

**Impulse paper on
specific liability issues
raised by the collaborative economy
in the accommodation sector**

Paris - Amsterdam - Barcelona

**Prepared by the
Working Group on the Collaborative Economy**



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This Impulse Paper was written in the period of 17 February - 14 March 2016 based on a questionnaire from the European Commission regarding specific liability issues raised by the collaborative consumption in the accommodation sector.

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Impulse paper on specific liability issues raised by the collaborative economy in the accommodation sector

Short summary

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The European Commission is developing a European Agenda on law applicable to the collaborative economy. This impulse paper provides information on many questions within the specific field of ‘sharing’ accommodations.

The study shows that all cities are struggling with a way to regulate the rise of sharing accommodations. The main concern is that in the capitals – this study concerns Amsterdam, Barcelona and Paris, but recently also Airbnb in Berlin made the news – housing is scarce. Accommodation sharing platforms do warn their users for their responsibilities, but offer a way to a source of income which is easily kept a secret from the tax authorities. This seems to be an incentive for people to rather use the space for tourism than for renting it to locals, increasing the scarcity of affordable housing.

Besides this, the study shows that it should be studied further to what extent competition in the tourism sector varies much within the Member States. Intermediation (by for example Airbnb) in the housing sector could give rise to unfair competition between intermediary platforms and professional agents who need a diploma or professional insurance to engage in such activity (agences immobiliers in France or Spain for example, not in the Netherlands). On the other hand, consumer accommodation providers might be in unfair competition with the professional hotels which are subject to permits and safety regulations. Especially in countries where the distinction between the professional and consumer accommodation provider is drawn by frequency of the rent, this problem arises. If the activity of renting out accommodation as such is regulated, each person – whether professional or not – will have to live up to these regulations.

Important questions addressed in this impulse paper are:

- the distinction between a consumer and a professional. This influences the rights and obligation arising within the contract between accommodation providers and accommodation seekers, as well as the relation of both of them with a platform.
- The applicability of E-commerce law. E-Commerce law poses many obligation on those offering information society services, which are basically there to protect parties concluding a contract electronically.

Relating to the first question, this study covers the role of platforms which bring together offer and demand, the role of consumers offering services to other consumers and – one of the hardest challenges – how to distinguish a consumer from a professional offering accommodation or intermediating. Amsterdam, Paris and Barcelona offer an interesting comparison, because the public and private laws, regulatory aims and methods are differing substantially. The study shows that there are several ways to address this situation: one could qualify the service – intermediating or offering accommodation - as a professional service, irrespective of the intention of the accommodation provider or agent. One could also draw a line between consumers and professionals based on the frequency with which the service is taking place, or with the amount of income involved. In Paris for example, renting accommodation to others is subjected to a permit.

This study also addresses the relationship between the different parties in private law. Clearly, the question whether the parties are consumers or professionals and the way this is decided, influences the rights and obligations arising from the contract.

Platforms can be seen as agents preparing the contract between two platform users, or can be seen as intermediaries contracting in their own name for the account of the users. Also, one finds platforms that are mere passive bulletin boards offering only technical means for users to find each other.

This distinction within the private law relations is a different one from the distinction made in European Directive 2000/31/EC on which liability for illegal content is based. This E-Commerce Directive uses the different activities that platforms are engaged in as a distinctive element in the answering of responsibility questions. Problematic is – as the research shows – that there is no strict dividing line between an active and a passive platform provider. There is a sliding scale.

A key issue is whether ultimately E-Commerce obligations that were written to address webshops and platforms, should be upheld by accommodation providers as well. This is not very clear. It depends on the question whether someone is said to offer an ‘information society service’.

The Working Group added some concerns. Many platforms explain that the collaborative economy is able to offer ‘cheaper’ access to goods than the traditional market. This does have a price. It should be studied in a comparative perspective, how a lower-than-market-price (or *nudum pactum*) influences the enforceability of an agreement and the guarantees and liabilities between the parties.

R. Koolhoven

Groningen, 13 May 2016

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1. General Part

1.1 Background of the tender: trust and/or information

Main goal

The European Commission is developing a European Agenda on law applicable to the collaborative economy. Besides initiating a consultation on online platforms and the impact of new business models on several parts of our society, the DG Grow already mapped a part of the existing regulations covering a.o. the accommodation sector (which is the subject of this tender). To understand very concrete legal aspects of the collaborative economy, DG GROW has launched a series of impulse papers to complement the results of the above mentioned initiatives.

The impulse paper's main goal is to provide a large amount of information on the many questions that can rise within the collaborative economy, within a short period of time. The Working Group had four weeks time to cover as many questions as possible in three different European Cities. Amsterdam, Paris and Barcelona offer an interesting comparison, because the public and private laws, regulatory aims and methods are differing substantially. One example is the fact that intermediating in the housing sector is a profession subject to authorisation or registration in Paris and Barcelona. In Amsterdam it is not. This alone shows a different answer to the question whether platform intermediation (by for example Airbnb) in the housing sector gives rise to unfair competition.

Also the way to determine which accommodation providers are seen as professional contracting partners instead of consumers acting in a C2C relationship varies from city to city.

The Working Group wishes to express that the impulse paper does not answer all questions. This impulse paper can be used to identify necessary future research and to identify subjects that need further exploration or monitoring: regulations are changing every month.

Currency and data

The Working Group wishes to add a perspective which was outside the scope of the impulse papers' questions, which it thinks is important. Many of the websites we looked at explain that the collaborative economy is able to offer 'cheaper' access to goods (accommodation in this case) than the traditional market can. The reason is that the collaborative economy uses trust as a currency instead of money. Trust can be used as an incentive to trade. We usually put trust in certificates, brands, institutions, knowing something familiar (prior bilateral interaction).

In private law, providing information is a matter of giving objective 'knowledge' which can lead to subjective trust or good faith of the other party receiving the information. Based on good faith even statements, oral or written, which do not represent the actual will or facts, can become legal acts and contracts. In a collaborative economy it seems that the information given is to comfort users, saying it will all be more social and that one does not need to worry.

Especially this credo – or marketing strategy – can endanger parties that have difficulty understanding the general terms.

1.2 Platforms and providers: distinctions and contractual relations

European Directive 2000/31/EC distinguishes not between different kinds of platforms, but between the different activities platforms are engaged in. These activities are taken as a distinctive element in the answering of responsibility questions.

Next to that, Dutch case law uses two terms that we will use in this paper as well, which relate to the amount of interference of the platform in the conclusion of private law contracts: the (active) agent (*bemiddeling*) platform and the (passive) bulletin board. The Supreme Court¹ recently ruled that a platform ‘intermediates’ between an accommodation provider and an accommodation seeker, when it assists in the conclusion of a contract between these two parties.² One can recognise an active agent, by the fact that there is some involvement of the platform, be it because an accommodation seeker cannot engage into a contract with the accommodation seeker directly. The platform that merely facilitates the exchange of contact details should be seen as a ‘bulletin board’. One recognises a bulletin board by the fact that one can search and find the direct contact details of a person offering something.

The difference lies in the applicable legal framework in private law: in the case in which a platform acts as an (active) agent, the rules on intermediation (and partially contractual representation) will apply, which contain specific rules on responsibilities and taking over these responsibilities from an intermediary in the case of bankruptcy or non-performance of an obligation. When it comes to remuneration, for an agent it is allowed to intermediate between two professionals and ask money from both parties. It is also allowed to intermediate between a house owner offering a room for rent and to ask remuneration from both parties. It is however forbidden to intermediate between a consumer and a professional for seeking an apartment and ask money from the consumer.

According to the Dutch Supreme Court an agent platform can be recognised by the fact that an accommodation provider and an accommodation seeker cannot contact each other directly. Only the accommodation is shown without giving a direct address or phone number. Once an accommodation seeker can use the platform to only find the necessary contact details of an accommodation provider, the platform will be seen as a bulletin board.

We assume that the difference in the process of the conclusion of the contract should be taken

¹ Hoge Raad 16 October 2015, ECLI:NL:HR:2015:3099, Prejudiciële beslissing op vraag van ECLI:NL:RBDHA:2015:1437.

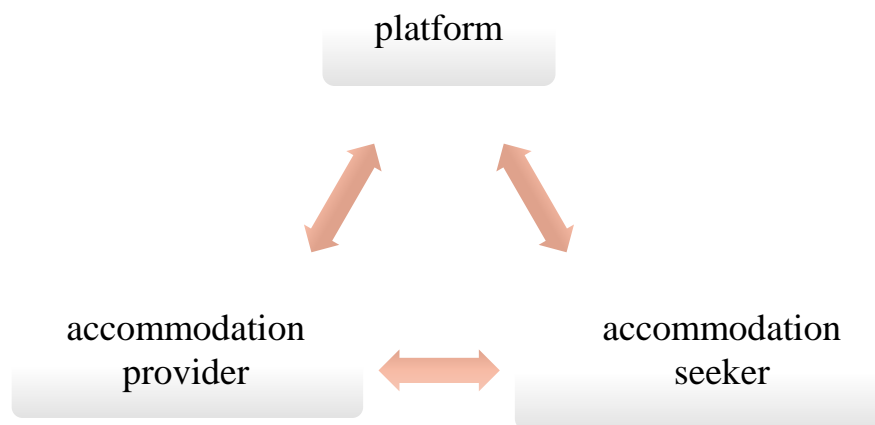
² R. Koolhoven (2015). Kwalificatie en rechtspluralisme in 'de deeleconomie'. Maandblad voor Vermogensrecht Vol. 6, p. 186-193 and

R. Koolhoven (2015). Het platform in de deeleconomie: elektronisch prikbord of bemiddelaar?. Weekblad voor Privaatrecht Notariaat en Registratie (7085), p. 991-992.

into account, when considering what contracts were made and between whom the terms are agreed and binding. For example, to know whether exemptions from liability in the contract between the platform and the accommodation provider can be ‘used’ by the accommodation provider in relation to the accommodation seeker is a question of national contract law. In national contract law, the way in which the contracts were agreed to is a circumstance which should be taken into account in the doctrine of *third party effects of contracts* (or *exceptions to the privity of contract*) or stipulation of payment to a third party.

The Working Group is of the opinion that there are ‘three relations’ in a ‘triangle’ that need to be defined:

- 1) The relation between the platform and the person offering an accommodation;
- 2) The relation between the platform and the person seeking an accommodation;
- 3) The relation between the provider and the seeker of an accommodation.



1.2.1 Active Accommodation Agent or Passive Bulletin Board

One example of an active accommodation agent (AAA) in the collaborative economy could be Airbnb. The Economic Desk of ING (a Dutch Bank)³ researched the scale of Airbnb use in the Netherlands. They expect a national number of 140.000 households putting their homes (be it apartment, house or room) for rent on this website. In terms of numbers Airbnb is the biggest player in the field, becoming even larger than the hotel industry offering 118.000 hotel rooms today (2016).^{4,5}

³ ING Economisch Bureau, ‘Hotels en de deeleconomie’, Ing.nl (zoek op hotels en de deeleconomie).

⁴ Centraal Bureau voor de Statistiek, ‘Hotels: capaciteit, accommodaties, kamers, bedden, sterklasse’, CBS 16 februari 2016, cbs.nl (zoek op kamers hotels)

Another example of an active accommodation agent is Belvilla, operating in the entire European Union.

Marktplaats in the Netherlands or LeBonCoin in France are examples of more passive ‘bulletin boards’.

As will become clear in this research, there is no strict dividing line between an active and a passive platform provider. There is a sliding scale. This will become apparent in section 1.4.2, where the exemption of liability for ‘passive’ platform providers is dealt with. If a platform like Marktplaats/LeBonCoin offers more active services for accommodation providers than just a bulletin board, also these passive platforms can eventually turn out to be active ones, and therefore be held accountable for, for example, illegal content.

The difficulty in the distinction of active and passive platforms lies in the fact that being active or passive has two ‘functions’. One is in private law. The other is in E-commerce law, which means that when acting actively a platform can be held accountable for illegal content, active platforms fall outside the scope of the liability exemption (see in fine nr. 1.4.3). A passive bulletin board will abstain from involvement and is protected against liability when having a notice-and-take-down procedure (see nr. 1.4.4). When looking at European case law the key criterion is the question whether the platform’s role is neutral, more technical, automatic and passive.

How this should be seen in European law is not quite clear.

The Working Group tried to help elaborate some possible criteria to develop a dividing line between active and passive platforms by taking private law and Dutch case law on this matter as a source of inspiration.

In private law the distinction between active and passive is important as well, yet it plays a somewhat different role. An ‘active platform’ is a platform which is more involved in the conclusion of the contract between the accommodation provider and seeker than a passive platform is. This kind of active involvement we called ‘agency’ (in private law terms) in the Impulse paper, to distinguish it from the E-commerce term of ‘intermediary’. In technical private law terms any person actively engaged in negotiation and/or contracting for someone else, would be called an intermediary (involved in representation). When a person is engaged in factual acts or negotiating the terms of contract without concluding the contracts, he is called ‘agent’ in private law terms (bemiddelaar). Only when a person allows people to place an add and contact details and search in the adds, are they seen as a passive bulletin board.

In Dutch law this is important, because being active will lead to the applicability of the rules on agency and representation and the more general diligence terms of ‘service contracts’ (opdracht). To protect the consumer, the law quickly wants to be applied to a relation between a website and a consumer. So, very soon the activity of a platform will fall within the scope of the agency and intermediation contract. Especially this is important because the agency rules

⁵ ING Economisch Bureau, ‘Hotels en de deeleconomie’, p. 8, Ing.nl (zoek op *hotels en de deeleconomie*).

prohibit an agency to intermediate for two parties at the same time and ask money from both sides when intermediating in the sphere of housing.

Being ‘active’ in this private law sense, does not necessarily mean that European Law in the sphere of E-commerce would draw the same conclusion, because as explained, this Dutch case law could be an inspiration when searching for more criteria in European law.

Because a website such as Airbnb gives many tips and advice and terms which help to promote the conclusion of lease contracts between accommodation providers and accommodation seekers, and because they offer other kinds of services – like guarantees, checks, promotional material and how to behave to make guests feel welcome – and because they set many terms of the contracts, tell how to behave, the Working Group considers that they are actively involved in the conclusion of the contracts. This could be established also by the fact that Airbnb is paid not for its’ bulletin board function, but is paid related to the number of lease contracts that are concluded. They are dependant of the concluded contracts. They are – which would be called ‘Selbsteintritt’ – benefitting from the accommodation provider and the accommodation seeker, intermediating for both parties on their own behalf. Their income is dependant of the conclusion of the contract. In Dutch law, the Supreme Court said a distinguishing factor is whether the eventual contracting parties can contact each other directly or not. In principle Airbnb does not give direct contact details, one first has to become a member of the website to be able to continue. Furthermore they advice to do all dealings through them.

A passive platform in E-commerce sense would only facilitate the conclusion of a contract in a technical way, allowing demand and offer to find one another. There can be a different business model behind such a bulletin board, for example requiring a fee to advertise for a certain amount of time, or seeing advertisements on the website.

A subject for more indepth study definitely is where and how to draw a strict dividing line. When looking at the way Airbnb ‘facilitates’ the contracting, we find it quite active in terms of private law. It is however not always the case that an active platform in the sense of private law is also an active platform in the E-commerce sense. As expressed in the paper: there might be more of a sliding scale. Also, it can be debated whether one should use the same criteria in private and in E-commerce law. We do see that Airbnb is in a way passive that it works with a notice-and-take-down procedure upon the complaint of guests, taking accommodation advertisements off of the website. It is also written in newspapers that Airbnb took away some accommodations, such as the igloo in New York, which could look like a more active involvement in the E-commerce sense.

It could be an interesting study to undertake, to see which other criteria could be used from other jurisdictions as well, to find more elements to constitute a clear dividing line.

1.2.2 Professional or peer accommodation providers

One of the core questions in the debate on the ‘collaborative economy’ is whether consumers offering goods or services on a regular basis are still consumers?

This is a question that cannot be answered in short, because each directive or rule in many of the countries decides this on a case-to-case basis. There are however some perspectives that are relevant for this research.

The Working Group found that for example in Dutch law, the debate on the dividing line between professional and consumer concerns first of all, on a more abstract level, whether this should be filled in ‘subjectively’ or ‘objectively’. Some authors say the definition of a consumer is governed by the intention of the service provider (as a hobby or as a professional) and is therefore a subjective concept. Others argue that it should be answered according to objective criteria.⁶

What these objective criteria are depends on the area of law. One could say that it depends on the specific question asked. For example, to know whether accommodation providers are in unfair competition with hotels, it will have to be seen whether a natural person or legal person is infringing a right or acting not in conformity with what he is bound to act like in society. If a natural person or legal person is infringing societal care this will be seen as a tort.⁷ Not relevant is whether the person infringing these behavioural norms is acting as a consumer of a professional. The problem is not solved by answering the question whether accommodation providers are acting as professionals.

For example in Barcelona, tourist regulations apply irrespective of the definition of professional or consumer: they merely apply regulation on the lease of properties in general. Some platforms (e.g. Homeaway⁸) in Spain, consider as professional real estate agents (*profesionales inmobiliarios*) the users that want to offer more than 10 properties under the same profile.

In Dutch law other rules may guide us to the answer. In the case of unfair competition one should look at more specific sectoral requirements. Are the accommodation providers without a hotel permit engaged in the same activity, and is this activity aimed at the same ‘audience’ or clientele?

In the Netherlands the Minister of Economic Affairs acknowledges that the amount of nights a ‘consumer’ is leasing his apartment to others does influence the answer to the question whether someone is a professional or not, but leaves the exact regulation up to the city’s municipal regulation.⁹

⁶ Asser/Hartkamp & Sieburgh 6-III 2014 [499-501], p. 462-464.

⁷ Brahn/Reehuis, *Zwaartepunten van het vermogensrecht*, 2015, p. 341-347; Sprout, *De identiteitscrisis van aribnb*, te vinden op <http://www.sprout.nl/artikel/deeconomie/de-identiteitscrisis-van-airbnb>.

⁸ <https://www.homeaway.es/info/quienes-somos/aviso-legal/Terminos-Condicion.es>.

⁹ Kamerstukken II 2015/12, 33 009, nr. 12.

In the City Chapters it will become clear how for example the City of Amsterdam set restrictions on private seasonal lease. Acting within these restrictions, one will be seen as a consumer. Acting across the boundaries will lead to the conclusion that one is acting as a professional.

A new development which shows the doubt on which criteria should be used is the service provision surrounding Airbnb and alike. There are other companies emerging, such as Keyokay-rentals.com, that are a sort of intermediaries again between the guests that come and the lessors. They have an intake with the lessor and take over all services: they make the house ready for the guests to arrive, receive the lessee, and clean the house when the guests leave. They can also be asked to be there to deliver the key. On the one hand one could say: that does not look like a personal ‘sharing’ situation anymore: the social exchange is not there at all. This might lead to the opinion that the lessor is more professional here than in the case where he receives the guests himself. On the other hand: a hotel would probably take care of these things itself; because they are professional service providers they know how to receive people and to do the cleaning in a professional way, whereas a person who does it only sometimes, might rather hire this from another professional person such as keyokay-rentals.com. One could even argue that the fact that the lessor is willing to pay another to do this shows that the money argument is not decisive for him.

1.3 The scope of the definition of ‘Information Society Services (ISS)’

When a certain service is defined as an ‘information society service’ in the sense of the E-Commerce Directive (2000/31) a number of information obligations are to be fulfilled by the service provider. At the same time special exemptions from liability will apply. These obligations and liabilities are the core of this impulse paper.

Information society services (hereafter: ISS) are defined by Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC. Directive 98/48/EC reads: ‘Service’ is any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

It is explicated:

‘For the purposes of this definition:

‘at a distance’ means that the service is provided without the parties being simultaneously present,

‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request.’

The Working Group on the Collaborative Economy (hereafter: WGCE) understands it is one of the goals to describe the scope and limitations of this definition. A key characteristic of the services provided in the Collaborative Economy, is that contracting parties – a house owner (lessor) and a lessee for example – make use of one website (Airbnb, Wimdu, Couchsurfing) to come to an agreement. The original definition of ISS was set at a time where the typical ISS was the web shop selling products to a consumer or the physical store or hotel making use of the internet to allow reservations of products or services. As the European Commission recognized in Consideration 11 of Directive 98/48/EC: it was not yet known which form the new services will take or what their nature would be.

The WGCE researched how to define the ‘service’ offered by the intermediating platforms and how to define what is offered by parties offering accommodation and whether they are consumers or not. One core task is to research to what extent a house owner making use of a website which functions as an intermediary or an agent between him and a renter, offers an ISS.

The Working Group will not opinion whether the scope of application of the rules is in conformity with the level of protection of the general interest of public health that the European Commission seeks, or whether rules and regulations are (dis)proportionate to the objectives they pursue. The Working Group only wishes only to describe the different ways one could interpret the definitions at stake.

The first set of definitions comes from article 2 of the Directive 2000/31/EC. Article 2 of Directive 2000/31/EC mentions the following possibly applicable definitions which will be taken into account when assessing which parties in the ‘triangle’ are present:

- (b) ‘service provider’: any natural or legal person providing an information society service;
- (c) ‘established service provider’: a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;
- (d) ‘recipient of the service’: any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;
- (e) ‘consumer’: any natural person who is acting for purposes which are outside his or her trade, business or profession;
- (f) ‘commercial communication’: any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications:
 - information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,

- communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration.

In the process of defining these relations and the services provided within these relations as ISS or not, the Working Group paid special attention to # Directive 2000/31/EC (Directive on electronic commerce), consideration (18):

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; activities such as the delivery of goods as such or the provision of services off-line are not covered; 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 offering on-line information or commercial communications, or 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 use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

In CJEU 11 September 2014, C-291/13 (*Papasavvas*), the Court of Justice affirmed, not surprisingly, that an information service (here a free online newspaper) which is not paid for by the user of the service but by advertisements is deemed an ISS (consideration 30).

1.3.1 Relation 1 between the platform and the person offering an accommodation

A platform could be seen as a service provider (Art. 2 sub b): any natural or legal person providing an information society service and an established service provider (Art. 2 sub c): a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period.

The person offering accommodation could be seen – in the relation with the platform - as a recipient of the service (Art. 2 sub d) and possibly as a consumer (Art. 2 sub e).

In the light of consideration 18, the platforms' service is to be seen as an ISS. It is an economic activity which takes place on-line. In the several websites the Working Group researched, it found different business models, varying from membership fees, percentages of

transactions to asking payment from people seeking an accommodation to offering ‘special services’ which were remunerated. When a platform deals for a person offering an accommodation, yet does not ask for a remuneration from those who will use the accommodation, but gains money from advertisements (commercial communications) it will be an economic activity as well.¹⁰ Even if the platform only provides a search tool or allows for a communication network, it will be seen as an ‘Information Society Service’.

Some ‘sharing’ platforms offer certain exchange services for free and seem to earn money offering an insurance against the most common risks, on a temporary basis.

1.3.2 Relation 2 between the platform and the person seeking an accommodation

There is a relation between the platform and the person seeking an accommodation as well. The platform could be seen as a (Art. 2 sub b) service provider: any natural or legal person providing an information society service and (Art. 2 sub c) established service provider: a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period.

The person seeking an accommodation is (Art. 2 sub d) recipient of the service: any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible. He will usually also be a (Art. 2 sub e) consumer: any natural person who is acting for purposes which are outside his or her trade, business or profession.

In the light of consideration 18, the platforms’ service is to be seen as an ISS. It is an online activity. On websites such as Airbnb or huizenruil.nl (Home Exchange) the remuneration is obvious. Other websites, such as for example Couchsurfing, do not ask for a remuneration, however are engaged in an economic activity because only a part of their service is offered ‘for free’. There is a part of the services which is offered for remuneration. The limited service offered can be extended for example with a paid ID-check or address check, which costs money and will ‘increase’ the likeliness of finding other participants to ‘share’ with. Here the same as mentioned under 1.2.1 is valid.

1.3.3 Relation 3 between the provider and the seeker of an accommodation

In the relation between the provider of an accommodation and the seeker of an accommodation it becomes harder to define the ‘service’ and the consequences.

The Working Group set out three different cases to illustrate the difficulties. It also varied on the question whether remuneration was asked.

1.3.3.1 Remuneration between provider of accommodation and seeker

¹⁰ Compare: CJEU 11 september 2014, C-291/13 (*Papasavvas*).

Example 1

I. John owns a big building with several offices. He wants to earn some money with some of the offices he hardly uses. He offers his empty workspace on Liquid Space. He asks for remuneration. This is a ‘service’ offered ‘at a distance’, ‘by electronic means’, ‘at the individual request of a recipient of services’. John is **not a consumer**. He offers an **ISS** and will have to meet the requirements of Articles 5 and 6 Directive 2000/31/EC.

II. Claire find Johns’ office on the website. To reserve the office John asks Claire to use the platforms’ **reservation button**. He offers an **ISS** and will have to meet the requirements of Articles 10 and 11 Directive 2000/31/EC. Except for Article 10 section 2, these requirements are to be met except when otherwise agreed by parties.

III. The contract concluded between John and Claire is to be defined by **national law**. In Dutch law for example it will be **rent of an office** (art. 7:201 Dutch CC and further). The execution of the contract itself is not **an ISS**; it will give Claire the personal right to use Johns’ space. In Spanish law it would be ‘*arrendamiento*’.

Example 2

I. John owns a big building with several offices. He wants to earn some money with some of the offices he hardly uses. He offers his empty workspace on Liquid Space. He asks for remuneration. This is a ‘service’ offered ‘at a distance’, ‘by electronic means’, ‘at the individual request of a recipient of services’. John is **not a consumer**. He offers an **ISS** and will have to meet the requirements of Articles 5 and 6 Directive 2000/31/EC.

II. Claire find Johns’ office on the website. To reserve the office John asks Claire to use the platforms’ **reservation button**. He offers an **ISS** and will have to meet the requirements of Articles 10 and 11 Directive 2000/31/EC. Except for Article 10 section 2, these requirements are to be met except when otherwise agreed by parties.

III. The contract concluded between John and Claire is to be defined by **national law**. In Dutch law for example it will be **rent of an office** (art. 7:201 Dutch CC and further). The execution of the contract itself is not **an ISS**; it will give Claire the personal right to use Johns’ space. In Spanish law it would be ‘*arrendamiento*’.

Example 3

I. John has bought a house which he renovated into three apartments. He pursues an economic activity renting out these apartments to tourists. John uses Airbnb and Wimdu to be visible to tourists.

John is **not a consumer**. Also, he uses the platform to provide information about his economic activity. He offers an **ISS** and will have to meet the requirements of Articles 5 and 6 Directive 2000/31/EC.

II. Anna find Johns' apartment on the website. To reserve the apartment John asks Anna to send him an **email**. This is outside the scope of 2000/31/EC, therefore in this B2C transaction articles 10 and 11 do not apply.

III. The contract concluded between John and Anna is to be defined by national law. In Dutch law for example it will be rent (art. 7:201 Dutch CC and further). Dependent on the duration of the rent it will be defined as short term or long term rent with different protective rent provisions. This factual use of the space is **not an ISS**. In Spanish law several different regimes apply to the lease, dependant of the short or long term.

Example 4

I. John has a house with an extra bedroom. He uses a platform to provide information about his room. He offers his room 'at a distance', 'by electronic means', 'at the individual request of a recipient of services'.

He does pursue an economic activity renting out these apartments to tourists.¹¹

Although one cannot say that John is running a commercial business, this in itself does not stand in the way of qualifying this way of offering the apartments as an ISS (Art. 2 sub b). He will probably have to meet the requirements of Articles 5 and 6 Directive 2000/31/EC.

II. Anna find Johns' apartment on the website. To reserve the apartment John asks Anna to send him an **email**. This is outside the scope of 2000/31/EC, therefore Articles 10 and 11 do not apply.

III. The contract concluded between John and Anna is to be defined by national law. In Dutch law for example it will be rent (art. 7:201 Dutch CC and further). Dependent on the duration of the rent it will be defined as short term or long term rent with different protective rent provisions. This factual use of the space is **not an ISS**.

1.3.3.2 No remuneration between provider of accommodation and seeker

Example 5

I. John owns a big house with many rooms. He likes the travelling lifestyle and uses Couchsurfing to find places to stay and to receive guests from all over the world. Although John expects to benefit from using this platform, he does not ask for a remuneration. It is unclear in how far there is an economic activity here. However the fact this 'service' is offered 'at a distance', 'by electronic means', 'at the individual request of a recipient of services' possibly suggests an ISS. It is unclear whether Articles 5 and 6 Directive 2000/31/EC apply.

¹¹ The Dutch tax authority would call this an economic activity because it raises an 'income from another source than 'labour'.

II. Anna find Johns' room on the website. To 'book' a couch John and Anna use the platforms' **chat box**. This is an electronic way of communicating individually which is not an ISS. The consideration (18) '*the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service*'.

III. The contract concluded between John and Anna is to be defined by **national law**. In Dutch law it is unclear that this will result into a contract under our law of obligations, because it is of no economic interest, maybe only leading to an unenforceable moral or natural obligation. In Spanish law this will probably be *comodat* or gratuitous use of a good (*bailment*).

Example 6

I. John has a house. He likes travelling and uses Home Exchange to find places to stay. He does not ask for remuneration in money but swaps his place with others to stay in their place. This 'service' does meet the requirements of a service, because it is an economic activity representing 'value'. It is also offered 'at a distance', 'by electronic means', 'at the individual request of a recipient of services': an ISS.

John is a **consumer**, offering an **ISS**. Therefore he will have to meet the requirements of Articles 5 and 6 Directive 2000/31/EC.

II. Maria find Johns' house on the website. They use personal emails to agree on the use etcetera. This falls outside the scope of Directive 2000/31/EC.

Because John and Anna are consumers, the Consumer Directive will not apply.

III. The contract concluded between John and Anna is to be defined by **national law**. In Dutch law for example it will be **rent** (art. 7:201 Dutch CC and further). Despite the remuneration not being in money, the 'consideration' is concrete and defined clearly enough to be a 'remuneration' in the sense of the law on rent. Dependent on the duration of the rent it will be defined as short term or long term rent with different protective rent provisions. This factual use of the space is **not an ISS**.

1.3.4 Key question

Using the definition of ISS and the consideration in the ECD, most cases seem clear. The key question is represented in example number 5:

I. John owns a big house with many rooms. He likes the travelling lifestyle and uses Couchsurfing to find places to stay and to receive guests from all over the world. Although John expects to benefit from using this platform, he does not ask for remuneration. It is unclear in how far there is an economic activity here. However the fact this 'service' is offered 'at a distance', 'by electronic means', 'at the individual request of a recipient of services' possibly suggests an ISS. It is unclear whether Articles 5 and 6 Directive 2000/31/EC apply.

II. Anna find Johns' add on the website. To 'book' a couch John and Anna use the platforms' **chat box**. This is an electronic way of communicating individually which is not an ISS. The consideration (18) *'the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service'*.

III. The contract concluded between John and Anna is to be defined by **national law**. In Dutch law it is unclear that this will result into a contract under our law of obligations, because it is of no economic interest, maybe only leading to an unenforceable moral or natural obligation, or a comodot or gratuitous use of a good.

In this case it is not clear whether an 'economic activity' is taking place. This is related to the fact that the service is not remunerated (not in money, data, through advertisements or in kind), combined with the informal (non-commercial) character of the transaction. The other issue here is that - at least in the traditional distinction of moral obligations and legal obligations, a remuneration in order to be seen as such, needs to be concrete. In the case of community swapping, the remuneration is delayed and not reciprocal; someone else might return 'the favour'.

The person providing and the person seeking accommodation could be engaged in either a B2C or C2C contract. A party is a consumer when a natural person who is acting for purposes which are outside his or her trade, business or profession. When the relation between the accommodation provider and renter is to be seen as a B2C relation, the Consumer Directive will apply. When both parties are consumers, this will not apply. The distinction consumer-professional therefore does not affect the application of Directive 2000/31/EC. Decisive is whether the service provided is an economic activity performed either by consumers or professionals.

1.4 The exemptions from platforms' liability for illegal content in the light of art. 12-15 Directive 2000/31/EC (E-commerce Directive)

1.4.1 Illegal content

National law provides the criteria under which information can be considered illegal. Some interesting situations can be:

- (a) Anonymous person A slanders Accommodation Provider B on the platform of Platform provider P. B wants to claim damages from A but cannot find this person. B wants to sue P for damages and/or to find out who A is to be able to sue this person.
- (b) B is a well-known impostor, who uses the platform of Platform Provider P to make people pay for accommodations which are not his. A is a victim of B's activities. A sues P for not warning him. He claims the content of B's offers is to be considered illegal.

These examples are singled out in order to show that the accommodation provider as well as the accommodation seeker can have an interest in claiming damages from the platform provider. The examples can serve to clarify the different questions that subsequently arise:

- 1) Can the platform provider make use of the exemptions on liability in art. 12-14 Directive 2000/31/EC (1.4.2)?
- 2) If not, what are the criteria for liability (1.4.3)?
- 3) If so, what duties are there for platform providers to avoid liability once they come to know about the illegal content (1.4.4)?
- 4) What kind of other legal measures can be asked from platform providers, taking into account art. 15 Directive 2000/31/EC (1.4.5)?

1.4.2 Active and passive platforms

Art. 12-14 Directive 2000/31/EC give exemptions on liability for access providers (art. 12-13) and hosting providers (art. 14) for illegal content they provide. The Working Group excludes the possibility of platform providers of being mere access providers. We start from the assumption that platform providers always will store data of the accommodation providers and accommodation seekers somehow, which brings art. 12-13 out of sight. This is in line with what the CJEU has decided on this matter in e.g. the case SABAM/Netlog.¹² Netlog as a platform provider for social media is in this respect comparable to platform providers for an accommodation:

27 In that regard, first, it is not in dispute that the owner of an online social networking platform - such as Netlog - stores information provided by the users of that platform, relating to their profile, on its servers, and that it is thus a hosting service provider within the meaning of Article 14 of Directive 2000/31.

So, if Platform Providers can make use of an exemption on liability at all, it is that of art. 14 Directive 2000/31/EC. Furthermore, the platform provider has to be just a passive intermediary as it comes to the (illegal) information which is stored on its site. In the case of Google France/Louis Vuitton¹³ the CJEU has given the key criterion (bold) when a service provider is deemed an ‘intermediary service provider,’ referring to recital 42 in the preamble to Directive 2000/31/EC.¹⁴

¹² CJEU 16 february 2012, case C-360/10.

¹³ CJEU 23 March 2010, Cases C-236/08 to 238/08.

¹⁴ It reads as follows: (42) *The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the*

112 *In order for the storage by a referencing service provider to come within the scope of Article 14 of Directive 2000/31, it is further necessary that the conduct of that service provider should be limited to that of an ‘intermediary service provider’ within the meaning intended by the legislature in the context of Section 4 of that directive.*

113 *In that regard, it follows from recital 42 in the preamble to Directive 2000/31 that the exemptions from liability established in that directive cover only cases in which the activity of the information society service provider is ‘of a mere technical, automatic and passive nature’, which implies that that service provider ‘has neither knowledge of nor control over the information which is transmitted or stored’.*

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

Here, the Working Group can fall back on the two roles of accommodation platform providers which have been defined in paragraph 1.4: the Active Accommodation Agent (AAA’s) and the Passive Bulletin Board (PBB’s).

Typically, AAA’s will help accommodation providers and accommodation seekers to find each other, a service for which they are paid. If this help is more than just technical, automatic and passive (for example because the AAA’s personally help to optimize the offer of the accommodation provider) then the Accommodation Platform Provider falls outside of the scope of the liability exemption.

PBB’s typically will abstain from involvement with the transactions taking place on the platform. They just deliver a communication medium and no content will be screened, at least not beforehand. In this case, the Accommodation Platform Provider typically acts a neutral intermediary service provider.

In real life, situations will occur where the activities of Accommodation Platform Providers will be not as clear as the ‘ideal types’ AAA and PBB. Then, it is uncertain whether the Platform Provider can profit from the liability exemption. The question that has to be answered then, is whether the involvement of the Platform Provider is neutral, i.e. merely technical, automatic and passive, or exceeds neutrality.¹⁵

information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

¹⁵ A detailed study on the question where exactly neutrality is exceeded is beyond the scope of this paper. Compare in re Google France/Louis Vuitton: considerations 115-118 (CJEU 23 March 2010, Cases C-236/08 to 238/08).

The Working Group considers the uncertainty whether an accommodation platform provider has an active or a passive role as one of the core problems surrounding this research.

1.4.3 Active platforms and liability

Active Platforms, such as Active Accommodation Agents (AAA's), are not shielded by the liability exemption of art. 14 Directive 2000/31. In the examples mentioned in 1.5.1 national law has to decide whether the AAA is liable or not. An AAA might escape liability, for example, if it has been careful in screening and cannot be blamed at all for the illegality of the content on his platform.

1.4.4 Passive platforms: Notice-and-take-down

Passive platforms, such as Passive Bulletin Boards (PBB's), benefit from the liability exemption. The exemption, however, works only to a certain extent. When the PBB comes to know of the illegal content the exemption is not applicable anymore (art. 14, section 1 (a) Directive 2000/31). In that case, the PBB has to take action to remove or to disable access to the information (art. 14, section 1 (b) Directive 2000/31). The procedure hosting service providers have to implement is known as 'Notice-and-take-down.'

The first questions that arises is when exactly the provider has actual knowledge. Here, the criterion is found in the case of L'Oréal/eBay (bold).¹⁶ The key considerations are as follows:

120 As the case in the main proceedings may result in an order to pay damages, it is for the referring court to consider whether eBay has, in relation to the offers for sale at issue and to the extent that the latter have infringed L'Oréal's trademarks, been 'aware of facts or circumstances from which the illegal activity or information is apparent'. In the last-mentioned respect, it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in Article 14 of Directive 2000/31, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b) of Directive 2000/31.

121 Moreover, if the rules set out in Article 14(1)(a) of Directive 2000/31 are not to be rendered redundant, they must be interpreted as covering every situation in which the provider concerned becomes aware, in one way or another, of such facts or circumstances.

122 The situations thus covered include, in particular, that in which the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information. In the second case, although such a notification admittedly cannot automatically preclude

¹⁶ CJEU 12 July 2011, Case C-324/09.

the exemption from liability provided for in Article 14 of Directive 2000/31, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality.

In short: a diligent platform provider has to respond to notifications about illegal content but the national court can still uphold the exemption when ‘bogus’ allegations have been made.

If the PBB has actual knowledge about the illegal content, it should act in order to remove it or disable access (notice-and-take-down). This means that the PBB effectively has to respond to allegations. For this, a procedure should be available on the platform. People who notice illegal content should be able to reach out to the PBB and make it react.¹⁷

1.4.5 Injunctions by national courts

The liability exemptions do not stand in the way of injunctions by national courts, such as (preamble, recital 45): ‘orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.’ In the case of L’Oréal/eBay, the CJEU also mentions the possibility of forcing the service provider to identify the infringer.¹⁸ From art. 15 Directive 2000/31, one

¹⁷ In recitals 40 Directive 2000/31, the importance of this procedural character is stressed (bold). In recital 46, there is a referral to national law on this point (bold).

(40) [...] service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; **this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information**; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; **it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures**; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; **the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level**; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

¹⁸ CJEU 12 July 2011, Case C-324/09, cons. 142.

can draw the conclusion that a service provider (like an accommodation platform provider) cannot be forced to put in place a general obligation to monitor information.¹⁹

This point has been confirmed by the CJEU in the case of Scarlet Extended/SABAM of 24 November 2011, Case C-70/10. In the case of UPC Telekabel/Wien, 27 March 2013, Case C-314/12, the CJEU pointed out that art. 15 of Directive 2000/31 does not stand in the way of an injunction *'prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders when that injunction does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures, provided that (i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures **have the effect** of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish.'*

It should be noted that a lot of this case law is on breaching intellectual property law, which is not the first thing that springs in mind when looking at information on accommodation platforms. In any case all relevant interests have to be weighed by the national court before one can say an injunction can be upheld. A lot of emphasis lies on the effectiveness of the injunction, as can be seen in, amongst many other cases, the quote of UPC Telekabel/Wien (bold).

1.5 E-commerce requirements according to Directive 2000/31/EC

In this impulse paper, the Working Group has been asked to identify the requirements based on the E-Commerce directive 2000/31/EC, articles 5-10. The question has been asked on whom the obligation to provide information lays and whether the platforms or the provider (or both) are liable in case these requirements are not met.

¹⁹ Article 15 reads as follows:

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.
2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

Art. 5 through to 11 of the E-commerce directive concern, roughly speaking, the way the recipient can perceive the public environment (e.g. the website of the platform provider) where the ISS is offered. There has to be transparency regarding information and communication. Furthermore, electronic contracting should be possible through electronic communication. In the parts on Amsterdam, Paris and Barcelona, the following five requirements will be dealt with in sections 1.5.1-1.5.5. In each of these sections special attention has to be paid to sanctions, because art. 20 of the E-commerce Directive leaves this subject to national law. Only in combination with the national law, one can therefore see the actual legal consequences of the infringement.

- (1) Art. 5 gives a general information duty concerning the identity of the ISS and prices. In CJEU 16 October 2008, Case C-298/07 (Bundesverband/DIV), the CJEU decided that art. 5, section 1(c) means that not only an e-mail address must be provided, but also another means of communication (most often a (working) telephone number or possibly an electronic contact form). Parties cannot contractually deviate from this information duty.
- (2) Art. 6-8 regulates the requirements concerning commercial communications (advertisements). The information duty of art. 7 concerns spam, and must be regarded in combination with telecommunication regulation. In art. 8, the need for codes of conduct is stressed.
- (3) Art. 9: This article concerns the treatment of electronic contracts as valid contracts under national law, with possible exceptions in art. 9, section 2.
- (4) Art. 10: Information duties concerning electronic contracts, concluded publicly, i.e. not by individual communications such as e-mail. If the recipient of the ISS is a consumer, parties cannot agree otherwise.
- (5) Art. 11: Requirements on order acknowledgement and error correction when contracting electronically. If the recipient of the ISS is a consumer, parties cannot agree otherwise.

In section 1.3.2 as well as 1.3.3, the Working Group established that platform providers deliver an ISS to accommodation providers and accommodation seekers alike. This means that to all those recipients, the platform provider should meet the requirements in art. 5-8 of the E-commerce directive. Depending upon the situation (and decided by national law), the platform provider may also be qualified as a contracting party to one or both recipients. In that case, also art. 9-11 apply.

In section 1.3.4, the Working Group established that in a lot of cases, the accommodation provider can be said to contract with an accommodation seeker as an ISS provider. Only in the situation that the lease is without (direct) remuneration in an informal setting one can possibly say that the lessor does not deliver an ISS. If the lessor is ISS provider, he will have to address art. 5-8. If the lessor is also contracting publicly (not via e-mail), he will have to fulfil the requirements set in art. 9-11 as well.

1.6 Unfair Commercial Practices Directive

The question posed in the tender was the following: Should accommodation providers be authorised, licenced or registered and if so, does this relate to the Unfair Commercial Practices Directive? Is the platforms or the provider liable in case this obligation is not met?

The Working Group sees this question could mean several things in the light of the Unfair Commercial Practices Directive. On the one hand there might be a licence or registration that accommodation providers have to meet to lease a holiday home or room to tourists. This kind of obligation is a sectoral requirement covered under 1.9 in the City Chapters, according to and specified by local legislation. Not meeting these requirements could be an unfair commercial practice vis-a-vis other (professional, licenced) accommodation providers and might fall within the scope of unfair competition, rather than under the scope of the Unfair commercial practice vis-a-vis a consumer.

One implication for consumers in the applicability of the Unfair commercial practices (Directive 2005/29/EC on Unfair Commercial Practices of 11 May 2005) is that internet technology may not be used to retrieve and analyse information on consumers by firms. This information collection may affect the relationship between firms and their customers, their marketing strategies and how certain offers are displayed to certain customers. This is a data privacy issue and it might lead to distributional issues, as some consumers win and others lose out: ‘as firms have access to more information about their customers, price discrimination and product customisation are likely to increase. Some consumers will benefit, others will not.’ The Working Group found that many websites have a code of conduct in which they impede their members or users to use any technology which could retrieve data from the platforms or the other users or accommodations.

The purpose of the Directive is to make sure that consumers are not misled and that claims made by traders in the EU are clear, accurate and substantiated, thus enabling consumers to make informed and meaningful choices. The Directive covers business-to-consumer (‘B2C’) transactions, offline and online. With this limited scope of application a large number of accommodation providers will not be governed by the rules that should have been modified on a national level by this Directive. In fact, in the collaborative economy it is said to be between consumers, so that basically none of the accommodation providers will be governed by this. Except for those businesses that are ‘hiding’ behind the ideology. That in itself does not concern the scope of application but is in fact a kind of unfair commercial practice, which is governed by the directive.

When looking at the diligence obligation, there is the fact that some services may only be offered when having a licence. The applicability of such licences or registrations are not necessarily attached to being a business or not, they are often connected to a certain activity. One example is the Loi Hoguet in French law. Platforms engaged in demand and offer of accommodation could be engaged in the same activity as real estate agents are that need to fulfil the requirements of the Loi Hoguet to have a licence to intermediate in the housing

sphere (gestion locative). The Loi Hoguet du 2 juillet 1970 provides that a real estate agent must hold a carte professionnelle (professional card) for ‘transactions on immovable properties and business’. In order to obtain this card, which is delivered by the Chamber of Commerce and Industry, several requirements ought to be met by the agent: The agent must be able to document a professional experience, either through degrees/diplomas or field work. Additionally, a financial guarantee which is used to secure third parties’ funds. The minimum amount acceptable for that guarantee is 110.000 €. The agent must also benefit from a special insurance ‘Responsabilité Civile Professionnelle’ (Responsibility Civil Professional). This being necessary to insure the agent against any possible financial consequences arising in the course of business. Finally, the agent ought to prove that he is not under any kind of prohibition or ban to exercise this job.²⁰ The Loi Hoguet makes an exception for those in the ‘gestion locative’ of seasonal lease objects. They do not need a Carte Professionnelle. The problem is that the Loi Hoguet (article 8) calls ‘location saisonniere’ the lease of less than 90 days (in a row). However, on Airbnb we found that also accommodation providers are there offering their home for more than 90 days. It is unclear whether this will imply that Airbnb needs the Carte Professionnelle. In any case, these agents involved in seasonal lease, do need a guarantee fund, and insurance.

Under Catalanian legislation, the Decree 12/2010 regulates the requirements to practice as a real estate agent. Articles 6-11 of the Decree set the rules relating to the obligation of the real estate agent to provide a guarantee and professional liability insurance.

According to Article 6.2,²¹ real estate agents must provide a guarantee for the time they develop their activities in order to answer for the amount of money they receive, until the moment the money is transferred to the person meant to it. According to Article 10,²² real estate agents must provide a liability insurance that guarantees the damages that might arise from the development of their activities.

Under the current regulatory framework therefore, we have significant doubts around the duty of the platforms to subscribe to professional liability insurance or to provide a guarantee. It seems that in France and in Catalonia these professional obligations should be met by the platforms.

In Dutch law article 5 (2) (a) of the Directive on professional diligence is transposed into article 6:193a Dutch CC. In Dutch law intermediating between house owners and future renters is not a protected or registered activity (anymore). Article 5 (2) provides for two cumulative criteria for assessing whether a commercial practice should be deemed unfair, namely if it is contrary to the requirements of ‘professional diligence’ and it materially distorts or is likely to materially distort the economic behaviour of the average consumer.

²⁰ <http://www.economie.gouv.fr/dgccrf/location-saisonniere-se-loger-en-voyage>.

²¹ ‘6.1 Los agentes inmobiliarios tienen que constituir una garantía y mantenerla vigente durante todo el tiempo que desarrollen su actividad mediadora para responder de las cantidades que reciban en el ejercicio de la actividad, hasta que dichas cantidades sean puestas a disposición de las personas destinatarias.’

²² ‘Los agentes inmobiliarios tienen que disponer y mantener vigente durante todo el tiempo que desarrollen la actividad una póliza de seguros de responsabilidad civil que garantice los daños y perjuicios que puedan causar durante el ejercicio de su actividad.’

Professional diligence is defined as the ‘standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity’.

Article 6:193a Dutch CC writes under subsection f:

f. professionele toewijding: normale niveau van bijzondere vakkundigheid en van zorgvuldigheid dat redelijkerwijs van een handelaar ten aanzien van consumenten mag worden verwacht, in overeenstemming met de op hem rustende verantwoordelijkheid, voortvloeiend uit de voor die handelaar geldende professionele standaard en eerlijke marktpraktijken; [...]

The concept of professional diligence works with the notion of ‘professional dedication’: normal standard of special proficiency and care, that could reasonably be expected from a trader by a consumer, in accordance with the responsibility vested in him, following from the professional standard that is applied to him and honest/fair market practices; [...]

According to the Commission professional diligence is automatically violated in the event of a misleading action, omission or aggressive practice. Article 5 can be applied as a stand-alone provision, as a ‘safety net’, to make sure that any unfair practice which is not caught by the remainder of the Directive can be penalised.²³

It would be interesting to see what in specific cases is ‘professional diligence’ in a comparative legal setting to find whether protection levels vary. It seems that in all three countries there are different ways to achieve consumer protection. either by obliging those engaged in certain activities to be registered, licenced and insured, or by assessing the liability based on contract or tort (Dutch law) for a breach of professional diligence by way of safety net. Under Dutch law a contract which was agreed to under the influence of the breach of this obligation is avoidable (vernietigbaar), according to art. 6:193j Dutch CC.

1.7 Services Directive (2006/123/EC)

The Working Group sees that there can be doubt in the Collaborative Economy on Accommodations on the applicability (or extent of applicability) of the Services Directive 2006/123/EC.

Under consideration 35 it is stated: ‘Non-profit making amateur sporting activities are of considerable social importance. They often pursue wholly social or recreational objectives. Thus, they might not constitute economic activities within the meaning of Community law and should fall outside the scope of this Directive.’

²³ See: 14.3.2013: Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee. First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), p. 12.

This is but one example of a social activity. Some of the activities in the collaborative economy could be seen as social, such as couchsurfing, rather than meeting the sphere of the Services Directive. It seems that they would constitute economic activities in the light of the E-Commerce Directive, but might not under the Services Directive. It will have to be determined on a case-to-case basis, related to the amount of money asked. Here a referral to carpooling and food sharing is relevant. When carpooling different rules apply than when offering taxi services. Carpooling is limited to asking not more than the expenses made on fuel and insurances. The same distinction could maybe be made under the Services Directive. That would again limit the amount of cases in which this Service Directive applies.

The activities of the platforms could fall under the scope of application, because consideration 33 explicitly mentions real estate agents, connected to article 24, which requires Member States to take away obstacles for advertising about their services. However, article 24 mentions regulated professions. Not in each country the real estate agent is exercising a regulated profession. This will at least lead to the question whether - such as in France where the profession is regulated - platforms offering agency services, are engaged in unfair competition, the way Uber is in Germany, for acting without a licence.

Another point of concern is what is written in considerations 56 and 57. (56) According to the case law of the Court of Justice, public health, consumer protection, animal health and the protection of the urban environment constitute overriding reasons relating to the public interest. Such overriding reasons may justify the application of authorisation schemes and other restrictions. However, no such authorisation scheme or restriction should discriminate on grounds of nationality. Further, the principles of necessity and proportionality should always be respected.

(57) The provisions of this Directive relating to authorisation schemes should concern cases where the access to or exercise of a service activity by operators requires a decision by a competent authority. This concerns neither decisions by competent authorities to set up a public or private entity for the provision of a particular service nor the conclusion of contracts by competent authorities for the provision of a particular service which is governed by rules on public procurement, since this Directive does not deal with rules on public procurement.

The Working Group sees that in the field of accommodation provision, many of the requirements posed, are sectoral requirements concerning public and/or consumer safety such as hygiene, fire safety, accessibility, knowing how many people are in a certain house in case of an emergency, knowing who to turn to in the case of a problem. They also concern liveability and protection of the urban environment. It is thereby doubted whether Member States have to meet all requirements of the Services Directive in this particular area, where most of the regulations are City policy rules, rather than national rules prohibiting the provision of certain services.

Moreover Article 2 subparagraph 3 reads: ‘This Directive shall not apply to the field of taxation.’ Many of the rules concerning accommodation lease have as their purpose to

impose tourist taxes on visitors. One of the main concerns for the cities of Amsterdam, Barcelona and Paris is proved to be the possibility to avoid tourist taxes. This issue is solved by requiring the platforms to work together on this with the cities and the accommodation providers.

In the City Chapters we will shortly show how the articles were implemented in national law, provided that we do not know the exact scope of application in this particular area. It is clear that the transposition of the Services Directive was done quite differently in the Member States.

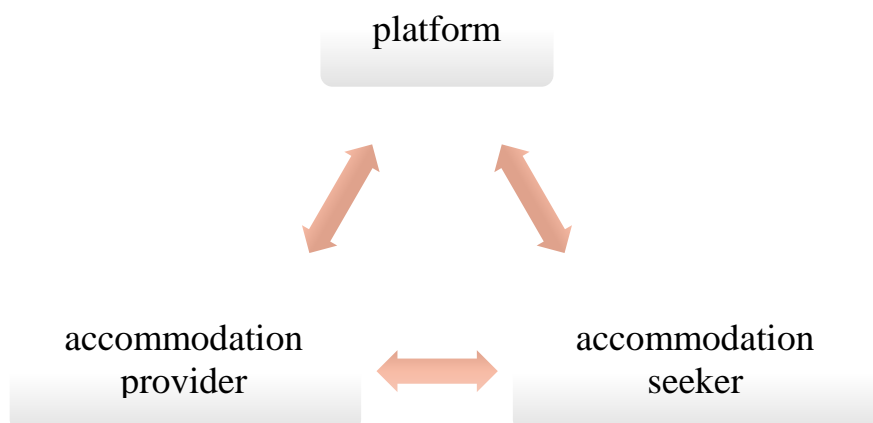
1.8 Consumer Rights Directive (2011/83/EC), CRD

The distinction between B2C and C2C contracts is relevant because of the possible applicability of the Consumer Rights Directive (art. 3 section 1). In this general ‘European’ part, the question whether a contract is B2C or C2C is preceded by the question whether these consumer directives apply for accommodation services in the sharing society at all.

In order for the specific consumer protection for electronic contracts to be applicable, the B2C-transaction has to be considered as a distance contract, defined in the directive under art. 2, section 7.

(7) ‘distance contract’ means any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded; (...)

Who in this case is the trader and who is the consumer? In order to be able to reflect on this, we use the figure of the triangle once more.



The service, provided for by the platform vis-a-vis the accommodation provider is a distance consumer contract if the platform is more than a mere bulletin board and the accommodation provider is a consumer. The same holds true for the transaction between the platform provider and the accommodation seeker. This means that in principle, the platform provider can be a trader, contracting with a consumer. If the platform is simply bringing together providers and seekers, the content of the service only indirectly has to do with the end result: the short term lease of accommodation.

The core relationship as far as this paper is concerned is the contractual relation between the accommodation provider and the accommodation seeker. Article 2 mentions the definitions of consumers: ‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession. Trader means ‘any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive’.

Considering the distinctive obligations that exist for either distance contracts or off-premise contracts, it needs to be said that it is difficult to qualify the contracts at stake. Consideration 20 explains: ‘The definition of distance contract should cover all cases where a contract is concluded between the trader and the consumer under an organised distance sales or service-provision scheme, with the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax) up to and including the time at which the contract is concluded. [...] Similarly, the concept of distance contract should not include reservations made by a consumer through a means of distance communications to request the provision of a service from a professional, such as in the case of a consumer phoning to request an appointment with a hairdresser. The notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform. It should not, however, cover cases where websites merely offer information on the trader, his goods and/or services and his contact details.’

This leaves the Working Group with the question whether making a reservation for accommodation leads to a distance contract. In the Guidance Document, more explanation is given. ‘Although simply taking of an appointment with the trader is not considered a distance contract, a binding reservation made, for example, by telephone of goods to be collected or services to be received at a certain time is likely to constitute a distance contract for the purposes of the Directive.’ Depending on the way the communication takes place, the service module on the platform may or may not constitute a distance contract.

The fact that a third party, an online platform provider stands between the provider and the user does not in itself stand in the way of the qualification as a distance contract. But as soon as the platform offers only information on the trader, there is again no distance contract. One will have to conclude on a case-to-case basis whether the platform offers only information or leads to a three party scheme. It could be subject of more intense research to find out which

three party relations lead to a three party scheme, and which would lead to three separate two-party-contracts. Furthermore, it should be researched whether the three separate two-party-contracts should be considered as a three party scheme under the scope of the directive.

If the definition of a distance contract is met, still there is a problem with the scope of the directive. In article 3, section 2(f), contracts for rental of accommodation for residential purposes is excluded from the scope of the directive. In the Dutch translation of the directive, the wording is ‘*verhuur van woonruimte*’ (rental of ‘residential space’). If this terminology were to be taken literally, services like AirBnB are excluded from the scope, as what is rented is space in which people can and do reside. Probably, however, rental of residential space for touristic purposes is not meant to be excluded. Only rental of residential space for residential purposes is, because in that case national law will provide for protection for the inhabitant.²⁴ The Working Group will therefore consider the accommodation service in the sharing economy as a rental for non-residential purposes, in this regard comparable to for example rental of hotel rooms. For several reasons, it can be less likely that the Directive applies between the lessor and the lessee in the holiday home sphere, either because these are peer-to-peer contracts or because they are for residential purposes. In the Consumer Rights Directive (CRD), Article 3 section 3 excludes a great number of other transactions from the scope of the Directive as well. We assume that the accommodation service does not constitute a service ex art. 3 section 3(g) or (h) CRD.

If the relationship between the accommodation provider and the accommodation seeker is to be qualified as a distance contract B2C²⁵, the rules of the Consumer Rights Directive apply. In that case, there is a service contract (article 2 (6) CRD) as well as a distance contract (art. 2(7) CRD) for which the consumer protection applies (art. 3 section 1 CRD). The consumer protection has an imperative nature (art. 25 CRD). If an accommodation provider is a consumer – as well as the seeker – the Consumer Rights Directive will **not** apply.

The consumer protection consists of:

- (1) Art. 6 CRD: precontractual information duties (section 1, a-g, k, m-p, t). The burden of proof as regards the compliance with the information duties is on the trader (section 7).
- (2) Art. 8 CRD, sections 1-3: additional information duties for distance contracts concluded by electronic means/trading websites.
- (3) Art. 8 CRD, section 7: post-contractual information duty (confirmation of the contract on a durable medium).²⁶ The confirmation must contain the information of

²⁴ This also is in line with recital 26 in the preamble of the Consumer Rights Directive, as well as the DC Justice Guidance Document on Directive 2011/83, p. 8-9. Note, however, that the examples used in the Guidance Document (rental of parking space or a party hall) do not cover accommodation services such as AirBnB.

²⁵ See paragraph 1.3.3, examples 2 and 3.

²⁶ Here, the trader cannot simply refer to the website for this information. He will have to send the information, for example in a letter or as an PDF-attachment with an e-mail. As the CJEU decided on July 5th of 2012 in case C-49/11 (*Content Services*), ECLI:EU:C:2012:419. The case is dealing with

art. 6 section 1 and has to be provided before the start of the performance of the service contract.

- (4) Art. 19 and 22 CRD (on payments).

In the city chapters more attention will be given to the transposition in the respective national laws. From art. 23 CRD follows that public or private organisations should be able to enforce compliance to the consumer rights. Penalties for breaching consumer law are not given in the Consumer Rights Directive. Art. 24 CRD directs this problem to national law, stating that the penalties must be effective, proportionate and dissuasive.

As far as transactions between accommodation providers and accommodation seekers are concerned, the consumer right of withdrawal (art. 9-15 CRD) is not applicable, because the agreement for the provision of accommodation other than for residential purposes is excluded under art. 16, section (l).

1.9 Non conformity

There are astonishing examples of ‘homes for rent’ to be found on platforms. Cases vary from an Amsterdam apartment situated next to canal which have no view or only a view on a blind wall to homes in war zones, such as in Jewish villages at the West Bank. This issue is not very likely to occur in Amsterdam, Barcelona or Paris, but it does illustrate that Airbnb tries to not interfere too much with what people are offering. In the General Terms it is expressed that the lessors are responsible to fulfil requirements of local or national legislation. The question whether the leased property is in accordance with the expectations of lessees is solved with the notice that the lessor is responsible for what he puts on the website. Airbnb only guarantees that the address exists. Reviews are supposed to do the rest.²⁷

In the City Chapters the Working Group will elaborate in more detail the not satisfactory service provision, using legislation, examples and opinions.

the same term in the preceding Directive (97/7/EC), but it is relevant still. The relevant consideration reads as follows. ‘Article 5(1) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts must be interpreted as meaning that a business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned does not meet the requirements of that provision, since that information is neither ‘given’ by that undertaking nor ‘received’ by the consumer, within the meaning of that provision, and a website such as that at issue in the main proceedings cannot be regarded as a ‘durable medium’ within the meaning of Article 5(1).’

²⁷ K. Bouma, ‘Airbnb verzekert verhuurders voor aansprakelijkheid’, Volkskrant 22 October 2015.

2. PARIS AND THE COLLABORATIVE ACCOMMODATION ECONOMY

2.1 Paris: facts

In January and February 2016 the Paris mayor sent out inspectors to track down unauthorised holiday rentals, whose owners face fines of up to € 100.000. Paris has 88,700 flats put up for rent only on Airbnb, more than any other city.²⁸

Homeowners renting out their properties to tourists causes concern to many Parisian inhabitants, yet is a source of income for inhabitants and tax authorities. ‘On one side owners can receive up to four times more income renting via Airbnb than by renting to traditional tenants. On the other residents are exasperated at the mass tourism in their blocks of flats. In the middle are politicians delighted at the additional tax revenue but worried that it will lead to an explosion of anger.’ Additional revenues are a great source of income. Airbnb started charging users in Paris a tourist tax of € 0,83 from October 2015 on and handed over nearly 1.169 million euros (€ 1.169.000) to the Paris city authorities in the last quarter of 2015, corresponding to 1.400.000 overnight stays over this period.

With residents’ complaints widespread, the fear of neighbourhood anger, and the accusations of traditional hotel chains that see Airbnb as hosting illegal hotels, the council is seeking to enforce a rule that owners can only rent to the holiday market for four months a year without a licence. Members of Parliament have voted to raise the maximum sentence for failing to declare a holiday rental to a year in prison. At this moment, this is a development without a clear decision taken.²⁹

In November 2015, a press release shows Paris remains Airbnb’s largest market with 1.300.000 guests, making Paris ‘the biggest market for the short-term vacation rental service’. Between September 2014 and August 2015, 3.9 million France-bound travellers booked their accommodation through Airbnb, 1.3 million of whom stayed in Paris. Paris is also the most active Airbnb community, with more Parisians using the service than any other market. The majority of Airbnb guests in France come from Europe (77 percent) with nearly half (45

²⁸ The Times, ‘Paris residents at war with renters over Airbnb influx’, 8.2.2016.

²⁹ The agreement followed similar pledges by the San Francisco group to collect and remit taxes in Amsterdam from January 2015 and the US capital Washington and Chicago from February 2015. AFP - Relaxnews (English International Version), ‘Airbnb hands over 1.2 mn euros to Paris city coffers’, 5.2.2016.

percent) made up of domestic travellers (France), and Britons and Germans rounding out the top European source markets. New data also paints a portrait of the average Airbnb host in France, who makes €1,970 a year, renting out their space about 26 nights a year. Average length of stay at an Airbnb listing in Paris: 4.2 nights.

A new development is that other kinds of agencies are emerging, acting as ‘agents’ for lessors, taking care of the keys, blankets and reception of the guests. About 25 % of Airbnb accommodations are leased like that in Paris (in Barcelona it was said to be even 33 %).^{30,31}

In France a lot of research was done on the collaborative economy. More information on this is in these reports:

- [Enjeux et perspectives de la consommation collaborative - Etude pour la Direction générale des entreprises. July 2015.](#) [🔗](#)
- [Economie numérique - Note du Conseil d’analyse économique \(CAE\), Oct. 2015.](#) [🔗](#)
- [Économie collaborative, économie du partage: quels enjeux pour demain ? - Rencontre du 29 décembre 2015, France Stratégie.](#) [🔗](#)
- [Le compte personnel d’activité en trois questions - Note d’analyse de France Stratégie, Oct. 2015.](#) [🔗](#)

2.2 The definition of the three relations in French law

2.2.1 Relation 1 between the platform and the person offering an accommodation: agency

In terms of French private law, a platform such as Airbnb is acting as an ‘agent immobilier’, facilitating the conclusion of contracts. This activity is called ‘gestion locative’. The activity is regulated by the ‘Loi Hoguet’: Loi n° 70-9 du 2.1.70 et décret n° 72-678 du 20.7.72.

Important to notice is that article 8 of the Loi Hoguet writes that persons acting as agents in the field of ‘gestion locative’ need to be a ‘titulaires d’une autorisation administrative délivrée en application de la loi du 13 juillet 1992’ to act as such. However, they are not under this obligation when offering ‘location saisonnière de meublés hors forfait touristique’. When offering a holiday home - less than 90 days in a row - they do not need the permit (carte professionnelle), provided that this seasonal lease is not their principal activity but only an ‘activité accessoire’. They do have to give a financial guarantee and insurance.

Yet also the Loi Hoguet and the general rules on *mandat* in the Code Civil apply - to some extent - because article 1984 – in the section on the nature and form of the mandate – writes:

³⁰ AFP - relaxnews (English International Version), ‘Paris remains Airbnb’s largest market with 1.3 million guests’, 13.11.2015.

³¹ <http://tempsreel.nouvelobs.com/economie/20150818.OBS4315/les-agences-immobilieres-colonisent-airbnb.html>; http://www.liberation.fr/societe/2015/07/07/airbnb-a-paris-le-squat-des-agents-immobiliers_1344375.

‘Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom.’ A website such as Airbnb or leboncoin.fr is not acting in the name of the lessor.

Important articles in this relation are:

Article 1985: A mandate may be conferred by an authentic act or by an act under private signature, even by letter. It may also be conferred verbally, but proof of it by witness is received only in accordance with the Title of Contracts or of Conventional Obligations in General. Acceptance of a mandate may only be tacit and result from its performance by the mandatary.

Chapter II is on the obligation of the mandatary

Article 1991: The mandatary is bound to fulfil the mandate as long as his authority lasts, and he is responsible for the damages which may result from his failure to perform.

[...]

Article 1992: The mandatary is liable not only for his deceit, but also for the faults committed in his management. Nevertheless, the liability for faults is enforced less rigorously against a person whose mandate is gratuitous than against one who receives a salary.

Article 1993: Every mandatary is bound to render an account of his management, and to return to the principal all that he received by virtue of his power of attorney, even if what he has received was not owed to the principal.

Other general Civil Code articles applicable is 1147 (on consequences of the obligation).

Article 1147: A debtor shall be ordered to pay damages, in the proper circumstance, either on account of the non-performance of the obligation, or on account of the delay in performing, whenever he cannot establish that the non-performance was due to an external cause that cannot be imputed to him provided, moreover, there is no bad faith on his part.

2.2.2 Relation 2 between the platform and the person seeking an accommodation: agency

There is a relation between the platform and the person seeking an accommodation as well. The platform is a service provider: any natural or legal person providing an information society service.

The person seeking an accommodation is a recipient of the service: any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible. He will usually also be a consumer: any natural person who is acting for purposes which are outside his or her trade, business or profession.

In terms of French private law, a platform such as Airbnb will be seen as an ‘agent’ (bemiddelaar) helping people find a place to stay. The relevant articles are cited in section 1.2.1.

The mentioned Loi Hoguet³² writes in article 1-1:

Pour l'application de la présente loi:

1° The leasing or the sub-leasing, seasonal or not, whether furnished or unfurnished, of existing buildings or those under construction, is to be considered as property management activities when they constitute the accessory of a management mandate (mandat de gestion).

2° For the purpose of this law is considered seasonal lease/rental encompassed lease of a building for a maximal period of ninety days, this period is non-renewable.

When these lease/rental brings about the services of an intermediary, the conditions of conclusions are precised by a decree (décret) of the Council of State.

2.2.3 Relation 3 between the provider and the seeker of an accommodation: lease

In the relation between the provider of an accommodation and the seeker of an accommodation the French law directs us to the utilisation of an immovable: a 'lease of things' (louage de chose) in the sense of art 1709 - 1713 of the Code Civil.

According to article 1708 There are two kinds of contract of lease: The lease of things; and The lease of work. Article 1709 provides that; 'The lease of things is a contract by which one party binds himself to provide the enjoyment of a thing to the other for a certain time, in return for a certain price that this other party obliges himself to pay the former'. Article 1711 specifies that this type of 'louage' is subdivided into several other types, inter alia, the lease of houses (bail à loyer) which corresponds to the lease of houses and movables.

Often the lease will be a 'location saisonnière': the lease of an immovable for a maximum of 90 days in a row (Loi n° 70-9, art. 1-1 n. 2). The immovable could be a villa, apartment, studio which is for the exclusive use of the lessee. The lease will be determined by day, week or month and the lessee will not have his residence there (il n'élit pas domicile, in the sense of article D.324-1 of the Code du tourisme). No services are offered, otherwise one would speak of a hotel. Holiday homes are different from a hotel in the sense that they allow the guest to be independent using a kitchen.³³

2.2.4 The definition of consumer and professional

The concept of consumer (*consommateur*), which has played a very important protective role in French civil, commercial, and competition law, suffered from a lack of satisfactory definition. For a rather long time, French judges used to base their approach of the concept on a definition provided by economic theory, and the idea was that a consumer acquired goods and services to satisfy personal needs, and outside its professional capacity.³⁴ This, definition

³² Loi n° 70-9 du 2 janvier 1970 réglementant les conditions d'exercice des activités relatives à certaines opérations portant sur les immeubles et les fonds de commerce.

³³ <http://www.fnaim.fr/3772-tout-savoir-sur-les-nouveaux-contrats-types-de-location.htm>;
<http://www.economie.gouv.fr/dgccrf/location-saisonniere-se-louer-en-voyage>.

³⁴ Jean-Pascal Chazal 'De la cohérence de la notion de consommateur : de l'unicité de la définition à la multiplicité des régimes', Recueil Dalloz 1999, p. 249.

was considered restrictive by some, criticizing the use of the terms *besoins personnels* (personal needs), arguing that this clear-cut approach was inappropriate, for in many instances a good will be used in private and professional capacity, which should not preclude the individual from the statute of consumer. Following the issuance of Directive 2011/83/EU on consumer rights of 25 October 2011, the legislator was left with no choice but to codify a definition of consumer. This was done through article 3 of the ‘Loi Hamon’³⁵, which inserted a preliminary article in the code de la consommation: ‘For the purpose of this code, considered as a consumer is every natural person which act for purposes which fall outside his trade, business, craft, industrial or liberal activities’.³⁶ This provision includes two rather remarkable features: first a consumer is a *personne physique* (a natural person), therefore excluding from the scope of the definition legal persons³⁷, thus confirming the stance adopted in the *Cour de Cassation*’s jurisprudence.³⁸ Furthermore, the wording of the law which excludes ‘trade, industrial, craft or liberal activities’ does not refer explicitly to ‘professional activities’, thus opting for a broader approach of the concept of consumer.³⁹

There is a difference between ‘*location nue*’ and ‘*location meublée*’. If one leases a furnished apartment or studio this lease will be considered an industrial or commercial activity in the sense of tax law. To be considered a professional in this sense, the total income gained from this activity must be at least € 23.000 per year, additionally the revenue gained from the renting activities must be the highest source of revenue of the household. Also a registration at the Chamber of Commerce should be fulfilled.⁴⁰ As established by article 8 of the loi Hoguet, non-professional seasonal renters do not need to obtain the ‘professional card’ mentioned in article 3 of the loi Hoguet. However, they do need an administrative authorisation prior to engaging in these activities and cannot lease for a period exceeding 90 days in a row.

2.3 The scope of the definition of ‘Information Society Services (ISS)’

When a certain service is defined as an ‘information society services’ in the sense of the E-Commerce Directive (2000/31) a number of information obligations are to be fulfilled by the service provider. At the same time special exemptions from liability will apply. In French law, the provider of an ISS is called ‘prestataire de services de la société de l’information’.

The ISS itself is a ‘service de la société de l’information’.

³⁵ Loi n° 2014-344 du 17 mars 2014 relative à la consommation also known as Loi Hamon.

³⁶ Article Préliminaire, Partie Législative code de la consommation reads; ‘*Au sens du présent code, est considérée comme un consommateur toute personne physique qui agit à des fins qui n’entrent pas dans le cadre de son activité commerciale, industrielle, artisanale ou libérale*’.

³⁷ Gobert-Grignan Cabinet d’Avocat (site officiel) ‘Précision sur la notion de consommateur’ accessible at; < <http://grignan-avocats.com/?p=986>>.

³⁸ Cass civ 1ère, 3 décembre 2013, jurisdata n°2013-027899.

³⁹ Jean-Pascal Chazal ‘De la cohérence de la notion de consommateur : de l’unicité de la définition à la multiplicité des régimes’, *Receuil Dalloz* 1999, p. 249.

⁴⁰ <http://droit-finances.commentcamarche.net/contents/1468-location-saisonnier-reglementation>.

Directive 2000/31/EC was transposed in several French laws:

- Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique;

- Décret n° 2005-137 du 16 février 2005 pris pour l'application de l'article L. 134-2 du code de la consommation

- Ordonnance n° 2005-674 du 16 juin 2005 relative à l'accomplissement de certaines formalités contractuelles par voie électronique

On the 'ISS' the following is written in Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique.

Article 14 writes: 'Le commerce électronique est l'activité économique par laquelle une personne propose ou assure à distance et par voie électronique la fourniture de biens ou de services.

Entrent également dans le champ du commerce électronique les services tels que ceux consistant à fournir des informations en ligne, des communications commerciales et des outils de recherche, d'accès et de récupération de données, d'accès à un réseau de communication ou d'hébergement d'informations, y compris lorsqu'ils ne sont pas rémunérés par ceux qui les reçoivent.'

2.3.1 Qualification of the service between the platform and the person offering an accommodation

A platform is a service provider: any natural or legal person providing an information society service. The person offering accommodation could be seen – in the relation with the platform - as a recipient of the service and possibly as a consumer.

The platforms' service is to be seen as an ISS. It is an economic activity which takes place on-line. In the several websites the Working Group researched, it found different business models, varying from membership fees, percentages of transactions to asking payment from people seeking an accommodation to offering 'special services' which were remunerated. When a platform deals for a person offering an accommodation, yet does not ask for a remuneration from those who will use the accommodation, but gains money from advertisements (commercial communications) it will be an economic activity as well. Even if the platform only provides a search tool or allows for a communication network, it will be seen as an 'Information Society Service'.

On websites such as Airbnb the remuneration is obvious. Other websites, such as for example Couchsurfing, do not ask for a remuneration, however are engaged in an economic activity because only a part of their service is offered 'for free'. There is a part of the services which is offered for remuneration. The limited service offered can be extended for example with a paid ID-check or address check, which costs money and will 'increase' the likeliness of finding other participants to 'share' with.

2.3.2 Qualification of the service between the platform and the person seeking an accommodation

The platforms' service is to be seen as an ISS. We would like to refer to 1.3.1.

2.3.3 Qualification of the service between the provider and the seeker of an accommodation

In the relation between the provider of an accommodation and the seeker of an accommodation it becomes harder to define the 'service'. Is the accommodation provider offering an ISS? If so, this accommodation provider (lessor) has to provide many information etcetera.

As written down in the general part, the fact that there is no remuneration concerned in cases of for example Couchsurfing could imply that there is no economic activity taking place. As soon as any remuneration is asked, whether in money or in returning the same service (such as a HomeSwap) the accommodation provider will be offering an ISS to the accommodation seeker.

As explained in 1.3, an Information Society Service is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. The original definition of ISS was set at a time where the typical ISS was the web shop selling products to a consumer or the physical store or hotel making use of the internet to allow reservations of products or services. As the European Commission recognized in Recital 11 of Directive 98/48/EC: it was not yet known which form the new services will take or what their nature would be.

The Working Group researched how to define the 'service' offered by the intermediating platforms and how to define what is offered by parties offering accommodation and whether they are consumers or not. One core task was to research to what extent a house owner making use of a website which functions as an intermediary or an agent between him and a renter, offers an ISS. We used directive 2000/31/EC recital (18) to search for a dividing line between ISS and not-ISS. It is written '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...'. This makes believe that advertising an accommodation online is an ISS.

'...activities such as the delivery of goods as such or the provision of services off-line are not covered...'. This makes us think that only the factual enjoyment of the accommodation, the lease contract is not an ISS.

'...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 offering on-line information or commercial communications, or 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; [...] This part makes us think that the dividing line is between the advertising and moment of conclusion of the contract. Up to that point the accommodation provider will be bound by all E-commerce requirements. Only after that, where the factual lease is contracted via email or individual messaging and executed, the service becomes an of-line service. That thought is again confirmed by the next part of the recital 18: ‘...the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.’

We expressed in our examples in 1.3.3 that the ISS is offered at the advertising level and at the reservation level. If to reserve an apartment the accommodation provider asks to send an **email**, this is outside the scope of 2000/31/EC.

Only the contract ultimately concluded between the accommodation provider and accommodation seeker is to be defined by **national law**: most of the time lease. The execution of the contract itself is not **an ISS**.

Using the definition of ISS and the recitals (of which 18 is key) in the ECD the key question is represented in one case:

John owns a big house with many rooms. He likes the travelling lifestyle and uses Couchsurfing to find places to stay and to receive guests from all over the world. Although John expects to benefit from using this platform, he does not ask for remuneration. It is unclear in how far there is an economic activity here. However the fact this ‘service’ is offered ‘at a distance’, ‘by electronic means’, ‘at the individual request of a recipient of services’ possibly suggests an ISS, it is unclear whether Articles 5 and 6 Directive 2000/31/EC apply.

The contract concluded between John and any couchsurfer is to be defined by **national law**. In Dutch law it is unclear that this will result into a contract under our law of obligations, because it is of no economic interest, maybe only leading to an unenforceable moral or natural obligation, or a *comodat* or gratuitous (non-commercial) use of a good.

In this couchsurfing case it is not clear whether an ‘economic activity’ is taking place. This is related to the fact that the service is not remunerated (not in money, data, through advertisements or in kind), combined with the informal (non-commercial) character of the transaction. The other issue here is that - at least in the traditional distinction of moral obligations and legal obligations, a remuneration in order to be seen as such, needs to be concrete. In the case of community swapping, the remuneration is delayed and not reciprocal; someone else might return ‘the favour’.

From the moment of offering an accommodation for money up to the reservation, there will be an ISS. If the reservation is through a button online, this is an ISS. If the reservation is made by email, the application of the ISS-rules stops. Also the factual lease is no longer governed by E-commerce requirements.

The *transfert à titre onéreux* (transfer for value) of the utilisation of a movable or an immovable between two private individuals does not fall under the *droit de la consommation* nor under the Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique. According to Lêmy D. Godefroy, it does not fit the definition of e-commerce given by the Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique. The contract between the lessee and lessor should be considered a 'lease of things' (*louage de chose*) in the sense of art 1709 and 1713 of the Code Civil. Between these two parties, the applicability of the E-Commerce Directive is excluded according to literature.⁴¹ This relates only to that factual lease contract.

2.4 The exemptions from platforms' liability in the light of the considerations in Directive 2000/31/EU

Platforms are obliged to act against illegal content harming others. Not always are they actively involved in the publication of this illegal content. Therefore a number of exemptions from liability - taken from the articles 12-15 E-Commerce Directive - are implemented in French law.

The Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (short: LCEN) creates a differentiation between the different ISS providers; there are *hébergeur - intermédiaire technique* (a host or technical intermediary) or they are *éditeur* (editor). Simple host face very little obligation under the LCEN (art. 6-I -2) since they do not have to act *a priori* on eventual illegal content, they are only under an obligation to act *a posteriori* if the illegal content was brought to their attention, and additionally do not have to undertake general surveillance of the information they stock (art. 6-I-7 LCEN). Contrastingly, an editor in the sense of art. 6-III-1 do not have the same exemptions, thus quite logically, and as explained by Lêmy D. Godefroy all the platforms are presenting themselves as being simple host, and usually uses it as a defence in a Court of law.^{42 43}

The distinction is rather subtle. The *Tribunal de Grande Instance de Paris*, in a decision rendered on the 13th May 2009⁴⁴, on a complaint from L'Oréal against eBay France on the

⁴¹ Lêmy D. Godefroy, 'Vers une régulation des places de marché de commerce en ligne entre particuliers', *Receuil Dalloz* 2015, p. 2513 (translated from French).

⁴² Lêmy D. Godefroy, 'Vers une régulation des places de marché de commerce en ligne entre particuliers', *Receuil Dalloz* 2015, p. 2513 (translated from French).

⁴³ Tribunal de Grande Instance de Paris (3eme Chambre) 10 Avril 2009 06/18473; Dailymotion – a website offering video streaming services – successfully used its status of host as a defence.

⁴⁴ Tribunal de Grande Instance de Paris (3eme Chambre) 13 May 2009 07/11365 L'Oreal c. eBay France.

basis that counterfeit fragrances of the former were sold on the website of the latter, has refused eBay's defence based on its alleged status as a *technical intermediary*⁴⁵, and concluded that the active role played by eBay in promoting advertisements was in essence capable of attributing a form of control over the illegal counterfeit products that are sold.⁴⁶ Therefore, the legal characterisation of platform such as Airbnb, Ebay and other in French law is still rather vague, since these platforms will always use the ambiguity of their positions, presenting themselves as simple host in their General Conditions, but in the meantime, they do not hesitate to play a more active role in assisting their customers to conclude agreements, which, as seen in the L'Oréal c. Ebay France case, can lead judges to question their status of simple host.

We would like to emphasise our assumption that platform providers will always store data of the accommodation providers and accommodation seekers somehow, which brings art. 12-13 out of sight.

2.4.1 Article 12 E-Commerce directive 2000/31/EC

Article 12 (1) Directive 2000/31/EC is in article 9 n°2004-575 which refers to article L. 32-3-3 Code des postes et des télécommunications

It reads;

'Art. L. 32-3-3. Code des postes et des télécommunications - Toute personne assurant une activité de transmission de contenus sur un réseau de télécommunications ou de fourniture d'accès à un réseau de télécommunications ne peut voir sa responsabilité civile ou pénale engagée à raison de ces contenus que dans les cas où soit elle est à l'origine de la demande de transmission litigieuse, soit elle sélectionne le destinataire de la transmission, soit elle sélectionne ou modifie les contenus faisant l'objet de la transmission.'

Article 12 (3) opens the possibility for MS to require from a service provider to terminate its activities in order to end or prevent an infringement.

In French law the *juge administratif* will require a service provider to end its activities if in breach of intellectual property law.

Also article 8 of the LCEN is relevant, referring to article L. 332-1 Code de la propriété intellectuelle:

'- Il est inséré, après le cinquième alinéa de l'article L. 332-1 du code de la propriété intellectuelle, deux alinéas ainsi rédigés:

« 4° La suspension, par tout moyen, du contenu d'un service de communication au public en ligne portant atteinte à l'un des droits de l'auteur, y compris en ordonnant de cesser de stocker ce contenu ou, à défaut, de cesser d'en permettre l'accès. Dans ce cas, le délai prévu à l'article L. 332-2 est réduit à quinze jours.

⁴⁵ G. Loiseau, Recherche statut d'hébergeur désespérément, CCE 2015. Comm. 42.

⁴⁶ Lémy D. Godefroy, 'Vers une régulation des places de marché de commerce en ligne entre particuliers', Recueil Dalloz 2015, p. 2513 (translated from French).

« Le président du tribunal de grande instance peut, dans les mêmes formes, ordonner les mesures prévues aux 1° à 4° à la demande des titulaires de droits voisins définis au livre II. »

2.4.2 Article 13 E-Commerce directive 2000/31/EC

Article 13 Directive 2000/31/EC was inserted in article L. 32-3-4 code des postes et télécommunications:

‘Art. L. 32-3-4. - Toute personne assurant dans le seul but de rendre plus efficace leur transmission ultérieure, une activité de stockage automatique, intermédiaire et temporaire des contenus qu’un prestataire transmet ne peut voir sa responsabilité civile ou pénale engagée à raison de ces contenus que dans l’un des cas suivants:

« 1° Elle a modifié ces contenus, ne s’est pas conformée à leurs conditions d’accès et aux règles usuelles concernant leur mise à jour ou a entravé l’utilisation licite et usuelle de la technologie utilisée pour obtenir des données;

« 2° Elle n’a pas agi avec promptitude pour retirer les contenus qu’elle a stockés ou pour en rendre l’accès impossible, dès qu’elle a effectivement eu connaissance, soit du fait que les contenus transmis initialement ont été retirés du réseau, soit du fait que l’accès aux contenus transmis initialement a été rendu impossible, soit du fait que les autorités judiciaires ont ordonné de retirer du réseau les contenus transmis initialement ou d’en rendre l’accès impossible. »

The Working Group excludes the possibility of platform providers of being mere access providers. We start from the assumption that platform providers always will store data of the accommodation providers and accommodation seekers somehow, which brings art. 12-13 out of sight, as explained under 2.4.1.

2.4.3 Article 14 E-Commerce directive 2000/31/EC

Article 14 (1) ECD was implemented through article 6 (I) (2) Loi n° 2004-575 (LCEN).

It reads:

‘2. Les personnes physiques ou morales qui assurent, même à titre gratuit, pour mise à disposition du public par des services de communication au public en ligne, le stockage de signaux, d’écrits, d’images, de sons ou de messages de toute nature fournis par des destinataires de ces services ne peuvent pas voir leur responsabilité civile engagée du fait des activités ou des informations stockées à la demande d’un destinataire de ces services si elles n’avaient pas effectivement connaissance de leur caractère illicite ou de faits et circonstances faisant apparaître ce caractère ou si, dès le moment où elles en ont eu cette connaissance, elles ont agi promptement pour retirer ces données ou en rendre l’accès impossible.’

Article 14 (2) is in Article 6 (I) (2) last sentence: ‘L’alinéa précédent ne s’applique pas lorsque le destinataire du service agit sous l’autorité ou le contrôle de la personne visée audit alinéa’

Article 14 (3) D 2000/31/EC can be linked to article 12 (3) of the same directive, it opens the possibility for the MS to require a service provider ‘to terminate or prevent an infringement’ through an administrative decision.

Article 8 of the loi 2004-575, referring to L. 332-1 *Code de la propriété intellectuelle* is also relevant. It reads:

‘- Il est inséré, après le cinquième alinéa de l’article L. 332-1 du code de la propriété intellectuelle, deux alinéas ainsi rédigés:

« 4° La suspension, par tout moyen, du contenu d’un service de communication au public en ligne portant atteinte à l’un des droits de l’auteur, y compris en ordonnant de cesser de stocker ce contenu ou, à défaut, de cesser d’en permettre l’accès. Dans ce cas, le délai prévu à l’article L. 332-2 est réduit à quinze jours.

« Le président du tribunal de grande instance peut, dans les mêmes formes, ordonner les mesures prévues aux 1° à 4° à la demande des titulaires de droits voisins définis au livre II. »

It seems that criteria for liability are governed by the question whether (art. 6-I (3)) there is a notice and take-down procedure, or whether they was no actual knowledge of the illegal activity or information (art. 14.1 sub a and b ECD).

Article 6 (I) sub 8 describes the sanctions: the judicial authority may take appropriate measures to prevent or stop a damage occurring because of an online service.

When the requirements to use the exemptions are not met, general tort law (responsabilité délictuelle) will apply.

2.4.4 Article 15 E-Commerce directive 2000/31/EC

The fact that there may not be a general obligation to monitor is implemented in article 6 (I) sub 7 of the LCEN.

‘Les personnes mentionnées aux 1 et 2 ne sont pas soumises à une obligation générale de surveiller les informations qu’elles transmettent ou stockent, ni à une obligation générale de rechercher des faits ou des circonstances révélant des activités illicites.

Le précédent alinéa est sans préjudice de toute activité de surveillance ciblée et temporaire demandée par l’autorité judiciaire.

Compte tenu de l’intérêt général attaché à la répression de l’apologie des crimes contre l’humanité, de l’incitation à la haine raciale ainsi que de la pornographie infantine, les personnes mentionnées ci-dessus doivent concourir à la lutte contre la diffusion des infractions visées aux cinquième et huitième alinéas de l’article 24 de la loi du 29 juillet 1881 sur la liberté de la presse et à l’article 227-23 du code pénal...

...A ce titre, elles doivent mettre en place un dispositif facilement accessible et visible permettant à toute personne de porter à leur connaissance ce type de données. Elles ont également l’obligation, d’une part, d’informer promptement les autorités publiques compétentes de toutes activités illicites mentionnées à l’alinéa précédent qui leur seraient signalées et qu’exerceraient les destinataires de leurs services, et, d’autre part, de rendre publics les moyens qu’elles consacrent à la lutte contre ces activités illicites.

Tout manquement aux obligations définies à l’alinéa précédent est puni des peines prévues au 1 du VI.’

2.5 Liability for infringement of E-Commerce requirements

This section identifies where the requirements based on the E-Commerce Directive are implemented.

Is the platforms or the provider (or both) liable in case these requirements are not met?

2.5.1 Article 5 E-Commerce directive 2000/31/EC

Article 5 Directive 2000/31/EC is covered by Article 19 of Loi 2004-575. Article 19 writes:

Sans préjudice des autres obligations d’information prévues par les textes législatifs et réglementaires en vigueur, toute personne qui exerce l’activité définie à l’article 14 est tenu d’assurer à ceux à qui est destinée la fourniture de biens ou la prestation de services un accès facile, direct et permanent utilisant un standard ouvert aux informations suivantes:

1° S’il s’agit d’une personne physique, ses nom et prénoms et, s’il s’agit d’une personne morale, sa raison sociale;

2° L’adresse où elle est établie, son adresse de courrier électronique, ainsi que des coordonnées téléphoniques permettant d’entrer effectivement en contact avec elle;

3° Si elle est assujettie aux formalités d'inscription au registre du commerce et des sociétés ou au répertoire des métiers, le numéro de son inscription, son capital social et l'adresse de son siège social;

4° Si elle est assujettie à la taxe sur la valeur ajoutée et identifiée par un numéro individuel en application de l'article 286 ter du code général des impôts, son numéro individuel d'identification;

5° Si son activité est soumise à un régime d'autorisation, le nom et l'adresse de l'autorité ayant délivré celle-ci;

6° Si elle est membre d'une profession réglementée, la référence aux règles professionnelles applicables, son titre professionnel, l'Etat membre dans lequel il a été octroyé ainsi que le nom de l'ordre ou de l'organisme professionnel auprès duquel elle est inscrite.

Toute personne qui exerce l'activité définie à l'article 14 doit, même en l'absence d'offre de contrat, dès lors qu'elle mentionne un prix, indiquer celui-ci de manière claire et non ambiguë, et notamment si les taxes et les frais de livraison sont inclus. Le présent alinéa s'applique sans préjudice des dispositions régissant les pratiques commerciales trompeuses prévues à l'article L. 121-1 du code de la consommation, ni des obligations d'information sur les prix prévues par les textes législatifs et réglementaires en vigueur.

'Les infractions aux dispositions du présent article sont recherchées et constatées dans les conditions fixées par les articles L. 450-1, L. 450-2, L. 450-3, L. 450-4, L. 450-7, L. 450-8, L. 470-1 et L. 470-5 du code de commerce.'

The Code de Commerce in article L450-1 describes the agents entrusted to carry out investigations of these types; it includes civil servants empowered by the Ministry of Economic Affairs, 'category A' civil servants empowered by the Minister of Justice, and civil servants from the Haute Autorité de la Concurrence (Competition authorities). Article L450-2 establishes rules on procedure, and L450-3 describes the investigational powers granted, which are limited through the establishment of counter-powers in Art L450-4. Finally, article L450-7 specifies that the agents can, without a breach of professional confidentiality being raised against them, access any documents or information held by the services and establishments of the State and other public authorities. Article L450-8 sets up the penalty for anyone that would be guilty of obstructing the investigation (300.000 euros of fine and up to 2 years imprisonment). Article L470-1 establishes that a company can be liable to pay fines imposed on the dirigeants of the company. Finally, article L470-5 grants other powers to the Ministry of Economic Affairs, such as filing pleading and the possibility to develop oral arguments before the civil, or criminal jurisdictions.

The Loi Macron (LOI n°2015-990 du 6 août 2015 - art. 134) added to the Code de la Consommation the article L111-5-1. This article explains that 'toute personne dont l'activité consiste à mettre en relation, par voie électronique, plusieurs parties' for the purpose of a.o. 'le partage d'un bien' is obliged to give 'information loyale, claire et transparente'

about 'la qualité de l'annonceur et les droits et obligations des parties en matière civile et fiscale'.⁴⁷

With that it is said that the platform is responsible for giving this information about the accommodation providers as well.

2.5.2 Article 6 -7 E-Commerce directive 2000/31/EC

Article 20 of Loi n° 2004-575 implements article 6 and 7.

It reads:

‘Toute publicité, sous quelque forme que ce soit, accessible par un service de communication au public en ligne, doit pouvoir être clairement identifiée comme telle. Elle doit rendre clairement identifiable la personne physique ou morale pour le compte de laquelle elle est réalisée.

L’alinéa précédent s’applique sans préjudice des dispositions réprimant la publicité trompeuse prévues à l’article L. 121-1 du code de la consommation.’

Article 21 paragraph 1 L. 121-15-1 code de la consommation reads:

‘Art. L. 121-15-1. - Les publicités, et notamment les offres promotionnelles, telles que les rabais, les primes ou les cadeaux, ainsi que les concours ou les jeux promotionnels, adressés par courrier électronique, doivent pouvoir être identifiés de manière claire et non équivoque dès leur réception par leur destinataire, ou en cas d’impossibilité technique, dans le corps du message.’

Article L. 121-15-2 reads: - Sans préjudice des dispositions réprimant la publicité trompeuse prévues à l’article L. 121-1, les conditions auxquelles sont soumises la possibilité de bénéficier d’offres promotionnelles ainsi que celle de participer à des concours ou à des jeux

⁴⁷ Article L111-5-1, Créé par LOI n°2015-990 du 6 août 2015 - art. 134

Sans préjudice des obligations d’information prévues à l’article 19 de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l’économie numérique, toute personne dont l’activité consiste à mettre en relation, par voie électronique, plusieurs parties en vue de la vente d’un bien, de la fourniture d’un service ou de l’échange ou du partage d’un bien ou d’un service est tenue de délivrer une information loyale, claire et transparente sur les conditions générales d’utilisation du service d’intermédiation et sur les modalités de référencement, de classement et de déréférencement des offres mises en ligne.

Lorsque seuls des consommateurs ou des non-professionnels sont mis en relation, la personne mentionnée au premier alinéa du présent article est également tenue de fournir une information loyale, claire et transparente sur la qualité de l’annonceur et les droits et obligations des parties en matière civile et fiscale.

Lorsque des professionnels, vendeurs ou prestataires de services sont mis en relation avec des consommateurs, la personne mentionnée au premier alinéa du présent article est également tenue de mettre à leur disposition un espace leur permettant de communiquer aux consommateurs les informations prévues à l’article L. 121-17.

Le contenu de ces informations et leurs modalités de communication sont fixés par décret.

promotionnels, lorsque ces offres, concours ou jeux sont proposés par voie électronique, doivent être clairement précisées et aisément accessibles.’

If one does not abide by the obligations stemming from the aforementioned articles, the publicity will be deemed an unfair commercial practice (*pratique commerciale trompeuse*) in the sense of Article L-121 et seq. Code de la Consommation. The sanctions incurred are precised in Article L121-6 of the same code, they include a fine of 300.000 euros and up to two years of imprisonment.

2.5.3 Article 8 E-Commerce directive 2000/31/EC

Article 8 2000/31/EC is covered by several rules in the Loi Hoguet (Loi no 70-9). These rules concern the way the publicity in this specific case of the ‘gestion locative’ should be:

Article 6-1:

Every advertisements issued by a person mentioned in article 1, which relates to activities mentioned in paragraph 1 of that same article, irrespective of the medium used, ought to mention the amount (all taxes included) of its fee concerning sales, expressed in percentage of the price, when it falls to the expense of the tenant or lessee.

Article 6-2:

Every advertisements which relates to operations mentioned in the first paragraph of article 1, which is proposed by a person who is not an employee, and who has been empowered by a professional to; negotiate and enter into agreements for him, must mention that this person is acting as a commercial agent (*agent commercial*).

This obligation to mention the statute of commercial agent is extended to sales or search mandate, and to all other real estate transaction documents to which the agent participates in.

The Loi Hoguet writes on the infringement of article 6-2 (in article 17-2), that the fine is given according to 5° of article 131-13 of the Penal Code. The same fine is given for violating article 6-2. Article 131-13 Penal Code, 5°: 1500 Euros and up to 3 000 Euros in case of recidive.

2.5.4 Article 9 E-Commerce directive 2000/31/EC

Article 9 (1) has been transposed into article 25 Loi n° 2004-575 (LCEN) which has amended the Civil Code. Article 1108 now provides that each time a written form is necessary to lead to a valid legal act, it can be established and saved in an electronic way as well, under the conditions expressed in article 1316-1 and 1316-4 and in the case of an authentic deed the second paragraph of article 1317.

The exceptions of article 9 (2) are copied into article 1108-2 French CC.

2.5.5 Article 10 E-Commerce directive 2000/31/EC

Article 10 is implemented in article 1369 Code Civil. Subparagraph 1 and 2 are in article 1369-4 French CC.

Quiconque propose, à titre professionnel, par voie électronique, la fourniture de biens ou la prestation de services, met à disposition les conditions contractuelles applicables d'une manière qui permette leur conservation et leur reproduction. Sans préjudice des conditions de validité mentionnées dans l'offre, son auteur reste engagé par elle tant qu'elle est accessible par voie électronique de son fait.

L'offre énonce en outre:

- 1° Les différentes étapes à suivre pour conclure le contrat par voie électronique;
- 2° Les moyens techniques permettant à l'utilisateur, avant la conclusion du contrat, d'identifier les erreurs commises dans la saisie des données et de les corriger;
- 3° Les langues proposées pour la conclusion du contrat;
- 4° En cas d'archivage du contrat, les modalités de cet archivage par l'auteur de l'offre et les conditions d'accès au contrat archivé;
- 5° Les moyens de consulter par voie électronique les règles professionnelles et commerciales auxquelles l'auteur de l'offre entend, le cas échéant, se soumettre.

Article 10 (3) Directive 2000/31/EC is in article L.134-2 Code de la consommation, concerning the duty of the service provider to keep the contract, and to have it available at all time for the other party upon request.

'Art. L. 134-2. - Lorsque le contrat est conclu par voie électronique et qu'il porte sur une somme égale ou supérieure à un montant fixé par décret, le contractant professionnel assure la conservation de l'écrit qui le constate pendant un délai déterminé par ce même décret et en garantit à tout moment l'accès à son cocontractant si celui-ci en fait la demande.'

Furthermore, this applies only to contract on a certain amount of money. This amount is precised by a *décret*. Décret n° 2005-137 du 16 février 2005 pris pour l'application de l'article L. 134-2 du code de la consommation' article 1 mentions an amount of 120 Euro.

Article 10 (4) Directive 2000/31/EC was implemented in article 1369-6 Code civil:

'Art. 1369-6. - Il est fait exception aux obligations visées aux 1° à 5° de l'article 1369-4 et aux deux premiers alinéas de l'article 1369-5 pour les contrats de fourniture de biens ou de prestation de services qui sont conclus exclusivement par échange de courriers électroniques. Il peut, en outre, être dérogé aux dispositions de l'article 1369-5 et des 1° à 5° de l'article 1369-4 dans les conventions conclues entre professionnels.'

It is doubted in French literature whether this protection is implemented in such a way that provides the consumers with genuine and enforceable protection.⁴⁸ Given the large discussion

⁴⁸ Anne-Marie Leroyer, in: Jean-Pierre Marguénaud (éd.), *Apprendre à Douter: Questions de Droit, Questions sur le Droit* (2004) p. 295 et seq.

at hand, and the fact that new changes on the Code Civil were made only recently in February 2016 - changing the numbering and adding more articles to the Code Civil - the Working Group has difficulty fully understanding the extent and implications of this transposition in French law at this point in time. See for example: ‘Apprendre à douter: questions de droit, questions sur le droit, etudes ...’, edited by Jean-Pierre Marguénaud’.

2.5.6 Article 11 E-Commerce directive 2000/31/EC

Article 11 (1) and (2) Directive 2000/31/EC modified article 1369-5 Code Civil

‘Art. 1369-5. - Pour que le contrat soit valablement conclu, le destinataire de l’offre doit avoir eu la possibilité de vérifier le détail de sa commande et son prix total, et de corriger d’éventuelles erreurs, avant de confirmer celle-ci pour exprimer son acceptation.

« L’auteur de l’offre doit accuser réception sans délai injustifié et par voie électronique de la commande qui lui a été ainsi adressée.

« La commande, la confirmation de l’acceptation de l’offre et l’accusé de réception sont considérés comme reçus lorsque les parties auxquelles ils sont adressés peuvent y avoir accès.’

Article 11 (3) Directive 2000/31/EC was written in article 1369-6 Code Civil

Art. 1369-6. - Il est fait exception aux obligations visées aux 1° à 5° de l’article 1369-4 et aux deux premiers alinéas de l’article 1369-5 pour les contrats de fourniture de biens ou de prestation de services qui sont conclus exclusivement par échange de courriers électroniques. Il peut, en outre, être dérogé aux dispositions de l’article 1369-5 et des 1° à 5° de l’article 1369-4 dans les conventions conclues entre professionnels.

If pre-contractual requirements laid down in article 1369-5 are not abided by, the contract is void.⁴⁹

2.6 The Unfair Commercial Practices Directive (2005/29/EC)

The question posed in the tender was the following: Should accommodation providers be authorised, licenced or registered and if so, does this relate to the Unfair Commercial Practices Directive? Is the platform or the provider liable in case this obligation is not met?

The Working Group sees this question could mean several things. On the one hand there might be a licence or registration that accommodation providers have to meet to lease a holiday home or room to tourists. This kind of obligation is mentioned in the Loi Hoguet. Not meeting these requirements could be an unfair commercial practice vis-a-vis other (professional, licenced) accommodation providers and might fall within the scope of unfair competition. In this respect it is unclear whether the accommodation providers are in unfair

⁴⁹ <http://www.village-justice.com/articles/point-procedure-acceptation-cadre,13340.html>.

competition with the hotels, whereas Airbnb for example, is in unfair competition with real estate agents that need to fulfil the requirements of the Loi Hoguet to have a licence to intermediate (*gestion locative*).⁵⁰

The professional practice of real estate sales and of *gestion locative* (rental management) is regulated under the Loi Hoguet du 2 juillet 1970. It provides that a real estate agent must hold a *carte professionnelle* (professional card) ‘transactions on immovable properties and business’. In order to obtain this card, which is delivered by the Chamber of Commerce and Industry, several requirements ought to be met by the agent;

The agent must be able to document a professional experience, either through degrees/diplomas or field work.

Additionally, a financial guarantee which is used to secure third parties’ funds.

The minimum amount acceptable for that guarantee is 110.000 €.

The agent must also benefit from a special insurance ‘*Responsabilité Civile Professionnelle*’ (Responsibility Civil Professional). This being necessary to insure the agent against any possible financial consequences arising in the course of business.

Finally, the agent ought to prove that he is not under any kind of prohibition or ban to exercise this job.⁵¹

The Loi Hoguet makes an exception for those in the ‘*gestion locative*’ of seasonal lease objects. They do not need a *Carte Professionnelle*. The problem is that the Loi Hoguet (article 8) calls ‘*location saisonniere*’ the lease of less than 90 days (in a row). However, Airbnb

⁵⁰ ‘French state rail cancels Airbnb partnership after hotels complain’, France 24, 15 December 2015: SNCF, the French state railway cancelled a partnership with Airbnb after the hotel industry complained about plunging profits due to unfair competition from the site. Until Tuesday, French travellers booking train tickets online through SNCF subsidiary Voyages-sncf.com had been receiving a follow-up email titled: ‘Your journey can earn you money’. ‘Is your property empty during your voyage?’ the message asked. ‘Become an Airbnb host to cover the cost of your trip.’ The message added that as soon as travellers had booked in their first guest, Airbnb would offer them ‘a free return ticket for their next outing in France’. French hotels, suffering from falling visitor numbers as a consequence of terror attacks in Paris and competition from flat-sharing sites like Airbnb, were not amused that a publicly-owned company had entered into this ‘disloyal’ partnership with the US-based company. ‘How can the SNCF, which relies on government subsidies, defend and promote a company that is damaging an important sector of the French economy?’ asked Didier Le Calvez, chief executive at the Bristol Hotel in Paris and head of the French Umih French hotel association. ‘[Airbnb] only declares two percent of its turnover in France and doesn’t create any jobs,’ he said. On Tuesday afternoon, the SNCF announced that in response to the complaints, the campaign with Airbnb had been stopped. The Bristol suffered a 20 percent drop in revenue in the first half of this year and had an occupancy rate that fell to 61.2 percent from 69.2 percent. The renowned Four Seasons George V saw a five percent point drop in occupancy to 66 percent in the same period. These factors saw The Plaza Athénée cut its prices by 20 percent last winter. At the same time, Paris has become the world’s top destination for Airbnb users: the flat-sharing site now has on offer some 50,000 properties in the French capital, versus some 80,000 hotel rooms.

⁵¹ <http://www.economie.gouv.fr/dgccrf/location-saisonniere-se-loger-en-voyage>.

could also attract accommodation providers who are offering their home for more than 90 days. It is unclear whether this will imply that Airbnb needs the Carte Professionnelle. In any case, these agents involved in seasonal lease, do need a guarantee fund, and insurance.

Another implication for consumers in the applicability of the Unfair Commercial practice (Directive 2005/29/EC on Unfair Commercial Practices of 11 May 2005) is that internet technology may not be used to retrieve and analyse information on consumers by firms. This information collection may affect the relationship between firms and their customers, their marketing strategies and how certain offers are displayed to certain customers. This is a data privacy issue and it might lead to distributional issues, as some consumers win and others lose out: ‘as firms have access to more information about their customers, price discrimination and product customisation are likely to increase. Some consumers will benefit, others will not.’

The Working Group found that many websites have a code of conduct in which they impede their members or users to use any technology which could retrieve data from the platforms or the other users or accommodations.

2.7 The Services Directive (2006/123/EC)

The task was to identify the requirements based on Services Directive Articles 22-24 and how the rules are applied by in the collaborative economy in the accommodation sector in practice.

Due to the resistance met in French civil society, the French government which wanted to transpose the directive through a ‘loi cadre’ (framework law), changed its’ method.⁵² The French Senate’s report outlined the directive should rather be implemented through a myriad of sectorial decrees and through several laws (at the very least 55).⁵³

Certain obligations in terms of information that the service supplier ought to make available to the service receiver (listed in article 22 Directive) can be partly found in the provisions of the Code de la Consommation listing a series of pre-contractual obligations. Other obligations are in the Code de Commerce – see ‘Rapport de synthèse sur la transposition de la Directive 2006/123’ issued in January 2010 by the Secrétariat Générale aux Affaires Européennes.⁵⁴

⁵² Sénat session ordinaire de 2008-2009, *Rapport d’information fait au nom de la commission des affaires européennes sur l’état de la transposition de la ‘Directive Service’*, par Jean M. Bizet. Page 15 ‘Ni loi cadre, ni ordonnance’.

⁵³ The list is accessible on the database légifrance; <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000518751&dateTexte=&fastReqId=1465051370&fastPos=1&oldAction=rechExpTransposition>.

⁵⁴ Available at ; especially page 13 where art. 22 of the Service Directive is dealt with. http://www.sgae.gouv.fr/webdav/site/sgae/shared/03_Autorites_FR_et_UE/Autres-positions/Directive_services/201001-Rapport_synthese_dir_services.pdf

One article on this matter is article L.111-1 Code de la Consommation which reads:

‘Avant que le consommateur ne soit lié par un contrat (...) fourniture de services, le professionnel communique au consommateur, de manière lisible et compréhensible, les informations suivantes:

1° Les caractéristiques essentielles du bien ou du service, compte tenu du support de communication utilisé et du bien ou service concerné;

2° Le prix du bien ou du service, en application des articles L. 113-3 et L. 113-3-1;

3° En l’absence d’exécution immédiate du contrat, la date ou le délai auquel le professionnel s’engage à livrer le bien ou à exécuter le service;

4° Les informations relatives à son identité, à ses coordonnées postales, téléphoniques et électroniques et à ses activités, pour autant qu’elles ne ressortent pas du contexte, ainsi que, s’il y a lieu, celles relatives aux garanties légales, aux fonctionnalités du contenu numérique et, le cas échéant, à son interopérabilité, à l’existence et aux modalités de mise en œuvre des garanties et aux autres conditions contractuelles. La liste et le contenu précis de ces informations sont fixés par décret en Conseil d’Etat.’

Completed by article L. 111-2 of the same code, which reads:

‘1° (...) tout professionnel, avant la conclusion d’un contrat de fourniture de services et, lorsqu’il n’y a pas de contrat écrit, avant l’exécution de la prestation de services, met à la disposition du consommateur ou lui communique, de manière lisible et compréhensible, les informations complémentaires relatives à ses coordonnées, à son activité de prestation de services et aux autres conditions contractuelles (...)’.

This list is non-exhaustive. Furthermore, one should also consider article L.113-3 Code de la Consommation, which encapsulates the obligation on a service supplier to inform the consumer by any means necessary of the price of the service (as laid down in article 22(1)(i) of Directive 2006/123). Whereas article L. 113-3-1 provides certain prudent exceptions (for services for which a precise pre-calculation of a price is difficult), additionally article L113-3-2 fixes the sanctions incurred in case of violation of the aforementioned provisions, including a fine of a maximum of 3.000 euros for natural person, and 15.000 euros for a legal person.

Consultation the integrality of that part of the Code de la Consommation discloses the other pre-contractual requirements for the service supplier, relevant for the purpose of the implementation of the relevant articles of Directive 2006/123.

Also, in the tourism sector these obligations are implemented in the Code du Tourisme:

https://www.legifrance.gouv.fr/affichCode.do;jsessionid=49FCC1681521A770E4E769EF96DF8A88.tpdila19v_1?cidTexte=LEGITEXT000006074073&dateTexte=20091231

This Code du Tourisme was modified on 1 January 2016, will be modified again this year: Version à venir au 1 avril 2016. It seems wise to consult the tekst online, for it is possible to ask for the up to date version, which the Working Group would like to recommend.

2.8 The Consumer Rights Directive (2011/83/EC)

The Working Group considers that there are not many cases in which this Directive will apply, given the basic notion that the collaborative consumption or *économie de partage* is meant to involve consumers with consumers (C2C). If an accommodation provider is a consumer – as well as the seeker – the Consumer Rights Directive will not apply. Since the area of the collaborative economy concerns exactly these C2C contracts, exclusion of the consumer protection based on CRD is likely.

We would like to refer to the General Part for the general thoughts on the applicability.

In the cases in which the Directive does apply, article 16 of the Directive states that the right to withdrawal (9-15 Directive) shall not be provided in case of the provision of accommodation other than for residential purpose.

The consumer protection consists of

- (1) Art. 6 CRD: precontractual information duties (section 1, a-g, k, m-p, t). The burden of proof as regards the compliance with the information duties is on the trader (section 7).
- (2) Art. 8 CRD, sections 1-3: additional information duties for distance contracts concluded by electronic means/trading websites.
- (3) Art. 8 CRD, section 7: post-contractual information duty (confirmation of the contract on a durable medium). The confirmation must contain the information of art. 6 section 1 and has to be provided before the start of the performance of the service contract.
- (4) Art. 19 and 22 CRD (on payments).

The French legislator transposed this into LOI n° 2014-344 du 17 mars 2014 relative à la consommation. The Working Group cites the relevant articles:

Article 6 (1) a b c d e → Article L121-17 (in conj. with L111-1 and L111-2) Code de la Consommation:

‘Préalablement à la conclusion d’un contrat de vente ou de fourniture de services, le professionnel communique au consommateur, de manière lisible et compréhensible, les informations suivantes:

1° Les informations prévues aux articles L. 111-1 et L. 111-2;

2° Lorsque le droit de rétractation existe, les conditions, le délai et les modalités d’exercice de ce droit ainsi que le formulaire type de rétractation, dont les conditions de présentation et les mentions qu’il contient sont fixées par décret en Conseil d’Etat

3° Le cas échéant, le fait que le consommateur supporte les frais de renvoi du bien en cas de rétractation et, pour les contrats à distance, le coût de renvoi du bien lorsque celui-ci, en raison de sa nature, ne peut normalement être renvoyé par la poste;

4° L’information sur l’obligation du consommateur de payer des frais lorsque celui-ci exerce son droit de rétractation d’un contrat de prestation de services, de distribution d’eau, de fourniture de gaz ou d’électricité et d’abonnement à un réseau de chauffage urbain dont il a

demandé expressément l'exécution avant la fin du délai de rétractation; ces frais sont calculés selon les modalités fixées à l'article L. 121-21-5;

5° Lorsque le droit de rétractation ne peut être exercé en application de l'article L. 121-21-8, l'information selon laquelle le consommateur ne bénéficie pas de ce droit ou, le cas échéant, les circonstances dans lesquelles le consommateur perd son droit de rétractation;

6° Les informations relatives aux coordonnées du professionnel, le cas échéant aux coûts de l'utilisation de la technique de communication à distance, à l'existence de codes de bonne conduite, le cas échéant aux cautions et garanties, aux modalités de résiliation, aux modes de règlement des litiges et aux autres conditions contractuelles, dont la liste et le contenu sont fixés par décret en Conseil d'Etat.'

Article 6 e → Article L113-3 and L113-3-1 Code de la Consommation

L113-3: 'Tout vendeur de produit ou tout prestataire de services doit, par voie de marquage, d'étiquetage, d'affichage ou par tout autre procédé approprié, informer le consommateur sur les prix et les conditions particulières de la vente et de l'exécution des services (...)'

L 113-3-1:

'I - Lorsque le prix ne peut être raisonnablement calculé à l'avance du fait de la nature du bien ou du service, le professionnel fournit le mode de calcul du prix et, s'il y a lieu, tous les frais supplémentaires de transport, de livraison ou d'affranchissement et tous les autres frais éventuels. Lorsque les frais supplémentaires ne peuvent raisonnablement être calculés à l'avance, le professionnel mentionne qu'ils peuvent être exigibles.

II - Dans le cas d'un contrat à durée indéterminée ou d'un contrat assorti d'un abonnement, le prix total inclut le total des frais exposés pour chaque période de facturation. Lorsque de tels contrats sont facturés à un tarif fixe, le prix total inclut également le total des coûts mensuels. Lorsque le coût total ne peut être raisonnablement calculé à l'avance, le mode de calcul du prix est communiqué.'

Article 6 f → Article R121-2 (I)(c) Code de la consommation

'I.-En application du 6° du I de l'article L. 121-17, le professionnel communique au consommateur les informations suivantes:

(...)

c) Le coût de l'utilisation de la technique de communication à distance pour la conclusion du contrat, lorsque ce coût est calculé sur une base autre que le tarif de base.'

Article 6 g → L121-19-3 alinéa 3 Code de la consommation

'Les sites de commerce en ligne indiquent clairement et lisiblement, au plus tard au début du processus de commande, les moyens de paiement acceptés par le professionnel et les éventuelles restrictions de livraison.'

Article 6 k → L121-17 (5°) Code de la consommation

'5° Lorsque le droit de rétractation ne peut être exercé en application de l'article L. 121-21-8, l'information selon laquelle le consommateur ne bénéficie pas de ce droit ou, le cas échéant, les circonstances dans lesquelles le consommateur perd son droit de rétractation;'

Article 6 m → Article L133-3 Code de la consommation

‘Les conditions générales de vente applicables aux contrats de consommation mentionnent:

1° Selon des modalités fixées par arrêté du ministre chargé de l’économie, l’existence, les conditions de mise en œuvre et le contenu de la garantie légale de conformité et de la garantie relative aux défauts de la chose vendue, dues par le vendeur;

2° Le cas échéant, l’existence d’une garantie commerciale et d’un service après-vente.’

Article 6 t → Article L133-4 Code de la consommation

‘Lors de la conclusion de tout contrat écrit, le consommateur est informé par le professionnel de la possibilité de recourir, en cas de contestation, à une procédure de médiation conventionnelle ou à tout autre mode alternatif de règlement des différends.’

Article 8 (1) → Article L121-19 Code de la consommation

‘Lorsque le contrat est conclu à distance, le professionnel fournit au consommateur, de manière lisible et compréhensible, les informations prévues au I de l’article L. 121-17 ou les met à sa disposition par tout moyen adapté à la technique de communication à distance utilisée.’

Article 8 (2) → Article L121-19-3 alinéa 2 Code de la consommation

‘Le professionnel veille à ce que le consommateur, lors de sa commande, reconnaisse explicitement son obligation de paiement. A cette fin, la fonction utilisée par le consommateur pour valider sa commande comporte, à peine de nullité, la mention claire et lisible: commande avec obligation de paiement ou une formule analogue, dénuée de toute ambiguïté, indiquant que la passation d’une commande oblige à son paiement.’

Article 8 (3) → Article L121-19-3 alinéa 3 Code de la consommation

‘Les sites de commerce en ligne indiquent clairement et lisiblement, au plus tard au début du processus de commande, les moyens de paiement acceptés par le professionnel et les éventuelles restrictions de livraison.’

Article 8 (7) → Article L121-19-2 Code de la consommation

‘Le professionnel fournit au consommateur, sur support durable, dans un délai raisonnable, après la conclusion du contrat et au plus tard au moment de la livraison du bien ou avant le début de l’exécution du service, la confirmation du contrat comprenant toutes les informations mentionnées au I de l’article L. 121-17, sauf si le professionnel les lui a déjà fournies, sur un support durable, avant la conclusion du contrat. Le contrat est accompagné du formulaire type de rétractation mentionné au 2° du même I.

Le cas échéant, le professionnel fournit au consommateur, dans les mêmes conditions et avant l’expiration du délai de rétractation, la confirmation de son accord exprès pour la fourniture d’un contenu numérique non présenté sur un support matériel et de son renoncement à l’exercice du droit de rétractation’

Article 19 → Article L121-17 II in conj. with L113-3-1 (I) and L121-17(I)(3°)

II.-Si le professionnel n'a pas respecté ses obligations d'information concernant les frais supplémentaires mentionnés au I de l'article L. 113-3-1 et au 3° du I du présent article, le consommateur n'est pas tenu au paiement de ces frais.

Article 22 → Art. L. 114-1 alinéa 1 Code de la Consommation

'Préalablement à la conclusion d'un contrat de vente ou de prestation de services, le professionnel s'assure du consentement exprès du consommateur pour tout paiement supplémentaire venant s'ajouter au prix de l'objet principal du contrat. Dans l'hypothèse où le paiement supplémentaire résulte d'un consentement du consommateur donné par défaut, c'est-à-dire en l'absence d'opposition expresse de sa part à des options payantes qu'il n'a pas sollicitées, le consommateur peut prétendre au remboursement des sommes versées au titre de ce paiement supplémentaire.'

2.9 Sectoral and other requirements: illegality of the service

Paris is suffering from the negative effects and concerns such as nuisance, unfair competition by illegal hotels and tension because people complain about their neighbourhood atmosphere changing.

2.9.1 Licence or authorisation (illegal lease)

Parisian hoteliers are demanding that Airbnb be regulated after claims that the flat-sharing website has become an increasingly professional operation in France. 'The Union of Hotel Industry Trades (UMIH) has published research which it says proves that the website is no longer part of the sharing economy and should be taxed and regulated in the same way as its own hotels. Airbnb has become a full-time business activity for a growing number of investors, according to the union. Hoteliers said that 19 per cent of the flats available on Airbnb in Paris belong to people offering at least two properties on the site. They said the profiles often make the owners sound like ordinary Parisians, whereas in fact they are professional hosts earning thousands of euros a month.'⁵⁵

This report shows the core of the debate: is everybody using Airbnb still within the sphere of friendly services, or is Airbnb offering a platform for economic activities which should be seen as having entered the sphere of 'illegal rent'. Some profiles have over 20 or even 100 accommodations (rooms) for rent.

Roland Héguy, the chairman of the UMIH urged the government to introduce rules such as making flats available for only 52 days a year, which he said would end the 'industrialisation' of flat sharing in France. Airbnb contested both the hoteliers' findings and conclusions. It said

⁵⁵ Adam Sage, 'Airbnb rivals protest over 'professional' landlords', The Times, 24.10.2015.

that the vast majority of its hosts in Paris were individual homeowners temporarily renting out their main residence.⁵⁶

There is a debate going on whether and how public law should limit the amount of short-term rent to a certain number of days, for public order. As explained in the introduction, complaints are coming from different sides: hotels claim the competition is unfair - private accommodations usually do not meet to fire and emergency safety requirements - residents are feeling their neighbourhood is changing and losing the characteristic atmosphere they were used to.

The discussion who assumes responsibility when the accommodation service is offered illegally, by a provider who is not authorised to have a hotel, has not found an end yet. In January 2016 the mayor of Paris announced ‘sanctions financières massives’. This assumes the responsibility and liability for illegal rent lies not with the platform but with the home owner.

The authorities of the Paris City Hall wants to slow the unregulated progression of Airbnb in the capital, they have calculated that around 40 000 Parisian apartments have been advertised on Airbnb, this represent a tenfold increase in the last two years only.⁵⁷ Following the municipality’s lightning raid control operations, it was established than an average of 10% of apartments inspected was not complying with applicable legislation.⁵⁸ As of now, renting an apartment under illegal conditions can be punished by a fine of 25 000 euros. Member of the mayor’s staff have declared that the level of fines is still too low to have a proper deterrent effect on Parisians.⁵⁹ Which illustrate the fact that the municipality has decided to concentrate its efforts on the user of the platform than on the platform itself?

Unsurprisingly, the hotel industry, which has been utterly destabilised by the rapid expansion of Airbnb all across Europe (Brussels, Barcelona, Berlin, Paris...), has advocated for a clearer and tighter legal framework to regulate those practices. Gathered in Paris, the main European hostel directors have presented a platform of ‘common proposal’ and subsequently submitted to governments and EU institutions, in order to slow down the expansion of practises seen as distorting competition.⁶⁰ The objectives being to protect not only ‘the hostels but also the consumers’. Proposals included, *inter alia*, the setting up of a ‘register procedure’, a ‘renting licence’, the genuine enforcement of taxation rules on these in all European countries, and the systematic verification of visitors identity in the States part of the Schengen space. Finally, the idea of an efficient statistical monitoring of short-term lease would help get read of hardy

⁵⁶ Adam Sage, ‘Airbnb rivals protest over ‘professional’ landlords’, The Times, 24.10.2015.

⁵⁷ David Barroux, ‘Airbnb : Paris veut faire des exemples avec les fraudeurs’, lesechos.fr, 14.1.2016.

⁵⁸ David Barroux, ‘Airbnb : Paris veut faire des exemples avec les fraudeurs’, lesechos.fr, 14.1.2016.

⁵⁹ David Barroux, ‘Airbnb : Paris veut faire des exemples avec les fraudeurs’, lesechos.fr, 14.1.2016.

⁶⁰ Christophe Palierse, ‘Les hôteliers européens se mobilisent pour mieux encadrer Airbnb et consorts’, Les Echos, 16.11.2015.

verifiable data. Regarding France more specifically, the UMIH (*Union des Métiers et des Industries de l'Hôtellerie*) proposed a maximal rental period of 52 days per year.⁶¹

At this moment, it is unclear what the outcome of the discussion will amount to. As the Mairie de Paris started fining the residents illegally renting out their house, it seems that the liability for not meeting the requirements of sectoral legislation is with the house owners renting their accommodation.

2.9.2 Different Code de Tourisme rules

In France it is important to see that the requirements for leasing not only depend on the lease object, but also on the duration. Therefore different regimes exist. There are 'meublés de tourisme': villas, apartments, studios for exclusive use 'en location à une clientèle de passage qui y effectue un séjour caractérisé par une location à la journée, à la semaine ou au mois, et qui n'y élit pas domicile', governed by article D 324-1 du code du tourisme.

There are hotels and residents (to be distinguished because there is no reception) and there are chambres d'hôtes, where the inhabitant is present during the holiday stay of the guest. There is 'location saisonnière' and 'bail d'habitation': If the lessee is residing in the rented property it will be 'bail d'habitation', 'location saisonnière' is during a maximum of 90 days.⁶²

Chambre d'hôte rules differ: <http://www.entreprises.gouv.fr/tourisme/chambres-d-hotes>

Furthermore, rules depend on the amount of inhabitants of the city. Fines for not fulfilling the requirements of different laws are high. The owner risks a fine of 25.000 euros 'par logement et une astreinte d'un montant maximal de 1 000 € par jour et par m² jusqu'à régularisation'.

Penalties are possible when providing wrong information, article L 651-3 du Code de la Construction et de l'Habitation: emprisonnement d'un an et amende de 80.000 €.

An important operator in the field is Atout France, for visiting each location that can be rented. See also the Comité français d'accréditation (COFRAC) and the list in 2° of article L. 324-1 Code du Tourisme.

A recent décret (2015-1002 of 18 August 2015) requires each lessor to ask for a written and signed declaration with all information concerning the tourist.

2.9.3 Infringement of specific information legislation

Another issue of concern in French law is the Arrêté du 16 mai 1967 (B.O.S.P. du 18-05-1967) relatif aux locations saisonnières en meublé. To be consulted under

http://www.economie.gouv.fr/files/files/directions_services/dgccrf/documentation/guide_voyageur/arrete_12051967.pdf.

⁶¹ Christophe Palierse, 'Les hôteliers européens se mobilisent pour mieux encadrer Airbnb et consorts', Les Echos, 16.11.2015.

⁶² www.economie.gouv.fr/dgccrf/location-saisonniere-se-loger-en-voyage.

The arrêté writes that furnished holiday homes publication should specify many characteristics of the holiday home and of the contract - no matter the duration of the stay or the name that was given to the rental object - according to the given arrêté. Not having this 'état descriptif' can be punished with a fine (5th classe - 1500 euros under article R.113-1 of the Code de la consommation. It does not matter whether the lessor (loueur) is a professional or a private person. See article L 121-1 of the Code de la consommation. This will be called *pratiques commerciales trompeuses*.⁶³

Likewise it is not clear whether for example the receipt which should be handed over is actually given in all the cases that occur. The law on that equally imposes this obligation on hotels, bed and breakfasts, holiday homes, etcetera:

https://www.legifrance.gouv.fr/jo_pdf.do?numJO=0&dateJO=19670613&numTexte=&pageDebut=05862&pageFin=

2.10 Non satisfactory service provision

In the case of a non conformity of the lease property the lessee can turn to the Procureur de la République or the Direction départementale de la protection des populations (DDPP).

If the apartment is not in conformity with what was promised, a letter should be sent (with a proven receipt) to the préfet within eight days after the beginning of the lease. The accommodation can be taken off the list of registered holiday homes.

Lessees are referred to for example the Office du Tourisme or a representative that made the contact with the lessor, in the traditional holiday home rental cases.

If the advertisement is clearly different from the factual state, this wrong publicity is governed by article L 121-1 of the Code de la Consommation (*pratiques commerciales trompeuses*).

It seems clear, from both these rules and the policy that was laid down, that the Paris municipality is confronting home owners (lessors) with these obligations.

⁶³ Le plaignant a la faculté de se constituer partie civile devant le tribunal correctionnel. S'il a subi un préjudice, des dommages et intérêts peuvent lui être attribués. En cas de recours devant la juridiction civile, le locataire de bonne foi obtiendra en règle générale une indemnisation pour le préjudice subi en raison de cette information erronée. Dans un premier temps, une démarche « amiable » auprès du professionnel (ou du loueur pour une location saisonnière) est à privilégier (conservez une copie de la réclamation). Dans un second temps, d'autres démarches amiables ou judiciaires sont possibles. Les associations de consommateurs de la département peuvent aider à trouver un règlement amiable avec le professionnel.

3. AMSTERDAM AND THE COLLABORATIVE ACCOMMODATION ECONOMY

3.1 Amsterdam: facts

Amsterdam is the largest ‘provider’ of accommodations for tourists coming via Airbnb in the Netherlands.⁶⁴ This has negative consequences for especially the amount of available housing for local residents in need.⁶⁵ The Town of Amsterdam developed (and is continuously ameliorating) its policy in order to protect the number of houses available for living and to prevent public safety problems. In a Memorandum of Understanding⁶⁶ Airbnb and Amsterdam made agreements on how to tackle the problems together. The responsible Town Council, the Council for ‘Wonen en Financiën’ (Living and Finance), recently prolonged the Memorandum of Understanding for another year (2016).⁶⁷



(Source: Z24)

⁶⁴ Gemeente Amsterdam, Notitie toeristisch verhuur van woningen, juni 2013, te vinden op www.amsterdam.nl (laatst geraadpleegd op 14 februari 2016).

⁶⁵ Kamerbrief van minister van Economische Zaken over toekomstbestendige wetgeving: digitale platforms en deeleconomie, waaronder particuliere verhuur aan toeristen, *Kamerstukken II* 2015, 15166286.

⁶⁶ Gemeente Amsterdam en Airbnb, *Memorandum of Understanding*, 18 februari 2014, te vinden op: www.amsterdam.nl (laatst geraadpleegd op 15 februari 2016).

⁶⁷ M. Kruiswerk, ‘Gemeente Amsterdam verlengt samenwerking met Airbnb’. Het parool 15 december 2015.

3.2 The definition of the three relations in Dutch law

3.2.1 Relation 1 between the platform and the person offering an accommodation: agency

In terms of Dutch private law, a platform such as Airbnb will be seen as an ‘agent’ (bemiddelaar), facilitating the conclusion of a contract on behalf of the accommodation provider. The agent is not representing the accommodation provider nor the accommodation seeker. The agent is not a ‘commercial agent’ in the sense of the Dutch CC, since that requires acting in the name of the principal. The Working Group chose to translate the ‘bemiddelaar’ as an agent, in conformity with the DCFR. Not choosing the term ‘intermediary’ has to do with the special meaning the ‘intermediary’ platform has under E-Commerce law.

The agent is in a contract with both the accommodation provider and the accommodation seeker to facilitate the conclusion of the lease contract between the accommodation provider and accommodation seeker, yet the actual lease contract is concluded between the latter two parties.⁶⁸ The lease contract is called ‘the prospective contract’.⁶⁹

Under Dutch law an agent is under the duty to care. Article 7:400 Dutch CC is the basis for the service provision agreement in general:

Article 7:400 reads as follows:

- 1. A service provision agreement is the agreement under which one of the parties (‘the service provider’) has engaged himself towards the other party (‘the client’) to perform work on another basis than an employment agreement, which work consists of something else than the making of a tangible construction, the safekeeping of property, the publication of a work or the transportation of persons or goods.
- 2. The provisions of Articles 7:401 up to and including 7:412 apply to each type of service provision agreement, unless something else results from law, the content or nature of the agreement, another juridical act or usage (common practice) and without prejudice to Article 7:413.

The general duty to care is found in article 7:401 Dutch CC: ‘During his work the service provider must observe the care of a prudent service provider.’

One could say, as far as the Working Group is concerned, that it is part of the platforms duty to care, to inform an accommodation provider about the duties that lie on the shoulders of an accommodation provider under (national) legislation. It will be clear later on, considering the question how platforms are trying to fulfil the requirements under national law, that

⁶⁸ The Working Group used the term agent as described in the DCFR: Principles, Definitions and Model Rules of European Private Law (DCFR) Outline Edition (Chr. v. Bar, E. Clive, H. Schulte-Nölke, eds.) 2009, p. 22.

⁶⁹ Article IV.D.-1:102 under c DCFR: The prospective contract is the contract the agent is authorised and instructed to conclude, negotiate or facilitate [...].

information is key. The Working Group considers the fact that platforms are more and more informing their clients of applicable legislation, as a fulfilment of the contractual duty to care for the clients.

Article 7:402 Dutch CC provides in subparagraph 1 that the service provider must follow the directions which the client has given him with regard to the performance of the service, as far as these directions are responsible and given in time.

Under article 7:403 Dutch CC the service provider must (1) keep the client informed about the work he has performed and (2) render account to the client of the way he has performed and completed the service. If the service provider has received money on behalf of the client or made payments at his expense in the course of his work, then he renders account thereof as well.

Article 7:405 mentions the remuneration of the service provider.

- 1. If the service provider has concluded the service provision agreement in the course of his professional practice or business, then the client is obliged to pay him a remuneration (fee). [- 2. ...]

Interesting, yet not easy to answer is the question whether article 7:407 Dutch CC would apply. The article speaks of ‘two or more clients or two or more service providers’. Subparagraph 2: ‘If two or more service providers have jointly engaged themselves under a service provision agreement towards one client to perform a service, then each of them is towards the client joint and several liable for a failure in the performance of any obligation from this agreement, unless this failure is not attributable to him.’ One might assume, in terms of contractual liability, that this article will apply answering the question who is liable in the case of a damage to the home of the accommodation provider, or in the case of a not satisfactory service provision. The question who is liable for damages to the home of the accommodation provider was not a subject of this study.

About the not satisfactory service provision, one could say that this article would make both the platform (as an agent) and the accommodation provider liable. This provision is not mandatory, so that the parties could have deviated from this liability in their terms of contract. As will be clear in the specific part on not satisfactory service provision, a website such as Airbnb has a specific procedure to stop payment to the lessor. However, whether this works is the risk of the lessee.

3.2.2 Relation 2 between the platform and the person seeking an accommodation: agency

There is a relation between the platform and the person seeking an accommodation as well. The platform is a service provider: any natural or legal person providing an information society service.

The person seeking an accommodation is a recipient of the service: any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible. He will usually also be a consumer: any natural person who is acting for purposes which are outside his or her trade, business or profession.

In terms of Dutch private law, a platform such as Airbnb will be seen as an ‘agent’ (bemiddelaar) helping people find a place to stay. The agent is not representing the accommodation seeker. The agent is in a contract with both the seeker and the accommodation provider to facilitate the conclusion of the lease contract between them, yet the actual lease contract - the prospective contract - is concluded between the accommodation provider and accommodation seeker.⁷⁰

Under Dutch law an agent is under the duty to care. Article 7:400 Dutch CC is the basis for the service provision agreement and was cited above. The general duty to care of article 7:401 Dutch CC ‘During his work the service provider must observe the care of a prudent service provider’ is also relevant here. The Working Group is of the opinion that this is a key article to answer the question whether a platform (agent) such as Airbnb could be held liable in the case of a not satisfactory service provision according to national law. Especially in the case in which an accommodation was already reviewed in a negative way. We will discuss this further under the specific liability paragraphs. It is obvious that several platforms might have deviated from this in their General Terms.

Article 7:402 Dutch CC provides in subparagraph 1 that the service provider must follow the directions which the client has given him with regard to the performance of the service, as far as these directions are responsible and given in time. This could be a key article in the situation in which an accommodation seeker is searching for an igloo to stay in, which could be more dangerous than the average hotel. One could wonder whether a platform should perform such a search with regard to this article.⁷¹

Under article 7:403 Dutch CC the service provider must (1) keep the client informed about the work he has performed and (2) render account to the client of the way he has performed and completed the service. If the service provider has received money on behalf of the client or made payments at his expense in the course of his work, then he renders account thereof as well.

⁷⁰ The Working Group used the term agent as described in the DCFR: Principles, Definitions and Model Rules of European Private Law (DCFR) Outline Edition (Chr. v. Bar, E. Clive, H. Schulte-Nölke, eds.) 2009, p. 22.

⁷¹ <http://www.theverge.com/2016/1/26/10832144/airbnb-new-york-igloo-removed-200-dollars-night> and <https://www.airbnb.nl/rooms/235616>.

Article 7:405 mentions the remuneration of the service provider.

- 1. If the service provider has concluded the service provision agreement in the course of his professional practice or business, then the client is obliged to pay him a remuneration (fee). [- 2. ...]

In the case of agency, not only these general articles (from 7:400-408 Dutch CC will apply, but also some specific mandate and agency (bemiddeling, usually translated as intermediary) rules. One of the rules is in section 7.7.2 on Mandate agreements. Article 7:417 subparagraph 4 speaks of the situation in which one mandatory is serving two or more mandators:

- 4. If one of the involved mandators is a person as meant in Article 7:408, paragraph 3 [consumer], and the prospective juridical act necessarily implies the sale or leasing out of an immovable thing, a part of such thing or a right that is related to such a thing, then the mandatory is not entitled to a remuneration (fee) towards the mandator who has engaged himself as buyer or lessee. It is not possible to derogate to the disadvantage of such a buyer or lessee from this provision, unless the to be performed juridical act necessarily implies the lease of a residential space in a part of a separate dwelling.⁷²

Articles 7:417 applies accordingly to agreements under which one of the parties is engaged or entitled towards the other party to work as an agent [in Dutch law called an intermediary, as referred to above] as referred to in Article 7:425 Dutch CC.⁷³

One might conclude from this that it is forbidden for a platform to ask a remuneration for finding an independent apartment from the accommodation seeker/consumer. In the case of leasing a room which is a part of an independent residence (and as such not an independent place to stay) it is allowed to deviate from this prohibition. We could conclude from this that in cases in which the accommodation seeker is seeking for an independent residence or apartment, it might not be allowed to ask a fee from the accommodation seeker. It is imaginable that the platforms aware of this prohibition will ask for a fee with relates to 'other services'. This is a subject which was not part of the tender. We however think it is an important step to take in the future regulation of platform agents.

Interesting, yet not easy to answer is the question whether article 7:407 Dutch CC would apply in the case of a non-satisfactory service provision for the lessee. The article speaks of 'two or more clients or two or more service providers'. Subparagraph 2: 'If two or more

⁷² Translation taken from <http://www.dutchcivillaw.com/civilcodebook077.htm>.

⁷³ The Working Group chose to use the term 'Agent' for a service under which one party engages himself towards the other party to facilitate the conclusion of a contract for his client. Usually the law speaks of a 'commercial agent' where the party facilitating or concluding contracts for the client (or principal) acts in the name of the principal. This article 7:425 Dutch CC is translated 'An intermediary agreement is a service provision agreement under which one of the parties, ('the intermediary') has engaged himself towards the other party ('the client') to work on payment of a fee (remuneration) as an intermediary in arranging one or more contracts to be concluded by his client with third persons.' We chose not to use the term 'intermediary' because this term has a special meaning under the E-Commerce Directive and the European case-law based on this. Therefore, we adopted the DCFR-definition..

service providers have jointly engaged themselves under a service provision agreement towards one client to perform a service, then each of them is towards the client joint and several liable for a failure in the performance of any obligation from this agreement, unless this failure is not attributable to him.’ One might assume, in terms of contractual liability, that this article will apply answering the question who is liable in the case of a non-satisfactory provision of an apartment which ‘is quite different than the photo’s’. Are the platform agent and the accommodation provider jointly engaged in the performance of the service? And if yes, is the platform exempted from liability, because the failure is not attributable to him in the case of misinformation by the accommodation provider?

The Working Group is of the opinion this is a starting point to answer that question. It might be possible that the platform agent is liable after having received several negative reviews on the accommodation. The duty to take down the non-conform advertisement and accommodation after a notice could be seen as fulfilling the general duty to care under article 7:401. This duty to care can be ‘light’ when the agent is not acting on his own behalf. If the agent asks for a remuneration, this duty to care can be heavier.⁷⁴

3.2.3 Relation 3 between the provider and the seeker of an accommodation: lease or moral obligation

In the relation between the provider of an accommodation and the seeker of an accommodation it becomes harder to define the ‘service’ and the consequences. The doubts on this respect were expressed in the General Chapter 1.

3.2.4 The definition of consumer and professional

The person providing and the person seeking accommodation could be engaged in a B2C or C2C contract. A party is a consumer when a natural person who is acting for purposes which are outside his or her trade, business or profession.

There is not one single set of criteria in Dutch law - linked to or based on specific European legislation - which draws a clear distinction between consumers and professionals.

On the one hand there is the Kamer van Koophandel (the Chambre de Commerces, where businesses register).⁷⁵ These only concern the question whether or not one should register.

Tax law uses a clear hour-rule. If one spends 1225 hours per year on a certain activity, one could be seen as a business for tax law. This goes hand in hand with adding VAT to the services provided and with tax benefits that businesses have.⁷⁶

⁷⁴ Tekst & Commentaar (Castermans & Krans) 2011, article 7:401, p. 3431.

⁷⁵ <http://www.kvk.nl/inschrijven-en-wijzigen/inschrijven-bij-de-kamer-van-koophandel/moet-ik-mijn-bedrijf-inschrijven/criteria-van-een-onderneming/>

⁷⁶

http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/zakelijk/winst/inkomstenbelasting/inkomstenbelasting_voor_ondernemers/voorwaarden_urencriterium

Case law shows other elements, according to the applicability of whichever law is debated, such as the economic character: a certain regularity, continuity and purpose to gain income.⁷⁷

In literature an attempt was made to distinguish between the consumer and professional lessor according to several questions: Is leasing a source of income? Are there certain commercial acts such as advertisements? How often is a home leased? Does the furniture show that it is decorated for lease purposes? And, is the lessor using an agent to find customers? How often is the object available? Does the lessor make room for the lessee or is it only available during the absence of the lessor himself, during his own holiday?⁷⁸ When a lessor of a social home put his house on Airbnb, the court decided that it was decisive whether he was living there himself and whether it was his main residence. If it wasn't his main residence the frequency of the lease to others should fill in the difference.

According to the opinion of the Working Group the platforms identity or impression they give cannot or should not be a compass for defining B2C or C2C. Because it would imply that businesses could 'hide' their nature using a typical C2C platform. Or it would impose on platforms an extensive registration procedure which they might not be able to fulfil. Such obligation would be seen probably as a duty to monitor, which is something the member states may not impose on platforms, based on the E-Commerce Directive.

3.3 The scope of the definition of 'Information Society Services (ISS)' in Dutch law

The definition of an 'information society service' in the sense of the E-Commerce Directive (2000/31) is found in article 3:15d subparagraph 3 Dutch CC. Literature shows that the element of service at a distance is explained as including the situations in which the parties are not in direct eye contact with each other.⁷⁹

3.3.1 Qualification of the service between the platform and the person offering an accommodation

A platform is a service provider: any natural or legal person providing an information society service. The person offering accommodation could be seen – in the relation with the platform - as a recipient of the service and possibly as a consumer.

The platforms' service is to be seen as an ISS. It is an economic activity which takes place on-line. In the several websites the Working Group researched, it found different business models, varying from membership fees, percentages of transactions to asking payment from people seeking an accommodation to offering 'special services' which were remunerated.

⁷⁷ HR 1 July 2008, ECLI:NL:HR:2008:BC8654 (concl. A-G mr. Vellinga).

⁷⁸ T. Grundmeijer en E.A. Minderhoud, 'Een nieuwe vorm van woninggebruik die juridische aandacht verdient', De Gemeentestem, Vakantieverhuur, 2014/48.

⁷⁹ A.R. Lodder in: eDirectives: Guide to European Union Law on E-commerce, blz. 71-72.

When a platform deals for a person offering an accommodation, yet does not ask for a remuneration from those who will use the accommodation, but gains money from advertisements (commercial communications) it will be an economic activity as well. Even if the platform only provides a search tool or allows for a communication network, it will be seen as an 'Information Society Service'.

3.3.2 Qualification of the service between the platform and the person seeking an accommodation

There is a relation between the platform and the person seeking an accommodation as well. The platform is a service provider: any natural or legal person providing an information society service.

The person seeking an accommodation is a recipient of the service: any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible. He will usually also be a consumer: any natural person who is acting for purposes which are outside his or her trade, business or profession.

In the light of European law, the considerations in the E-Commerce Directive the platforms' service is to be seen as an ISS. It is an online activity. On websites such as Airbnb or huizenruil.nl (Home Exchange) the remuneration is obvious. Other websites, such as for example Couchsurfing, do not ask for a remuneration, however are engaged in an economic activity because only a part of their service is offered 'for free'. There is a part of the services which is offered for remuneration. The limited service offered can be extended for example with a paid ID-check or address check, which costs money and will 'increase' the likeliness of finding other participants to 'share' with.

3.3.3 Qualification of the service between the accommodation provider (lessor) and the seeker of an accommodation (lessee)

In the relation between the provider of an accommodation and the seeker of an accommodation it becomes harder to define the 'service'. Is the accommodation provider offering an ISS? If so, this accommodation provider (lessor) has to provide much information etcetera.

As written down in the general part, the fact that there is no remuneration concerned in cases of for example Couchsurfing could imply that there is not economic activity taking place. As soon as any remuneration is asked, whether in money or in returning the same service (such as a HomeSwap) the accommodation will be offering an ISS to the accommodation seeker.

The person seeking accommodation could be engaged in a B2C or C2C contract, dependant on the quality of the lessor, assuming the accommodation seeker is a consumer. A party is a

consumer when a natural person who is acting for purposes which are outside his or her trade, business or profession. When the relation between the lessor and lessee is to be seen as a B2C relation, the Consumer Directive will apply. When both parties are consumers, this will not apply.

This distinction between the B2C or C2C contract does not affect the application of Directive 2000/31/EC. Decisive is whether the service provided is an economic activity. If accommodation is provided for free or without any commercial purpose, it will not be seen as a service and therefore cannot be an ISS. In cases where remuneration (in whatever form) is asked, both consumers and businesses offering accommodation through the internet are engaged in ISS. It is important to notice again, that the person offering accommodation for free, might still be engaged in an economic activity if the accommodation is offered for free yet money is involved in periphery services.

3.4 The exemptions from platforms' liability in the light of the considerations in Directive 2000/31/EU

Platforms are obliged to act against illegal content harming others. Not always are they actively involved in the publication of this illegal content. Therefore a number of exemptions from liability - taken from the articles 12-15 E-Commerce Directive - are implemented in Dutch law in article 6:196c Dutch CC. One example is article 6:196c lid 4 Dutch CC: a host is not liable for information when is, as soon as it knows of the illegal character of the information, removes it or makes access to it impossible.

In this paragraph we will show where the exemptions of articles 12-14 Directive 2000/31/EC are implemented in Dutch law.

The question whether information is to be considered illegal is a question to be answered in national tort law, in The Netherlands in art 6:162 Dutch civil code.

3.4.1 Article 12 E-Commerce directive 2000/31/EC

Article 12 E-Commerce is implemented in article 6:196c subparagraph 1 and 2 Dutch CC.

The Working Group excludes the possibility of platform providers of being mere access providers. We start from the assumption that platform providers always will store data of the accommodation providers and accommodation seekers somehow, which brings art. 12-13 out of sight. This is in line with what the CJEU has decided on this matter in e.g. the case SABAM/Netlog (see 1.4.1 more extensively). Netlog as a platform provider for social media is comparable to platform providers for an accommodation:

27 In that regard, first, it is not in dispute that the owner of an online social networking platform - such as Netlog - stores information provided by the users of that platform, relating to their profile, on its servers, and that it is thus a hosting service provider within the meaning of Article 14 of Directive 2000/31.

So, if Platform Providers can make use of an exemption on liability at all, it is that of art. 14 Directive 2000/31/EC. Furthermore, the platform provider has to be just a passive intermediary as it comes to the (illegal) information which is stored on its site. In the case of Google France/Louis Vuitton the CJEU has given the key criterion (bold) when a service provider is deemed an ‘intermediary service provider,’ referring to recital 42 in the preamble to Directive 2000/31/EC.

3.4.2 Article 13 E-Commerce directive 2000/31/EC

Article 13 is implemented in article 6:196c subparagraph 3 Dutch CC. As explained before, the Working Group excludes the possibility of platform providers of being mere access providers, starting from the assumption that platform providers always will store data of the accommodation providers and accommodation seekers somehow, which brings art. 12-13 out of sight (see 1.4.1).

3.4.3 Article 14 E-Commerce directive 2000/31/EC

Article 14 is implemented in article 6:196c subparagraph 4 Dutch CC.

Active or passive platform?

The Working Group noted in the general part, paragraph 1.4.2, that the question whether a platform provider is an active agent or a passive bulletin board refers to a key distinction. In the case of L’Oréal/eBay, the criterion has been identified as: ‘*it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.*’ Therefore, for the limited liability to apply, a platform should not be actively involved as regards the illegal information on its site.

Interesting in this perspective is the fact that platforms such as Airbnb are quite actively involved in designing the information that accommodation providers give to attract lessees (active accommodation agent, AAA). According to the directive, the platform cooperating with a service provider in the offering of illegal services goes beyond ‘hosting’. Therefore, on the grounds of general Dutch tort law (art. 6:162 DutchCC), AirBnB can be held liable: the exemption does not apply. Marktplaats.nl is a passive site (a passive bulletin board, PBB), as has been confirmed in Dutch case law.⁸⁰ Here, the exemption for hosting does apply.

⁸⁰ Gerechtshof Leeuwarden 22 May 2012, ECLI:NL:GHLEE:2012:BW6296 (*Stokke/Marktplaats*).

3.5 Liability for infringement of E-Commerce requirements

This section identifies where the requirements based on the E-Commerce directive articles 5 to 11 are implemented. Is the platforms or the provider (or both) liable in case these requirements are not met?

Do platforms assume responsibility for the services they provide in their terms of use?

3.5.1 Article 5 E-Commerce directive 2000/31/EC

An ISS provider should have certain information easily, permanently and directly accessible to viewers of his website to fulfil the obligation under article 5 ECD. This article is implemented in article 3:15d Dutch CC. In subparagraph 1, the general information duty on the identity of the ISS is regulated. Article 3:15d subparagraph 2 Dutch CC requires a clear description of the price of the service, with the express notification to the question whether and if so, which, taxes and delivery costs are included.

What are the consequences of not fulfilling this requirement?

The question is how websites should fulfil this obligation. Literature explains it is not correct to first let users login to a website or make an account or ask for a remuneration before giving this information. It should be prevented that information on the identity of the service provider is to be found under a header titles 'Agenda' or anything else which does not clearly show where the information is. Clicking many buttons before reaching the necessary information is wrong as well.

The consequence in private law - for the contracting parties - of infringement is not clear. It is said that the legislator did not want a general sanction and that the requirements to conclude a contract are not met as long as the information is not provided. Probably, the sanction of avoidability is too burdensome for the service provider, because it would give the consumer the right to terminate the contract for a long time after the conclusion.⁸¹ Still, via art. 193f under (a) Dutch CC, one might say that leaving out this information is to be considered as an illegal omission in advertisements which can lead to liability for the provider or nullification of the contract (art. 6:193j Dutch CC).

Under administrative law it is possible to inform the Autoriteit Consument en Markt (the Consumer Authority). Based on articles 8.2 and 2.9 Wet Handhaving Consumentenbescherming this authority can take the requires measures of administrative nature, like fining the website.⁸² Non-fulfilment of the obligations under article 3:15d subparagraphs 1 and 2 are an economic crime (art. 1 sub 4° Wet op de economische delicten).⁸³ According to article 3:15f subparagraph 3 the FIOD (fiscal intelligence authority)

⁸¹ GS Vermogensrecht (Tjong Tjin Tai), art. 3:15d BW, aant. 5.

⁸² E.D.C.Neppelenbroek, E-Commerce: diensten van de informatiemaatschappij, in: Inleiding IT-recht (C.N.J. de Vey Mestdagh (red.), 2014, p. 162.

⁸³ Huijgen, in: Tekst & Commentaar Burgerlijk Wetboek 3, art. 3:15d BW.

is the competent authority to turn to. One case is CBB 4th of April 2013, ECLI:NL:CBB:BZ7807 (Consumentenautoriteit/Postgarant), where the Court held that the ISS Postgarant did not fulfil its obligations under art. 3:15d, subparagraph 1 Dutch CC and an administrative penalty was in order.

3.5.2 Article 6 -7 E-Commerce directive 2000/31/EC

Art. 6 and 7 of the E-commerce directive deal with advertising. The articles were implemented in article 3:15e Dutch CC, concerning 'commerciële communicatie'. Subparagraph 2 of this article, most prominently deals with the recognisability of advertisements as such. On a website of an ISS, it must be clear what is an advertisement and what is objective information. Furthermore, one should be able to recognize the identity of the advertiser.

Under administrative law it is possible to inform the Autoriteit Consument en Markt (the Consumer Authority). Based on articles 8.2 and 2.9 Wet Handhaving Consumentenbescherming this authority can take the requires measures of administrative nature, like fining the website.⁸⁴ According to article 3:15f subparagraph 3 the FIOD (fiscal intelligence authority) is the competent authority to turn to. In the already mentioned case of CBB 4th of April 2013, ECLI:NL:CBB:BZ7807 (Consumentenautoriteit/Postgarant), the Court held that the ISS Postgarant did not fulfil its obligations under art. 3:15e, subparagraph 1 (b) and (c) Dutch CC and an administrative penalty was in order.

Self-regulation, also concerning advertising in the electronic environment, is done by the Reclame Code Commission in the Dutch Code on Advertising (Nederlandse Reclame Code, www.reclamecode.nl).

3.5.3 Article 8 E-Commerce directive 2000/31/EC

Article 8 is not applicable in the accommodation sphere in Dutch law.

3.5.4 Article 9 E-Commerce directive 2000/31/EC

Article 9 section 1 E-Commerce Directive asks the Member States to enable contracting parties to contract electronically. It lead to the provision of article 6:227a Dutch CC, in book 6 on obligations, subsection 2 on the conclusion of contracts in general. Dutch law already had as a main rule that there are no forms (vormvrij) for the conclusion of contracts (article 3:37 subparagraph 1 Dutch CC). What is new according to article 6:227a Dutch CC, is that the contracts that required a written form previously, can also be concluded electronically. For such a contract to be enforceable, parties need to take into consideration a few requirements.

⁸⁴ E.D.C.Neppelenbroek, E-Commerce: diensten van de informatiemaatschappij, in: Inleiding IT-recht (C.N.J. de Vey Mestdagh (red.)), 2014, p. 162.

The conclusion of such a contract may also require an electronic signature as laid down in article 3:15a Dutch CC.

3.5.5 Article 10 E-Commerce directive 2000/31/EC

Article 10 subparagraph 1 and 2 are implemented in article 6:227b Dutch CC. The article concerns a.o. the technical steps to conclude a contract on the internet. Therefore it was placed in book 6 on the law of obligations, in title 5 on contracts, section 2 on contract formation (articles 217-230). The obligation to provide the information is not applicable on contracts that are concluded by sending emails or other individual means of information exchange (such as SMS or WhatsApp). This exception based on article 10 section 4 E-Commerce Directive is found in article 6:227b paragraph 3 Dutch CC.

Not fulfilling the obligations under article 6:227b Dutch CC leads to avoidability of the contract. When the information about the technicalities is missing, it will be assumed that the contract was concluded under the influence of not giving this information.

If the information about the question whether the contract is kept or saved and how it can be accessed and in what languages one can contract, is missing, the legal consequence is the rescission (ontbinding, a termination of contract without retroactive effect).⁸⁵

Art. 10, subparagraph 3 is implemented in art. 6:227b, subparagraph 2 Dutch CC, as far as it concerns specific contract provisions, and in art. 6:234 subparagraph 2 Dutch CC, as far as general contract provisions are concerned. In article 6:231 (a) general terms are defined as 'one or more provisions that were drafted in order to function in multiple contracts'. Roughly speaking, art. 6:234 concerns the information duty for general terms and art. 6:227b concerns the core of the contract, for example: the description of the accommodation and the price.

Art. 6:227 b subparagraph 2 as well as art. 6:234 subparagraph 2 Dutch CC provide that before or when entering into the contract the terms should be provided in such a way that they can be stored for future reference. If the information duty on general terms is not provided, art. 6:233(b) calls this a ground for avoidance. If the information about the core contract terms, is missing, the legal consequence is the rescission (ontbinding, a termination of contract without retroactive effect, art. 6:227b subparagraph 5).

As a part of the regulation on general terms, art. 6:234 Dutch CC is only directed to consumers and small businesses (art. 6:235 Dutch CC). The information duty for big companies has to be accomplished through the general provision on reasonableness (art. 6:248 subparagraph 2 Dutch CC). In literature, some have said that in this respect, the directive was incorrectly implemented. In practise, this seems to have had no noticeable effect. The Working Group will not go into detail about it, although it is not totally inconceivable that big companies will make use of accommodation services in the sharing society.

⁸⁵ R.E. van Esch, 'Elektronisch contracteren en de aanpassingswet inzake elektronische handel', *NTBR* 2002, p. 435.

3.5.6 Article 11 E-Commerce directive 2000/31/EC

Article 11 E-Commerce Directive lead to the implementation of article 6:227c Dutch CC.⁸⁶ The reception of the order should be confirmed as soon as possible. Between non consumers this obligation can be excluded.

In Dutch law the order and the receipt are received by the recipient as soon as they can be accessed by the recipient. A message is received when the mail is in the email inbox.⁸⁷

The placing of an order is seen as an acceptance of the offer done by the service provider. Also it can be a counter offer, as a reaction on the invitation (of the service provider) to negotiate.

As long as the confirmation of the order reception was not sent out by the service provider, the recipient can rescind the contract. Not confirming an order is seen as a rejection of an offer.⁸⁸

3.6 The Unfair Commercial Practices Directive (2005/29/EC)

The question posed in the tender was the following: Should accommodation providers be

⁸⁶ Artikel 6:227c: 1. Degene die een dienst van de informatiemaatschappij als bedoeld in artikel 15d lid 3 van Boek 3 verleent, stelt de wederpartij passende, doeltreffende en toegankelijke middelen ter beschikking waarmee de wederpartij voor de aanvaarding van de overeenkomst van door hem niet gewilde handelingen op de hoogte kan geraken en waarmee hij deze kan herstellen.

2. Indien een wederpartij van een dienstverlener langs elektronische weg een verklaring uitbrengt die door de dienstverlener mag worden opgevat hetzij als een aanvaarding van een door hem langs elektronische weg gedaan aanbod, hetzij als een aanbod naar aanleiding van een door hem langs elektronische weg gedane uitnodiging om in onderhandeling te treden, bevestigt de dienstverlener zo spoedig mogelijk langs elektronische weg de ontvangst van deze verklaring. Zolang de ontvangst van een aanvaarding niet is bevestigd, kan de wederpartij de overeenkomst ontbinden. Het niet tijdig bevestigen van de ontvangst van een aanbod geldt als verwerping daarvan.

3. Een verklaring als bedoeld in lid 2 en de ontvangstbevestiging worden geacht te zijn ontvangen, wanneer deze toegankelijk zijn voor de partijen tot wie zij zijn gericht.

4. De leden 1 en 2 zijn niet van toepassing indien de overeenkomst uitsluitend door middel van de uitwisseling van elektronische post of een soortgelijke vorm van individuele communicatie tot stand komt.

5. Een overeenkomst die tot stand is gekomen onder invloed van het niet naleven door de dienstverlener van zijn in lid 1 genoemde verplichting, is vernietigbaar. Indien de dienstverlener zijn in lid 1 genoemde verplichting niet is nagekomen, wordt vermoed dat een overeenkomst onder invloed daarvan tot stand is gekomen.

6. Van dit artikel kan slechts worden afgeweken tussen partijen die handelen in de uitoefening van een beroep of bedrijf.

⁸⁷ Article 6:227c paragraph 3 and article 3:37 paragraph 3 Dutch CC lead to the same conclusion.

⁸⁸ Asser/Hartkamp & Sieburgh 6 III, 2014/272.

authorised, licenced or registered and if so, does this relate to the Unfair Commercial Practices Directive? Is the platforms or the provider liable in case this obligation is not met?

The Working Group sees this question could mean several things. On the one hand there might be a licence or registration that accommodation providers have to meet to lease a holiday home or room to tourists. This kind of obligation is a sectoral requirement covered under 1.9, according to and specified by local legislation. Not meeting these requirements could be an unfair commercial practice vis-a-vis other (professional, licenced) accommodation providers and might fall within the scope of unfair competition.⁸⁹

Another implication for consumers in the applicability of the Unfair Commercial practice (Directive 2005/29/EC on Unfair Commercial Practices of 11 May 2005) is that internet technology may not be used to retrieve and analyse information on consumers by firms. This information collection may affect the relationship between firms and their customers, their marketing strategies and how certain offers are displayed to certain customers. This is a data privacy issue and it might lead to distributional issues, as some consumers win and others lose out: ‘as firms have access to more information about their customers, price discrimination and product customisation are likely to increase. Some consumers will benefit, others will not.’⁹⁰

The Working Group found that many websites have a code of conduct in which they impede their members or users to use any technology which could retrieve data from the platforms or the other users or accommodations.

3.7 The Services Directive (2006/123/EC)

⁸⁹ Rules for hotel-restaurant-cafe (short: horeca) industry are to be found on Ondernemersplein, wetten en regels – horeca en catering, 2016, (www.ondernemersplein.nl). De regels die voor deze branche gelden zijn opgedeeld in de volgende categorieën: eet- en drinkwaren; kraam, uitstalling of terras; logies; openings- en bevoorradingstijden; speel- en attractietoestellen; zwemgelegenheden; beveiliging; horecapand en omgeving; reclame en promotie en speelautomaten en kans-spelen. Hotels krijgen onder andere te maken met: regels over het schenken en verkopen van alcohol; regels op het gebied van veiligheid, gezondheid, economie en milieu; wettelijke voorschriften over hygiëne van levensmiddelen; lokale regels met betrekking tot sluitingstijden van de horeca; voorschriften om brandveiligheid te waarborgen en regels die geluidsoverlast voorkomen. Ook moeten hoteleigenaren denken aan de verplichte aanwezigheid van: eventuele terrasvergunningen; een nachtregister; drank- en horecaverunning en een juist bestemmingsplan. Daarnaast zijn er nog een aantal zaken die door- of aangegeven moeten worden zoals: toeristenbelasting, het feit dat men een exploitatie recreatie inrichting heeft en overige belastingen, zoals inkomsten- en omzetbelasting. Tevens is een inschrijving bij de Kamer van Koophandel verplicht.

⁹⁰ COMMISSION STAFF WORKING DOCUMENT, Report on cross-border e-commerce in the EU February 2009, http://ec.europa.eu/consumers/archive/strategy/docs/com_staff_wp2009_en.pdf online:

The task was to identify the requirements based on Services Directive Articles 22-24 and how the rules are applied by platforms in practice.

3.7.1 Article 22 Services Directive

Article 22 is implemented in article 6:230b-f Dutch CC. Competent authorities are the Consumerauthority or the Stichting Autoriteit Financiële Markten to give an administrative fine. In private law there is no specific sanction, provided that not giving all information will result in an infringement of article of article 6:233b: not providing all terms of the contract will lead to avoidability.⁹¹

It can also lead to a mistake of fact, under article 6:228 Dutch CC.⁹²

3.7.2 Article 23 Services Directive

Article 23 is implemented in article 6:230b sub 11 Dutch CC and concerns professional insurance or guarantee arrangements.

There are two cases in the Netherlands in which the court decided that an advocate is not obliged to provide the details of its professional insurance, however this was a wrong decision, criticized by advocates and the Orde van Advocaten which rely on article 6:230b.⁹³

Also real estate agents fall under this provision (consideration 33). The consequence is again a fine from the Autoriteit Consument en Markt or the risk of being fined if the problem is not solved within a limited period of time.

A guarantee for real estate agents is given by the so called NVM: Nederlandse Vereniging voor Makelaars en taxateurs, so that not everyone who calls himself a ‘makelaar’ will fall under such guarantee. The term ‘makelaar’ is free since 2001. Anyone can basically start an agency is the intermediation of lease contracts. The question therefore would be to determine whether the scope of the Services Directive intended to cover all activities that are usually done by ‘makelaars’ so that also new platforms engaged in this activity are under the obligation to provide such guarantee, or whether the services directive works with the presumption that such activities should be under a licence according to the national laws.

However we did find that Airbnb has a special guarantee fund for both accommodation providers and for accommodation seekers. Albeit with a quite limited applicability and some presumably unfair terms. Because the court to go to is set in the United States from a low amount of damage on. Only in smaller cases the national courts can settle the problem.

3.7.3 Article 24 Services Directive

⁹¹ Tekst & Commentaar (Valk), art. 230b, note 1, p. 2845.

⁹² Tekst & Commentaar (Valk), art. 230b, note 1, p. 2846.

⁹³ [/nl/data/artikelen/publicaties/naam-beroepsaansprakelijkheids-verzekeraar-hoeft-niet-te-worden-verstrekt-aan-klagende-client](http://nl/data/artikelen/publicaties/naam-beroepsaansprakelijkheids-verzekeraar-hoeft-niet-te-worden-verstrekt-aan-klagende-client); <http://www.boekel.com/nl/data/artikelen/publicaties/raad-of-richtlijn>.

Article 24 provides that Member States shall remove all total prohibitions on commercial communications by the regulated professions.

Being an agent in the real estate market is not a regulated profession in Dutch law.

3.8 The Consumer Rights Directive

In the general part of this Impulse Paper, the Working Group made the observation that some difficulties may stand in the way of qualifying the reservation of accommodation as a distance contract, an ‘overeenkomst op afstand’ as defined in art 230g, subparagraph 1 (e) Dutch CC. In as far as this qualification is possible at all, the right to withdrawal, one important consumer protection tool implemented in art. 6:230o Dutch CC, is not applicable, because it involves the reservation of accommodation other than for residential purposes, art. 6:230p Dutch CC.

Also in the regional perspective, the relation lessor-lessee is difficult to grab. It is a big problem the cities are trying to solve, to find out whether lessors offering accommodation are in fact traders or not. Amsterdam is now trying to filter all the businesses from the consumers using ‘big data’ and searching all websites and platforms on public accessible data, to combine all information and try to draw conclusions from that. An issue in this respect is that accommodation websites are stuck between giving private information of their users infringing privacy policies on the one hand. On the other they might be obliged to cooperate. It shows that it is also impossible for the Working Group to find out how accommodation providers or websites are trying to fulfil the obligations under the Directive, as far as they are at all governed by it.

It would be important to know who is trying to escape from being a subject of the Directive by pretending to be a consumer. In Dutch law the difference between the trader and consumer as a contracting party ‘colours’ the expectations that arise from the contract. In general a contract and its content is explained by the expectations the contracting parties were reasonably allowed to have in the given circumstances (Haviltex).

As described in the general part on the difference between a professional and a consumer is connected in the collaborative economy, accommodations sector, to a set of city policies on the illegal and legal seasonal lease of private homes. When one acts within the limitations of the sector specific rules of a certain city, one is not a professional.

In as far as there is a B2C distance contract for which the consumer rights directive does apply, the information duties that the trader should implement are found in art. 6:230g Dutch CC and further.

The precontractual information duties can be found in art. 6:230m Dutch CC. There is a hot debate in the Netherlands on what sanction should follow from not complying to the

precontractual information duty. Some claim that there is an outright possibility for avoidance. Others make clear that for avoidance, there should be a connection between the violation of the information duty and the decision to enter into the contract.⁹⁴

The additional information duties for distance contracts are implemented in art. 6:230v paragraphs 1-3 Dutch CC. Art. 8 CRD, section 7, about the so-called post-contractual information duty (confirmation of the contract on a durable medium) is implemented in art. 6:230v subparagraph 7 Dutch CC. Art. 6:230k and 6:230n subparagraph 3 Dutch CC implement the consumer protection concerning extra payments.

3.9 Infringement sectoral and other requirements: illegality of the service

Amsterdam embraces Airbnb because of the growth of tourism and economy it promises. At the same time the city cannot deny the negative effects and concerns such as nuisance, fire safety regulation being infringed, illegal competition by illegal hotels and a tension in respect to liveability for residents.⁹⁵ The latest development is that Amsterdam uses ‘big data’ to find illegal hotels.⁹⁶ Airbnb has promised to help find the illegal hotels.⁹⁷ Another issue, which was not part of this research governing the consequences for consumers, is whether illegality will amount to unfair competition.⁹⁸

3.9.1 For not acting in conformity with licence or authorisation (illegal lease)

3.9.1.1 Regulation in Amsterdam law

⁹⁴ See, for example, L.B.A Tigelaar, ‘Sancties op schending van informatieplichten uit de Richtlijn consumentenrechten’, *Tijdschrift voor Consumentenrechten en Handelspraktijken* 2013, p. 154-161 and M.Y. Schaub, ‘Het herroepingsrecht bij overeenkomsten op afstand’, *NTBR* 2014/23.

⁹⁵ Gemeente Amsterdam, Toeristische verhuur van woningen (‘vakantieverhuur’) in Amsterdam, juni 2013, online: www.amsterdam.nl (last visited 2 March 2016); Kamerbrief van minister van Economische Zaken over toekomstbestendige wetgeving: digitale platforms en deeleconomie, waaronder particuliere verhuur aan toeristen, Kamerstukken II 2015, 15166286 on www.overheid.nl.

⁹⁶ L. Kraniotis, Amsterdam gaat illegale Airbnb’s aanpakken met ‘big data’, 15 februari 2016, te vinden op www.nos.nl, laatst geraadpleegd op 2 maart 2016.

⁹⁷ K. Bouma, Airbnb schrapt huizen Amsterdam die te vaak worden verhuurd, 13 January 2016, on www.volkskrant.nl, last checked 2 March 2016; Gemeente Amsterdam, Raadsvoordracht uitwerking notitie (2014), 13 February 2014, www.amsterdam.nl (last visited 2 March 2016).

⁹⁸ In Germany for example Uber was prohibited to act because any company intermediating in personal transport services needs a licence ‘Genehmigung’. Not having this Genehmigung leads to unfair competition (based on the Gesetz Unlauterer Wettbewerb). In the Netherlands there is no licence required to intermediate in this transport section. However, the UberPOP service was prohibited in both countries- for the reason that to engage in personal transport as a driver, one needs a licence. This is merely a consumer and public order safety measure.

Amsterdam recently renewed its ‘regional hotel strategy 2016-2022’.⁹⁹ Amsterdam works with a so-called MRA-ladder. MRA is for Metropole Region Amsterdam, comprising Schiphol as well. The ladder shows each step in the start-up of a hotel.

Starting up a hotel is usually permitted after a licence check based on three elements: city development (*planologie*) requirements, quality for the area and the economy.¹⁰⁰ The goal is to create variation: the right hotel on the right spot. Next to that there are licences for the exploitation of hotels, restaurants or café’s (horeca-vergunning). A ‘no’ on the MRA-ladder is not a legally binding prohibition to start a hotel - it is possible to get a licence in the case of a negative advice - but it shows how Amsterdam is trying to steer the tourist industry.¹⁰¹

Criteria that are checked are:

Whether hotels are near public transport, whether it will increase the quality of the building or the nearby area of the future hotel. Do the roads and parkings surrounding the area have sufficient capacity to receive guests? Is the business plan sustainable? Are there impediments in environmental law? Does the hotel affect the residential area in a negative way? Other questions are there as well. These examples are merely to show what is taken into consideration in a normal ‘hotel’-case. These questions are not answered where private hotels emerge.¹⁰²

3.9.1.2 Illegality based on the Bestemmingsplan

Every city designs city plans giving each area or building a certain destination to improve the liveability of the city. This plan is known as the *bestemmingsplan*. A residence is often defined as ‘a residence with the purpose to be resided by one household’. Lease to students or tourists is not ‘one household’.¹⁰³ The consequence of a breach of the city planning rules is a charge imposed under penalty, noting that the offender (the owner / landlord or the tenant¹⁰⁴) is requested to stop the breach within a specified period, risking to receive a penalty when the breach wasn’t ended in time.¹⁰⁵

3.9.1.3 Illegality based on the Huisvestingsverordening

The more obvious way to address illegal lease is on the basis of the Housing Law (Huisvestingsverordening). It is forbidden to lease out a home without a permission, because

⁹⁹ Regionale hotelstrategie 2016 - 2022, to be consulted online: <https://www.amsterdam.nl/ondernemen/horeca/hotel-ontwikkelen/>

¹⁰⁰ Regionale hotelstrategie 2016 - 2022, p. 5.

¹⁰¹ Regionale hotelstrategie 2016 - 2022, p. 7-8.

¹⁰² Regionale hotelstrategie 2016 - 2022, p. 10-11.

¹⁰³ ABRvS 28 January 2015, ECLI:NL:RVS:2015:160 and ABRvS 8 February 2012, ECLI:NL:RVS2012:BV3229.

¹⁰⁴ The person in breach is the one who has the power to stop the breach, see: ECLI:NL:RVS:2014:117 and ECLI:NL:RVS:2015:654.

¹⁰⁵ S.W. Derksen, N. Amiel, Streng toezicht op hotelmatige verhuur, TBR 2015/188, nr. 2.2.

one may not deprive a house from the market, given the fact that there is not enough housing available in the area. It is to some extent allowed to lease a property to others. If one stays within these rules, one will not be fined.

In Amsterdam it is allowed to lease a house when

- 1) the lessee remains the main resident of the home,
- 2) the home is leased less than two months per year¹⁰⁶,
- 3) the owner pays income tax and tourist tax
- 4) there is - in the case of an apartment - a permit from the Community of Owners to lease out the place,
- 5) fire safety measures were taken¹⁰⁷,
- 6) the home is not leased to more than four persons at the same time,
- 7) the lessees are not causing nuisance for the other residents in the area.

Any behaviour contrary to the Huisvestingsverordening will lead to the conclusion that the owner is acting as an illegal hotel.¹⁰⁸

Amsterdam policy however shows that it is usual to use the housing regulation (Huisvestingsverordening in the former paragraph) to stop any breach. Using the city planning rules (bestemmingsplan) is less obvious. The obligation to stop a breach risking a penalty turned out laborious and extensive (especially in cases in which offenders violated the regulation deliberately, severely and repeatedly), and moreover not deterrent enough. Hence, ultimately the city opted for imposing high administrative fines.¹⁰⁹

The standard fine is € 12.000 at a first offence and € 18.500 for a repetition.¹¹⁰

The lessee is fined (an administrative fine) after having illegally leased out the apartment. Often the defence against this is that they merely gave their house to a caretaker (*bewaarnemer*) on a temporary basis. The administrative courts are strict: as soon as someone is registered in Amsterdam as a resident, the house is found on the internet for lease, too many

¹⁰⁶ Holiday lease is not deprivation of a home from the market because the resident is usually there the majority of the year. Gemeente Amsterdam, *Raadsvoordracht uitwerking notitie (2014)*, 13 Februari 2014.

¹⁰⁷ Indien een woning voor langere periode aan steeds wisselende personen wordt verhuurd, zijn de risico's in verband met brandveiligheid groter, doordat bijvoorbeeld omwonenden niet weten dat andere mensen in het huis verblijven. De gemeente Amsterdam heeft daarom als eis gesteld dat er daarom voor het aanbieden van meer dan vier logies een gebruiksvergunning vereist is. De eisen voor brandveiligheid zijn daarom verduidelijkt naar een makkelijke toepassing voor de vakantieverhuur en er zal met de brandweer samengewerkt worden, waarbij brandveiligheid onderdeel wordt van de handhaving. Gemeente Amsterdam, *Toeristische verhuur van woningen ('vakantieverhuur')* in Amsterdam, juni 2013, te vinden op: www.amsterdam.nl (laatst geraadpleegd op 2 maart 2016).

¹⁰⁸ S.W. Derksen, N. Amiel, *Streng toezicht op hotelmatige verhuur*, TBR 2015/188, nr. 2.1. Art. 27 Regionale Huisvestingsverordening Stadsregio Amsterdam.

¹⁰⁹ Beleidsnotitie bestuurlijke boete Huisvestingswet, oktober 2009, p. 7.

¹¹⁰ S.W. Derksen, N. Amiel, *Streng toezicht op hotelmatige verhuur*, TBR 2015/188, nr. 3.

tourists are staying there, the court finds the house owner is exploiting an illegal hotel. In certain cases the house owner was fined € 12.000,- for lease like a hotel and for not having a licence to deprive the residence from the market, because of the use for non-residential purposes.¹¹¹

3.9.1.4 Notice procedure

The nuisance residents are complaining about is drunk tourists and the noise of suitcases on the street in the middle of the night.¹¹² To prevent this residents can notify the city. There is no special initiative since the collaborative economy; there has always been a service to inform the city of problems and nuisance of any kind. The city is aiming at lessors communicating to the neighbours that they are renting out their homes, so that there will be some social control. Airbnb has agreed with Amsterdam to confront the lessors with nuisance. In some cases the city will take notifications of nuisance as a hint to start investigating whether someone is exploiting an illegal hotel according to the rules mentioned before.¹¹³

3.9.2 Liability for tourist taxes

On 18 December, 2014 the City of Amsterdam and Airbnb announced their agreement (Memorandum of Understanding) that will simplify the payment of tourist tax for hosts. The agreement between Airbnb and Aldermen Laurens Ivens (Housing) and Udo Kock (Finance) was made about providing clear and accessible information on the rules for home sharing. Airbnb would also start collecting and remitting tourist taxes on behalf of hosts. It was perceived to be an infringement of equality to alleviate tax pressure from those who are acting as illegal hotels, at the expense of legal hotels.¹¹⁴

Amsterdam and Airbnb also concluded that they would improve the webpage for hosts on information and links to rules that may affect people leasing their homes in Amsterdam, including a link to a brochure from the City Council. On that basis Airbnb will also prominently display a summary of these rules and hosts will be required to actively declare that they understand and will comply with them before they can post their listing. Airbnb will

¹¹¹ S.W. Derksen, N. Amiel, Streng toezicht op hotelmatige verhuur, TBR 2015/188, nr. 1; ABRvS 7 oktober 2015, ECLI:NL:RVS:2015:3086.

¹¹² André de Vos, Schaduwzijde Airbnb steeds zichtbaarder, 12 June 2015, www.fd.nl.

¹¹³ Gemeente Amsterdam, Toeristische verhuur van woningen ('vakantieverhuur') in Amsterdam, juni 2013; Raadsvoordracht uitwerking notitie (2014), 13 februari 2014; Gemeente Amsterdam en Airbnb, Memorandum of understanding, 18 februari 2014, on www.amsterdam.nl (laatst geraadpleegd op 2 maart 2016).

¹¹⁴ Airbnb, article 860: Amsterdam, www.airbnb.nl (last visited 2 March 2016).

also send email updates twice a year to remind local hosts of the rules and regulations in Amsterdam.¹¹⁵

Even though a host is responsible for tourist tax remittance, Airbnb has joined the City of Amsterdam to inform hosts to prevent them from infringing sectoral rules. Airbnb and the Town of Amsterdam concluded in a Memorandum of Understanding that Airbnb would charge and collect the tourist taxes. Amsterdam is aiming at involving other platforms in the same agreement.¹¹⁶ We can conclude from this that the responsibility for meeting this requirement lies at the platform.¹¹⁷

3.10 Not satisfactory service provision

3.10.1 Short duration lease in the law

In the case a holiday home is leased for a short period of time the contract will be defined as a 'short duration lease'. Article 7:201 Dutch CC defines the lease agreement in general:

'- 1. A lease agreement is an agreement under which one of the parties, 'the lessor', engages himself towards the other party, 'the lessee', to grant him the use of an immovable or movable thing or of a part of such thing, opposite to which the lessee engages himself to perform a counter performance.'

There is only the term 'short duration lease' in the law, yet there are no requirements or characteristics mentioned in the law as to the question in which cases lease is short duration lease.

Short duration lease is found by looking at a few elements of the contract, which come from case law: the nature of the lease object;
the intention of the lessor and lessee at the start of the contract;
the way in which these intentions were executed;
the duration of the use of the lease object.¹¹⁸

In cases in which the house owner or lessor is present at the same time as the lessee, one might speak of a hotel agreement. Distinctive is that hotel owner will not only offer the use of

¹¹⁵ <https://www.airbnb.es/press/news/amsterdam-and-airbnb-sign-agreement-on-home-sharing-and-tourist-tax>

¹¹⁶ Gemeente Amsterdam en Airbnb, Memorandum of understanding, 18 februari 2014, te vinden op: www.amsterdam.nl (laatst geraadpleegd op 2 maart 2016).

¹¹⁷ www.amsterdam.nl 'Memorandum of understanding, d.d. 18.2.2014'.

¹¹⁸ tekst & Commentaar (Huydecoper), art. 7:232, p. 3125-3127; Handelingen II 1978/79, 14175, p. 5026; HR 8 January 1999, NJ 1999/495 (Abbo/St. Renesse); A.M. Kloosterman, Hoofdlijnen in het huurrecht, Deventer: Kluwer 2014, p. 142-153; F. van der Hoek, in: Tekst & Commentaar BW 2015, art. 7:232 BW, note 3.

a room, but will also engage in a work service. As soon as the lessor will cook and clean for the lessee, there is no lease agreement anymore.

3.10.2 The legal framework and the lessor's liability

The relevance of the short duration lease, is that the protective residential regulations under section 7.4.5 are not applicable anymore: Section 7.4.5 on the lease of residential spaces says in article 7:232 subparagraph 2:

- 2. This Section (Section 7.4.5) does not apply to lease agreements concerning the use of residential spaces which use by its nature is of short duration.

That means only the general - not mandatory rules in articles 7:201-231 Dutch CC apply, in the case nothing else was agreed to.

Section 7.4.2 concerns the obligations of the lessor of which the main obligation is to provide *the use which the lessee may expect* based on the lease agreement. Article 7:203 says the lessor is obliged to place the leased out property at the disposal of the lessee and to leave it at his disposal insofar this is necessary to comply with the agreed enjoyment (right of use).

The satisfactory service provision is related to the notion of 'defect'. A defect is a quality or characteristic of the leased property or another circumstance *not attributable to the lessee*, as a result of which the leased property does not provide the lessee the enjoyment which a lessee, at the moment on which the lease agreement was entered into, could have expected to get of a well maintained property of the kind as to which the lease agreement relates (article 7:204 Dutch CC). An actual disturbance in the agreed enjoyment by a third person who does not claim to have a right in the leased property as meant in Article 7:211, is no defect in the meaning of paragraph 2; neither a defect is the claim of a third person to the leased property itself, but without actually causing a disturbance in the agreed enjoyment.

When leasing a property with a pool, which in fact does not have a pool, this is seen as a defect under article 7:204 Dutch CC.¹¹⁹

3.10.3 Mistake of fact

Article 7:205 mentions the rights (actions) result from Section 7.4.2 and from Book 6 (General law of obligations on mistake of fact or rescission and damages).¹²⁰

¹¹⁹ Groene Serie Huurrecht (-Huydecoper), 7.2 BW, note 1.

¹²⁰ The question posed concerned the question who is liable. When the lessor is liable, he will be under the following obligations: Article 7:206 Remedy of defects

- 1. If the lessee desires so, the lessor must remedy a defect, unless this is impossible or it would require expenditures which in the given circumstances reasonably cannot be expected to be made by the lessor.

- 2. This obligation does not apply to minor defects which the lessee has to repair himself pursuant to Article 7:217, nor to defects for which the lessee is responsible (liable) towards the lessor.

Especially the doctrine of mistake of fact is relevant here (article 6:228 Dutch CC: it is about the conclusion of a contract which would not be concluded if the party knew of the factual circumstances. If for example a house was thought to be suited for a woman with asthma because the contract said it has good ventilation, and this ventilation is not working properly, the lease contract can be avoided (with retroactive effect) based on the mistake of fact (article 6:228 jo. 7:205 Dutch CC).

The main rule is that the mistake of fact is attributed to the person under the influence of the mistake (in this case the lessee), however there are three exceptions: when the mistake is based on wrong information of the lessor, based on not giving relevant information and on mutual mistake. In some cases there is a duty to research on the shoulders of the lessee. the duty to inform comes in first, after that, when things are unclear, one can require from the

- 3. Where the lessor is in default of remedying a defect, the lessee may perform the remedy himself; as far as the remedy costs are reasonable, they may be recovered from the lessor, if required by withholding them from the lease. It is not possible to derogate to the disadvantage of the lessee from this provision.

Article 7:207 Reduction of the lease

- 1. In the event that the enjoyment of the lease has been diminished due to a defect, the lessee may claim a proportional reduction of the lease as from the day on which he has properly notified the lessor of the defect or on which the defect was sufficiently known to the lessor in order to take measures, up until the day that the defect is remedied.

- 2. The lessee is not entitled to a reduction of the lease to the point of minor defects that he has to repair himself pursuant to Article 7:217, nor of defects for which he is responsible (liable) towards the lessor.

Article 7:208 Damages

Without prejudice to the rights and legal remedies of the lessee in the event of a non-performance of the obligation meant in Article 7:206, the lessor is obliged to compensate the damage caused by the defect, if the defect has arisen after the conclusion of the lease agreement and is attributable to him, as well as if the defect already existed at the conclusion of the lease agreement and the lessor was aware or ought to have been aware of its existence or the lessor had made clear, at that time, that the leased property did not have this defect.

Article 7:209 Mandatory law

It is not possible to derogate to the disadvantage of the lessee from Articles 7:206, paragraph 1 and 2, 7:207 and 7:208 as far as it concerns defects of which the lessor was aware or ought to have been aware at the conclusion of the lease agreement.

Article 7:210 No agreed enjoyment left

- 1. If a defect makes it entirely impossible to enjoy the leased property in conformity with the lease agreement, but from Article 7:206 follows that the lessor is not obliged to remedy this defect, then both, the lessee and the lessor, may rescind the lease agreement on the basis of Article 6:267 of the Civil Code.

- 2. The damage caused by the fact that the lease agreement has ended in consequence of paragraph 1, may be recovered by virtue of a debt-claim for damages caused by a defect.

lessee that he should research these unclaritys. Overall one should say that both parties are under the duty to prevent any mistake of fact.¹²¹

One could imagine, where the mistake of facts leads to an avoidability of the lease contract, the agency contract remains valid.

¹²¹ Huydecoper, in: *GS Huurrecht*, art. 7:205 BW, note 7; Rb. Den Haag (ktr.) 22 April 2009, ECLI:NL:RBSGR:2009:BJ7850 (on rechtspraak.nl); Asser/Hijma 7-I* 2013/242; HR 15 November 1957, ECLI:NL:HR:1957:AG2023; Hijma e.a. (eds.) 2013, p.173.

4. BARCELONA AND THE COLLABORATIVE ACCOMMODATION ECONOMY

4.1 Barcelona: facts

In 2015 Barcelona was one of Airbnb's top-3 destinations in the world¹²². By the same year, Barcelona had 137.196 accommodation places available in P2P platforms (e.g Airbnb, Homeaway, Rentalia), i.e. around 64% of the total places available for accommodation. From the 137.196 accommodation places in platforms P2P, 91% of them are offered in the touristiest neighbourhoods (Ciutat Vella, Eixample, Gràcia, Sant Montjuic y Sant Martí).¹²³

In July 2015, the government of Catalonia fined¹²⁴ two of the major platforms (Airbnb and Homeaway) in the amount of 30.000 euros for announcing apartments and houses without the number of the inscription in the Register of Tourism of Catalonia (*Registro de Turismo de Cataluña*) and for not providing to the local administration the data by them required.¹²⁵

Another platform (Booking) removed from the listing of apartments and houses all those that were offered illegally, i.e. apartments that did not have the number of the inscription in the Register of Tourism of Catalonia.¹²⁶

It seems that the government of Catalonia is preparing a decree (not yet approved) to legalize the offer of touristic accommodation through P2P platforms when particulars offer accommodation in their own home. According to the proposed decree, particulars could lease rooms in their own house to tourists; as long as the stays do not exceed more than 31 days and that the total period of different stays does not exceed 4 months.¹²⁷

¹²² <http://novobrief.com/airbnb-legal-in-cataluna-barcelona/>

¹²³ Data provided by the Exceltur Report 'Alojamiento turístico en viviendas de alquiler. Impactos y retos asociados', 24 June 2015. Available online at: <http://www.exceltur.org/wp-content/uploads/2015/06/Alojamiento-tur%C3%ADstico-en-viviendas-de-alquiler-Impactos-y-retos-asociados.-Informe-completo.-Exceltur.pdf>. Last accessed <13 March 2016>.

¹²⁴ http://economia.elpais.com/economia/2014/07/06/actualidad/1404673035_679660.html

¹²⁵ http://ccaa.elpais.com/ccaa/2015/12/29/catalunya/1451418307_063779.html

¹²⁶ Ibid.

¹²⁷ Ibid.

4.2 The definition of the three relations in Spanish law

4.2.1 Relation 1 between the platform and the person offering an accommodation

The relation between the platform and the person offering accommodation is difficult to determine under Spanish law. The contractual relation between the two parties may be defined differently depending on the object of the contract between the platform and the person offering accommodation and the mechanisms of payment for the services provided by the platform. According to the terms and conditions of the websites considered (Airbnb and Homeaway), the Working Group has identified two different services provided by the platforms:

providing an internet platform to connect the provider and the seeker of accommodation (Airbnb)¹²⁸ or

renting advertising space in an online website in which the announcers can propose the leasing of the accommodation they own or manage (Homeaway).¹²⁹ According to the Homeaway website¹³⁰ the platform is not a tourism intermediary, and its services are limited to offering services of promotion of the advertisements placed and managed by the accommodation provider.

Two different modalities of payments can be identified:

- i) The platform deduces the payment for the services from the amount that the seeker of accommodation transfers to the provider of accommodation (Airbnb).¹³¹
- ii) The owner pays a fee in advance for the publication of the advertisement of the accommodation on the platform for a period of time, e.g. one year (Homeaway).¹³²

The Working Group considers that under Spanish law, the relation between the platform and the offeror of accommodation may be a contract of brokerage (*contrato de mediación o corretaje*) if the service provided by the platform consist in a) providing an internet platform

¹²⁸ ‘Airbnb ofrece una plataforma por Internet que conecta anfitriones que tienen alojamientos para alquilar con clientes que buscan alquilar dichos alojamientos’. <https://www.airbnb.es/terms>. Last accessed <10 of March 2016>.

¹²⁹ ‘El objetivo de HomeAway es el alquiler de espacios publicitarios en un portal en línea en el cual los Anunciantes pueden proponer el alquiler de alojamientos que posean o administren.’ <https://www.homeaway.es/info/quienes-somos/aviso-legal/Terminos-Condicion.es>. Last accessed <10 of March 2016>.

¹³⁰ ‘El objetivo del Proveedor es ofrecer un portal en línea donde los Viajeros puedan obtener información sobre los alquileres de corta duración ofrecidos por los Propietarios, y filtrar los resultados de búsqueda a través de herramientas de búsqueda, de una manera rápida y sencilla.’ <https://www.homeaway.es/info/quienes-somos/aviso-legal/terminos-condiciones-viajeros> Last accessed <10 of March 2016>.

¹³¹ <https://www.airbnb.es/terms>

¹³² <https://www.homeaway.es/info/quienes-somos/aviso-legal/Terminos-Condicion.es>.

to connect the provider and the seeker of accommodation and the payment is made under the modality i).

A platform such as Airbnb will be seen as an 'agent' (*intermediario*), facilitating the conclusion of a contract on behalf of the accommodation provider. The agent is not representing the accommodation provider nor the accommodation seeker. The agent is not a 'commercial agent' in the sense of the Spanish Commercial Code. The Working Group chose to translate the '*intermediario*' as an agent, in conformity with the DCFR.¹³³ Not choosing the term 'intermediary' has to do with the special meaning the 'intermediary' platform has under E-Commerce law.

Under Spanish law, the contract of brokerage is an atypical contract.¹³⁴ However, case law¹³⁵ has described this brokerage as a contract whereby a person (offeror) commissions another one (the intermediary) to inform him/her about the opportunity of concluding with another person/s a contract, or to perform the necessary arrangements to obtain the agreement of the parties on concluding a contract. The intermediary receives in exchange an economic retribution once the prospective contract between the person offering accommodation and the other party has been concluded.¹³⁶

Platforms like Airbnb are commissioned by the person offering accommodation to perform the necessary arrangements in order to reach an agreement between the offeror and seeker of accommodation on the prospective contract of lease. Airbnb only gets paid once the contract of lease has been concluded.

The contract of brokerage does not have a specific legal regime under Spanish legislation. According to scholarly opinions,¹³⁷ the applicable legal sources to the contract of brokerage should be in order: Article 1091 and 1255 (on contractual freedom and the principle of *pacta sunt servanda*) of the Spanish Civil Code, hereafter S.C.C; the general norms on obligations and contracts of the Titles I and II Book IV of the S.C.C; commercial practices and complementary norms; case law; and scholarly opinions.

The liability of the platforms with regards to the accommodation provider should be established therefore by the contractual obligations incorporated in the brokerage contract and the aforementioned legal sources.

¹³³ The Working Group used the term agent as described in the DCFR: Principles, Definitions and Model Rules of European Private Law (DCFR) Outline Edition (Chr. v. Bar, E. Clive, H. Schulte-Nölke, eds.) 2009, p. 22.

¹³⁴ Gazquéz Serrano, 2007, p. 161-172.

¹³⁵ On the definition of this contracts by case law see for example: Sentencia de la Audiencia Provincial de Madrid, de 13 de octubre de 2005.

¹³⁶ On case law on this matter see: SS.T.S. 26 March 1991, SS.T.S. 7 March 1994 and SS.T.S. 30 April 1998.

¹³⁷ Gazquéz Serrano, 2007, p. 175

However, significant doubts still remain on the definition of the contractual relationship between the platforms and the person offering accommodation due to the business model used by platforms like Airbnb. In fact, according to the terms and conditions,¹³⁸ the offeror of accommodation contracts with two different legal persons. For the use of the website and the other services provided by Airbnb, the offeror contracts with 'Airbnb Ireland'. For the payment of the services the offeror contracts with 'Airbnb Payments UK'.¹³⁹ 'Airbnb payments' is described in the terms and conditions as a limited billing agent (*agente limitado de cobros*).¹⁴⁰ The Working Group considers that this particular relation between the offeror of accommodation and 'Airbnb Payments UK' may be governed by the rules applicable to the 'commission agreements' (*contratos de comisión mercantil*) as regulated by Articles 244-280 of the Spanish Commercial Code, hereafter S.Co.C.¹⁴¹

According to Article 244 S.Co.C 'the commission agreement is a mandate that has as its object a commercial act or operation, if either the principal or the commission agent are traders.'¹⁴² Airbnb has undoubtedly the condition of trader. Therefore, one could say that the contract between the offeror of accommodation and the platform may be considered a mandate for the collection of the payments of the seeker of accommodation.

The applicable rules to 'commission agreements' contained in Articles 244-288 S.Co.C. would therefore shed light on the determination of liability between the three parties involved.

Furthermore, the Working Group considers the relation between the platform and the offeror of accommodation may be a contract of 'rent of advertising space in an online website' if the payment is made under the second modality described above ii) i.e. when the owner pays a fee in advance for the publication of the advertisement of the accommodation. This contract cannot be considered a brokerage contracts because the online platform gets paid in advance and not after the conclusion of the 'prospective contract'. The rules applicable to this contract remain unclear to the Working Group.

However, in the latter case, one may argue that if the payment is done according to the first modality, the contract concluded between the offeror of accommodation and the platform could be considered a contract of brokerage.

¹³⁸ <https://www.airbnb.es/terms>.

¹³⁹ 'Si usted reside fuera de EE. UU., estará contratando con Airbnb Ireland respecto del uso de la página web, la aplicación o los servicios de Airbnb, y con Airbnb Payments UK Ltd. respecto de cualesquiera pagos o desembolsos por su parte o a su favor realizados a través de la página web, la aplicación o los servicios.' <https://www.airbnb.es/terms>. Last accessed <11 of March 2016>.

¹⁴⁰ '(...) el Anfitrión nombra a Airbnb Pagos como agente limitado de cobros del Anfitrión al objeto exclusivo de aceptar las Tarifas de alojamiento de los Clientes.' <https://www.airbnb.es/terms>. Last accessed <11 of March 2016>.

¹⁴¹ Available at: http://noticias.juridicas.com/base_datos/Privado/ccom.12t3.html .Last accessed <11 of March 2016>.

¹⁴² The translation is ours, the original text reads as following: 'Se reputará comisión mercantil el mandato, cuando tenga por objeto un acto u operación de comercio y sea comerciante o agente mediador del comercio el comitente o el comisionista.'

4.2.2 Relation 2 between the platform and the person seeking an accommodation: agency

The Working Group considers that under Spanish law, the relation between the platform and the person seeking accommodation may be a contract of brokerage (*contrato de mediación o corretaje*) if the service provided by the platform consist in a) providing an internet platform to connect the provider and the seeker of accommodation and the payment is made under the modality i).¹⁴³

A platform such as Airbnb will be seen as an 'agent' (*intermediario*), facilitating the conclusion of a contract on behalf of the accommodation provider. The agent is not representing the accommodation provider nor the accommodation seeker. The agent is not a 'commercial agent' in the sense of the Spanish Commercial Code. The Working Group chose to translate the '*intermediario*' as an agent, in conformity with the DCFR.¹⁴⁴ Not choosing the term 'intermediary' has to do with the special meaning the 'intermediary' platform has under E-Commerce law.

Platforms like Airbnb are commissioned by the seeker of accommodation to perform the necessary arrangements in order to reach an agreement between the offeror and seeker of accommodation on the prospective contract of lease. Airbnb only gets paid once the contract of lease has been concluded.

The contract of brokerage does not have a specific legal regime under Spanish legislation. According to scholarly opinions,¹⁴⁵ the applicable legal sources to the contract of brokerage should be in order: Article 1091 and 1255 (on contractual freedom and the principle of *pacta sunt servanda*) of the Spanish Civil Code, hereafter S.C.C; the general norms on obligations and contracts of the Titles I and II Book IV of the S.C.C; commercial practices and complementary norms; case law; and scholarly opinions.

The liability of the platforms with regards to the accommodation seeker should be established therefore by the contractual obligations incorporated in the brokerage contract and the aforementioned legal sources.

The Working Group considers that it is unclear which kind of contractual relation exists between the person seeking accommodation and the platform when the former does not have to pay any kind of remuneration for using the services¹⁴⁶ offered by the platform, e.g.

¹⁴³ See 4.2.1.

¹⁴⁴ The Working Group used the term agent as described in the DCFR: Principles, Definitions and Model Rules of European Private Law (DCFR) Outline Edition (Chr. v. Bar, E. Clive, H. Schulte-Nölke, eds.) 2009, p. 22.

¹⁴⁵ Gazqu ez Serrano, 2007, p. 175

¹⁴⁶ 'El objetivo del Proveedor es ofrecer un portal en l nea donde los Viajeros puedan obtener informaci n sobre los alquileres de corta duraci n ofrecidos por los Propietarios, y filtrar los resultados de b squeda a trav s de herramientas de b squeda, de una manera r pida y sencilla.'

Homeaway. One may argue that in this case, the rights and obligations of the parties should be ruled, firstly, by the conditions agreed in the contract, and secondly by the general norms of private law.

4.2.3 Relation 3 between the provider and the seeker of an accommodation

The relation between the provider and the seeker of accommodation may be governed by one of three different legal regimes:

- 1) A contract of urban lease (*contrato de arrendamiento urbano*) regulated by the law 29/1994¹⁴⁷ on urban leases (Ley de Arrendamientos Urbanos, hereafter LAU),
- 2) A contract of lease, regulated by Articles 1542-1582 of the Spanish Civil Code (hereafter, S.C.C.),
- 3) A contract of gratuitous loan for use or commodatum (*contrato de comodato*), regulated by Articles 1741-1752 S.C.C.

The LAU, regulates the applicable legal regime to the lease of urban estates destined to housing or other uses different than housing.¹⁴⁸ Article 5 lit. e¹⁴⁹ of the LAU excludes from its scope of application the temporary lease of an entirely furnished and equipped estate for immediate use, that is marketed or promoted with lucrative aim in channels for touristic offer, when subjected to a specific regime, derived from its sectorial regulations. Therefore, for an estate to be outside the scope of regulation of the LAU, besides the existence of a sectorial legislation, three main conditions must be met: a) that the estate is fully furnished and equipped for immediate use; b) That the estate is marketed and promoted in channels of touristic offer; c) with lucrative aim. This law will only govern the relation between the provider and the accommodation seeker, if none of the conditions described in Article 5 lit. e apply.

The autonomous province of Catalonia has a specific sectorial legislation aimed at regulating the activities of tourism (Law 13/2002¹⁵⁰) and establishments for touristic accommodation and

<https://www.homeaway.es/info/quienes-somos/aviso-legal/terminos-condiciones-viajeros> Last accessed <11 of March 2016>.

¹⁴⁷ Ley 29/1994, 24 of November, of urban lease. Official text available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1994-26003>. Last accessed <9 of march 2016>

¹⁴⁸ LAU, Article 1: ‘Artículo 1. Ámbito de aplicación. La presente ley establece el régimen jurídico aplicable a los arrendamientos de fincas urbanas que se destinen a vivienda o a usos distintos del de vivienda.’

¹⁴⁹ LAU, Article 1, lit. e) ‘La cesión temporal de uso de la totalidad de una vivienda amueblada y equipada en condiciones de uso inmediato, comercializada o promocionada en canales de oferta turística y realizada con finalidad lucrativa, cuando esté sometida a un régimen específico, derivado de su normativa sectorial.’

¹⁵⁰ Ley 13/2002, 21 of June, on tourism in Catalonia. Official version available at: <http://www.boe.es/buscar/act.php?id=BOE-A-2002-14081>. Last accessed <9 of March 2016>

estates for touristic use (Decree 159/2012¹⁵¹). Decree 159/2012 lays down the administrative legal regime and requirements for the estates for touristic use. According to Article 66, par. 1 of this Decree, the estates for touristic use are the estates (e.g. apartments or houses) that are 'regularly leased' by the owner, directly or indirectly, to third parties in exchange of **economic remuneration**, for a 'temporary stay', in condition of immediate availability. Article 66 par. 2 further specifies that estates for touristic use can only be leased as a whole, and forbids the lease of rooms. Article 66 par. 3 defines 'temporary stay' as a continuous occupation of the estate for a period of time equal or inferior to 31 days. For the purposes of the Decree 159/2012, a 'regularly lease' means the leasing of the estate two or more times during the same year.¹⁵² Furthermore, Article 67 par. 2¹⁵³ of the Decree 159/12 establishes as a requirement for the estates for touristic use that they must be sufficiently furnished for the immediate use.

The first condition laid down in Article 5 lit. e., i.e. 'that the estate is fully furnished and equipped for immediate use' is met by the definition of 'estates for touristic use' brought by Article 66 of the Decree 159/2012 in coordination with Article 67 par. 2 of the same Decree. The second condition laid down in Article 5 lit. e, is 'that the estate is marketed and promoted in channels of touristic offer'. According to a scholarly opinion,¹⁵⁴ the marketing and promotion through the Internet constitutes a channel of touristic offer. Therefore, the promotion and marketing through shared economy accommodation platforms would meet this second condition. However, some platforms, like Homeaway, state in their terms and conditions (for both accommodation providers and seekers) that they are not to be considered as channels of touristic offer.¹⁵⁵

¹⁵¹ Decreto 159/2012, 20 of November, on establishments for touristic accommodation and estates for touristic use. Available at: http://noticias.juridicas.com/base_datos/CCAA/ca-d159-2012.html. Last accessed <9 of March 2016>.

¹⁵² Article 66 Decree 159/2012: 'Definiciones y ámbito de aplicación 1. Tienen la consideración de viviendas de uso turístico aquellas que son cedidas por su propietario, directamente o indirectamente, a terceros, de forma reiterada y a cambio de contraprestación económica, para una estancia de temporada, en condiciones de inmediata disponibilidad y con las características establecidas en este Decreto. 2. Las viviendas de uso turístico se ceden al completo, y no se permite la cesión por estancias. 3. A efectos de este Decreto se considera estancia de temporada toda ocupación de la vivienda por un periodo de tiempo continuo igual o inferior a 31 días, y se considera cesión reiterada cuando la vivienda se cede dos o más veces dentro del periodo de un año.'

¹⁵³ Article 67 par. 2: 'Las viviendas deben estar suficientemente amuebladas y dotadas de los aparatos y enseres necesarios para su empleo inmediato (...)'

¹⁵⁴ Román Marquez, 2014, p. 11.

¹⁵⁵ See Article 2 par. 3 of the terms and conditions: '(3) El Proveedor no es intermediario turístico, limitándose a ofrecer servicios de promoción de anuncios publicados y gestionados directamente por Propietarios. En consecuencia, el sitio web www.homeaway.es no podrá ser considerado a ningún efecto canal de oferta turística sino que es un mero portal de publicación de anuncios relacionados con el alquiler de corta duración, independientemente del motivo por el que los Viajeros puedan estar interesados en los mismos.'

<https://www.homeaway.es/info/quienes-somos/aviso-legal/terminos-condiciones-viajeros>. Last accessed <10 of March 2016> .

The third condition of Article 5 lit. e, i.e. the lucrative aim, is met by the requirement of **economic remuneration** set by Article 66. Par. 1 of the Decree 159/2012.

From the analysis of the abovementioned sectorial legislation it can be deduced that a contract between the provider and the seeker of accommodation falls outside the scope of application of the LAU if it is concluded via a platform (e.g. Airbnb, Homeaway) under the conditions set by Article 66 and 67 of the Decree 159/2012. In this case, the contract will be governed by the rules set in Article 1542-1582 S.C.C. However, for the estate to be considered as **legal** apartment or house for touristic use, it should meet certain requirements laid down in Article 67¹⁵⁶ and 68¹⁵⁷ of the Decree 159/2012. The following requirements bear particular relevance to integrate the content of the contract of lease, the obligations of the person offering accommodation and the individualization of possible liability rules:

- The estate must have a certificate of occupancy (*cédula de habitabilidad*).¹⁵⁸
- The estate must be sufficiently furnished and ready for its immediate use.¹⁵⁹
- The owner or the manager of the estate must give to the users of the property and neighbors a phone number to solve queries and incidents related to the activity of the tourist estate.¹⁶⁰
- The owner or the manager must guarantee a service of assistance and maintenance of the estate.¹⁶¹
- The owner or the manager must send a previous communication to the city hall indicating the beginning of activities the estate of touristic use.¹⁶²
- The use of an estate for touristic use is not possible if it is forbidden by the regulations on the use of the land or the statutes of community.¹⁶³
- The estates for touristic use must be **inscribed in the Register of Tourism of Catalonia**.

¹⁵⁶ Article 67 Decree 159/2012: ‘Requisitos y servicios de las viviendas de uso turístico 1. las viviendas de uso turístico deben disponer de la cédula de habitabilidad y cumplir en todo momento las condiciones técnicas y de calidad exigibles a las viviendas. Las viviendas no pueden ser ocupadas con más plazas que las indicadas en la cédula. 2. Las viviendas deben estars uficientemente amuebladas y dotadas de los aparatos y enseres necesarios para su empleo inmediato, con el fin de prestar un servicio de alojamiento correcto en relación con la totalidad de plazas de que dispongan, todo en perfecto estado de higiene. 3. La persona propietaria de la vivienda, o la persona gestora en la que delegue, debe facilitar a personas usuarias y vecinos el teléfono para atender y resolver de manera inmediata consultas e incidencias relativas a la actividad de vivienda de uso turístico. 4. La persona propietaria, o la persona gestora en la que delegue, debe garantizar un servicio de asistencia y mantenimiento de la vivienda.’

¹⁵⁷ http://noticias.juridicas.com/base_datos/CCAA/ca-d159-2012.html.

¹⁵⁸ Article 67, par. 1 Decree 159/2012.

¹⁵⁹ Article 67, par. 2 Decree 159/2012.

¹⁶⁰ Article 67, par. 3 Decree 159/2012.

¹⁶¹ Article 67, par. 4 Decree 159/2012.

¹⁶² Article 68, par. 1 Decree 159/2012.

¹⁶³ Article 68, par. 6 Decree 159/2012.

If the contract between the provider and the seeker of accommodation is concluded via a platform (e.g. Airbnb, Homeaway) under different conditions than the ones set in Article 66 and 67, for example if the period of time exceeds the 31 days, then it falls within the scope of the LAU, and the rules set thereby are applicable to this contract.

Furthermore, it might be possible that the person offering accommodation works as a real estate agent. In fact, some platforms (e.g. Homeaway¹⁶⁴) consider as professional real estate agents (*professionals inmobiliarios*) the users that want to offer more than 10 properties under the same profile. In this case, the real estate agents would have to comply with the legislation applicable. In Catalonia, the Decree 12/2010 regulates the requirements to practice as a real estate agent. (Decreto 12/2010, de 2 de febrero, por el que se regulan los requisitos para ejercer la actividad de agente inmobiliario y se crea el Registro de Agentes Inmobiliarios de Cataluña).¹⁶⁵

Finally, if the contract between the provider and the seeker of accommodation is concluded without **economic remuneration**, then such a contract should be regulated by the rules of Articles 1741-1752 S.C.C. regarding the loan for use or commodatum.¹⁶⁶ This might be the case of the contracts concluded via platforms like Couchsurfing where economic remuneration is not asked.

¹⁶⁴ <https://www.homeaway.es/info/quienes-somos/aviso-legal/Terminos-Condicion.es>.

¹⁶⁵ Online version available at: http://noticias.juridicas.com/base_datos/CCAA/ca-d12-2010.html. Last accessed <13 March 2016>.

¹⁶⁶ Martos, 2014, p. 95.

4.2.4 The definition of consumer and professional

The person providing and the person seeking accommodation could be engaged in a B2C or C2C contract.

The law 3/2014¹⁶⁷ transposes into Spanish legislation the Directive 2011/83/EC on Consumer Rights and modifies the previous national legislation on the Defense of the Consumers and Users.¹⁶⁸

Article 3 and 4 of the law 3/2014 respectively define the general concept of consumer and user, and the concept of trader.

According to Article 3 ‘(f)or the purposes of this norm (...) consumers and users are natural persons acting for purposes outside their trade, business, craft or profession. Are also consumers for the purposes of this norm the legal persons and the entities without legal personality acting for purposes outside their trade or business.’¹⁶⁹

According to Article 4 ‘For the purposes of this norm trader means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession.’¹⁷⁰

A particular feature of the Spanish legislation on consumer protection is that, as can be seen in Article 3 of the Law/2014, a legal person can be also be considered a consumer.¹⁷¹

According to the opinion of the Working Group the platforms identity or impression cannot or should not be a compass for defining B2C or C2C. Because it would imply that businesses could ‘hide’ their nature using a typical C2C platform. Or it would impose on platforms an extensive registration procedure which they might not be able to fulfill. Such obligation

¹⁶⁷ Ley 3/2014, 27 of March. Official version available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-3329. Last consulted <9 of March 2016>

¹⁶⁸ Royal Legislative Decree 1/2007, 16 of November, that approves the consolidated text of the general law for the defense of Consumers and users and other complementary laws (*Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*).

¹⁶⁹ The translation is ours, the original reads as following: ‘A efectos de esta norma y sin perjuicio de lo dispuesto expresamente en sus libros tercero y cuarto, son consumidores o usuarios las personas físicas que actúen con un propósito ajeno a su actividad comercial, empresarial, oficio o profesión. Son también consumidores a efectos de esta norma las personas jurídicas y las entidades sin personalidad jurídica que actúen sin ánimo de lucro en un ámbito ajeno a una actividad comercial o empresarial.’

¹⁷⁰ Article 4 is a direct translation of Article 2, par. 2 of the Directive 2011/83/EC. The original text in Spanish reads as follows: ‘A efectos de lo dispuesto en esta norma, se considera empresario a toda persona física o jurídica, ya sea privada o pública, que actúe directamente o a través de otra persona en su nombre o siguiendo sus instrucciones, con un propósito relacionado con su actividad comercial, empresarial, oficio o profesión.’

¹⁷¹ On this issue see: Diaz Alabart (Director), 2014, p. 28.

would be seen probably as a duty to monitor, which is something the member states may not impose on platforms, based on the E-Commerce Directive, albeit some platforms (e.g. Homeaway¹⁷²) consider as professional real estate agents (*professionals inmobiliarios*) the users that want to offer more than 10 properties under the same profile.

4.3 The scope of the definition of ‘Information Society Services (ISS)’ in Spanish law

The definition of an ‘information society service’ in the sense of the E-Commerce Directive (2000/31) is found in the explanatory motives to the law 34/2002 of 11 of July on information society services and e-commerce (hereafter law 34/2002)¹⁷³ that implements the E-Commerce Directive. The law 34/2002 uses a broad concept¹⁷⁴ of ISS. An ISS is a service that represents an economic activity for the provider and includes:

- contracting on goods and services by electronic means;
- supplying information by electronic means (like online magazines and newspapers);
- intermediation activities relating to the supply of access to the network, to the transmission of data via telecommunication networks, to carry out the copying of websites requested by users;
- services or applications provided by others, or providing search engines or links to other websites and;
- Any other service provided by petition of the users, provided it represents an economic activity for the provider.

This services are provided by telecommunication operators, internet access providers, portals, search engines, or any other subject that has at its disposition a website through which it performs any of the aforementioned activities, including e-commerce.

¹⁷² <https://www.homeaway.es/info/quienes-somos/aviso-legal/Terminos-Condicion.es>.

¹⁷³ Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2002-13758>. Last accessed <11 March 2016>.

¹⁷⁴ Law 34/2002: ‘Exposición de motivos. II Se acoge, en la Ley, un concepto amplio de ‘servicios de la sociedad de la información’, que engloba, además de la contratación de bienes y servicios por vía electrónica, el suministro de información por dicho medio (como el que efectúan los periódicos o revistas que pueden encontrarse en la red), las actividades de intermediación relativas a la provisión de acceso a la red, a la transmisión de datos por redes de telecomunicaciones, a la realización de copia temporal de las páginas de Internet solicitadas por los usuarios, al alojamiento en los propios servidores de información, servicios o aplicaciones facilitados por otros o a la provisión de instrumentos de búsqueda o de enlaces a otros sitios de Internet, así como cualquier otro servicio que se preste a petición individual de los usuarios (descarga de archivos de vídeo o audio...), siempre que represente una actividad económica para el prestador. Estos servicios son ofrecidos por los operadores de telecomunicaciones, los proveedores de acceso a Internet, los portales, los motores de búsqueda o cualquier otro sujeto que disponga de un sitio en Internet a través del que realice alguna de las actividades indicadas, incluido el comercio electrónico.’

4.3.1 Qualification of the service between the platform and the person offering an accommodation

A platform is a service provider: any natural or legal person providing an information society service. The person offering accommodation could be seen – in the relation with the platform - as a recipient of the service and possibly as a consumer.

The platforms' service is to be seen as an ISS. It is an economic activity which takes place on-line. In the several websites the Working Group researched, it found different business models, varying from membership fees, percentages of transactions to asking payment from people seeking an accommodation to offering 'special services' which were remunerated. When a platform deals for a person offering an accommodation, yet does not ask for a remuneration from those who will use the accommodation, but gains money from advertisements (commercial communications) it will be an economic activity as well. Even if the platform only provides a search tool or allows for a communication network, it will be seen as an 'Information Society Service'.

4.3.2 Qualification of the service between the platform and the person seeking an accommodation

There is a relation between the platform and the person seeking an accommodation as well. The platform is a service provider: any natural or legal person providing an information society service.

The person seeking an accommodation is a recipient of the service: any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible. He will usually also be a consumer: any natural person who is acting for purposes which are outside his or her trade, business or profession.

In the light of European law, the considerations in the E-Commerce Directive the platforms' service is to be seen as an ISS. It is an online activity. On websites such as Airbnb or Homeaway, and Home Exchange the remuneration is obvious. Other websites, such as for example Couchsurfing, do not ask for a remuneration, however are engaged in an economic activity because only a part of their service is offered 'for free'. There is a part of the services that is offered for remuneration. The limited service offered can be extended for example with a paid ID-check or address check, which costs money and will 'increase' the likeliness of finding other participants to 'share' with.

4.3.3 Qualification of the service between the accommodation provider and the seeker of an accommodation

In the relation between the provider of an accommodation and the seeker of an accommodation it becomes harder to define the 'service'. Is the accommodation provider offering an ISS? If so, this accommodation provider (lessor) has to the information required by the 34/2002.

As written down in the general part, the fact that there is no remuneration concerned in cases of for example Couchsurfing could imply that there is not economic activity taking place. As soon as any remuneration is asked, whether in money or in returning the same service (such as a HomeSwap) the accommodation will be offering an ISS to the accommodation seeker.

Article 93 lit. e of the Royal Legislative Decree 1/2007, as modified by the Law 3/2014 excludes from the scope of application of the consumer protection rules on distance contracts 'the contracts for the creation, acquisition or transfer of immovable property, or of rights in immovable property.'¹⁷⁵

The contractual relation between the offeror and the seeker of accommodation may fall under one of three different legal regimes (See subsection 1.2.3). However, independently of the regulation applicable, the contract between the parties will always have as its main object a right on an immovable property. Furthermore, the contracts between the persons offering and seeking accommodation are also a distance contracts if concluded via an online platform. Therefore, the contractual relation between these parties is excluded from the consumer protection regulation.

4.4 The exemptions from platforms' liability in the light of the considerations in Directive 2000/31/EU

Platforms are obliged to act against illegal content harming others. Not always are they actively involved in the publication of this illegal content. Therefore a number of exemptions from liability - taken from the articles 12-15 E-Commerce Directive - are implemented.

In this paragraph we will show where the exemptions of articles 12-14 Directive 2000/31/EC are implemented in Spanish law.

The issue whether information is to be considered illegal is a question to be answered according to national law.

¹⁷⁵ Article 93, lit. 2. 'A los contratos de creación, adquisición o transferencia de bienes inmuebles o de derechos sobre los mismos'. Official version available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2007-20555>. Last accessed <12 March 2016>.

4.4.1 Article 12 E-Commerce directive 2000/31/EC

Article 12 E-Commerce is implemented in Article 14 of the law 34/2002:

‘Artículo 14. Responsabilidad de los operadores de redes y proveedores de acceso. 1. Los operadores de redes de telecomunicaciones y proveedores de acceso a una red de telecomunicaciones que presten un servicio de intermediación que consista en transmitir por una red de telecomunicaciones datos facilitados por el destinatario del servicio o en facilitar acceso a ésta no serán responsables por la información transmitida, salvo que ellos mismos hayan originado la transmisión, modificado los datos o seleccionado éstos o a los destinatarios de dichos datos. No se entenderá por modificación la manipulación estrictamente técnica de los archivos que alberguen los datos, que tiene lugar durante su transmisión. 2. Las actividades de transmisión y provisión de acceso a que se refiere el apartado anterior incluyen el almacenamiento automático, provisional y transitorio de los datos, siempre que sirva exclusivamente para permitir su transmisión por la red de telecomunicaciones y su duración no supere el tiempo razonablemente necesario para ello.’

The Working Group excludes the possibility of platform providers of being mere access providers. We start from the assumption that platform providers always will store data of the accommodation providers and accommodation seekers somehow, which brings art. 12-13 out of sight. This is in line with what the CJEU has decided on this matter in e.g. the case SABAM/Netlog. Netlog as a platform provider for social media is in this respect comparable to platform providers for an accommodation:

27 In that regard, first, it is not in dispute that the owner of an online social networking platform - such as Netlog - stores information provided by the users of that platform, relating to their profile, on its servers, and that it is thus a hosting service provider within the meaning of Article 14 of Directive 2000/31.

So, if Platform Providers can make use of an exemption on liability at all, it is that of art. 14 Directive 2000/31/EC. Furthermore, the platform provider has to be just a passive intermediary as it comes to the (illegal) information which is stored on its site. In the case of Google France/Louis Vuitton the CJEU has given the key criterion (bold) when a service provider is deemed an ‘intermediary service provider,’ referring to recital 42 in the preamble to Directive 2000/31/EC.

4.4.2 Article 13 E-Commerce directive 2000/31/EC

Article 13 is implemented in Article 15 of the law 34/2002.

‘Artículo 15. Responsabilidad de los prestadores de servicios que realizan copia temporal de los datos solicitados por los usuarios. Los prestadores de un servicio de intermediación que transmitan por una red de telecomunicaciones datos facilitados por un destinatario del servicio y, con la única finalidad de hacer más eficaz su transmisión ulterior a otros

destinatarios que los soliciten, los almacenen en sus sistemas de forma automática, provisional y temporal, no serán responsables por el contenido de esos datos ni por la reproducción temporal de los mismos, a) No modifican la información. b) Permiten el acceso a ella sólo a los destinatario que cumplan las condiciones impuestas a tal fin, por el destinatario cuya información se solicita. c) Respetan las normas generalmente aceptadas y aplicadas por el sector para la actualización de la información. d) No interfieren en la utilización lícita de tecnología generalmente aceptada y empleada por el sector, con el fin de obtener datos sobre la utilización de la información, y e) Retiran la información que hayan almacenado o hacen imposible el acceso a ella, en cuanto tengan conocimiento efectivo de: 1.o Que ha sido retirada del lugar de la red en que se encontraba inicialmente. 2.o Que se ha imposibilitado el acceso a ella, o 3.o Que un tribunal u órgano administrativo competente ha ordenado retirarla o impedir que se acceda a ella.’

The Working Group excludes the possibility of platform providers of being mere access providers. We start from the assumption that platform providers always will store data of the accommodation providers and accommodation seekers somehow, which brings art. 12-13 out of sight, as explained under 1.4.1.

4.4.3 Article 14 E-Commerce directive 2000/31/EC

Article 14 is implemented in Article 16 of the law 34/2002:

‘Artículo 16. Responsabilidad de los prestadores de servicios de alojamiento o almacenamiento de datos. 1. Los prestadores de un servicio de intermediación consistente en albergar datos proporcionados por el destinatario de este servicio no serán responsables por la información almacenada a petición del destinatario, siempre que: a) No tengan conocimiento efectivo de que la actividad o la información almacenada es ilícita o de que lesiona bienes o derechos de un tercero susceptibles de indemnización, o b) Si lo tienen, actúen con diligencia para retirar los datos o hacer imposible el acceso a ellos. Se entenderá que el prestador de servicios tiene el conocimiento efectivo a que se refiere el párrafo a) cuando un órgano competente haya declarado la ilicitud de los datos, ordenado su retirada o que se imposibilite el acceso a los mismos, o se hubiera declarado la existencia de la lesión, y el prestador conociera la correspondiente resolución, sin perjuicio de los procedimientos de detección y retirada de contenidos que los prestadores apliquen en virtud de acuerdos voluntarios y de otros medios de conocimiento efectivo que pudieran establecerse. 2. La exención de responsabilidad establecida en el apartado 1 no operará en el supuesto de que el destinatario del servicio actúe bajo la dirección, autoridad o control de su prestador.’

For the limited liability a platform should not be involved in changing the information it provides. Interesting in this perspective is the fact that platforms such as Airbnb are quite actively involved in designing the information that accommodation providers give to attract lessees. According to the directive, the platform cooperating with a service provider in the offering of illegal services goes beyond ‘mere conduit’ or ‘caching’. Furthermore, as can be

seen in their websites¹⁷⁶, some platforms such as Airbnb are aware of the existing regulation on the requirements for the lease of estate for touristic use, e.g. the inscription of the property in the Register of Tourism of Catalonia (one of the requirements set down by Article 68 of the Decree 12/2012).¹⁷⁷

The government of Catalonia fined several platforms for advertising apartments and houses without the number of the inscription in the Register of Tourism of Catalonia after being required to remove the announcement of several illegal apartments. 3.929 apartments in the Airbnb platform and 1.891 in the Homeaway platform.¹⁷⁸

Furthermore, after the platforms obtain knowledge of the illegality of the information, they should act expeditiously to remove or to disable access to information. If they do not so, as occurred in Barcelona, they cannot be covered by the liability exception of Article 16 of the law 34/2002 (Article 14 E-commerce directive).

4.5 Liability for infringement of E-Commerce requirements

This section identifies where the requirements based on the E-Commerce directive articles 5 to 11 are implemented.

Is the platforms or the provider (or both) liable in case these requirements are not met?
Do platforms assume responsibility for the services they provide in their terms of use?

4.5.1 Article 5 E-Commerce directive 2000/31/EC

An ISS provider should have certain information easily, permanently and directly accessible to viewers of his website to fulfill the obligation under article 5 ECD. This Article is implemented in Article 10 of the law 34/2002:

‘Article 10. 1. Sin perjuicio de los requisitos que en materia de información se establecen en la normativa vigente, el prestador de servicios de la sociedad de la información estará obligado a disponer de los medios que permitan, tanto a los destinatarios del servicio como a los órganos competentes, acceder por medios electrónicos, de forma permanente, fácil, directa y gratuita, a la siguiente información: a) Su nombre o denominación social; su residencia o domicilio o, en su defecto, la dirección de uno de sus establecimientos permanentes en España; su dirección de correo electrónico y cualquier otro dato que permita establecer con él una comunicación directa y efectiva. b) Los datos de su inscripción en el Registro Mercantil en el que, en su caso, se encuentren inscritos o de aquel otro registro público en el que lo estuvieran para la adquisición de personalidad jurídica o a los solos

¹⁷⁶ <https://es.airbnb.com/help/article/862/catalu-a-barcelona>.

¹⁷⁷ <http://www.theguardian.com/technology/2014/jul/07/airbnb-fined-illegal-tourist-lets-barcelona-catalonia>.

¹⁷⁸ http://ccaa.elpais.com/ccaa/2015/12/21/catalunya/1450694300_272687.html.

efectos de publicidad. c) En el caso de que su actividad estuviese sujeta a un régimen de autorización administrativa previa, los datos relativos a dicha autorización y los identificativos del órgano competente encargado de su supervisión. d) Si ejerce una profesión regulada deberá indicar: 1.º Los datos del Colegio profesional al que, en su caso, pertenezca y número de colegiado. 2.º El título académico oficial o profesional con el que cuente. 3.º El Estado de la Unión Europea o del Espacio Económico Europeo en el que se expidió dicho título y, en su caso, la correspondiente homologación o reconocimiento. 4.º Las normas profesionales aplicables al ejercicio de su profesión y los medios a través de los cuales se puedan conocer, incluidos los electrónicos. e) El número de identificación fiscal que le corresponda. f) Cuando el servicio de la sociedad de la información haga referencia a precios, se facilitará información clara y exacta sobre el precio del producto o servicio, indicando si incluye o no los impuestos aplicables y, en su caso, sobre los gastos de envío. g) Los códigos de conducta a los que, en su caso, esté adherido y la manera de consultarlos electrónicamente. 2. La obligación de facilitar esta información se dará por cumplida si el prestador la incluye en su página o sitio de Internet en las condiciones señaladas en el apartado 1. 3. Cuando se haya atribuido un rango de numeración telefónica a servicios de tarificación adicional en el que se permita el acceso a servicios de la sociedad de la información y se requiera su utilización por parte del prestador de servicios, esta utilización y la descarga de programas informáticos que efectúen funciones de marcación, deberán realizarse con el consentimiento previo, informado y expreso del usuario.

A tal efecto, el prestador del servicio deberá proporcionar al menos la siguiente información: a) Las características del servicio que se va a proporcionar. b) Las funciones que efectuarán los programas informáticos que se descarguen, incluyendo el número telefónico que se marcará. c) El procedimiento para dar fin a la conexión de tarificación adicional, incluyendo una explicación del momento concreto en que se producirá dicho fin, y d) El procedimiento necesario para restablecer el número de conexión previo a la conexión de tarificación adicional. La información anterior deberá estar disponible de manera claramente visible e identificable. Lo dispuesto en este apartado se entiende sin perjuicio de lo establecido en la normativa de telecomunicaciones, en especial, en relación con los requisitos aplicables para el acceso por parte de los usuarios a los rangos de numeración telefónica, en su caso, atribuidos a los servicios de tarificación adicional.'

Under Spanish law several consequences can be derived from not fulfilling this requirement.

Firstly, the law 34/2002 provides for an injunction mechanism or action for cessation (*Acción de cesación*). This action is regulated in Article 30 and 31 of the law 34/2002. According to Article 30, '(t)he action of cessation proceeds against the conducts that are contrary to this law and that injure collective or diffuse consumer interests. This action is aimed at obtaining a decision that sentences de defendant to cease any conduct contrary to this law and to prohibit any future reiteration. The action can be also exercised to prohibit the performance of a conduct that has already ended at the moment the action of cessation has been exercised,

if it exists evidence of an imminent repetition of the same conduct.’¹⁷⁹ Article 31¹⁸⁰ lists the persons entitled to exercise the action of cessation, e.g.: the natural or legal persons that hold a right or a legitimate interest; the groups of consumers and **affected users**; and consumer protection associations among others.

The Working Group considers that the persons offering and seeking for accommodation in platforms like Airbnb are entitled to exercise the action of cessation, under the condition that they also bear the condition of consumers.

Secondly, Article 38¹⁸¹ of the law 34/2002 categorizes the infractions to the rules of this law in very serious, serious, and minor infractions. Article 39¹⁸² determines the value of the fines

¹⁷⁹ The translation is ours, the original reads as following: ‘**Artículo 30. Acción de cesación.** 1. *Contra las conductas contrarias a la presente Ley que lesionen intereses colectivos o difusos de los consumidores podrá interponerse acción de cesación.* 2. *La acción de cesación se dirige a obtener una sentencia que condene al demandado a cesar en la conducta contraria a la presente Ley y a prohibir su reiteración futura. Asimismo, la acción podrá ejercerse para prohibir la realización de una conducta cuando ésta haya finalizado al tiempo de ejercitar la acción, si existen indicios suficientes que hagan temer su reiteración de modo inminente.*’

¹⁸⁰ The translation is ours, the original reads as following: ‘**Artículo 31. Legitimación activa.** *Están legitimados para interponer la acción de cesación:* a) *Las personas físicas o jurídicas titulares de un derecho o interés legítimo.* b) *Los grupos de consumidores o usuarios afectados, en los casos y condiciones previstos en la Ley de Enjuiciamiento Civil.* c) *Las asociaciones de consumidores y usuarios que reúnan los requisitos establecidos en la Ley 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios, o, en su caso, en la legislación autonómica en materia de defensa de los consumidores.* d) *El Ministerio Fiscal.* e) *El Instituto Nacional del Consumo y los órganos correspondientes de las Comunidades Autónomas y de las Corporaciones Locales competentes en materia de defensa de los consumidores.* f) *Las entidades de otros Estados miembros de la Unión Europea constituidas para la protección de los intereses colectivos o difusos de los consumidores que estén habilitadas ante la Comisión Europea mediante su inclusión en la lista publicada a tal fin en el ‘Diario Oficial de las Comunidades Europeas’.*

Los Jueces y Tribunales aceptarán dicha lista como prueba de la capacidad de la entidad habilitada para ser parte, sin perjuicio de examinar si la finalidad de la misma y los intereses afectados legitiman el ejercicio de la acción.’

¹⁸¹ ‘**Artículo 38. Infracciones.** 1. *Las infracciones de los preceptos de esta Ley se calificarán como muy graves, graves y leves.* 2. *Son infracciones muy graves:* a) *El incumplimiento de las órdenes dictadas en virtud del artículo 8 en aquellos supuestos en que hayan sido dictadas por un órgano administrativo.* b) *El incumplimiento de la obligación de suspender la transmisión, el alojamiento de datos, el acceso a la red o la prestación de cualquier otro servicio equivalente de intermediación, cuando un órgano administrativo competente lo ordene, en virtud de lo dispuesto en el artículo 11.* c) *El incumplimiento de la obligación de retener los datos de tráfico generados por las comunicaciones establecidas durante la prestación de un servicio de la sociedad de la información, prevista en el artículo 12.* d) *La utilización de los datos retenidos, en cumplimiento del artículo 12, para fines distintos de los señalados en él.* 3. *Son infracciones graves:* a) *El incumplimiento de lo establecido en los párrafos a) y f) del artículo 10.1.* b) *El envío masivo de comunicaciones comerciales por correo electrónico u otro medio de comunicación electrónica equivalente a destinatarios que no hayan autorizado o solicitado expresamente su remisión, o el envío, en el plazo de un año, de más de tres*

for the infractions. For the very serious infractions the fines could range between 150.001 and 600.000 euros. For the serious infractions the fines could range between 30.000 and 150.000 euros. For the minor infraction, the fine could be up until 30.000 euros.

The infraction to Article 10 of the law 34/2002 (5 ECD) could be either serious, if they refer to lit. a) and f) of Article 10, or minor, if they relate to lit. b), c), d), e), and g) of Article 10.

comunicaciones comerciales por los medios aludidos a un mismo destinatario, cuando éste no hubiera solicitado o autorizado su remisión. c) No poner a disposición del destinatario del servicio las condiciones generales a que, en su caso, se sujete el contrato, en la forma prevista en el artículo 27. d) El incumplimiento habitual de la obligación de confirmar la recepción de una aceptación, cuando no se haya pactado su exclusión o el contrato se haya celebrado con un consumidor. e) La resistencia, excusa o negativa a la actuación inspectora de los órganos facultados para llevarla a cabo con arreglo a esta Ley. 4. Son infracciones leves: a) La falta de comunicación al registro público en que estén inscritos, de acuerdo con lo establecido en el artículo 9, del nombre o nombres de dominio o direcciones de Internet que empleen para la prestación de servicios de la sociedad de la información. b) No informar en la forma prescrita por el artículo 10.1 sobre los aspectos señalados en los párrafos b), c), d), e) y g) del mismo. c) El incumplimiento de lo previsto en el artículo 20 para las comunicaciones comerciales, ofertas promocionales y concursos. d) El envío de comunicaciones comerciales por correo electrónico u otro medio de comunicación electrónica equivalente a los destinatarios que no hayan solicitado o autorizado expresamente su remisión, cuando no constituya infracción grave e) No facilitar la información a que se refiere el artículo 27.1, cuando las partes no hayan pactado su exclusión o el destinatario sea un consumidor. f) El incumplimiento de la obligación de confirmar la recepción de una petición en los términos establecidos en el artículo 28, cuando no se haya pactado su exclusión o el contrato se haya celebrado con un consumidor, salvo que constituya infracción grave.'

¹⁸² *'Artículo 39. Sanciones. 1. Por la comisión de las infracciones recogidas en el artículo anterior, se impondrán las siguientes sanciones: a) Por la comisión de infracciones muy graves, multa de 150.001 hasta 600.000 euros. La reiteración en el plazo de tres años de dos o más infracciones muy graves, sancionadas con carácter firme, podrá dar lugar, en función de sus circunstancias, a la sanción de prohibición de actuación en España, durante un plazo máximo de dos años. b) Por la comisión de infracciones graves, multa de 30.001 hasta 150.000 euros. c) Por la comisión de infracciones leves, multa de hasta 30.000 euros. 2. Las infracciones graves y muy graves podrán llevar aparejada la publicación, a costa del sancionado, de la resolución sancionadora en el 'Boletín Oficial del Estado', o en el diario oficial de la Administración pública que, en su caso, hubiera impuesto la sanción; en dos periódicos cuyo ámbito de difusión coincida con el de actuación de la citada Administración pública o en la página de inicio del sitio de Internet del prestador, una vez que aquella tenga carácter firme. Para la imposición de esta sanción, se considerará la repercusión social de la infracción cometida, el número de usuarios o de contratos afectados, y la gravedad del ilícito. 3. Cuando las infracciones sancionables con arreglo a lo previsto en esta Ley hubieran sido cometidas por prestadores de servicios establecidos en Estados que no sean miembros de la Unión Europea o del Espacio Económico Europeo, el órgano que hubiera impuesto la correspondiente sanción podrá ordenar a los prestadores de servicios de intermediación que tomen las medidas necesarias para impedir el acceso desde España a los servicios ofrecidos por aquéllos por un período máximo de dos años en el caso de infracciones muy graves, un año en el de infracciones graves y seis meses en el de infracciones leves.'*

Platforms could therefore be fined in the aforementioned amounts if they infringe Article 10 of the law 34/2002.

4.5.2 Article 6 -7 E-Commerce directive 2000/31/EC

Articles 6 and 7 of the E-commerce directive deal with advertising. These Articles are implemented in Article 20 and 21 of the law 34/2002:

‘Artículo 20. Información exigida sobre las comunicaciones comerciales, ofertas promocionales y concursos.

1. Las comunicaciones comerciales realizadas por vía electrónica deberán ser claramente identificables como tales y deberán indicar la persona física o jurídica en nombre de la cual se realizan. En el caso en el que tengan lugar a través de correo electrónico u otro medio de comunicación electrónica equivalente incluirán al comienzo del mensaje la palabra «publicidad». 2. En los supuestos de ofertas promocionales, como las que incluyan descuentos, premios y regalos, y de concursos o juegos promocionales, previa la correspondiente autorización, se deberá asegurar, además del cumplimiento de los requisitos establecidos en el apartado anterior y en las normas de ordenación del comercio, que queden claramente identificados como tales y que las condiciones de acceso y, en su caso, de participación se expresen de forma clara e inequívoca.’

‘Artículo 21. Prohibición de comunicaciones comerciales no solicitadas realizadas a través de correo electrónico o medios de comunicación electrónica equivalentes.

Queda prohibido el envío de comunicaciones publicitarias o promocionales por correo electrónico u otro medio de comunicación electrónica equivalente que previamente no hubieran sido solicitadas o expresamente autorizadas por los destinatarios de las mismas.’

Furthermore, Article 19¹⁸³ par. 2 of the law 34/2002 (non existent in the E-commerce directive) states that the law 15/1999 on the Protection of Personal Data (Ley Orgánica 1571999, de 13 de diciembre, de Protección de Datos de Carácter Personal) is applicable to the procurement of personal data, to the information be provided and to the creation of personal data files.

The infraction to Article 20 and 21 of the law 34/2002 (6 and 7 ECD) could be either serious or minor. According to Article 38 par. 3 lit b. of the law 34/2002 it will be a serious infraction

¹⁸³ ‘Artículo 19. Régimen jurídico. 1. Las comunicaciones comerciales y las ofertas promocionales se registrarán, además de por la presente Ley, por su normativa propia y la vigente en materia comercial y de publicidad.

2. En todo caso, será de aplicación la Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal, y su normativa de desarrollo, en especial, en lo que se refiere a la obtención de datos personales, la información a los interesados y la creación y mantenimiento de ficheros de datos personales.’

if it consists in the massive unsolicited commercial communications via electronic mail or another communication means. According to Article 38 par. 4. Lit c. of the law 34/2002 it will be minor if it refers to promotional competitions or games.

Platforms could therefore be fined in the aforementioned amounts stated in 5.5.1 if they infringe Article 20 and 21 of the law 34/2002.

The Working Group considers that the persons offering and seeking for accommodation in platforms like Airbnb are entitled to exercise the action of cessation, under the condition described in 5.5.1.

4.5.3 Article 8 E-Commerce directive 2000/31/EC

Article 8 is not applicable in the accommodation sphere in Spanish law.

4.5.4 Article 9 E-Commerce directive 2000/31/EC

Article 9 section 1 E-Commerce Directive asks the Member States to enable contracting parties to contract electronically. It lead to the provision of article 23 of the law 34/2002: *‘Validez y eficacia de los contratos celebrados por vía electrónica 1. Los contratos celebrados por vía electrónica producirán todos los efectos previstos por el ordenamiento jurídico, cuando concurran el consentimiento y los demás requisitos necesarios para su validez. Los contratos electrónicos se regirán por lo dispuesto en este Título, por los Códigos Civil y de Comercio y por las restantes normas civiles o mercantiles sobre contratos, en especial, las normas de protección de los consumidores y usuarios y de ordenación de la actividad comercial. 2. Para que sea válida la celebración de contratos por vía electrónica no será necesario el previo acuerdo de las partes sobre la utilización de medios electrónicos. 3. Siempre que la Ley exija que el contrato o cualquier información relacionada con el mismo conste por escrito, este requisito se entenderá satisfecho si el contrato o la información se contiene en un soporte electrónico. 4. No será de aplicación lo dispuesto en el presente Título a los contratos relativos al Derecho de familia y sucesiones. Los contratos, negocios o actos jurídicos en los que la Ley determine para su validez o para la producción de determinados efectos la forma documental pública, o que requieran por Ley la intervención de órganos jurisdiccionales, notarios, registradores de la propiedad y mercantiles o autoridades públicas, se regirán por su legislación específica.’*

4.5.6 Article 10 E-Commerce directive 2000/31/EC

Article 10 was implemented in Article 27 of the law 34/2002: *‘Artículo 27. Obligaciones previas al inicio del procedimiento de contratación 1. Además del cumplimiento de los requisitos en materia de información que se establecen en la normativa vigente, el prestador de servicios de la sociedad de la información que realice actividades de contratación*

electrónica tendrá la obligación de poner a disposición del destinatario, antes de iniciar el procedimiento de contratación y mediante técnicas adecuadas al medio de comunicación utilizado, de forma permanente, fácil y gratuita, información clara, comprensible e inequívoca sobre los siguientes extremos: a) Los distintos trámites que deben seguirse para celebrar el contrato. b) Si el prestador va a archivar el documento electrónico en que se formalice el contrato y si éste va a ser accesible. c) Los medios técnicos que pone a su disposición para identificar y corregir errores en la introducción de los datos, y d) La lengua o lenguas en que podrá formalizarse el contrato. La obligación de poner a disposición del destinatario la información referida en el párrafo anterior se dará por cumplida si el prestador la incluye en su página o sitio de Internet en las condiciones señaladas en dicho párrafo. Cuando el prestador diseñe específicamente sus servicios de contratación electrónica para ser accedidos mediante dispositivos que cuenten con pantallas de formato reducido, se entenderá cumplida la obligación establecida en este apartado cuando facilite de manera permanente, fácil, directa y exacta la dirección de Internet en que dicha información es puesta a disposición del destinatario.’

4.5.7 Article 11 E-Commerce directive 2000/31/EC

Article 11 E-Commerce Directive lead to the implementation of article 28 of the law 34/2002: ‘*Artículo 28. Información posterior a la celebración del contrato. 1. El oferente está obligado a confirmar la recepción de la aceptación al que la hizo por alguno de los siguientes medios: a) El envío de un acuse de recibo por correo electrónico u otro medio de comunicación electrónica equivalente a la dirección que el aceptante haya señalado, en el plazo de las veinticuatro horas siguientes a la recepción de la aceptación, o b) La confirmación, por un medio equivalente al utilizado en el procedimiento de contratación, de la aceptación recibida, tan pronto como el aceptante haya completado dicho procedimiento, siempre que la confirmación pueda ser archivada por su destinatario. En los casos en que la obligación de confirmación corresponda a un destinatario de servicios, el prestador facilitará el cumplimiento de dicha obligación, poniendo a disposición del destinatario alguno de los medios indicados en este apartado. Esta obligación será exigible tanto si la confirmación debiera dirigirse al propio prestador o a otro destinatario. 2. Se entenderá que se ha recibido la aceptación y su confirmación cuando las partes a que se dirijan puedan tener constancia de ello. En el caso de que la recepción de la aceptación se confirme mediante acuse de recibo, se presumirá que su destinatario puede tener la referida constancia desde que aquél haya sido almacenado en el servidor en que esté dada de alta su cuenta de correo electrónico, o en el dispositivo utilizado para la recepción de comunicaciones. 3. No será necesario confirmar la recepción de la aceptación de una oferta cuando: a) Ambos contratantes así lo acuerden y ninguno de ellos tenga la consideración de consumidor, o b) El contrato se haya celebrado exclusivamente mediante intercambio de correo electrónico u otro tipo de comunicación electrónica equivalente, cuando estos medios no sean empleados con el exclusivo propósito de eludir el cumplimiento de tal obligación.’*

According to this Article, the offeror is obliged to confirm the reception of the acceptance. The offeror can do so by sending an acknowledgement of the reception of the acceptance by

e-mail or another equivalent communication means, or by the confirmation via an equivalent procedure to the one used for concluding the contract, when the person accepting the offer has completed such procedure and the recipient can store the confirmation.

It is not necessary to confirm the reception when both parties have agreed so and none of the parties is a consumer, or when the contract has been concluded exclusively via exchange of electronic mail.

4.6 The Unfair Commercial Practices Directive (2005/29/EC)

The question posed in the tender was the following: Should accommodation providers be authorised, licenced or registered and if so, does this relate to the Unfair Commercial Practices Directive? Is the platforms or the provider liable in case this obligation is not met?

The Working Group sees this question could mean several things. On the one hand there might be a registration that accommodation providers have to meet to lease a holiday home or room to tourists. This kind of obligation is a sectorial requirement covered under 1.9, according to and specified by local legislation. Not meeting these requirements could be an unfair commercial practice vis-a-vis other (professional, licensed) accommodation providers and might fall within the scope of unfair competition.

Another implication for consumers in the applicability of the Unfair Commercial practice (Directive 2005/29/EC on Unfair Commercial Practices of 11 May 2005) is that Internet technology may not be used to retrieve and analyse information on consumers by firms. This information collection may affect the relationship between firms and their customers, their marketing strategies and how certain offers are displayed to certain customers. This is a data privacy issue and it might lead to distributional issues, as some consumers win and others lose out: 'as firms have access to more information about their customers, price discrimination and product customization are likely to increase. Some consumers will benefit, others will not.'

The Working Group found that many websites have a code of conduct in which they impede their members or users to use any technology which could retrieve data from the platforms or the other users or accommodations.

4.7 The Services Directive (2006/123/EC)

The task was to identify the requirements based on Services Directive Articles 22-24 and how the rules are applied by platforms in practice.

4.7.1 Article 22 Services Directive

Article 22 of the Services Directive was transposed into Spanish Law by Article 22 of the law 17/2009 (*ley 17/2009, de 23 de noviembre, sobre el libre acceso a las actividades de servicios y su ejercicio*).¹⁸⁴

Article 22 reads as follows:

‘Artículo 22. Obligaciones de información de los prestadores. 1. Sin perjuicio de las obligaciones de información establecidas en la legislación de protección de los consumidores y usuarios que resulte de aplicación, los prestadores de servicios, con la debida antelación, pondrán a disposición de los destinatarios toda la información exigida en el presente artículo de forma clara e inequívoca, antes de la celebración del contrato, o en su caso, antes de la prestación del servicio. 2. Los prestadores proporcionarán al destinatario, de forma fácilmente accesible, la información siguiente: a) Los datos de identidad, forma y régimen jurídico, número de identificación fiscal del prestador, dirección donde tiene su establecimiento, y los datos que permitan ponerse rápidamente en contacto con él y en su caso, por vía electrónica. b) Datos registrales del prestador del servicio. c) Los datos de la autoridad que, en su caso, haya otorgado la autorización. d) En las profesiones reguladas, la cualificación profesional y el Estado miembro en el que fue otorgada, así como, en su caso, el colegio profesional, la asociación profesional u organismo análogo en el que esté inscrito el prestador. e) Las condiciones y cláusulas generales, y las relativas a la legislación y jurisdicción aplicable al contrato. f) Garantías posventa adicionales a las exigidas por ley, en su caso. g) El precio completo del servicio, incluidos los impuestos, cuando el prestador fije previamente un precio para un determinado tipo de servicio. h) Las principales características del servicio o servicios que ofrezca. i) En su caso, el seguro o garantías exigidas, y en particular, los datos del asegurador y de la cobertura geográfica del seguro. j) En caso de que el prestador ejerza una actividad sujeta al IVA, el número de identificación fiscal. k) Lengua o lenguas en las que podrá formalizarse el contrato, cuando ésta no sea la lengua en la que se le ha ofrecido la información previa a la contratación. l) Existencia del derecho de desistimiento del contrato que pueda corresponder al consumidor, el plazo y la forma de ejercitarlo. 3. A petición del destinatario, los prestadores pondrán a disposición de aquél la siguiente información complementaria: a) Cuando el precio no lo fije previamente el prestador, el precio del servicio o, si no se puede indicar aquél, el método para calcularlo; o un presupuesto suficientemente detallado. b) Fecha de entrega, ejecución del contrato y duración. c) En el caso de las profesiones reguladas: referencia a las normas de acceso a la

¹⁸⁴ Official version available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2009-18731>. Last accessed <13 march 2016>.

profesión en el Estado miembro de establecimiento y los medios para acceder a dichas normas. d) La información relativa a sus actividades multidisciplinares, posibles conflictos de interés y las medidas adoptadas para evitarlos. Esta información deberá figurar en todo documento informativo de los prestadores en el que se presenten de forma detallada sus servicios. e) Los posibles códigos de conducta a que, en su caso, esté sometido el prestador, así como la dirección en que dichos códigos se pueden consultar por vía electrónica y en qué idiomas están disponibles. f) Información detallada sobre las características y condiciones para hacer uso de los medios extrajudiciales de resolución de conflictos cuando estén sujetos a un código de conducta o sean miembros de alguna organización profesional en los que se prevean estos mecanismos. 4. Toda la información a que se refieren los apartados anteriores se pondrá a disposición del destinatario por el prestador, en alguna de las formas siguientes: a) En el lugar de prestación del servicio o de celebración del contrato. b) Por vía electrónica a través de una dirección facilitada por el prestador. c) Figurando dicha información en todo documento informativo del prestador que se facilite al destinatario y en el que se presenten de forma detallada sus servicios. d) Por vía electrónica a través de una página web.'

The aforementioned Article lists the information that the provider should make available to the recipient. The list does not exclude further information required by the general applicable legislation on consumer and users rights (Law 3/2014¹⁸⁵) and the sectorial legislation aimed at regulating the protection of consumer with regards to the information to be provided for the sale or lease of estates.

Under Spanish law, the Royal Decree 515/1989¹⁸⁶ (Real Decreto 515/1989, de 21 de abril, sobre protección de los consumidores en cuanto a la información a suministrar en la compraventa y arrendamiento de viviendas) regulates the protection of consumers with regards to the information to be provided for the sale or lease of estates. This Decree only applies to contracts that fall under the scope of application of the LAU.

Article 4¹⁸⁷ of the Royal Decree 515/1989 lists the information that should be provided when engaging into one of the activities under the scope of application of the Decree, e.g. the lease of a house or apartment.

¹⁸⁵ Ley 3/2014, 27 of March. Official version available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-3329. Last consulted <13 of March 2016>

¹⁸⁶ Official version available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-1989-11181. Last consulted <13 of March 2016>

¹⁸⁷ 'Artículo 4.º *Quienes realicen las actividades sujetas a este Real Decreto deberán tener a disposición del público, y en su caso, de las autoridades competentes, la información siguiente: 1. El nombre o razón social, domicilio y, en su caso, los datos de la inscripción en el Registro Mercantil, del vendedor o arrendador. 2. Plano general del emplazamiento de la vivienda y plano de la vivienda misma, así como descripción y trazado de las redes eléctrica, de agua, gas y calefacción y garantías de las mismas, y de las medidas de seguridad contra incendios con que cuente el inmueble. 3. Descripción de la vivienda con expresión de su superficie útil, y descripción general del edificio en el que se encuentra, de las zonas comunes y de los servicios accesorios. 4. Referencia a los materiales empleados en la construcción de la vivienda, incluidos los aislamientos térmicos y acústicos, y del edificio y zonas comunes y servicios accesorios. 5. Instrucciones sobre el uso y conservación de las*

4.7.2 Article 23 Services Directive

According to Article 23 of the Directive ‘Member States may ensure that providers whose services present a direct and particular risk to the health or safety of the recipient or a third person, or to **the financial security of the recipient**, subscribe to professional liability insurance appropriate to the nature and extent of the risk, or provide a guarantee or similar arrangement which is equivalent or essentially comparable as regards its purpose.’ (...) ‘5. For the purpose of this Article ‘direct and particular risk’ means a risk arising directly from the provision of the service, and ‘(...)‘financial security’ means, in relation to a recipient, the prevention of substantial losses of money or of value of property.’

Article 21¹⁸⁸ of the law 17/2009 transposes article 23 of the Services Directive.

The Working Group identified that the person offering accommodation may be considered, under certain circumstances, a professional real estate agent. Under Catalanian legislation, the Decree 12/2010 regulates the requirements to practice as a real estate agent. Articles 6-11 of the Decree set the rules relating to the obligation of the real estate agent to provide a guarantee and professional liability insurance.

According to Article 6.2,¹⁸⁹ real estate agents must provide a guarantee for the time they develop their activities in order to answer for the amount of money they receive, until the moment the money is transferred to the person meant to it.

According to Article 10,¹⁹⁰ real estate agents must provide a liability insurance that guarantees the damages that might arise from the development of their activities.

Finally, under the current regulatory framework, significant doubts still remain around the duty of the platforms to subscribe professional liability insurance or to provide a guarantee.

instalaciones que exijan algún tipo de actuación o conocimiento especial y sobre evacuación del inmueble en caso de emergencia. 6. Datos identificadores de la inscripción del inmueble en el Registro de la Propiedad o expresión de no hallarse inscrito en el mismo. 7. Precio total o renta de la vivienda y servicios accesorios y forma de pago.’

¹⁸⁸ Official version available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2009-18731>. Last accessed <13 March 2016>

¹⁸⁹ ‘6.1 Los agentes inmobiliarios tienen que constituir una garantía y mantenerla vigente durante todo el tiempo que desarrollen su actividad mediadora para responder de las cantidades que reciban en el ejercicio de la actividad, hasta que dichas cantidades sean puestas a disposición de las personas destinatarias.’

¹⁹⁰ ‘Los agentes inmobiliarios tienen que disponer y mantener vigente durante todo el tiempo que desarrollen la actividad una póliza de seguros de responsabilidad civil que garantice los daños y perjuicios que puedan causar durante el ejercicio de su actividad.’

4.7.3 Article 24 Services Directive

Article 24 provides that Member States shall remove all total prohibitions on commercial communications by the regulated professions.

Article 24¹⁹¹ of the law 17/2009 transposes article 24 of the Services Directive. This Article guarantees the freedom of communications by the regulated professions. Limitation can only be imposed by reasons relating to public interests and must proportionate.

4.8 The Consumer Rights Directive

The Working Group considers that there are not many cases in which this Directive will apply, given the basic notion that the collaborative consumption is meant to involve consumers with consumers (C2C). If an accommodation provider is a consumer – as well as the seeker – the Consumer Rights Directive will not apply. Since the area of the collaborative economy concerns exactly these C2C contracts, exclusion of the consumer protection based on CRD is likely.

We would like to refer to the General Part for the general thoughts on the applicability.

Furthermore, according to recital 26¹⁹² of the Consumer Rights Directive, the rental for accommodation for residential purposes is excluded from its scope of application. Accordingly, if a contract is regulated by the LAU, it should be excluded from the application of the rules of the Directive.

In the cases in which the Directive does apply, article 16 of the Directive states that the right to withdrawal (9-15 Directive) shall not be provided in case of the provision of accommodation other than for residential purpose.

The Spanish legislator transposed the Directive with the Law 3/2014 that modifies the previous national legislation¹⁹³ on the Defense of the Consumers and Users, i.e the Royal Legislative Decree 1/2007.

¹⁹¹ ‘Artículo 24. Comunicaciones comerciales de las profesiones reguladas. 1. Se garantiza la libertad de las comunicaciones comerciales en las profesiones reguladas. 2. No podrán establecerse prohibiciones totales a las comunicaciones comerciales en las profesiones reguladas. Las limitaciones que se puedan imponer no podrán ser discriminatorias, habrán de estar siempre justificadas por una razón imperiosa de interés general y serán proporcionadas.’

¹⁹² Recital 26 ‘(...) contracts for the rental of accommodation for residential purposes are already subject to a number of specific requirements in national legislation. Those contracts include for instance sales of immovable property still to be developed and hire-purchase. The provisions of this Directive are not appropriate to those contracts’.

¹⁹³ Royal Legislative Decree 1/2007, 16 of November, that approves the consolidated text of the general law for the defense of Consumers and users and other complementary laws (*Real Decreto*

The consumer protection consists of:

(1) Art. 6 CRD: precontractual information duties (section 1, a-g, k, m-p, t). The burden of proof as regards the compliance with the information duties is on the trader (section 7). Article 97 of the Royal Legislative Decree 1/2007 corresponds to Article 6 of the CRD.

(2) Art. 8 CRD, sections 1-3: additional information duties for distance contracts concluded by electronic means/trading websites. Article 98 section 1-3¹⁹⁴ of the Royal Legislative Decree 1/2007 incorporated Article 8, sections 1-3 of the CRD.

(3) Art. 8 CRD, section 7: post-contractual information duty (confirmation of the contract on a durable medium). The confirmation must contain the information of art. 6 section 1 and has to be provided before the start of the performance of the service contract. Article 98 section 7¹⁹⁵ of the Royal Legislative Decree 1/2007 incorporated Article 8 section 7 of the CRD.

Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias).

¹⁹⁴ ‘1. En los contratos a distancia, el empresario facilitará al consumidor y usuario, en la lengua utilizada en la propuesta de contratación o bien, en la lengua elegida para la contratación, y, al menos, en castellano, la información exigida en el artículo 97.1 o la pondrá a su disposición de forma acorde con las técnicas de comunicación a distancia utilizadas, en términos claros y comprensibles y deberá respetar, en particular, el principio de buena fe en las transacciones comerciales, así como los principios de protección de quienes sean incapaces de contratar. Siempre que dicha información se facilite en un soporte duradero deberá ser legible.

2. Si un contrato a distancia que ha de ser celebrado por medios electrónicos implica obligaciones de pago para el consumidor y usuario, el empresario pondrá en conocimiento de éste de una manera clara y destacada, y justo antes de que efectúe el pedido, la información establecida en el artículo 97.1.a), e), p) y q).

El empresario deberá velar por que el consumidor y usuario, al efectuar el pedido, confirme expresamente que es consciente de que éste implica una obligación de pago. Si la realización de un pedido se hace activando un botón o una función similar, el botón o la función similar deberán etiquetarse, de manera que sea fácilmente legible, únicamente con la expresión «pedido con obligación de pago» o una formulación análoga no ambigua que indique que la realización del pedido implica la obligación de pagar al empresario. En caso contrario, el consumidor y usuario no quedará obligado por el contrato o pedido.

3. Los sitios web de comercio deberán indicar de modo claro y legible, a más tardar al inicio del procedimiento de compra, si se aplica alguna restricción de entrega y cuáles son las modalidades de pago aceptadas.’

¹⁹⁵ ‘7. El empresario deberá facilitar al consumidor y usuario la confirmación del contrato celebrado en un soporte duradero y en un plazo razonable después de la celebración del contrato a distancia, a más tardar en el momento de entrega de los bienes o antes del inicio de la ejecución del servicio. Tal confirmación incluirá:

a) Toda la información que figura en el artículo 97.1, salvo si el empresario ya ha facilitado la información al consumidor y usuario en un soporte duradero antes de la celebración del contrato a distancia, y b) Cuando proceda, la confirmación del previo consentimiento expreso del consumidor y

(4) Art. 19 and 22 CRD (on payments). Article 60 ter.¹⁹⁶ of the Royal Legislative Decree 1/2007 incorporated Article 19 CRD. Article 60 bis¹⁹⁷ of the Royal Legislative Decree incorporated Article 22 CRD.

4.9 Sectorial and other requirements: illegality of the service

4.9.1 Not acting in conformity with licence or authorisation (illegal lease)

The Working Group considers that illegality may arise from activities relating two different sets of sectorial rules under Spanish and Catalan law. On the one hand, the rules derived from the Decree 159/2012 for the lease of real estate for touristic use (See 4.2.3) On the other hand, the sectorial rules regulating the requirements to practice as a real estate agent, i.e. the Decree 12/2010.¹⁹⁸

Illegality based on the requirements for the apartments and houses for touristic use:

The Decree 159/2012 sets the requirements for the apartments and houses for touristic use:

- The estate must have a certificate of occupancy (*cédula de habitabilidad*).¹⁹⁹
- The estate must be sufficiently furnished and ready for its immediate use.²⁰⁰
- The owner or the manager of the estate must give to the users of the property and neighbors a phone number to solve queries and incidents related to the activity of the tourist estate.²⁰¹

usuario y del conocimiento por su parte de la pérdida del derecho de desistimiento de conformidad con el artículo 103.m).'

¹⁹⁶ 'Cargos por la utilización de medios de pago. 1. Los empresarios no podrán facturar a los consumidores y usuarios, por el uso de determinados medios de pago, cargos que superen el coste soportado por el empresario por el uso de tales medios. 2. Corresponde al empresario probar el cumplimiento de las obligaciones a que este artículo se refiere.'

¹⁹⁷ 'Artículo 60 bis. Pagos adicionales. 1. Antes de que el consumidor y usuario quede vinculado por cualquier contrato u oferta, el empresario deberá obtener su consentimiento expreso para todo pago adicional a la remuneración acordada para la obligación contractual principal del empresario. Estos suplementos opcionales se comunicarán de una manera clara y comprensible y su aceptación por el consumidor y usuario se realizará sobre una base de opción de inclusión. Si el empresario no ha obtenido el consentimiento expreso del consumidor y usuario, pero lo ha deducido utilizando opciones por defecto que éste debe rechazar para evitar el pago adicional, el consumidor y usuario tendrá derecho al reembolso de dicho pago. 2. Corresponde al empresario probar el cumplimiento de las obligaciones a que este artículo se refiere.'

¹⁹⁸ Online verion available at: http://noticias.juridicas.com/base_datos/CCAA/ca-d12-2010.html#c3.

Last accessed <13 March 2016>

¹⁹⁹ Article 67, par. 1 Decree 159/2012

²⁰⁰ Article 67, par. 2 Decree 159/2012

²⁰¹ Article 67, par. 3 Decree 159/2012

- The owner or the manager must guarantee a service of assistance and maintenance of the estate.²⁰²
- The owner or the manager must send a previous communication to the city hall indicating the beginning of activities the estate of touristic use.²⁰³
- The use of an estate for touristic use is not possible if it is forbidden by the regulations on the use of the land or the statutes of community.²⁰⁴
- The estates for touristic use must be **inscribed in the Register of Tourism of Catalonia**.

Article 73²⁰⁵ of the Decree 159/2012 prescribes that the owner of the real estate and the manager of the real estate are jointly liable for the infractions to the obligations set in the sectorial legislation on tourism, consumer protection and housing. This Article also prescribes the competent disciplinary authorities on the aforementioned infractions.

Illegality based on the sectorial rules regulating the requirements to practice as a real estate agent

In what refers to the sectorial rules regulating the requirements to practice as a real estate agent, the Decree 12/2010 prescribes:

- The requirements for attention and location of real estate agents (Article 3);
- The requirements for professional training of real estate agents (Article 4);
- The obligation relating to guarantees and professional insurance (Articles 6-11 See 4.7.2);
- The applicable regulation to the **Public Register of Real Estate Agents of Catalonia** (Articles 12-21).

²⁰² Article 67, par. 4 Decree 159/2012

²⁰³ Article 68, par. 1 Decree 159/2012

²⁰⁴ Article 68, par. 6 Decree 159/2012

²⁰⁵ ‘1. La persona propietaria y la persona gestora de la vivienda de uso turístico, en el supuesto de que no sean la misma persona, son responsables solidarias de las infracciones e incumplimientos de las obligaciones definidas en la normativa sectorial turística, de vivienda, de consumo y municipal de aplicación en razón de su actividad. 2. De acuerdo con el apartado anterior, los organismos administrativos tutores de los intereses públicos concurrentes en el objeto de la actividad de vivienda de uso turístico actúan en materia sancionadora y disciplinaria de acuerdo con sus competencias. Así: a) Respecto la disciplina de actividad: el departamento competente en materia de turismo, los ayuntamientos en el ámbito de su competencia y el departamento competente en materia de vivienda. b) Respecto a aquellos hechos y actividades que tengan la consideración de infracción en materia de defensa de las personas consumidoras: el departamento competente en materia de consumo y los ayuntamientos en el ámbito de sus respectivas competencias. 3. Las sanciones que puedan imponer las administraciones competentes por incumplimientos de este Decreto deben atender al procedimiento sancionador aplicable de la Administración de la Generalidad, y en su caso, a los procedimientos sancionadores que tengan establecidos los propios municipios.’

5. PLATFORMS AND THE LAW

5.1 Background of this chapter

In this chapter examples are put forward that the Working Group came across during the scanning of several platforms in Amsterdam, Paris and Barcelona. The scanning of the platforms was done bearing in mind the core question that was posed on all E-Commerce and sectoral requirements. To fully understand the infringements that are there and to map the different ways platforms try to fulfill all requirements, more time is needed and a more specific research question. Some of the articles of for example the E-Commerce Directive are met by platforms using a 40 page set of ‘General terms’. The focus of this Chapter therefore lies on giving examples and ultimately to emphasise some results that were found, concerning business models, payment methods and marketing strategies which might be important when determining whether further research or regulation is necessary.

This Chapter follows the order and numbering of the General Part and the City Chapters.

5.2 Platforms and providers: distinctions and contractual relations

Dutch case law uses two terms that might be helpful for future rules. The distinction relates to the amount of interference of the platform in the conclusion of private law contracts: the active agent (we called AAA: ‘Active Accommodation Agent’ for the purpose of this paper) and the PBB: passive bulletin board. The Supreme Court ruled that a platform ‘intermediates’ between an accommodation provider and an accommodation seeker, when it assists in the conclusion of a contract between these two parties. One can recognise an active agent, by the fact that there is some involvement of the platform, be it because an accommodation seeker cannot engage into a contract with the accommodation seeker directly. The platform that merely facilitates the exchange of contact details should be seen as a ‘bulletin board’. One recognises a bulletin board by the fact that one can search and find the direct contact details of a person offering something. Once an accommodation seeker can use the platform to only find the necessary contact details of an accommodation provider, the platform will be seen as a bulletin board.

The Working Group found that at least in Dutch law it is not allowed to ask money from a consumer when intermediating between a lessor and a consumer lessee. Because some business models are requiring a Membership Fee to afterwards have full access to all accommodations listed, this rule is not applicable. This rule is also not applicable in home swap when two consumers are swapping homes for a holiday period. Also, there are platforms

that make a agency contract with accommodation providers and seekers on the one hand, whereas the payment contract concerns ‘other services’ than the agency. Some lessors will ‘stipulate’ in their contract with the lessee that the payment has to run through the platform, which would be a stipulatio to the benefit of a third party (the platform). It is not studied in all countries whether this will become a three-party-contract or whether there are basically only plural two-party-contracts.

There will probable be national differences in the Civil Codes defining the exact limits of contracts in the sphere of agency and representation. This might be a difficulty in the draft of a unitary policy. For example in Dutch law only, there are representatives acting in the name of the principal, those acting not in the name of the principal, there are representatives with a general and a special authority, and there is a distinction between having the duty to act actively for a principal and without a duty, Furthermore there is a difference in representation for legal acts and for facilitating or negotiating which does not imply the authority to legally bind the principal.

The Working Group did not solve all questions relating to this, but would like to emphasise that one could take these differences into account. Or, to prevent more qualification issues, define the activities and behaviour of a platform that should meet the scope of application of a certain rule.

5.3 The scope of the definition of ‘Information Society Services (ISS)’

All platforms offer Information Society Services. The only doubt the Working Group found is whether a service such as Couchsurfing is leading to legal obligations in the sense of the respective Civil Codes. It might be only a unenforceable moral obligation, or a unitary (single), not reciprocal obligation. It might be outside the scope of the ‘service’ definition because it is not an economic activity.

On the other hand, home exchange is an economic activity since the agreement (a two sided, mutual, reciprocal obligation) is a rental agreement when the remuneration is sufficiently specific.

A question would be whether one wants to extend the scope of application of the information Society Services irrespective of the remuneration or not, basically only looking at the aim to provide anyone engaged in any activity which might lead to any moral or enforceable contract via electronic means, with sufficient information on the other person or party.

5.4 The exemptions from platforms' liability in the light of the considerations in Directive 2000/31/EU

5.4.1 Active platforms and liability

Active Platforms, such as Active Accommodation Agents (AAA's), are not shielded by the liability exemption of art. 14 Directive 2000/31. In the examples mentioned in 1.5.1 national law has to decide whether the AAA is liable or not. An AAA might escape liability, for example, if it has been careful in screening and cannot be blamed at all for the illegality of the content on his platform.

5.4.2 Passive platforms: Notice-and-take-down

Passive platforms, such as Passive Bulletin Boards (PBB's), benefit from the liability exemption. The exemption, however, works only to a certain extent. When the PBB comes to know of the illegal content the exemption is not applicable anymore (art. 14, section 1 (a) Directive 2000/31). In that case, the PBB has to take action to remove or to disable access to the information (art. 14, section 1 (b) Directive 2000/31). The procedure hosting service providers have to implement is known as 'Notice-and-take-down.'

5.4.3 How do platforms try to meet this requirements?

5.4.3.1 Active accommodation agent: Airbnb

Examining AirBnB's terms, the Working Group came across the following relevant regulations on illegal content.

Under the heading 'User Conduct', Airbnb states the following:

You understand and agree that you are solely responsible for compliance with any and all laws, rules, regulations, and Tax obligations that may apply to your use of the Site, Application, Services and Collective Content. In connection with your use of the Site, Application, Services and Collective Content, you may not and you agree that you will not:

violate any local, state, provincial, national, or other law or regulation, or any order of a court, including, without limitation, zoning restrictions and Tax regulations;

[...]

infringe the rights of any person or entity, including without limitation, their intellectual property, privacy, publicity or contractual rights;

[...]

as a Host, submit any Listing with false or misleading price information, or submit any Listing with a price that you do not intend to honor; post, upload, publish, submit or transmit any Content that: (i) infringes, misappropriates or violates a third party's patent, copyright, trademark, trade secret, moral rights or other intellectual property rights, or rights of publicity or privacy; (ii) violates, or encourages any conduct that would violate, any applicable law or regulation or would give rise to civil liability; (iii) is fraudulent, false, misleading or deceptive; (iv) is defamatory, obscene, pornographic, vulgar or offensive; (v) promotes discrimination, bigotry, racism, hatred, harassment or harm against any individual or group; (vi) is violent or threatening or promotes violence or actions that are threatening to any other person; or (vii) promotes illegal or harmful activities or substances;

Airbnb has the right to investigate and prosecute violations of any of the above to the fullest extent of the law.

Airbnb may access, preserve and disclose any of your information if we are required to do so by law, or if we believe in good faith that it is reasonably necessary to (i) respond to claims asserted against Airbnb or to comply with legal process (for example, subpoenas or warrants), (ii) enforce or administer our agreements with users, such as these Terms and the Airbnb Host Guarantee, (iii) for fraud prevention, risk assessment, investigation, customer support, product development and de-bugging purposes, or (iv) protect the rights, property or safety of Airbnb, its users, or members of the public. You acknowledge that Airbnb has no obligation to monitor your access to or use of the Site, Application, Services or Collective Content or to review or edit any Member Content, but has the right to do so for the purpose of operating and improving the Site, Application and Services (including without limitation for fraud prevention, risk assessment, investigation and customer support purposes), to ensure your compliance with these Terms, to comply with applicable law or the order or requirement of a court, administrative agency or other governmental body, to respond to content that it determines is otherwise objectionable or as set forth in these Terms. Airbnb reserves the right, at any time and without prior notice, to remove or disable access to any Collective Content that Airbnb, at its sole discretion, considers to be objectionable for any reason, in violation of these Terms or otherwise harmful to the Site, Application or Services.

Looking at these rules, the Working Group notices that, at least on paper Airbnb tries to make sure that the law will be abided. It also gives an opportunity to report illegal content via (in Airbnb.nl, through the section on the website on airbnb.nl called 'Content Richtlijnen' (*content policy*)).

A very active accommodation agent is <http://www.francelodge.fr/atouts.htm?lang=fr>. This seems to be not quite a collaborative consumption website. It is possible to rent apartments and to have them cleaned and managed by this company. It is not clear whether they are agence immobilier or not. For knowing more about legal issues, a question form is given.

5.4.3.2 *Passive Bulletin Board: Marktplaats.nl*

The general terms of Marktplaats.nl contain a lot of rules concerning illegal content. In the general terms (I-6, section 2, art. II-7), a specific link has been made to the notice and take down-procedure, called, the ‘Meld aan Marktplaats-systeem. In art. II.2, rules on illegal content are given.

Two parts of the ‘help-section’ of marktplaats.nl are relevant as regards illegal content. The first part is called ‘secure trading and internet fraud’ which contains guidelines on how to act when the transaction is not satisfactory due to fraud via e.g. phishing. The second part concerns suspicious objects or services and is more directly aimed at forbidding trade in a vast number of goods and services. The Working Group noticed that for pornographic goods/services, marktplaats.nl states that to the discretion of marktplaats.nl, can remove advertisements. This may lead to doubt whether - at least in this respect - marktplaats acts as a passive bulletin board.

Checking the website HomeExchange it is really hard to find a notice and take down or anything legally clear on this. We consulted the page on Safety, on ‘Etiquette’ and other rules about exchange, but could not find this information.

The website
https://www.huizenruil.com/nl/?utm_source=google&utm_medium=cpc&utm_term=%2Bhuizenruil&utm_campaign=Home%20Exchange%20Campaign%20-%20Dutch&mkwid=sePNyptW5|dc&pcrid=53448837714&gclid=CKX9h5yNvssCFUqeGwodstMLIw is not clear on the notice or takedown.

5.5 E-Commerce requirements

This section identifies whether platforms assume responsibility for the services they provide in their terms of use.

5.5.1 Article 5 E-Commerce directive 2000/31/EC

The question is how websites should fulfil this obligation. Literature explains it is not correct to first let users login to a website or make an account or ask for a remuneration before giving this information. It should be prevented that information on the identity of the service provider is to be found under a header titles ‘Agenda’ or anything else which does not clearly show where the information is. Clicking many buttons before reaching the necessary information is wrong as well.

5.5.1.1 Active accommodation Agent

<https://www.airbnb.nl/> shows information on the bottom of the website. To know the name and address of the person providing accommodation, one has to first accept all terms and login. The same holds true for the telephone number of Airbnb (as far as we could see). This might constitute a breach on the obligation that all information should be online permanently.

<https://www.airbnb.nl/> shows all the required information on the bottom of the website.

To know the name and address of the person providing accommodation, one has to first accept all terms and login. We are not sure whether the accommodation provider is also bound by article 5 of the E-Commerce Directive. It seems - as written before, based on the Loi Macron (*loi pour la croissance, l'activité et l'égalité des chances économiques*), that the platform is responsible for that.

The Working Group, in general, did sometimes find it not completely clear where the relevant information is. Sometimes one has to click many pages to find all information. Also it only became clear later, that Airbnb is a platform to search on the one hand, and that there is an Airbnb-payment-service, which is another company, that does the payment.

Especially the requirement under article 5-1 sub e and f ECD is not always upheld. If Airbnb is acting as an 'agent immobilier' by being involved in the 'gestion locative' it should give information on the authority monitoring this licenced activity, based on ECD and the Loi Hoguet (Loi n° 70-9).

An example of the way the Working Group thinks it should be done is the website of <http://www.ajflatservices.com/en/>.

5.5.1.2 Passive bulletin board

Marktplaats.nl is a more general website where professionals and consumers can offer goods or services for sale or rent. Marktplaats is showing all the required information on the website as well.

To know the name of an accommodation provider and how to contact them, no login is needed. See for example: <http://www.marktplaats.nl/a/vakantie/vakantiehuisen-nederland/m539635500-te-huur-vakantiehuisje-heerde.html?c=8c285449651fa109c354bbabe740c1b&previousPage=lr>

Another example of a Passive Bulletin Board is LeBonCoin.fr. It shows all relevant details and distinguishes between the professional and consumer accommodation providers.

If the offerer of an accommodation is the one bound by article 5 ECD, the website LeBonCoin provides for a possibility of asking the exact address of the accommodation provider. http://www.leboncoin.fr/locations_gites/782760710.htm?ca=12_s

5.5.1.3 Professional or private accommodation provider

It is clear on the website LeBonCoin.fr, that many professional accommodation providers use this website to advertise. It is quite clear that private accommodation providers show their own contact details, whereas as soon as a professional accommodation provider (another agent) is at work, they refer to their own website where the relevant information is. The website clearly distinguishes (visually) between professional and private: http://www.leboncoin.fr/annonces/offres/ile_de_france/

It is clear on the website marktplaats.nl, that many professional accommodation providers use the Marktplaats as a way to advertise. It is quite clear that private accommodation providers show their own contact details, whereas as soon as a professional accommodation provider (another agent) is at work, they refer to their own website where the relevant information is. <http://www.marktplaats.nl/verkopers/6601296.html>

As written in the Paris City Chapter (3), French law seems to confer on the platform the obligation to provide the relevant information on accommodation providers as well. It will be a question, whether this information is ‘provided’ when one has to login first.

5.5.1.4. Home swap

The website huizenruil.com has a clear description of all contact details. Huizenruil also requires registration before it is clear who is offering an apartment or home for swap.

The website Home Exchange expresses clearly that it is up to the contracting parties that exchange houses whether or not to provide only a nickname or the real personal details: http://support.homeexchange.com/customer/nl/portal/articles/1057086-is-home-swapping-safe?_ga=1.128796169.482226968.1457285301

At huizenruil.com it is expressed that the each member should meet the following general term:

‘As a user of this website, you agree:

To not provide false or misleading information to the Club or its Members, including, without limitation the obligation to accurately describe your Listing on the Website and in all correspondence. All Listings shall reflect an accurate description of the property, including, without limitation, the type, number and size of rooms. Any interior or exterior photos posted must be of the property offered for Exchange, unless specifically indicated. The omission of any detail which a reasonable person may find relevant may be treated the same as an inaccurate description and subject a Member’s membership to termination and the Listing to removal from the Websites.’

Furthermore it has a specific term for booking professional accommodations:

‘B&Bs

All properties on the site are available for Exchange, subject to a mutual agreement between Members. Certain properties, such as licensed B&Bs, may, with explicit Club approval, be available for booking. The Club does not participate in any way in income received by such B&Bs and is not acting as a broker or an agent in connection with any terms you may negotiate. Any request for payment from a B&B must be in response to an exchange enquiry. Members are not allowed to initiate contact with other Members to offer their homes for rent. In the event you choose to book a B&B, it is your responsibility and you assume all risks of any financial transaction, including if a deposit is requested by an approved B&B. *We urge caution when sending deposits and in no case recommend deposits be sent by Western Union.*'

Therewith the Working Group concludes that website will try to pass the information obligation to the accommodation providers on the website.

The website <http://fr.camago.com/comparatif-site-echange-maison> shows many different forms of Homeswap. One of them, <https://www.echangedemaison.com/contact> we considered, is not with a permit for 'gestion locative'. It might be that their service does not fall under the scope of article 5-1 sub e and f ECD.

The website huizenruil, which seems a bulletin board with a membership fee has a yearly fee. It is not clear whether additional costs occur. <https://www.huizenruil.com/nl/registration/membership-options/>

<https://www.trocmaison.com/fr/> is a French website. When consulting it from the Netherlands, immediately a local phonenumber arises, which is good.

On pricing the website is not clear. It says 'Séjournez gratuitement', which seems for free. To know more one has to register. <https://www.trocmaison.com/fr/registration/> Even before registration this is not clear what comes next.

5.5.2 Article 6-7 E-Commerce directive 2000/31/EC

In order to know how platforms meet the advertising responsibilities, one needs to subscribe to - for example - the newsletter as well. One needs to acquire memberships or to register on relevant websites in order to assess how websites are trying to fulfil these obligations. Other advertisements are directly on the website itself.

Marktplaats is a more general website where professionals and consumers can offer thing for sale or rent.

The website shows in its results a mixture of messages, offers and requests from customers and private and professional providers. It is however indicated whether the listed results are results from messages and offers, or whether they are added in 'results or adds from Google'. <http://www.marktplaats.nl/verkopers/6601296.html>

It is clear on the website marktplaats.nl, that many professional accommodation providers use the Marktplaats as a way to advertise. It is quite clear that private accommodation providers show their own contact details, whereas as soon as a professional accommodation provider (another agent) is at work, they refer to their own website where the relevant information is.

<http://www.marktplaats.nl/verkopers/6601296.html>

The Working Group did not find any specific problems in this area.

For example <https://www.echangedemaison.com/> and LeBonCoin.fr show a clear banner for commercial communications from third parties, clearly connected to our location.

Airbnb for example sends advertisements to its members by email, usually suggesting places to go. The member can clearly identify that the advertisement comes from Airbnb (name of the company is everywhere + banner with logo). Systematically at the end of the email the address of Airbnb in Ireland can be found. As well as the possibility for the customer to 'unsubscribe'.

5.5.3 Article 8 E-Commerce directive 2000/31/EC

The diversity in Member States is referred to.

5.5.4 Article 9 E-Commerce directive 2000/31/EC

It seems that the websites the Working Group checked, such as Airbnb and huizenruil use the registration by email to confirm orders and provide information to the accommodation seeker. The website couchsurfing (which was out of the scope but still offers an interesting 'service' in legal terms) gives access to a private communication 'platform' on which people can communicate. As soon as a new message is posted, the system sends a message to the email address provided by the member. This is also the way Marktplaats.nl works.

Airbnb, LeBonCoin and Echangedemaison all seem to work with registration and passwords. It seems possible to conclude the contracts online, either through an exchange of emails or inside a 'chat box function' of the websites. Airbnb stresses the importance of concluding the contracts through the website.

To know whether all General Terms are sent to the email address of the users in order to be able to save a copy to the hard disk, one has to register.

We doubt whether Airbnb does this. Two of the Working Group members registered for this study, but did not receive an email to do this.

5.5.5 Article 10 E-Commerce directive 2000/31/EC

5.5.5.1 Active accommodation Agent

As far as the Working Group could find out, Airbnb has a professional website where the steps, leading to a contract can be followed intuitively. There is no reason to believe that contracting parties will be ‘trapped’ into a contract. Therefore, there seems to be no reason to have doubts about the transparency concerning art. 6:227b, subparagraphs 1 and 2.

The general contract terms can be accessed, but as far as we can see one can have doubts about the possibility to store the general terms. One has to cut and paste the text in order to piece in into a document that that the contracting party can save for himself. In literature, one has defended that does not fulfill the requirement that article 6:234 subparagraph 2 that the general terms should be given in a fashion that ensures that the document can easily be stored.

5.5.5.2 Passive bulletin board

The way the advertisements on for example marktplaats are fashioned, differs from advertiser to advertiser. It exceeds the possibilities of this paper to identify eventual flaws in them. We note that in case of contracting between accommodation providers and accommodation seekers, the actual contract takes places after the partners met on the bulletin board.

In Dutch case law, Hof Arnhem 8 september 2009, ECLI:NL:GHARN:2009:BL6588 (New Beetle) is noteworthy. Here, due to a mistake by marktplaats.nl, on an advertisement an addition was made which suggested that the product for sale (a car) came with a well known guarantee (the *BOVAG-garantie*). The risk for this mistake was laid on the offeror (art. 3:37 subsection 4 Dutch CC), who eventually entered into contract with a buyer, who claimed that the guarantee was valid. The way the advertisement looked like was deciding for the reasonable expectations (art. 3:35 Dutch CC) of the contracting party.

Marktplaats.nl places its general terms in a document which, just like airbnb, cannot be stored as such. What is said there, also applies here.

5.5.6 Article 11 E-Commerce directive 2000/31/EC

At Marktplaats, the normal case will be that the advertisements are not offers that can be accepted. In literature, marktplaats.nl has been called a bulletin board where general notifications are made to the public. The advertisements on marktplaats.nl are deemed to be not precise enough to constitute an offer ex article 6:217 Dutch CC, which only has to be accepted in order to form a contract. On marktplaats.nl this is confirmed in art. II.5 of the general terms of marktplaats.nl. Here, the rule is created that a bidding (*bieding*) on an advertisement is not binding (*bindend*). Usually one should contact the provider of the service of good and email about the price and the delivery of the good. These are all options that one can fill in before placing the add. If this makes the offer precise enough, possibly this constitutes a real offer nonetheless. But it is normal to email about the exact deal before concluding it.

5.6 The Unfair Commercial Practices Directive (2005/29/EC)

The question posed in the tender was the following: Should accommodation providers be authorised, licenced or registered and if so, does this relate to the Unfair Commercial Practices Directive? Is the platforms or the provider liable in case this obligation is not met? The Working Group sees several problems, differing from country to country, city to city.

This is an issue which could be researched on several levels.

1. There might be a licence or registration that accommodation providers have to meet to lease a holiday home or room to tourists. In Paris the Loi Hoguet mentions this. Not meeting these requirements could be an unfair commercial practice vis-a-vis other (professional, licenced) accommodation providers and might fall within the scope of unfair competition.

It could also be seen as a tort, an infringement of the law. A question would be, governed by private law, whether the infringement of such a law is a tort related to another private party (another hotel), and whether damages occurred or whether national law provides for a prohibition order to stop the infringing behaviour. Generally speaking to file such a claim successfully, the claimant will have to prove that the law that is infringed actually covers his interest (relativity rule). Another question is whether this could be a tort vis-a-vis a consumer who might be misled, if at all, concerning the quality of the accommodation provider. This will depend on relativity as well: which interest does the licence law or registration requirement protect?

2. There might also be a licence or registration necessary to 'intermediate' in housing. In Paris the Loi Hoguet mentions this. Not meeting these requirements could be an unfair commercial practice vis-a-vis other (professional, licenced) 'agences'. This might therefore fall within the scope of unfair competition. Dependant on how this is arranged in the national law, unfair competition could be a special type of tort. A question would be, governed by private law, whether the infringement of such a law is a tort vis-a-vis the agency that is claiming the prohibited behaviour. And again, whether damages occurred and whether national law provides for a prohibition order to stop the infringing behaviour. In Dutch law for example, it should be clear that the ratio of the licence or registration is to protect another agency. If the protection is merely a consumer protection measure, it is not meant to protect agencies.

The website <http://fr.camago.com/comparatif-site-echange-maison> shows many different forms of Homeswap. One of them, <https://www.echangedemaison.com/contact> we considered, is not with a permit for 'gestion locative', for example.

An implication which gives rise to concern is that internet technology may not be used to retrieve and analyse information on consumers by firms. Many of the services that are 'for

free' involve a lot of data transfer. This is a data privacy issue. An example outside the accommodation sphere: being a member of 'Peerby' a Dutch borrowing platform one of the member of the Working Group received an email from the Peerby system asking a certain thing for rent. This object was offered by the member a few months earlier to another member after a general bulletin asking for it, to which she responded. From the later email asking the same object it became clear that somehow the system registers what goods a person once offered individually to someone else upon a general request. In the terms it is not clear that the system registers peoples' belongings for other purposes.

The Working Group found that many websites have a code of conduct in which they impede their members or users to use any technology which could retrieve data from the platforms or the other users or accommodations.

5.7 The Services Directive (2006/123/EC)

Concerning the Services Directive there are three subjects that are relevant: whether all terms are provided, whether information on professional insurance and guarantees are given and on advertisement. For advertisement issues we refer to 5.5.2, 5.5.3.

Professional insurance and guarantee issues are related to the questions whether a 'Carte Professionnelle' or certain education or licence is necessary to provide a certain service. The mentioned this extensively in the Paris Chapter in 2.7. Furthermore, under Spanish law it might be possible that the person offering accommodation works as a real estate agent. In fact, some platforms (e.g. Homeaway²⁰⁶) consider as professional real estate agents (*professionals inmobiliarios*) the users that want to offer more than 10 properties under the same profile. In this case, the real estate agents would have to comply with the legislation applicable. In Catalonia, the Decree 12/2010 regulates the requirements to practice as a real estate agent. (Decreto 12/2010, de 2 de febrero, por el que se regulan los requisitos para ejercer la actividad de agente inmobiliario y se crea el Registro de Agentes Inmobiliarios de Cataluña).²⁰⁷

Some remarks to the websites we found: A guarantee for Dutch real estate agents is given by the so called NVM: Nederlandse Vereniging voor Makelaars en taxateurs, so that not everyone who calls himself a 'makelaar' (agent) will fall under such guarantee. The term 'makelaar' is free since 2001. Anyone can basically start an agency is the intermediation of lease contracts. The question therefore would be to determine whether the scope of the Services Directive intended to cover all activities that are usually done by 'makelaars' so that also new platforms engaged in this activity are under the obligation to provide such guarantee, or whether the services directive works with the presumption that such activities should be under a licence according to the national laws.

²⁰⁶ <https://www.homeaway.es/info/quienes-somos/aviso-legal/Terminos-Condicion.es>.

²⁰⁷ Online version available at: http://noticias.juridicas.com/base_datos/CCAA/ca-d12-2010.html. Last accessed <13 March 2016>.

In France it is for example quite clear that the provision of these services are under licence. We would like to refer to the City Chapters for the details.

We found that Airbnb has a special guarantee fund for both accommodation providers and for accommodation seekers for different liability issues. Albeit with a quite limited applicability and some presumably unfair terms. Because the court to go to is set in the United States from a low amount of damage on. Only in smaller cases the national courts can settle the problem. This could be a subject for extensive research, because it is quite unclear what ‘certainty’ is offered here. The Working Group noticed that especially this is a core ‘weak spot’ in sharing: guarantees and insurances are probable less or at least not clear in the C2C contracts in which a small remuneration is asked. In the Amsterdam chapter we gave some examples of the insurance companies that are now offering ‘additional’ insurances. This will differ also in regard to the specific liability situation (personal injury, non satisfactory service provision, damage caused to the home for fault, negligence, damage caused to goods/property of the lessor or lessee).

For example huizenruil: In no event shall the Club be liable for any damages whatsoever, whether direct, indirect, general, special, compensatory, consequential, and/or incidental, arising out of or relating to the conduct of you or anyone else in connection with the use of the service, including without limitation, bodily injury, emotional distress, and/or any other damages resulting from communications or meetings with other registered users of this service. UNDER NO CIRCUMSTANCES, INCLUDING BUT NOT LIMITED TO NEGLIGENCE, SHALL THE CLUB, ITS OFFICERS, DIRECTORS, SHAREHOLDERS, AFFILIATES, SUPPLIERS, REPRESENTATIVES OR AGENTS BE LIABLE TO YOU FOR DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE OR EXEMPLARY DAMAGES EVEN IF THE CLUB HAS BEEN ADVISED SPECIFICALLY OF THE POSSIBILITY OF SUCH DAMAGES, ARISING FROM USE OF OR INABILITY TO USE THE SERVICE OR ANY LINKS OR ITEMS ON THE SERVICE OR ANY PROVISION OF THE TERMS OF SERVICE. (<https://www.huizenruil.com/nl/terms-of-use/>)

5.8 The Consumer Rights Directive

The Working Group already expressed its’ thoughts on the question whether making a reservation for accommodation leads to a distance contract. Secondly about the fact that the C2C collaborative economy is supposed to be only between consumers.

For this section the Working Group consulted a few websites searching for any of the rights that are usually conferred by the consumer protection rights of the CRD:

precontractual information duties

information duties for distance contracts

post-contractual information duty

payments,

the right to annul.

On Homeexchange we found that it is ‘etiquette to not annul’. It is explained that once a house is exchanged people will start booking a flight and ‘more of those things’. If one annuls it is advised – if you really have to annul – to arrange another place to stay for your home exchange partner. <http://support.homeexchange.com/customer/nl/portal/articles/1167780-huizenruil-etiquette#sthash.0TxGH1M0.dpuf>

Platforms like **Rentalia** (Spain) provide the information about the necessary steps to conclude the contract in the paragraph of the terms and conditions named "[Dar de alta un alojamiento](#)". According to the terms and conditions,²⁰⁸ the Rentalia does not allow platform users to exercise their right to withdrawal as regulated by the Legislative Decree 1/2007.

Rentalia provides links for, among others:

- the provider and seeker of accommodation to be informed about the relevant tourism legislation, (<http://es.rentalia.com/owner/legal.php>)
- a model contract for the agreement between the persons offering and seeking accommodation (<http://es.rentalia.com/owner/contratos.php>)
- the prices for the platform services: <http://es.rentalia.com/owner/prices.php>

Platforms like **Homeaway** (Spain) provide the information for the persons offering and seeking accommodation in two different documents of terms and conditions. However, no reference is made therein to the right to annul or the right to withdrawal or to consumer protection laws.

Homeaway provides links for, among others:

- a model contract for the agreement between the persons offering and seeking accommodation (<https://www.homeaway.es/info/comunidadpropietarios/relacion-viajero/ejemplo-contrato>)
- the terms and conditions for the offeror. These terms include the information about payments and additional paid services. (<https://www.homeaway.es/info/quienes-somos/aviso-legal/Terminos-Condicioness>)
- the terms and conditions for the person seeking accommodation (<https://www.homeaway.es/info/quienes-somos/aviso-legal/terminos-condiciones-viajeros>)

Platforms like **Homeexchange** (Spain) have information about how the platform works (<https://www.homeexchange.com/en/how-it-works/>). Homeexchange guarantees that there are not hidden fees or extra payments (<https://www.homeexchange.com/en/registration/membership-options/>). Furthermore, they provide community guidelines that constitute the so called ‘Home exchange etiquette’

²⁰⁸ Terms and conditions. Article 5.8 “*No será de aplicación el derecho de desistimiento contemplado en el Real Decreto Legislativo 1/2007, de 16 de noviembre por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios, siendo de aplicación la excepción contemplada en el artículo 103 letra m) ya que los anuncios publicados en el sitio web tienen la naturaleza de contenido digital y la publicación, es decir su ejecución ha comenzado a realizarse con el previo consentimiento del usuario.*” Available at: <http://es.rentalia.com/legal.php>.

(<http://support.homeexchange.com/customer/en/portal/articles/1167780-home-exchange-etiquette->)

5.9 Illegality of the service

5.9.1 Illegality under public law

Our check shows that each country works with different ways to for example involve certain activities within the scope of application of the existing laws. The public law legislation that is infringed had several purposes. There is taxation regulation focussing on revenue from tourist presence (tourist tax), from lessors' income (to decide whether the person earning money with the lease is a business (which will give possibilities to deduct investments, so that it is not necessarily a negative consequence to be called a business) or a consumer. In the latter case VAT-rules and tax regulation for income taxes will be different.

There are regulations focussing on the liveability in areas that are used to the maximum capacity, trying to find a balance between tourism and local inhabitants. There are safety requirements (mainly on fire safety and accessibility for emergency workers). And there are rules focussing on regional planning, public transport possibilities with the purpose of a sustainable development of the region.

Ultimately hotel regulations and other professional tourism rules can be drawn up to prevent fraud and consumers (locals and foreigners) taken advantage of. It is questioned whether these rules are also giving rights in return, in the sense that the infringement of these rules constitutes unfair competition vis-a-vis the professional branch.

It is without doubt that the collaborative economy causes the necessity to re-think the way the purpose and rationale of these rules are met.

We have found rules that focus on

- The number of days
- Purpose of lease
- Amount of guests
- Inhabitant present or not
- Object of the lease
- Area of the object.

Airbnb and the city of Amsterdam made certain agreements. Airbnb now mentions on its' website that there is specific regulation for Amsterdam. And, the city of Amsterdam and Airbnb are agreeing to the thought that communication on the legal impediments and requirements are the way forward.

Airbnb has obliged to clearly show links to the Amsterdam regulations and to insert a 'check box' that accommodation providers have to fill in before concluding a contract. In December

2015 Airbnb deleted 170 Amsterdam advertisements on the websites because accommodation providers were not living up to the rules. They are – as Airbnb concluded – illegal hotels.²⁰⁹

On 18 December, 2014 the City of Amsterdam and Airbnb announced their agreement (Memorandum of Understanding) that will simplify the payment of tourist tax for hosts. The agreement between Airbnb and Aldermen Laurens Ivens (Housing) and Udo Kock (Finance) was made about providing clear and accessible information on the rules for home sharing. Airbnb would also start collecting and remitting tourist taxes on behalf of hosts. It was perceived to be an infringement of equality to alleviate tax pressure from those who are acting as illegal hotels, at the expense of legal hotels.

Even though a host is responsible for tourist tax remittance, Airbnb has joined the City of Amsterdam to inform hosts to prevent them from infringing sectoral rules. Airbnb and the Town of Amsterdam concluded in a Memorandum of Understanding that Airbnb would charge and collect the tourist taxes. Amsterdam is aiming at involving other platforms in the same agreement. We can conclude from this that the responsibility for meeting this requirement lies at the platform.

5.10 Non satisfactory accommodation

There are astonishing examples of ‘homes for rent’ to be found on platforms. Cases vary from an Amsterdam apartment situated next to canal which have no view or only a view on a blind wall to homes in war zones, such as in Jewish villages at the West Bank. This issue is not very likely to occur in Amsterdam, Barcelona or Paris, but it does illustrate that Airbnb tries to not interfere too much with what people are offering. In the General Terms it is expressed that the lessors are responsible to fulfil requirements of local or national legislation. The question whether the leased property is in accordance with the expectations of lessees is solved with the notice that the lessor is responsible for what he puts on the website. Airbnb only guarantees that the address exists. Reviews are supposed to to the rest.

In the City Chapters the Working Group will elaborate in more detail the not satisfactory service provision, using legislation, examples and opinions.

In the case of a non conformity traditional rules mention the lessor as the responsible party to turn to in case of a non satisfactory provision. Many websites cover this question. We found many differences:

²⁰⁹ K. Bouma, ‘Airbnb schrapt huizen Amsterdam die te vaak worden verhuurt’. Volkskrant 13 januari 2016, te vinden op <http://www.volkskrant.nl/economie/airbnb-schrapt-huizen-a-dam-die-te-vaak-woorden-verhuurd~a4223391/>.

5.10.1 Active Accommodation provider

The platform Airbnb does offer some solution. Airbnbs' service centre provides what to do in the case of a gap between expectations and reality when checking in.²¹⁰ The lessee is directed to the lessor for help. If the problem is not solved, the lessee can use the Gast Restitutiebeleid which is three steps: contacting Airbnb to notify the problem, blocking payment to the lessor, notifying the lessor through the website, making pictures of the problem. This should be within 24 hours. Afterwards they will still help 'intermediate' when the lessee did not get any reaction from the lessor.²¹¹

Ultimately, Airbnb allowed itself to delete lessors from the website, when the reviews are negative. This has not been a debate in the Netherlands (we did not find publications other than this), however there is one case in the United Kingdom: High Court of Justice (Verenigd Koninkrijk) 23 juli 2015, Mark Howell v. Airbnb UK Ltd [2015] 1HJ/15/0446. In this case the lessor who was expelled from the website, sued Airbnb. The judge allowed Airbnb to refuse the lessor because the negative reviews made it too risky for Airbnb to facilitate the conclusion of contracts with that lessor.

The Working Group is of the opinion this is a starting point to answer that question. It might be possible that the platform agent is liable after having received several negative reviews on the accommodation. The duty to take down the non-conform advertisement and accommodation after a notice, could be seen as fulfilling the general duty to care under for example article 7:401 Dutch CC. This duty to care can be 'light' when the agent is not acting on his own behalf. If the agent asks for a remuneration, this duty to care can be heavier.²¹²

In this respect the role of reviews should be mentioned. A mistake of fact could arise after reading reviews. A review however is not an information provided by the lessor (as required by article 6:228 Dutch CC). On the other hand, if the lessor sees that one of the reviews is not matching reality, we could assume the lessor has the duty to set this straight. And, if the lessee wants to avoid the contract based on mistake of fact, the lessor cannot defend himself stating the lessee has a duty to research instead.

5.10.2 Home Exchange

MEMBER DISPUTES AND RELEASE

The Club cannot be held responsible for any events that occur as a result of any relationship between Members or Guests using the Websites. Any disputes arising from the use of the Club or Affiliate websites must be settled between the parties who directly participated in the

²¹⁰ <https://www.airbnb.nl/help/article/248/what-should-i-do-if-something-s-not-missing-or-not-as-expected-when-i-check-in> last visited 27-2-2016.

²¹¹ <https://www.airbnb.nl/help/article/324/what-is-the-guest-refund-policy> last visited 27-2-2016.

²¹² Tekst & Commentaar (Castermans & Krans) 2011, article 7:401, p. 3431.

Exchange, B&B booking, hospitality, house sitting or other use of the property in question. Members shall use best efforts to attempt to resolve disputes arising out of or relating to the Exchange of properties by amicable discussion. If this is unsuccessful, the Club may volunteer to assess the arguments of the Members and make suggestions for settlement, but it has no obligation to do so and any recommendation by the Club has no binding authority; provided, however, the Member may choose to terminate a Membership after assessing a dispute in its sole and absolute discretion. In the event of a termination of a Membership due to a dispute the Club has no obligation to offer a refund. The Club does not assume any responsibility for subsequent resolution or failure to resolve.

If you have a dispute with one or more of our Members, you release us (and our officers, directors, agents, subsidiaries, joint ventures and employees) from any claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, arising out of or in any way connected with such dispute.

6. Other Remarks

6.1 Relevance of this chapter

During the research the Working Group came across other issues than the ones asked for in the Impulse paper. We would like to mention these, to give direction to possible future research and to show some concerns.

6.2 Private law insurance issues

The Impulse paper was about liability for infringing European Directives, mostly information obligations. In national law, it is very much debated which insurances in the sharing economy are needed. Some home insurances do not offer damages when one rents out a home, others do.

Airbnb offers an insurance for damages to the home or goods inside the leased home. Even though they cover up to € 800.000, there are many requirements to be fulfilled such as a notification within 14 days. Many valuable things are not insured such as jewelry. First, Airbnb asks the accommodation provider and lessee to settle the problem.

The usual Dutch insurances (on goods in the home and the home itself, called 'inboedelverzekering' and 'opstalverzekering') only covered damages that arise from the own, personal use of goods. As soon as people start making money offering the use of their goods, most insurances do not cover damages arising out of that. (The criterium is not whether someone is professional or not, this is still within the consumer sphere). Nationale Nederlanden and Centraal Beheer Achmea do cover damages when leasing. Other insurance companies want to know when people are allowing other people to use their goods or home. They even risk the insurance company ending the insurance contract.

New, since a few weeks is that some insurance companies offer extra insurance for those who lease their homes to others: ASR and Aegon have this flexible option.

Airbnb's insurance (Guarantee) does not cover liability for injury. Usually, insurances cover this kind of damage for extra-contractual damages arising out of tort. However, this would be a contractual liability between a house owner and a lessee. Insurance companies could decide not to cover this²¹³. (The same is found in UberPOP-cases: the usual - and obligatory - drivers' insurance policies do not cover damages occurred when the driver transports other people for money. Since carpooling is accepted, carpooling is merely asking for a contribution in the gas costs and not a commercial service, the exception is called the 'carpooling rule'. As soon as the line between a friendly service such as carpooling is crossed and a driver is offering a commercial service, the insurance company will not cover the damages.)

²¹³ www.Independer.nl

Huizenruil.com for example writes: It is the responsibility of Members to verify their own insurance coverage and the coverage provided by their Exchange Partner, including auto, property and liability.

6.3 Not authorised under property law

Not part of the research was the illegality under property law. In that respect it is worth noticing that owners for example in the Netherlands can be impeded to lease their house according to a financing contract with the bank, entitled to a mortgage (hypotheec), who has an absolute right enforceable against everyone.

Also owners of an apartment are bound by the community rules (which are also absolute rights) vis-à-vis third parties. It can be forbidden in the community rules to lease the property. At least, problems are easily created when lessees leave garbage in for example the communal area, like the hallways, garden or staircase.

6.4 Not authorised under contract law

The question about the consequences of illegal rent in private (contract) law was not expressly a subject of the tender. However, there are numerous cases in each City that involve the illegal sub-letting of housing, leading to a breach of lease contracts. This is acknowledged by a big platform such as Airbnb, referring the users in the General Terms to the fact that lessors will have to check the local rules.

There is case law on sub-lease being an infringement of the lease contract. A man sub-letting his flat in the 9th *arrondissement* of Paris for €450 a week has been found guilty of breaking his lease and ordered to pay €2.842 damages to his landlord. The city of Paris, in reaction to this court decision stated in the newspapers that it believes that many – although by no means all – of the flats or rooms offered on Airbnb and similar sites break the law. Almost all tenants are forbidden to sub-let their homes, even for a few days.²¹⁴

Also in Dutch law it is prohibited under contract law to lease ‘social houses’ for the purpose of Airbnb and alike.²¹⁵

²¹⁴ John Lichfield, ‘Airbnb: French court finds man who sub-let room on short-term rental website guilty of breaking lease’, *Independent.co.uk*, 22.5.2014.

²¹⁵ Gemeente Amsterdam, *Infographic particuliere vakantieverhuur*, www.amsterdam.nl & *Toeristische verhuur van woningen (‘vakantieverhuur’) in Amsterdam*, juni 2013, www.amsterdam.nl.

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