of Brussels is composed by 19 *communes*. According to the Institut Bruxellois de Statistique et d’Analyse, in 2015, Brussels had a population of 1,175.173 inhabitants.⁸⁴ The most populated *communes* were Brussels (city) and Schaarbeek. In Belgium 78% of the population owned a house in 2014.⁸⁵ Brussels is however the region with the highest number of tenant-occupied dwellings. According to research on landlord-tenant law in Belgium, the number of tenant-occupied houses has decreased in the last decade, but it remains at a higher level in Brussels: in 2009, for example, 55% of dwellings were rented and 45% were owner-occupied; the national average was however quite different as only 28% of dwellings were rented.⁸⁶ In the Brussels region, many dwellings are rented to professionals from other areas of

⁸² Helena Coen & Laura Gerard, “Deelinitiatieven is meer dan hype: Deeleeconomie en geen bezigheidstherapie”, *Brusselnieuws*, 19.02.2016, available at <http://www.brusselnieuws.be/nl/nieuws/deelinitiatieven-meer-dan-hype-deeleeconomie-en-geen-bezigheidstherapie> (last accessed on February 23, 2016).

⁸³ Brussels Hotels Association Press Release ‘Hébergement touristique à Bruxelles: vers la fin du flou juridique’, *Actualités-BHA*, 17.07.2015, available at (last accessed on February 23, 2016).

⁸⁴ Institut Bruxellois de Statistique et d’Analyse, ‘Population: évolution annuelle’, <http://www.ibsa.irisnet.be/themes/population#.VsItY3iftFI>

⁸⁵ “78% van de Belgen bezit een woning en we staan daarmee niet eens in de Europese top5”, *Express Business*, 27.01.2014, available at <http://nl.express.live/2014/01/27/78-van-de-belgen-bezit-een-woning-en-we-staan-daarmee-niet-eens-in-de-europese-top-5-exp-201529/> (last accessed on February 9, 2016).

⁸⁶ Hendrik Ploeger et. Al., “National Report for Belgium, TENLAW: Tenancy and Housing Policy in Multi-

the country or foreigners who work at European and international institutions and companies in Brussels, which explains the higher levels of tenancy.

Brussels also has the most expensive housing market in Belgium, with both indep and apartment significantly above the national average.⁸⁷ Although the population in Brussels has been increasing in the past decade, putting pressure on the housing market, this has not resulted in a much higher supply of housing. Rather, the media and the literature have often criticized the housing crisis in Brussels which as elsewhere, is characterized by housing shortage, high prices of rents and low salaries for non-skilled labor.⁸⁸ Despite this crisis, there have been for many years unoccupied and underutilized housing units, the majority of which pertaining to the private sector.⁸⁹

3.1.3. Home-Sharing in Brussels

The home-sharing sector (*“hébergement chez l’habitant”*) has become increasingly popular throughout Belgium, particularly in Brussels.

3.1.3.1. Key Players and Listings

In Brussels, the main home-sharing platforms are foreign platforms which are either subsidiaries of US-based platforms or platforms primarily established in other Member States. Airbnb has more than 1,000 listings in Brussels, ranging from 13 euros in a simple bedroom in the suburbs of Brussels to 1,680 euros for a mansion outside Brussels.⁹⁰ On average the prices

level Europe”, ZERP, p.7, available at http://www.tenlaw.uni-bremen.de/reports/BelgiumReport_09052014.pdf (last accessed on February 10, 2016).

⁸⁷ Statistics Belgium, “Vastgoedprizen”, Economie, http://statbel.fgov.be/nl/statistiek/cijfers/economie/bouw_industrie/vastgoed/ (last accessed February 22, 2016). (while the national average price for a villa/independent house was 333,736 euros in 2014, in Brussels the average price was 952,257 euros).

⁸⁸ This problem has been discussed in Belgium for a number of years, see, e.g., E. Deny, “Le marché locatif privé en Région de Bruxelles-Capitale. Analyse des loyers demandés”, Bruxelles, Ministère de la Région de Bruxelles-Capitale (Direction des Études et de la Statistique), 2003.

⁸⁹ Nicholas Bernard, “Situation du logement à Bruxelles: vers une ville duale?”, IEW, 05.07.2007, available at http://www.iewonline.be/IMG/pdf/Texte_Nicolas_Bernard.pdf (last accessed on February 9, 2016).

⁹⁰ https://www.airbnb.nl/s/Brussels--Belgie?checkin=25%2F03%2F2016&checkout=28%2F03%2F2016&ss_id=bszxqab6&ss_tag=2BBnMU5a

per night for an individual bedroom in cities like Antwerp, Ghent, and Brussels can range between 30 and 100 euros per night. Wimdu, for example, has more than 500 listings, ranging from 27 EUR for a simple bedroom to 482 EUR for a whole luxurious apartment or even a room in a design hotel.⁹¹

The French platform Bedycasa offers approx. 70 listings in Brussels and surrounding boroughs.⁹² 9Flats has 340 units in the Brussels region.⁹³ HomeAway offers approx. 182 listings,⁹⁴ The marketplace 2dehands.be also offers a number of private listings of houses to rent but these are mainly long-term leases rather than vacation homes.⁹⁵ In the home-swapping market, LoveSwapHome offers 688 houses in Belgium, many of which in the Brussels region,⁹⁶ Huizenruil (local version of HomeExchange) has 111 listings,⁹⁷ and the nice home-exchange or home-sharing platform SabbaticalHomes only 3. A new tendency in the home-swapping sector present in Brussels is the “night-swapping”, where individuals can offer to host tourists for a number of nights and then “redeem that number” by being hosted by someone else within the same network.⁹⁸ The platform “Night-swapping” only covers however damages up to 450 euros (according to the information available on the website).

3.1.3.2. Legal Framework

Hotels, bed and breakfasts as well as home-sharing and home-exchange platforms in Brussels are primarily regulated by the 2014 *Ordonnance relative à l' hébergement touristique* (hereinafter “2014 *Ordonnance*”) on tourist accommodation (amended in 2015).⁹⁹ In the Preamble of the

⁹¹http://www.wimdu.com/search?utf8=✓&search_geolocation=2071-brussels&lat=&lng=&distance=&guests=2&per_page=25&country_iso=&city=Brussels&checkin_date=&checkout_date=&min_bedrooms=1&sort_by=price_desc (last accessed on February 23, 2016)

⁹²<https://fr.bedycasa.com/chambre-a-louer/bruxelles-31867.html?sort=popularity>

⁹³https://www.9flats.com/brussels-capital_region_of_brussels-belgium

⁹⁴ The number of listings is based on a search effectuated on February 22, 2016, the results may therefore vary and are approximate numbers.

⁹⁵ <http://www.2dehands.be/immo/huurwoningen-belgië/brussel/>

⁹⁶ The platform only allows non-registered users to visualize some listings in Brussels and provides a total number for the whole country, see <http://www.lovehomeswap.com/preview> (last accessed on February 23, 2016).

⁹⁷https://www.huizenruil.com/nl/search/Brussel_België?page=2

⁹⁸<https://www.nightswapping.com/en-us/>

⁹⁹ Ordonnance relative à l' hébergement touristique du 8 mai 2014, 17.06.2014, n2014031471 (in Flemish, “Ordonnantie betreffende het toeristische logies).

2014 *Ordonnance*, it was stated that this law aimed to provide a partial implementation of the Services Directive as well as to regulate the tourist profession by establishing a set of rules (“*un régime de conditions d’accès à la profession en matière de tourisme*”).¹⁰⁰

The 2014 *Ordonnance* entered into force in April 2016, after the long-awaited adoption of the respective implementation decree on March 24, 2016 (*arrêté d’exécution*). This decree was approved by the Brussels government, the Brussels-region Economic and Social Council, and the Council of State. While the project of this decree was already voted in July 2015 and submitted in September 2015 to the Conseil Économique et Social de la Région de Bruxelles-Capitale which suggested some minor changes to the content of the decree, the final implementation decree was only enacted at the end of March. Until April 24, 2016, home-sharing platform hosts could lease their units without any previous registration requirement or inspection. New regulations impose however the duty to register as well as to comply with a large number of additional requirements regarding the facilities offered.

At the moment, Airbnb and other home-sharing platforms hosts must take the following legal framework into account:

- a) Articles 23 and 39 of the Belgian Constitution: basis for the right to salubrious and “decent” accommodation and the regional regulation of accommodation;
- b) *Code du logement* de Bruxelles: general dispositions on accommodation, including the definition of “logement” (accommodation) (article 2), the imposition of minimal requirements of safety, salubrity, and equipment, notably that the accommodation must have hot and cold water, a working heating system, ventilation, and sewage (article 4), as well as the prohibition to lease accommodation that does not comply with these minimal requirements (article 5);
- c) *Ordonnance relative à l’hébergement touristique du 8 mai 2014* as modified by the *Ordonnance du 10 juin 2015*: regulates tourist accommodation by distinguishing the rules applicable to each category (see below for further details);¹⁰¹

¹⁰⁰ See preamble of the *projet-Ordonnance* and article 2 of the *Ordonnance relative à l’hébergement touristique du 8 mai 2014*, 17.06.2014, n2014031471.

¹⁰¹ *Ordonnance modifiant l’ordonnance du 8 mai 2014 relative à l’hébergement touristique*, 10.06.2015,

- d) *Arrêté du Gouvernement de la Région de Bruxelles-Capitale du 24 mars 2016 portant execution de l'ordonnance du 8 mai 2014 relative à l'hébergement touristique*: this implementation decree establishes a number of specific rules for the authorization procedure, fire safety certification, quality of the unit and even type and number of furniture and amenities required.

The 2014 *Ordonnance* regulation and its implementation decree provide partial implementation of the Services Directive.¹⁰² In the 2014 *Ordonnance* different types of accommodation are listed:

- a) *Hébergement touristique*: housing offered for one or more nights, for a fee (“à titre onéreux”) regularly or occasionally to tourists;¹⁰³
- b) Hotel;
- c) apart-hotel;
- d) vacation houses (“*résidences de tourisme*”);
- e) *hébergement chez l'habitant*, which typically referred to bed and breakfasts but now also includes accommodation provided through home-sharing platforms by a private individual;
- f) *hébergement de tourisme social et camping*.

The rules comprised in the 2014 *Ordonnance* are applicable to transactions involving “a consideration” (“à titre onéreux”) which according to Belgian law (article 1106 of the Belgian Civil Code) means that both home-sharing and home-exchange platforms will be included if both parties are expected to give or receive an advantage from the exchange, that is, the transaction implies consideration.¹⁰⁴ However, considering the nature of some home-swaps or exchanges, it might be more difficult (and even unreasonable) to apply the general requirements applicable to home-sharing for monetary consideration. The reciprocal character of these transactions means

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¹⁰² See article 2 of the *Ordonnance relative à l'hébergement touristique du 8 mai 2014*, 17.06.2014, n2014031471.

¹⁰³ Article 3, *hébergement touristique* tout logement propose pour une ou plusieurs nuits, à titre onéreux, de manière régulière ou occasionnelle, à des touristes.”

¹⁰⁴ Article 1106 du Code Civil Belge: “Le contrat à titre onéreux est celui qui assujettit chacune des parties à donner ou à faire quelque chose.”

however that solidarity networks where tourists are not required to pay a fee or reciprocate in the short-run by offering an equivalent stay at their place, are not comprised by the regulations described below.

Subsection 4 of the 2014 *Ordonnance* lists a number of specific dispositions applicable to home-sharing practices with the duration of up to 90 days (“*hébergement chez l’habitant*”).¹⁰⁵

1. The host must register his or her house and obtain a “*déclaration préalable*” which is further regulated in both the 2014 *Ordonnance* and the Implementation Decree (articles 14, 16) (*see more information below on this authorization*);
2. The host is not allowed to have more than one listing and this listing must be his principal residence (article 10, §1er, 1 a));
3. The host is not allowed to host more than 15 tourists at the same time (article 10, §1er, 1 b);
4. A written contract must be concluded for each occupation/room, comprising the price of the stay per night (including the breakfast) (article 10§1er, 1c);
5. The host should inform his or her insurance company (civil liability) (article 10§1er, 1d);
6. The host commits himself/herself to offer a personal and quality welcome and facilitate the tourists’ stay (article 10§1er, 1e);¹⁰⁶
7. The prices for each room must be displayed (article article 10§1er, 1f);
8. The host must provide for regular cleaning services and clean linens (article 10§1er, 1g);
9. The housing unit must be well-maintained, safe, and clean, have between one to a maximum of five guestrooms (article 10§1er, 2). This means that home-sharing platforms offering accommodation in shared rooms or living-rooms (sofa-beds) do not comply with this requirement.

¹⁰⁵ Stays that exceed the period of 90 days will be regulated according to landlord-tenant law, more specifically, “*location avec service*”).

¹⁰⁶ The original text of article 10§1er, 1e) “L’exploitant ou la personne chargée de la gestion journalière de la personne morale exploitant (...) s’engage à s’impliquer personnellement, éventuellement avec la ou les personnes qui vivent habituellement sous le même toit, dans l’accueil des hôtes, à leur réserver un accueil personnel de qualité, à mettre tout en oeuvre pour faciliter leur séjour et à les aider dans leurs recherches d’informations touristique.”

10. The host should notify the local authorities of any circumstance relevant to the registration of the leased housing within thirty days following this modification (article 22);
11. According to article 23, hosts can be fined if they do not comply with the abovementioned requirements (250 to 25,000 euros), do not apply for an authorization (“*déclaration préalable*”), do not provide a timely communication of the changes mentioned in article 22 or continues to lease the unit despite the rejection of the requirement administrative authorization (article 23§1er).

Implementation Decree

In July 2015, the Government of the city-region of Brussels-Capital voted in favor of the Implementation Decree (*arrêté d'exécution*) which will further regulate and implement the mentioned *ordonnance*. The Economic and Social Council of the Region stated in its opinion on the project of implementation decree that the latter as well as the *Ordonnance* responded to new and important concerns: while allowing for social innovation and the development of the tourist accommodation sector, this regulation should avoid unlawful competition and black economy by requiring all operators of tourist accommodation to comply with certain rules and prevent illegal activities.”¹⁰⁷ The Council also underlined the importance of maintaining the two-year period for the transitory application of the mentioned rules stated in the Implementation Decree.¹⁰⁸ The Council raised however questions regarding the federal taxation of this type of accommodation and the need to ensure the equal taxation of tourist accommodation.¹⁰⁹

The Implementation Decree provides detailed information on how to obtain the authorization to operate a home-sharing or home-exchange activity. This further regulation of the sector includes the duty to register the unit and an a posteriori control of the authorization of the

¹⁰⁷ Avis sur l' Arrêté du Gouvernement de la Région de Bruxelles-Capitale portant execution de l' ordonnance du 8 mai 2014 relative à l' hébergement touristique, 17 September 2015, Conseil Économique et Socialde la Région de Bruxelles-Capitale, available at <http://www.ces.irisnet.be/avis/avis-du-conseil/par-date/2015/a-2015-056-ces>

¹⁰⁸ Avis du Conseil Conseil Économique et Socialde la Région de Bruxelles-Capitale, available at <http://www.ces.irisnet.be/avis/avis-du-conseil/par-date/2015/a-2015-056-ces>

¹⁰⁹ Id.: “Le Conseil encourage le Gouvernement à réfléchir à l'opportunité de transmettre des informations pertinentes vers les services de contrôles fiscaux fédéraux afin de permettre à ceux-ci d'exercer efficacement leur mission, de créer des conditions fiscales équitables entre les exploitants et d'assurer une juste participation de tous aux finances publiques.”

mentioned parties was frowned upon by home-sharing platforms who consider these requirements too onerous for hosts.¹¹⁰

The abovementioned regulation and its implementation decree will have an important impact on home-sharing practices in the short-run as they essentially require that home-sharing hosts:

- 1) are registered: this registration will be accompanied by the emission of a registration number;
- 2) have a certificate of fire safety, proving that the unit complies with all fire safety regulations applicable to that building or part of it. This certificate is provided by the mayor of the respective municipality. In the case of “*hébergement chez l’habitant*”, individuals benefit from a simplified procedure to apply for this certificate.¹¹¹
- 3) comply with zoning regulations: the *commune* will issue a document confirming that this type of accommodation is acceptable according to zoning regulations;
- 4) request and obtain the authorization to lease or sub-lease the unit as tourist accommodation from co-owners, landlord, and, in the case of units integrated in multi-dwelling buildings, the authorization of the housing association.

In addition, the host applying for this registration must file an application request which includes the following documents:

- 1) A copy of the title deed;
- 2) Home insurance policy;
- 3) Criminal register;
- 4) Fire safety certificate
- 5) House plan.
- 6) Price information available into French and Dutch and translated at least in English.

¹¹⁰ Robert van Apeldoorn, “Airbnb s’ inquiète des nouvelles règles à Bruxelles (et cite la Flandre en exemple), *Le Vif*, 20.07.2015, available at <http://trends.levif.be/economie/entreprises/airbnb-s-inquiete-des-nouvelles-regles-a-bruxelles-et-cite-la-flandre-en-exemple/article-normal-406455.html>

¹¹¹ “*L’établissement d’hébergement touristique devra détenir une attestation de sécurité d’incendie, délivrée par le bourgmestre, qui témoigne que l’hébergement satisfait aux normes de sécurité en matière de protection contre l’incendie ou une attestation de contrôle simplifié, qui témoigne que l’hébergement satisfait aux normes de sécurité concernant l’installation électrique, le chauffage et le gaz et qui pourra se substituer à l’attestation de sécurité d’incendie.*” (original text)

The implementation decree (Annex 4) imposes a number of detailed additional requirements on units leased in the context of the collaborative economy (*“hébergement chez l’habitant”*) including:

1. The host must welcome the tourists upon their arrival.
2. The host must be available during the period of the guest’s stay.
3. All the leased rooms must have their entrance door identified and can be locked with a key.
4. The number of hosts able to sleep in the unit is limited to the stated occupancy: a convertible bed, a bunk bed, a fixed wall bed, wardrobe bed or similar equipment are equated to regular bed as far as the maximum occupancy is concerned.
5. All the rooms leased and facilities accessible to the tourists must have sufficient lighting (100 lx).
6. All the rooms leased must have a light switch at the entrance to the room. The main lighting is controlled from the beds in the absence of lamp.
7. There must be at least one window in the bedroom. In the absence of air conditioning or ventilation, the guests must be able to open the windows. The windows must have blackout curtains or be equipped with something similar.
8. There is at least one electrical outlet in the bedroom.
9. The beds are equipped with mattresses, mattress covers , pillow and bedding adapted to the dimensions of beds .
10. The bedroom must be furnished at least with:
 - a) a cabinet or similar space built for use as wardrobe and underwear, at least two hangers per person are available ;
 - b) a seat each. When the room has a maximum capacity of more than two people, two seats are sufficient ;
 - c) if breakfast is provided, there is a chair person and a table. The chair is considered a seat as referred to in point b;
 - d) a wastebasket .

12. When the room has a private bathroom, the bathroom must either directly next to the room or built in an area of the house or in a connected annex which can be closed. If the bathroom is not immediately next to the room, there should be a clear visible symbol identifying it.

13. The private bathroom of the room has at least the following equipment:

- a) reasonable general electric lighting (100 lux) ;
- b) a window or a ventilation system which can be opened;
- c) a bath or shower with clean running water, hot and cold, always available (at any time - 24 hours a day). The bath is equipped with a drain plug or a similar device;
- d) a sink with clean running water , hot and cold , always available (at any time - 24 hours a day);
- e) a sink mirror;
- f) an electric lighting sink (200 lx) ;
- g) cup or glass for each guest ;
- h) a guest towel ;
- j) a small garbage bin ;
- k) when there is a window in the bathroom, it should be possible to obscure the view temporarily.

There are equally detailed dispositions for separate toilets. Shared bathrooms can be used by a maximum of three bedrooms. The amenities and furniture of shared bathrooms are also regulated in detail and must have the same items as private bathrooms. The regulation also imposes the daily maintenance of shared facilities, the availability of a first-aid kit. If the host claims to be a Bed & Breakfast, breakfast must be provided in the bedroom, in the host's or in an annex adjoining the bedroom. The Regulation also states that "if the facility has space for breakfast, this space includes at least a chair for each guest in the facility and one or more matching tables."

3.1.4. Taxation

A home-sharing platform host in Brussels is subject to income tax, VAT, and local taxes for the unit rented on Airbnb.¹¹² Belgian authorities are however concerned with tax evasion in this

¹¹² http://www.rtbf.be/info/belgique/detail_le-fisc-va-faire-la-chasse-aux-fraudeurs-sur-airbnb?id=9005633 (last accessed on February 22, 2016).

sector as they suspect that the majority of hosts do not declare the income earned through home-sharing platforms to the tax authorities.¹¹³ In June 2015, it was reported in the media that the Belgian authorities were planning to conduct inspections in order to identify tax evaders.¹¹⁴ The Belgian Internet Service Center (Bisc), a special unit of the Belgian Tax Authority, planned to do this through regular inspections of home-sharing platforms like Airbnb or 9Flats.

Income tax

The lease of a furnished unit on a home-sharing platform (as it tends to be the case), means that the host must declare two types of income: a property income regarding the lease of the dwelling and an income from movable assets regarding the furniture included in the unit.¹¹⁵ In this second income, the host should include the use of existing furniture and kitchen appliances. The tax office will assume 40% of the rent refers to the reimbursement for the use of the furniture and other goods contained in the house. A standard deduction of 50% for depreciation and maintenance of goods will be applied.

VAT

The calculation of the applicable VAT to tourist accommodation is a complex task in Belgium due to the varying rates applied to the different services typically provided by hotels and other forms of accommodation:

- a) hotels as well as home-sharing practices (bed and breakfast) for fee are subject to 6% VAT;
- b) restauration services offered by the same accommodation service will be however subject to a 12% rate;
- c) regular rate for other services and alcoholic drinks: 21% rate.

Local tax

¹¹³ http://www.rtf.be/info/belgique/detail_le-fisc-va-faire-la-chasse-aux-fraudeurs-sur-airbnb?id=9005633 (last accessed on February 22, 2016).

¹¹⁴ http://www.rtf.be/info/belgique/detail_le-fisc-va-faire-la-chasse-aux-fraudeurs-sur-airbnb?id=9005633 (last accessed on February 22, 2016).

¹¹⁵ Id.

The different communes in Brussels currently have the right to impose local taxes on the total price of the nights spent at a local hotel (*nuitées*) and on furnished rooms. There is currently no homogeneity at this level. These local taxes are highly contested since some communes have used higher taxes to influence behavior and discourage certain services.¹¹⁶ This practice has been however disfavored by the Belgian Council of State in 2002.¹¹⁷

3.1.5. Impact of Home-Sharing and Social Perceptions

The expansion of home-sharing platforms in Belgium has been received with suspicion by many consumers, the Belgian Hotel Association, and government officials. These parties criticize the unfair competition that allows individuals to offer their houses to tourists without any meaningful inspection or control of whether the unit is safe and suitable for tourists.¹¹⁸ As mentioned earlier, the Brussels government has tried to address these concerns since 2014. The Implementation Decree enacted on March 24, 2016 introduces very comprehensive provisions which impose stringent requirements on hosts. The requirements transcend ex ante and ex post registration and authorization schemes as they impose very detailed provisions on furniture and the availability of sanitary facilities.

3.2. Stockholm

3.2.1. Introduction

In Stockholm there are growing concerns with the expansion of Airbnb and other home-sharing platforms. These concerns are primarily threefold. First, many Airbnb housing units are being used for prostitution and human trafficking, a problem Sweden has been trying to tackle for many years in the hotel industry. While hotel workers already have training to identify and report these cases and some hotels have posters warning workers and other guests against human

¹¹⁶ See, e.g., Gilles Carnoy, "De la location immobilière à l'hébergement carré", 08.08.2014, available at <http://gillescarnoy.be/2014/08/08/de-la-location-immobiliere-a-lhebergement/> (last accessed on February 23, 2016).

¹¹⁷ "Le Conseil d'État a rappelé que la taxe établie par la commune ne peut revêtir « un caractère dissuasif ou prohibitif tel qu'elle constituerait une entrave à la liberté du commerce et de l'industrie dans ce secteur d'activités » (23 décembre 2002, www.raadvst-consetat.be).

¹¹⁸ http://www.rtf.be/info/regions/detail_airbnb-etc-la-region-bruxelloise-veut-reglementer-l-accueil-des-touristes?id=9032749

trafficking, Airbnb-hosts might be easy preys for human traffickers.¹¹⁹ Second, housing associations are unhappy with the fact that multi-dwelling buildings are now being transformed into “unlicensed hotels”, where there is a constant flow of tourists with irregular schedules and access to common areas of the building. This appears to be in contrast with the cooperative nature of many buildings. Third, the lack of a legal framework to address home-sharing platform is currently creating much regulatory uncertainty and facilitating tax evasion. Sublease of units is strictly regulated in Swedish law but recent case-law excluded the application of these rules to Airbnb which was qualified as an unlicensed hotel. However, existing hotel regulations do not appear to be applicable to most listings advertised on home-sharing platforms.

3.2.2. Background Information

In 2015, Stockholm was the fastest growing city in Europe.¹²⁰ the Swedish capital is an attractive destination to Swedes from other regions as well as to foreigners. Migration combined with longer life expectancy and growing birth rate has contributed to an unprecedented population growth during the last decennium. Between 2008 and 2014, city’s population grew by 100,000 inhabitants, which amounts to circa 46 new residents per day. In 2015 the population of the Swedish capital exceeded 900, 000 inhabitants. It is estimated that by year 2020 Stockholm’s population will amount to one million.¹²¹ The metropolitan area of Stockholm hosts 22% of the national population, it is composed by 26 municipalities and has an estimated population of 2.1 million inhabitants.¹²²

¹¹⁹ Eskil Fagerström, ‘Hyreslag hejdar Airbnb-värd’, *Sydsvenskan*, 28.08.2015, available at <http://www.sydsvenskan.se/ekonomi/hyreslag-hejdar-airbnb-varld/> (last accessed on February 20, 2016). See also ‘Naïve’ Swedes Are Renting Homes to Airbnb-Hookers’, *The Local*, 8.02.2016, available at <http://www.thelocal.se/20160208/naive-swedes-are-renting-homes-to-airbnb-hookers> (last accessed on February 20, 2016).

¹²⁰ ‘Stockholm is Fastest Growing City in Europe’, *The Local*, 16.10.2015, available at <http://www.thelocal.se/20151016/stockholm-is-fastest-growing-city-in-europe> (last accessed on February 20, 2016). See also the economic and demographic analysis performed by the Swedish Chamber of Commerce, available at <http://www.chamber.se/nyheter/stockholm-vaxer-snabbast-i-europa-2.htm> (last accessed on February 20, 2016).

¹²¹ Data available at the Stockholm City Council official website: <http://www.stockholm.se>, as well as official city statistics website: <http://www.statistikomstockholm.se>.

¹²² World Population Review, Stockholm, 13.09.2015, available at <http://worldpopulationreview.com/world-cities/stockholm-population/>

90% of Stockholmers live in dwellings in multi-dwelling (condominium) buildings, while 10% in small independent houses/villas. Of all those occupying dwelling in multi-dwelling buildings 55% enjoy tenant ownership, while 45% other forms of tenancy rights.¹²³ This number is in deep contrast with the national statistics for the whole country, where 70% of the population owns a house.¹²⁴

44% of households are single households. 27% is shared by two occupants, while 3- or 4-person households constitute respectively 13% and 11% of the total number of households. Households with a larger number of inhabitants (5-7 persons) amount to 6% of the total.¹²⁵

Housing shortage in Swedish cities has been a problem for many decades and it continues to remain a very important challenge in Stockholm.¹²⁶ This is true for all types of housing, and in particular with regard to social housing for low-income segment of the population. In Stockholm there are few incentives to solve this problem by building new social houses: the market is highly regulated, rents are controlled, and decided in negotiations between the tenants' association and the Stockholm property agency, or by courts, rather than in accordance with market principles.¹²⁷ Therefore, the average waiting time for a public house lease (social housing) in the inner city averages 13 years.¹²⁸ The long waiting lists have favoured the development of a parallel black market, where rooms in central Stockholm are offered at exorbitant prices.¹²⁹

As far as owner-occupied housing is concerned, prices have doubled in the past decade. According to Eurostat, in the second quarter of 2015 the prices of houses in Stockholm increased

¹²³ Data available at the Stockholm City Council official website: <http://www.stockholm.se>, as well as official city statistics website: <http://www.statistikomstockholm.se>. See also the multiple publications in both Swedish and English on the housing market, construction standards, and other matters related to housing and urban planning by the Swedish National Board of Housing, Building and Planning [Boverket], available at <http://www.boverket.se/en/start-in-english/search/?query=Airbnb>

¹²⁴ Olivia Baath, Per Norberg et. Al., 'National Report for Sweden, TENLAW: Tenancy Law and Housing Policy in Multi-level Europe', ZERP-University of Bremen (2012), p.14 available at http://www.tenlaw.uni-bremen.de/reports/SwedenReport_18052015.pdf (last accessed on February 20, 2106).

¹²⁵ Data available at the Stockholm City Council official website: <http://www.stockholm.se>, as well as official city statistics website: <http://www.statistikomstockholm.se>.

¹²⁶ See Olivia Baath, Per Norberg et. Al., 'National Report for Sweden, TENLAW: Tenancy Law and Housing Policy in Multi-level Europe', ZERP-University of Bremen (2012) available at http://www.tenlaw.uni-bremen.de/reports/SwedenReport_18052015.pdf (last accessed on February 20, 2106).

¹²⁷ D. Dickson and V. Goarant, "Both immigrants and IT startups suffer in Swedish housing shortage," *Reuters*, 12 January 2016, available at: <http://www.reuters.com/article/us-nordics-housing-idUSKCN0UQ1ZH20160112>.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

by 13% in comparison to the previous year, amounting to the fastest pace in Europe. The situation raises concern due to the existence of excessive lending and housing bubbles, predicting future risks for the entire economy as well as for neighbouring Denmark and Finland.¹³⁰ According to the Stockholm City Council, the construction of 140, 000 new dwellings is planned by 2030.¹³¹

3.2.3. The Collaborative Economy and Home-Sharing Platforms in Stockholm

In a recent Swedish report, the “collaborative” or “sharing economy” is defined as follows:

“driven by digitalization, the Sharing Economy involves the peer-to-peer exchange of tangible and intangible slack (or potential slack) resources, including information, in both global and local contexts. This mediated exchange tends to reduce transaction costs for users by replacing third-party intermediaries with digital platforms. However, the elimination of third-party intermediaries means that risks are often borne by the providers and consumers of resources rather than by a central actor.”¹³²

Despite Sweden’s housing shortage, very high Internet and smartphone penetration, sharing economy platforms do not appear to be as popular as elsewhere in Europe. According to the mentioned report, the Swedish market for some of these sharing services (housing, cars, time) remains fragmented.¹³³ In addition, the Swedish sharing economy appears to be closer to a model of genuine sharing or collaborative consumption as many platforms are driven by

¹³⁰ *Ibid.*

¹³¹ This is supported by a study of Stockholm’s urban development potential conducted in 2014, which estimated a possibility for 150 000 new dwellings to be constructed in a planned and sustainable way, see: “Bostadspotential i Stockholm”, Stockholms stad, 13.1.2014, available at <http://www.stockholm.se/Fristaende-webbplatser/Fackforvaltningssajter/Stadsbyggnadskontoret/Bostadspotential-Stockholm/> (last accessed February 28, 2016).

¹³² Anna Felländer, Claire Ingram, Robin Teigland, “Sharing Economy—Embracing Change with Caution,” *Entreprenorskap Forum* (2015), available at http://entreprenorskapsforum.se/wp-content/uploads/2015/06/Sharing-Economy_webb.pdf

¹³³ Anna Felländer, Claire Ingram, Robin Teigland, “Sharing Economy—Embracing Change with Caution,” *Entreprenorskap Forum* (2015), p. 29, available at http://entreprenorskapsforum.se/wp-content/uploads/2015/06/Sharing-Economy_webb.pdf

sustainability goals and run by non-profit organizations.¹³⁴ While the sharing of tangible assets in Sweden has been dominated by global players such as Airbnb and Uber; local actors have reacted by developing digital platforms of their own. For example, a large number of firms have contributed to the sharing of second-hand clothing, tools and used goods, and numerous cities have introduced bike-sharing arrangements.¹³⁵

The debate on the collaborative economy has been highly polarized in Sweden. On the one hand, the idea of revival of sharing economy and home-sharing goes back in Swedish history to its collective housing projects. Therefore, collaborative consumption initiatives have been received very enthusiastically by the sustainability-conscious Stockholmers. The idea of “buy less – get access to more” applied in various spheres of life, has found many followers in the urban community.¹³⁶ These ideas seem particularly relevant as far as the housing market is concerned, with its notorious shortage of dwellings and very high prices for short-term housing. On the other, there is still much uncertainty regarding the regulatory boundaries of these practices as well as those of more commercial platforms such as Airbnb and vacation-rental platforms (*see also* implications and concerns below).

3.2.3.1. Key Players and Listings

Around 10,500 dwellings are nowadays offered for rent via Airbnb in Sweden, six out of ten of those dwellings are located in Stockholm. In 2015 alone, the volume of Airbnb rentals in Stockholm increased by 94%.¹³⁷ All the major International home-sharing and home-exchange players have Swedish versions of their service websites or Swedish equivalent websites: airbnb.se (300+ listings); homeaway.se (with 91 listings); wimdu.se (125 listings); the Swiss platform interhome.se (36 listings); as well as the platform “hembyte.se” (Swedish version of HomeExchange).

¹³⁴ Idem at 29.

¹³⁵ R. Teigland, C. Ingram and A. Felländer, *The Sharing Economy: Embracing Change with Caution*, Näringspolitisk Forum Rapport #11, Entreprenörskapsforum, 2015, p.8.

¹³⁶ ”Ägodela: Köp mindre – få tillgång till mer”, Årets bok från Naturskyddsföreningen, årgång 107, 2016.

¹³⁷ H. Arberman, “Kraftig ökning av uthyrning genom Airbnb” *Dagens Nyheter*, 3.02.2016, available at: <http://www.dn.se/sthlm/kraftig-okning-av-uthyrning-genom-airbnb-1/>.

There are also multiple local platforms. Examples are Novasol.se, which started as Nordic/Northern European exchange platform, but now covers most European countries; as well as Skistar.se and Branas.se, which specialise in renting accommodation in the Nordic ski resorts. Finally, home sharing and short rentals are offered through Sweden's biggest advertisement website blocket.se, which is equivalent to Craigslist. Other examples of home-sharing platforms are Semesterbyte.com and Fritiden.se.

All types of accommodation are offered, from a shared room on Airbnb for 177 SEK (or approx. 19 euros) on a sofa-bed in a shared apartment or a bunk bed in a setting similar to that of a hostel in the city centre, a single room in shared flat in Stockholm suburbs for 246 SEK, to centrally located luxury apartments (e.g., 2-bedroom apartment in the old town for 34 059 SEK) and villas in the Stockholm archipelago for 3000-5000 SEK. One can also rent a place on a luxury boat docking in Stockholm's central pier for 25 000 SEK.¹³⁸ Airbnb estimates today's average at 973 SEK.

3.2.3.2. Legal Framework

The regulation of home-sharing platforms in Stockholm appears to be characterized by high uncertainty since contrary to other cities analyzed in this report, these platforms still do not fit clearly within either the regulations on short-term lease or sublease (housing legislation and landlord-tenant law) or tourist accommodation/hotel legislation or regulation.

With the growing number of listings in Stockholm and the rise in criticism from housing associations and neighbors that complain about the multiple tourists (as well as the noise, safety of building, late hours of arrivals, and trash left behind), regulatory concerns with home-sharing platforms are rising.¹³⁹ It is also worth noting that in Sweden tenants are required to request individual licenses or authorizations to sublease every time they sublet the house to a new guest.¹⁴⁰ This means that, if landlord-tenant law would apply to Airbnb, hosts might have to

¹³⁸ Information on rentals available on www.airbnb.com. Forex bank exchange rate for 10.02.2016: 9,9565 SEK/1 EUR.

¹³⁹ Johan Hellekent, 'Airbnb stoppade controller från borätsförening', *SVD*, 28.05.2015, available at <http://www.svd.se/airbnb-stoppade-kontroller-fran-borattsforening> (last accessed on February 20, 2016).

¹⁴⁰ §10 Bostadsrättslag (1991:614), SFS-nummer 1991:614.

apply for separate authorizations. In August 2015, a Swedish court shaped this discussion by comparing multiple short-term leases to unlicensed hotel activities (*see below*). Since home-sharing platforms are still not directly regulated by Swedish legislation, we provide below an overview of potentially applicable housing and tourist accommodation legislation and regulation.

a) Housing Legislation

The strict Swedish housing laws are considered inadequate for the short-term rental situations, such as those facilitated by Airbnb and other platforms. Therefore, at the time of writing the rules governing this type of transactions are unclear.

From the perspective of the housing laws, three types of situations can be distinguished:

- 1) House under full ownership: the owner has full right to make all decisions on all types of lease and authorize sublease;
- 2) Dwellings in multi-dwelling buildings with tenants' ownership/Leasehold or co-operative apartment ("bostadsrätt"): permission from the /housing association is required for rent/sublet;
- 3) Dwellings in multi-dwelling buildings with other tenancy lease ("hyresrätt"): permission for the landlord is required for sublet.¹⁴¹

The rights and obligations of a tenant are governed by chapter 7 of the housing law, in particular §10 and §11 thereof.¹⁴² Under those provisions every time a tenant intends to sublet his or her unit, he or she needs to obtain permission from their landlord (in case 3 listed above) or the Board of Directors of the housing association (in the case of dwellings in condominium as listed above under 2). The sublease application must state the reasons for the sublet. If the application is declined, the tenant can appeal to by the Rental Tribunal.¹⁴³ The Tribunal will examine whether the building association had legitimate reasons to decline the application.

¹⁴¹ §40 Jordabalk (1970:994), SFS-nummer 1970:994.

¹⁴² Bostadsrättslag (1991:614), SFS-nummer 1991: 614.

¹⁴³ §11, Bostadsrättslag (1991:614), *ibid*.

In 2013 and 2014, the Housing law was amended in order to facilitate private lease and sublease and open up the market to more second-hand rentals.¹⁴⁴ The most relevant change from the point of view of this study, entered into force on 1 July 2014. Previously, the tenant was required to have “a valid reason” for renting/subletting his or her dwelling. Following the amendment of §10, it is sufficient if he or she has “a reason.” Despite this change, it results from the existing legislative documents that the economic argument that the sublease of the unit is necessary to cover the costs of the lease, might not be easily accepted (*see below*).

According to the preamble and the legislative pro memoria of these legislative amendments, the regulatory objectives of this reform were to make the second-hand housing market more flexible and facilitate sublease to tenants who might need to live elsewhere for a certain period of time, but still wish to keep their dwelling. In addition, the government aimed to address the persisting housing shortage with this amendment.¹⁴⁵ The unexpected perverse or positive effect (depending on the perspective) of this legislative amendment was the facilitation of short-term rentals in the context of the collaborative economy.

In August 2015, the first Airbnb case was tried before the Rental Tribunal (“Hyresnämnden”) in Stockholm.¹⁴⁶ The case resulted from the appeal of a decision of the Board of Directors of a housing association which rejected a tenant’s application for permission for a series of short-term rentals through Airbnb. Expecting the termination of her tenancy contract with the building association, and while already having moved to a new dwelling, the tenant requested permission for 7 short-term rentals. The subleases would occur within the period of one month, precisely before a new tenant takes over the apartment. The main reason given in her application was her willingness to avoid double costs with the payment of leasing fees for both the old and the new apartments during that month. The Tribunal rejected the appeal. The decision was based on the following reasoning:

1) the tenant established contacts with the potential short-term guests via Airbnb platform, which is used for offering private dwellings for rent in return for compensation, and is hence comparable to *a fee collected by hotels*;

¹⁴⁴ Amendments introduced by statutes 2013:433 and 2014:319.

¹⁴⁵ Propositionen 2013/14:142, p.12.

¹⁴⁶ Hyresnämnden i Stockholm, Ärende numer 8741-15, 17.08.2015.

2) taking into consideration the large number of rentals during the period in question, the tenant's activity resembles a commercial activity as performed by hotels, rendering the application of amended §10 of the housing law inadequate, as it does not fulfil the intended regulatory purpose of the reform;

3) moreover, the activity may be bothersome to other occupants of the building, as multiple unknown guests will be gaining access to the property including to the common areas.

This decision sparked a debate on the one hand on the legality of home-sharing activities, and on the other, on adequacy of existing legislation to respond to the challenges of these emergent platforms.¹⁴⁷ Thus far, there has not been any legislative change or amendment in this context.

An additional challenge posed particularly by Airbnb refers to the regulation of shared rooms (*e.g.*, a sofa-bed or a bunk bed in a shared room). The Housing rules mentioned above do not apply to the sharing of a limited space of a dwelling while the tenant is also present since this cannot be qualified as a sublease. The same is applicable to shared rooms rented by the owner of the apartment. It is unclear, however, which rules should be considered to govern those situations and how they should be judged. It is possible that housing associations have internal rules governing such situations.

B) Tourist Accommodation Legislation

Since the mentioned decision of the Stockholm Rental Tribunal compared multiple Airbnb-sublets to hotel services, it is important to provide an overview of the Swedish legislation applicable to hotels.

Hotel and B&B activities require a specific permit. According to legislation, “hotel-” or “guest/boarding house-” activity are defined as professional activity with the objective to offer

¹⁴⁷ See, for example, “Swedes debate capital’s first Airbnb rent ‘ban’”, *The Local*, 27.08.2015, available at: <http://www.thelocal.se/20150827/woman-hit-by-stockholms-first-airbnb-ban>, as well as J. Hellekant, “Hyresnämnden stoppar Airbnb-uthyrning”, *Svenska Dagbladet*, 27.08.2015, available at: <http://www.svd.se/hyresnamnden-stoppar-airbnb-uthyrning>.

temporary, furnished accommodation.¹⁴⁸ It is covered by the permit obligation when the accommodation services cater for at least 9 guests, or comprise at least 5 guest rooms.¹⁴⁹ *A contrario* one can interpret the law as not requiring a permit in other situations.

The permit (“Tillstånd”) is applied for in writing at the police authority in the municipality concerned. The permit is granted to a hotel/guest house located in a given building or apartment. A permit shall be granted unless there is reason to assume that the applicant will undertake the activity in a way that compromises public order and security.¹⁵⁰

In order to initiate hotel activity, a building permit must be obtained from local authorities, irrespective of whether it is located in a new or renovated building. The permit will only be granted if the planned building fulfils all necessary requirements concerning for example the size of rooms, ventilation and electricity systems or evacuation ways.¹⁵¹ Hotel activity must also be notified to the local authorities before the actual commencement of activities and must follow specific rules pertaining to the protection of health and the environment. Finally, the owner of the building where hotel activity will be taking place, may have to send to the local authorities a written report concerning fire protection policy.

Apart from the mentioned judicial decision, there have not been any attempts thus far to apply hotel regulation to home-sharing activities. It can, however, be pointed out that in accordance with § 20, amended in 2014, the police have the right to forbid hotel or guesthouse activities which do not require a permit, if it is necessary to retain public order and security.¹⁵² This paragraph is primarily covering small-scale B&B activity of up to 4 rooms/8 persons, but may in some cases have implications for some types of home sharing activities if their professional character can be proved.

3.2.4. Taxation

¹⁴⁸ Lag on hotell- och pensionatörrelse, (1966:742), SFS-nummer 1966:742, § 1: ”Med hotell- och pensionatörrelse avses i denna lag yrkesmässig verksamhet med ändamål att tillhandla tillfällig möblerad bostad.”

¹⁴⁹ *Ibid.*, § 2.

¹⁵⁰ *Ibid.*, second section.

¹⁵¹ § 5, 10, 11 and 12, Lag on hotell- och pensionatörrelse, (1966:742), *ibid.*, and implementing acts.

¹⁵² § 20, Lag on hotell- och pensionatörrelse, as last amended by statute 2014:607.

Income Tax

All income linked to renting private property must be declared.¹⁵³ However, when renting out one's private accommodation (*e.g.*, house, cottage or apartment) there is a standard deduction of SEK 40 000 (approx. EUR 4300) per year. The standard deduction has successively and significantly increased, with the current level in place since 2013 (in 2008 it was SEK 4000). This implies that no tax is payable for amounts lower than the standard deduction of SEK 40 000. In case of surplus income (following deductions), 30% capital income tax applies.

In September 2015, the Swedish Tax Authority adopted a statement/opinion setting out how to draw the line between "economic activity" (in the sense of business activity) and private activity, for tax purposes, as far as natural persons are concerned.¹⁵⁴ In a nutshell, the aim of economic activity should be to provide goods or services on *a continuous basis* against remuneration.¹⁵⁵ A natural person who sells, rents out or in another way makes use of his/her private property normally is not considered to engage in economic activity. Such selling or renting out usually does not occur on a continuous basis or, in other words, in a professional manner.

VAT

Hotel services are subject to the payment of VAT. According to a 2015 VAT Brochure prepared by the Swedish Tax Authority, "the reduced tax [VAT] rate of 12 per cent applies to letting of

¹⁵³ Inkomstskattelagen, kapitel 42 § 30.

¹⁵⁴ Skatteverket, "Ställningstagande: Beskattningsbar person – gränsdragning mellan ekonomisk verksamhet och privat verksamhet", 02.09.2015. An overview of applicable tax regulations is available on the website of the Swedish Tax Authority, see <https://www4.skatteverket.se/rattsligvagledning/24.html> (last accessed February 21, 2016).

¹⁵⁵ "Syftet med en ekonomisk verksamhet ska vara att fortlöpande tillhandahålla varor eller tjänster mot ersättning. (...) En person som säljer, hyr ut eller på annat sätt utnyttjar sina privata tillgångar bedriver som huvudregel inte en ekonomisk verksamhet. Sådan försäljning eller uthyrning sker normalt inte fortlöpande. För att det ska vara fråga om fortlöpande tillhandahållanden anser Skatteverket att syftet ska vara att försäljningen, uthyrningen eller utnyttjandet av tillgången sker med en kontinuitet och frekvens som är jämförbar med hur en motsvarande ekonomisk verksamhet normalt bedrivs." "The objective of economic activity is to provide goods or services on a continuous basis against remuneration. A person who sells, rents out or in any other way uses his or her private resources, is not as a rule considered to be engaged in an economic activity. Such selling or renting does not normally take place on a continuous basis. For the Tax Authority to consider such selling, renting or other use of resources as taking place on a continuous basis, its continuity and frequency must be comparable to that of an analogous regular economic activity." Skatteverket, "Ställningstagande: Beskattningsbar person – gränsdragning...", *ibid.*, available at: https://www4.skatteverket.se/rattsligvagledning/edition/2015.16/321542.html#update_20150902095411.

rooms in hotels, guest-houses, hostels *or similar*. The tax rate of 12 per cent also applies to certain other services linked to the letting of rooms, e.g. parking, phone, fax, pay-TV, bathing and sauna and laundry.”¹⁵⁶ The inclusion of “similar accommodation” in combination with the judicial decision mentioned above might open the door to future developments in this area (see also below).

Tourist tax or other special taxes

Stockholm does not apply any specific local tax on hotel/tourist activities, thus there is no discussion of the obligation or capacity of persons engaged in home sharing to collect such.

In December 2015 the National Tax Authority was given a task by the Government (the Ministry of Finance) to undertake an analysis of the impact of sharing economy’s on the Swedish taxation system, including the influence on tax revenues over time as well as the system’s capacity to control and effectively collect taxes from sharing economy undertakings. The report is supposed to be delivered by the 15th March 2016, and be completed by the 31st October with experiences of control activities.¹⁵⁷

3.2.5. Impact of Home-Sharing Platforms and General Perceptions on the Phenomenon

Compared to other parts of Europe, the collaborative economy sector is less developed in certain economic areas in Sweden but more developed in others. In Sweden, public actors have been more involved in this new exchange model, encouraging the use of sharing ideas for public spaces and more sustainable consumption models (see *supra* 3.2.3).

Besides the regulatory uncertainty regarding the applicable legal regime, the Swedish debate on the legal and public policy concerns has also focused on the following topics:

¹⁵⁶ Swedish Tax Authority, *VAT Brochure*, April 2015, available at <http://www.skatteverket.se/download/18.7be5268414bea0646946f3e/1428566850726/552B14.pdf> (last accessed on February 21, 2016).

¹⁵⁷ Regeringskansliet, Regleringsbrev för budgetåret 2016 avseende Skatteverket, Fi2015/05629/S3, 17.12.2015, point 3 item 2.

a) *Implications for the labour market:* the development of the collaborative economy has raised much anxiety regarding potential unemployment in the traditional commercial sectors; and the definition of applicable labour law legislation, rights, and obligations.¹⁵⁸

b) *Security and consumer safety concerns:* Alongside the commonly quoted concerns with consumer protection, liability and insurance coverage, resulting from with the unclear legal status of home-sharing short-term rental agreement, the Swedish debate raises issues of general safety, potential consequences for third parties (e.g., neighbours) as well as to the public order. Stockholm has been on the spotlight due to a number of scandals involving Airbnb which were widely reported by the media first in 2012 and now in February 2016.¹⁵⁹ In both moments, the media revealed that multiple Airbnb apartments were being converted into brothels.¹⁶⁰ Furthermore, Airbnb rentals were also connected with increased criminality such as break-ins and burglaries.¹⁶¹ Given these problems, neighbours are concerned about the fact that home-sharing platforms are allowing multiple strangers to have access to common areas of their buildings.

In Sweden, the situation of regulatory uncertainty regarding the regulation of home-economy does not appear to be clarified by national legislation implementing the Electronic Commerce directive (2000/31/EC). This directive was implemented in 2002 by the *Lag om elektronisk handel och andra informationssamhällets tjänster* (Law on Electronic Commerce and Information Society Services).¹⁶² This law does not impose any limitations on the services provided by home-sharing platforms (as information society services).

¹⁵⁸ G. Westberg, "Delningsekonomin behöver svensk partsmodell", *Kollega*, 17.11.2015, as well as C.-M. Jonsson, "Eld, Airbnb och farliga saker", LO Bloggen, 8.01.2016.

¹⁵⁹ H. Arbman, "Lägenheter på Airbnb används för prostitution", *Dagens Nyheter*, 8.02.2016, available at: <http://www.dn.se/sthlm/lagenheter-pa-airbnb-anvands-for-prostitution-1/>. (last accessed on February 21, 2016)

¹⁶⁰ Mike Butcher, "Police Bust Prostitutes Using Airbnb Apartment in Stockholm", *TechCrunch*, 14.08.2012, <http://techcrunch.com/2012/08/14/police-bust-prostitutes-using-airbnb-apartment-in-stockholm/> (last accessed on February 21, 2016).

¹⁶¹ T. Nandorf, "Stora risker hyra ut lägenheten via Airbnb", *Dagens Nyheter*, 21.07.2015, available at: <http://www.dn.se/ekonomi/stora-risker-hyra-ut-lagenheten-via-airbnb/>; H. Arbman, "Lägenheter på Airbnb används för prostitution", *Dagens Nyheter*, 8.02.2016, available at: <http://www.dn.se/sthlm/lagenheter-pa-airbnb-anvands-for-prostitution-1/>; H. Arbman, "Kraftig ökning av uthyrning genom Airbnb" *Dagens Nyheter*, 3.02.2016, available at: <http://www.dn.se/sthlm/kraftig-okning-av-uthyrning-genom-airbnb-1/>.

¹⁶² (2002:562) SFS 2002:562.

3.3. Budapest

3.3.1. Introduction

While in the past five years a number of accommodation platforms have emerged in Hungary, the regulatory concerns with unlicensed home-sharing have been a constant of urban life in Budapest since the 1970s. Most houses in Hungary are currently privately owned and many have spare rooms which, even before the emergence of Airbnb or other sharing platforms, were already rented to tourists, often illegally and without the payment of taxes. Airbnb and other sharing economy platforms recreate in the digital age a longstanding “Zimmer Frei” culture which has been present for decades in Hungarian cities.¹⁶³ In this context, the existing regulatory restrictions of home-sharing are not a direct response to platforms such as Airbnb. Rather, they date back to the 1970s. At the time, regulation was introduced to legalize peer-to-peer short-term housing (spare guestrooms) in order to avoid tax evasion. Home-sharing and black economy have been closely related even before the emergence of the notion of (digital) collaborative economy. Since the economic liberalization in the 1990s, the black economy has thrived in Hungary, distorting official GDP economic performance rates.¹⁶⁴ The unregistered rental of property has been among the most common black economy activities since this period.¹⁶⁵

In Budapest city officials were not willing to answer any questions and were not available for interviews. At the time of writing there is no case law regarding home-sharing platforms.

3.3.2. Background Information

Budapest is a densely populated city with approximately 1,757,600 residents. According to the 2012 Hungarian Census, the size of the country’s housing stock had reached 4.4 million units by 2011, of which 3.9 million are residential units.¹⁶⁶ In 2012, there were 909,962 residential estate

¹⁶³ See, e.g., http://www.piecesprofit.hu/kkv_cegblog/airbnb-azaz-a-modern-zimmer-frei-lehet-szabalyosan/

¹⁶⁴ J. Arvay & A. Vertes, ‘Impact of the Hidden Economy or Growth Rates in Hungary’ (1995), 12(1) *Statistical Journal of the United Nations Economic Commission for Europe* 27-35.

¹⁶⁵ Pál Belyó, ‘The Hidden Economy in Hungary’ (1995) 125, 130 http://www.ksh.hu/statszemle_archive/1998/1998_K2/1998_K2_125.pdf

¹⁶⁶ József Hegedüs et al. “National Report for Hungary.” In: *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe*. 9. http://www.tenlaw.uni-bremen.de/reports/HungaryReport_09052014.pdf

units in Budapest.¹⁶⁷ According to a recent report on housing and landlord-tenant law, the vast majority of housing units are owner-occupied. With a 92% (approx.) owner occupation rate, Hungary can be considered one of the “super home-ownership” states.¹⁶⁸ In the early 1980s, 23-24% of the total population lived in rental dwellings. The situation has however changed in the past decades.

According to the 2011 Census, private rental housing accounted at that time for 4%, public rental for 3%, and “other tenure types” for the remaining 1% of the full housing stock.¹⁶⁹ Although private rental only represents officially 4% of the full housing stock, researchers believe that many of the residences reported as “vacant” are in fact being privately let in the black economy. While market rent rates are fairly expensive for tenants and provide a solid income for landlords, the application of landlord-tenant law in case of non-payment and eviction appears to provide longstanding incentives to landlords to operate illegally.¹⁷⁰ Not surprisingly, in the private market, professional and registered landlords are a small minority within the rental sector.¹⁷¹ This is particularly worrisome as recent research shows that Hungary is one of the few EU Member States where the shadow economy is expected to increase in the coming years.¹⁷² Therefore, as far as the private market is concerned, researchers have argued that the existing Census data should be corrected in order to reflect a more realistic picture: the share of private rentals is more likely to be around 8% rather than 4% as a part of rentals might remain unregistered.¹⁷³

In the context of public and social rental, municipalities appear to be the main social landlords.¹⁷⁴ There is however great shortage of social housing in Budapest. In addition, existing

¹⁶⁷ Hungarian Central Statistical Office: <http://statinfo.ksh.hu/Statinfo/haViewer.jsp?lang=en>

¹⁶⁸ Hegedüs at 9.

¹⁶⁹ *Idem* at 4. See also CSO (2011c) Népszámlálás 2011: A népesség és a lakásállomány jellemzői [Population and housing data], available at http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepszelo2011_2.pdf (accessed on February 17, 2016);

¹⁷⁰ Hegedüs József et al. “National Report for Hungary.” In: *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe*. 20. http://www.tenlaw.uni-bremen.de/reports/HungaryReport_09052014.pdf

¹⁷¹ Hegedüs József et al. “National Report for Hungary.” In: *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe*. 65. http://www.tenlaw.uni-bremen.de/reports/HungaryReport_09052014.pdf

¹⁷² Friedrich Schneider, ‘Size and Development of the Shadow Economy of 31 European and 5 other OECD Countries from 2003 to 2015’ (2015), available at *See Shadow Work and Undeclared Work*, available at http://ec.europa.eu/europe2020/pdf/themes/07_shadow_economy.pdf;

¹⁷³ Hegedüs at 9.

¹⁷⁴ Hegedüs at 14.

social housing is not well-maintained and it is located in the worst parts of the city. A new development in the public sector is the growing number of vacant municipal apartments, because neither the municipalities, nor the tenants have the resources or incentives to rehabilitate them.¹⁷⁵ The Hungary housing market is therefore highly distorted in the sense that there are very few available houses for lease. This distortion appears to result from the massive privatization of the real estate which occurred in the 1990s. State backed mortgage subsidies incentivized individual ownership rather than the rental market leading to a shortage in houses. Due to housing privatization during the 1990s and the incentives related to taxation and the subsidy structure, the proportion of public rental housing had decreased from 22% to 4% by 1994, and has been stagnating ever since.

The need to rent spare rooms appears to have increased after 2008 in Hungary due to ongoing changes in the Hungarian economy and housing market. Mortgage payments increased namely due to economic circumstances such as the fluctuations in the exchange rate and the adjustment of bank interest rates.¹⁷⁶ While according to the Housing Affordability Index, houses are generally affordable, everyday experience teaches that this in practice not the case due to the rise in utility costs, job insecurity, and the banks' reluctance to grant new mortgages.¹⁷⁷

3.3.3. The Sharing Economy and Home-Sharing Platforms in Budapest

3.3.3.1. Key Players and Type of Listings

In the last five years, a number of international home-sharing platforms emerged in Budapest. At the time of writing, Flipkey, for example, currently lists 1494 units in the Hungarian capital.¹⁷⁸ HomeAway featured 1336, Housetrip 946, Wimdu more than 500 listings, HomeExchange 238,

¹⁷⁵ Hegedüs József et al. "National Report for Hungary." In: *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe*. 15. http://www.tenlaw.uni-bremen.de/reports/HungaryReport_09052014.pdf

¹⁷⁶ Hegedüs József et al. "National Report for Hungary." In: *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe*. 22-23. http://www.tenlaw.uni-bremen.de/reports/HungaryReport_09052014.pdf

¹⁷⁷ Hegedüs József et al. "National Report for Hungary." In: *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe*. 25. http://www.tenlaw.uni-bremen.de/reports/HungaryReport_09052014.pdf

¹⁷⁸ See www.flipkey.com (search by location "Budapest & Central Danube Region").

LoveHomeSwap 185, the niche home-sharing and lease platform SabbaticalHomes 7 units, and Intervac-HomeExchange 5 units.¹⁷⁹ Besides these short-term home-sharing platforms, foreign short- or longer-visitors typically use other national and international platforms for long-term sublet. These platforms are currently regulated under the Housing Act. Examples are Inglatan.com, Alberlet.hu, RoomMatesBudapest.com. Short-term and long-term sublease (for example for Erasmus students) also takes place through social networks, namely Facebook.¹⁸⁰ In the context of the hotel sector, the most common platforms used by short-term house seekers and tourists are the international platform Booking.com and the local platform Szallas.Hu.

According to the information publicly made available, in August 2015, there were 8000 housing units for short-term lease in Hungary, among which 3500 only in Budapest.¹⁸¹ This number has increased significantly since then and it is possible that users advertise their units on different platforms. This rising number of listings also reflects the fast expansion of the sharing economy sector in this city, as in December 2014 there were only 1500 listings in Budapest.¹⁸²

On a given date in February, Airbnb listed more than 300 listings, including entire apartments, individual rooms, and shared rooms. Although the price range varied between 7.89 EUR per night for a single bed in a dormitory¹⁸³ and 467EUR for an entire house with eleven bedrooms. The average price/day for a room is 20EUR. A brief analysis of the available listings on Airbnb reveals that most houses are located in touristic neighborhoods in downtown: in Buda side (I., XI., XII. Districts) and in the Pest side (V., VI., VII., XIX., XIII., XIV. Districts). These districts refer to the most privileged neighborhoods, including on the Buda side the area surrounding the Castle (district I), the Rose Hill (district II), and the residential area in district XII also known for being a privileged area. On the Pest side, most listings are located in district V close to the Parliament.

¹⁷⁹ Search on respective websites by location.

¹⁸⁰ Examples of Facebook groups through which short-term sublease takes place are Budapest Flats, *see* https://www.facebook.com/groups/budapestflats/?ref=br_rs; Flats for Erasmus in Budapest (targeting mostly students), *see* https://www.facebook.com/groups/306915466086335/?ref=br_rs

¹⁸¹ Felpörgött itthon az Airbnb, már 8000 szálláshely a választékban, Travelo, 10.08.2015, available at <http://travelo.hu/kozel/2015/08/10/felporgott-itthon-az-airbnb-mar-8000-szallashely-a-valasztekben/> (last accessed on February 19, 2016)

¹⁸² Alberlet listing, *see* <http://444.hu/2015/08/08/alberlet> (last accessed on February 19, 2016).

¹⁸³ *See* Airbnb, https://www.airbnb.com/rooms/10963070?s=jqn_BFpv (price at the time of writing) (last accessed on February 19, 2016).

3.3.3.2. Legal Framework

The lease of extra rooms by private hosts to tourists in Budapest is far from being a new phenomenon in Hungary. Instead, the practice to rent spare rooms to tourists emerged in the 1970s ('Zimmer Frei culture') and has been since then characterized by tax evasion.¹⁸⁴

Home-sharing platforms in Budapest are subject to very detailed national legislation on hotel accommodation, which leaves very little room for municipalities to further develop or customize it to local specificities. This legal framework consists of the following statutes and regulations:¹⁸⁵

1. Trade Act, Act CLXIV of 2005: This act contains: relevant definitions, general provisions for performing trading activities, business hours and operation of commercial establishments, general provisions for the supply of services auxiliary to commercial activities, general provisions for the performance of tourist service activities of a commercial nature, regulation of trade registers, provisions relating to companies with significant market power, participation of interest representation organizations, oversight of trading activities, services auxiliary to commercial activities and tourist service activities of a commercial nature, legal consequences;
2. Government Decree: 239/2009. (X.20.) on the detailed requirements to engage in accommodation service activities, and on the procedure for the issuance of accommodation license;¹⁸⁶

¹⁸⁴ Bede Marton, 'New Yorkban be akarják tiltani, Budapesten virágzik az Airbnb', 444HU, 11.10.2013, available at <http://444.hu/2013/10/11/ebbol-sem-te-fogsz-meggazdagodni-airbnb> (last accessed on February 19, 2016); 'Airbnb Adózási Kisokos 2016: Megári-e a Lakás Kiadása Külföldieknek Budapesten?', *Officina*, available at <http://officina.hu/utazas-latnivalok/115-airbnb-adozas?jji=1455134244680> (last accessed on February 19, 2016).

¹⁸⁵ 2005. évi CLXIV. törvény a kereskedelemről, Published: 2005. XII. 25.

<https://ugyintezes.magyarorszag.hu/ugyek/410009/440191/szallodauzemeltetes.html> For an overview of the applicable legislation and regulations, see the following report on the shadow economy and the "sharing economy", http://www.hah.hu/files/9414/4231/9735/a_kzssgi_gazdasg_megjelense_magyarorszgon_a_kereskedelmi_szllshelyek_piactn_final.pdf (last accessed on February 21, 2016).

¹⁸⁶ 239/2009. (X. 20.) Korm. rendelet a szálláshely-szolgáltatási tevékenység folytatásának részletes feltételeiről és a szálláshely-üzemeltetési engedély kiadásának rendjéről

3. Act LXXVI of 2009 providing the implementation of “the Services Directive on general rules on the taking up and pursuit of service activities), which lays down the general rules applicable to all service sectors and establishes provisions on the exercise of the freedom of establishment and the free movement of services.”¹⁸⁷
4. Act CXL of 2004 on the general rules of the administrative procedures;¹⁸⁸

Other relevant legislation:

1. Civil Code: Act V of 2013: the Hungarian Civil Code applies when it comes to the general protection of home-sharing platforms tourists (in addition to national and EU consumer protection legislation and regulations).

In Hungarian legislation, the basic concepts are defined as follows:

- a) “(tourist) accommodation” [szálláshely]: “a building, an independent section of a building or an area constructed or used for accommodation service activities;”¹⁸⁹
- b) “*other accommodation*” [egyéb szálláshely] (emphasis added): “an independent building or a delimited part of the building, which is used for the purpose of accommodation service activity, which is not regulated under the points of a)-g), and was not solely established with the purpose of accommodation service activity; and where the number of rooms used for this purpose is no more than 8, and the number of beds is no more than 16.”¹⁹⁰
- c) “accommodation service activities” [szálláshely-szolgáltatás]: “the provision - on a commercial scale - of accommodation for the purpose of overnight stay and leisure, typically on a short-term basis, including the supply of directly related services. This definition refers to a

¹⁸⁷ Services Directive: Assessment of Implementation Measures in Member States - National Report for Hungary http://ec.europa.eu/internal_market/services/docs/services-dir/mileu-study/hu-national-report-part_I_en.pdf

¹⁸⁸ 2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól. Published: 2004. XII. 28.

¹⁸⁹ Section 2, point 22. of the Trade Act, Our translation, original text reads “szálláshely-szolgáltatás folytatása céljából létesített vagy használt épület, önálló rendeltetési egységet képező épületrész vagy terület.”

¹⁹⁰ Section 2, point h) of the Decree Government Decree 239/2009. (X.20.) on the detailed requirements to engage in accommodation service activities, and on the procedure for the issuance of accommodation license [239/2009. (X. 20.) Korm. rendelet a szálláshely-szolgáltatási tevékenység folytatásának részletes feltételeiről és a szálláshely-üzemeltetési engedély kiadásának rendjéről], our translation, original text reads “szálláshely-szolgáltatás céljára hasznosított, az a)-g) pont alá nem tartozó, nem kizárólag szálláshely-szolgáltatás rendeltetéssel létesített önálló épület vagy annak lehatárolt része, ahol az e célra hasznosított szobák száma legfeljebb nyolc, az ágyak száma legfeljebb tizenhat.”

wide range of accommodation services, including hotels, guest houses, community or social accommodation, camping parks, rural accommodation and the so-called “other accommodation”;¹⁹¹

Providers of “other accommodation services” (and consequently, Airbnb or other platforms hosts) are required to follow the process described below in order to lease their property legally:¹⁹²

1. *Fee Payment*: the host is required to fill in a request and pay the fee of the process (3000 HUF or approx. 10 euro at the time of writing);

2. *Notarial Authorization*: the notary issues the authorization and a certificate to the petitioner within the general deadline of 21 days (renewable).¹⁹³ The authorization is tacitly granted in case of lack of decision within this period.¹⁹⁴

3. *Income tax Payment and VAT collection*: accommodation host is required to obtain his or her tax number from the Hungarian Tax Authority.¹⁹⁵ Hosts must also collect VAT on accommodation services. In Hungary, VAT rate for hotel services as well as for the category “other accommodation” is 18%. The information booklet by the Hungarian Tax Authority

¹⁹¹ Section 2, point 23. of the Trade Act, our translation, original text reads “üzletszerű gazdasági tevékenység keretében rendszerint nem huzamos jellegű, éjszakai ott-tartózkodást, pihenést is magában foglaló tartózkodás céljára szálláshely nyújtása és az ezzel közvetlenül összefüggő szolgáltatások nyújtása.”

¹⁹² From the summary of the ‘Jozsefvaros’ district on the authorization process, available on the official homepage of the district [[Szálláshely üzemeltetés engedélyezése](http://jozsefvaros.hu/onkormanyzat/ugy/165)] <http://jozsefvaros.hu/onkormanyzat/ugy/165>

¹⁹³ Section 33 (1) of the Act CXL of 2004 on the general rules of the administrative procedures [A határozatot, az eljárást megszüntető végzést, valamint a másodfokú döntést hozó hatóságnak az első fokú döntést megsemmisítő és új eljárásra utasító végzését az (5) bekezdésben meghatározott időponttól számított huszonegy napon belül kell meghozni és gondoskodni a döntés közléséről.]

¹⁹⁴ Section 14 of the Act LXXVI of 2009 on the general rules of starting and continuing service providing [Ha a szolgáltatási tevékenység megkezdéséhez vagy folytatásához szükséges engedélyezési eljárásban az elsőfokú eljárásban ellenérdekű ügyfél nem vett részt, és a szakhatóság a rá irányadó ügyintézési határidőn belül nem adott ki állásfoglalást, vagy az eljáró hatóság a rá irányadó ügyintézési határidőn belül nem hozott határozatot, az adott szolgáltatási tevékenységet szabályozó külön törvény vagy eredeti jogalkotói hatáskörben kiadott kormányrendelet valamely közérdeken alapuló kényszerítő indok érvényesítésére irányuló kifejezett eltérő rendelkezése hiányában

a) - a szakhatóság mulasztása esetén - másik szakhatóság az eljárásra nem jelölhető ki, és a szakhatóság hozzájárulását megadottnak kell tekinteni, és

b) - az eljáró hatóság mulasztása esetén - másik hatóság az eljárásra nem jelölhető ki, és az ügyfelet megilleti a kérelmezett tevékenység megkezdésének és folytatásának joga.]

¹⁹⁵ information provided by the Hungarian Tax Authority: http://nav.gov.hu/nav/archiv/regiok_archiv/eszak_alfold/eszakalfold/aktualis/szallashelyadas.html?pagenum=1

highlights that the regulation complies with the Directive 2006/112/EC.¹⁹⁶ Hosts are also required to issue a receipt to tourists.¹⁹⁷

4. The notary notifies the consumer-protection and labor-law authorities about the beginning of the service accommodation activity *and* 2. The notary sends a notification to the bodies *if* the accommodation service that is provided concerns the following authorities' competence, based on the following points:

- a) hygiene, drinking water, trash, public health, smoking zones: government body/office with competence on public health is notified;
- b) production of raw material or food: government body/office responsible for "food-chain and animal health" will be notified;
- c) occupation for more than 10 people, raising risk of fire hazard: fire protection office will be notified.¹⁹⁸

¹⁹⁶ "A kereskedelmi szálláshely-szolgáltatás tartalmában igazodik a közös hozzáadottértékadó-rendszerről szóló 2006/112/EK tanácsi irányelv szerint kedvezményezhető szolgáltatások köréhez." http://nav.gov.hu/nav/archiv/regiok_archiv/eszak_alfold/eszakalfold/aktualis/szallashelyadas.html?pagenum=5

¹⁹⁷ Section 159 of the Act CXXVII of 2007 on the VAT [(1) Az adóalany köteles - ha e törvény másként nem rendelkezik - a 2. § a) pontja szerinti termékértékesítéséről, szolgáltatásnyújtásáról a termék beszerzője, szolgáltatás igénybevevője részére, ha az az adóalanytól eltérő más személy vagy szervezet, számla kibocsátásáról gondoskodni.

(2) Az (1) bekezdés egyéb rendelkezéseinek sérelme nélkül az adóalany köteles számla kibocsátásáról gondoskodni abban az esetben is, ha

a) részére egy másik adóalany vagy nem adóalany jogi személy előleget fizet;

b) 251 részére az a) pont alá nem tartozó személy, szervezet előleget fizet, és

ba) az előleg összege eléri vagy meghaladja a 900 000 forintnak megfelelő pénzösszeget, illetőleg

bb) egyéb, a ba) alpont alá nem tartozó esetekben pedig kéri a számla kibocsátását;

c) 252 belföldön kívül, a Közösség területén teljesít termékértékesítést, szolgáltatásnyújtást, feltéve, hogy az adott ügylet teljesítésével legközvetlenebbül érintett gazdasági célú letelepedési helye belföldön van, gazdasági célú letelepedési hely hiányában pedig lakóhelye vagy szokásos tartózkodási helye van belföldön és az adófizetésre kötelezett személy a termék beszerzője vagy a szolgáltatás igénybevevője;

d) 253 belföldön kívül harmadik államban teljesít termékértékesítést, szolgáltatásnyújtást, feltéve, hogy az adott ügylet teljesítésével legközvetlenebbül érintett gazdasági célú letelepedési helye belföldön van, gazdasági célú letelepedési hely hiányában pedig lakóhelye vagy szokásos tartózkodási helye van belföldön.

(3) A (2) bekezdés a) és b) pontjában említett esetben a számla annak a termék értékesítésének, szolgáltatás nyújtásának az adatait tartalmazza, amelynek teljesítése fejében járó ellenértékébe az előleg beszámítható.

¹⁹⁸ Section 11 (3) of the Decree [Ha a szálláshelyen nyújtott szálláshely-szolgáltatás a 7. § (1) bekezdésben meghatározott valamely hatóság feladat- és hatáskörét az ott megjelölt szempontok szerint érinti, a jegyző az egyéb szálláshelyen történő szálláshely-szolgáltatási tevékenység folytatására vonatkozó bejelentés megtörténtéről szóló igazolást megküldi az érintett hatóság részére. A hatóság ellenőrzés befejezését követő nyolc napon belül, annak eredményéről tájékoztatja a jegyzőt.]

If there is any violation of the rules prescribed by law, the notary can urge the host to cease the violation with a specific deadline; if the service provider does not comply with this order, the notary reiterates the cease-and-desist order but on this second occasion a fine is also imposed.¹⁹⁹

Accommodation service activities may be performed in a place authorized by the authority for trade and commerce for that purpose.²⁰⁰ The competent authority to decide on accommodation service activities is local government of the accommodation's location. In the case of Budapest, this authority is the notary of the district local government, in connection with the territories directly administered by the Metropolitan Local Government the notary-in-chief of the Metropolitan Local Government.²⁰¹

Besides the general authorization process, Hungarian legislation also imposes fairly detailed requirements regarding the legal practice of “other accommodation services”. These requirements include:

1. *the size of the room:*

- a) 1 bed: min. 8 m²;
- b) 2 or more beds: min 12 m², after the 3rd bed plus 4 m² per bed;
- c) maximum number of beds: 4 beds/room, bunk bed is allowed for children use;

2. *available bathroom:* demarcated bathroom/shower or wash basin for the guests; toilet with toilet brush keeper, with toilet paper holder, and trash bin;

¹⁹⁹ Section 14 (1) a)-b) of the Decree [“(1) A szálláshelyre vonatkozó jogszabályi és hatósági előírások megsértése esetén a jegyző az alábbi jogkövetkezményeket állapítja meg:

a) - a c)-e) pontokban meghatározott esetek kivételével - határidő tűzésével felhívja a szálláshely-szolgáltatót a jogsértés megszüntetésére, illetve a jogszabályi feltételeknek megfelelő állapot helyreállítására,

b) ha a szálláshely-szolgáltató az a) pontban meghatározott határidő elteltével a jogsértést nem szünteti meg, illetve a jogszerű állapotot nem állítja helyre, arra ismételt határidő kitűzésével felszólítja a szolgáltatót és egyidejűleg pénzbírságot szab ki,]]

²⁰⁰ Section 6/D. of the Trade Act [“Szálláshely-szolgáltatás csak a kereskedelmi hatóság részére történő a szálláshely-üzemeltetési bejelentést követően folytatható.”]

²⁰¹ Section 3 (1) of the Decree [“A Kormány a Kertv. 6/D. §-a, 6/G. § f) pontja és a szálláshely-szolgáltatási tevékenységgel összefüggésben a Kertv. 9. §-a tekintetében kereskedelmi hatóságként a szálláshely fekvése szerinti illetékes települési önkormányzat, Budapesten a kerületi önkormányzat jegyzőjét, a Fővárosi Önkormányzat által közvetlenül igazgatott terület tekintetében a fővárosi főjegyzőt (a továbbiakban: jegyző) jelöli ki.”]

3. *kitchen with appropriate furniture and appliances* (stovetop, sink, table, chair, dishes and cups for coffee and tea making, and separated usage of fridge for guests);²⁰²

4. *a telephone and a service telephone phone number* for emergencies;

5. *after-hours access* for guests;

6. cleaning:

a) guest room: cleaning at least once a week with the replacement of the bed linen and towel (bed linen: 1 piece of quilt, 1 piece of pillow per person, towel: 1 hand towel, 1 bath towel per person);

b) daily cleaning of the common areas.²⁰³

In addition, the competent authority (the local notary) will require the host to provide a number of documents to legalize the operation of “other accommodation services”. The required information and documents are:²⁰⁴

1. name and address of the accommodation provider;

2. tax number, “statistical number” of the accommodation provider;²⁰⁵

²⁰² Section 6/A. of Annex 1. of the Decree [“Bejelentési követelmény

1. A szoba nagysága:

a) egyágyas: legalább 8 négyzetméter,

b) két- vagy több ágyas: legalább 12 négyzetméter, a harmadik ágytól ágyanként további 4 négyzetméter,

c) legmagasabb ágyszám: szobánként 4 ágy, gyermekek számára emeletes ágy használata is megengedett.

2. Vizesblokk: a vendégek számára elkülönített fürdőszoba/zuhanyozó vagy mosdó, WC, -kefe tartóval, WC-papírtartó papírral, higiéniai hulladéktárolóval.

3. Kávékonyha: kávé-, tea főzésére, reggeli jellegű ételek készítésére alkalmas berendezéssel (főzőlap, mosogató, asztal, szék) és felszereléssel (edények), a vendégek számára elkülönített hűtőszekrény használatával.”]

²⁰³ Section 6/B. of Annex 1. of the Decree [6/B. Üzemeltetési követelmény

1. Ügyelet: a szállásadó vagy megbízottja a helyszínen vagy ügyeleti telefonszám megadásával biztosítja.

2. A helyszíni ügyeleti időszakon kívül a vendégek számára belépés biztosítása.

3. Takarítás:

a) vendégszoba legalább hetente egyszer, ágyneműhuzat- és törülközőcserével egyidejűleg. (ágynemű: 1 db paplan, 1 db párna személyenként, törülköző: 1 db kéztörölő, 1 db nagyméretű törülköző személyenként), az új vendégek érkezése előtt minden esetben,

b) a közösen használt helyiségek takarítása mindennap.”]

²⁰⁴ Section 6 of the Decree.

3. address, cadastral number, plan of the accommodation;
4. capacity of the accommodation, including the number of guest rooms and the number of beds;
5. indication of the legal right to use the accommodation;
6. name of the accommodation (private name comparable to that of an enterprise, *e.g.*, guesthouse “Pest”);
7. type of the accommodation (*e.g.*, “hotel, “other accommodation”);
8. whether the accommodation provider will offer cooked or raw food;
9. if the accommodation provider requests an onsite inspection by the competent authority;²⁰⁶

Any changes to the state of the property or the cease of accommodation activity must be reported in writing to the competent notary immediately or within the 8 days, respectively.²⁰⁷ In addition, each year hosts are required to provide information on their activities in writing to the local notary (number of guests received, nights spent by the guests at the accommodation). This report must also distinguish between the guests with a Hungarian permanent residence and those with foreign one. No personal data on the guests should be included.²⁰⁸

²⁰⁵ The “statistical number” in Hungary consists of it consists of 17 numbers according to the following: 1-8: first 8 numbers of the tax number; 9-12: code of statistical classification of economical activities; 13-15: code of the type of legal status; 16-17: territorial code. For more information, see https://www.ksh.hu/statisztikai_szamjel

²⁰⁶ In addition, the host must also attach the following documents to the authorization file: 1. original document or official copy of a document proving that the host has the right to use and sublease the accommodation, if the host is not the owner of the unit; 2. a document containing the agreement of the usufructuary, in case of usufruct if the accommodation provider is not the owner or the usufruct; 3. a document containing the agreement of all owners, in case of a joint ownership if the accommodation provider is not comprised of all the owners.

²⁰⁷ Section 13 (1) of the Decree [“A szálláshely-szolgáltató a 6. § (1) bekezdésében meghatározott adatokban bekövetkezett változást haladéktalanul köteles írásban bejelenteni a jegyzőnek.”]

²⁰⁸ Section 16 (1), (2) of the Decree [(1) Az egyéb szálláshelyet üzemeltető szálláshely-szolgáltató köteles az adott naptári évre (a továbbiakban: tárgyév) vonatkozóan a tárgyévet követő év január hó 31. napjáig a jegyzőnek írásban adatot szolgáltatni a következőkről:

- a) fogadott vendégek száma, és
- b) a vendégek által a szálláshelyen eltöltött éjszakák száma.

(2) Az (1) bekezdés a) és b) pontja szerinti adatokat összesítve, valamint magyarországi lakóhellyel rendelkező és magyarországi lakóhellyel nem rendelkező vendégek szerinti bontásban kell közölni. Az (1) bekezdés szerinti adatszolgáltatás személyes adatokat nem tartalmazhat.]

4. need to fill out the guest book that is provided by the local government, which is also used for the purpose of calculating the tourist tax statement.²⁰⁹

Scope of Application:

In observance of the Services Directive, the abovementioned legislation explicitly states that these requirements apply to those who would like to provide “other accommodation services” in Hungary, regardless of whether they are nationals or permanent residents of Hungary, that of EU Member States or in any other third countries.²¹⁰

It is important to underline that the Housing Act²¹¹ and Hungarian landlord-tenant law does not apply to the lease of “other accommodation”. Hungarian law distinguishes the obligations of hosts (both old –fashioned Zimmer Frei hosts and Airbnb hosts) and landlords. The former must provide services to guests (*e.g.*, cleaning, changing linens). Therefore, in case of conflicts (*e.g.*, non-payment), only specific accommodation services rules will apply and guests cannot claim tenant protection regulations

According to the legal framework described above, home-sharing platforms are allowed as long as they fall under the category “other accommodation service”. The mentioned legislative framework was introduced before the emergence of home-sharing platforms like Airbnb, in order to legalize the “Zimmer Frei culture” around Lake Balaton, a popular vacation destination close to Budapest.

In 2015, the Minister of National Economy stated that it was not necessary to amend existing regulations to respond to Airbnb and other sharing economy platforms. The Minister did not express the intention to change the regulation, as the only existing problems with the

²⁰⁹ ‘Jozsefvaros’ district’s description: <http://jozsefvaros.hu/onkormanyzat/ugy/103>

²¹⁰ Magyarország.hu. Governmental Portal. Operated by: Ministry of Internal Affairs. https://ugyintezes.magyarorszag.hu/ugyek/410009/440191/egyeb_szallashely_uzemeltetese.html

²¹¹ Hegedüs József et al. “National Report for Hungary.” In: *TENLAW: Tenancy Law and Housing Policy in Multi-level Europe*. 101. http://www.tenlaw.uni-bremen.de/reports/HungaryReport_09052014.pdf

regulation of “other accommodation” relate to the evasion of existing rules and not with their inadequacy to regulate home-sharing platforms.²¹²

3.3.4. Taxation of Home-Sharing Platforms

Accommodation provided through home-sharing platforms, at the resemblance of any other form of “other accommodation”, subject to the payment of a number of different taxes:

1. *Income tax: private individuals providing accommodation services.*²¹³ Two types depending on the number of properties that are offered as “other accommodation”:

A. *one property*: ‘light’ taxation regime. The following rules apply:

a) “*Itemized lump sum tax*” if the accommodation is the provider’s property and the same guest does not stay for more than 90 consecutive days,²¹⁴ 32 000HUF/year/room²¹⁵; and 20% “health care contribution”,²¹⁶

b) “*Itemized cost accountance*”: costs incurred with the maintenance of the property (with receipts) and its depreciation must deducted from the income;²¹⁷ 15% tax²¹⁸ (16% until January

²¹² ‘NGM: nem turisztikai, hanem adózási kérdés az Airbnb-ügy’, *Világgazdaság*, 26.08.2016, available at <http://www.vg.hu/gazdasag/adozas/ngm-nem-turisztikai-hanem-adozasi-kerdes-az-airbnb-ugy-456167> (last accessed on February 20, 2016).

²¹³ Information provided by the Hungarian Tax Authority: http://nav.gov.hu/nav/archiv/regiok_archiv/eszak_alfold/eszakalfold/aktualis/szallashelyadas.html?pagenum=2, http://nav.gov.hu/nav/archiv/regiok_archiv/eszak_alfold/eszakalfold/aktualis/szallashelyadas.html?pagenum=3, http://nav.gov.hu/nav/archiv/regiok_archiv/eszak_alfold/eszakalfold/aktualis/szallashelyadas.html?pagenum=5

²¹⁴ Section 57/A (1) of the Act CXVII of 1995 on personal income tax [Fizetővendéglátó tevékenységet folytató magánszemély az, aki - nem egyéni vállalkozóként - a szálláshely-szolgáltatási tevékenység folytatásának részletes feltételeiről és a szálláshely-üzemeltetési engedély kiadásának rendjéről szóló kormányrendelet szerinti egyéb szálláshely-szolgáltatási tevékenység keretében - nyújt szálláshelyet ugyanannak a személynek adóévenként 90 napot meg nem haladó időtartamra.]

²¹⁵ Section 57/A (4) of the Act CXVII of 1995 on personal income tax [A tételes átalányadó évi összege szobánként 32 ezer forint.]

²¹⁶ Section 4 (4) of the Act LXVI of 1998 on health contribution [A fizető-vendéglátó tevékenységet folytató magánszemély által fizetendő százalékos mértékű egészségügyi hozzájárulás a tételes átalányadó 20 százaléka, ha e tevékenység alapján a magánszemély nem minősül a társadalombiztosítás ellátásaira és a magánnyugdíjra jogosultakról, valamint e szolgáltatások fedezetéről szóló 1997. évi LXXX. törvény szerinti egyéni vállalkozónak.]

²¹⁷ Section 4 (1) of the Act CXVII of 1995 on personal income tax [Jövedelem a magánszemély által más személytől megszerzett bevétel egésze, vagy a bevételnek e törvény szerint elismert költséggel, igazolás nélkül elismert költséggel, vagy átalányban meghatározott költséggel csökkentett része, vagy a bevétel e törvényben meghatározott hányada, kivéve, ha a bevételt a jövedelem kiszámításánál nem kell figyelembe venni.]

²¹⁸ Section 8 (1) of the Act CXVII of 1995 on personal income tax.

2016); 27% health care contribution (equivalent to a solidarity contribution for the national health system)²¹⁹

c) 10% cost ratio deduction; 10% of the income is counted as costs (without receipts) that has to be subtracted from the income²²⁰; 15% tax²²¹; 27% “health care contribution”.²²² -

B. more than one property: itemized cost deduction or 10% cost ratio deduction can be chosen; 15% tax;²²³ 27% health care contribution;²²⁴

2. *Value Added Tax*: 18% VAT unless the expected income (without deduction of costs) is under 6 million HUF;²²⁵

²¹⁹ Section 3 (1) of the Act LXVI of 1998 on health contribution [A kifizető, - kifizető hiányában, vagy ha a kifizető az adó (adóelőleg) alapját képező jövedelem után adót (adóelőleget) nem köteles megállapítani - a jövedelmet szerző magánszemély 27 százalékos mértékű egészségügyi hozzájárulást fizet az adóévben kifizetett, juttatott, a személyi jövedelemadóról szóló 1995. évi CXVII. törvény (a továbbiakban: Szja tv.) szerinti

a) összevont adóalapba tartozó jövedelemnél az adó (adóelőleg) alap számításánál figyelembe vett jövedelem,

b) külön adózó jövedelmek közül

ba) a béren kívüli juttatásnak nem minősülő egyes meghatározott juttatások [Szja tv. 70. §] adóalapként meghatározott összege,

bb) a kamatkedvezményből származó jövedelem adóalapként meghatározott összege után.]

²²⁰ Section 17 (3) b) of the Act CXVII of 1995 on personal income tax [Az önálló tevékenységből származó bevételből a jövedelmet tevékenységenként külön-külön kell megállapítani. A bevétellel szemben a jövedelem megállapításához elszámolható az önálló tevékenység bevételeinek 10 százaléka (10 százalékos költségköltségnyitvány).]

²²¹ Section 8 (1) of the Act CXVII of 1995 on personal income tax

²²² Section 3 (1) of the Act LXVI of 1998 on health contribution [A kifizető, - kifizető hiányában, vagy ha a kifizető az adó (adóelőleg) alapját képező jövedelem után adót (adóelőleget) nem köteles megállapítani - a jövedelmet szerző magánszemély 27 százalékos mértékű egészségügyi hozzájárulást fizet az adóévben kifizetett, juttatott, a személyi jövedelemadóról szóló 1995. évi CXVII. törvény (a továbbiakban: Szja tv.) szerinti

a) összevont adóalapba tartozó jövedelemnél az adó (adóelőleg) alap számításánál figyelembe vett jövedelem,

b) külön adózó jövedelmek közül

ba) a béren kívüli juttatásnak nem minősülő egyes meghatározott juttatások [Szja tv. 70. §] adóalapként meghatározott összege,

bb) a kamatkedvezményből származó jövedelem adóalapként meghatározott összege után.]

²²³ Section 8 (1) of the Act CXVII of 1995 on personal income tax

²²⁴ Section 3 (1) of the Act LXVI of 1998 on health contribution [A kifizető, - kifizető hiányában, vagy ha a kifizető az adó (adóelőleg) alapját képező jövedelem után adót (adóelőleget) nem köteles megállapítani - a jövedelmet szerző magánszemély 27 százalékos mértékű egészségügyi hozzájárulást fizet az adóévben kifizetett, juttatott, a személyi jövedelemadóról szóló 1995. évi CXVII. törvény (a továbbiakban: Szja tv.) szerinti

a) összevont adóalapba tartozó jövedelemnél az adó (adóelőleg) alap számításánál figyelembe vett jövedelem,

b) külön adózó jövedelmek közül

ba) a béren kívüli juttatásnak nem minősülő egyes meghatározott juttatások [Szja tv. 70. §] adóalapként meghatározott összege,

bb) a kamatkedvezményből származó jövedelem adóalapként meghatározott összege után.]

²²⁵ Section 188 (2) of the Act CXXVII of 2007 on the VAT [Az alanyi adómentesség választására jogosító felső

3. *Tourist tax*: 4% of the accommodation price.²²⁶

Until the 15th day of the month following the provision of accommodation services, a tax statement has to be sent to the local government stating the monthly income. This statement must be faxed or personally handed to the local government but it cannot be sent via e-mail.²²⁷ The tourist tax has to be wire transferred to the bank account of the local government.²²⁸ The tax statement has to be sent even if only people stayed at the accommodation who are not subject to the tax (e.g., individuals under 18 years, students, individuals receiving medical assistance).²²⁹

értékhatar: 6 000 000 forintnak megfelelő pénzösszeg.]

²²⁶ Section 33 of Act C of 1990 on Local Taxes [1990. évi C. törvény a helyi adókról, Published: 1990. XII. 30.]

²²⁷ Official homepage of the local government of Jozsefvaros district. Operated by: the Local Government of Jozsefvaros. Description of the local tourist tax: <http://jozsefvaros.hu/onkormanyzat/ugy/103>,

²²⁸ 'Jozsefvaros' district's description: <http://jozsefvaros.hu/onkormanyzat/ugy/103>

²²⁹ This exemption is based on Act C of 1990 on Local Taxes [1990. évi C. törvény a helyi adókról, Published: 1990. XII. 30.]:

Section 3/A (2)

“a) the armed forces of the Parties of the North Atlantic Treaty and other nations participating in the Partnership for Peace, which are stationed in Hungary by virtue of service of obligation.”

b) military command posts set up within the framework of the North Atlantic Treaty Organization, including their staff and military and civilian personnel of citizenship other than Hungarian who are employed by such armed forces and bodies.”

[a) az Észak-atlanti Szerződés tagállamainak a Békapartnerség más részt vevő államainak, Magyarországon kizárólag szolgálati kötelezettség céljából tartózkodó fegyveres erői,

b) az Észak-atlanti Szerződés alapján felállított nemzetközi katonai parancsnokságok személyi állományába tartozó vagy alkalmazásában álló nem magyar állampolgárságú, katonai szolgálatban lévő és polgári állományú személyek.]

Section 31.

“a) private individuals under the age of 18

b) private individuals receiving inpatient care in health institutions or regular care in social institutions;

c) private persons who reside within the jurisdictional area of a local government because they are students in an institution of secondary or higher education, under official or court order to do so, undergoing vocational training, fulfilling a service obligation, entrepreneurs pursuing the activities defined under Subsection (2) of Section 37 of the LTA who have a registered office or place of business in the community or an employee in such a company, and

d) private individuals who own or lease a holiday resort which is located in the area of jurisdiction of a local government, or who are members of a housing cooperative with utilization right of a holiday resort owned by the housing cooperative for the term of the utilization right, or the relative of the owner or lessor, or the close relative defined in the Civil Code of the housing cooperative member with the utilization right of a holiday resort owned by the housing cooperative for the term of the utilization right.

e) members of the clergy when spending the night in construction works owned by an ecclesiastical legal entity, only if this is connected to ecclesiastical reasons or to practicing ones religion.”

[a) a 18. életévét be nem töltött magánszemély;

b) a gyógyintézetben fekvőbeteg szakellátásban részesülő vagy szociális intézményben ellátott magánszemély;

c) a közép- és felsőfokú oktatási intézménynél tanulói vagy hallgatói jogviszony alapján, hatóság vagy bíróság intézkedése folytán, a szakképzés keretében, a szolgálati kötelezettség teljesítése, vagy a településen székhellyel, vagy telephellyel rendelkező vagy a Htv. 37. §-ának (2) bekezdése szerinti tevékenységet végző vállalkozó esetén vállalkozási tevékenység vagy ezen vállalkozó munkavállalója által folytatott munkavégzés céljából az önkormányzat illetékességi területén tartózkodó magánszemély, továbbá

4. *Special taxes:* local government has the discretionary power to establish an additional special tax on “other accommodation services”. This tax can be as high as 1500-2000 HUF/m²/year.²³⁰

Tax Evasion

According to available information and estimates, 80% of the Airbnb hosts in Budapest are not paying taxes for the earned income.²³¹ The Hungarian Tax Authority has been focusing on this issue and has undertaken undercover operations (by renting out accommodations as guests and checking if everything is done according to the law) since last summer to control tax evasion.²³² Since Hungary already faced significant problems with tax evasion in this economic area due to the proliferation of “Zimmer Frei” offers, the emergence of digital platforms has apparently facilitated the task of tax authorities by providing them with the possibility to trace the identity and location of hosts.

3.3.5. The Impact of Home-sharing platforms on the hotel and private housing lease sector

a) Hotels

At the resemblance of other countries, also in Hungary, hotels have regarded home-sharing platforms with suspicion. Based on the data of the Hungarian Central Statistical Office, in 2014 tourists spent 419, 000 more nights in “other accommodation service” than in the previous

d) aki az önkormányzat illetékességi területén lévő üdülő tulajdonosa vagy bérlője, továbbá a használati jogosultság időtartamára a lakásszövetkezet tulajdonában álló üdülő használati jogával rendelkező lakásszövetkezeti tag, illetőleg a tulajdonos, a bérlő hozzátartozója, valamint a lakásszövetkezet tulajdonában álló üdülő használati jogával rendelkező lakásszövetkezeti tag használati jogosultságának időtartamára annak a Polgári Törvénykönyv szerinti hozzátartozója;

e) az egyházi jogi személy tulajdonában lévő építményben, telken vendégéjszakát - kizárólag az egyházi jogi személy hitéleti tevékenységéhez kapcsolódó részvétel céljából - eltöltő egyházi személy.]

²³⁰ ‘Airbnb: megéri foglalkozni vele?’, *Kiszamolo*, 9.10.2014, available at <http://kiszamolo.hu/airbnb-megeri-foglalkozni-vele/> (last accessed March 23, 2016).

²³¹ Rényl Pál Dániel, ‘Tönkreteszi az Airbnb a budapesti albérletpiacot’, 444HU, 08.08.2015, available at <http://444.hu/2015/08/08/alberlet> (last accessed on February 20, 2016); Horváth Attila, ‘Apartmanok a konkurens Airbnb ellen’, *MNO*, 23.09.2015, available at <http://mno.hu/gazdasag/apartmanok-a-konkurens-airbnb-ellen-1305605> (last accessed on February 20, 2016).

²³² Horváth Attila, ‘Utálnánéz az adóhivatal a lakáskiadóknak’, *MNO*, 01.08.2015, available at http://mno.hu/magyar_nemzet_belfoldi_hirei/utananez-az-adohivatal-a-lakaskiadoknak-1298072 (last accessed on February 20, 2106).

year.²³³

While hotels and hostels fear the upcoming competition of home-sharing platforms, they also formulate their criticism in terms of the lack of a level-playing field. First, hotels claim that private hosts can easily evade tax by engaging into transactions through Airbnb or other platforms.²³⁴ Second, hotels and home-sharing platforms categorized under “other accommodation” are not required to comply with the same regulations on fire, hygiene and food safety, and hotel tax. Hotels and hostels must incur higher compliance costs, which means that there is not the same level-playing field.²³⁵ Hotels argue that some companies rent flats from owners in one or more buildings, and then operate them as other accommodation services (with business purpose).²³⁶ The Hungarian Union of Hotels and Restaurants recently released a report claiming that there were disparities between the data on “other accommodation” registered by the local notaries and the data provided by the Central Statistical Office, which could be indicative of tax evasion.²³⁷

In an interview with the Hungarian media, the President of the Union of Hungarian Hotels and Restaurants, Akos Niklai, stated that “approximately 5-10% of former hotel guests preferred Airbnb” but this phenomenon was not based exclusively on Hungarian data.²³⁸ The hotel representative argued that since renting accommodation has a positive effect on tourism it

²³³ Stubnya Bence, ‘Mindent fel forgat az Airbnb’, *Index*, 25.08.2015, available at <http://index.hu/gazdasag/2015/08/25/airbnb/> (last accessed on February 19, 2016).

²³³ *Idem.*

²³⁴ Stubnya Bence, ‘Mindent fel forgat az Airbnb’, *Index*, 25.08.2015, available at <http://index.hu/gazdasag/2015/08/25/airbnb/> (last accessed on February 19, 2016).

²³⁵ Sarnyai Gábor, Az Airbnb Letarolta a világ szállodaiparát, MNO, 11.03.2015, available at <http://mno.hu/gazdasag/az-airbnb-letarolta-a-vilag-szallodaiparat-1276760> (last accessed on February 20, 2016). ‘Ezért mennek az egekbe az albérletárak’, *Index*, 03.08.2015, available at <http://index.hu/gazdasag/2015/08/03/ezert-mennek-az-egyekbe-az-alberletarak/> (last accessed on February 20, 2016).

²³⁶ Union of Hungarian Hotels and Restaurants. *The appearance of sharing economy – shadow economy on the market of commercial accommodations in Hungary, and its effects*. 2015, p. 8, at http://www.hah.hu/files/9414/4231/9735/A_KZSSGI_GAZDASG_MEGJELENSE_MAGYARORSZGON_A_KE_RESKEDELMI_SZLLSHELYEK_PACN_final.pdf

²³⁷ Union of Hungarian Hotels and Restaurants. *The appearance of sharing economy – shadow economy on the market of commercial accommodations in Hungary, and its effects*. 2015. p. 8, available at http://www.hah.hu/files/9414/4231/9735/A_KZSSGI_GAZDASG_MEGJELENSE_MAGYARORSZGON_A_KE_RESKEDELMI_SZLLSHELYEK_PACN_final.pdf

²³⁸ *Idem.*

should not be prohibited; instead the whole industry should be more regulated.²³⁹ In 2015, Deputy Minister, Nandor Csepreghy, stated that that home-sharing platforms are only “modernizing and organizing the original Zimmer-Frei service. Airbnb will not compete with hotels because it cannot provide the additional services offered by hotels.”²⁴⁰ Airbnb does not appear to be regarded as a competitor of hotels but as an innovative alternative party.²⁴¹ Hostels and private individuals renting spare rooms offline are therefore the most affected types of accommodation by the development of home-sharing platforms.²⁴² Chief secretary of the Union of Hungarian Hotels and Restaurants, Istvan Kovacs, has indeed confirmed that so far there was no relevant data on how Airbnb affected the situation of hotels.²⁴³

While hotels might be less affected by home-sharing platforms, apartment renting companies are more concerned about the expansion of the latter and have announced that they will plan a united action against Airbnb, in order to ask the government to limit the maximum number of days one can lease via Airbnb (and comparable platforms), and introduce a new system of receipts, where the tax is automatically deducted from the sum customers pay (and transferred automatically to the Hungarian Tax Authority)²⁴⁴.

Although the emergence of home-sharing platforms has allegedly had positive effects on tourism and consequently on employment,²⁴⁵ it has also put pressure on an already limited private lease market, triggering the rise in the prices of private rents.²⁴⁶ Despite the low prices of rooms for lease in Budapest, home-sharing practices appear to be quite lucrative in Hungary. This has generated incentives to private investors to buy flats in the center and subsequently rent

²³⁹ *Idem*.

²⁴⁰ Torontáli Zoltán, ‘A kormány benézheti az Airbnb ügyét’, HVG, 03.10.2015, available at http://hvg.hu/gazdasag/20151003_A_kormany_benezheti_az_Airbnb_ugyet (last accessed on February 20, 2016).

²⁴¹ Krezinger Szongja, ‘Pénzt hoz a turizmusba az Airbnb,’ *Metropol*, 02.02.2016, available at <https://www.metropol.hu/mellekletek/utazas/cikk/1410605-penzt-hoz-a-turizmusba-az-airbnb> (last accessed on February 19, 2016).

²⁴² Stubnya Bence, ‘Mindent fel forgat az Airbnb’, *Index*, 25.08.2015, available at <http://index.hu/gazdasag/2015/08/25/airbnb/> (last accessed on February 19, 2016).

²⁴³ Sarnyai Gábor, ‘Az Airbnb Letarolta a világ szállodaiparát’, *MNO*, 11.03.2015, available at <http://mno.hu/gazdasag/az-airbnb-letarolta-a-vilag-szallodaiparat-1276760> (last accessed on February 20, 2016).

²⁴⁴ Horváth Attila, ‘Apartmanok a Konkurens Airbnb ellen’, *MNO*, 23.09.2015, available at <http://mno.hu/gazdasag/apartmanok-a-konkurens-airbnb-ellen-1305605> (last accessed on February 20, 2016).

²⁴⁵ Stubnya Bence, ‘Mindent felforgat az Airbnb’, *Index*, 25.08.2015, available at <http://index.hu/gazdasag/2015/08/25/airbnb/>

²⁴⁶ ‘Tönkreteszi az Airbnb a budapesti albérletpiacot’, 08.08.2015, *444.Hu*, available at <http://444.hu/2015/08/08/alberlet>

them to tourists.²⁴⁷ Impact on prices of flats: the spread of online platforms resulted in an approx. 1/5th rise in the price of flats in Budapest.²⁴⁸

Home-sharing platforms, housing associations and neighbors

In many cities around the world, neighbors of Airbnb hosts have complained about noisy tourists and the frequent coming and going of new short-term tenants. Housing associations typically required owners to discuss the frequent and temporary lease of units with them. In Hungary, this does not appear to be a pregnant problem so far. According to the President of the Hungarian Union of Condominium Management, Gyorgy Kaplonyi, no significant complaint has been sent to the union.²⁴⁹

The provision of “other accommodation services” through home-sharing platforms such as Airbnb does not appear to be impeded or heavily taxed according to Hungarian tax law. However, this might be the effect of the lack of compliance with existing legislation by the hosts as the imposed requirements are quite detailed. Tax rates change however significantly when hosts start leasing two or more properties as this is accompanied by considerable tax obligations (*see above*).²⁵⁰ Existing Hungarian legislation appears to endorse or, at least, easily authorize “small scale Airbnb (or other)” platforms but not the professional use of these platforms, which are subject to higher tax rates. In order to control tax evasion, particularly by professionals, the

²⁴⁷ Torontáli Zoltán, ‘A kormány benézheti az Airbnb ügyét’, HVG, 03.10.2015, available at http://hvg.hu/gazdasag/20151003_A_kormany_benezheti_az_Airbnb_ugyet; Union of Hungarian Hotels and Restaurants. *The appearance of sharing economy – shadow economy on the market of commercial accommodations in Hungary, and its effects*. 2015, p. 9, at http://www.hah.hu/files/9414/4231/9735/A_KZSSGI_GAZDASG_MEGJELENSE_MAGYARORSZGON_A_KE_RESKEDELMI_SZLLSHELYEK_PACN_final.pdf (noting that the expansion of online platforms appears to have resulted in an approx. 25% increase in the price of flats in Budapest).

²⁴⁸ Union of Hungarian Hotels and Restaurants. *The appearance of sharing economy – shadow economy on the market of commercial accommodations in Hungary, and its effects*. 2015 p. 9, at http://www.hah.hu/files/9414/4231/9735/A_KZSSGI_GAZDASG_MEGJELENSE_MAGYARORSZGON_A_KE_RESKEDELMI_SZLLSHELYEK_PACN_final.pdf

²⁴⁹ ‘Nemcsak a NAV-ot, a szomszédokat is zavarja az Airbnb’, 09.09.2016, available at <http://magyartarsashaz.hu/2015/09/09/nemcsak-a-nav-ot-a-szomszedokat-is-zavarja-az-airbnb/> (last accessed on February 20, 2016).

²⁵⁰ Bence, see *supra* note 212.

Hungarian Tax Authority has announced future large scale inspections of home-sharing properties.²⁵¹

The current government claims that the rules on accommodation services shall not be changed for the time being. Local governments appear to follow central orders at this level. As far as tourist taxes are concerned, it is worth mentioning that the product of tourist tax represents a small fraction of the Budapest city budget. For example, the V. District's (city center) had 21,081,286 thousand HUF as planned income, of which only 1,162,000 thousand HUF originated from tourist tax.²⁵²

In Budapest, home-sharing platforms compete with the traditional offline "Zimmer Frei" offers. Given the wide availability and the low price of rooms in the Hungarian capital (less than 10 euros/night in some cases), many of the offered accommodations have a low occupancy rate. Registered hosts who follow all the specified rules and pay taxes are however disadvantaged, given the considerable size of the offline and online black economy.²⁵³

²⁵¹ See http://mno.hu/magyar_nemzet_belfoldi_hirei/utananez-az-adohivatal-a-lakaskiadoknak-1298072

²⁵² Decree 1/2015. (I.15.) of the Local government of Belvaros-Lipotvaros on the 2015 budget of the local government. Published by: 15th of January, 2015. Available at <http://www.belvaros-lipotvaros.hu/user/rendeletek/R2015001%20ktgv%20rend%202015.pdf> -

²⁵³ Torontáli Zoltán, 'Tombol az Airbnb-láz már a magyarok is milliókról álmodznak', *HVG*, 02.07.2015, available at http://hvg.hu/ingatlan/20150702_Megvesztek_a_magyarok_mindenki_az_Airbnb (last accessed on February 20, 2016).

4. Legal Analysis

4.1. EU Law Framework

The national and local regulation of home-sharing platforms implies the consideration of a number of additional EU law and policies as well as a EU legal framework consisting namely of a patchwork of EU directives and regulations. Besides the applicable dispositions of the Treaty on the Functioning of the European Union (*e.g.*, arts. 49 et seq. TFEU), the legal framework (broadly considered) also includes or will include in the short-run the following legal and policy elements:

- a) Electronic Commerce (E-Commerce) Directive (2000/31/EC): digital platforms providing home-sharing intermediation services are susceptible of being qualified as “information society services” and are thus subject to the law of the Member State in which the service provider is established. Member States cannot restrict incoming services (see more information on this below).
- b) New “Data Protection Package” consisting of:
 - (i) the *General Data Protection Regulation*, pursuant to Article 16(1) TFEU (exercise of right to personal data protection), “will enable people to better control their personal data. At the same time modernized and unified rules will allow businesses to make the most of the opportunities of the Digital Single Market by cutting red tape and benefiting from reinforced consumer trust.”
 - (ii) The *Data Protection Directive* (indirectly applicable) “for the police and criminal justice sector will ensure that the data of victims, witnesses, and suspects of crimes, are duly protected in the context of a criminal investigation or a law enforcement action.
- c) EU legislation and communications implementing the Digital Single Market Strategy;
- d) The Services Directive (2006/123/EC): given the presence of mostly foreign home-sharing platforms in most Member-States, the provision of cross-border services, access

to profession (tourism), and the need for simplified procedures and formalities are important elements to be discussed within this framework.²⁵⁴

- e) The Directive on Consumer Rights (2011/83/EC) regulating contracts between consumers and traders (platforms) and imposing price transparency;
- f) The Working Time Directive (2003/88/EC): one of the controversies of the collaborative economy concerns the self-employed character of platform users that provide peer-to-peer services. While this controversy might be less relevant in the context of home-sharing and other forms of collaborative consumption, it is still potentially applicable. This Directive refers to limits imposed on working time but allows Member States to enact derogations provides for limits on working time.²⁵⁵
- g) Communication from the European Commission on “Upgrading the Single Market: more opportunities for people and business”: announcing guidance on the collaborative economy in the context of EU law.²⁵⁶

The European Committee of Regions suggested recently that the collaborative economy is indeed “a paradigm changer” which can be a source of numerous benefits, however the Committee also warned against the challenge of balancing national, local, and EU law in this context:

²⁵⁴ European Parliament, *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities*, European Parliament Research Advice (2016), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777), p. 25 (accessed on February 4, 2016) (The European Parliament Research Service notes in its analysis of the legal framework of the collaborative economy that “under the Internal Market Strategy for Goods and Services (CWP 2015), the aim is to ‘deliver further integration and improve mutual recognition in key industrial and services sectors’. Providers offering their services through sharing economy platforms could clearly fit within this principle.”)

²⁵⁵ Also in this field, see the Employment Information Directive (91/553/EEC), defining how workers should be told about terms and conditions; the Citizens Rights Directive (2004/38/EC), which gives workers the right to move freely and work anywhere in the EU; the Professional Qualifications Directive (2005/36/EC) securing the mobility of qualifications. This EU labor law framework is based on the list prepared by the European Parliament, *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities*, European Parliament Research Advice (2016), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777), p. 25 (accessed on February 4, 2016).

²⁵⁶ Drawing on the policy selection made by European Parliament, *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities*, European Parliament Research Advice (2016), [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777), p. 25 (accessed on February 4, 2016).

“the SE [sharing economy] can improve the quality of life, foster growth (in particular in local economies) and reduce environmental effects. It can also generate new, good quality jobs, reduce the cost as well as increase the availability and efficiency of some goods and services or infrastructure. However it is important that services offered through SE do not lead to tax avoidance, unfair competition or are in violation of local and regional regulation or national and European law[(emphasis added)] The evaluation of all possible positive and negative impacts and the definition of the public policy objectives should also be key drivers of any regulatory initiative on the SE” (point 13)

(...)

considers that many of the sectors touched by SE have a, sometimes disruptive, impact at the local and regional level and that it should therefore be possible for them to be governed or regulated as necessary by local and regional authorities (LRAs) in compliance with the principle of local autonomy in order to allow LRAs to adapt SE initiatives and ventures to local conditions (point 29)

(...)

insists that a SE regulatory initiative should not be detached from a vision of urban and local governance (point 30).”

In the following sections, we delve into two specific aspects of the current EU legal framework: the compatibility of the abovementioned national restrictions (in Brussels Stockholm, and Budapest) with the internal market regulations and, more specifically, the Services Directive; and, to a more reduced extent, the E-Commerce Directive.

4.1.1. General Remarks

Digital technologies are currently disrupting traditional services by offering on-demand, more convenient, affordable, and varied services and goods to consumers in Europe. The benefits of

the new “on-demand” model developed by digital platforms has been acknowledged in the recent Digital Single Market Strategy which aims to meet the challenges of the digital economy, improve connectivity in Europe, and promote the most adequate conditions for the development of services networks.²⁵⁷ The Digital Single Market Agenda has been designed to improve consumers and businesses’ *access* to digital goods and services across Europe, which means that national practices such as geo-blocking of foreign platforms and websites are criticized in this context; create a digital-friendly environment where innovative businesses can flourish and develop a level playing field for digital services; and maximize the growth potential of the digital economy.²⁵⁸

Thus far, two of the most significant obstacles to the development of the digital economy both in Europe and overseas have been the *existence of outdated national legislation and regulation* which was enacted decades ago to regulate the paradigm of traditional businesses and, in some cases, protect them directly or indirectly against foreign competitors; and the *regulatory uncertainty* regarding the rules, rights and obligations applicable to digital platforms.²⁵⁹ The existence of stringent national legislation and regulation currently creates barriers to the provision of multiple digital services, notably in the context of the collaborative economy. These barriers stifle innovation and discourage innovative players from developing new products and services and offering them in other Member States. These concerns underlie the need to rethink and modernise the Internal Market in light of the emergence of digital platforms and new and

²⁵⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Agenda, COM(2015) 192, 6.5.2015 (“the Digital Single Market is defined as “a market in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality of place of residence.”). *See also* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Upgrading the Single Market: More Opportunities for People and Businesses, COM(2015), 28.10.2015.

²⁵⁸ *See* Communication from the Commission, Digital Single Market Strategy (2015).

²⁵⁹ *See* European Commission, Digital Single Market Agenda, “First Brief Results of the Public Consultation of the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy”, 26.01.2016, available at <https://ec.europa.eu/digital-agenda/en/news/first-brief-results-public-consultation-regulatory-environment-platforms-online-intermediaries> (“A large majority of both businesses and consumers agree that there are regulatory and other obstacles to the development of the collaborative economy in Europe. Uncertainty over the rights and obligations of users and providers are a key obstacle hampering the collaborative economy according to all types of respondents.”)

collaborative exchange models which are often based on peer-to-peer transactions and are intermediated by a technological infrastructure.

In the case of home-sharing platforms, our analysis requires us to consider a legal framework which combines both EU and national law on electronic services, freedom of establishment and provision of services (that is, tourist or short-term accommodation and related services), and national regulations on hotels and short-term housing.

In EU law there are two important pillars to be considered: first, the electronic commerce directive; and second and with greater detail, the Services Directive. In both cases, this paper analyses the legal obstacles that might prevent or discourage the exercise of the freedom of establishment (primary or secondary establishment) of home-sharing platforms, the provision of cross-border online services on home-sharing, and other forms of online trade in this sector. Drawing on the recent report by the Swedish National Board of Trade, we define “legal obstacles or barriers” “as rules that render cross-border trade more difficult and sometimes impossible.” This concept encompasses “laws and regulations, judgments and decisions in individual cases as well as guidelines, interpretation documents and recommendations by the public authorities. Unlike market deficiencies, legal barriers have their origin in the actions of the public authorities.”²⁶⁰

4.1.2. E-commerce Directive and Online Platforms

The definition and qualification of collaborative economy platforms as “information society services” is essential to determine the applicable legal framework. If home-sharing platforms are primarily qualified as intermediaries and in particular as information society

²⁶⁰ Swedish National Board of Trade (Kommerskollegium), ‘Online Trade, Offline Rules: A Review of Barriers to E-Commerce in the EU’, (2015), available at <http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-online-trade-offline-rules.pdf>, p. 6.

services, then the E-commerce Directive²⁶¹ is applicable to the transactions operated by these platforms.²⁶² As explained in Recital 18 of the E-Commerce Directive:

“information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line (...) information society services are not solely restricted to services giving rise to on-line contracting but also, *in so far as they represent an economic activity*, extend to services which are not remunerated by those who receive them, such as those (...) providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service.”

The concept of “information society services” was already defined by Directive 98/34/EC²⁶³ The consideration of the E-Commerce directive implies inquiring whether national regulations are impeding the operation of these information society services. Recital 60 of the E-Commerce Directive states that “in order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it.” Although there might not be any new national restrictions on these platforms as information society services, their regulation is far from certain and clear. This was mentioned for example in the case of Sweden, where the applicable housing or tourism legislation or regulation is quite unclear since there are not any specific provisions, but home-sharing has not been accepted by courts.

²⁶¹ 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 (“Directive on electronic commerce”).

²⁶² Id.

²⁶³ The Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services(21) and Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access(22) defined “information society services” as “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.”.

The E-Commerce Directive

According to Article 3 of the E-Commerce Directive, Member States may restrict the operation of information society services from other Member States if such measures are necessary to protect the public interest, for example, in the context of the prevention of criminal offences. This does not appear to be the most immediate scenario of home-sharing platforms for the time being, except if one of the public policy grounds is interpreted very broadly (or possibly in the case of Sweden, as explained in the case of Stockholm). According to Article 3(4) of the E-Commerce Directive:

“States may derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled: for one of the following reasons: public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons; the protection of public health; public security, including the safeguarding of national security and defence; the protection of consumers, including investors; (ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives.”

In general, the mere access to the activity to provide information society services is not subject to any previous authorization procedure. This explains why the mere provision of digital intermediation services in the specific case of home-sharing is not directly restricted by national authorities. Instead, national authorities target local hosts leasing their houses on these platforms.

Liability Rules

Local authorities separate home-sharing platforms such as Airbnb and HomeAway from the requirements imposed on their hosts, by allowing the former—as intermediaries—to freely operate as determined by legislation on information society providers but imposing authorization

burdens on the hosts. That is, the intermediaries are only regarded as the service operating the matching between supply and demand. This raises an important question on the applicable liability regime, in particular, whether the special liability rules of Articles 12 to 15 of the E-Commerce Directive are applicable to these platforms, rendering them for a great part unaccountable for third-party listings. More importantly, are online sharing platforms vehicles to store and transmit information or do they play a role in shaping it, imposing certain standards of quality, and having consequently a share of the responsibility for the service they provide? These interconnected questions have not been sufficiently analyzed in the context of the collaborative economy. It is nonetheless worth questioning whether it is reasonable to allow states to impose all the burdens on individuals and incur the risk of stifling the innovative character of the collaborative economy. An alternative would be to rethink, from a EU perspective and in compliance with EU law, the imposition a monitoring obligation on platforms. As mentioned in the last section of this paper, national and local governments in the Member States (*e.g.*, Amsterdam) appear to expect platforms to take action in the prevention of fraud and the monitoring of illegal listings. In this context, we raise the following questions:

- 1) Can home-sharing platforms be qualified as “intermediaries” in the terms specified by articles 12 to 15 of the E-Commerce directive?
- 2) Are Airbnb and other home-sharing platforms exempt from liability as stated in Articles 12 to 15 of the E-commerce directive and implementing national legislation?
- 3) If not, are online platforms liable in case local hosts do not comply with national legislation?

Home-Sharing Platforms as ISPs

Home-sharing platforms are *sui generis* information society services: they host third-party listings but in many cases they appear to have a more active role than a regular website or peer-to-peer marketplaces. It is difficult to argue in abstract that home-sharing platforms only host user-generated information (accommodation listings in the case of home-sharing) and do not control the content of the listings. They are however primarily information society intermediaries as the most common international and national platforms (*e.g.*, Airbnb, FlipKey, Wimdu, HomeExchange, HomeAway) discussed in this paper do not own real estate and do not provide

any direct accommodation services. Rather, they provide a *pure intermediation service* between supply (local hosts) and demand (tourists): they match supply and demand, allow hosts to advertise their units on the platform, provide the hosts with peer-review mechanisms and help centers to facilitate conflict resolution. Online platforms that provide home-sharing services are however not common “online intermediaries”. Rather, they impose a number of requirements or provide suggestions to hosts, regarding how they should welcome their hosts, they charge a significant fee to the involved parties, and provide ancillary services regarding conflict mediation.²⁶⁴ In addition, Airbnb, for example, has a legal center in each country that provides an overview of the legislation and regulation that hosts should comply with. The critical distinction between home-sharing platforms and other online services refers to the degree of control the platform exercises over each transaction. This degree of control is very significant in the case of home-sharing platforms and this aspect should be taken into account when rethinking existing legislation on online platforms.

Liability Rules

Since any person can typically post information and advertise on an information society provider (ISP), it would be unreasonable if ISPs could be held accountable for illegal activities they could not easily control or monitor. The limitation of the liability of ISPs aims to protect three main values: the internal market, freedom of expression, and innovation or, more specifically, the development of the Internet. The limitation of liability in the E-Commerce directive aimed to facilitate the provision of cross-border information society services. Platforms often respond on a “notice-and-take-down” basis to illegal listings. Thus far, EU and national law in Belgium, Hungary, and Sweden assumes that ISPs have a minimal degree of control and are therefore not liable for the advertisements placed there as long as they operate as mere vehicles of information transmission or storage.²⁶⁵

²⁶⁴ See Vanessa Katz, ‘Regulating the Sharing Economy,’ (2015) 30 *Berkeley Technology Law Journal* 1067, 1071, 1073.

²⁶⁵ See, e.g., *Loi du 11 mars 2003, loi sur certain aspects juridiques des services de la société de l’information*, C-2003/11125 (exempting information service providers from liability in Belgium); In Sweden, see *Lag om elektronisk handel och andra informationssamhällets tjänster* [Law on Electronic Commerce and Information Society Services], (2002:562) SFS 2002:562 (besides the information contained in this law, we have verified with the Swedish Consumer Protection Agency and there are not currently any national rules imposing liability on online platforms for the cases when hosts do not comply with national rules. As far as additional national measures are

Compliance with local regulations

The position of collaborative platforms remains however unclear since they often offer much more than a mere advertisement platform (see part 1). National legislation has so far not addressed the possibility that these platforms might be aware of the fact that hosts do not comply with legal requirements. However, local regulators appear to be putting platforms under pressure to delete “illegal listings.” Hosts are also not legally required to prove to the platform that they comply with local registration requirements or that they are paying income and local taxes. Platforms might have their own internal policies regarding legal compliance but it is worth asking whether self-regulation has been sufficient to impede abuses and the advertisement of illegal listings. However, in Hungary, the Hotel Union has criticized the lack of regulation in this context and has suggested a legislative change in order to require online portals to only allow them to advertise houses that have the necessary permits.²⁶⁶ The question is whether these platforms can be held liable for turning a blind eye.

Information society providers (ISPs) tend not to be considered liable for third-party actions. However, the implementation of articles 12 to 15 of the E-Commerce on the liability of ISPs has been far from smooth. This problem has been discussed for example in the context of the violation of intellectual property rights by third-parties (e.g., platform users advertising and selling counterfeited products on Ebay).²⁶⁷ Information society services (“hosting providers”) tend to have a limited degree of knowledge about the listings posted on their platforms:²⁶⁸ Airbnb and other platforms require representative photos of the advertised units but they do not generally inspect the houses themselves. The same happens with peer-to-peer marketplaces like

concerned, Sweden only regulated the liability of electronic bulletin board operators. The 1998 Act on Responsibility for Electronic Bulletin Boards required operators to monitor the bulletin board, supervise the activities of subscribers and remove any infringing material. In the case of Hungary, see CVIII Act of 2001. *See also* the country study on liability of online intermediaries in Hungary, available at http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/hungary_12nov2007_en.pdf. In this report it was stated that at the time Hungary had very limited case law on the liability of online intermediaries.

²⁶⁶ Union of Hungarian Hotels and Restaurants, *The appearance of sharing economy – shadow economy on the market of commercial accommodations in Hungary, and its effects [our translation]* 2015 p. 9, available at http://www.hah.hu/files/9414/4231/9735/a_kzssgi_gazdasg_megjelense_magyarorszgon_a_kereskedelmi_szllshelyek_piact_n_final.pdf [in hungarian].

²⁶⁷ *See also Google v Louis Vuitton* (Joined Cases C-236/08, C-237/08 and C-238/08).

²⁶⁸ Ian Lloyd, *Information Technology Law* (Oxford: Oxford University Press 2011) 572.

Ebay. Therefore, the decision on who to hold accountable for misleading advertisement or non-compliance with local regulations can be problematic.

Article 12 of the E-Commerce Directive states that service providers shall not be held liable for the information they transmit on condition that they do *not initiate or select the receiver of the transmission, or modify the information contained in the transmission*. This exemption does not prevent Member States from taking action in accordance with their own legal systems to require a service provider to terminate transmission or prevent an infringement.²⁶⁹ The “hosting” of illegal content is also exempted (Article 14) as long as the ISP did not “have actual knowledge” of the illegal character of the information (“hosting defence”). However, this does not prevent Member States from imposing duties of care on the platforms “in order to detect and prevent certain types of illegal activities”(recital 48).²⁷⁰ In imposing these duties, Member States must also comply with the freedom of speech.

It is worth underlining that in order to benefit from the special liability exemptions laid down in Articles 12 to 15, ISPs must have a passive role in the administration of listings on their platforms. Hosting platforms that control the listings posted cannot benefit from this exemption. More thorough and empirical research would be necessary to evaluate the extent to which home-sharing actually control the listings. While platforms such as Airbnb provide guidelines on “how to host,” “how to place a listing,” and what rules to comply with, it is not clear to what extent the platform controls the content of the listings. However, after many cities warned the platform against the problem of multiple listings belonging to commercial operators, Airbnb has started deleting these “illegal listings” or inviting the hosts to do so.²⁷¹ The decision on whether Airbnb or any other home-sharing platform can benefit from Article 14 relies heavily on the adoption of

²⁶⁹ Graham Pearce & Nicholas Platter, ‘Promoting the Information Society: the EU Directive on Electronic Commerce,’ (2000) 6(4) *European Law Journal* 363, 372.

²⁷⁰ See Graham Pearce & Nicholas Platter, ‘Promoting the Information Society: the EU Directive on Electronic Commerce,’ (2000) 6(4) *European Law Journal* 363, 373.

²⁷¹ See, for example, Will Collwell, ‘Airbnb to Warn Hosts over Illegal Listings,’ *The Guardian*, 31.03.2016, available at <http://www.theguardian.com/travel/2016/mar/31/airbnb-in-paris-to-warn-hosts-over-illegal-listings> “Airbnb Vows to Take a New Approach to Culling Illegal Listings in San Francisco,” TechCrunch, 04.04.2016, available at <http://techcrunch.com/2016/04/04/airbnb-vows-to-take-a-new-approach-to-culling-illegal-listings-in-san-francisco/>

a neutral role regarding these listings. Once again, only a case-by-case analysis would shed some light on this element.²⁷²

Monitoring Obligations?

In 2013, the European Court of Human Rights refined this limited liability of ISPs and accepted the imposition of a monitoring obligation in certain cases (*Delfi AS v Estonia*).²⁷³ In this case, a news website had removed all offensive comments and threats directed at a director of a company operating ferry services, following the publication of a controversial investigative article. The website refused however to compensate for damages, claiming it was not liable for third-party comments. The ECtHR considered that the platform's filtering and notice-and-take-down instruments were insufficient because they failed to prevent a number of insults or threats. Although in the case of home-sharing platforms, content in this sense is limited in many cases to peer-review mechanisms and the description of listings, platforms appear to be in a better position to verify the identity of hosts as well as certain legal requirements (e.g., one listing per person).

Local Law and Online Platforms

As this paper shows, existing and forthcoming national restrictions at the e-commerce level do not aim to restrict just platform-operated home-sharing but also longstanding unlicensed home-sharing, that is, online and offline black economy. Local law imposes authorization schemes on the hosts, not on the platforms. Therefore, these local restrictions only affect the provision of information society services indirectly if they prevent these platforms from attracting hosts. It is however important to underline that, as far as forthcoming legislation is concerned, public interest justifications appear to underlie, either directly or indirectly, some of

²⁷² See the Opinion of AG Maduro in Google AdWords, C-236/08, arguing that "Google AdWords is not protected by the special liability regime, because – although it stores certain information – the service is not neutral as regards the information it carries, because the display of ads stems from Google's relationship with its advertisers. Consequently, Google can be held liable for trademark infringements occurring through its Adwords service." See DLA Piper, *EU Study on the Legal Analysis of the Single Market for the Information Society: New Rules for a New Age? The Liability of Online Intermediaries* (2009).

²⁷³ *Delfi AS v Estonia*, ECtHR, Application No. 64569/09, 10 October 2013.

the mentioned national restrictions of home-sharing platforms such as Airbnb. This is for example the case of Airbnb in Sweden, where national authorities are concerned with the abuse of this platform by local human traffickers. It might be more difficult for non-Swedish home-sharing, hotels, and real estate actors to understand the Swedish context and regulations on prostitution and the relative ease with which platforms can be captured by the illegal prostitution industry (for example, in Sweden hotel employees are now trained to recognize human trafficking).

Conclusion on the E-Commerce Directive

Home-sharing platforms appear to fit within the broad concept of “information society services.” These platforms are however not only user-generated as they tend to provide extensive guidelines to users as to how to advertise their accommodation listings. While the E-Commerce Directive is germane to these platforms, the applicability of the special liability regime, in particular, the “hosting defence” (Article 14) depends on the extent to which platforms remain neutral vis-à-vis the listings and do not exercise sufficient control on the listings. In the collaborative economy, the use of smart algorithms and filters might give rise to questions in this context (*see part 1*), calling for further research on the relationship between platforms and users.

4.2. The Services Directive

In this Section, we analyze the home-sharing sector in the context of the Services Directive. Some of the abovementioned Belgian, Swedish, and Hungarian statutes and regulations transposed this directive to the legal orders of these Member States.

Article 49 TFEU concerns the establishment of EU natural persons and companies, subsidiaries and agencies with a certain degree of permanence. In the case of collaborative practices, the existing local obstacles do not reside at this level. Platforms can in theory become established in another Member State, but national and in particular local law might discourage locals from leasing their homes on these platforms by imposing excessive burdens. Although we are not aware of any national prohibition affecting directly the establishment of home-sharing platforms, it is worth referring here to EU case-law regarding this broader topic, notably

Centros.²⁷⁴ A few years after *Centros*, the Court stated that “the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators.”²⁷⁵

4.2.1. Services

“Services” are defined as a self-employed economic activity, *normally* for remuneration, that is, it constitutes consideration for the service in question. (Article 4 of the Services Directive) As decided in the case *Skandia*, this remuneration does not need to be paid directly to the recipient of the service.²⁷⁶ In addition, the remuneration does not need to be paid at the same time or within a short period of time of the provision of the service. Instead, the Court also decided in the same case that the time of the service provision and the remuneration may be separated by years or decades.²⁷⁷ The services must also be temporary “in light of the duration of the provision of the service (...) regularity, periodical nature or continuity.”²⁷⁸ As explained in section 2, some home-sharing platforms allow for exchanges compensated with indirect and future remuneration to other hosts within the same hospitality network.

4.2.2. National Restrictions: Public Interest and Proportionality Assessment

Despite the European-wide implementation of the Services Directive, multiple national barriers to the freedom of establishment and provision still remain. In 2002, a commentator, analyzing the regulation of hotels and the consolidation of the internal market, noted that “the common market, in one sense, is and never can be complete because as long as new technology and new marketing techniques force Member States to make new laws to deal with them, these laws will cause common market distortions.”²⁷⁹ Fast forward fourteen years and we realize that this statement is particularly true in the case of home-sharing platforms which challenge the

²⁷⁴ *Centros*, Case C-212/1999 [1999] ECR I-1459.

²⁷⁵ *SEVIC Systems* para 18, Case C-411/03 [2005] ECR-I-10805.

²⁷⁶ *Skandia*, Case C-422/01 [2003] ECR I-6817.

²⁷⁷ *Skandia*, Case C-422/01 [2003] ECR I-6817. See Catherine Barnard & Steve Peers (Eds), *European Union Law* (Oxford University Press 2014), p. 409.

²⁷⁸ *Schnitzer*, C-215/01 [2003] ECR I-14847.

²⁷⁹ Marc McDonald, ‘Hotels and the Common Market—Unfinished Business? Part One,’ (2002) *International Travel Law Journal* 153.

traditional provision of accommodation services in European countries. Now the freedom to provide accommodation services in all Member States does not only refer to hotel chains but also to foreign platforms that wish to facilitate local residents to offer their houses as temporary accommodation to tourists, many of them residents of other Member States.

In this Section, we analyze whether the national regulations described in Section 3 can be first qualified as restrictions to the freedom to provide cross-border services and the freedom of establishment, and if so, whether they can be justified in light of the public interest and are deemed proportionate in the sense defined by the case-law of the Court of Justice of the European Union (CJEU). The principle of proportionality requires the analysis of the adequacy of the national restriction, that is, the ability of the national rule to advance the relevant public policy; of whether this measure is the only option available to achieve this public interest goal, that is, no other means exist for doing so, and in case they exist, whether those means would be less restrictive.

4.2.2.1. Analysis of Services Directive: Overview

At a time when the EU aims to implement the Digital Single Market Agenda and thus further consolidate the internal market in the digital age, the development of the collaborative economy appears to open a window of opportunity to peer-to-peer cross-border transactions. However, the adoption of national and local restrictions on these transactions affects directly the provision of these peer-to-peer services, and indirectly the provision of intermediation services by digital platforms. This section delves primarily into the concerns regarding the compatibility of these national and local restrictions with the Services Directive.

When analyzing the cases of Brussels, Budapest, and to a much more limited extend, Stockholm, the following aspects pertinent to the Services Directive should be considered:

a) *Definition of “services”*: in the collaborative economy, the provision of services does not always require a remuneration. Although “the essential characteristic of a remuneration lies in the fact that it constitutes consideration for the service in question” (CJEU *Humbel*), as mentioned in the previous subsection, this consideration is not always easy to ascertain in the

case of home-swapping. This does not mean that it is inexistent (*see above* our analysis of *Skandia*). To illustrate, the resident that owns an apartment might offer to host tourists but only much later in time “have the right” to receive her compensation which might be provided by someone else other than the hosted tourists (*see above* section 2). While the type of consideration and the “paying party” do not affect the qualification of the activity as a “service” within the meaning of the TFEU and the Services Directive, these elements might be however problematic for national authorities that might establish equally onerous burdens for commercial home-sharing and collaborative home-swapping. This appears to be the cases of Brussels and Budapest, where both forms of home-sharing are subject to onerous registration requirements.

(b) *Point of single contact* (Article 6 of the Services Directive): while Brussels and Budapest do not seem to have simple administrative procedures, there appears to be an attempt to have a single point of contact: the mayor and the local city halls in the Brussels region, and the local notary for Budapest. Besides the official authorization procedure, individuals wishing to rent out their houses must nonetheless seek the authorization of other parties, including the housing associations; banks; and inform their insurance companies.

(c) *Electronic procedures* (Article 8): the cities under analysis offer abundant information on their websites on the applicable authorization schemes. However, in the case of Budapest, the tax reporting procedure does not allow hosts to inform the tax authorities electronically.

(d) *Authorization schemes or procedures* (Articles 9 to 13, 16 to 21): the registration procedures in Brussels and Budapest which must be initiated before hosts start renting their houses can be qualified as “authorization schemes.” Although the Brussels model is called “declaration” (which would mean that this formality would not fall within the rules on “authorization schemes”), the procedure implies *ex ante* and *ex post* controls and appears to involve the adoption of administrative decisions that exceed the mere acknowledgement of facts that declarations usually entail.

(e) *Conditions for granting an authorization* (Article 10): the conditions for granting authorizations should be clear and unambiguous, non-discriminatory, be justified by overriding reasons of the public interest, and be proportionate. In the case of Brussels, the 2014 Ordonnance

and the 2016 Implementation Decree appear to impose on the hosts (“*hébergement chez l’habitant*”) onerous requirements, which bring them too close to hotels or other forms of professional tourist accommodation. The extremely detailed requirements also show a misperception of the collaborative economy. In addition, not all of these detailed prescriptions are justified by the public interest. An example is the number of available towels, tables, clothes hangers or chairs. While Brussels requires hosts to offer one towel per guest, it is not uncommon for guests sharing or swapping houses to bring their own linens. Other examples of unreasonable conditions are the requirement to display prices, offer a personalized welcome (many hosts are on vacation and often arrange the key to be delivered by friends or neighbors), and the inadmissibility of renting couches in studios and in a livingroom more exotic forms of accommodation (*e.g.*, a sleeping place in a treehouse—available on Airbnb—would hardly fulfill the requirements imposed by the government of Brussels-Capital). While the underlying privacy reasons of some of these provisions are clear, it is worth noting that hostels also offer shared dorms with shared bathrooms with minimal amenities and privacy. Staying at a hostel also implies in some cases sharing a bedroom and bathroom with strangers. At the resemblance of Brussels, Budapest also imposes stringent and detailed requirements on hosts leasing “other accommodation.”

The application of Swedish housing law and landlord-tenant rules to home-sharing platforms regarding the individual authorization of each sublease offered on Airbnb might stand on the way of the expansion of these services as it might be particularly burdensome for individuals that travel often but for short periods of time. However, these provisions were not originally designed for home-sharing. Therefore, a proportionality analysis in the context of the Services Directive does not appear to be relevant here.

4.2.2.2. *National restrictions*

In this section, we provide an overview of the most restrictive national restrictions imposed by Brussels and Budapest and their public interest justification.²⁸⁰

²⁸⁰ Since Stockholm does not present any specific regulation on home-sharing, we exclude this city from the

Brussels

With the enactment of the Implementation Decree in March 2016, Brussels imposes a very stringent regulatory framework on home-sharing. The *2014 Ordonnance* and the Implementation Decree prescribe extremely detailed rules on registration and authorization procedures, facilities, furniture, and appliances of accommodation; prohibition of shared rooms; “logo” and visibility of price disclosure (*see above 2014 Ordonnance*). The Implementation Decree also imposes rules on the interaction between hosts and guests which might discourage many individuals from engaging into collaborative practices and leasing their house while on vacation (e.g., how hosts should welcome guests and cleaning).

The regulations on the number of hangers in a closet, furniture (e.g., number of chairs and “matching tables”), bathroom and kitchen appliances appear to be excessive, particularly in the context of the collaborative economy. Both Brussels and Budapest regulate these elements in a very detailed manner.

It is important to distinguish between national restrictions since some provisions address important concerns. While the imposition of sufficient “lighting” can be justified on the grounds of public safety, this argument appears to be excessive in the case of furniture. The Implementation Decree compares a bedroom advertised on a home-sharing platform to a hotel room, imposing similar requirements. However, many travelers nowadays often prefer a “home-sharing stay” over a hotel because they seek to experience a “different vacation” rather than a standardized hotel room. Therefore, the requirements imposed both by Hungarian legislation and by the recent Brussels Ordonnance and Implementation Decree transcend the mere argument of the public interest as they understand and regulate home-sharing through the lens of hotels and not of collaborative economy.

Brussels appears to justify its detailed regulations on a number of public interest justifications, including:

- (i) “dignity”, salubrity and privacy of tourist accommodation – one guest bedroom required (instead of shared bedroom), minimal cleaning requirements;
- (ii) public safety: fire certification; sufficient lighting; maximum occupancy;

- (iii) combat tax evasion and maintain level-playing field: registration obligations, payment of income and local taxes.

Budapest

The regulation of home-sharing in Budapest precedes the expansion of home-sharing platforms. Therefore, the existing registration procedure of “other accommodation” seeks to address both offline and online practices, but not necessarily the collaborative economy as such. That is, existing Hungarian legislation does not consider the model of “sharing a house” or “swapping a house” in the context of collaborative economy. Rather, it regards “other accommodation” as simply an unlicensed guesthouse or B& B.

Budapest imposes particularly detailed authorization procedures, declaration and reporting obligations which can be particularly restrictive in the digital age. To illustrate, “until the 15th day of the month following the provision of accommodation services, a tax statement has to be sent to the local government stating the monthly income. This statement must be *faxed or personally handed to the local government* but it cannot be sent via e-mail.” The public interest of this provision appears to be difficult to explain in the digital age. At the resemblance of Brussels, also “hotel-like” requirements are imposed. An example is the “daily cleaning of the common areas”, which while reasonable in the context of a hotel, where guests are not expected to clean after they use kitchen utensils, might not be justified in the context of the collaborative economy, where guests might in fact be willing to clean after using common areas as they will be rated on these grounds.

Budapest appears to justify some of its restrictions on two types of public interest justifications:

- (i) Public health, food safety (regarding related services, “notification of competent authorities regarding the serving of raw food”) and guest safety (after-hours access).
- (ii) But primarily, combat black economy and tax evasion: registration procedure and tax obligations.

Both Budapest and Brussels regulate home-sharing in detail and do not distinguish between home-sharing and nonmonetary home-exchange or home-swapping. This might mean that people engaging in home-exchange in the context of solidarity networks might be required to comply with these detailed provisions. However, some of the recent regulations introduced by the Implementation Decree appear to be more restrictive than Hungarian legislation as they request home-sharing hosts to offer the same amenities as hotels. While a “good host” would probably fulfill most of the requirements, the Brussels Implementation Decree does not leave room for much innovation in the home-sharing sector. In the following table we provide an overview of some of the mentioned national restrictions and their underlying public interest:

Public Interest Justification	Examples of regulatory provisions: <i>Brussels</i>	<i>Budapest</i>
Fire safety	Certificate of fire safety	Not required to comply with fire safety regulations applicable to hotels
Safety	Availability of host: welcome and throughout stay; after-hours access; First-aid kit	Availability of hosts: after-hours access
Privacy	Only individuals rooms with key lock; “blackouts”, bathroom window (temporary blackout)	No explicit provisions
Health	e.g., window/Adequate ventilation; cleaning and daily maintenance of common areas	e.g., “related services” (e.g., raw food, additional requirements), frequent cleaning

4.2.2.3. *Justification*

Tourist accommodation services and short-term leases have been regulated services for many decades. Existing legislation and regulation is justified by the protection of public policy (which

requires the existence of a serious threat to society),²⁸¹ the public interest and the private interests (e.g., consumer protection) of the service beneficiaries. In 2016, many of these national and local regulations might no longer be necessary, adequate, and proportionate in light of existing reputational mechanisms that provide additional information on the service providers and consumers, the wide availability of information and technologies such as GPS, and the different consumer expectations in the peer-to-peer economic model.²⁸²

The admissibility of public interest restrictions in light of article 16 of the Services Directive, can be asserted after submitting them to the principle of proportionality, as elaborated in the CJEU case-law. The free movement of rights conferred on natural and legal persons by EU law are not absolute.²⁸³ In certain circumstances the free movement of services can be restricted in compliance with EU law, provided that the national restriction can be justified. In the case of “discriminatory or distinctly applicable restrictive measures, a derogation ground expressly provided for in the TFEU can be engaged.” For “non-discriminatory restrictions, that is, indistinctly applicable restrictive measures, an overriding requirement relating to the public interest that is capable of justifying a restriction of the fundamental freedoms established by the Treaty can be demonstrated;” *and in either case* the national restrictive measure also satisfies the proportionality test, that is, “it is appropriate and necessary for achieving the relevant public interest objective.”²⁸⁴

Treaty-based derogation grounds refer in the case of article 56 TFEU (services) to “grounds of public policy, public security or public health” (see article 62 TFEU). The concept of public policy has not been interpreted in a very broad way by the Court as the term might suggest.²⁸⁵

The assessment of the compatibility of the national regulation of home-sharing in Brussels, Budapest, and Stockholm with EU law implies considering whether:

1. existing regulations are non-discriminatory;

²⁸¹ Judgment of 14 October 2004, *Omega*, Case 36/02.

²⁸² Communication from the Commission, Upgrading the Single Market: More Opportunities for People and Business, p. 7.

²⁸³ Niamh Nic Shuibhne, ‘Exceptions to the Free Movement Rules’, in Catherine Barnard & Steve Peers (Eds), *European Union Law* (OUP 2014) p. 473.

²⁸⁴ *Id.* at 473-474.

²⁸⁵ See Case 231/83 *Cullet v Centre Leclerc* [1985] ECR 305, para 30.

2. the notion of *public interest* used in defense of these national and local regulations is too broad, is somehow outdated or needs to be rethought in light of the new model economic model established by the collaborative economy and is compatible with the understanding of valid public interest defenses generally accepted in EU case-law;
3. the mentioned national or local regulations and policies are *proportionate* and are not creating *unnecessary and excessive* “regulatory obstacles to the mobility of professionals [here understood as digital platforms offering short-term accommodation], lowering productivity.”²⁸⁶

In the last years, the Court has accommodated a number of public interest concerns invoked by the States. Examples are the combat of drug tourism (*Burgemeester van Maastricht*, C-137/09), ensuring road safety (*Schaik*, C-55/93), the maintenance of press diversity (*Heinrich Bauer Verlag*, C-368/95), the cohesion of a tax system (*Bachman v. Belgian State*, C-204/90), the protection of national or regional socio-cultural characteristics (*Stroke-on-Trent and Norwich City Council*, C-169/91), the protection of the recipients of a service through the application of professional rules (*Van Wasemael*, C-110/78), and labor protection (*Rush Portuguesa*, C-113/89).

(i) Non-discrimination

First, we inquire whether the national rules on tourist accommodation in Stockholm, Brussels, and Budapest are non-discriminatory. In Section 3 there was no reference to a potential discrimination between national and foreign home-sharing platforms or national or foreign hosts wishing to rent their houses. In Budapest, only mention must be made to the “number of national and foreign tourists”, without including their personal details. However, the existence of highly complex and contextualized access conditions as the ones described both in Brussels and Budapest raise doubts as to the potential discouragement of home-sharing activities, notably when intermediated by smaller foreign platforms which might not be able to advise local residents as to the registration procedure. Although we consider that these restrictions target primarily *all* nationally and internationally mediated transactions, we should underline that it could be argued that the complex registration procedure conditions could possibly amount to

²⁸⁶ Communication from the Commission, Upgrading the Digital Single Market, p.7.

restrictive measures, in the sense described by the Court of Justice of the European Union in the 2010 cases *Commission v. Portugal*:

“As regards the compatibility with Article 49 EC of the national scheme at issue, it has consistently been held that Article 49EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, *but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services* (see, in particular, Case C-350/07 Kattner Stahlbau [2009] ECR I-1513, paragraph 78 and the case-law cited).”

“It follows unequivocally from the case-law cited above that the scheme established by Decree-Law No 12/2004 – under which even undertakings which are already legally established in another Member State must, before being able to provide temporary construction services in Portugal, be authorised by the Portuguese authorities to provide the type of services which they wish to carry out – constitutes a restriction of the freedom to provide services.”²⁸⁷

(...)

It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions of that freedom [emphasis added] (see, inter alia, Case C-79/01 Payroll and Others [2002] ECR I-8923, paragraph 26; Case C-442/02 CaixaBank France [2004] ECR I-8961, paragraph 11; and Case C-157/07 KrankenhausRuhsitz am Wannsee-Seniorenheimstatt [2008] ECR I-0000, paragraph 30).

Another important consideration from the Court was:

²⁸⁷ Case C-458/08 *Commission v Portugal* [2010] ECR I-0000 §83, 86.

*Even though those rules apply in exactly the same way to operators established in Portugal and to those originating in other Member States, they could lead to the prevention of operators not satisfying the criteria defined there from establishing in Portugal for the purpose of carrying on the activity of vehicle inspection. In particular, as the Commission claims, the public interest criterion, to which the grant of the administrative authorisation concerned is subject, may open the way for an arbitrary use of the discretion on the part of the competent authorities, permitting them to refuse that authorisation to certain interested operators, although they fulfil the other conditions laid down by the legislation.*²⁸⁸

Similarly, in the *Commission v. The Netherlands*, the Court asserted that:

*“any national measure which, even though it is applicable without discrimination on grounds of nationality, [can be restrictive if it] is liable to hamper or to render less attractive the exercise by Community nationals of the freedom of establishment guaranteed by the Treaty (see, to that effect, Case C-19/92 Kraus [1993] ECR I-1663, paragraph 32).*²⁸⁹

The complexity of the national registration procedures and the discretionary character that some of their steps appear to have, do not restrict the establishment of home-sharing platforms directly in Brussels or Budapest. However, they might *indirectly* discourage the provision of services by these platforms as local hosts might not be willing to undergo a complex procedure with challenging administrative and tax obligations just to rent one spare room or their entire house while on vacation. The question is whether these regulations cause such a “degree of inconvenience” that they are susceptible of discouraging the collaborative economy to a significant extent.²⁹⁰ These procedures have thus the potential of indirectly favoring local operators that are well-acquainted with the applicable administrative procedures.

²⁸⁸ Case C-438/08 *Commission v Portugal* [2009] ECR I-0000 §28-31.

²⁸⁹ Case C-299/02 *Commission v Netherlands* [2004] ECR I-9761 §15.

²⁹⁰ Case C-168/91 *Konstantinidis* [1993] ECR I-1191 §15: “Rules of that kind are to be regarded as incompatible with Article 52 of the Treaty only in so far as their application causes a Greek national such a degree

(ii) Public interest

In the three cities under analysis public interest justifications appear to underlie some of the existing restrictions or at least the Swedish skepticism regarding the expansion of home-sharing platforms. These interests ranged from the thus far fairly unregulated Stockholm with serious concerns regarding the abuse of home-sharing platforms to engage into human trafficking and illegal prostitution; to the combat of tax evasion and black economy (Budapest); and in Brussels the need to guarantee a safe (both in terms of food and fire safety) accommodation with sufficient privacy for both the host and tourist.

Not all restrictions imposed by Belgian and Hungarian legislation appear to be sufficiently grounded on public interest grounds. This is the case of the very detailed furniture and bedding requirements which do not appear to serve any clear public interest. These restrictions are present both in Budapest and Brussels. However, Brussels appears to take a step forward by requiring the 24h availability of a bathroom, imposing specific privacy requirements, and that hosts are welcomed by the host and that she or he (and not a neighbor or friend, as it often happens in the context of Airbnb) remains fully available.

It is worth noting that the CJEU has been critical regarding the nature of some public interest justifications:

“public policy and public security may not be invoked unless there is a genuine and sufficiently *serious threat to a fundamental interest of society* (see, inter alia, Case C-355/98 Commission v Belgium [2000] ECR I-1221, paragraph 28; Case C-54/99 Eglise de scientologie [2000] ECR I-1335, paragraph 17; and Commission v Spain, paragraph 47).

As mentioned earlier, Hungarian law in the home-sharing sector is fundamentally justified by the need to legalize a longstanding practice and limit the expansion of the black economy. While the combat of tax evasion and black economy are important policies for any Member State

of inconvenience as in fact to interfere with his freedom to exercise the right of establishment enshrined in that article.”

in order to guarantee the maintenance or growth of tax revenue, it is worth noting that the CJEU decided in 1998 that:

“In answer to the argument that revenue lost through the granting of tax relief on losses incurred by resident subsidiaries cannot be offset by taxing profits of non-resident subsidiaries, it must be pointed out that diminution of tax revenue occurring in this way is not one of the grounds listed in Article 56 of the Treaty and cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify unequal treatment that is, in principle, incompatible with Article 52 of the Treaty.” Case C-264/96 ICI [1998] ECR I-0000 §28.

And:

“The need to prevent the reduction of tax revenue is not one of the grounds listed in Article 46(1) EC or a matter of overriding general interest which would justify a restriction on a freedom introduced by the Treaty (see, to that effect, Case C-136/00 Danner [2002] ECR I-8147, paragraph 56, and Skandia and Ramstedt, paragraph 53).”

Case C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas [2006] ECR I-07995 § 49

However, Member States could still turn to the SEVIC case:

“it is not possible to exclude the possibility that imperative reasons in the public interest such as (the preservation of the effectiveness of fiscal supervision and *the fairness of commercial transactions* (see Case C-167/01 Inspire Art [2003] ECR I-10155, paragraph 132), may, in certain circumstances and under certain conditions, justify a measure restricting the freedom of establishment. Case C-411/03 SEVIC Systems [2005] ECR I-10805 §28

“But such a restrictive measure would also have to be *appropriate for ensuring the attainment of the objectives pursued and not go beyond what is necessary to attain them*. Case C-411/03 SEVIC Systems [2005] ECR I-10805 §29.”

The CJEU has created therefore room for an exception in the case of tax revenue when such national policies aim to promote the fairness of commercial transactions and are proportionate (“appropriate for ensuring the attainment of the objectives pursued and not go beyond what is necessary...”). As explained in the Opinion of Van Gerven AG in the case SPUC v Grogan (1991):

“it is not sufficient for a national rule to be in pursuance of an imperative requirement of public interest which is justified under Community law, *it must also not have any effects beyond that which is necessary. In other words, it must comply with the principle of proportionality.*”

Even if the CJEU accepts that a national measure may legitimately restrict the freedom to provide (or receive) services, this measure can only be justified if it is “appropriate” to guarantee the attainment of the objective in question (*e.g.*, protect the interest in safe accommodation and individual privacy, preserve the characteristics of neighborhoods). The proportionality test involves however a multi-step analysis, as developed in the *Gebhard*²⁹¹ case concerning the freedom of establishment of a German lawyer in Italy:

- ¶i) The restriction must be applied in a non-discriminatory manner;
- ¶ii) It must be justified by imperative requirements of public interest (*necessary*);
- ¶iii) It must be suitable for securing the attainment of the objective which it pursues (*appropriateness or suitability*);
- ¶iv) And it must not go beyond what is necessary in order to attain it (proportionality *stricto sensu*, least restrictive measure (often considered with the criterium of “necessity”).

²⁹¹ Case C-55/94 Reinhard Gebhard v. Consiglio dell’ Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165.

“Appropriate measures” are those that employ means that “are suitable for the purpose of attaining desired objectives.”²⁹² That is, there should be a relationship (desirably) of cause and effect between the measure adopted and the legitimate aim, otherwise the measure might be interpreted as being merely protectionistic.²⁹³ Unsuitable measures are those that are “manifestly inappropriate to achieve the objective which the competent institution is seeking to pursue.”²⁹⁴ The assessment of “necessity” and “proportionality *stricto sensu*” imply a more substantive test that assesses whether there are other equally effective and least restrictive measures in terms of achieving the public interest.²⁹⁵

In the following section we inquire whether the abovementioned national restrictions can be considered proportionate in light of these criteria.²⁹⁶

(iii) Proportionality

The proportionality analysis of the abovementioned national restrictions is not entirely straightforward in the cities under analysis. The public interest arguments invoked are different but the national measures are similar in that they consist of an authorization procedure:

- a) Brussels: public safety, dignity and privacy of both guests and hosts.
- b) Budapest: combat tax evasion;
- c) In Stockholm, there are still no specific restrictions but it is possible that future restrictions to be approved will aim to tackle the combat human trafficking.

The authorization and registration procedures are deemed to provide a legal framework that guarantees that the houses exist, are safe, and the hosts pay taxes on the income received. In addition, these procedures strive to maintain a certain level-playing field. However, the Hungarian and the Brussels authorization procedures are very detailed and might seem onerous for hosts that only wish to lease a spare room while on vacation. In Brussels, home-sharing and

²⁹² See Case C-463/01 *Commission v Germany* [2004] ECR I-11705.

²⁹³ Jan H. Jan, ‘Proportionality Revisited’ (2000) 27(3) *Legal Issues of Economic Integration* 239, 240.

²⁹⁴ Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, para 14.

²⁹⁵ See Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR 3961, para 12.

²⁹⁶ On the principle of proportionality and the internal market, see, e.g., Wolf Sauter, ‘Proportionality in EU Law: A Balancing Act?’ (2013) 15 *Cambridge Yearbook of European Studies* 439.

home-exchange appear to be treated like hotels, although this goes against the general objectives of the collaborative economy (*see section 1*).

Before delving into the characteristic three-step analysis underlying the proportionality test, we inquire first whether the national measures under analysis aim to protect a legitimate goal. This appears to be the case of most provisions, particularly if we interpret Budapest's policy in the sense of protecting the coherency of its tax system and combat black economy; and the Brussels' concern with the safety and privacy of guests. Second, we question whether the measures should be qualified as discriminatory but still considered justified by a legal ground (*see above*), or whether they are non-discriminatory measures justified by public interest.

At first blush, the mentioned national restrictions in Hungary and Belgium do not appear to be non-discriminatory in terms of nationality. The restrictions are in fact applied to local citizens or residents and have an indirect impact on both local and foreign digital platforms. These restrictions do not appear to intend to discriminate between the national and foreign provision of services, but rather reduce the number of unlicensed tourist accommodation units. As mentioned earlier, we do not discard the possibility that in practice national home-sharing platforms might have an advantage in relation to foreign ones, but the cities under analysis appear to be more concerned with the practice as a whole. Regulators are also under the pressure of both national hotels and international hotel chains.

Existing national legislation implementing the E-Commerce Directive does not distinguish between national and foreign information society services providing these type of services. It is important to note that the possibility to derogate from the directive dispositions transposed into national law is explicitly stated for example in the Belgian statute that implements the e-commerce directive. The 2003 Belgian Statute (11.03) refers to the possibility of adopting national measures proportionate to their objectives in derogation of the free movement of information society services if such measures are necessary to "protect the public order, namely the safeguard of criminal investigations, racial discrimination (...) and attempted violations of human dignity; public health; national security; consumer protection."²⁹⁷ This article mirrors the

²⁹⁷ *Loi du 11 mars 2003 sur certain aspects juridiques des services de la société de l'information visés à l'article 77 de la Constitution, Moniteur Belge, 17.03.2003, N.90, p.12960, Article 2.*

text of the E-commerce directive, as mentioned above. However, as we underlined above, not all of the provisions imposed by the Brussels legislator are justified by a public interest or proportionate.

The conflict of interests in the case of home-sharing is not primarily between nationals and service providers from other Member States or third countries (notably, the USA). It is rather between incumbents (hotels, hostels, registered B&B, and real estate agents specialized in short-term leases) and the digital platforms and their users. In this sense, the potentially non-discriminatory character of the national measure refers to the application of similar criteria in order to guarantee an equivalent level-playing field to different realities. That is, hosting tourists one month a year while on vacation should not be compared to managing a professional B&B. The imposition of onerous requirements which are similar to that of B&B or guesthouses and do not take into account the informal dynamics underlying the collaborative economy (*e.g.*, requirement to offer an individual room and not merely a couch in the living-room) suggest this tendency. Therefore, some of the restrictions from the Brussels 2014 Ordonnance and the respective Implementation Decree as well as the abovementioned Hungarian legislation might therefore raise some doubts regarding their proportionality. Although both laws assume the temporary and non-professional character of these activities, the authorization procedures are quite lengthy and complex (see above).

Second, it is important to inquire whether the mentioned existing national restrictions (Brussels—still to enter into effect; and Budapest) or potentially forthcoming policies (Sweden) are adequate to achieve the goals they pursue. The national restrictions in Brussels and Budapest impose complex authorization and registration procedures. The objectives pursued are different: Brussels aims to guarantee the minimal quality of the provided accommodation including its safety, hygiene, and privacy; and Budapest combat tax evasion and the expansion of the black economy. Stockholm does not have specific regulations yet at this level but if it will in the future, we can imagine that they would aim to control human trafficking and illegal prostitution. While these are all legitimate objectives, the question is whether the national authorization measures are suitable, necessary, and are the least restrictive instruments to attain these

objectives. These criteria have been developed in the case-law of the CJEU, notably in the cases *Cassis de Dijon* (1979).²⁹⁸

The Belgian and Hungarian measures are not manifestly unsuitable. They consist of common authorization processes and are imbued by the need to protect public safety, hygiene, and avoid tax evasion. Imposing an authorization scheme is in itself a suitable measure to pursue this goal. However, both Brussels and Budapest impose multiple and very detailed requirements on individuals that only wish to rent their houses a few days or weeks a year. The processes are perhaps too complex for the occasional and non-professional renting of a house. It is worth asking whether all these dispositions and requirements are necessary (and, moving to the following criteria, not excessive) to protect the mentioned goals. For example, must the host always guarantee the weekly cleaning of common areas (Brussels) or can she agree with the long-term tourists that they will take over these tasks, which can be considered acceptable given the low rates? This type of agreement is indeed quite common in the collaborative economy.

It is namely doubtful whether there are not least restrictive means to achieve the same goals, and whether these measures are even appropriate, as in the Hungarian case, non-compliance appears to be a well-known problem for many years (see above). In addition, the proportionality analysis typically requires verifying whether there is a means-ends compatibility between the national restriction and the attainment of an imperative public interest:

“the Court has held that, in order to establish whether a provision of Community law complies with the principle of proportionality, *it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objectives and whether they do not go beyond what is necessary to achieve it* (see, in particular, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755, paragraph 57).” Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405 §54

According to existing case law restrictive licensing schemes should not only be suitable for achieving a certain goal, but they should also do so in “a consistent and systematic manner.”²⁹⁹

²⁹⁸ Case 120/78 *Rewe –Zentral AG v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR 649.

²⁹⁹ Case c-243/01, *Gambelli* [2003] ECR I-13031.

The Belgian and Hungarian practices should be not only suitable to achieve the mentioned goals, but they should also be consistent with other national policies regarding the protection of safety, for example. While these national measures appear to be consistent with the regulation of tourist accommodation, it is worth asking whether this is adequate considering the different nature of the collaborative economy. That is, Brussels is regulating two different realities with very similar regulations, refusing to embracing the distinctive character of the collaborative economy. In addition, it is important to inquire whether it would not be possible to simplify some of these procedures for occasional practices.

The multiple-step test of proportionality also implies assessing whether the measure does not have any excessive or disproportionate effect on the applicant's (host) interest and potentially and indirectly that of the online platform. That is, while the tests of suitability and necessity were focused on the efficiency relationship between means and ends, this last step refers to the individual interest. It implies balancing the "advantages of the legislative measure" with the disadvantages that this has on individual interests.³⁰⁰ This step is also an *excessive burden* test that implies analyzing the balancing of different interests. In the specific case of home-sharing it is worth asking whether requiring the hosts to register their houses and complying with complex registration and reporting procedures is indeed proportionate when hosts only intend to rent their houses for a short period (*e.g.*, two weeks while on vacation). The same applies to the hosts that engage in home-exchange in the context of solidarity networks. Here, the imposition of reporting requirements (*see* Budapest) appears to be manifestly excessive, considering the potential advantages.

In this context and considering the practices of other cities (for example, Amsterdam), it might be worth inquiring whether instead of the authorization scheme and reporting obligations, more responsibility could be shifted to the platforms that are in general in a better position to comply with legal requirements, namely by asking them to collect taxes for the national and local governments. In addition, many of these platforms already exert a certain amount of control on the services provided by the hosts and appeal to be keen on self-regulating or trying to find their own solutions.

³⁰⁰ Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Brill 2015) 37.

The Services Directive aims to ensure that Member States do not impede the freedom to provide services by maintaining regulations that are supposed to restrict competition for the sake of the regulation of different market failures such as asymmetric information, monopolistic behavior, and other negative externalities. A part of the literature on collaborative economy has however argued that many of these market failures are not pertinent in the context of the digital economy.³⁰¹ Rather, the existence of peer-review mechanisms provides information to other users about the general conditions of the tourist accommodation. However, the technological specificities and advantages of home-sharing platforms do not solve problems such as the need to ensure that the house is inspected and fulfills a minimal amount of safety requirements (in the case of Airbnb a photographer may be sent to the location to photograph the accommodation, but other platforms allow users to upload their own pictures), the need to control the professional use of platforms namely by limiting the number of nights hosts are allowed to rent their houses (see Brussels), or the control of negative externalities which might have an important impact on the public order as described in the Swedish case.

In conclusion, while some national and local restrictions that primarily serve tax policies (Budapest) and the maintenance of a level-playing field between home-sharing accommodation and hotels (Brussels) might be difficult to justify in light of the public interest and the principle of proportionality; other existing or forthcoming measures that seek to protect hosts, neighbors, and tourists against unsafe living conditions and criminality appear to be justified by a public interest, as long as the criteria imposed are not too onerous for the hosts and do not discourage users to embrace the benefits of the collaborative economy.

5. Suggestions

Collaborative economy practices have had a disruptive effect not only on the consumption of assets and services but also on urban housing and policy, prompting local regulators and

³⁰¹ Molly Cohen & Arun Sundararajan, 'Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy' (2015), *The University Of Chicago Law Review Dialogue* 116.

transnational think tanks to rethink existing legal barriers to certain forms of housing and home-sharing.³⁰² This also comes at a time when different public consultations have taken place in the context of the Digital Single Market Agenda. In 2015, the Swedish National Board of Trade published a report on the regulation of online trade and the existing national barriers to electronic commerce in the EU. The Board advised against the adoption of new rules in this area, noting that:

“many of the problems affecting cross-border e-commerce are related to the functioning of the market rather than to intrusive legislation. Issues taken up by e-traders such as pricing for dispatching goods over the border, the role of quasi-monopolistic players on certain markets (apps, search engines, cloud providers, etc.) or the lack of consumer trust in online cross-border transactions *are not necessarily solved by adopting new laws*. [emphasis added] The public authorities, whether national or at EU level, and the market players may need to rethink ways to address these issues if they want to achieve a truly integrated market for e-commerce in Europe.”³⁰³

Recently, CERRE also advised against the adoption of new rules to regulate the EU digital market:

“EU rules for digital services should not duplicate the existing general rules applicable to all services (internal market law, Services Directive, competition law (...)) and should be limited to what is strictly necessary given the specific characteristics raised by the digitalization of the services.”³⁰⁴

Expert in the “sharing economy”, Janelle Orsi has suggested that cities should “permit residents to use their homes for short-term renters or guests as a way to diversify local tourism

³⁰² John Infranca, ‘Spaces for Sharing: Micro Units Amid the Shift from Ownership to Access’ (2015) 43 Fordham Urban Law Journal (forthcoming Fall 2015), working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678072

³⁰³ Swedish National Board of Trade (Kommerskollegium), ‘Online Trade, Offline Rules: A Review of Barriers to E-Commerce in the EU’, (2015), available at <http://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-online-trade-offline-rules.pdf>, p.3.

³⁰⁴ CERRE, *An Integrated Regulatory Framework for Digital Networks and Services: A CERRE Policy Paper* (2016), available at http://cerre.eu/sites/cerre/files/160127_CERRE_IntegratedRegulatoryFramework_Final_1.pdf

opportunities and to help residents offset high housing costs.”³⁰⁵ This would recognize that “the purpose of sharing is not necessarily to profit, but, rather, to offset the cost of housing.”³⁰⁶ This would imply however a simplified approach to the registration of hosts engaging in home-sharing practices. In this light, the first step that is suggested is the adoption of a clear definition of “collaborative economy services” that distinguishes between the underlying ratio of the regulation of hotels and that of collaborative economy services. While hotels offer professional services, home-sharing and home-exchange practices are deemed to be sporadic, operated within a solidarity or collaborative network consisting of peers and not professionals. Therefore, a simple registration duty with the limitation of the number of consecutive or total days a house can be rented on a home-sharing platform or the regulation of maximum occupancy are examples of reasonable requirements in this regard. Complex authorization procedures that require hosts to clean facilities every day, change towels, have a certain number of tables or chairs are examples of excessive dispositions that might stifle the collaborative economy.

Simplification and Transparency

Some of the national regulations analyzed in Section 3 impose burdens primarily on the providers of accommodation who are private individuals, mostly local residents (and probably nationals). They are also, in the case of home-sharing, non-professionals (“prosumers” at most, see above) who might not be the best parties to comply with complex regulations. Therefore, it is important to guarantee that declaration procedures are as simple as possible and do not impose unnecessary burdens.

As mentioned in the Commission’s Communication “Upgrading the Single Market”, access to reliable and accessible information on applicable requirements is a common barrier to the provision of services in Member States.³⁰⁷ The complex list of requirements to be fulfilled both in Brussels and Budapest illustrate these potential challenges, even if in the Hungarian case, the city might argue in its defense that there is minimal compliance with existing rules and the sector

³⁰⁵ J. Orsi et al., *Policies for Shareable Cities* 27 (2011), see summary of the report <http://www.shareable.net/blog/policies-for-a-shareable-city>.

³⁰⁶ Orsi et al. *Policies for Shareable Cities*, 27.

³⁰⁷ Communication from the Commission, *Upgrading the Digital Single Market*, p.9.

is adequately regulated considering the longstanding experience with “Zimmer Frei” accommodation offers.

The existing authorization procedures for home-sharing platforms are fairly complex both in Brussels and Budapest. In Budapest, the registration with the local notary might be closer to a “one-stop-principle” but it implies taking multiple bureaucratic steps which might be onerous to private parties seeking to rent their units on a sporadic basis. In addition, the notary seems to be obliged to notify other public bodies (for example competent on food safety), which suggests the potential involvement of other agencies in the process, adding complexity to the registration process.

The minimal regulation of the digital platform (besides that of the property) would facilitate the provision of services and could potentially limit the expansion of the shadow economy since platforms have access to the identity of hosts and can thus collect taxes for the government. The simplification of the existing procedure could potentially facilitate the legalization of multiple units and impede the further proliferation of the shadow or black economy. The application of “services passports” or “once only principle” might have limited applicability in the case of home-sharing platforms because existing regulations are not directed towards digital platforms, but housing units and their hosts. In addition, the decision on whether a house is suitable for short-term lease is casuistic as it depends on the specific characteristics of the unit. It is important to separate the regulation of the platform as the intermediary or broker from that of the property offered on the digital platform.

In this part, we suggest a number of other potential solutions for a legal internal market approach to the collaborative economy in the specific case of home-sharing:

- a) The collaborative economy should be approached on a sector-by-sector basis, incorporating feedback from platforms and end-users, involving a broad set of stakeholders in consultations. The European Commission’s open consultation process in 2015 is an example of this effort.
- b) Mitigate the impact of existing national regulations that unintentionally obstruct sharing ventures and allow permits to support new collaborative-economy business models.

- c) Introduce mandatory requirements in existing legal frameworks for shareable products in order to promote sustainable consumption(e.g., minimum or maximum number of days for home-sharing, recyclability requirements, reusability);
- d) Facilitate the establishment of minimum safety and quality standards for collaborative economy markets and promotion of "trust certificates" that could encourage consumers to participate in peer-to-peer activities and platforms.³⁰⁸
- e) Develop and implement appropriate legal mechanisms, insurance products and tax provisions for collaborative forms of business, consumption, production and exchange. Specific requirements could include tax withholding and tax collection by platforms.
- f) *Home-sharing and social empowerment*: aging is a significant problem in the European Union. Collaborative economy platforms could be used to reduce isolation of the elderly. These citizens might have more difficulties in complying with complex authorization schemes and, at the resemblance of many other sporadic users of the collaborative economy, could benefit from simplified authorization schemes.

In times of economic crisis, the possibility to rent a spare room or the entire house during one's vacation can assist many families and allow owners to shift and share the burden of ownership, protecting some home-owners against the effects of negative housing market downturns.³⁰⁹ Temporary home-sharing and in particular home-swapping should be therefore embraced by national and local governments as it increases competition, lowers prices, and increases choice in the accommodation sector. In addition, the collaborative economy promotes tourism within Europe. Home-sharing must be nevertheless responsible, which justifies the need for some of the restrictions adopted by national legislators and regulators. However, these restrictions should not compare home-sharing units to hotels or other tourist facilities operated by professionals.

6. Conclusion

³⁰⁸ See European Sharing Coalition, <http://www.euro-freelancers.eu/european-sharing-economy-coalition/>

³⁰⁹ Jamila Jefferson-Jones, 'Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconditional Taking?', (2015) 42 *Hastings Constitutional Law Quarterly* 557, 575.

In this paper, we analyzed the definition of collaborative economy services and how the business model behind them diverges from the traditional capitalist model upon which incumbents are based.

Home-sharing and home-exchange platforms can be qualified as information society services since their main activity is to provide mediation services: they match supply and demand, host advertised listings, provide peer-review mechanisms, and help solve conflicts. However, in order to establish their liability for third-party actions and the upload of illegal listings, it is important to understand the degree to which these platforms control the information posted on their platforms. Further empirical research or a case-by-case analysis would be necessary to decide upon the possibility of home-sharing platforms to invoke a “hosting defence” (article 14 of the E-Commerce Directive) or to be held liable for illegal listings. This is only one of the many concerns in the context of digital home-sharing.

Despite the multiple advantages of digital platforms, many national and local authorities remain critical. Besides the cities analyzed in this paper, it is worth underlining that Barcelona and Berlin have enacted particularly restrictive policies and regulations regarding Airbnb. Amsterdam, once an ‘Airbnb-friendly city,’ has started to rethink its policy in light of the generalized discontent of Amsterdam residents and the multiplication of commercially operated listings.³¹⁰ In most cases restrictive regulations are the result of special interest groups (notably incumbents) that wish to limit competition in the name of a similar level-playing field. In Berlin, the threat of rising rents has convinced local regulators to prohibit the lease of entire units. Despite the multiple benefits of the collaborative economy, national restrictions also address legitimate public interests, even though some provisions appear to transcend the boundaries of what would be strictly necessary to protect public health, the guest’s safety and its privacy.

The three cases studies analyzed here tell us a multifaceted story:

- a) Brussels recently implemented a restrictive authorization scheme (even though it is called “a declaration prealable”) which imposes a number of requirements on hosts. The Brussels-Capital Region amended existing legislation in 2014 in order to introduce

³¹⁰ See the report prepared by the municipality of Amsterdam and published on March 18, 2016, available at <https://www.amsterdam.nl/wonen-leefomgeving/wonen/nieuws-wonen/amsterdam-versterkt/>

additional requirements to the lease of rooms at someone's house (*'hébergement chez l'habitant'*). The Implementation Decree determining the entering into force of the 2014 Ordonnance was enacted in March 2016 and entered into force in 2016. The Decree imposes very detailed prescriptions on hosts, ranging from the number of tables and chairs to towels. While some requirements are justified by the public interest (*e.g.*, availability of a first-aid kit, sufficient lighting), many others appear to be unnecessary and excessive, considering the collaborative nature of home-sharing practices. Brussels regulations compare private bedrooms advertised on home-sharing platforms to hotel rooms, disregarding the different expectations of these consumers.

- b) In Stockholm there is a great deal of uncertainty regarding the application of either housing law or hotel regulations to the collaborative economy. However, local authorities are particularly concerned with the expansion of illegal brothels within home-sharing networks. Housing regulations are quite onerous since they require, for example, individual authorizations from HOAs and landlords but they do not seem to fit the concept of home-sharing. Stockholm, by adopting a “laissez-faire” approach, appears to have the most liberal approach to the collaborative economy. This might nonetheless change in the short-run, as a Swedish court recently declared an Airbnb house as an unlicensed hotel (see part 2).
- c) Budapest has regulated home-sharing a number of years ago in order to control the expansion of the untaxed “Zimmer Frei” culture. Although the authorization procedure is complex and registration obligations are onerous, compliance with these requirements has been minimal and the adoption of this legislation does not seem to have restricted in any way the expansion of home-sharing business in Budapest. It is however worth asking whether the results would be the same if these requirements would be strictly controlled and whether the city of Budapest is planning to do so.

The main conclusion to be drawn from this paper is that some guidance for the collaborative economy is required so that national and local regulators do not succumb to the interests of incumbents, limit national restrictions to public interest requirements, and do not become trapped in traditional business models which were not based on peer-to-peer transactions. Such guidance should help local authorities rethink the necessary requirements to be imposed on home-sharing

hosts and the possibility to shift some of these burdens to the platform as long as this remains within the boundaries of the E-Commerce Directive.