IMPULSE PAPER NO.02

on the business authorisation/licensing requirements imposed on peer-providers and platforms in the accommodation/tourism sector in Paris, Rome, Milan and London.

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1 EXECUTIVE SUMMARY

Short term rentals and, more limitedly, home swaps have deeply changed the accommodation sector in most European cities. New peer-to-peer services not only put into question how tourist accommodation is planned, but they also redesign city spaces and local economies, *de facto* deregulating traditional services and making existing rules obsolete. This Impulse paper aims to assess the existing regulatory framework for the collaborative economy in the accommodation/tourism sector in Paris (chapter 2), Rome/Milan (chapter 3) and London (chapter 4), and to provide a view on its compatibility with EU law (chapter 5). In the closing chapters, it also articulates some final recommendations on how to address the emerging challenges of the collaborative economy (chapters 6-7).

Among the surveyed countries, the UK is the only one that amended its legislation in response to the spreading of peer-to-peer services. On the contrary, no significant legislative changes took place in France and Italy. Both approaches are plausible and in some cases the old rules may well be the effective regulatory responses suited for the collaborative economy. However, it is likely that the many challenges posed by peer-to-peer services require new rules, at least in some cases.

Having regard to the compatibility of national regulations with EU law, none of the rules reviewed in this paper discriminate on the ground of nationality. The same cannot be said about the place of residence, which plays a significant role in French legislation (chapter 2) and it may also be relevant under UK law (chapter 4). More often, indistinctly (non-discriminatory) measures establish obstacles capable of hindering free provision of peer-to-peer services. These obstacles may be linked to bureaucratic and financial burdens. This may occur when rules make the establishment/provision of services conditional upon the issue of prior authorisation, as in France. Other obstacles may be due to a lack of clarity in legislation, as in Italy where different layers of national, regional, and municipal rules create a somehow confused legal scenario that may render less attractive the provision of these services (chapter 3).

When plainly expressed, the most widespread justifications for restricting the provision of these services are the availability of long-term rental houses (especially affordable ones), the promotion of social diversity and a fair balance between housing and employment in different neighborhoods. Safety, health and environmental concerns are also invoked (chapter 5). While these justifications are all legitimate under EU law - and the Member States decide on the level at which they intend to guarantee their protection and the way that level must be attained – nonetheless the Member States must observe the principle of proportionality in both regulation and enforcement. Regulation should be proportionate to the scale of operation and public authorities should act consistently in response to suspected breaches, taking the most appropriate action.

In this regard, a choice must be made between strict rules and principles. On the one hand, a clear-cut rule may be preferable to demarcate the scope of rules for professionals and to define the non-professional status of peers operating through platforms. On the other hand, principles may be better suited to address safety concern and consumer protection (chapter 7).

The main reason to amend old regulations in the face of these changes is the non-professional status of peers. Extending rules for professionals also to peer-to-peer services would impose disproportionate costs on non-professional providers and erect insurmountable barriers to entry. On the other hand, the rising of peer-to-peer economy, where private, non-professional individuals provide services, may lead to novel safety, health, and environmental concerns. Balancing these two conflicting aspects – having different rules for non-professionals and protecting consumers - is one of the most challenging aspects of the collaborative economy (chapter 6).

Furthermore, the emergence of third-party intermediaries - the online platforms that mediate the exchange among peers offering an infrastructure upon which people depend on to connect to each other – makes a strong argument for reconsidering the role of regulation in the market. In some cases, platforms make the case for regulation less compelling, thanks to their self-correcting capacity. However, there may still be the case that regulation is

preferable, especially in those cases where platforms have no possibility and/or interest to correct market failures (chapter 6).

In conclusion, new peer-to-peer services may result in unprecedented opportunities of economic growth but they can also lead to a considerable disregard for existing regulation. A potential regulatory response for such a scenario entails two complementing strategies: recognizing platforms as rulers and enforcers, and allowing higher flexibility in regulation and enforcement (chapter 7). In this perspective, it is crucial to define a new regulatory toolkit that reallocates responsibilities, leveraging platforms' self-governing capacity, while at the same time retaining a significant part of the process for public regulators.

2 INTRODUCTION

With recent technological changes and the resulting reduction in transaction costs, an entire economic system of crowd-based firms for digitally enabled peer-to-peer activities is emerging, reshaping and in some cases supplanting long established business models. Thanks to these innovations that facilitate access over ownership, people are now able to share, rent or borrow underutilized goods and provide peer-to-peer services.

Among them, short term and home swapping are the most relevant economic activities which are emerging from this revolution. These new peer-to-peer services disrupt traditional local services, influence housing affordability and change urban environment.

This Impulse paper scrutinise the existing regulatory framework for the collaborative economy in the accommodation/tourism sector in Paris, Rome, Milan and London and, once identified municipal rules, to give a view on its compatibility with EU law, in relation to both: the peer provider - individual or business - who offers through online platforms a spare room in their primary residence or an apartment for short-term rental or home exchange/swap, to other individuals or companies; and the online platforms which advertises and intermediates between the peer provider offering the assets and the user looking for accommodation service. In the closing part of the impulse paper these findings will be compared in order to verify the actual degree of legal coordination, harmonization, and unification that has been achieved in the field.

The first part of the paper (chapters 2-4) identifies national, regional or local rules and related administrative practices that apply and regulate the collaborative economy in the accommodation/tourism sector in the above-mentioned cities both for: a) providers of the assets (rooms, apartments, etc.) for home-sharing or short-term rentals and home swapping; b) online platforms offering/advertising those assets.

The central part of the impulse paper (chapter 5) will assess: a) whether the applicable legislation which imposes authorisation, licenses and registration requirements on providers

of collaborative economy services and on intermediation platforms, as identified and discusses in Chapters 2-4, can be considered a "restriction" under EU law; b) the possible overriding reason of public interest that could justify such restrictions according to the competent national authority; c) whether the identified restrictions are justified in view of the principles of proportionality and necessity; d) which other less restrictive means may be used to achieve or protect the same overriding reasons of general interest, if considered that those are justified. This part takes into account all relevant legislative and administrative measures – among all, Services Directive and e-Commerce Directive – in order to verify the effective protection of freedom to provide services and freedom of establishment (Articles 56 and 49 TFEU). A special attention is devoted to case-law and particularly to decisions rendered by the European Court of Justice.

A comparative study among the legal solutions adopted for each city is also carried out (chapter six), focusing on observing similarities as well as differences in each distinctive legal system covered by this study.

The last part of the paper (chapter seven) is devoted to conclusive remarks and final recommendations.

3 FRANCE. PARIS

3.1 Task I - Identification of the existing rules

First, identify the national, regional or local rules and administrative practices (related for example to the functioning of the registry) that apply and regulate the above-mentioned activities both for providers of the assets (rooms, apartments, etc.) for home-sharing or short-term rentals and home swapping, and the online platforms offering/advertising those assets.

3.2 The collaborative economy

In France there is no general law on collaborative economy. However, France is preparing several laws which will impact this sector. In January 2016 the National Assembly passed the Bill for a Digital Republic, jointly prepared in consultation with citizens, that establishes net neutrality, data portability and the confidentiality of electronic correspondence; states that online review sites must indicate whether their publication has been verified so that consumers can assess the degree of credibility of the reviews available online; imposes public bodies to publish their databases online; requires public authorities to guarantee the quality and updating of "reference data" such as the national address database.[1]

Other bills - *Nouvelles opportunités économiques* (*Noé*) and *Sapin II* – have been presented in the last months.[2] The assumption behind these new bills is that current economic models are deeply questioned by technological transformations and a new type of innovation – first of all, innovation to use - in the same way to create innovation and transformation of the productive model itself. This brand new innovation is due to digital competition, that is lowering search costs, helping developing co-operative economy (BlaBlaCar; Airbnb) that often represents additional income and less spending for French.[3]

[1] http://www.gouvernement.fr/en/the-digital-bill.
[2] http://proxy-pubminefi.diffusion.finances.gouv.fr/pub/document/18/20703.pdf.
[3] http://www.economie.gouv.fr/files/files/PDF/presentation-Noe_0911205.pdf.

3.3 The accommodation sector

France is one of the biggest market in short-term rentals. Paris has more than thirty-five thousands Airbnb listings, the overall majority of which are entire homes/apartments (around 84%), the rest being private or shared rooms. The average price per night is around one hundred euros. While eighty percent of hosts have a single listing, the other twenty percent have multiple listings (ranging from more than one hundred to few units).[4]

Absent a general law on collaborative economy, existing regulatory framework for the collaborative economy in the accommodation/tourism sector is mainly based on *Loi n° 2014-366 du 24 March 2014 pour l'accès au logement et un urbanisme rénové (Loi ALUR)*(4). This statute governs the access to housing and renovated urban planning, whose aim is to improve access to housing for households and to promote the construction in accordance with the quality of the living environment. Other relevant legislation is the *Code du Tourism*.

3.4 Definitions and classifications

Different legal regimes apply to short-term rentals in France, depending on the type of dwelling that is rented out and its destination of use. These distinctions concern the definition of the premise as "residential", and between primary residence ("*résidence principale*") and secondary residence ("*résidence sécondaire*"). Another relevant category is "*meublés de tourisme*" (tourist dwellings). All these variances are relevant for ascertaining the legal regime of short-term rentals in the peer-to-peer economy in France.

3.4.1 Residential use

A first classification to be taken into account is based on whether the dwelling is residential or not. A dwelling is deemed to be for residential use if this was its destination on January 1st, 1970. This destination can be demonstrated by any evidence. Premises that have been built or restored, in accordance with a change of destination after January 1st, 1970, are deemed to have the destination for which the building or work is allowed. However, when an

[4] Source: Inside Airbnb, http://insideairbnb.com/paris/#.

authorization (subject to compensation) has been issued after January 1, 1970 to change the destination, both modified premise and dwelling used for compensation are considered to have the destination specified in the authorization.

Constituent des locaux destinés à l'habitation toutes catégories de logements et leurs annexes, y compris les logements-foyers, logements de gardien, chambres de service, logements de fonction, logements inclus dans un bail commercial, locaux meublés donnés en location dans les conditions de l'article L. 632-1.
Pour l'application de la présente section, un local est réputé à usage d'habitation s'il était affecté à cet usage au 1er janvier 1970. Cette affectation peut être établie par tout mode de preuve. Les locaux construits ou faisant l'objet de travaux ayant pour conséquence d'en changer la destination postérieurement au 1er janvier 1970 sont réputés avoir l'usage pour lequel la construction ou les travaux sont autorisés.
Toutefois, lorsqu'une autorisation administrative subordonnée à une compensation a été accordée après le 1er janvier 1970 pour changer l'usage d'un local mentionné à l'alinéa précédent, le local autorisé à changer d'usage et le local ayant servi de compensation sont réputés avoir l'usage résultant de l'autorisation.[5]

3.4.2 Principal and secondary residence

Another important distinction, that may affect the legal rules applicable to short-term rentals and home swap, must be traced between principal and secondary residence. The main residence is any dwelling occupied for at least eight months a year, unless there are professional obligations, health or force majeure, occur either to the lessee, her partner or dependent family member, in accordance with the meanings devised by the *Code de la construction et de l'habitation*.

La résidence principale est entendue comme le logement occupé au moins huit mois par an, sauf obligation professionnelle, raison de santé ou cas de force majeure, soit par le preneur ou

[5] Article L631-7, Code de la construction et de l'habitation.

son conjoint, soit par une personne à charge au sens du code de la construction et de l'habitation.[6]

Following this rule, the accommodation cannot remain unoccupied by residents for more than 120 days per year, in order to be regarded as "*résidence principale*". Therefore, an accommodation that is rented more than 120 days in a solar year is regarded as a "*résidence sécondaire*".

3.4.3 Meublés de tourisme

The definition of "*meublés de tourisme*" is also of great importance for short-term rentals. *Meublés de tourisme* are furnished villas, apartments or studios, that are in the exclusive use of the tenant, and are offered for rent to temporary guests, who do not elect domicile in the rented dwelling, for a period of staying determined by day, week or month.

Les meublés de tourisme sont des villas, appartements, ou studios meublés, à l'usage exclusif du locataire, offerts 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.[7]

Meublés de tourisme differ from other types of accommodation, such as hotels and tourism residences, in that they are reserved for the exclusive use of the tenant, with no reception, additional services or shared facilities. They also differ from B&B, because in this latter case the owner lives in the premise during the rental period. Further, seasonal or holiday rentals differ from the residential lease by two criteria: the tenant does not elect domicile in the rented dwelling, which is mainly for vacation; rental periods last no longer than ninety days.[8]

[6] Art. 2, Loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986, Modifié par LOI n°2014-366 du 24 mars 2014 - art. 1.
[7] Article D324-1. Code de tourism.
[8] http://www.entreprises.gouv.fr/tourisme/meubles-tourisme.

3.4.4 Residency

The last relevant concept to be defined in order to assess the discipline applicable to short term rentals and to verify how these rules impact with EU law is "residency".

Determination of residency status in France is governed by a general rule providing that those who spend at least 183 days per calendar year in France are deemed to be resident. Alternatively, a person is regarded as resident if any one of these conditions apply: having the main home in France; carrying on a professional activity in France (either self-employed or as an employee); having the centre of economic interests in France.

According to Art. 4B, *Code Général des Impôts* (CGI):

"*1. Sont considérées comme ayant leur domicile fiscal en France au sens de l'article 4 A:*

a. Les personnes qui ont en France leur foyer ou le lieu de leur séjour principal ;

b. Celles qui exercent en France une activité professionnelle, salariée ou non, à moins qu'elles ne justifient que cette activité y est exercée à titre accessoire ;

c. Celles qui ont en France le centre de leurs intérêts économiques.

2. Sont également considérés comme ayant leur domicile fiscal en France les agents de l'Etat qui exercent leurs fonctions ou sont chargés de mission dans un pays étranger et qui ne sont pas soumis dans ce pays à un impôt personnel sur l'ensemble de leurs revenus."[9]

Art. 4A, of the Code Général des Impôts (CGI), states that: "Les personnes qui ont en France leur domicile fiscal sont passibles de l'impôt sur le revenu en raison de l'ensemble de leurs revenus. Celles dont le domicile fiscal est situé hors de France sont passibles de cet impôt en raison de leurs seuls revenus de source française."[10]

Once identified the meaning of "residential use", "primary residence", "secondary residence" and "touristic dwelling" under French law, it is now possible to verify how renting a place to stay for short-term rentals to guest is regulated in France.

[9] Art. 4B of the Code Général des Impôts (CGI).
[10] Art. 4A of the Code Général des Impôts (CGI).

3.5 Change of use

Renting a furnished lodging repeatedly for short periods to transient guests, who do not elect their domicile in the lodging, is deemed as a change in the use.

Le fait de louer un local meublé destiné à l'habitation de manière répétée pour de courtes durées à une clientèle de passage qui n'y élit pas domicile constitue un changement d'usage au sens du présent article.[11]

The legal regime of change in use significantly differs from place to place, ranging from no formal requirement at all to communication or - in some cases - authorization regime. In this latter case, a compensation may be required (see *infra*). Thus, change of use is subject to different rules depending on where the premise is located.

3.5.1 Communication regime

Any person offering a *meublé de tourisme* for rent, whether classified or not, must declare it to the mayor of the municipality where the premise is located.

Toute personne qui offre à la location un meublé de tourisme, que celui-ci soit classé ou non au sens du présent code, doit en avoir préalablement fait la déclaration auprès du maire de la commune où est situé le meublé.[12]

The declaration must be sent to the mayor of the municipality where the premise is located by certified mail and return receipt. It must specify: the identity and address of the declarant, the address of the *meublé de tourisme*, the number of rooms/beds, and the anticipated rental periods. When applicable, the declarant must also communicate the date of classification

[11] Art. L631-7, Code de la construction et de l'habitation.
[12] Art. L324-1-1, Code du Tourisme.

decision and the level of classification of the *meublé de tourisme*. In case of any change of the above mentioned information, a new declaration the mayor of the municipality where the premise is located is required. The list of furnished accommodation, classified or not within the meaning of this code is available at the Town Hall.

La déclaration de location d'un meublé de tourisme, que celui-ci soit classé ou non au sens du présent code, prévue à l'article L. 324-1-1 est adressée au maire de la commune où est situé le meublé par tout moyen permettant d'en obtenir un accusé de réception.
La déclaration précise l'identité et l'adresse du déclarant, l'adresse du meublé de tourisme, le nombre de pièces composant le meublé, le nombre de lits, la ou les périodes prévisionnelles de location et, le cas échéant, la date de la décision de classement et le niveau de classement des meublés de tourisme.
Tout changement concernant les éléments d'information que comporte la déclaration fait l'objet d'une nouvelle déclaration en mairie.
La liste des meublés de tourisme, classés ou non au sens du présent code, est consultable en mairie.[13]

3.5.2 Exception: *résidence principale*

However, when the dwelling is the primary residence - that is to say, when the owner lives there more than eight months a year - there is no duty to declare the property. As a result, the duty to communicate does not apply to premises that are the "*résidence principale*" of the landlord.

Cette déclaration préalable n'est pas obligatoire lorsque le local à usage d'habitation constitue la résidence principale du loueur, au sens de l'article 2 de la loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986.[14]

[13] Art. D324-1-1, Code du Tourisme.
[14] Art. L324-1-1 Code du Tourisme.

3.5.3 Authorisation regime

In some geographical areas, a prior authorization issued by City Hall is also required in order to rent a furnished accommodation housing that determines a change of use of the dwelling, from main residence to tourist furnished premise.

This authorization scheme applies to: Paris; the municipalities of the suburbs (Hauts-de-Seine, Seine-Saint-Denis and Val-de-Marne); municipalities with more than two hundred-thousands inhabitants. In all these cases the change of use of premises for housing is subject to prior authorization, as provided by Article L. 631-7-1.

La présente section est applicable aux communes de plus de 200 000 habitants et à celles des départements des Hauts-de-Seine, de la Seine-Saint-Denis et du Val-de-Marne. Dans ces communes, le changement d'usage des locaux destinés à l'habitation est, dans les conditions fixées par l'article L. 631-7-1, soumis à autorisation préalable.[15]

3.5.4 Authorisation with compensation scheme

In above-specified municipalities and regions, such authorization is granted subject to a "compensation". Compensation requires the requester to convert an area of commercial premises into "residential", which is equivalent to the one to be used as short term rental. In sum, the authorization to a permanent change of destination is conditional to a compensation obligation, consisting in the transformation into housing of a surface equivalent to the one used for touristic accommodation.[16]

[15] Art. L631-7 (6) Code de Construction et d'Habitation.

[16] See Mairie de Pris, Bureau de la Protection des Locaux d'Habitation – Direction du Logement et de l'Habitat - Règlement municipal fixant les conditions de délivrance des autorisations de changement d'usage de locaux d'habitation et déterminant les compensations en application de la section 2 du chapitre 1er du titre III du livre VI du Code de la construction et de l'habitation - November 2014. In Paris the change of use can be subject to different types of authorizations: 1) : mixed use authorization, issued to a person exercising a professional or commercial activity in her principal residence; 2) "personal" authorization, issued to a specific person for the duration of her activity in the local; 3) change of destination of the dwelling, permanently turning a dwelling into professional or commercial use. http://www.paris.fr/services-et-infos-pratiques/urbanisme-et-architecture/demandes-d-autorisations/exercer-une-activite-dans-un-logement-172. For change of destination of the dwelling, permanently turning a dwelling into professional or commercial use, see https://api-site.paris.fr/images/72044.

In order to comply with this prescription, applicants for a change of use can alternatively: a) propose as compensation another premise that she owns, turning it into housing; b) buy a stock compensation from a third party, who is the owner of a premise with a use other than residential (offices, shops ...), and turn it into housing. Following this alternative, a title of compensation can be either a premise owned by the requester or a "merchantability transfer certificate" sold in the market. In any case, once the title of compensation is obtained, the requester can file an application for permanent change of use.

The compensation consists in the conversion of non-residential premises into housing. The premises offered as compensation must cumulatively: a) be of equivalent quality and surface to those subject to the change of use, b) be located in the same *arrondissement* of the converted premise (art. 2, co. 1).

Les locaux proposés en compensation doivent cumulativement:
a) correspondre à des unités de logement, et être de qualité et de surface équivalentes à celles faisant l'objet du changement d'usage, les dossiers étant examinés en fonction de la qualité d'habitabilité des locaux. Les locaux apportés en compensation doivent répondre aux normes définies par le décret du 30 janvier 2002 relatif aux caractéristiques du logement décent ;
b) être situés dans le même arrondissement que les locaux d'habitation faisant l'objet du changement d'usage.

In some special areas (*secteur de compensation renforcée*), defined in the Annex to the Municipal regulation, the area required is doubled (art. 2, co. 2):

Dans le secteur de compensation renforcée défini en annexe n° 1, par dérogation au a) du I, les locaux proposés en compensation doivent représenter une surface double de celle faisant l'objet de la demande du changement d'usage, sauf si ces locaux sont transformés en logements locatifs sociaux faisant l'objet d'une convention conclue en application de l'article L 351-2 du Code de la construction et de l'habitation d'une durée minimale de 20 ans.

Compensation is neither a tax, nor it is monetary. Nonetheless it can be very expensive. Even if there are no official prices for purchase of "compensation" and prices are negotiated between the buyer and seller, varying depending on where the is located, the average price in Paris is around € 1,600 per square meter, with very significant differences, ranging from € 400 per m² up to € 3,000 per m² (especially in those west/center districts of Paris, where the demand for shot term rentals is particularly strong).[17]

The authorization is considered to be personal and it is related to the person. It expires when the beneficiary ends her professional activity for any reason whatsoever. However, when the authorization is subject to compensation, the title is attached to the premise. Premises offered in compensation are listed in the authorization and recorded in the public register.

L'autorisation préalable au changement d'usage est délivrée par le maire de la commune dans laquelle est situé l'immeuble, après avis, à Paris, Marseille et Lyon, du maire d'arrondissement concerné. Elle peut être subordonnée à une compensation sous la forme de la transformation concomitante en habitation de locaux ayant un autre usage.
L'autorisation de changement d'usage est accordée à titre personnel. Elle cesse de produire effet lorsqu'il est mis fin, à titre définitif, pour quelque raison que ce soit, à l'exercice professionnel du bénéficiaire. Toutefois, lorsque l'autorisation est subordonnée à une compensation, le titre est attaché au local et non à la personne. Les locaux offerts en compensation sont mentionnés dans l'autorisation qui est publiée au fichier immobilier ou inscrite au livre foncier.[18]

[17] http://www.paris.fr/services-et-infos-pratiques/urbanisme-et-architecture/demandes-d-autorisations/exercer-une-activite-dans-un-logement-172#autorisation-3-le-changement-d-usage-a-caractere-reel-avec-compensation_5.
[18] Article L631-7-1, Code de Construction et d'Habitation. In its website, Airbnb itself specifies: Si votre bien entre actuellement dans la catégorie des locaux destinés à l'habitation, le fait de le louer de manière répétée pour de courtes durées à une clientèle de passage qui n'y élit pas domicile constitue un changement d'usage soumis à une autorisation préalable de la mairie.

3.5.5 Rationale for compensation

As reported, the authorization for a change of destination and for the transformation of housing premises into *meublé de tourisme*, repeatedly rented for short periods to transient guests who do not establish their domicile there, is subject to compensation.

The main purpose of this legal requirement is the need not to aggravate the shortage of housing. The objective of French regulation on the change of use of residential premise, and of this system based on compensation, is not worsen the lack of housing in cities like Paris. Further, legislation takes into account social diversity objectives and balance between housing and employment in different neighborhoods of Paris, in accordance with local housing program and the local development plan in force in Paris.[19]

3.5.6 Exception: *résidence principale*

When the housing premises are the principal residence of the landlord within the meaning of Article 2 of Law No. 89-462 of July 6, 1989 (…) the authorization to change the use, provided for in Article L. 631-7 of this Code or under this article, is not necessary to rent the premises for short periods to transient guests who do not elect domicile.

Lorsque le local à usage d'habitation constitue la résidence principale du loueur, au sens de l'article 2 de la loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986, l'autorisation de changement d'usage prévue à l'article L. 631-7 du présent code ou celle prévue au present article n'est pas nécessaire pour le louer pour de courtes durées à une clientèle de passage qui n'y élit pas domicile.[20]

[19] http://www.paris.fr/services-et-infos-pratiques/urbanisme-et-architecture/demandes-d-autorisations/exercer-une-activite-dans-un-logement-172#autorisation-3-le-changement-d-usage-a-caractere-reel-avec-compensation_5.
[20] Article L631-7-1 A alinéa 5, Code de Construction et d'Habitation.

3.6 Temporary change of destination

A partial exception is permissible for temporary changes of destination. A resolution of the Municipal council may set a temporary authorization regime for change in use, allowing an individual to rent her dwelling for short periods to transient guests who do not elect domicile there. The resolution sets the conditions for issuing this temporary authorization by the mayor of the municipality where the property is situated (the *maire d'arrondissement* in Paris, Marseille and Lyon). The resolution also determines the criteria for this temporary authorization, which may relate to the duration of the lease, the physical characteristics of the place and its location, in accordance with specific characteristics of the residential premises market and the need to to worsen the housing shortage. These criteria can be adjusted depending on the number of authorizations granted to the same owner.

Une délibération du conseil municipal peut définir un régime d'autorisation temporaire de changement d'usage permettant à une personne physique de louer pour de courtes durées des locaux destinés à l'habitation à une clientèle de passage qui n'y élit pas domicile.
La délibération fixe les conditions de délivrance de cette autorisation temporaire par le maire de la commune dans laquelle est situé l'immeuble après avis, à Paris, Marseille et Lyon, du maire d'arrondissement concerné. Elle détermine également les critères de cette autorisation temporaire, qui peuvent porter sur la durée des contrats de location, sur les caractéristiques physiques du local ainsi que sur sa localisation en fonction notamment des caractéristiques des marchés de locaux d'habitation et de la nécessité de ne pas aggraver la pénurie de logements. Ces critères peuvent être modulés en fonction du nombre d'autorisations accordées à un même propriétaire.
Si la commune est membre d'un établissement public de coopération intercommunale compétent en matière de plan local d'urbanisme, la délibération est prise par l'organe délibérant de cet établissement.
Le local à usage d'habitation bénéficiant de cette autorisation temporaire ne change pas de destination, au sens du 2° du II de l'article L. 123-1-5 du code de l'urbanisme.[21]

[21] Article L631-7-1 A Créé par LOI n°2014-366 du 24 mars 2014 - art. 16.

3.7 Other regulations

In order to comply with regulation for short-term rentals, other duties are on the lessor. First of all, the lessor is obliged, by the nature of the contract and without the need of any special written statement, to grant to the lessee a decent stay. If the rented premise is unsuitable for residential use, the lessor cannot claim the voidness of the lease or its termination, in order to obtain the eviction of the occupier. Further, the lessor has a legal duty to guarantee that the rented place can be used for the purpose for which it was rented and ensure the enjoyment of the rented place during the lease, the continuity and the quality of the stay.

Le bailleur est obligé, par la nature du contrat, et sans qu'il soit besoin d'aucune stipulation particulière : De délivrer au preneur la chose louée et, s'il s'agit de son habitation principale, un logement décent. Lorsque des locaux loués à usage d'habitation sont impropres à cet usage, le bailleur ne peut se prévaloir de la nullité du bail ou de sa résiliation pour demander l'expulsion de l'occupant; D'entretenir cette chose en état de servir à l'usage pour lequel elle a été louée ; D'en faire jouir paisiblement le preneur pendant la durée du bail; D'assurer également la permanence et la qualité des plantations.[22]

Other obligations concern the safety of the premise: e.g. to install a standard smoke detector and, if the house is leased, to ensure that the smoke detector is properly working in the establishment of the inventory[23] and to ascertain the safety of swimming pools, if any.[24]

[22] Article 1719 Code civil.

[23] Article L129-8, Code de la construction et de l'habitation. «Le propriétaire d'un logement installe dans celui-ci au moins un détecteur de fumée normalisé et s'assure, si le logement est mis en location, de son bon fonctionnement lors de l'établissement de l'état des lieux mentionné à l'article 3-2 de la loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986. L'occupant d'un logement, qu'il soit locataire ou propriétaire, veille à l'entretien et au bon fonctionnement de ce dispositif et assure son renouvellement, si nécessaire, tant qu'il occupe le logement. Cette obligation incombe au propriétaire non occupant dans des conditions définies par décret en Conseil d'Etat, notamment pour les locations saisonnières, les foyers, les logements de fonction et les locations meublées. Ce décret fixe également les mesures de sécurité à mettre en œuvre par les propriétaires dans les parties communes des immeubles pour prévenir le risque d'incendie. L'occupant du logement notifie cette installation à l'assureur avec lequel il a conclu un contrat garantissant les dommages d'incendie.»

[24] Article R128-1, Code de la construction et de l'habitation. «Les maîtres d'ouvrage des piscines construites ou installées à partir du 1er janvier 2004 doivent les avoir pourvues d'un dispositif de sécurité destiné à prévenir les noyades, au plus tard à la mise en eau, ou, si les travaux de mise en place des dispositifs nécessitent une mise en eau préalable, au plus tard à l'achèvement des travaux de la piscine.»

3.8 Taxe de séjour (city tax).

After October 1st, 2015, a tax of 0.83 euros per person per night is charged in Paris for accommodation in "meublés touristiques non classés" and it includes the city-imposed tourist tax and the administrative district tax.[25] According to the agreement concluded between the city of Paris and Airbnb, this tax is added to the total amount paid by guests for stays in Paris and is directly remitted by Airbnb to City Hall.[26]

3.9 Sanctions

Anyone who violates the provisions of Article L. 631-7 or does not comply with the conditions or obligations imposed under that article is fined € 25,000. The fine is imposed by the Public prosecutor and issued by the President of the Court. The fine is to be paid to the municipality where the building is located.

An order to return the illegally transformed premise to residential use can also be issued by the President of the Court. The order must be executed within a time limit; at the expiration of this term, the judge condemns the owner to pay a penalty (*astreinte*) up to one thousand euros per day per square meter. Damages are to be paid to the city where the property is situated. When the deadline is expired, the administration may proceed *ex officio* to the eviction of the occupiers and do the necessary work, at the expenses of the infringer.

Toute personne qui enfreint les dispositions de l'article L. 631-7 ou qui ne se conforme pas aux conditions ou obligations imposées en application dudit article est condamnée à une amende de 25 000 euros.

Cette amende est prononcée à la requête du ministère public par le président du tribunal de grande instance du lieu de l'immeuble, statuant en référé ; le produit en est intégralement versé à la commune dans laquelle est située l'immeuble.

Le président du tribunal ordonne le retour à l'habitation des locaux transformés sans

[25] http://next.paris.fr/pro/df-fiscalite-des-entreprises/taxe-de-sejour/rub_9536_stand_88121_port_23422.
[26] http://publicpolicy.airbnb.com/wp-content/uploads/2015/08/Parisrelease-English.pdf.

autorisation dans un délai qu'il fixe. A l'expiration de celui-ci, il prononce une astreinte d'un montant maximal de 1 000 euros par jour et par mètre carré utile des locaux irrégulièrement transformés. Le produit en est intégralement versé à la commune dans laquelle est situé l'immeuble.

Passé ce délai, l'administration peut procéder d'office, aux frais du contrevenant, à l'expulsion des occupants et à l'exécution des travaux nécessaires.[27]

3.10 Sublet

To sublet the dwelling an authorization issued by the owner is usually required.

Le locataire ne peut ni céder le contrat de location, ni sous-louer le logement sauf avec l'accord écrit du bailleur, y compris sur le prix du loyer. Le prix du loyer au mètre carré de surface habitable des locaux sous-loués ne peut excéder celui payé par le locataire principal.

Le locataire transmet au sous-locataire l'autorisation écrite du bailleur et la copie du bail en cours. En cas de cessation du contrat principal, le sous-locataire ne peut se prévaloir d'aucun droit à l'encontre du bailleur ni d'aucun titre d'occupation.

Les autres dispositions de la présente loi ne sont pas applicables au contrat de sous-location.[28]

Sublet is forbidden for Habitation à loyer modéré (HLM).

Dans tous les immeubles destinés à la location et financés au moyen de crédits prévus par le livre III, il est interdit de louer en meublé ou de sous-louer un logement, meublé ou non, sous quelque forme que ce soit, sous peine d'une amende de 9 000 €.[29]

[27] L651-2, Code de Construction et d'Habitation.
[28] Art. 8, Loi du 6 juillet 1989.
[29] Art. L442-8, Code de Construction et d'Habitation.

3.11 Platforms. Liability and duties

3.11.1 Loi no. 575 21.6. 2004 pour la confiance dans l'économie numérique

According to the E-commerce Directive 2000/31, internet intermediary service providers should not be held liable for the content that they transmit, store or host, as long as they act in a strictly passive manner (articles 12 to 14). And this principle has been transposed in France with the reception of the Directive.[30]

Under French law, intermediaries lose protection if they are too "active", as opposed to being "passive" or "neutral" - the more discretion the platform exercises in managing the functioning of the website, the more responsibility it has. Despite this reception, it is not always easy to define the limits on what intermediaries can do, before losing the possibility to benefit from the limitations of liability set out in the Directive. The law requires the service providers to act as intermediaries and to maintain a passive role in order to benefit from the liability exemption. However, the level of passiveness differs among the three types of service providers.

In 2007 the Court of Paris ruled that, although social network hosts information provided by its users, it nonetheless does not limit itself to this function, offering a presentation structure, and displaying banners from which it clearly draws profits. Thus acting as an editor with coming responsibilities.[31]

Two years later, another decision by the same Court recognises video platform YouTube as a hosting provider, despite the offering of the presentation structure and search facilities, since these activities do not influence its qualification as hosting provider.[32]

[30] Loi no. 575 21.6. 2004 pour la confiance dans l'économie numérique. Before the adoption of the Directive, in 1996 a bill was introduced the Minister of Telecommunication to limit the liability of online intermediaries. Nevertheless, case law varied considerably since French legal doctrine made also use of general tort law in order to define these cases.

[31] T.G.I. Paris, réf., 22 June 2007, Lafesse v. Myspace.

[32] Bayard Presse / YouTube LLC, TGI de Paris 3ème chambre, 2ème section, 10 July 2009, available at www.legalis.net/jurisprudence-decision.php3?id_article=2693. See also Legal analysis of a Single Market for an Information Society – Liability of online intermediaries, 2009,

In a third case, the Court ruled that a service provider who was aware of the possibility that users upload illegal content, had an obligation to monitor this content before it was published on the website.[33]

Finally, in 2012 a decision by the *Cour de Cassation* found a famous ecommerce website liable for abstention and negligence, resulting in its failure to set up effective and appropriate means to control the website. The website was not deemed as a "passive host" but rather as an "active broker", playing an essential role in the commercialization of products and profiting from sales. As a broker—rather than a technical intermediary— it was held ineligible under the hosting exemption and deemed liable for failing to control its own activity.[34]

It is not entirely clear whether peer-to-peer networks may be considered as "mere conduit" providers (see art. 12, Directive), acting in a passive manner, so benefiting from liability exemptions. As a matter of fact, given the central role that online platforms perform in collaborative economy, it is highly likely that they would be considered as "active", according to French case law, and held liable according to general tort law.

3.11.2 Other regulations

Beside general rules on responsibility for online platforms, online intermediaries in the accommodation sector have additional duties.

Anyone who engages or assists a lessor in exchange for money, through activity or negotiation or by providing a digital platform, has a duty to inform the lessor about any prior declaration or authorization required by the law and to obtain a declaration of compliance. It follows that when a dwelling is rented via a real estate agency or an online booking site, the agency or the platform must inform the lessor about her legal obligations and, if necessary, about the need

[33] Zadig Productions v. Google Inc., Court of Appeals of Paris, December 3, 2010.

[34] Cour de Cassation, eBay Inc. et al. v. LVMH, Parfums Christian Dior et al., May 3, 2012 (affirming C.A. Paris Sep. 3, 2010), holding eBay liable for third parties' sales on eBay because played an "active role" in providing assistance in the promotion and optimization of these offers. eBay was also held to have red flag knowledge of infringing activity because of (i) the multitude notices of infringement it received on sales concerning this type of products and (ii) its promotion and involvement in these sales..

of a prior communication or authorization for the change of use of the premise. Further, before renting a dwelling subject to article L. 324-1-1 of the *Code du tourisme* and articles L. 631-7 and following of the Code of Construction and Housing, the agency or the platform must obtain a sworn statement attesting that the lessor complied with the prescribed formalities.[35]

Toute personne qui se livre ou prête son concours contre rémunération, par une activité d'entremise ou de négociation ou par la mise à disposition d'une plateforme numérique, à la mise en location d'un logement soumis à l'article L. 324-1-1 du présent code et aux articles L. 631-7 et suivants du code de la construction et de l'habitation informe le loueur des obligations de déclaration ou d'autorisation préalables prévues par ces articles et obtient de lui, préalablement à la location du bien, une déclaration sur l'honneur attestant du respect de ces obligations.[36]

In addition, Law No. 2015-1785 of Finance 2016 requires undertakings to inform individuals that perform business transactions through it of their tax and social obligations (this rule applies to transactions taking place after 1st July 2016).[37]

3.12 Home swap

3.12.1 Money and monetary obligations.

In order to qualify home swap under French law, an elucidation of concepts such as money and monetary obligation may be of use.

Absent a statutory definition of money, according to one of the most well-known definitions, money can be described as “a legal instrument for payment that can have either a metal or a fiduciary base, in accordance with monetary systems, or more often a combination of the two”

[35] https://www.service-public.fr/particuliers/vosdroits/F2043.
[36] LOI n° 2014-366 du 24 mars 2014 pour l'accès au logement et un urbanisme rénové - Article 11.
[37] https://www.service-public.fr/particuliers/vosdroits/F2043.

("*un instrument légal de paiement, pouvant avoir, suivant les systèmes monétaires, une base métallique ou une base fiduciaire, le plus souvent par combinaison des deux*").[38]

Under French law, money obligations are subject to the so-called nominalist principle. It implies that a unit of currency is always equal to itself and unaffected neither by the external changes in the value of currency (the rate of exchange) nor by the internal changes. This principle is famously laid down in art. 1895 c.c. (*prêt en argent*): The obligation resulting from a loan of money consists in the sum stated in the contract, and the debtor must return the money lent, and shall make that amount in the coin current at time of payment.[39] However, both *Cour de Cassation* and *Conseil Constitutional*, with their decisions, eroded the original centrality of the principle, in order to protect creditor's interests especially in time of high inflation [40]

A statutory definition is available for electronic money: "*La monnaie électronique est une valeur monétaire qui est stockée sous une forme électronique, y compris magnétique, représentant une créance sur l'émetteur, qui est émise contre la remise de fonds aux fins d'opérations de paiement définies à l'article L. 133-3 du code monétaire et financier et qui est acceptée par une personne physique ou morale autre que l'émetteur de monnaie électronique*".[41]

3.12.2 Remuneration and contract

Under French contract law, a remuneration exists when the advantage conferred by one of the parties to the other one is interdepended with an advantage that the party receive from the other one. A remuneration may consist in money (see *supra*) or any other valuable advantage conferred on the other party.

[38] G. Cornu, Vocabulaire juridique, Association Henri Capitant.
[39] Art. 1895: "L'obligation qui résulte d'un prêt en argent n'est toujours que de la somme énoncée au contrat. S'il y a eu augmentation ou diminution d'espèces avant l'époque du paiement, le débiteur doit rendre la somme prêtée, et ne doit rendre que cette somme dans les espèces ayant cours au moment du paiement."
[40] Cons. const. 16 janv. 1982.
[41] Loi n° 2013-100 du 28 janvier 2013 portant diverses dispositions d'adaptation de la législation au droit de l'Union européenne en matière économique et financière

In such a case, when each parties' obligation is dependent on the obligation of the other, there is an interdependence of the contractual performances. It follows that a legal action for the resolution of the contract can be issued, on the ground of the other party's non-performance (*action en resolution*).[42]

Reciprocity is what define a contract as "bilateral", meaning that the conferral of an advantage in justified by a "remuneration" by the other party. A synallagmatic (bilateral) contract is a contract that creates reciprocal obligations on both parties, and each of them have reciprocal and interrelated rights and duties arising from the contract.[43]

A related distinction is the one between *contrat à titre onéreux* and *contrat à titre gratuit*.[44] The presence or absence of an intention to receive a reciprocal advantage is at the basis of this distinction. In the first type of contract one party confers an advantage (i.e. a right) on the other party, while obtaining a reciprocal advantage for herself; in the second one, an advantage is conferred by one of the two parties with no intention to obtain an advantage (*intention libérale*). As for the terminology, contracts for gratuitous services are usually referred as *contrat de bienfaisance* or *contrat désintéressés*.[45]

The last potentially relevant feature of French contract law is the distinction between nominate and innominate contracts. The French civil code lists a number of "named" contracts (*contrats nommés*), providing specific rules for each of them. At the same time, it also acknowledges that parties are free to make other contracts (*contrats innomés*), following the principle of autonomy of the will. In this second case, the contract must first be "qualified" by

[42] Art. 1184 c.c.: "La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera point à son engagement. Dans ce cas, le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté, a le choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts. La résolution doit être demandée en justice, et il peut être accordé au défendeur un délai selon les circonstances."

[43] Art. 1102 c.c.: "Le contrat est synallagmatique ou bilatéral lorsque les contractants s'obligent réciproquement les uns envers les autres." Art. 1104 c.c.: "Il est commutatif lorsque chacune des parties s'engage à donner ou à faire une chose qui est regardée comme l'équivalent de ce qu'on lui donne, ou de ce qu'on fait pour elle. Lorsque l'équivalent consiste dans la chance de gain ou de perte pour chacune des parties, d'après un événement incertain, le contrat est aléatoire."

[44] All synallagmatic (bilateral) contract are *contrat à titre onéreux*.

[45] Art. 1105 c.c.: "Le contrat de bienfaisance est celui dans lequel l'une des parties procure à l'autre un avantage purement gratuit."; art. 1106 c.c.: "Le contrat à titre onéreux est celui qui assujettit chacune des parties à donner ou à faire quelque chose."

a court, in order to determine whether it falls within the realm of nominate contract: as a result, the court may decide that the contract is akin to one specific nominate contract or that it comprises elements of several nominate contracts, interpreting it accordingly and applying the related discipline.[46]

3.12.3 Qualification of home swap under French law

Home exchange/swap is the temporary peer to peer exchange of homes, usually for holidays. These agreements are not regulated under French law.

Absent a specific set of rules, home swap often takes the form of a detailed written agreement between two parties to swap their homes for a given period of time, although verbal agreements are also frequent. The exchange can be simultaneous, when it takes place in the same period, or it can occur in different moments. In this latter case, the exchange system if often coupled with a credit system that can be redeemed at a later date, so lessening potential scheduling problems that can hamper straight home swaps. Usually no monetary exchange takes place.

Following the above mentioned distinctions, home swap can be seen as an innominate (*contrat innomé*), synallagmatic (bilateral) contract, where both parties confer advantages on the other one, while obtaining a reciprocal advantage for themselves; and it is an onerous contract, since both parties have the intention to confer such an advantage in exchange for a reciprocal advantage.

The contract template most commonly proposed by platforms is usually based on "*prêt à usage*" (or "*commodat*"). According to article 1875, Code Civil, "*le prêt à usage ou commodat est un contrat par lequel l'une des parties livre une chose à l'autre pour s'en servir, à la charge par le preneur de la rendre après s'en être servi*". In other cases, the contract template proposed in based on *échang* (barter). According to art. 1702, Code Civil, "*L'échange est un*

[46] Art. 1107 c.c.: "Les contrats, soit qu'ils aient une dénomination propre, soit qu'ils n'en aient pas, sont soumis à des règles générales, qui sont l'objet du présent titre. Les règles particulières à certains contrats sont établies sous les titres relatifs à chacun d'eux ; et les règles particulières aux transactions commerciales sont établies par les lois relatives au commerce."

contrat par lequel les parties se donnent respectivement une chose pour une autre". In this case rules laid down for purchase can also be applied.[47] But no court decision has been found that legally defines this kind of contract.

Outside contract, tortious liability also applies. Despite the absence of money, potential risks connected to this kind of exchange are not negligible, and online platforms play an important role in guaranteeing the fairness of the exchange and the prevention and/or resolution of disputes; platforms may require prior registration of the parties, check parties' reliability, provide penalties in case of breach/damages, and recommend to take up insurance. Platforms may also provide detailed guidance on how to arrange a swap or even arrange it. However, most platforms do not accept responsibility for damages associated with any exchange.

3.13 Primary and secondary residence, change of use and professionalism

Renting a furnished lodging repeatedly for short periods to transient guests, who do not elect their domicile in the lodging, is deemed as a change in the use under French law.[48] However, the legal regime for such a change differs from place to place, ranging from no formal requirement at all to communication or - in some cases - authorization regime and, in this latter case, compensation. Even more important, an exception applies in both cases (communication and authorization with compensation) when the housing premise is the main residence of the landlord: in this case the communication or authorization to change the use is not necessary and no formality applies, in order to rent the premises for short periods to transient guests who do not elect domicile.[49]

This regulation aims at limiting rentals of residential premises for short periods, in order not to aggravate the shortage of housing. For this reason, exceptions in case of primary residence are provided, in consonance with the alleged rationale for these rules.

[47] Art. 1707, Code civil: "Toutes les autres règles prescrites pour le contrat de vente s'appliquent d'ailleurs à l'échange."
[48] Art. L631-7, Code de la construction et de l'habitation: "*Le fait de louer un local meublé destiné à l'habitation de manière répétée pour de courtes durées à une clientèle de passage qui n'y élit pas domicile constitue un changement d'usage au sens du présent article.* »
[49] Article L631-7-1 A alinéa 5, Code de Construction et d'Habitation ; Art. L324-1-1 Code du Tourisme.

The objective of French regulation on the change of use of residential premise, and especially of the system based on compensation, is not to worsen the lack of housing in cities like Paris, and also to take into account social diversity and to balance housing and employment in different neighborhoods of Paris, in accordance with local housing program and the local development plan in force in Paris.[50]

Since *résidence principale* is the residence of the landlord for at least eight months per year, no dwelling is thus subtracted to the market by renting it out occasionally, nor its destination as short term rental to transient guests for a limited time have the potential to aggravate the shortage of housing.[51]

Leaving aside the question as whether these rules amount to a prohibited restriction under EU law (see *infra*), following this line of reasoning the different legal treatment for primary and secondary residence does not amount to a different legal qualification for those who rent the dwelling, as professionals or not. Nor it intend to define short terms rentals of secondary residence as a professional activity. It is instead a way to face the lack of housing, limiting it to a temporary use of dwelling primarily devoted to residence, unless an authorization or communication is provided, mainly for the protection of urban environment.

3.14 Conclusions

In Paris the short-term rental of the principal residence by an individual is legal and offers an alternative kind of accommodation for tourists. However, a residence dedicated solely to short-term leasing requires a change of use from residential to *meublés de tourisme*. In this case, an authorization is needed and the owner must compensate for the commercial usage by creating a comparable furnished residential property.

[50] http://www.paris.fr/services-et-infos-pratiques/urbanisme-et-architecture/demandes-d-autorisations/exercer-une-activite-dans-un-logement-172#autorisation-3-le-changement-d-usage-a-caractere-reel-avec-compensation_5.

[51] http://www.paris.fr/services-et-infos-pratiques/urbanisme-et-architecture/demandes-d-autorisations/exercer-une-activite-dans-un-logement-172#autorisation-3-le-changement-d-usage-a-caractere-reel-avec-compensation_5.

Whereas in most French cities, a declaration to the city where the premise is located is mandatory in order to rent a *meublés de tourisme*, in Paris as well as in most touristic place an authorization issued by City Hall is required. The authorization to change the use of a dwelling is issued by the mayor of the city where the property is located. When an authorization is required, a compensation may be asked. Conditions for compensation are set by the municipalities. When authorization is subject to compensation, it often takes the form of the concomitant transformation into housing premise of other premises having a use different from residential.

Partial exceptions to these rules apply when the dwelling is the primary residence of the lessor, i.e. is the place where she lives at least eight months a year. In this case, no communication and/or authorization is mandatory. When the premise is the principal residence of the lessor, the communication or authorization to change the use is not necessary to rent for short periods to transient guests who do not elect domicile.[52]
A departure from the rule is possible for temporary changes of destination. A resolution of the municipal council may set a temporary authorization regime change in use of allowing an individual to rent for short periods of premises for housing to transient guests who do not elect domicile.

3.15 Legal texts

- Code du tourisme : articles L324-1 à L324-2-1 (Classement et déclaration en mairie des meublés de tourisme)
- Code du tourisme : articles D324-1 à R324-1-2 (Définition et déclaration en mairie des meublés de tourisme)

[52] Article L631-7-1 A Créé par LOI n°2014-366 du 24 mars 2014 - art. 16. "Lorsque le local à usage d'habitation constitue la résidence principale du loueur, au sens de l'article 2 de la loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986, l'autorisation de changement d'usage prévue à l'article L. 631-7 du présent code ou celle prévue au présent article n'est pas nécessaire pour le louer pour de courtes durées à une clientèle de passage qui n'y élit pas domicile."

- Code du tourisme : articles D324-2 à D324-6-1 (Procédure de classement des meublés de tourisme)
- Code du tourisme : articles R324-7 à R324-8 (Sanctions en cas de défaut ou insuffisance grave d'entretien du meublé et de ses installations)
- Code de la construction et de l'habitation : articles L631-7 à L631-9 (Autorisation de changement d'usage d'un bien immobilier)
- Arrêté du 2 août 2010 fixant les normes et la procédure de classement des meublés de tourisme
- Arrêté du 6 décembre 2010 relatif aux organismes de contrôle des meublés de tourisme

4 ITALY. ROME, MILAN

4.1 Task I - Identification of the existing rules

First, identify the national, regional or local rules and administrative practices (related for example to the functioning of the registry) that apply and regulate the above-mentioned activities both for providers of the assets (rooms, apartments, etc) for home-sharing or short-term rentals and home swapping, and the online platforms offering/advertising those assets.

4.2 The collaborative economy

In Italy there is no general law on collaborative economy. However, a bill has been presented in Parliament in March 2016, whose aim is to define the collaborative economy in a comprehensive way. This bill will be jointly discussion in consultation with citizens until May 31st 2016.[53] The draft bill – Atto Camera 3564 – Proposta di legge. *Disciplina delle piattaforme digitali per la condivisione di beni e servizi e disposizioni per la promozione dell'economia della condivisione* - is described by the promoters as the first law on collaborative economy in Europe.

Despite the comprehensive definition, the draft address only few issues related to the emergence of the collaborative economy. Among other things, it delegates to the Italian competition authority (Autorità garante della concorrenza e del mercato – AGCM) the task of controlling the collaborative platforms and to keep a public Register of these platforms (art. 3). It also provide a flat rate taxation for up to 10,000 euros for peers operating through these collaborative platforms (art. 6). The adoption of rules for adopting collaborative practices in the Public administration is also strongly supported (art. 8).

[53] http://www.makingspeechestalk.com/ch/comment_sea/?id_speech=45#sthash.VvLDRO9h.dpuf.

4.3 The accommodation sector

Italy is one of the biggest market in short-term rentals. Rome has more than fifteen thousands Airbnb listings[54]; more than six thousands are listed in Milan[55] and Florence[56] and more than three thousands in Venice.[57] In all these cases the overall majority of listings are entire homes/apartments, the rest being private or shared rooms.

4.3.1 State, Regions and Municipalities

Even if in Italy there is no general law on collaborative economy, both the accommodation and the tourism sectors are heavily regulated. As a result, there are different layers of a sector-specific legislation for peer-to-peer accommodation at national, regional and local level, and a multiplicity of sources regulates the use of premises for tourism.

The relative weight of each of these layer also depends on how the peer-to-peer rental is framed: as normal lease, regulated almost exclusively by the Italian civil code, or as tourism accommodation, whose regulation is attributed by the Italian Constitution to Regions. In order to clarify the discipline applicable to short-term accommodation is important to make this distinction as sharp as possible.

4.3.2 Italian Constitution and national legislation

Before the revision of Italian Constitution that took place in 2001, tourism was enumerated as a sector subject to "concurrent" regional legislation, which indicated that Regions could rule on these topics "within the limits of general principles laid down by State law" (art. 117 Cost.). These general principles were usually indicated in so-called "leggi quadro" (framework laws).

[54] https://www.google.com/fusiontables/DataSource?docid=1-uiwK02QTS3QJ51mO1TXZ7k7rh97cpZYrSYaWzCi#map:id=3
[55] https://www.google.com/fusiontables/DataSource?docid=1wcoUv2XNMJ_5e7wvhdz0WZoV-y0GgzrZ5t1mb4A1#map:id=3
[56] https://www.google.com/fusiontables/DataSource?docid=17DKSbohThHL-Mt1UOEXFpFH3fSzYRxtp7vOPJHg7#rows:id=1
[57] http://insideairbnb.com/venice/

In application of this constitutional principle, a specific legal framework was first set in place by national law with Legge 17 maggio 1983, n. 217 and, later, with Legge 29 marzo 2001, n. 135 (that repealed Legge 17 maggio 1983, n. 217).
After the constitutional amendments in 2001 (Legge 3/2001), tourism is now one of the so-called "*residual*" subjects, meaning that the legislative power is vested in Regions with no need of national laws setting general principles (so-called "framework laws", art. 117, co. 4, Const.). Nonetheless, a new specific legal framework was first set in place by national law with the new national *Codice del turismo* (Code of Tourism - *Decreto legislativo* n. 23.5.2011, n. 79), that provides a general basis for regional regulation, which sets down general principles in the field of tourism and hotel industry.[58]

Il presente codice reca, nei limiti consentiti dalla competenza statale, norme necessarie all'esercizio unitario delle funzioni amministrative in materia di turismo ed altre nome in materia riportabili alle competenze dello Stato, provvedendo al riordino, al coordinamento e all'integrazione delle disposizioni legislative statali vigenti, nel rispetto dell'ordinamento dell'Unione europea e delle attribuzioni delle regioni e degli enti locali (art. 1, co. 1).

The need for a national framework even after the constitutional change of 2001 is usually justified by the need to have a coherent and systematic legislation among different Italian regions in a strategic field such as tourism. Despite this current justification, this piece of legislation has been partially dismantled, since in 2012 the Italian Constitutional Court repealed nearly all Title III (arts. 8-17) of the Code of Tourism on the ground that it violated the legislative powers attributed by the Constitution to Regions.[59]

4.3.3 Regional and municipal competence

In accordance with the Code of Tourism, which assigns to Regions the competence to legislate in the field of tourism, most Italian Regions promulgated laws that enumerate and classify

[58] Code of Tourism repealed both Legge 17 maggio 1983, n. 217 and, later, with Legge 29 marzo 2001, n. 135.
[59] Constitutional Court, Decision 2 - 5 April 2012, n. 80 (in G.U. 1a s.s. 11/4/2012, n. 15).

hotel and non-hotel tourist accommodation with disparate solutions that vary considerably from a region to another (see *infra*).

In addition to regional law, each municipality - especially the biggest and most touristic ones - adopted their own regulation to control tourist rentals, i.e. implementing tourist tax, or requiring registration in a special municipal register for tourist locations. Administrative functions are also attributed to Municipalities, unless they are conferred to provinces, metropolitan cities, regions and states, in order to ensure uniformity based on the principles of subsidiarity, differentiation and adequacy (art. 118, 1 par., Const.).

Le funzioni amministrative sono attribuite ai Comuni salvo che, per assicurarne l'esercizio unitario, siano conferite a Province, Città metropolitane, Regioni e Stato, sulla base dei principi di sussidiarietà, differenziazione ed adeguatezza. (Art. 118, co. 1, Cost.).

4.3.4 The civil code

While regional legislative competence concerns the exercise of touristic activities, regular leases for tourist purposes are subject to national law, according to Art. 117, par. 2, lett. i), Cost., that provides that the state has exclusive legislation in civil law issues. In fact, residential leases for tourism purposes - vacation homes and apartments – are deemed as a regular lease agreement by art. 1571 ff. of the Civil Code. Since the touristic lease is just one kind of lease contract expressly provided for by the Civil Code, the primary source of regulation is a special section of the the Civil Code devoted to rental agreements (art. 1571 ff.). Instead, contracts for tourist use are subtracted to the national Law 9 December 1998, n. 431, on rents and release of buildings for residential use, since tourist lease are not regarded as tourist lease, whose terms and conditions are laid down by article 5 of the law 431/1998 (Legge 9 dicembre 1998, n. 431).

4.4 A two-tracks regime

4.4.1 Touristic lease and the civil code

As mentioned above, a vacation home can be rented with a regular short-term lease. In case of “tourist lease” or “pure lease”, articles 1571 et seq. of the Civil Code apply (cfr. Art. 53, Code of tourism).

Whereas the pertinent discipline for tourist lease is laid down by the Italian civil code, all national special legislation passed since the Seventies to regulate the housing market and rental agreements do not pertain. This diverse discipline is usually justified by the lack in the touristic lease of those emergencies that leaded to special rules in housing market (housing shortage, ecc.).

According to the civil code, the lessee has a duty to: make use of the rented property in accordance with the agreed terms with the diligence of a reasonable person (art. 1587 of the Civil Code); return the rented property in the same condition as received, except for deterioration due to ordinary use (art. 1590 of the Civil Code); respect the rules of good neighborliness and the building code. Further, the lessee is also responsible for any damage that she should cause to properties, furniture and plants during the term of the contract. The landlord has a duty to: deliver and maintain the thing “so to preserve its destination” (art. 1575 of the Civil Code); and make necessary repairs, except those of small maintenance (art. 1576 of the Civil Code).

In order to define a contract as ordinary lease, the house can be rented only with “ordinary facilities” (i.e. furniture), without providing additional services. In practice, however, the conferral of a mandate to an estate agency may allow the delivery of additional services by third parties, without changing the nature of the contract. In this way, the operation of a hotel-like tourist accommodation business cannot be attributed to the owner, and formalities required for running a business are not due.

4.4.2 Other rules applicable to touristic lease

The lessor offering a touristic dwelling as “tourist lease” or “pure lease” is subject to the following requirement:

1) Registration ("registrazione") to Inland Revenue Office, when the rent is longer than 30 days;[60]

2) If guest are EU citizens, Communication to P.S. Authority about the identity of the people lodging in the rented premise.[61] This means that a two-standard regime applies, with regards to this communication: a) Communication to P.S. Authority is required for rents for less than 30 days; b) Communication to P.S. Authority is not required for rents longer than 30 days, since registration *sub* 1) fulfil the same function.

3) If guests are non-EU citizens, a "Declaration of hospitality" addressed to: a) the local Police station (P.S. Authority); or b) in municipalities without such an Office, to a special Municipal Office.[62] The communication is compulsory, even if the rental agreement has already been registered (see *supra* 1). It follows that "Declaration of hospitality" for non-EU citizens is always mandatory, regardless the length of the stay;

4) A Communication to the building manager about guests temporarily living in the apartment, in order to keep the condominium population register updated.[63]

Art. 1130 Civil Code - Attribuzioni dell'amministratore

L'amministratore, oltre a quanto previsto dall'articolo 1129 e dalle vigenti disposizioni di legge, deve:

curare la tenuta del registro di anagrafe condominiale contenente le generalità dei singoli proprietari e dei titolari di diritti reali e di diritti personali di godimento, comprensive del codice fiscale e della residenza o domicilio, i dati catastali di ciascuna unità immobiliare, nonché ogni dato relativo alle condizioni di sicurezza delle parti comuni dell'edificio. ogni variazione dei dati deve essere comunicata all'amministratore in forma scritta entro sessanta giorni. L'amministratore, in caso di inerzia, mancanza o incompletezza delle comunicazioni, richiede con lettera raccomandata le informazioni necessarie alla tenuta del registro di anagrafe.

[60] Legge 04/08/2006, n. 248; D.P.R. 26/04/1986, n. 131; D.L. 22/06/2012, n. 83.
[61] Art. 109 of TULPS - Royal Decree no. 773 of 18 June 1931. Circular no. 4023 of 26 June 2015, issued by the Interior Ministry, clarified that Art. 109 of TULPS (Royal Decree no. 773 of 18 June 1931), applicable to the entrepreneurial management of touristic premises, also applies to those who rent their properties for short periods of less than 30 days.
[62] Art. 7, D. Lgs. 286/98.
[63] Art.1130, co. 1, 6, Civil code.

Decorsi trenta giorni, in caso di omessa o incompleta risposta, l'amministratore acquisisce le informazioni necessarie, addebitandone il costo ai responsabili.

Tourist lease entails the conclusion of a written contract between the parties only if the lease is longer than 30 days. If the duration of the lease does not exceed 30 days, "registration" is not required and lease is not subject to Tax Office registration. As a result, the contract must be in written form and is subject to compulsory registration only when the duration of the contract exceeds one month.

The same holds in case of several different leases during the year. In case of multiple guests, this entails just the conclusion of a plurality of locations of the property for a limited time for holiday and recreation purposes.

4.4.3 Regional legislation and "non hotel accommodation"

Short term rentals can be framed both as tourist rental (pure leases) or as "non-hotel touristic activity". While in the former case the civil law applies, in the latter case regional legislation for hospitality and premises classification and authorisation applies, together with national legislation on tourism.

With the national constitutional reform that took place in 2001 this competence is now regional. However, the Code of tourism lists different types of accommodation in order to provide a minimum national standard that each region has to follow in its legislation (whereas it is still possible to set better standards at regional level).[64]

Art. 12 of Code of tourism provides a list of non-hotel accommodations: a) room rental ("affittacamere"); b) bed and breakfast; c) holiday homes; d) furnished housing for tourist; e) residence; f) youth hostels; g) accommodation in catering premises; h) farm ("agriturismi"); i) rural residences; l) guesthouses; m) student houses; n) historical residences; o) hiking shelters;

[64] In the past, art. 7, L. 217/1983 stated that the classification of accommodation services is decided by each region on the base of three standards: dimension of the premise; services offered; professional skills of those running the premise. This provision was complemented with D.P.C.M. 13.9.2002 for the definition of uniform standards across the different Italian regions.

p) mountain huts; q) any other tourist accommodation related to one or more of previous categories.

The same article provides a detailed description of each of these categories.

Art. 12 - Strutture ricettive extralberghiere

1. Ai fini del presente decreto legislativo, nonché ai fini dell'esercizio del potere amministrativo statale di cui all'articolo 15, sono strutture ricettive extralberghiere: a) gli esercizi di affittacamere; b) le attività ricettive a conduzione familiare - bed and breakfast; c) le case per ferie; d) le unità abitative ammobiliate ad uso turistico; e) le strutture ricettive - residence; f) gli ostelli per la gioventù; g) le attività ricettive in esercizi di ristorazione; h) gli alloggi nell'ambito dell'attività agrituristica; i) attività ricettive in residenze rurali; l) le foresterie per turisti; m) i centri soggiorno studi; n) le residenze d'epoca extralberghiere; o) i rifugi escursionistici; p) i rifugi alpini; q) ogni altra struttura turistico-ricettiva che presenti elementi ricollegabili a uno o più delle precedenti categorie.

The distinction between non-hotel accommodation and hotel accommodation is relevant not only as a classification but also for the powers the public authority can exercise. Non-hotel accommodations are subject to minimum national standards set up in an Agreement among State and Regions and they are not subject to the rating system (one to five stars) used for hotels at national level.

4.4.4 Segnalazione certificata di inizio attività" – SCIA for non-hotel accommodation

Tourist Code provide a general framework for the provision of touristic services in Italy, stating that a Prior notice (“Segnalazione certificata di inizio attività” - SCIA) is sufficient to start an activity, with no need of a prior authorisation. The so-called SCIA must be directed to the local City Council, enclosing the communication of the beginning of the activity (to the “Sportello unico per le attività produttive” – SUAP - or “Sportello unico per le attività ricettive” - SUAR - when existing in the municipality where the property is located).

Art. 16, Code of tourism, provides that the opening and operation of touristic accommodation are subject to the SCIA. The activity can be started right after the submission of the required communication has been issued to the Public authority. When the Public Authority ascertains that the activity does not comply with legal rules, it can adopt subsequent decision by sixty days from the communication. In any case, the activity remains subject to compliance with zoning regulations, building codes, environmental rules, public security, fire prevention, sanitation and safety in the workplace, as well as rules on energy efficiency and provisions of the Code of cultural heritage and the landscape.

Art. 16 (Semplificazione degli adempimenti amministrativi delle strutture turistico - ricettive)
L'avvio e l'esercizio delle strutture turistico - ricettive sono soggetti a segnalazione certificata di inizio attività nei limiti e alle condizioni di cui all'articolo 19 della legge 7 agosto 1990, n. 241.
L'attività oggetto della segnalazione, di cui al comma 1, può essere iniziata dalla data della presentazione della segnalazione all'amministrazione competente.
L'avvio e l'esercizio delle attività in questione restano soggetti al rispetto delle norme urbanistiche, edilizie, ambientali, di pubblica sicurezza, di prevenzione incendi, igienico-sanitarie e di sicurezza nei luoghi di lavoro, nonché quelle relative all'efficienza energetica e delle disposizioni contenute nel codice dei beni culturali e del paesaggio, di cui al decreto legislativo 22 gennaio 2004, n. 42.

See also art. 19, co. 1, L. 241/1990:
Ogni atto di autorizzazione, licenza, concessione non costitutiva, permesso o nulla osta comunque denominato, comprese le domande per le iscrizioni in albi o ruoli richieste per l'esercizio di attività imprenditoriale, commerciale o artigianale il cui rilascio dipenda esclusivamente dall'accertamento di requisiti e presupposti richiesti dalla legge o da atti amministrativi a contenuto generale, e non sia previsto alcun limite o contingente complessivo o specifici strumenti di programmazione settoriale per il rilascio degli atti stessi, è sostituito da una segnalazione dell'interessato, con la sola esclusione dei casi in cui sussistano vincoli ambientali, paesaggistici o culturali e degli atti rilasciati dalle amministrazioni preposte alla

difesa nazionale, alla pubblica sicurezza, all'immigrazione, all'asilo, alla cittadinanza, all'amministrazione della giustizia, all'amministrazione delle finanze, ivi compresi gli atti concernenti le reti di acquisizione del gettito, anche derivante dal gioco, nonché di quelli previsti dalla normativa per le costruzioni in zone sismiche e di quelli imposti dalla normativa comunitaria.[65]

This communication is issued online to c.d. "Sportello unico" (SUAP), in application of art. 38 Decreto-legge 25 giugno 2008, n. 112 (conv. L. 6.8.2008, n. 133; D.P.R. 7.9.2010, n. 160). Art. 109 of TULPS (Royal Decree no. 773 of 18 June 1931) further establishes a duty to communicate the identity of the people lodging, applicable to the management in business form of touristic for profit activities to the P.S. Authority. In this case, registration of guests may be done only via online channel "*Alloggiati Web*" (https://alloggiatiweb.poliziadistato.it/PortaleAlloggiati/).

4.5 Accommodation as business or non-business activity

Short term rentals are potentially regulated by disparate sources of law, depending on the classification of the economic transaction as touristic rental or non-hotel tourist activity. This distinction is extremely relevant: not only for the legal regime variations, due to the different classifications, but also because State, Regions and Municipalities have different roles in the two cases.

Code of Tourism defines "tourist undertakings" as those undertakings that carry out organized economic activities for the production, marketing, brokerage and management of touristic products and services. The registration of these undertakings in the Public register (as prescribed by Legge 29.12.1993, n. 580 and D.P.R. 7.12.1995, n. 581), is an essential condition for the access to benefits, contributions, grants, incentives and benefits of any kind for the tourism.

[65] See also Law 30 July 2010, n. 122 ("Conversione in legge, con modificazioni, del decreto-legge 31 maggio 2010, n. 78, recante misure urgenti in materia di stabilizzazione finanziaria e di competitività economica

Among "tourism undertakings", the most important one are "touristic accommodations". The expression "touristic accommodation" defines the activities aimed at the production of services for the hospitality (art. 8, Code of Tourism). In addition, art. 53 of Tourism Code (Decree no. 23.5.2011, n. 79) defines tourist locations as "the property devoted exclusively to tourism purposes, located in any place".[66]

Since private law is part of national legislation and tourism is part of regional legislation, the definition of a "tourist undertakings" under the Code of Tourism is only relevant for public law purposes, such as the capacity to be recipient of funding for tourism or being subjects to controls by public bodies for safety or security reasons, but does not affect the qualification of a legal person as "undertaking" for private law purposes. Under private law, an entrepreneur exercises her activity "habitually" and "professionally", and this definition leaves aside those who exercise an economic activity occasionally or not professionally, such as a small family-owned touristic premise. In this cases, such an activity is deemed to be an undertaking for public law purposes, but not for private law. And a touristic premise can be managed in both an entrepreneurial and non-entrepreneurial way.

4.6 Classifications and definitions of touristic lease and "non-hotel accommodation"

4.6.1 The presence of additional services

A first distinguishing criterion between touristic lease and non-hotel accommodation is based on whether additional services are offered. The tourist lease differs from non-hotel accommodation, such as holiday homes or bed and breakfast, because in the former case a private party rents out a room or apartment without offering any additional services (such as daily cleaning, change of linen, catering services, breakfast, ironing, etc.). In these cases, guests must be informed that the apartment does not have any offered service.

[66] Art. 53, Code of Tourism: "Gli alloggi locali esclusivamente per finalità turistiche, in qualsiasi luogo ubicati, sono regolati dalle disposizioni del codice civile in tema di locazione".

On the contrary, if in addition to the property ancillary services are also provided, a non-hotel accommodation is realised with consequential obligations. When a touristic accommodation is run as a professional activity, those who rents the apartment have an obligation to provide additional services that go beyond the mere leasing of the house with ordinary equipment.

Nell'ambito di tale attività rientra altresì, unitamente alla prestazione del servizio ricettivo, la somministrazione di alimenti e bevande alle persone alloggiate, ai loro ospiti ed a coloro che sono ospitati nella struttura ricettiva in occasione di manifestazioni e convegni organizzati, nonché la fornitura di giornali, riviste, pellicole per uso fotografico e di registrazione audiovisiva o strumenti informatici, cartoline e francobolli alle persone alloggiate, nonché la gestione, ad uso esclusivo di dette persone, attrezzature e strutture a carattere ricreativo, per le quali è fatta salva la vigente disciplina in materia di sicurezza. Nella licenza di esercizio di attività ricettiva è ricompresa anche la licenza per la somministrazione di alimenti e bevande per le persone non alloggiate nella struttura nonché, nel rispetto dei requisiti previsti dalla normativa vigente, per le attività legate al benessere della persona o all'organizzazione congressuale.[67]

4.6.2 The length of activity

A second element that can help separating private rent from entrepreneurial activity is the length of use. As a general rule, if the property rental business works throughout the year it is deemed to be non hotel accommodation, whereas shorter period can be seen as occasional rent.

However, in order to assess the applicable discipline, different rules must be taken into account, so to better define how the length of rental activity affects the legal treatment of short term rentals as business or not. A clear-cut description of how the length of activity affects the qualification of short term rentals can be derived only by the consolidated reading of both national and regional legislation.

[67] Art. 8, co. 2, Codice Turismo.

At a national level, art. 12, co. 5, Codice del Turismo, defines "furnished apartments for tourist use" as those houses or apartments, that furnished and equipped with both hygienic services and independent kitchen facilities, rented out to tourists, during one or more seasons, *for a period of no less than seven days and no more than six consecutive months* without the provision of any hotel-like service. The furnished apartments to tourist use can be managed: a) in business form; b) in a non-business, from those who have the availability of up to a maximum of four units, without organization in the form of enterprise (emphasis added).

Le unità abitative ammobiliate ad uso turistico sono case o appartamenti, arredati e dotati di servizi igienici e di cucina autonomi, dati in locazione ai turisti, nel corso di una o più stagioni, con contratti aventi validità non inferiore a sette giorni e non superiore a sei mesi consecutivi senza la prestazione di alcun servizio di tipo alberghiero. Le unità abitative ammobiliate a uso turistico possono essere gestite: a) in forma imprenditoriale; b) in forma non imprenditoriale, da coloro che hanno la disponibilità fino ad un massimo di quattro unità abitative, senza organizzazione in forma di impresa (art. 12, co. 5, Codice turismo).

In addition, regional laws regulate time limits for non professional rental activities. This is usually done either by reference to somehow indefinite categories, such as "occasionally" ("*occasionalmente*") as opposed to "continuously" ("*continuativamente*"), or by adding specific time limit for each category of non-hotel accommodation. The two cases of Lazio and Lombardia may help to better clarify this point. On the same line, most other regional laws use this two-track regime, by either defining discrete time limits or by using indeterminate expressions for each classified category of non hotel accommodation.

Legge regionale Lazio, n.13, 2007, rules that furnished premises rented to tourists can be managed as non-business for a maximum of two houses/apartments located in one or more buildings, rented *on an occasional basis, with a period of inactivity of at least one hundred days a year*. While the same statute determines that b&b must observe a non operating period

must be *equal at least to one 120 days a year in Rome and 90 days in other cities*; b) as business, when the activity is *carried out continuously* (emphasis added).

Lombardia Regional Law of 1 October 2015, n. 27 (Regional policies on tourism and attractiveness of Lombardy) establishes that "houses and holiday apartments" can be managed as non-business, for up to three units if the activity is carried out *on an occasional basis*. For b&b, the same statute determines that the non operating period must be *equal at least to one 90 days a year* (emphasis added).

In sum, in Italy the length of rental activity affects the definition of short term rentals as business or not. However, a clear-cut conclusion of how this element impacts on how these economic activities are qualified by the law can be reached only by the consolidated reading of both national and, most of all, regional legislation, which offer disparate solutions, either based on indefinite categories, such as "occasionally" ("*occasionalmente*") as opposed to "continuously" ("*continuativamente*"), or by adding specific time limits (see *supra*).

4.7 Taxation

A local tax for tourism ("imposta di soggiorno") has been created in Italy following the implementation of federalism with the legislative reform that took place in 2001. This tax is due by those who stay in touristic accommodations in bigger cities as well as in those touristic cities listed in a special regional list. Municipalities included in a regional lists of cities of art can establish a tourist tax paid by those staying in accommodation in its territory.[68]

In case of touristic rent, earnings received by the lessor are subject to personal income tax to be declared via "Dichiarazione dei redditi" (Form 730 or "Unico"). The rental income must be reported as "Income from land" (RB section of the model). In this case the lessor can opt for regular taxation or a flat rate tax – c.d. "cedolare secca". This option is available also for non registered contracts whose duration is less than 30 days a year and flat rate can be applied to the leases for which there is no obligation to register. However, in this latter case contract

[68] Art. 4, Decree no. 14 March 2011, n. 23.

must be in writing (art. 3 co.2 D.Lgs. 23/2011). A deduction of 15% is allowed only if "cedolare secca" is not applied. Different rules apply in case of "non-hotel accommodation" by entrepreneurs. In this case, business income tax applies for undertakings carrying out entrepreneurial activities.

4.8 Regional laws. Rome

With Legge regionale Lazio n.13, 2007, new rules have been adopted to simplify the procedure for the opening of such a structure.[69] Legge regionale n. 8, 2013, confirmed this trend, prescribing that the owners of such a premise must comply with certification/authorization formalities through the SCIA. Earlier, a previous obligation to communicate the price lists to the central administration, before applying for the SCIA for the certification/authorization, was in force.

More recently, Legge regionale Lazio 7 August 2015, n. 8, on "New discipline for non-hotel accommodations", identifies non-hotel accommodations and their characteristics at a regional level. Among them, Guest House or House (lett. a), houses and apartments (lett. e) and B&B (lett. f) may be potentially relevant for the collaborative economy. Together with accommodation, SCIA also enables to provide foods and drinks to the lodging people. In addition, equipment and to recreational facilities, where permitted, can be also provide for the exclusive use of guests. In this case, compliance with current regulations on safety, hygiene and health must be respected (art. 14, co. 3).

Art. 1, co. 3. Le disposizioni di cui al presente regolamento si applicano alle seguenti strutture: a) Guest house o Affittacamere; b) Ostelli per la gioventù; c) Hostel o Ostelli; d) Case e appartamenti per vacanze; e) Case per ferie; f) Bed & Breakfast; g) Country house o Residenze di campagna; h) Rifugi montani; i) Rifugi escursionistici.

[69] L.R. 6 Agosto 2007, n. 13, Organizzazione del sistema turistico laziale. Modifiche alla legge regionale 6 agosto 1999, n. 14 - Organizzazione delle funzioni a livello regionale e locale per la realizzazione del decentramento amministrativo.

Another important provision that affect short-term rents and peer-to-peer activities is art. 2, co. 3., providing that: "In order to promote safety and oppose illegal touristic accommodation, with detriment of the quality of the tourist offer, owners of premises other than those listed above, who offer hospitality in private apartments by leasing these premises for tourism purposes, and those who offer other forms of hospitality through online channels and marketing promos, shall communicate it to the municipality and to Agenzia regionale del Turismo (art. 2, co. 3).

Per favorire la sicurezza sul territorio regionale e contrastare forme irregolari di ospitalità a danno della qualità dell'offerta turistica, i soggetti titolari di strutture diverse da quelle di cui al comma 3 dell'articolo 1 che offrono ospitalità in appartamenti privati locati per fini turistici di cui all'articolo 1, comma 2, lettera c), della legge 9 dicembre 1998, n. 431 (Disciplina delle locazioni e del rilascio degli immobili adibiti ad uso abitativo) o coloro che esercitano altre forme di ospitalità attraverso canali on line di promo commercializzazione, trasmettono al Comune competente e all'Agenzia di cui al comma 1, idonea comunicazione sull'ospitalità offerta utilizzando l'apposita modulistica on line predisposta dal Comune stesso.

4.8.1 Non hotel accommodations. Regional classification

1) Guest house or self-catering facilities are managed professionally when they provide accommodation and complementary services. These facilities consist of a maximum of six rooms, located in no more than two furnished apartments in the same building, and accessible from the same entrance and have: a) a minimum dimension of 14 square meters; b) a kitchen or kitchenette adjacent to the living room. Apartments devoted to guest house or houses are not subject to change of use destination for urban purposes. These facilities must comply with provisions for residential homes, existing building laws and health and hygiene as well as minimum functional and structural requirements described in an Annex to the Law (Art. 4. 1).
2) Houses and apartments are furnished premises rented to tourists, that cannot host persons that are resident or domiciled there. These structures do not provide any centralized services and provision of foods and drinks. They can be managed: a) as non-business for a maximum

of two houses/apartments located in one or more buildings, rented on an occasional basis, with a period of inactivity of at least one hundred days a year; b) as business, when the management of one or more houses and apartments, placed in one or more building, takes place continuously and in an organized manner. Professional management is mandatory if homes/apartments are three or more. The duration of leases shall be determined: a) in Rome, for a period of at least three days and no longer than three months; b) in other cities, for a maximum of three months. The premise must have a minimum dimension of 14 square meters, a kitchen or a kitchenette adjacent to the living room. Change of use for planning purposes is not required. Premises are rented to tourists as a whole and no room can be reserved to the owner. Facilities shall meet the requirements for residential homes, the existing building laws and health and hygiene as well as all the functional and structural minimum requirements set out in Annex to the Law (Art. 7. 1.).

3) Bed and Breakfast are premises that provide hospitality for a maximum of ninety consecutive days, with a minimum dimension of 14 square meters with kitchen or kitchenette. The person who owns the activity shall live in the structure. The use of the structure to be allocated to the activity of B&B does not involve change of use to urban purposes. The structures can be managed: a) as non-business, when management took place only occasionally and the property has a number of up to three bedrooms, with up to six beds, and service accommodation includes breakfast. The non operating period must be equal at least to one 120 days a year in Rome and 90 days in other cities; b) as business, when the activity is carried out continuously, and the property has a number of up to four rooms, and a maximum of eight beds, and the accommodation service also includes the breakfast. The facilities must comply with provisions for residential homes, and existing building laws and health and hygiene regulations, as well as all the functional and structural minimum requirements set out in Annex to the Law (Art. 9. 1).

4.9 Regional law. Milan

Art. 19, Regional Law of 1 October 2015, n. 27 (Regional policies on tourism and attractiveness of Lombardy) provides a list of non-hotel accommodations. Non-hotel accommodation are: a)

Holiday homes; b) youth hostels; c) Lombardy guesthouses; d) inns; e) houses and apartments; f) bed & breakfast; g) alpine huts, hiking and bivouacs shelters; h) hospitality businesses outdoors. Among them, houses and apartments and B&B may be potentially relevant for the sharing economy.

4.9.1 Non hotel accommodations. Regional classification

Houses and apartments are those accommodation facilities managed and arranged to provide lodging and complementary services in housing units or parts of them, for residential purposes, consisting of one or more furnished rooms, with toilet and kitchen, and located in a one or more residential complexes.[70] Houses and holiday apartments can be managed: a) as business; b) as non-business, for up to three units if the activity is carried out on an occasional basis. Houses and apartments retain the urban residential and must satisfy the health and hygiene and building requirements for residential premises.

Bed & breakfast are those non-business, family-run, activities for accommodation and breakfast, consisting in no more than four rooms with up to twelve beds, availing normal family organization, including the presence of domestic household employees (art. 29). The activities must stop for at least ninety days. Each period of business interruption must be notified in advance to the relevant province or territory to the City of Milan. The exercise of bed & breakfast activity does not require registration in the commercial register and VAT and benefits from the facilities provided by the Region.

Hotel and non-hotel accommodation activities need a prior SCIA, in accordance with Article 19 of the l. 241/1990. A prior notice to the municipality suffices for houses and apartments. The SCIA is presented to the relevant municipality to be accompanied by documentation proving the existence of the territory requirements under applicable regulations (a copy of the SCIA must be visibly displayed inside the premises where the activity is performed).

[70] See art. 26, Definition and functional characteristics of houses and apartments.

In addition to compliance with applicable tax laws and safety rules, all hotel and non-hotel accommodation are required to communicate flows of tourists in accordance to regional tourism guidelines and the recommendations of the P.S. Authority. Non-hotel accommodations do not require the change of use for the exercise of the activity. The owners of facilities governed by Regional law are required to take out insurance for the risks resulting from civil liability to customers, adequate to the accommodation volume.

Anyone who carries on a business for touristic accommodation, and anyone who uses and advertises, including online, one of the names referred to in Article 18, paragraphs 3 and 4, and Article 19, paragraph 5, without having presented the SCIA or communication referred to in Article 38, paragraph 1, incurs the administrative sanction from € 2,000 to € 20,000. Any person who pursues an activity as hotel and not hotel accommodation, in the absence of the requirements, incurs administrative fine from € 2,000 to € 10,000. In case of repeated violations, the penalties referred to in paragraphs 1, 2 and 3, are doubled, subject to the right of the Municipality, to suspend the activity for no more than three months or the cessation of the activity in most severe cases.

4.10 Platforms

4.10.1 Decreto legislativo n. 70/2003. Attuazione della direttiva 2000/31/CE relativa a taluni aspetti giuridici dei servizi della società dell'informazione, in particolare il commercio elettronico, nel mercato interno

According to the E-commerce Directive 2000/31, Internet intermediary service providers should not be held liable for the information they transmit, store or host, as long as they act in a strictly passive manner (articles 12 to 14).[71] This rule has been transposed in Italy with

[71] Article 12 ("Mere conduit"): 1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission. 2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission. 3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.
Article 13 ("Caching"). 1. Where an information society service is provided that consists of the transmission in a

Decreto legislativo n. 70/2003 ("Attuazione della direttiva 2000/31/CE relativa a taluni aspetti giuridici dei servizi della società dell'informazione, in particolare il commercio elettronico, nel mercato interno").

Despite this reception, it is not always easy to define what intermediaries can do without losing the possibility to benefit from the limitations of liability set out in the Directive. As a general rule, under the e-Commerce Directive, intermediaries lose protection if they are too "active", as opposed to being "passive" and "neutral" (the more discretion the platform exercises in managing the functioning of the website, the more responsibility it has).[72]

4.10.2 Case law

In the last years, many cases have been decided in application of the new legal regime derived from the implementation of the e-commerce Directive, especially with regards to the liability of online platforms.

communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that: (a) the provider does not modify the information; (b) the provider complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement. 2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.
Article 14 (Hosting). 1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. 2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider. 3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

[72] In a recent decision, the Milano Court of Appeal ruled that a video sharing platform is not liable for contents published by its users even if this publication infringes copyright. Corte d'Appello di Milano, n. 29, 22 January 2015, reforming Tribunale di Milano, 9 settembre 2011, n. 10893.

In an important decision in 2009, *Corte di Cassazione* ordered the seizure of file sharing website *The Pirate Bay*, issuing an injunction to the provider in order to impede the access to the website[73] (*Cassazione* confirmed the resolution originally adopted by *Procuratore della Repubblica* of Bergamo, lately revoked by *Giudice per le indagini preliminari*).[74] In its conclusion the Court clarified that a website that limits its activity to the offering of a peer-to-peer protocol for file sharing is not to be deemed liable, both on civil and criminal ground. On the contrary, a different solution would apply to websites that contribute to the creation of an index of information provided by customers, so helping them to find downloadable files. In this latter case – *Cassazione* affirms – the activity performed by the website is not just "mere conduit" but instead "transportation of contents protected by copyright". Adding that, in such a case, even the minimal information would be sufficient to held the website liable, according to art. 171 ter, co. 2, let. a-bis, Legge 22 aprile 1941 n. 633 ("*Protezione del diritto d'autore e di altri diritti connessi al suo esercizio*").

Other decisions have been issued by national lower courts, mainly in Rome and Milan. A very strict position has been taken by *Tribunale* Roma 16.12.2009 and 11.2.2010. The solution provided by the Court in these two related pronouncements was based on the factual circumstances under examination: that providers offered additional services to its customers; received several injunctions by injured parties; enjoyed contractual rights to control the content uploaded by their clients; and retained a right to discontinue the service in case of violation. According to these decisions, under such circumstances a provider has a duty to immediately remove illegal content once it is aware of their existence; and this awareness can be proved by the mere existence of a communication by the injured parties, with no need to receive a formal statement by public authority or by a court.[75]

Another important ruling is *Tribunale* Milano 9.9.2011, dealing with the violation of copyright law caused by the availability of a TV shows available via Yahoo!. Also in this case, the court found that the defendant played an active role in managing the website. This active role was

[73] Cass. Pen. sez. III, 29.9.2009, n. 49437, Foro it., 2010, II, 136; e Dir. Inf., 443 s.
[74] For the first decision see Dir. Inf. 2009, 258.
[75] Trib. Roma, 16.12.2009, in Foro it., 2010, I, 1348; Giur. it., 2010, 1323; Obbligazioni e contratti, 2010, 3030; Dir. Inf., 275.

proved by the following activities: linking ads to videos; offering services to better visualize online contents; creating a service where third parties could signal the existence of illegal contents; and maintaining a contractual right to control and remove illegal contents. In consideration of these elements, the Court concluded that the defendant had retained for itself an active role in checking contents, performing a function which is radically different from pure hosting. As in the previous case, the Court concluded for the existence of a duty to remove illegal content, with no need to receive a formal statement by a public authority or a court. And this conclusion was held valid even in those cases when the communication does not provide detailed information on each illegal content, since the website can make use of the very same tools that third parties use to search online contents.[76]

One of the most significant Italian verdict on this issue is the famous Google Vivi Down case. This case was first decided by *Tribunale* Milano, with a decision lately reversed by Court of Appeal and finally confirmed by *Cassazione*.[77] The issue was the (criminal) liability of Google officials for a video in which a young student affected by autism is harassed by his classmates. The video, which was sadly successful, was lately removed, but only after several injunctions were sent to the website. The *ratio decidendi* of the judgment of first instance was based on the lack of informed consent of the person offended in the video; a *ratio* that was rejected by Court of Appeal on the basis that a similar duty on the defendant would be too burdensome and dangerous for freedom of expression. This conclusion was confirmed by *Corte di Cassazione*.

In another decision rendered by *Tribunale* Roma, 11.7.2011, the court took a more nuanced position. In this case, the Court was called to decide whether Yahoo! search engine was liable for helping customers to find movies protected by copyright, through suggested links to streaming and download websites. In line with previous pronouncements, the Court affirmed that a simple communication is sufficient to consider the website aware of the illegal content, with no need of any official injunction by a court. On the other side, the Court concluded that

[76] Trib. Milano, 9.9.2011, n. 10893, Riv. Dir. Ind., 2011, 559.
[77] Trib. Milano, 24.2.2010; App. Milano, 21.12.2012; Cass. Pen. 17.12.2013, n. 3672.

a nonspecific communication, with little or no element to identify the illegal contents, cannot be deemed as adequate knowledge of the infringement, and does not impose a duty on the website to search and remove the allegedly illegal contents.[78]

In 2014, *Tribunale* Torino condemned YouTube as an online content provider, on the ground that the website had played an active role, modifying online contents uploaded by its customers: by indexing those contents, dividing them into channels, suggesting specific contents to each customer in accordance with their tastes and preferences, making money using these content, by selling ads linked to each video. So, *de facto* creating brand new contents.[79]

A more recent judgment has been issued by *Corte d'Appello* Milano, reforming the verdict rendered by the Court of first instance in RTI v. Yahoo!. In this decision, the Court of Appeal rejected the dominant approach taken by Italian courts since then, and concluded that even if an hosting provider offers additional services, this circumstance is not by itself sufficient to define it as an active intermediary. And this conclusion is held to be valid also in those cases when the activity of the provider goes well beyond the distinction made by the eCommerce Directive. According to this decision, only when the contribution offered by the provider is so significant, that it amounts to an alteration of the original contents, the exemption provided by the Directive does not apply. In doing this, the Court openly adopted an evolving standard of judgment for the activities of online platforms and underscored the need of a drastic revision of the Directive an offered.[80]

[78] See Trib. Roma, 11.7.2011, Riv. Dir. Ind., 2012, II, 19, in Dir. Ind., 2012, 75; Trib. Roma, 22.3.2011, Dir. Inf., 2011, 532; Danno resp. 2011, 753
[79] Trib. Torino, 23.6.2014.
[80] App. Milano, 7.1.2015, in Diritto24, 27.1.2015. On the same line, see also Trib. Roma, 20.10.2011.

4.11 Home swap

4.11.1 Obligations and money

Under Italian law there is no legal definition of "money". Absent a statutory definition, scholars usually describe "money" as "any adopted measure of value and/or any common object usually employed as medium of exchange".[81]

The Italian civil code prescribes special rules for the so-called "obbligazioni pecuniarie", which are those special obligations whose object is money (art. 1224 c.c.).[82] Money obligations are subject to nominalist principle, which implies that a unit of currency is always equal to itself and unaffected neither by the external changes in the value of currency (the rate of exchange) nor by the internal changes.

This principle is laid down in art. 1277 c.c.:

"*I debiti pecuniari si estinguono con moneta avente corso legale nello Stato al tempo del pagamento e per il suo valore nominale. Se la somma dovuta era determinata in una moneta che non ha più corso legale al tempo del pagamento, questo deve farsi in moneta legale ragguagliata per valore alla prima.*"

However, courts have radically limited the generality of this principles, in order to protect creditor's interests especially in time of high inflation.[83]

4.11.2 Remuneration and contracts

A remuneration may not only consist in money but also in any other valuable advantage conferred on the other party. This advantage can be either economic or non-economic, so

[81] T. Ascarelli, Obbligazioni pecuniarie (artt. 1277-1320).
[82] Art. 1224 c.c. (Danni nelle obbligazioni pecuniarie): "Nelle obbligazioni che hanno per oggetto una somma di danaro, sono dovuti dal giorno della mora gli interessi legali, anche se non erano dovuti precedentemente e anche se il creditore non prova di aver sofferto alcun danno. Se prima della mora erano dovuti interessi in misura superiore a quella legale, gli interessi moratori sono dovuti nella stessa misura. Al creditore che dimostra di aver subito un danno maggiore spetta l'ulteriore risarcimento. Questo non è dovuto se è stata convenuta la misura degli interessi moratori."
[83] See, ex multis, Cass. 21.8.1985, n. 4468; Cass. 4.12.1992, n. 12942.

long as it truly reflects a creditor's interest that is demonstrably valuable from an economic perspective (art. 1174 c.c.).[84]

Under Italian law, the concept of remuneration (or compensation) is related to reciprocity, and implies that the performance of one contracting party finds its justification in the performance of the other. Reciprocity not only indicates the existence of remuneration, but also determines the interdependence of the performances, creating a contractual nexus, so that each performance is conditional on the other (so-called synallagma).

A contract is bilateral if it envisages reciprocal performances of the parties toward each other. In such a contract there is a double relationship of rights and duties and each contracting party is at the same time both promisor and promisee. The category of contracts involving reciprocal performances includes all those contracts from which parties receive reciprocal benefits and detriments of an economic character, involving real or personal rights and duties, according to the Roman schemes: *do ut des, facio ut des, facio ut facias*.

In so-called "bilateral" contract the conferral of an advantage by one party in justified by a "remuneration" by the other. This kind of contract creates reciprocal and interrelated rights and duties. In accordance with these principles, a party can refuse to carry out her promise if the other party does not carry out her offer (art. 1460 c.c.), and may be released from contractual bond under the same circumstances (art. 1453 c.c.).[85]

A contract is onerous if each of the contracting party obtains a benefit in exchange for remuneration; a contract is gratuitous if one party confers a benefit on the other without

[84] Art. 1174 c.c. (Carattere patrimoniale della prestazione): "La prestazione che forma oggetto dell'obbligazione deve essere suscettibile di valutazione economica e deve corrispondere a un interesse, anche non patrimoniale, del creditore."

[85] Art. 1460 c.c. (Eccezione di inadempimento): "Nei contratti con prestazioni corrispettive, ciascuno dei contraenti può rifiutarsi di adempiere la sua obbligazione, se l'altro non adempie o non offre di adempiere contemporaneamente la propria, salvo che termini diversi per l'adempimento siano stati stabiliti dalle parti o risultino dalla natura del contratto. Tuttavia non può rifiutarsi l'esecuzione se, avuto riguardo alle circostanze, il rifiuto è contrario alla buona fede". Art. 1453 c.c. (Della risoluzione per inadempimento): "Nei contratti con prestazioni corrispettive, quando uno dei contraenti non adempie le sue obbligazioni, l'altro può a sua scelta chiedere l'adempimento o la risoluzione del contratto, salvo, in ogni caso, il risarcimento del danno. La risoluzione può essere domandata anche quando il giudizio è stato promosso per ottenere l'adempimento; ma non può più chiedersi l'adempimento quando è stata domandata la risoluzione. Dalla data della domanda di risoluzione l'inadempiente non può più adempiere la propria obbligazione."

receiving anything in exchange. This distinction has important consequences as to the applicable legal rules, among which: the liability for breach of promise is assessed less strictly in gratuitous contracts; the creditor's claim to revoke debtor's disposition of asset are subject to different rules (art. 2901 c.c.); and less strict rules also apply to liability in case of eviction (art. 797 c.c.) and latent defects (art. 798 c.c.), if compared to onerous contracts (art. 1476-1490 c.c.).

4.11.3 Qualification of home swap under Italian law

Home exchange/swap is the temporary exchange of homes, usually for holidays. The exchange can be simultaneous, when it takes place in the same period, or it can occur in different moments. In this latter case, the exchange system if often coupled with a credit system that can be redeemed at a later date, so lessening potential scheduling problems that can hamper straight home swaps. Usually no monetary exchange takes place.

The Italian civil code lists a number of "named" contracts (*contratti tipici* or *nominati*), providing specific rules for each of them. At the same time, it also acknowledges that parties are free to make other contracts (*contratti atipici* or *innominati*), following the principle of autonomy of the will. In this second case, the contract must first be "qualified" by a court, in order to determine whether it falls within the realm of of nominate contract: as a result, the court may decide that the contract is akin to one specific nominate contract or that it comprises elements of several nominate contracts, interpreting it accordingly and applying the related discipline.

Home swap is not regulated in Italy. It follows that, under Italian law, a home swap contract is a "contratto atipico" (art. 1322 c.c.). Beside the general discipline on contract (art. 1321-1469 c.c.), the legal discipline applicable to home swap is either that of barter or lease. Even if barter is usually thought to regard the exchange of property rights, legal doctrine also includes the temporary exchange of things within the boundaries of this agreement. An alternative account considers this contract as a specific case of lease, where the *quid pro quo*

is not money, but a *res*.[86] However, no court decision has been found that legally defines this kind of contract.

Following the distinctions laid down above, home swap is a synallagmatic (bilateral) contract, where both parties confer advantages on the other one, while obtaining a reciprocal advantage for themselves; and an onerous one, since both parties have the intention to confer such an advantage in exchange for a reciprocal advantage.

Absent a specific set of rules, home swap often takes the form of a detailed written agreement between two parties to swap their homes for a given period of time, although verbal agreements are also frequent.

Despite the absence of money, potential risks connected to this kind of exchange are not negligible, and online platforms play an important role in guaranteeing the fairness of the exchange and the prevention and/or resolution of disputes; platforms may also require prior registration of the parties, check parties' reliability, provide penalties in case of breach/damages, and recommend to take up insurance. Platforms may provide detailed guidance on how to arrange a swap or even arrange it. However, most platforms do not accept responsibility for damages associated with any exchange.

4.12 Conclusions

The existing line between short-term lease, that a private party can make with almost no formality, and tourist accommodation, which necessarily imposes compliance with national and regional regulations, depends on many factors and is based on disparate sources of law. Thought no sharp line can be traced based on definite criteria and each regional law must be taken into account in order to have a complete and reliable picture of the legal framework

[86] The Corte di Cassazione ruled that the *quid pro quo* for a lease contract can be obligation to deliver a *res*. See Cass. 1909/1965.

applicable to short-term rental in Italy, the two elements that help to define a short term rent or non-hotel accommodation are the length of stay and the provision of additional services.

The first distinguishing criterion between touristic lease and non-hotel accommodation is based on whether or not additional services are offered. On the contrary, if ancillary services are also provided, a non-hotel accommodation is realised with consequential obligations.

The second relevant element is the length of use. As a general rule, if the property rental business works throughout the year it is deemed to be non hotel accommodation, whereas shorter period can be seen as occasional rent. However, different rules determine how to ascertain how the length of rental activity affects the qualification of short term rentals as business or not (see *supra*). Both national law and regional laws regulate time limits for non professional rental activities. This is usually done either by reference to somehow indefinite categories, such as "occasionally" ("*occasionalmente*") as opposed to "continuously" ("*continuativamente*"), or by adding specific time limit for each category of non-hotel accommodation. Most Italian regional laws use this two-track regime, by either defining discrete time limits or indeterminate expressions for each classified category of non hotel accommodation.[87]

This distinction between touristic lease and non-hotel accommodation, together with the different layers of national, regional and municipal rules, creates a somehow confused legal scenario, that may render less attractive the provision of services in short term peer-to-peer rental sector (see *infra*).

4.13 Legal texts

- Art. 117-118, Costituzione
- Legge 18 ottobre 2001, n. 3
- Art. 1571 ss. Codice civile

[87] Lombardia Regional Law of 1 October 2015, n. 27 (Regional policies on tourism and attractiveness of Lombardy).

- Codice del turismo (Decreto legislativo 23 maggio 2011, n. 79)

- D.L. 22 giugno 2012, n. 83

- D.L. 25 giugno 2008, n. 112

- Legge 04 agosto 2006, n. 248

- D. Lgs. 9 aprile 2003, n. 70

- Legge 29 marzo 2001, n. 135

- Legge 9 dicembre 1998, n. 431

- Legge 7 agosto 1990, n. 241

- D.P.R. 26 aprile 1986, n. 131

- Legge 17 maggio 1983, n. 217

- Regio decreto 18 giugno 1931, 773

- Legge regionale Lazio, 7 agosto 2015, n. 8

- Legge regionale Lazio, 6 agosto 2007, n. 13

- Legge regionale Lombardia, 1 ottobre 2015, n. 27

Corte Costituzionale, 2 - 5 aprile 2012, n. 80

5 UNITED KINGDOM. LONDON

5.1 Task I - Identification of the existing rules

First, identify the national, regional or local rules and administrative practices (related for example to the functioning of the registry) that apply and regulate the above-mentioned activities both for providers of the assets (rooms, apartments, etc) for home-sharing or short-term rentals and home swapping, and the online platforms offering/advertising those assets.

5.2 The collaborative economy

The UK Government strongly believes the sharing economy can help cities to address social and economic challenges in innovative new ways and to drive local growth. For this reason it intends to be at the forefront of the sharing economy, questioning old barriers that stop people sharing their assets and providing an environment for the sharing entrepreneurs to flourish.[88]

The government also intends to enable government employees to use sharing economy solutions to book accommodation and transport when travelling on official business, where this represents value for money, and to amend the future Travel and Vehicle Hire contracts due to be awarded by the Crown Commercial Service providing accommodation sharing choices.

A new trade body, Sharing Economy UK (SEUK), has been launched in March 2015 to represent the sector.[89]

5.3 The accommodation sector

In London there are more than 25,000 listings. Around 52% are entire homes/apartments; 45% private rooms and less than 2% shared rooms. 41% of the entire homes being listed in London on Airbnb (7,893 of 13,331) are by hosts that have more than one listing. The average

[88] Department for Business, innovation and Skills, Independent review in the sharing economy. Government response, March 2015. This document was issued in response to D. Wosskow, Unlocking the sharing economy. An independent review, November 2014.

[89] http://www.sharingeconomyuk.com/.

price per night is £ 101.[90] A problem of enforcement also exists. According to a source, in London around fourty per cent of all listings are probably "professional hosts running pseudo-hotels".[91]

5.3.1 The Town and country planning act 1990

In order to appreciate rules applicable to short term rents in London, a short premise on planning permission may be useful, so to frame the applicable legislation – especially the Greater London Council (General Powers) Act 1973 - within the context of English planning system.

Under the Town and Country Planning Act 1990, a planning permission is required for any development of land (subject to certain provisions). The meaning of development is set out in section 55(1) of the 1990 Act and includes a "material change in the use".

Sec. 55. Meaning of "development" and "new development"
Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.[92]

The Act does not provide a statutory definition of "material change in the use". However, its meaning is usually linked to the significance of a change and the resulting impact on the use of land and buildings.

[90] http://insideairbnb.com/london/index.html?neighbourhood=&filterEntireHomes=false&filterHighlyAvailable=false&filterRecentReviews=false&filterMultiListings=false
[91] See UK House of Commons, *Supplementary Written Evidence from the British Hospitality Association*, 1, at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-innovation-and-skills-committee/the-digital-economy/written/26821.html.
[92] http://www.legislation.gov.uk/ukpga/1990/8/section/55.

5.3.2 The Greater London Council (General Powers) act 1973

UK planning legislation specifies that the change of use of land or buildings requires planning permission so far as it constitutes a "material change in the use". In the short-term letting sector this means that a person may be able to rent her residential property provided that it does not amount to a material change in the use.[93]

In order to verify the occurrence of a "material change in the use" due to short term rentals, local planning authorities must ponder each case, taking into account all relevant elements: the amount of a property which is used as a short-term let, the frequency of use, whether the property owners live in the property whilst it is used as a short term let (i.e. provided that a house is primarily used as a home first, and short-term letting accommodation as a secondary use).[94]

Until March 2015, London was subject to different rules from the rest of the country and The Greater London Council (General Powers) Act 1973 was the law applicable to short-term rents in the City of London. Section 25 of the Greater London Powers Act 1973 stated that the "use as temporary sleeping accommodation of any residential premises in Greater London involves a material change of use of the premises and of each part thereof which is so used".

This means that renting a property in London would always amount to a "material change in the use" that required a planning application to be submitted, and this ban was valid regardless the length of the stay (this rule applied even if only part of the premises is used as temporary sleeping accommodation).[95]

[93] Under the Town and Country Planning (Use Classes) Order 1987 Houses are grouped into use class C3, whereas guest houses and boarding houses are grouped into use class C1.
[94] Department for Communities and Local Government, Review of Property Conditions in the Private Rented Sector, February 2014, 48-50.
[95] Deregulation Act (2015), Explanatory Notes, Commentary on Sections 44-45, 206.

Considering the destination of a residential premises to temporary sleeping accommodation as a material change of use implies that a change from residential premises to temporary sleeping accommodation is to be seen as development which requires planning permission.[96]

In accordance with this statute, homeowners in London were banned from letting out their property on a short term basis, unless they had planning permission. Those who disregarded this rule faced a possible fine of up to £20,000 for each "offence" of failing to secure planning permission.

The Greater London Council (General Powers) Act 1973 aimed to safeguard the housing supply in London, and the purpose of section 25 of the Act was to protect London's existing housing supply, restricting the use of residential premises in the thirty-two London boroughs and the City as temporary sleeping accommodation, for the benefit of permanent residents, by giving London boroughs greater and easier means of planning control to prevent the conversion of family homes into short term lets.[97] This result was achieved by making the use as temporary sleeping accommodation of the premises a "*material change of use*" for which planning permission is required.

5.4 Rules applicable outside London

In UK a landlord may be able to rent her residential property, provided that it does not amount to a material change in use, for which a planning permission is required under the Town and Country Planning Act 1990. Under this Act, a planning permission is required for any development of land if this development amounts to a "material change in the use".[98]

[96] Deregulation Act (2015), Explanatory Notes, Commentary on Sections 44-45, 209.
[97] Deregulation Act (2015), Explanatory Notes, Commentary on Sections 44-45, 208.
[98] Sec. 55. Meaning of "development" and "new development": Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land http://www.legislation.gov.uk/ukpga/1990/8/section/55.

The Act does not provide a statutory definition of "material change in the use". However, its meaning is usually linked to the significance of a change and the resulting impact on the use of land and buildings.

In order to verify the occurrence of a "material change in the use", local planning authorities should ponder each case in order to verify whether the use of a residential premise as temporary sleeping accommodation amounts to a significant transformation[99], taking into account all relevant elements: among others, whether the property owners live in the property whilst it is used as a short term let (i.e. provided that a house is primarily used as a home first, and short-term letting accommodation as a secondary use).

In sum, outside London local planning authorities must ponder each case each case of short term rentals, taking into account all relevant elements, among which whether the property owners lives in the property whilst it is used as a short term let (i.e. provided that a house is primarily used as a home first, and short-term letting accommodation as a secondary use).[100]

5.5 The need for a change

More recently these London provisions from the 1970s have attracted controversy, especially during the recent London Olympics where a touristic accommodation shortage took place. As stated in the Explanatory Notes to the Act, internet has also changed patterns in short-term lets, as new technologies are helping facilitate householders rent out their homes for short periods of time without recourse to traditional letting agencies; and has created entirely new ways to do business, making much easier for people to rent out their property, and allowing residents to supplement their incomes and offer new experiences for consumers.

The call for change was based on this new reality taking place and the widespread diffusion of

[99] Department for Communities and Local Government, Review of Property Conditions in the Private Rented Sector, February 2014, 48-50.
[100] Department for Communities and Local Government, Review of Property Conditions in the Private Rented Sector, February 2014, 48-50.

practices in breach of law and difficulties in enforcement. The development of the internet and changes in the way that people want to use their home have led to calls for the provisions of section 25 to be relaxed so that people in London can let out their property as temporary sleeping accommodation for short periods without obtaining planning permission.[101]

As stated in a Discussion Document issued by the Department for Communities and Local Government in February 2015 ("*Promoting the sharing economy in London. Policy on short-term use of residential property in London*"): "There are currently thousands of London properties and rooms advertised for use as short-term accommodation on websites. However, each is potentially in breach of Section 25 as it stands. The current legislation is poorly enforced leading to confusion and uncertainty for householders as to whether their local authority will take planning enforcement action against them for unauthorised short-term letting". As mentioned, this was particularly evident during the London Olympics where there was some controversy over the inconsistent application of the legislation across the Boroughs.[102]

5.6 Discussion Document "Promoting the sharing economy in London. Policy on short-term use of residential property in London"

The amendment of Section 25 of the Greater London Council (General Powers) Act 1973 that took place in March 2015 was preceded by the above-mentioned *Discussion Document*, which summed up the results of a survey for the need for reform of short-term letting in London. The results are somehow conflicting.

While organisations and individuals involved in short-term letting in London were strongly supportive of the proposals to modernise this legislation, eight authorities and London Councils were opposed to changing the legislation on the basis that they fear an increase in short-term letting would lead to a loss of amenity and housing supply (those with concerns

[101] Deregulation Act (2015), Explanatory Notes, Commentary on Sections 44-45, 210.
[102] Department for Communities and Local Government, Promoting the sharing economy in London. Policy on short-term use of residential property in London, February 2015.

included individuals, some residents' associations, property owners and representative bodies and local authorities). None of them were advocating unrestricted deregulation of short-term use.[103]

The modernisation of the Greater London Council (General Powers) Act 1973 has the aim to make London regulation uniform with the rest of the country: while in all other parts of the country residents were able to let out their homes for short periods as a matter of course, in London short-term use was strictly regulated under the old legislation and short-term use as temporary sleeping accommodation were only permitted once planning permission was obtained from the local authority, which was "a bureaucratic and disproportionate process" for all concerned. The new regulation intends to enable Londoners to participate in the sharing economy and benefit from recent innovations in information technology by letting out either a spare room or their whole house in the same way as other residents across the country.[104]

5.7 Deregulation act 2015

As a result of the debate, in March 2015 the Deregulation Act 2015 amended the Greater London Council (General Powers) Act 1973. With the new rules, while permanent short-term use of a residential property should still require planning permission, the Act assumes that the short-term letting of a property is reasonable, putting in place measures to provide for this. Homeowners are now able, under given conditions, to rent out their property as a short-term let for up to ninety days a year.

5.8 Change of use

Deregulation Act 2015 creates a new section of the Greater London Council (General Powers) Act 1973 Act (25a) which provides that the use as temporary sleeping accommodation of any

[103] Department for Communities and Local Government, Promoting the sharing economy in London. Policy on short-term use of residential property in London, February 2015, 13-15.
[104] Department for Communities and Local Government, Promoting the sharing economy in London. Policy on short-term use of residential property in London, February 2015, 1-2.

residential premises in Greater London does not constitute a change of use, for which planning permission would be required, if certain conditions are met. Art. 44, Deregulation Act 2015 provides that:

"*Despite section 25(1), the use as temporary sleeping accommodation of any residential premises in Greater London does not involve a material change of use*".[105]

Temporary sleeping accommodation is defined as "sleeping accommodation which is occupied by the same person for less than ninety consecutive nights and which is provided (with or without services) for a consideration arising either by way of trade for money or money's worth, or by reason of the employment of the occupant, whether or not the relationship of landlord and tenant is thereby created".[106]

This provision applies only if two conditions are met:
1. The first is that the sum of (a) the number of nights of use as temporary sleeping accommodation, and (b) the number of nights (if any) of each previous use of the premises as temporary sleeping accommodation in the same calendar year, does not exceed ninety;
2. The second is that, in respect of each night which falls to be counted under subsection (2)(a) — (a) the person who provided the sleeping accommodation for the night was liable to pay council tax under Part 1 of the Local Government Finance Act 1992 in respect of the premises, or (b) where more than one person provided the sleeping accommodation for the night, at least one of those persons was liable to pay council tax under Part 1 of that Act in respect of the premises (art 44, Deregulation Act 2015).

The first condition is based on the number of nights and states that the use of a premise as temporary sleeping accommodation in one calendar year must not exceed ninety. The second condition is that the person who provided the sleeping accommodation must be liable to pay council tax (including people who are liable to council tax but are in receipt of a discount).

[105] Art. 44, Deregulation Act (2015), Short-term use of London accommodation: relaxation of restrictions.
[106] Deregulation Act (2015), Explanatory Notes, Commentary on Sections 44-45, 207.

In sum, the Deregulation Act 2015 restricts short-term letting of residential premises to a maximum of 90 days in a calendar year, meaning that properties cannot be used as temporary sleeping accommodation on a permanent basis throughout the year, limiting the potential impact on local amenity. While property owners will still have to seek planning permission from their local authority if they wish to change the use of premises, for example from a private home to a hotel or hostel. It will also remain a matter for local planning authorities to determine whether an unauthorised change of use has taken place, and whether they should take planning enforcement action in the public interest.[107]

5.9 Exemptions

The Deregulation Act 2015 also created a new section 25B of the 1973 Act which provides that either the local planning authority or the Secretary of State may direct that the Exception created by section 25A of the 1973 Act is not to apply to certain residential premises or to residential premises located in certain areas. Such a direction may only be given if it is necessary to protect the amenity of the locality.

These exceptions are the result of the apprehensions expressed about the new legislation. A particular concern centred on the issues arising from frequency of tenant turnover and the nature of tenants who accessed property on a short-term basis. Other points that were made included the risk of losing existing family housing from the mainstream market, and loss of amenity; fear of crime, noise and disturbance, fire risk and hygiene; short-term use undermining the current policy to increase and improve the long-term private rented sector; discouraging downsizing and freeing up of larger homes; and the need to ensure consistent regulation of the hotel sector and short-term use.[108]

[107] Department for Communities and Local Government, Promoting the sharing economy in London. Policy on short-term use of residential property in London, February 2015, 24.
[108] Department for Communities and Local Government, Promoting the sharing economy in London. Policy on short-term use of residential property in London, February 2015, 17.

Art. 45 of the Deregulation Act (2015) "Short-term use of London accommodation: power to relax restrictions", provides the Secretary of State with a power to make regulations, subject to the affirmative procedure, so that further exceptions to section 25 of the 1973 Act may be created ("the Secretary of State may by regulations made by statutory instrument provide that section 25(1) of the Greater London Council (General Powers) Act 1973 does not apply if conditions specified by the regulations are met"). If regulations are made to create new exceptions, they must also include provision equivalent to section 25B of the 1973 Act (inserted by section 44) which permits the local planning authority or the Secretary of State to make a direction that the new exception will not apply to particular residential premises or residential premises situated in a particular area.[109]

The local planning authority[110] or the Secretary of State may direct that section 25A is not to apply: (a) to particular residential premises specified in the direction; (b) to residential premises situated in a particular area specified in the direction. Subsection (3) provides that the local planning authority may only give a direction with the consent of the Secretary of State. Subsection (4) provides that the direction can be revoked by the person who gave the direction. Subsections (5) and (6) provide that the Secretary of State may delegate his power to give or revoke a direction, and direct that a local planning authority does not require the Secretary of State's consent to give a direction.

A direction may be given only if the local planning authority or (as the case may be) the Secretary of State considers that it is necessary to protect the amenity of the locality. The local planning authority may give a direction only with the consent of the Secretary of State. A direction may be revoked by the person who gave it, whether or not an application is made for the revocation. The Secretary of State may delegate the functions of the Secretary of State to the local planning authority; direct that a local planning authority may give directions without the consent of the Secretary of State.[111] The Secretary of State can make regulations in relation to the information which must be provided by a local planning authority when it is

[109] Deregulation Act (2015), Explanatory Notes, Commentary on Sections 44-45, 215.
[110] "local planning authority" has the same meaning as in the Town and Country Planning Act 1990 (see section 336(1).
[111] Deregulation Act (2015), Explanatory Notes, Commentary on Sections 44-45, 212.

seeking consent to give a direction, as well as the procedure which should be followed in connection with the making or revocation of a direction.[112]

The Secretary of State may by regulations made by statutory instrument make provision: (a) as to the procedure which must be followed in connection with the giving of a direction or in connection with the revocation of such a direction; (b) as to the information which must be provided where the local planning authority seeks the consent of the Secretary of State to the giving of a direction.

A full planning permission in case to convert a flat or house into a short term/ holiday let may be difficult to obtain. Camden Council, for example, adopted planning policy within the Council's Local Development Framework that aim to resist development that changes permanent housing to short stay accommodation/holiday lets, on the assumption that short term letting can disturb neighbours, with visitors creating noise, sometimes at unsociable hours; that high turnover of visitors/renters can also impact on permanent occupiers reducing the sense of community and raising the fear of crime; that the short term letting of residential properties also reduces the permanent housing stock. In case of unauthorised change of use for which planning permission will be required, the Council can take appropriate enforcement action which can include serving an Enforcement Notice to require the use to cease.[113]

5.10 Enforcement

Where a property has changed its use, for example where a house is being used as a hotel or hostel, this would require planning permission. If a change of use occurs without planning permission, the local planning authority can consider taking enforcement action.

The National Planning Policy Framework clarifies that effective planning enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control. Local planning authorities should consider

[112] Art. 44, subsection 7, Deregulation Act (2015), Short-term use of London accommodation: relaxation of restrictions.

[113] http://www.camden.gov.uk/ccm/content/environment/planning-and-built-environment/two/planning-applications/before-you-apply/residential-and-business-projects/short-term-lettings/.

publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area. This should set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development, and take action where it is appropriate to do so.[114]

With specific reference to the accommodation sector, the Government recommends that Regulations for those providing accommodation should be proportionate to the scale of operation (i.e. someone renting out a spare room a few nights a year should not be subject to the same level of regulation as a business renting out 100 rooms year-round).[115]

5.11 Sublet

The tenant must not assign or sublet the whole or any part of the property. This clause is in the standard tenancy agreement, located in the website of the Government. However, the Government announced to its response to the Recommendation of Debbie Wosskow that it will amend its model agreement for an assured short hold tenancy by summer 2015, to provide that tenants in private rented accommodation can request their landlord's permission to sub-let or otherwise share space, on a short-term basis.[116] Although the website has an updated version of the standard tenancy agreement, the prohibition of subletting remains so far.

5.12 Other regulations

Regulation for those providing accommodation should be proportionate to the scale of operation. For example, the Fire Safety Order 2005 is based on the principle of proportionality, rather than prescription. The Fire Safety Order applies to anyone who has a property for which someone pays to stay, other than to live there as a permanent home. If someone has any

[114] Department for Business, innovation and Skills, Indipendent review in the sharing economy. Government response, March 2015, 2.8.
[115] Department for Business, innovation and Skills, Independent review in the sharing economy. Government response, March 2015, Chapter 2.
[116] Department for Business, innovation and Skills, Independent review in the sharing economy. Government response, March 2015. This document was issued in response to D. Wosskow, Unlocking the sharing economy. An independent review, November 2014.

paying guests, even in her own home, she must comply with the law on fire safety and carry out a risk assessment.

Assuming that there is no "one size fits all" to fire safety, it requires a responsible person (usually the employer or the owner) to assess the risk from fire in their particular premises and use this assessment to determine what fire precautions are sufficient to reduce the risk to life to as low as reasonably practicable. The responsible person need to use her judgment to decide what fire precautions are appropriate in the light of the particular circumstances and those of guests. If the premises are similar to a family home, the fire safety precautions are likely to be simpler than those needed for larger premises with more complicated layouts and staff. However, there is no absolute definition of "small" premises, so providers must use their common sense. The responsible person will need to use their judgement to decide what fire precautions are appropriate in the light of their particular circumstances and those of their guests.[117]

The "Housing Health and Safety Rating System" (HHSRS) provides an objective assessment of the extent to which a property contains hazards and the likelihood of harm occurring to the occupier(s) as a result. This HHSRS is the Government's approach to the evaluation of the potential risks to health and safety from any deficiencies identified in dwellings. Although not in itself a standard, it has been introduced as a replacement for the Housing Fitness Standard.[118] The underlying principle of the HHSRS is that any residential premises should provide a safe and healthy environment for any potential occupier or visitor.[119]

This HHSRS does not set out minimum standards. It is concerned with avoiding or, at the very least, minimizing potential hazards. The scoring system for hazards is prescribed by the Housing Health and Safety Rating System (England) Regulations 2005 (SI 2005 No 3208) and is also set out in the statutory HHSRS Operating Guidance for local authorities.[120] Installations

[117] Department for Business, innovation and Skills, Independent review in the sharing economy. Government response, March 2015, 2.2.

[118] Housing Act 1985, s604, as amended by the Local Government and Housing Act 1989.

[119] Office of the Deputy Prime Minister: London, Housing Health and Safety Rating System Operating Guidance Housing Act 2004 Guidance about inspections and assessment of hazards given under Section 9, 1.12 (February 2006).

[120] Local authorities already have powers under the Housing Act 2004 to assess the risks and hazards in all residential properties using the Housing Health and Safety Rating System.

covered are: water, gas and electricity; personal hygiene covers installations; sanitation and drainage; food safety; ventilation; space and water heating installations.[121]

This existing legislation, such as that imposing health and safety requirements, remains in place for properties being let out on a short-term basis even after the reform that took place in 2015.[122] For example, HHSRS is applicable to short-term rents, since using the HHSRS means that even an unoccupied dwelling can be checked (it is the dwelling by itself which is checked, not the dwelling with the current occupants). So, the hazard score produced by the local authority officer stays with the dwelling even if there is a change of occupiers and stays until work has been done to minimise any hazards. Further, when rooms and areas are shared, the check or assessment has to look at any possible increase in the likelihood and/or outcomes which could happen as a result of the sharing. It must also take into account the number of other dwellings sharing rooms and areas. For instance, the chance of a risk of infection might be greater because of sharing, or a person living in the dwelling that is being rated may be under stress because of the sharing.[123] If a property is found to contain serious hazards, the local authority has a duty to take the most appropriate action. This could range from trying to deal with the problems informally at first, to prohibiting the use of the whole or part of the dwelling, depending on the severity of the hazard. Local authorities also have powers to carry out emergency remedial works if necessary.

Building Regulations require the provision of smoke alarms in all new dwellings but, at present, landlords are not legally required to install or maintain smoke alarms in their properties. A non-regulatory approach to increase smoke alarm installation in the private rented sector has been deployed, including targeted national awareness activity, and direct retrofitting of smoke alarms by fire authorities and their partners. This approach has seen deaths in the home reduced by 60% in the last 30 years. It is a requirement of the Building

[121] Department for Communities and Local Government, Housing Health and Safety Rating System Guidance for Landlords and Property Related Professionals, May 2006, 5 ss.
[122] Department for Communities and Local Government, Promoting the sharing economy in London. Policy on short-term use of residential property in London, February 2015, 25.
[123] Department for Communities and Local Government, Housing Health and Safety Rating System Guidance for Landlords and Property Related Professionals, May 2006, 10-13.

Regulations that a carbon monoxide alarm must be installed in any property when a solid fuel heating system, for example, a wood burning stove, is first installed. There is no requirement for any other property to have a carbon monoxide alarm.

Landlords are under a general legal duty to ensure that electrical installations in the property are safe and kept in good working order. The Electrical Safety Council recommends that electrical installations in rented dwellings should be checked by a qualified electrician every 5 years and that a visual inspection of electrical sockets should be undertaken on a change of tenancy. On the issue of working smoke alarms, a Discussion paper on improving Property Conditions in the Private Rented Sector has been issued by the the Department for Communities and Local Government (DCLG) in 2014.

5.13 Taxation

UK adopted a "Rent a Room Scheme" which allows householders to earn an additional £4,250 a year tax free (the Government announced this threshold to climb to £7,500 in April 2016). Eligible are those who are resident landlords, whether or not they own the house, who receive rent from letting furnished accommodation in their only or main home, and those who run a bed and breakfast or a guest house.

Rent-a-Room does not apply to income from accommodation used as an office or for business other than by genuine lodgers (for example, students who are provided with study facilities in their lodgings, or lodgers who do some work in your home in the evenings or weekends). The beneficiaries of this allowance should be liable for council tax. If gross receipts are more than £4,250 it is possible to choose between paying tax on actual profit (gross rents minus actual expenses and capital allowances), or gross receipts (and any balancing charges) minus £4,250 – with no deduction for expenses or capital allowances.[124]

The standard personal allowance is applicable in collaborative economy services as well (£10,600). According to the UK VAT Guidelines, there seems to be no different threshold

[124] https://www.gov.uk/rent-room-in-your-home/the-rent-a-room-scheme.

depending on the activity pursued. Anybody must register for VAT with HM Revenue and Customs (HMRC) if his business' VAT taxable turnover is more than £82,000.

HMRC is committed to making it easier for people participating in the sharing economy to understand their tax obligations and report their income to HMRC. This includes plans to produce targeted bespoke guidance for the sharing economy.[125] Further, Government recommends that HM Revenue and Customs (HMRC) and HM Treasury should create a guide to tax in the sharing economy, and an online tax calculator to help users of sharing economy services to easily work out how much tax they are liable to pay.[126]

5.14 Platforms. Liability and duties

5.14.1 Electronic Commerce (EC Directive) Regulations 2002

Directive 2000/31 was incorporated into national law by the Electronic Commerce (EC Directive) Regulations (Electronic Commerce (EC Directive) Regulations 2002. To encourage online business, in accordance with article 4(1) of the E-Commerce Directive, this regulation provides that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or to any other requirement having equivalent effect, no such requirements exist in UK law, where there are specific authorisation requirements but only for the platforms offering crowdfunding, peer-to peer lending services.

Even before the transposition of the E-Commerce Directive, the United Kingdom was the first European country to adopt a specific legislation to limit online intermediary liability, although this legislation was limited to defamation.[127]

Also the question of platforms' liability arose for the first time thanks to a preliminary ruling filed by the High Court of Justice (England and Wales), as a result of a lawsuit filed by L'Oreal

[125] https://www.gov.uk/vat-businesses/how-vat-works.
[126] Department for Business, innovation and Skills, Indipendent review in the sharing economy. Government response, March 2015, 1.23.
[127] The Defamation Act of 1996 introduced an "innocent dissemination", and exempted online intermediaries from liability for third party materials. See http://www.legislation.gov.uk/ukpga/1996/31/contents.

and its subsidiaries companies (Lancome and Garnier) against eBay, in regards to the marketing of L'Oreal products through eBay without its consent. This preliminary ruling later leaded to the ECJ decision in the famous L'Oréal v eBay (see *infra*).[128]

Following the distinction traced by the Directive, UK courts distinguish between service providers that only facilitate infringements by a third party, and service providers that authorise infringements by a third party.[129]

5.14.2 Enterprise and Regulatory Reform Act 2013

A new piece of legislation, *Enterprise and Regulatory Reform Act 2013*, introduced novel rules applicable to all letting and managing agents in England.

Letting agents are already subject to consumer protection legislation and where agents are in breach of this legislation, action can be taken against them by trading standards who have civil and criminal enforcement powers. In addition to existing duties, Enterprise and Regulatory Reform Act 2013 requires letting agencies to belong to an approved redress scheme.

Art. 83, sec. 1, Enterprise and Regulatory Reform Act 2013 rules that:

"*The Secretary of State may by order require persons who engage in lettings agency work to be members of a redress scheme for dealing with complaints in connection with that work which is either a redress scheme approved by the Secretary of State, or a government administered redress scheme*".

A "redress scheme" is a system which provides for complaints against members of the scheme to be investigated and determined by an independent person; a "government administered

[128] (Case C-324/09.
[129] Bunt v. Tilley, [2006] EWHC 407 (QB).

redress scheme" means a redress scheme which is administered by or on behalf of the Secretary of State, and designated for the purposes of the order by the Secretary of State.[130]

Under this new legislation, the same interpretive issue related to ecommerce Directive, on the active or passive role role of peer-to-peer platforms, can be raised, since the adoption of the above mentioned redress scheme depends on the definitions of "letting agency work":

On this aspect, art. 83, sec. 7-8, of Enterprise and Regulatory Reform Act 2013, provides that:

7. In this section "lettings agency work" means things done by any person in the course of a business in response to instructions received from:
(a) a person seeking to find another person wishing to rent a dwelling-house in England under a domestic tenancy and, having found such a person, to grant such a tenancy ("a prospective landlord");
(b) a person seeking to find a dwelling-house in England to rent under a domestic tenancy and, having found such a dwelling-house, to obtain such a tenancy of it ("a prospective tenant").

8. However "lettings agency work" does not include any of the following things when done by a person who does no other things falling within subsection (7)
(a) publishing advertisements or disseminating information;
(b) providing a means by which
(i) a prospective landlord or a prospective tenant can, in response to an advertisement or dissemination of information, make direct contact with a prospective tenant or (as the case may be) prospective landlord;
(ii) a prospective landlord and a prospective tenant can continue to communicate directly with each other.

Notably, the rules do not introduce any restriction to the provision of services. Quite the contrary, by adopting a redress scheme for letting agency work the Enterprise and Regulatory

[130] Art. 83, sec. 2-3.

Reform Act 2013 delegates a significant part of governance to platforms in consonance with EU law principles (see *infra*).

5.15 Home swap

5.15.1 Money and remuneration

According to a widespread definition, money is the medium of exchange authorized or adopted by a government as part of its currency.[131] Remuneration (or price) is "the amount of money or other consideration asked for or given in exchange for something else".[132] Money or other consideration can constitute remuneration.

Under English law, a promise is binding as a contract only if supported by some "consideration", which means that something of value must be given for a promise in order to make it enforceable as a contract. While a gratuitous promise does not amount to a contract. Consideration is "something of value in the eye of the law" [133] or, in other words, "the price for which the promise is bought", according to the definition adopted by the House of Lords.[134]

For a valid consideration, a performance or a return promise must be bargained for. A performance or a return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. Performance may consist of an act other than a promise, a forbearance or the creation, modification, or destruction of a legal relation. The performance or return promise may be given to the promisor or to some other person.[135]

[131] Black's Law Dictionary (10th ed. 2014)
[132] Black's Law Dictionary (10th ed. 2014).
[133] Thomas v. Thomas (1842); Re Hudson (1885).
[134] Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge Ltd. (1915) A.C. 847, 855. This definition was first offered by F. Pollock, Principles of contract.
[135] This conclusion can be found in disparate authors: ranging from those more influenced by a civilian approach, such as P.S. Atiyah (See *The law of contract*) to those more influenced by the traditional common law legal categories, such as G.H. Treitel (See *The law of contract*).

5.15.2 Mutual promises and consideration

Mutual promises are regarded as consideration for each other. This means that performance and counter performance are interconnected. It follows that a contracting party must have performed her duties under the contract, in order to maintain an action for an agreed sum. Otherwise, only damages can be claimed. "You cannot claim remuneration under a contract if you have not earned it; if you are prevented from earning it, your only remedy is in damages".[136] In case of breach, a claim based on "*quantum meruit/valebat*" applies, and the plaintiff may sue the defendant for a reasonable amount of money.[137]

5.15.3 Qualification of home swap under English law

Home exchange/swap is the temporary peer to peer exchange of homes, usually for holidays. Under English law home swap can be seen as a contract, with a valuable consideration since both parties confer "something of value in the eye of the law" on the other one, while obtaining something of value for themselves as an exchange. In sum, home swap can be seen as a contract with a valid consideration, consisting in the exchange of one commodity or service for another without the use of money.

Home swap often takes the form of a detailed written agreement between two parties to swap their homes for a given period of time, although verbal agreements are also frequent. The exchange can be simultaneous, when it takes place in the same period, or it can occur in different moments. In this latter case, the exchange system if often coupled with a credit system that can be redeemed at a later date, so lessening potential scheduling problems that can hamper straight home swaps. Usually no monetary exchange takes place.

Despite the absence of money, potential risks connected to this kind of exchange are not negligible, and online platforms play an important role in guaranteeing the fairness of the

[136] The Alaskan Trader (1984).
[137] F.H. Lawson, Remedies of English law.

exchange and the prevention and/or resolution of disputes; platforms may require prior registration of the parties, check parties' reliability, provide penalties in case of breach/damages, and recommend to take up insurance. Platforms may also provide detailed guidance on how to arrange a swap or even arrange it. Most platforms do not accept responsibility for damages associated with any exchange. Home swap is not regulated under UK law and no court decision has been found dealing with this contract.

5.16 Conclusions

With the amendment of Section 25 of the Greater London Council (General Powers) Act 1973 that took place in March 2015, is now possible to let out spare room or whole houses in London in the same way as in the rest of the country.

With the new rules, while permanent short-term use of a residential property should still require planning permission, it is now possible, under given conditions, to rent out a property as a short-term let for up to ninety days a year, and the use as temporary sleeping accommodation of any residential premises in Greater London does not constitute a change of use, for which planning permission would be required.

Different rules apply to the rest of the country, where the significance of the change, due to the short term rental of a given premise, must be ascertained in each case, in order to decide whether "material change in the use" took place.

Notably, with specific reference to the accommodation sector, the Government recommends that regulations for those providing accommodation should be proportionate to the scale of operation, that regulation must always be deemed as a last resort and the scope for non-regulatory alternatives is always explored non-regulatory alternatives. A flexible approach is also suggested with regard to enforcement.

5.17 Legal text

Deregulation Act 2015

Enterprise and Regulatory Reform Act 2013

Town and Country Planning Act 1990

Town and Country Planning (Use Classes) Order 1987

Greater London Council (General Powers) Act 1973

6 LEGAL ASSESSMENT OF THE IDENTIFIED MEASURES

6.1 Task II – Legal assessment of the identified measures

First, identify whether the applicable legislation which imposes authorisation, licenses and registration requirements on providers of collaborative economy services and on intermediation platforms, can be considered a restriction in view of the Services Directive (Articles 9 to 16 and Article 22) and the e-Commerce Directive (Articles 3 to 5), and alternatively, in view of the freedom to provide services and freedom of establishment (Articles 56 and 49 TFEU).

6.2 What is a "service"

Article 56 TFEU (ex Article 49 TEC) prohibits restrictions on the provision of services between Member States:

"Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."

Article 49 TFEU (ex Article 43 TEC) provide that:

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State."

"Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

These provisions are complemented by Directive 2006/123/EC on services in the internal market ("Services Directive"), and by sector specific regulation.

6.2.1 Purely internal situations

The provisions of the Treaty on freedom of establishment and freedom to provide services apply whenever the service provider and service recipient are established in different Member States.[138] This happens when the service provider travels to another state; when it is the recipient who travels[139] or where both recipient and provider meet in a third state.[140] On the contrary, they do not apply to purely internal situations.[141]

Even though, according to their wording, the provisions of the EC Treaty concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation.[142] Accordingly, the right to exercise freedom to provide services includes the freedom for the recipients of services to go to another Member State in order to receive a service[143] and also when neither the provider nor the recipient of the service travels, but the service is provided by internet.[144] Those

[138] Case C-108/98 RI-SAN v Comune di Ischia [1999]; Case 52/79 Procureur du Roi v Debauve [1980] ECR 833; Case 15/78 SG Alsacienne v Koestler [1978] ECR 1971.
[139] Joined Cases C-286/82 and C-26/83 Luisi and Carbone v Ministero del Tesoro [1984]; Case 186/87 Cowan v Trésor Public [1989].
[140] Case C-180/89 Commission v Italy [1991]; Case C-398/95 Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias [1997].
[141] Case C-115/78 Knoors [1979].
[142] Cfr. European Commission, *Guide to the Case Law of the European Court of Justice on Articles 49 et seq. TFEU. Freedom of Establishment*, Ref. Ares(2016)766693 - 12/02/2016. See, inter alia, Case C-298/05 Columbus Container Services [2007].
[143] Case C-55/98 Vestergaard [1999].
[144] Case C-62/79 SA Compagnie générale pour la diffusion de la télévision Coditel v. Ciné Vog Films [1980]; Joined Cases C-34-

considerations also apply where a company established in a Member State carries on business in another Member State through a permanent establishment.[145] And the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State.[146]

6.2.2 Remuneration.

A core aspect is that the services must be provided for remuneration, since genuinely non-economic services are excluded from the meaning of "service" under EU law.

Article 57 TFEU provides that "Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons".

Remuneration need not be money, as long as it can be valued in money.[147] Nor does remuneration need to be paid by the recipient of the service.[148]

The essential characteristic of remuneration lies in the fact that *it constitutes considerations for the service in question*, and is normally agreed upon between the provider and the recipient of the service (emphasis added).[149]

On the other side, not every payment to the service provider is remuneration, as in the case of a payment that constitutes only a small part of what received in exchange for a service, or when very small payments took place.[150]

36/95 De Agostini [1997]; Case C-384/93 Alpine Investments v Minister van Financiën [1995].
[145] Case C-414/06 Lidl Belgium [2008].
[146] Case C-384/93 Alpine Investments v Minister van Financiën [1995].
[147] Case C-154/80 Staatsecretaris van Financiëen v Coöperative Aardappelenbewaarplaats [1981]; Case C-288/94 Argos Distributors Ltd v CCE [1996]; Case C-258/95 Söhne v Finanzamt Neustadt [1997].
[148] Joined Cases C-51/96 and C-191/97 Deliège v Asbl Ligue Francophone de Judo [2000] ECR I-2549
[149] Case C-263/86 Humbel v. Belgium [1988].
[150] Cfr. D. Chalmers – G. Davies – G. Monti, European Union Law.

In sum, those payments which are essentially consideration for the services are regarded by the European Court of Justice as remuneration: "The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service".[151]

Another aspect of potential interest for peer-to-peer services in the accommodation sector is related to the motivation of both service providers and recipients. Under EU law, the motivation of the payer appears to be important to define a "service", while the motivation of the provider is not.[152] The European Court of Justice has ruled that there is no need for service providers to seek to make a profit, and the mere fact that they are providing very important public services does not as such take them outside of Article 56.[153] In sum, it is not crucial that providers "do it for the money", and the only question appears to be whether the service provider receives consideration for their activities.[154]

This ruling can be of potential relevance for peer to peer rental activities, some of which are predominantly motivated by non monetary reasons. According to the mentioned case, such activities would nonetheless be regarded as "service".

6.3 Home swap as "service" under TFUE and Services Directive

Home swap is not regulated under any of the reviewed legal systems and no court decision has been found.

If the absence of direct rules implies that no explicit restriction is laid down by national legislation, it is questionable whether this transaction falls within the scope of the Services Directive as a "services".

[151] Case 263/86 Humbel v Belgium [1988] ECR 5365
[152] Cfr. D. Chalmers – G. Davies – G. Monti, European Union Law.
[153] Case C-157/99 Geraets-Smits v Stichting Ziekenfonds; Peerbooms v Stichting CZ Groep Zorgverzekeringen [2001] ECR I-5473; Case C-158/96 Kohll v Union des Caisses de Maladie [1998] ECR I-1931.
[154] Monti

Admittedly, the Services Directive lists, among others, real estate and tourism services as an example of service to which the Directive does apply to (Recital 33).[155] But the interpretive question under scrutiny here is whether home swap can be described as a "self-employed economic activity, normally provided for remuneration" (art. 4, co. 1, n. 1).

To be sure, this reasoning does not suggest that home swap cannot be regarded as a contract. Quite the contrary, home swap is a contract with a valid consideration, consisting in the exchange of a commodity for another. And even if no money is involved in the exchange, a valuable consideration exists, since both parties confer "something of value in the eye of the law" on the other one, while obtaining a something else for themselves as an exchange.

More precisely, absent a set of rules devoted to this kind of exchange, this contract classified as "atypical" under civil law categories (*contrats innomés* under French law; *contratti atipici* or *innominati* under Italian law).[156] Following the principle of autonomy of the will, parties are free to conclude any contract even if it is not expressly ruled by the law. With no statutory discipline, the contract must first be "qualified" in order to determine whether it falls within the realm of one specific nominate contract or that it comprises elements of several nominate contracts, interpreting it accordingly and applying the related discipline.

These conclusions imply that home swap can be defined as a synallagmatic (bilateral) contract, where both parties confer advantages on the other one, while obtaining a reciprocal advantage for themselves. Further, it is an onerous contract, since both parties have the intention to confer such an advantage in exchange for a reciprocal advantage.

However, defining home swap as synallagmatic (bilateral) and onerous contract does not imply its framing as "service" in exchange for money/remuneration. Not all bilateral, onerous contract are service, and the case of home swap can be better defined as an "exchange contract", rather than a service contract, where parties have a symmetrical position, with no

[155] See also Case C-398/95 Syndesmos ton en Elladi Touristikon kai Taxidiotikon Grafeion v Ypourgos Ergasias [1997].
[156] This distinction holds only with reference with civil law systems. In common law, case law is defined by decisions that always deal with specific contracts.

clear difference between provider and recipient. Thus, in case of home swap it can be argued that no service for remuneration is provided, but an exchange between two parties takes place.

6.4 What is a "restriction" on service?

The concept of "restriction" covers any measure taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade.

Art. 16, Services Directive provides that:
Member States shall respect the right of providers to provide services in a Member State other than that in which they are established. The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:
(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;
(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

6.4.1 Nationality

The first, clearest case of discrimination under art. 16, sec. 2, a), is any distinction in legal treatment based on nationality. Abolition of all discrimination against a person providing a

service on grounds of his nationality is the most plain and indisputable form of discrimination forbidden by EU law.[157]

Art. 57 TFEU provides that: *"Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals."*

6.4.2 Direct and indirect discrimination

Rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but they also forbid all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.[158]

EU law prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for its own nationals.[159] Following this rule, Member States must avoid any overt or covert discrimination on grounds of nationality.[160]

Any national measure which, albeit applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the Treaty constitutes a restriction within the meaning of Article 49 TFEU.

[157] Case C-279/80 Webb [1981].
[158] Case C-330/91 The Queen v Inland Revenue Commissioners, ex parte Commerzbank [1993]. Although the difference in treatment has only an indirect effect on the position of companies constituted under the law of other Member States, it constitutes discrimination on grounds of nationality which is prohibited by Article 52 of the Treaty. Case C-1/93 Halliburton Services v Staatssecretaris van Financïen [1994].
[159] Case 270/83 Commission v France [1986].
[160] Case C-250/95 Futura Participations and Singer v Administration des contributions [1997].

6.4.3 Residence

The second case of direct discrimination is based on residence. National rules under which a distinction is drawn on the basis of residence are liable to operate mainly to the detriment of nationals of other Member States.[161]

Art. 20, Services Directive, provides:

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.

2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

Before Services directive explicitly took into account residence, European Court of Justice ruled on this point: "National law of a Member State cannot, by imposing a requirement as to habitual residence within that State, deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable."[162]

The rationale behind such prohibition is that the great majority of nationals of a Member State are resident and domiciled in that State and therefore they meet that requirement automatically, whereas nationals of other Member States would, in most cases, have to move their residence and domicile to another State in order to comply with such a requirements.[163]

[161] Case C-224/97 Ciola. v Land Vorarlberg [1999].

[162] Case 33/74 Van Binsbergen [1974]. The ECJ concluded that "by retaining rules requiring patent agents established in other Member States to be enrolled on the Italian register of patent agents and to have a residence or place of business in Italy, in order to provide services before the Italian Patent Office, the Italian Republic has failed to fulfil its obligations under Articles 49 EC to 55 EC". Case C-131/01 Commission v. Italy [2003].

[163] Case C-221/89 Factortame [1991]. The use of the criterion of fiscal residence within national territory for the purpose of granting repayment supplement on overpaid tax is liable to work more particularly to the disadvantage of companies having, their seat in other Member States. Indeed, it is most often those companies which are resident for tax purposes outside the territory of the Member State in question. See Case C-330/91 Commerzbank [1993].

6.5 Direct discrimination in home-sharing and short term rentals

The first kind of discrimination to be evaluated in this Impulse paper are those connected with nationality and residence. While none of the national rules examined in this paper discriminate on the ground of nationality of the service provider and/or recipient, the same cannot be said about residence.

6.5.1 France (Paris)

Under French law, any accommodation repeatedly offered for short rent rents determines a change in classification of the dwelling, from residence into furnished premise. For this reason, any person who rents out a premise must declare it to the mayor of the municipality where the premise is located[164] and, in specific geographical areas (among them, Paris), a prior authorization subject to a "compensation" is required, allowing the permanent change of destination. [165] In sum, renting a furnished lodging repeatedly for short periods to transient guests, who do not elect their domicile in the lodging, is deemed as a change in use.[166]

In cases when a declaration of renting a tourist dwelling must be sent to the mayor of the municipality where the premise is located, the duty to communicate does not apply to premises that are the "*résidence principale*" of the landlord. Even more important, a similar exception applies when a prior authorization issued by City Hall is also required, such as in Paris; the municipalities of the suburbs (Hauts-de-Seine, Seine-Saint-Denis and Val-de-Marne); municipalities with more than two hundred-thousands inhabitants.[167] Also in this case, the

[164] Art. L324-1-1, Code du Tourisme. *Toute personne qui offre à la location un meublé de tourisme, que celui-ci soit classé ou non au sens du présent code, doit en avoir préalablement fait la déclaration auprès du maire de la commune où est situé le meublé.*

[165] Art. L631-7 (6) Code de Construction et d'Habitation. *La présente section est applicable aux communes de plus de 200 000 habitants et à celles des départements des Hauts-de-Seine, de la Seine-Saint-Denis et du Val-de-Marne. Dans ces communes, le changement d'usage des locaux destinés à l'habitation est, dans les conditions fixées par l'article L. 631-7-1, soumis à autorisation préalable.*

[166] Art. L631-7, Code de la construction et de l'habitation. *Le fait de louer un local meublé destiné à l'habitation de manière répétée pour de courtes durées à une clientèle de passage qui n'y élit pas domicile constitue un changement d'usage au sens du présent article.*

[167] Art. L631-7 (6) Code de Construction et d'Habitation. *La présente section est applicable aux communes de plus de 200 000 habitants et à celles des départements des Hauts-de-Seine, de la Seine-Saint-Denis et du Val-de-Marne. Dans ces communes, le changement d'usage des locaux destinés à l'habitation est, dans les conditions fixées par l'article L. 631-7-1, soumis à*

authorization to change the use is not necessary when the premise is the principal residence of the landlord.[168] When the dwelling is the primary residence an exception applies and none of these formalities applies to "*résidence principale*".[169]

Given those premises, it is clear that the distinction between "*résidence principale*" and "*résidence* sécondaire" is of paramount importance, since an exception to prescribed rules applies in case of "*résidence principale*" with regard to communications, authorisations and compensations.

Notably, under French law the main residence is any dwelling occupied for at least eight months a year, in accordance with the meanings devised by the *Code de la construction et de l'habitation*; unless there are professional obligations, health or force majeure, that occurred either to the lessee, her partner or her dependent family members.[170] Following this rule, in order to be regarded as "*résidence principale*" the accommodation cannot remain unoccupied by residents for more than 120 days per year. Therefore, an accommodation that is rented out for more than 120 days in a solar year is regarded as a "*résidence sécondaire*".

In order to understand how the distinction between "*résidence principale*" and "*résidence* sécondaire" may constitute a restriction in the provision of services under EU law, and to verify whether this restriction is based on an unlawful discrimination, rules applicable to "*résidence principale*" and "*résidence sécondaire*" must be seen in combination with those on residency.

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autorisation préalable.

[168] *Lorsque le local à usage d'habitation constitue la résidence principale du loueur, au sens de l'article 2 de la loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986, l'autorisation de changement d'usage prévue à l'article L. 631-7 du présent code ou celle prévue au present article n'est pas nécessaire pour le louer pour de courtes durées à une clientèle de passage qui n'y élit pas domicile (*Article L631-7-1 A alinéa 5).

[169] Art. L324-1-1 Code du Tourisme. *Cette déclaration préalable n'est pas obligatoire lorsque le local à usage d'habitation constitue la résidence principale du loueur, au sens de l'article 2 de la loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986.*

[170] Art. 2, Loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986, Modifié par LOI n°2014-366 du 24 mars 2014 - art. 1. *La résidence principale est entendue comme le logement occupé au moins huit mois par an, sauf obligation professionnelle, raison de santé ou cas de force majeure, soit par le preneur ou son conjoint, soit par une personne à charge au sens du code de la construction et de l'habitation.*

The determination of residency status in France is governed by a general rule providing that those who spend at least 183 days per calendar year in France are deemed to be resident. Alternatively, a person would also be deemed to be resident if any one of these conditions apply: having the main home in France; carrying on a professional activity in France (either self-employed or as an employee); having the centre of economic interests in France.[171]

Combining these rules, it is apparent that the exemption for the "*résidence principale*" have a disparate impact on residents and non-residents, since it may only benefit residents, i.e. those who have been living in France for at least 183 a year. The fact itself of living in a dwelling for at least eight months a year makes the occupier a French resident. On the contrary, not all residents benefit from these exemptions. A dwelling that is not occupied for at least eight months a year is deemed as "*résidence secondaire*" and is subject to the above described formalities, even if the landlord is a French resident.

The disparate impact of this regulation on residents and non-residents may create an obstacle to the free provision of services, capable of hindering the exercise of this freedom and to deter the provision of services by foreigners, preventing them from freely pursuing their activities on account of disproportionate costs. And this conclusion is especially true in cases of authorisation with compensation, since in this case the difference may have a significant economic burden on those providing a short term rental service.[172] Even more important, the economic burden is significantly different, depending on where the premise to be converted is located, whether or not in the same arrondissement of the converted premise.

[171] According to art. 4B, Code Général des Impôts (CGI): "1. Sont considérées comme ayant leur domicile fiscal en France au sens de l'article 4 A: a. Les personnes qui ont en France leur foyer ou le lieu de leur séjour principal ; b. Celles qui exercent en France une activité professionnelle, salariée ou non, à moins qu'elles ne justifient que cette activité y est exercée à titre accessoire ; c. Celles qui ont en France le centre de leurs intérêts économiques. 2. Sont également considérés comme ayant leur domicile fiscal en France les agents de l'Etat qui exercent leurs fonctions ou sont chargés de mission dans un pays étranger et qui ne sont pas soumis dans ce pays à un impôt personnel sur l'ensemble de leurs revenus." Art. 4A, of the Code Général des Impôts (CGI), states that: "Les personnes qui ont en France leur domicile fiscal sont passibles de l'impôt sur le revenu en raison de l'ensemble de leurs revenus. Celles dont le domicile fiscal est situé hors de France sont passibles de cet impôt en raison de leurs seuls revenus de source française."

[172] As already observed, even if there are no official prices for purchase of "compensation" and prices are negotiated between the buyer and seller, varying depending on where the is located, the average price in Paris is around € 1,600 per square meter, with very significant differences, ranging from € 400 per m² up to € 3,000 per m² (especially in those west/center districts of Paris, where the demand for shot term rentals is particularly strong). See http://www.paris.fr/services-et-infos-pratiques/urbanisme-et-architecture/demandes-d-autorisations/exercer-une-activite-dans-un-logement-172#autorisation-3-le-changement-d-usage-a-caractere-reel-avec-compensation_5.

In sum, while the formalities for renting out a dwelling that is not "*résidence principale*" are applicable to both residents and non-residents, the application of more favourable rules for "*résidence principale*" may show a bias for residents, being related to the occupation of the rented premise by the landlord for at least eight months a year – a condition that only residents may fulfil.

6.5.2 Italy (Rome, Milan)

No rule has been found, both at national and regional level, that make a distinction between Italians and non Italians and/or residents and non-residents, potentially relevant for the provisions of services in the short term rental sector. This conclusion holds regardless the legal treatment of the short term rental – whether as a regular lease for touristic purpose, regulated by the Italian civil code (art. 1571 ff.), or as "non-hotel touristic activity", regulated by regional laws.

6.5.3 United Kingdom (London)

In the UK a person may be able to rent her residential property, provided that it does not amount to a material change in use, for which a planning permission is required under the Town and Country Planning Act 1990.

Until March 2015 the "use as temporary sleeping accommodation of any residential premises in Greater London involved a material change of use of the premises and of each part thereof which is so used"[173], therefore requiring planning permission.

As this law was amended in March 2015, when the Deregulation Act 2015 prescribed that the use as temporary sleeping accommodation of any residential premises in Greater London does not constitute a change of use (for which planning permission would be required) if certain conditions are met: the first condition states that the use of a premise as temporary sleeping accommodation in one calendar year must not exceed ninety; the second condition is that the

[173] Section 25 of the Greater London Powers Act 1973.

person who provided the sleeping accommodation must be liable to pay council tax. Those liable to pay this tax are the owner, tenant or occupier, with no reference to residents.[174] In sum, while a marginal relevance can be attached under UK law to residence in short term rentals outside London (see *infra*), this element is irrelevant in Greater London.

6.5.4 United Kingdom (outside London)

In the UK a person may be able to rent her residential property, provided that it does not amount to a material change in use, for which a planning permission is required under the Town and Country Planning Act 1990.

As a general rule, local planning authorities must ponder each case, taking into account all the relevant elements. Among them, a potential relevance is also given to whether the property owners live in the property whilst it is used as a short term let (i.e. provided that a house is primarily used as a home first, and short-term letting accommodation as a secondary use).[175]

Following this conclusion, residence may be a relevant element, together with other ones, in order to decide whether a "material change of use" took place in a given case. However, no automatic distinction between residents and residents applies.

6.6 Indistinctly applicable (non-discriminatory) measures

It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions of that freedom.[176]

[174] https://www.cityoflondon.gov.uk/services/council-tax/Pages/who-pays-council-tax.aspx.
[175] Department for Communities and Local Government, Review of Property Conditions in the Private Rented Sector, February 2014, 48-50.
[176] Case C-55/94 Gebhard v Consiglio dell'ordine degli avvocati e procuratori di Milano [1995]; Case C-79/01 Payroll and Others [2002]; Case C-442/02 Caixa Bank France [2004]; Case C-157/07 Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt [2008].

According to the Court's case-law, Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality, against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services".[177]

6.6.1 Regulation and taxation

Rules of a Member State do not constitute a restriction within the meaning of the EC Treaty solely by virtue of other Member States applying less strict, or more commercially favourable, rules to providers of similar services. On the other hand, even laws which are equally applicable, but in practice require foreign service providers to adapt their business models, or amend their service in order to provide those services in another state, will tend to be exclusionary, and therefore fall within Article 56.[178]

In principle, taxation by Member State is not excluded from the scope of the discipline on freedom to provide services. According to settled case-law, although direct taxation falls within the competence of the Member States, Member States must exercise that competence consistently with European law and therefore avoid any overt or covert discrimination on grounds of nationality.[179] Such a system, which is in conformity with the fiscal principle of territoriality, cannot be regarded as entailing any overt or covert discrimination, prohibited by the Treaty.[180]

When a tax is applicable without distinction to any provision of services in the territory of the municipality concerned - and do not, therefore, draw any distinction based on the place of

[177] Case C-544/03 Mobistar v Commune de Fléron [2005]; Joined Cases C-369/96 and C-376/96 Arblade [1999]; Case C-165/98 Mazzoleni and ISA [2001]; Case C-49/98 Finalarte [2001]; Case C-350/07 Kattner Stahlbau [2009].
[178] Case C-518/06 Commission v Italy [2009]; Case C-384/93 Alpine Investments v Minister van Financiën [1995].
[179] Case C-279/93 Schumacker [1995]; Case C-80/94 Wielockx [1995]; Case C-107/94 Asscher [1996].
[180] Case C-250/95 Futura & Singer [1997].

establishment of the provider or recipient – there is no restriction.[181] Further, when tax is set at a level which may be considered modest in relation to the value of the services provided, such a tax is not on any view liable to prohibit, impede or otherwise make less attractive the provision of services to be carried out in the territory of the municipalities concerned (including the case of cross-border provision of services, on account of the place of establishment of either the provider or the recipient of the services). In other words, such a tax does not impede or make less attractive the provision of services.[182]

6.6.2 Authorizations and bureaucratic procedures.

Bureaucracy have long been identified as a major obstacle to the free movement of services. A national rule which makes the establishment of an undertaking from another Member State conditional upon the issue of prior authorisation falls within the category of "restriction", since it is capable of hindering the exercise of freedom of establishment by preventing that undertaking from freely pursuing its activities through a fixed place of business.

First, the undertaking may have to bear the additional administrative and financial costs which any such grant of authorisation entails. Secondly, the system of prior authorisation acts as a bar to self employed activity for economic operators who do not satisfy predetermined requirements, whose compliance is a condition for the issue of that authorisation.[183] Further, the public interest criterion, to which the grant of the administrative authorisation concerned is subject, may open the way for an arbitrary use of the discretion on the part of the competent authorities, permitting them to refuse that authorisation to certain interested operators, although they fulfil the other conditions laid down by the legislation.[184]

A prior authorisation procedure does not comply with the fundamental principles of the free movement of goods and the freedom to provide services if, on account of its duration and the

[181] Case C-134/03 Viacom Outdoor v Giotto Immobilier and Others [2005].
[182] Case C-134/03 Viacom Outdoor v Giotto Immobilier and Others [2005].
[183] Case C-169/07 Hartlauer [2009].
[184] Case C-438/08 Commission v Portugal [2009].

disproportionate costs to which it gives rise, it is such as to deter the operators concerned from pursuing their business plan. And it is deemed to be necessary only where subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued.[185]

A measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State. Thus precluding the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State.[186]

If a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion.[187]

National legislation which makes the provision of certain services on the national territory, by an undertaking established in another Member State, subject to the issue of an administrative licence for which the possession of certain professional qualifications is required, constitutes a restriction on the freedom to provide services. The same holds also for trades register constitutes a restriction.[188]

For these reasons, article 5(1) of the Services Directive accordingly provides that:
Member States shall examine the procedure and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities are not sufficiently simple, Member States shall simplify them.

[185] Case C-390/99 Canal Satelite Digital [2002].
[186] Case C-158/96 Kohll v Union des Caisses de Maladie [1998].
[187] Case C-205/99 Analir and Others [2001]; Case C-169/07 Hartlauer [2009].
[188] See Case C-76/90 Säger v Dennemeyer [1991]; Case C-58/98 Corsten [2000].

Beside simplification, Member States should recognise when the requirements of authorisations are fulfilled in another State. The requirement of authorisation by the State where the service is provided is not justified when the undertaking providing the services already satisfies equivalent conditions in the Member State where it is established and where a system of co-operation between supervisory authorities of the Member States exists, so to ensure effective supervision of compliance with such conditions.[189]

6.6.3 Points of single contact and right to information.

On this line, art. 6 of the Services Directive, imposes that:

Member States shall ensure that it is possible for providers to complete bureaucratic procedures and formalities through points of single contact.

Further, Member States shall ensure that relevant information is easily accessible to providers and recipients through the points of single contact. And that information is provided in a clear and unambiguous manner, that it is easily accessible at a distance and by electronic means and kept up to date (art. 7, Services Directive). The principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the concession-granting public authority to ensure that those principles are complied with.[190]

[189] Case C-205/84 Commission v. Germany [1986].
[190] Case C-324/98 Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG [2000]; Case C-458/03 Parking Brixen [2005].

6.7 Indistinctly applicable measures in home-sharing and short term rentals

6.7.1 France (Paris)

The general rule, in force in most parts of France, prescribes that any person offering a touristic furnished accommodation for rent, whether classified or not, must declare it to the mayor of the municipality where the premise is located.[191]

In specific geographical areas, a prior authorization issued by City Hall is also required in order to rent a furnished accommodation housing that determines the change in classification of the dwelling from main residence into tourist furnished premise.[192] In this latter case, such authorization is granted subject to a "compensation", which requires to convert into "residential" an area of commercial premises, equivalent to the one to be used as short term rental, allowing the permanent change of destination.[193]

While the first formality does not impose a particular burden on those who wants to change the destination of a premise, the same cannot be said in case of authorisation and compensation. In this case a bureaucratic duty is imposed and a significant financial burden is linked with the compensation.

This authorisation is based on objective criteria, easily known in advance, so to circumscribe the exercise of French authorities' discretion. And even if French rules are stricter than others, these rules do not constitute a restriction within the meaning of the EC Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory.

[191] Art. L324-1-1, Code du Tourisme. *Toute personne qui offre à la location un meublé de tourisme, que celui-ci soit classé ou non au sens du présent code, doit en avoir préalablement fait la déclaration auprès du maire de la commune où est situé le meublé.*

[192] Art. L631-7 (6) Code de Construction et d'Habitation. *La présente section est applicable aux communes de plus de 200 000 habitants et à celles des départements des Hauts-de-Seine, de la Seine-Saint-Denis et du Val-de-Marne. Dans ces communes, le changement d'usage des locaux destinés à l'habitation est, dans les conditions fixées par l'article L. 631-7-1, soumis à autorisation préalable.*

[193] Article L631-7-1, Code de Construction et d'Habitation.

However, these bureaucratic and financial burdens have a disparate impact on residents and non-residents (see *supra*), and may constitute an obstacle to the free movement of services. Such a rule, which makes the establishment/provision of services conditional upon the issue of prior authorisation, is capable of hindering the exercise of these freedoms, by preventing from freely pursuing economic activities, on account of the disproportionate costs to which it gives rise, such as to deter the provision of services by non-residents.

Other legal requirements are prescribed by French law for online platforms operating in the short term rentals sector. Under French law, when a dwelling is rented via a real estate agency or an online booking site, the agency or the platform has a duty to inform the lessor about her legal obligations and, if necessary, about the need of a prior communication or authorization for the change of use of the premise. And before renting a touristic dwelling the agency or the platform must obtain a sworn statement attesting that the lessor complied with the prescribed formalities.

Toute personne qui se livre ou prête son concours contre rémunération, par une activité d'entremise ou de négociation ou par la mise à disposition d'une plateforme numérique, à la mise en location d'un logement soumis à l'article L. 324-1-1 du présent code et aux articles L. 631-7 et suivants du code de la construction et de l'habitation informe le loueur des obligations de déclaration ou d'autorisation préalables prévues par ces articles et obtient de lui, préalablement à la location du bien, une déclaration sur l'honneur attestant du respect de ces obligations.

These requirements do not constitute "restriction" under EU law. Sworn statements, prior declarations and, more generally, obligations concerning the communication of information, are all common requirements across European national laws as a condition for the exercise of freedom to provide services and/or establishment. EU law does not preclude the requirement of a sworn statement of compliance, especially if that omission can be subsequently remedied in any way in case of a purely formal irregularity.[194]

[194] Case C-42/13 Cartiera dell'Adda spa v CEM Ambiente spa [2014]; Case C-161/07 Commission v Austria [2008].

Accordingly, the obligations for Member States to examine the procedures and formalities applicable to access to a service activity and to the exercise thereof, and where procedures and formalities examined are not sufficiently simple, to simplify them (art. 5, Services Directive), is not infringed in the examined case.

Not only the duty for the online platform to inform the provider, and to obtain a sworn statement of compliance with their duties, cannot be seen as an obstacle to the free provision of services and/or establishment. Quite the contrary, such a requirement may help to foster the right to information and it is consistent with the aim of defining a new regulatory toolkit that delegates governance to platforms, leveraging platforms' self-governing capacity (see artt. 7 and 22, Services Directive).

6.7.2 Italy (Rome, Milan)

Italy allows service providers to complete bureaucratic procedures and formalities through points of single contact, in line with art. 6 of the Services Directive - the "Sportello unico per le attività produttive" (SUAP) or "Sportello unico per le attività ricettive" (SUAR).

A prior notice ("Segnalazione certificata di inizio attività" - SCIA) is sufficient to start an activity, with no need of authorisation. This requires the presentation of the so-called SCIA to the local City Council containing the communication of the beginning of the activity. The activity can be started from the day the declaration has been issued to the Public authority. In case the Public Authority ascertain that the activity does not comply with legal rules, can adopt a different decision by sixty days from the communication.

In Italy short term rentals can be framed both as tourist rental (pure leases) or as "non-hotel touristic activity". While in the former case the civil law applies, in the latter regional legislation for hospitality and assets classification and authorisation applies, together with national legislation on tourism. As a result, different layers of legislation are potentially

applicable to peer-to-peer accommodation services, at national, regional and local level, and a multiplicity of sources regulates the use of premises for tourism: regional legislative competence concerns only the exercise of touristic activities; regular leases for tourist purposes are subject to national law, according to Art. 117, par. 2, lett. i), Cost., that provides that the state has exclusive legislation in civil law. Further, notwithstanding with constitutional amendments in 2001 (Legge 3/2001), tourism is now a "*residual*" subjects, and the legislative power is vested in Regions with no need of national laws, a new specific legal framework was first set in place by national law with the new national *Codice del turismo* (Code of Tourism), then partially dismantled by the Constitutional Court.

This two-tracks regime – touristic lease and non-hotel accommodation – together with the different layers of national, regional and municipal rules, creates a somehow confused legal scenario, that may render less attractive the exercise of the freedom of establishment and can be regarded as a potential restriction of those freedoms. In sum, even if Italian legislation does not create any "restriction" to the provision of services in short term peer-to-peer rental sector, a lack of clarity in applicable legislation may discourage the provision of such services.

6.7.3 United Kingdom (London)

After Deregulation Act 2015, which amended the Greater London Powers Act 1973, homeowners in London are now allowed to let out their property on a short term basis without a planning permission for up to ninety days a year. An exception is still admissible under Sec. 25b for particular residential premises or residential premises situated in a particular area. And the local planning authority may give a direction only with the consent of the Secretary of State.[195]

While permanent short-term use of a residential property should still require planning permission and property owners will still have to seek this permission from their local authority if they wish to change the use of premises, the Act assumes that the short-term

[195] Deregulation Act (2015), Explanatory Notes, Commentary on Sections 44-45, 215.

letting of a property by a resident is reasonable, and no formal requirements are now necessary in order to provide such a service for a limited period of time (ninety days).[196]

6.7.4 United Kingdom (outside London)

While rules applicable in Greater London have been changed in 2015 with *Deregulation Act*, the old rules are still in force in the rest of the country, meaning that local planning authorities must ponder each case in order to verify whether the use of a specific residential premises as temporary sleeping accommodation does not amount to a material change in use.

As already observed, under the old rules one of the elements to be taken into account is whether the property owners live in the property whilst the property is rented on a short-term basis (i.e. provided that a house is primarily used as a home first, and short-term letting accommodation as a secondary use).[197] So, making residence an element potentially relevant for determining applicable procedures in violation of EU law.

In addition, due the absence of definite criteria, considerable discretion is given to authorities, in tension with EU principles. According to EU case law, if a prior authorisation is needed, it must be based on objective, non-discriminatory criteria known in advance, in such a way as adequately to circumscribe the exercise of the national authorities' discretion.[198]

A different conclusion can be reached with regard to the *Enterprise and Regulatory Reform Act 2013*, which introduced new rules applicable to all letting and managing agents in England, requiring letting agencies to belong to an approved redress scheme - a scheme which provides for complaints against members of the scheme to be investigated and determined by an independent person.[199]

[196] Art. 44, Deregulation Act (2015), Short-term use of London accommodation: relaxation of restrictions. "*Despite section 25(1), the use as temporary sleeping accommodation of any residential premises in Greater London does not involve a material change of use*".
[197] Department for Communities and Local Government, Review of Property Conditions in the Private Rented Sector, February 2014, 48-50.
[198] Case C-205/99 Analir and Others [2001]; Case C-169/07 Hartlauer [2009].
[199] Art. 83, sec. 2-3.

Leaving aside the interpretive issue on the active or passive role role of peer-to-peer platforms and the connected questions related to the definitions of "letting agency work"[200], in this case no potential restriction to the provision of services and/or establishment can be found as a consequence of the aforementioned rules (see *supra*).

Quite the contrary, the adhesion to the redress scheme is consistent with art. 17, Services Directive, on "Out-of-court dispute settlement":

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.
2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.
3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

In sum, the provision of the Enterprise and Regulatory Reform Act 2013 on the adoption of a redress scheme for letting agency work clearly goes in the direction of defining a new

[200] Art. 83, sec. 7-8, of Enterprise and Regulatory Reform Act 2013, provides that: 7. In this section lettings agency work" means things done by any person in the course of a business in response to instructions received from: (a) a person seeking to find another person wishing to rent a dwelling-house in England under a domestic tenancy and, having found such a person, to grant such a tenancy ("a prospective landlord"); (b) a person seeking to find a dwelling-house in England to rent under a domestic tenancy and, having found such a dwelling-house, to obtain such a tenancy of it ("a prospective tenant"). 8. However "lettings agency work" does not include any of the following things when done by a person who does no other things falling within subsection (7) (a) publishing advertisements or disseminating information; (b) providing a means by which (i) a prospective landlord or a prospective tenant can, in response to an advertisement or dissemination of information, make direct contact with a prospective tenant or (as the case may be) prospective landlord; (ii) a prospective landlord and a prospective tenant can continue to communicate directly with each other.

regulatory toolkit that delegates governance to platforms, leveraging platforms' self-governing capacity at both levels - definition of rules and enforcement/dispute resolution.

6.8 Task II – Legal assessment of the identified measures

Second, for each restriction, please identify the possible overriding reasons of public interest that according to the competent national authority could justify such restriction. In order to identify the justifications which national authorities may allege to justify such requirements, please check the recitals of the legislation, impact assessments of the relevant legislation, studies carried out or papers written on this piece of legislation, public declarations, etc.

6.9 Conditions for justified restrictions

A restriction on services is permitted if it is equally applicable to the national and the foreign; justified by some legitimate public interest objective; and proportionate to that objective. Appropriateness, necessity, indispensability, and proportionality of the measure, together with the priority for less restrictive measures, are the elements to be pondered in order to evaluate whether a national decision amounts to a justified restriction.

The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided.

Such restrictions come within the scope of Article 59 if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the general interest or if the requirements embodied in that legislation are already safeguarded by the rules to which the provider of such a service is subject in the MS where he is established.[201]

[201] Case C-288/89 Gouda v Commissariat voor de Media [1991]; Case C-58/98 Corsten Case C-58/98 [2000]; Case 355/98 Commission v. Belgium [2000].

The measure in question must be appropriate for ensuring attainment of the objective pursued and does not go beyond what is necessary for that purpose.[202] A link must be proved by the Member State between the national measure and the invoked justification.[203]

As a derogation from the fundamental rule of freedom of establishment, a restriction must be interpreted in a manner which limits its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect.[204] A restriction on freedom of establishment is prohibited by Article 43 EC, even if it is of limited scope or minor importance.[205]

6.9.1 Treaty exceptions

Restrictions that are not equally applicable, but discriminates on its face, may only be saved by reliance on one of the Treaty exceptions.[206] The free movement of services may be restricted on grounds of public policy, public security or public health.[207] Discriminatory rules justified on grounds of public policy, public security or public health must be interpreted strictly.[208] Recourse to these justifications presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[209] So, public policy and public security may not be invoked unless there is a real and present threat to a fundamental interest of society.[210]

[202] Case C-140/03 Commission v Greece [2005].
[203] Case C-243/01 Gambelli [2003].
[204] Case 147/86 Commission v Greece [1988]; Case C-114/97 Commission v Spain [1998].
[205] Case 270/83 Commission v France; Case C-34/98 Commission v France [2000]; Case C-9/02 De Lasteyrie du Saillant [2004].
[206] Case C-288/89 Gouda v Commissariat voor de Media [1991].
[207] The protection of public health is one of the overriding reasons in the general interest which can justify restrictions on the freedoms of movement guaranteed by the Treaty such as the freedom of establishment. See, inter alia, Case C-169/07 Hartlauer [2009]; Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes Hartlauer [2009].
[208] Case C-260/89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others [1991].
[209] Case C-114/97 Commission v Spain [1998].
[210] Case C-355/98 Commission v Belgium [2000]; Case C-54/99 Eglise de scientologie [2000].

In keeping with their domestic needs, Member States remain free to fix the requirements of public policy and public security, as grounds for derogating from a fundamental freedom, but those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally without any control by the institutions of the European Community.

6.9.2 Case-law exceptions

A national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty may be justified by overriding reasons of general interest. According to Gerhard, "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it".[211]

For equally applicable measures, justifications which may be put forward are diverse, and the list is not closed. The overriding reasons relating to the public interest are those recognised by the ECJ in its case-law. In addition to, notably public policy, public security, public health, reasons already recognised by the Court include the objectives of road safety[212], environmental protection[213] and consumer protection.[214] Other admissible justification for the existence of an overriding reason of general interest, recognised by the ECJ, concern: protection of workers, creditors and recipients of services; health of animals, conservation of the national historic and artistic heritage, social policy objectives, cultural policy; efficient

[211] Case C-55/94 Gebhard v Consiglio dell'ordine degli avvocati e procuratori di Milano [1995].
[212] Case C-55/93 van Schaik [1994]; Case C-54/05 Commission v Finland [2007].
[213] Case 302/86 Commission v Denmark [1988]; Case C-309/02 Radlberger Getränkegesellschaft and S. Spitz [2004].
[214] Consumer protection is one of the most invoked public interest recognized by the ECJ. See Case 220/83 Commission v France [1986]; Case C-393/05 Commission v Austria [2007]; Case C-348/08 Attanasio [2010]; Case 252/83 Commission v. Denmark [1986]; Commission v. Germany [1986]; Case 206/84 Commission v. Ireland [1986]; Case C-180/89 Commission v. Italy [1991].

administration of justice; cohesion of the tax system; professional ethics; intellectual property; cultural policy, diversity of opinion; language requirements.

6.9.3 Housing shortage, social diversity, development of urban environment as legitimate public interest objectives

Justifications for restrictions under EU law may legitimately be based on the need to protect city environment, housing shortage and social diversity, according to both legal texts and case law. And the exercise by national public bodies of regulatory urban-planning powers, with regards to limitation of short term rental activities, can be justified for reasons connected with the protection of urban environment.

Art. 4, Services Directive, includes both "the protection of environment and the urban environment", and "social policy objectives and cultural policy objectives", within the definition of what constitutes "overriding reason relating to public interest".[215]

Following the well-established case-law of the Court of Justice, the impact of a given rule onenvironmental protection[216] and town and country planning[217] are legitimate criteria that a public body can adopt to regulate the provision of services.[218] Further, the aim of ensuring an adequate supply of housing may constitutes an overriding reason in the public interest.[219] Member States cannot be denied the possibility of pursuing objectives, such as environmental

[215] Art. 4, par. 8, Services Directive: "'overriding reasons relating to the public interest' means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives".

[216] See, inter alia, Case C‑384/08 Attanasio Group [2010]. See Case C‑260/04 Commission v Italy [2007]. On the other hand, purely economic objectives cannot constitute an overriding reason in the public interest: see, to that effect, Case C‑96/08 CIBA [2010].

[217] See, by analogy, Case C‑567/07 Woningstichting Sint Servatius [2009].

[218] See Case C‑400/08 Commission v Spain [2011].

[219] See Case C-269/07 Commission v Germany [2009]. For examples, national measures can be justified by the aim of encouraging the building of dwellings in its territory, in order to ensure an adequate supply of housing. Case C-152/05 Commission v Germany [2008].

protection, town and country planning and consumer protection, through the introduction of rules which are easily managed and supervised by the competent authorities.[220]

A particular attention is devoted by European law to social housing.[221] The European Court of Justice recognises that the need to provide sufficient housing for the low-income or otherwise disadvantaged sections of the local population can amount to a legitimate interest that can justify the restriction of freedom in the provision of services and/or establishment. The purpose of responding to the housing needs of the less affluent local population, in particular socially weak individuals, is deemed as vital by the Court.[222]

In addition, according to the well-established case-law of the Court, national authorities may also contribute to ensuring the implementation of policies aimed at the promotion of cultural policies promoting diversity may constitute an overriding requirement relating to the general interest, which justifies a restriction of the freedom to provide services.[223]

It is understood that the less restrictive method is to be adopted, among those ones that can be embraced to pursue these aims, in order to achieve objectives such as the protection of the urban environment.[224]

6.10 Conditions for justified restrictions in home-sharing and short term rentals

6.10.1 France (Paris)

In France, any person offering a touristic furnished accommodation for rent, whether classified or not, must declare it to the mayor of the municipality where the premise is

[220] Case C-400/08 Commission v Spain [2011]; see also, by analogy, Case C-137/09 Josemans [2010]. See also Case C-237/99 *Commission* v *France* [2001], concerning low-rent housing bodies.
[221] See Joined Cases C-197/11 and C-203/11 Libert v. Gouvernement flamand [2013].
[222] See Case C-567/07 Minister voor Wonen, Wijken en Integratie v Woningstichting Sint Servatius [2009]; Case C-400/08 Commission v Spain [2011].
[223] Case C-16/10 The Number (UK) and Conduit Enterprise [2011]; C-281/06 Jundt v Finanzamt Offenburg [2007]. See also, to that effect, C-134/10 Commission v Belgium [2011]; Case C-250/06 United Pan-Europe Communications v. Belgium [2007].
[224] Case C-17/00 De Coster [2001].

located.[225] And, in specific geographical areas, a prior authorization issued by City Hall is also required, which is usually granted subject to a "compensation" that consists in the convertion into "residential" of an area of commercial premises, equivalent to the one to be used as short term rental.[226] In both cases, an exception applies to "*résidence principale*", that can be rented out up to 120 days per year with no formalities. [227]

The rationale for these rules is related to the permanent change of destination, from main residence into tourist furnished premise, deriving from renting a furnished accommodation housing on a permanent basis.[228] The objective of French regulation on the change of use of residential premise, and especially of the system based on compensation, is not to worsen the shortage of housing in cities like Paris, and also to take into account social diversity, as well as to balance housing and employment in different neighborhoods of Paris, in accordance with local housing program and the local development plan in force in Paris.[229]

Housing shortage, social diversity and local housing programs are all valid justifications for restricting the provision of services based on legitimate public interest objective, thus allowing a restriction on services (see *supra*). However, such restrictions should be equally applicable to residents and non-residents. Contrariwise, restrictions that are not equally applicable, but discriminates on its face – such those applied on the basis of "*résidence principale*" - may only be saved by reliance on one of the Treaty exceptions.[230] A restriction of the free movement of services based on criteria that have a disparate impact on residents and non-residents presupposes the existence of a genuine and sufficiently serious threat affecting one of the

[225] Art. L324-1-1, Code du Tourisme. *Toute personne qui offre à la location un meublé de tourisme, que celui-ci soit classé ou non au sens du présent code, doit en avoir préalablement fait la déclaration auprès du maire de la commune où est situé le meublé.*

[226] Art. L631-7 (6) Code de Construction et d'Habitation. *La présente section est applicable aux communes de plus de 200 000 habitants et à celles des départements des Hauts-de-Seine, de la Seine-Saint-Denis et du Val-de-Marne. Dans ces communes, le changement d'usage des locaux destinés à l'habitation est, dans les conditions fixées par l'article L. 631-7-1, soumis à autorisation préalable.*

[227] Art. 2, Loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986, Modifié par LOI n°2014-366 du 24 mars 2014 - art. 1. Art. L324-1-1 Code du Tourisme.

[228] Under French law, renting a furnished lodging repeatedly for short periods to transient guests, who do not elect their domicile in the lodging, is deemed as a change in use. Art. L631-7, Code de la construction et de l'habitation.

[229] http://www.paris.fr/services-et-infos-pratiques/urbanisme-et-architecture/demandes-d-autorisations/exercer-une-activite-dans-un-logement-172#autorisation-3-le-changement-d-usage-a-caractere-reel-avec-compensation_5.

[230] Case C-288/89 Gouda v Commissariat voor de Media [1991].

fundamental interests of society[231], notably public policy, public security or public health.[232] And these exceptions must be interpreted strictly.[233] Thus, French rules that allow "*résidence principale*" to be rented out for up to four months may be seen as a discrimination, in consideration of the disparate impact it has on non-residents, who face a complex and, in case of compensation, expensive procedure to provide the same service.

6.10.2 Italy (Roma, Milano)

Italian legislation does not create any "restriction" to the provision of services in short term peer-to-peer rental sector. Thus, no special justification is brought.

Nonetheless a lack of clarity in applicable legislation may discourage the exercise of freedom. The described two-tracks regime – touristic lease and non-hotel accommodation – together with the different layers of national, regional and municipal rules, create a legal framework that may render less attractive the exercise of the freedom of establishment and can be regarded as a potential restriction of those freedoms. In accordance with article 5(1) of the Services Directive, Italy may simplify the procedure and formalities applicable to access to a service activity and to the exercise.

6.10.3 United Kingdom (London)

With the Deregulation Act 2015 it is now allowed to let out a property in London for up to ninety days a year, without a planning permission. No restriction is now applicable to short term rentals in London for ninety days or less.

An exception to new rules is still admissible for particular residential premises or residential premises situated in specific areas.[234] The justification brought relies on the concern for issues arising from frequency of tenant turnover, the risk of losing existing family housing from the

[231] Bouchereau; Case C-114/97 Commission v Spain [1998].
[232] The protection of public health is one of the overriding reasons in the general interest which can justify restrictions on the freedoms of movement guaranteed by the Treaty such as the freedom of establishment (see, inter alia, Hartlauer; Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes Hartlauer [2009].
[233] Case C-260/89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others [1991].
[234] Deregulation Act (2015), Explanatory Notes, Commentary on Sections 44-45, 215.

mainstream market, and loss of amenity; fear of crime, noise and disturbance, fire risk and hygiene; short-term use undermining the current policy to increase and improve the long-term private rented sector; discouraging downsizing and freeing up of larger homes; and the need to ensure consistent regulation of the hotel sector and short-term use.[235]

6.10.4 United Kingdom (outside London)

In the rest of the country, local planning authorities must ponder each case in order to verify whether the use as temporary sleeping accommodation of a residential premises amount to a material change in use[236], taking into account all relevant elements, among others whether the property owners live in the property whilst it is used as a short term let (i.e. provided that a house is primarily used as a home first, and short-term letting accommodation as a secondary use).

The above mentioned justifications for restricting the provision of services may be contemplated as legitimate public interest objectives, thus allowing a restriction on services equally applicable to the national and the foreign. Contrariwise, none of these reasons can be a basis for restrictions that discriminate on its face[237] for which a restriction can be permissible only if a genuine and sufficiently serious threat occurs, affecting one of the fundamental interests of society[238] - public policy, public security or public health.[239] And such an exception is subject to strict scrutiny.[240] For these reasons, in pondering the exceptions to the Deregulation Act 2015 and those applicable outside London, no weight should be given to residence.

[235] Department for Communities and Local Government, Promoting the sharing economy in London. Policy on short-term use of residential property in London, February 2015, 17.
[236] Department for Communities and Local Government, Review of Property Conditions in the Private Rented Sector, February 2014, 48-50.
[237] Case C-288/89 Gouda v Commissariat voor de Media [1991].
[238] Case C-114/97 Commission v Spain [1998].
[239] The protection of public health is one of the overriding reasons in the general interest which can justify restrictions on the freedoms of movement guaranteed by the Treaty such as the freedom of establishment (see, inter alia, Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes Hartlauer [2009]).
[240] Case C-260/89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others [1991].

6.11 Task II. Legal assessment of the identified measures

Third, provide a detailed legal assessment as to whether the identified restriction is justified in view of the principles of proportionality and necessity, taking into account the existing case-law of the EUCJ, for each overriding reason of public interest. Please elaborate in particular on which other less restrictive means may be used to achieve or protect the same overriding reasons of general interest, if considered that those are justified. This legal proportionality assessment constitutes a very important deliverable of the paper.

6.12 Proportionality and necessity

National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[241] Irrespective of the existence of a legitimate objective under EU law, a restriction on the fundamental freedoms enshrined in the Treaty may be justified only if the relevant measure is appropriate to ensuring the attainment of the objective.

It is for the Member States to decide on the level at which they intend to ensure the protection of the objectives and of the general interest and also on the way in which that level must be attained. However, they can do so only within the limits set by the Treaty and, in particular, they must observe the principle of proportionality.

In order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for

[241] Case C-19/92 Kraus v Land Baden-Wuerttemberg [1993]; Case C-55/94 Gebhard v Consiglio dell'ordine degli avvocati e procuratori di Milano [1995].

the purpose of achieving the desired objectives and whether they do not go beyond what is necessary to achieve it.[242]

First, it must be recalled that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner.[243] Not only the reasons which may be invoked by a Member State, in order to justify a derogation from the principle of freedom of establishment, must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that Member State, but it also must be supported by precise evidence enabling its arguments to be substantiated.[244]

Examining the case law of the EUCJ, the scrutiny under which steps, taken by member States to protect a given interest, are evaluated varies considerably. The general principle is that States should not go beyond what is necessary to attain the interest at stake. But the way this principle is applied in case law depends on the (political, cultural) sensitivity of the subject matter. Leaving to the Member State to decide with a margin of appreciation in more sensitive fields.[245]

6.13 Proportionality and necessity in home sharing and short term rentals

6.13.1 France (Paris)

In France, any accommodation repeatedly offered for short rent rents determines the change in classification of the dwelling from residence into furnished premise. For this reason the person who rent out the premise must declare it to the mayor of the municipality where the

[242] Case C-106/91 Ramrath v Ministre de la Justice [1992]; Case C-19/92 Kraus [1993]; Case C-84/94 United Kingdom v Council [1996]; Case C-233/94 Germany v Parliament and Council [1997]; Joined Cases C-171/07 and C-172/07 Apothekerkammer des Saarlandes Hartlauer [2009]; Joined Cases C-570/07 and C-571/07 Blanco Perez [2010]; Case C-100/01 Oteiza Olazabal [2002]; Case C-527/06 Renneberg [2008]; Joined Cases C-155/08 and C-157/08 X and Passenheim-van Schoot [2009]; Case C-169/08 Presidente del Consiglio dei Ministri [2009]; Case C-299/02 Commission v Netherlands [2004].
[243] Joined Cases C-338/04, C-359/04 and C-360/04 Placanica and Others [2007]; Case C-500/06 Corporación Dermoestética [2008]; Case C-531/06 Commission v Italy [2009].
[244] Case C-161/07 Commission v Austria [2008].
[245] See D. Chalmers, G. Davies, G. Monti, *European Union Law,* 2nd ed., Cambirdge, 2010, 892.

premise is located[246] and, in specific geographical areas (among them, Paris), a prior authorization subject to a "compensation" is required, allowing the permanent change of destination. [247] None of these formalities applies to "*résidence principale*".[248]

The distinction between "*résidence principale*" and "*résidence sécondaire*" is of utmost importance, since an exception to prescribed rules applies in case of "*résidence principale*" with regard to communications, authorisations and compensations.[249] Besides, in order to better define how this distinction may constitute a restriction in the provision of services under EU law, and to verify whether an unlawful discrimination occures, the concept of residency must also be taken into account.

The determination of residency status in France is governed by a general rule providing that those who spend at least 183 days per calendar year in France are deemed to be resident. Alternatively, a person would also be deemed to be resident if any one of these conditions apply: having the main home in France; carrying on a professional activity in France (either self-employed or as an employee); having the centre of economic interests in France (see *supra*).

Combining these rules, it is apparent that the exemption for the "*résidence principale*" have a disparate impact on residents and non-residents: it may benefit only residents (i.e. those who have been living in France for at least 183 a year) since the fact itself of living in a dwelling for at least eight months a year make the occupier a French resident.

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[246] Art. L324-1-1, Code du Tourisme. *Toute personne qui offre à la location un meublé de tourisme, que celui-ci soit classé ou non au sens du présent code, doit en avoir préalablement fait la déclaration auprès du maire de la commune où est situé le meublé.*

[247] Art. L631-7 (6) Code de Construction et d'Habitation. *La présente section est applicable aux communes de plus de 200 000 habitants et à celles des départements des Hauts-de-Seine, de la Seine-Saint-Denis et du Val-de-Marne. Dans ces communes, le changement d'usage des locaux destinés à l'habitation est, dans les conditions fixées par l'article L. 631-7-1, soumis à autorisation préalable.*

[248] See Art. L324-1-1, Code du Tourisme; Art. L631-7-1, Code de la construction et de l'habitation.

[249] Under French law, the main residence is any dwelling occupied for at least eight months a year, unless there are professional obligations, health or force majeure, occur either to the lessee, her partner or dependent family member. Following this rule, in order to be regarded as "*résidence principale*" the accommodation cannot remain unoccupied by residents for more than 120 days per year. Therefore, an accommodation that is rented more than 120 days in a solar year is regarded as a "*résidence* sécondaire".

On the contrary, not all residents benefit from these exemptions. A dwelling that the landlord does not occupy for at least eight months a year is deemed as "*résidence secondaire*" even if the owner is a French resident, and is subject to the above described formalities.

This different impact on residents and non-residents may create an obstacle to the free provision of services, capable of hindering the exercise of this freedom and to deter the provision of services by foreigners, preventing them from freely pursuing their activities on account of its disproportionate costs to which these rules give rise. And this conclusion is especially true in cases of authorisation with compensation.

In sum, while the formalities for renting out a dwelling that is not "*résidence principale*" are applicable to both residents and non-residents, the application of the more convenient rules for "*résidence principale*" may only support residents, since the more favourable rules apply only to premises occupied by the landlord for at least eight months a year – a condition that only residents may fulfil.

Following official statements (see *supra*), this regulation on the change of use of residential premise intends to to address the need not to aggravate the shortage of housing in cities like Paris, to take into account social diversity and to balance housing and employment in different neighborhoods of Paris, in accordance with local housing program and the local development plan in force in Paris.[250]

Admittedly, all these reasons may be seen as justifications for restricting the provision of services based on legitimate public interest objective, thus allowing such restrictions. However, this conclusion holds so long as the restriction is equally applicable to nationals and foreigners; but does not work for discriminations based on "*résidence principale*".

[250] http://www.paris.fr/services-et-infos-pratiques/urbanisme-et-architecture/demandes-d-autorisations/exercer-une-activite-dans-un-logement-172#autorisation-3-le-changement-d-usage-a-caractere-reel-avec-compensation_5.

Different techniques can be adopted to attain the same result, without producing disparate impact on the base of residence. If the need not to aggravate the shortage of housing, to foster social diversity and to balance housing and employment in different neighborhoods are the main concerns, these objectives can be addressed in many ways, with the same impact on French and non-French service providers. Among them, the introduction of a maximum number of days per year that a premise can be rented out on short term basis with neither authorization nor compensation needed, as it is now for "*résidence principale*". This result can be reached by simply regarding "*résidence principale*" as the same as "*résidence secondaire*", thus limiting up to four months the maximum number of days for the exemption from formalities (communication/authorization/compensation).

Admittedly, even under this equally applicable rule more premises could be rented out, since not all the dwelling are "*résidence principale*". But, in order to preserve neighborhoods from housing shortage, a maximum number of days for the exemption, lower than the 120 days limit currently applicable to "*résidence principale*", could be devised. This different limit should be applied to all service providers with no distinction between residents and non-residents.

6.13.2 Italy (Roma, Milan)

While Italian law does not create any "restriction" to the provision of services in short term peer-to-peer rental sector, nonetheless a lack of clarity in legislation may discourage the exercise of freedom to provide short term rental services: the described two-tracks regime for touristic lease and non-hotel accommodation, together with the different layers of rules may render less attractive the exercise of economic activities and can be regarded as a potential restriction of those freedoms. For this reason Italy should simplify the procedure and formalities applicable to access to a service activity and to the exercise.

A bright line between touristic lease and non-hotel accommodation should be traced, based on the provision of additional services and/or on the duration of rent. In making such a

distinction it is important to make sure that similar activities are not subject to diverse rules, leading to both uncertainty and unfair competition. As a general rule, it can be said that the simple rent of a premise with no facility can be deemed as touristic rent, subject to Italian civil code, and short term rental service that include the provision of additional services (linen change, laundry, breakfast) is deemed as non-hotel accommodation, subject to Code of tourism and regional laws.

6.13.3 United Kingdom (London)

Proportionality in both regulation and enforcement are the focus of UK policies in the nascent collaborative economy. With specific reference to the accommodation sector, the Government recommends that Regulations for those providing accommodation should be proportionate to the scale of operation (i.e. someone renting out a spare room a few nights a year should not be subject to the same level of regulation as a business renting out 100 rooms year-round).[251]

Despite a clear dividing line applies in Greater London, as the new rules provide that a temporary sleeping accommodation for up to ninety days a year does not constitute a change in the use, and does not require a planning permission, exceptions are still admissible for particular residential premises or residential premises situated in specific areas. This exceptions must be grounded on concerns for the frequency of tenant turnover, the risk of losing existing family housing from the mainstream market, and loss of amenity; fear of crime, noise and disturbance, fire risk and hygiene; the risk to undermine the current policy to increase and improve the long-term private rented sector and the need for consistent regulation of the hotel sector and short-term use.[252] Similarly, a case-to-case analysis must be brought in the rest of the country, in order to verify whether the use of a residential premise as temporary sleeping accommodation amounts to a material change in use.[253]

[251] Department for Business, innovation and Skills, Independent review in the sharing economy. Government response, March 2015, Chapter 2.
[252] Department for Communities and Local Government, Promoting the sharing economy in London. Policy on short-term use of residential property in London, February 2015, 17.
[253] Department for Communities and Local Government, Review of Property Conditions in the Private Rented Sector, February 2014, 48-50.

The need for a proportionate action is also explicitly mentioned as far as enforcement is concerned. The National Planning Policy Framework clarifies that effective planning enforcement is important but, being enforcement action discretionary, local planning authorities should act proportionately in responding to suspected breaches of planning control: they should consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area; set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development, and take action where it is appropriate to do so.[254]

The same holds for safety regulation as rules for those providing accommodation should be proportionate to the scale of operation. Assuming that there is no "one size fits all" to fire safety, these rules are based on proportionality, requiring the responsible person to assess the risk in a particular premises and to use her assessment to determine what precautions are sufficient to reduce the risk. The responsible person will need to use her judgement to decide what precautions are appropriate in the light of the circumstances.[255] These rules do not set out minimum standards, but impose on local authority a duty to take the most appropriate action, ranging from deal with the problems informally at first, to prohibiting the activity, depending on the severity of the hazard.

6.13.4 United Kingdom (outside London)

Beside London and the mentioned pilot experiments, the old rules are still in force for the rest of the UK, and the above examined planning legislation apply.

The UK planning legislation specifies that the change of use of land or buildings requires planning permission so far as it constitutes a "material change in the use". And even if there

[254] Department for Business, innovation and Skills, Independent review in the sharing economy. Government response, March 2015, 2.8.
[255] Department for Business, innovation and Skills, Independent review in the sharing economy. Government response, March 2015, 2.2.

is no statutory definition of "material change of use", its meaning is linked to the significance of a change and the resulting impact on the use of land and buildings.[256]

In the short-term letting sector this means that a person may be able to rent her residential property, provided that it does not amount to a material change in the use. In order to verify the occurrence of a "material change in the use" due to short term rentals, local planning authorities must ponder each case, taking into account all relevant elements: the amount of a property which is used as a short-term let, the frequency of use, whether the property owners live in the property whilst it is used as a short term let (i.e. provided that a house is primarily used as a home first, and short-term letting accommodation as a secondary use).[257] It follows that a marginal relevance can be attached to residence in short term rentals outside London, under UK law.

As already highlighted, this regulation makes residence a potentially relevant element for determining applicable procedures. In addition, due the absence of definite criteria, significant room is given to authorities' discretion.[258]

On the other side, the British government recently defended the idea of developing "sharing cities." Almost one million pounds were invested in two "sharing city pilots" - Leeds City Region and Greater Manchester[259] - which in 2015 and 2016 test a number of sharing economy initiatives, experimenting with home and ride-sharing and social and health care collaborative programs. These cities are encouraged to pilot legislation that will make it easier for individuals to sub-let spare rooms and for non-residential properties to rent out parking spaces.[260]

[256] See section 55(1), Town and Country Planning Act 1990.
[257] Department for Communities and Local Government, Review of Property Conditions in the Private Rented Sector, February 2014, 48-50.
[258] Case C-205/99 Analir and Others [2001]; Case C-169/07 Hartlauer [2009].
[259] Leeds will be involved in developing new approaches focused on local transports. A more comprehensive approach has been adopted with regard to Manchester.
[260] H. Goulden, 8 Steps Toward a Sharing City, NESTA, May 17, 2015, http://www.nesta.org.uk/blog/8-steps-toward-sharing-city#sthash.0ndPHTpj.dpuf; Department for Business, innovation and Skills, Independent review in the sharing economy. Government response, March 2015.

The relaxation of restrictions created with the amendment of section 25 of the Greater London Council (General Powers) Act 1973, and the creation of a number of sharing economy initiatives in the accommodation sector in pilot cities, clearly make the maintenance of old rules in the rest of England and Wales both obsolete and inconsistent.

While these inconsistencies of national legislation are not themselves under the scrutiny of European law, nonetheless they can be relevant as they clearly show that the legal solutions under scrutiny are not proportionate to the interest they aim to protect. For this reason, a revision of rules applicable outside London is highly convenient.

6.14 Platform. Liability and duties

The e-Commerce Directive requires the service providers to act as intermediaries and to maintain a passive role to be exempted from liability.[261] Art. 15, section 4, of the Directive sets forth the principle that service providers have no obligation to seek facts or circumstances that would indicate illegal activity. However, the level of passiveness differs among the three types of service providers, and the focus of the Directive on specific types of services creates uncertainty on their applicability of the liability exemptions to new types of services, among which peer to peer platforms are one of the most relevant case.

Member States have almost verbatim transposed articles 12, 13 and 14 of the e-Commerce Directive on the special liability regime and courts encountered many difficulties in applying the special liability regime to new kind of online intermediaries, leading to diverging case law. In 2011 the ECJ handed down its famous decision *L'Oreal v. eBay*, which defines peer to peer marketplace as service providers, thus entitled to the liability exemption laid down by the e-Commerce Directive. But the Court also added that this exemption applies on condition that these platforms limit themselves to "providing an intermediary service, neutrally, by a merely

[261] The Directive distinguishes: "Mere conduit" service providers (art. 12), where this liability exemption only applies when the service provider is passively involved in the transmission of data; "Caching" providers (art. 13), who temporarily and automatically store data in order to make the onward transmission of this information more efficient; and "Hosting providers" (art. 14) who store data provided by their users. These last type of providers can benefit from the liability exemption only if they are "not aware of facts or circumstances from which the illegal activity or information is apparent" or "do not have actual knowledge of illegal activity or information". In all these cases, service providers are exempted from contractual, administrative, tortious, criminal liability, civil or any other type of liability, for all types of activities initiated by third parties.

technical and automatic processing of data", but not when they play "an active role", such as providing assistance to its customers. The decision left many questions unsolved and national court rulings continue to provide widely diverging interpretations in different cases and in different countries. As result, the way courts interpret the special liability regime across the EU, varies widely across EU Member States and within legal systems (see *supra*).[262]

[262] Legal analysis of a Single Market for an Information Society – Liability of online intermediaries, 2009, concludes that "It seems that courts and legal practitioners find it difficult to apply the special liability regime, and seem inclined to find arguments to put aside the special liability regime and instead revert to more general rules of legal doctrine".

7 COMPARISON OF THE FINDINGS

7.1 Task III – Comparison of the findings

Carry-out a comparison analysis between the findings and the legal assessment done for each city covered by the impulse paper.

7.2 A legal mapping of regulation in France, Italy, UK

7.2.1 What strategy for the collaborative economy? Old rules versus new rules

By connecting people to share assets, services or both, and facilitating a more efficient use of underutilized resources, collaborative economy is playing an important role in making the economic system more efficient and enhancing social welfare.

Short term rentals and, albeit in a much more limited way, home swap have deeply changed the accommodation sector for tourism in most European cities. In few years these changes are already having a profound impact, altering urban environments in many ways. Paris, Rome, Milan and London are all undergoing a rapid and drastic transformation, and the same can be said about both metropolitan areas and touristic cities across the Continent.

A few cities across the world are at the head of this new trend. Commonly defined "sharing cities" (or, with a somehow overlapping terminology, "smart" or "sustainable" cities) these places characterize themselves as having a more systematic approach to promoting the collaborative economy and as adopting principles and practices that enable and encourage people and institutions (public or private) to adopt the new business models.[263]

While none of the investigated cities define itself as "sharing city", London is distinguishable from the others for the efforts to put itself at the forefront of the collaborative economy, and to question old barriers that stop people sharing their assets. Accordingly, London changed its rules on collaborative economy in March 2015 with the Deregulation Act 2015 (see *supra*). As clearly stated in the accompanying Explanatory Notes to the Act, the reason for this change lies in the development of the internet and in changes in the way that people want to use

[263] T. SAUNDERS, P. BAECK, *Nesta. Rethinking smart cities from the ground up*, June 2015.

their home. These changes "have led to calls for the provisions of section 25 to be relaxed so that people in London can let out their property as temporary sleeping accommodation for short periods without obtaining planning permission".[264]

A more conservative approach has been adopted by the other cities studied in this survey. Paris, Rome and Milan all apply the old rules to the new scenario, with no change as a result of the spreading of peer to peer services in the accommodation sector. This is especially significant in the cases of Rome and Milan: despite both cities amended regional rules in tourist accommodation in 2015[265], they nonetheless did not take up the opportunity to adapt their legislation to new peer to peer schemes.

While both approaches are plausible, and old rules may be effective regulatory responses to real and present market failures perfectly suited for the collaborative economy, it is likely that the many challenges posed by peer to peer services make the need for new rules compelling.

7.3 The new challenges for EU in the collaborative economy

7.3.1 From professionals to peer providers

The most invoked reason to amend old regulation for the collaborative economy is the non-professional status of peers operating through platforms. People who provide services or share their goods in the collaborative economy are not full-time, large scale professionals - Airbnb hosts are not hoteliers, Uber drivers are not professional taxi drivers. And since professionals and peers are radically different, extending rules, which were originally conceived for a professional provision of goods and services, to peer-to-peer services would determine a disparate impact at the expense of sharing undertakings and would erect insurmountable barriers to entry in these growing markets (e.g. imposing a duty to comply with hotel regulations for allowing people to occasionally rent a spare guest room).

[264] See Explanatory Notes of the Deregulation Act 2015
[265] See Legge Regionale Lombardia 1.10.2015, n. 27; Regolamento Regione Lazio 7.8.2015, n. 8.

7.3.2 Consumer protection

On the other hand, the emergence of a peer-to-peer economy, where private, non-professional individuals provide services to customers, may lead to safety, health, environmental concerns. Beside information asymmetries, another often invoked danger of peer to peer activities is negative externalities (the most obvious example in short term rentals is the occurrence of guest-noise or the rise in the presence of strangers in a building).

In response to these risks and to avoid race-to-the-bottom dangers, safety protocols, background checks and other rules can be conceived with the aim of protecting consumers. Balancing the two somehow conflicting aspect – having rules different than those applicable for professionals and protecting consumers - is one of the most challenging aspect of the collaborative economy.

7.3.3 The role of platforms

The other big issue connected with the emergence of collaborative economy is the diffusion of online platforms that offer an infrastructure upon which peers depend on to connect to each other.

These companies often depict themselves as networks or “marketplaces”, not as service providers. On a legal ground, such a description would lead to the conclusion that only peers are subject to legal obligations and directly responsible for ensuring safe and reliable services, and authorities would be supposed to enforce regulation only against individual customers. While platforms would just be required to do is to inform their customers about duties and liabilities and warn them about responsibilities for not complying with local regulations. In sum, by framing the platforms as “marketplace”, these p2p companies would not to be bound by rules usually applicable to service providers, distancing themselves from potential violations and making enforcement more difficult.

In making a choice on whether these p2p platforms are service providers or not, reference can be made to ECJ decisions on the liability exemption laid down by the e-Commerce Directive. Since this exemption applies on condition that platforms limit themselves to "providing an intermediary service, neutrally, by a merely technical and automatic processing of data", but not when they play "an active role", such as providing assistance to its customers.

Given that p2p platform usually perform an active role in the intermediation among peers for the provision of goods and services, it is highly likely that the exemption provided by the Directive would not be applicable to platforms operating in the accommodation sector. However, a new piece of legislation is highly recommended.

7.4 How existing EU law applies to collaborative economy

7.4.1 Justified restrictions

The collaborative economy is a powerful tool of economic inclusion and opportunity that may have a profound positive impact on the urban environment. On the other side diverse groups - incumbents, entrants, consumers, neighbors – are involved in these changes, with distinctive, conflicting interests. Beside safety, health, environmental concerns, and the peril of negative externalities, the rising short-term rentals may diminish the availability of long-term rental houses in the market, especially affordable ones, and zoning laws and building codes are often invoked to limit these activities in order to protect housing affordability.
Both London and Paris expressed their concerns on may of these aspects.

In Greater London justifications for restrictions to the possibility to rent out a residential premise in specific areas rely on the concern for issues arising from frequency of tenant turnover, the risk of losing existing family housing from the mainstream market, and loss of amenity; fear of crime, noise and disturbance, fire risk and hygiene.[266]

[266] Department for Communities and Local Government, Promoting the sharing economy in London. Policy on short-term use of residential property in London, February 2015, 17.

French regulation imposing the change of use, in order to rent out residential premise on a short term basis, aims at keeping the development of urban environment under control, not to aggravate the shortage of housing and worsen the lack of housing in cities like Paris; and to take into account social diversity objectives and to balance between housing and employment in different neighborhoods of Paris, in accordance with local housing program and the local development plan in force in Paris.[267]

No similar explanations are available for Rome and Milan, where there is neither new regulation, nor official documents dealing with the problems.

Discrimination based on residence is surely in violation of EU law. However, this wide array of competing and sometimes conflicting aspects of these new innovative collaborative practices must be assessed when defining the occurrence of a justified restriction regarding an indistinctly applicable measure.

7.4.2 Proportionality and necessity

While it is up for the Member States to decide on the level at which they intend to ensure the protection of the objectives and of the general interest and also on the way in which that level must be attained, Member States can do so only within the limits set by the Treaty and, in particular, they must observe the principle of proportionality, which requires that the measures adopted be appropriate for ensuring attainment of the objective which they pursue and do not go beyond what is necessary for that purpose.

In Paris the distinctive legal treatment for residents and non-residents creates an obstacle to the free provision of services, capable of hindering the exercise of this freedom and to deter the provision of services by foreigners, on account of its disproportionate costs to which these rules give rise. As a result, residents can rent their home for up to four months, while this

[267] http://www.paris.fr/services-et-infos-pratiques/urbanisme-et-architecture/demandes-d-autorisations/exercer-une-activite-dans-un-logement-172#autorisation-3-le-changement-d-usage-a-caractere-reel-avec-compensation_5.

opportunity is precluded to non-residents, regardless the length of the rent. In London, in order to pursue a similar outcome, a limitation on the number of days a property can be rented out has been devised (ninety days) equally applicable to all, with no distinction between residents and non-residents, and proportionality is taken into account in both regulation and enforcement. No limitation of this kind exists in Italy.

8 CONCLUSIVE REMARKS AND FINAL RECOMMENDATIONS

8.1 A new regulatory framework

The recent emergence of third-party intermediaries - the online platforms that mediate the exchange among peers – makes the case for regulation less compelling. Platforms have a ubiquitous control over economic agents operating through the platform. In this task platforms can mitigate information asymmetries and create strong incentives for economic agents. After all, in most cases platforms' interests are aligned with the general one - facilitating the exchange among peers and fostering a safe and efficient development of online market, all of these at trivial or no costs.

This makes a strong argument for reconsidering the role of regulation in the market, making the role of public intervention more and more marginal.

However, platforms may mitigate most, but not all, market failures: not all information asymmetries are solved by platforms and in some cases there is still a strong need to protect customers from frauds and dangers. Further, if digital platforms can solve part of market failures addressed in the past through regulation, peer-to-peer activities may create additional problems. The new collaborative services *de facto* deregulate heavily ordered traditional services and additional requirements may be imposed to address those issues that cannot be entirely delegated to private ordering.

For these reasons there may still be the case that regulation is preferable to govern some of these failures, especially in those cases where platforms have no interest to correct them. And it is crucial to define a new regulatory toolkit that delegates governance to platforms and reallocates responsibilities, leveraging platforms' self-governing capacity, while at the same time retaining part of the process for public regulators.

8.2 Strict rules versus principles

In addressing the regulation of collaborative economy a choice must be made between strict rules and principles or, more likely, a combination of the two.

In some cases, setting out minimum standards may be the most appropriate solution, providing certainty to economic agents. For example, a rule determining the maximum number of days a residential premise can be rented out on a short term basis is a practical solution. In other cases, a case to case approach can be adopted.

A strict rule is preferable for delimiting the scope of application of professional rules versus new collaborative rules and define the non-professional status of peers operating through platforms, so limiting the application of rules, conceived for a professional provision of services, to peer-to-peer services (i.e. restricting short-term letting of residential premises to a maximum number of days per year).

On the contrary, principles are better suited to address safety concern and consumer protection. Rather than giving a strict prescription, a principle prescribing that regulation should be "proportionate to the scale of operation", can be the necessary flexibility to address a new and changing phenomenon. Assuming that there is no "one size fits all" solution in the collaborative economy, legislation should require non professional service providers to assess the risk of their activity and use this assessment to determine what precautions are reasonably practicable. The service provider has to use her judgment to decide what precautions are appropriate in the light of particular circumstances.[268]

8.3 Enforcement

The last issue to be addressed is related to the enforcement. The unprecedented opportunity to create new commercial services by peers may result in a massive disregard of regulation and expose cities to the risks of lack of control.

For such a scenario two complementing strategies can be adopted. The first one is considering the platform not only as ruler but also as enforcer of such a self-regulatory regime, making use of its self-correcting capacity (v. *supra*). The second one is a flexible use of enforcement

[268] Department for Business, innovation and Skills, Independent review in the sharing economy. Government response, March 2015, 2.2.

action and a reasonable degree of flexibility is suggested not only in regulation but also in enforcement.

With specific reference to the accommodation sector, regulations for those providing accommodation should be proportionate to the scale of operation (i.e. someone renting out a spare room a few nights a year should not be subject to the same level of regulation as a business renting out several homes). Local planning authorities should act proportionately in responding to suspected breaches of planning control, as rules for those providing accommodation should be proportionate to the scale of operation, in the light of their particular circumstances and those of their guests.[269] And public authorities should take the most appropriate action, ranging from deal with the problems informally to sanction misconducts, depending on the severity of the infraction.

[269] This degree of flexibility both in regulation and enforcement is adopted by UK legislation.