

## **Collaborative Short-Term Accommodation Services: Policy Principles & Good Practices**<sup>1</sup>

The short-term rental of guest rooms and private properties has a long-standing tradition alongside other popular accommodation services such as hotels and bed & breakfasts. The rise of online platforms bringing together accommodation providers and travellers has led to a rapid growth of these services. According to a Eurobarometer survey undertaken in spring 2018, around 12% of EU citizens have used a collaborative short-term accommodation service.<sup>2</sup>

Significant growth in collaborative short-term accommodation rental services<sup>3</sup> has created many new opportunities for consumers, for citizens sharing their properties, for professional traders and for local economies. It has also given rise to concerns, including by some local communities witnessing a strong demand and high concentration of collaborative short-term accommodation offers. Enabling citizens and entrepreneurs to make use of the opportunities offered, while addressing justified concerns in an appropriate manner is likely to promote the sustainable and balanced long-term growth of collaborative short-term accommodation rental services in the EU.

With this in mind, and following the 2016 Communication 'A European Agenda for the Collaborative Economy'<sup>4</sup>, representatives of national, regional and local authorities and stakeholders met in a series of workshops hosted by the European Commission and each dedicated to a specific issue. These workshops allowed discussing the European legal framework as well as policy principles and good practices for the balanced and responsible development of collaborative short-term accommodation rental services in the EU<sup>5</sup>.

The discussions showed that challenges encountered were not the same in all cities and regions. Different situations call for different solutions. As a consequence, the policy principles and good practices summarised in this document explore a range of options against the background of the existing European legal framework. The principles and practices may serve to guide Member States' authorities in their policy measures as well as stakeholders.

Fully recognising that the market for collaborative short-term accommodation rental services is ever-changing and developing, this paper summarises the discussions held during the series of workshops in 2017 and policy principles and good practices identified.

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<sup>1</sup> This paper has not been adopted or endorsed by the European Commission and may not be regarded as stating an official position of the European Commission, the European Commission services or any of the participants of the workshops where these policy principles and good practices were identified.

<sup>2</sup> Eurobarometer Flash, results yet to be published

<sup>3</sup> For the purposes of this Charter, the term "collaborative economy" refers to business models where activities are facilitated by online platforms that create an open marketplace for the temporary usage of goods or services provided either by private individuals offering services on an occasional basis ('peers') or by service providers acting in a regular or professional capacity. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills; (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms'). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit (see European Commission: 'A European Agenda for the Collaborative Economy'; COM(2016)356).

<sup>4</sup> European Commission: 'A European Agenda for the Collaborative Economy'; COM(2016)356).

<sup>5</sup> [https://ec.europa.eu/growth/content/opening-pleinary-collaborative-economy-tourism-accommodation-sector-0\\_en](https://ec.europa.eu/growth/content/opening-pleinary-collaborative-economy-tourism-accommodation-sector-0_en)

### ***Market access requirements for accommodation providers***

National, regional and municipal authorities in Member States are currently putting into place a variety of policies and regulation covering the provision of short-term accommodation rental services. In some cases, these include requirements on the providers of these services amounting to restrictions of market access or the exercise of the activity in question, such as authorisation schemes. As explained in the European Commission's Communication on the collaborative economy, the Treaty on the Functioning of the European Union (TFEU) and the Services Directive<sup>6</sup> in particular require these requirements generally "to be justified and proportionate, taking account of the specificities of the business model and innovative services concerned, while not favouring one business model over the other".<sup>7</sup>

Under the Services Directive or TFEU, measures taken by national, regional or municipal authorities may not unlawfully restrict market access or the exercise of these activities. Such measures can however be justified where they are necessary for an overriding reason relating to the public interest. In the context of the rapid development of the collaborative short-term accommodation rental services, ensuring the protection of the urban environment; adequate housing; public security; the protection of consumers; and ensuring tax compliance and effective fiscal supervision were identified as important. These objectives have also been recognised by the Court of Justice as overriding reasons relating to the public interest.<sup>8</sup> At the same time, the Court of Justice has held that purely economic objectives, such as the protection of competitors or ensuring the economic basis of specific categories of providers, do not constitute an overriding reason relating to the public interest.<sup>9</sup>

In addition, where they can be justified by an overriding reason relating to the public interest, restrictions of market access or of the exercise of a certain service activity must still be proportionate. According to constant case-law of the Court of Justice, any such restrictive measures must therefore be suitable for securing the attainment of the objective pursued and not go beyond what is necessary in order to attain that objective. In this context the Court of Justice has also ruled that, when taking these measures, Member State cannot rely on a general presumption of an

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<sup>6</sup> Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ 2016/L 376/36 ("Services Directive"). In respect of intermediation services provided by online platforms, see the section below on supporting responsible online platforms and the legal rules referred to there.

<sup>7</sup> Communication from the European Commission: A European Agenda for the Collaborative Economy; COM(2016)356, p. 3.

<sup>8</sup> The concept of overriding reasons relating to the public interest may continue to evolve (Recital 40 of the Services Directive). A non-exhaustive list of overriding reasons of general interest is provided in Article 4(8) and Recital 40 of the Services Directive. For the effectiveness of fiscal supervision see Case C-233/09, *Dijkman* paras 54, 58; Case C-254/97, *Baxter and Others*, para 18; Case C-478/98, *Commission v Belgium*, para 39. For housing policy objectives see Case C-567/07 *Woningstichting Sint Servatius*, para 30, Case C-302/97, *Konle*, para 40. In this regard it is worth mentioning that participants of the workshops expressed particular concerns over the policy objective of ensuring the availability and affordability of local housing.

<sup>9</sup> With regard to the TFEU, see Case C-400/08, *Commission v Spain*, para 74; Case C-338/09, *Yellow Cab. Verkehrsbetrieb*, para 51.

objective being put at risk<sup>10</sup> and that they must present precise evidence enabling their arguments to be substantiated<sup>11</sup>.

Accordingly, under the Services Directive a necessity and proportionality test applies specifically with regard to authorisation schemes<sup>12</sup> and certain other specific requirements, such as territorial restrictions<sup>13</sup>. It also lists certain requirements which are in any case prohibited, such as discriminatory requirements<sup>14</sup>. In addition, a number of additional conditions are to be met where authorisation schemes are in principle necessary and proportionate. For example, the applicable procedures and formalities must be clear, be made public in advance and offer guarantees in terms of objective and impartial application, whereas any charges for applicants must be reasonable and proportionate<sup>15</sup>. As a general rule, authorisations are to be granted for an unlimited period and applications are to be subject to tacit approval<sup>16</sup>.

On this basis, the following policy principles were identified:

- 1. Member State authorities issuing guidelines and information on the rights and obligations of accommodation providers and guests can provide a useful means to facilitate compliance with applicable rules and regulations. Establishing a dedicated contact point can help addressing complaints by consumers and citizens about collaborative short-term accommodation rental services.*
- 2. Introducing a simple central online registration system for accommodation providers can constitute a proportionate policy response where collaborative short-term accommodation rental services negatively impact housing policy objectives or endanger the protection of the urban environment.*
- 3. Where there is evidence that in a specifically designated area there is a shortage in the availability and affordability of local housing and there is a significant and causal link between this shortage and the placing on the market of properties for short-term accommodation rental, introducing an authorisation scheme with a possible restriction in the number of properties authorised for short-term rental via online platforms can constitute a proportionate policy response for properties rented short-term on a regular basis. The imposition of a limitation of the number of authorisations granted should constitute a measure of last resort and be used only where other policy measures, such as setting a maximum for the number of nights that a property can be rented out, failed to address the shortage in the availability and affordability of local housing.*
- 4. Where there is evidence or an objective and serious risk of significant tax fraud, introducing a simple online registration system for accommodation providers can facilitate authorities*

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<sup>10</sup> See Case C-577/10, *Commission v Belgium*, para 53.

<sup>11</sup> See Case C-161/07, *Commission v Austria*, para 36.

<sup>12</sup> Articles 9 and 10 of the Services Directive.

<sup>13</sup> Article 15 of the Services Directive, according to which Member States are to evaluate such requirements and are precluded from introducing any new ones, unless they meet the tests of non-discrimination, necessity and proportionality of its paragraph 3.

<sup>14</sup> Article 14 of the Services Directive.

<sup>15</sup> Article 13(1) and (2) of the Services Directive.

<sup>16</sup> Articles 11(1) and 13(4) of the Services Directive.

*monitoring and verifying that applicable income and tourist taxes are paid and can constitute a proportionate policy response.*

- 5. Where there are justified concerns relating to public security, the establishment of a simple online register for accommodation providers to identify their guests can allow for effective controls by authorities and can constitute a proportionate policy response.*

### **Peers and professionals**

While there is a long-standing tradition of people regularly renting out properties held for investment purposes or used as secondary homes, the rapid growth of occasionally renting out primary residences is a more recent phenomenon in many Member States.

The European Commission's Communication on the collaborative economy recommends Member States to take into account the specific features of collaborative economy business models and not to treat private citizens offering services on an occasional basis ('peers') automatically like services providers acting in a regular or professional capacity.<sup>17</sup> This can help avoid the imposition of disproportionate policy measures.

Thresholds are a possible means to identify peers. Their introduction can allow the occasional sharing of properties while also allowing public authorities to apply policies effectively protecting overriding reasons relating to the public interest in a proportionate manner, without favouring one business model over the other.

On this basis, the following policy principles were identified:

- 6. Where there is a need to protect an overriding reason relating to the public interest, a differentiated policy between peers and providers acting in a regular or professional capacity can be useful to ensure that policy measures addressing accommodation providers are both effective and proportionate. Compliance with a threshold is aided where the threshold is easy to understand, monitor and enforce. A registration obligation for accommodation providers and/or online platforms sharing information with public authorities can aid the practical application of a threshold.*
- 7. The introduction of a threshold should take into account the nature of the overriding reason relating to the public interest pursued. A differentiation between peers and accommodation providers acting in a regular or in a professional capacity can be particularly pertinent where authorities prepare the introduction of authorisation schemes or quantitative or territorial restrictions for accommodation providers to meet legitimate and justified policy objectives such as the availability and affordability of local housing. The pursuit of other legitimate and justified overriding reasons relating to the public interest may not always require a differentiation between peers and accommodation providers acting in a regular and in professional capacity (e.g. concerns relating to public security).*
- 8. A threshold expressed in terms of a number of nights a property is rented out per year can constitute a uniform and clear means of identifying a peer that is independent from the value of the property, its location and income generated per night. A threshold of a pre-defined number of*

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<sup>17</sup> European Commission: 'A European Agenda for the Collaborative Economy'; COM(2016)356, p. 7.

*nights per year (e.g. 90 nights) can ensure that there is no economic incentive to withdraw a property from the long-term rental market. A peer may also be identified as a citizen renting out a property held for personal use (primary or secondary residences) as opposed to a property not used as a private residence.*

### **Requirements for platforms**

Online platforms often provide for a new and efficient market place and play an increasingly central role in intermediating between accommodation providers and consumers. They typically reduce transaction costs and lower market entry barriers. They may in some cases also provide ancillary services (e.g. payment services through third party providers, insurance, etc.). Some online platforms attract significant numbers of accommodation providers and travellers placing trust in their intermediation and possible other services.

Whether or not – and the extent to which – online platforms can be subject to market access and other restrictive requirements may depend on the nature of their activities, in particular on whether those activities qualify as the provision of information society services within the meaning of the E-Commerce Directive<sup>18</sup>.

Under the E-Commerce Directive, for matters falling within the coordinated field, providers of information society services are, as a general rule, subject only to the rules and regulations of the Member State in which they are established, without other Member States being allowed to restrict their freedom to provide their services from another Member State<sup>19</sup>. However, that general rule can be derogated from under certain conditions, for reasons of public policy, public security, public health and the protection of consumers.<sup>20</sup> In those cases Member States can thus take necessary and proportionate measures also in respect of information society services provided by online platforms established in other Member States.

Where online platforms provide not only intermediation services but also the underlying accommodation service,<sup>21</sup> they will, as regards the latter, normally be in the same position as other providers of such accommodation services and be subject to the same rules.<sup>22</sup>

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<sup>18</sup> Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ 2000/L 178/1 ("E-Commerce Directive"). According to its Article 2, which refers to Directive 98/34/EC, since replaced by Directive 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015/L 241/1), information society services are services offered at a distance, by electronic means, at the request of the user and normally for remuneration.

<sup>19</sup> Article 3(1) and (2) of the E-Commerce Directive.

<sup>20</sup> Article 3(4) of the E-Commerce Directive.

<sup>21</sup> A non-exhaustive list of criteria which can offer strong indications of the level of control or influence that a collaborative online platform exerts over the provider of the underlying service (here: accommodation service) is provided in the European Commission's Communication: 'A European Agenda for the Collaborative Economy'; COM(2016)356, p. 6. The Court of Justice has provided further clarity on this question in its ruling in Case C-434/15, *Elite Taxi*.

<sup>22</sup> See the above section on promoting sustainable short-term rental activities.

Furthermore, pursuant to the E-Commerce Directive, when online platforms acting as intermediaries provide information society services that consist of storing third party content (e.g. information on accommodation rented out by third parties) in respect of which they act in a neutral and passive way, they cannot be held liable for such content, unless they become aware of illegal content which they store and they do not act expeditiously to remove it or to disable access thereto<sup>23</sup>. Additionally, a general obligation to monitor such content or to actively seek for illegal activities on their website cannot be imposed on them.<sup>24</sup> However, these rules do not preclude the taking of certain measures by the online platforms on a voluntary basis, nor the imposition of an obligation on them to promptly inform the competent authorities of alleged illegal activities or to communicate to the authorities, at their request, information to identify the persons concerned, to take monitoring measures in specific cases or to apply a duty of care.<sup>25</sup>

On this basis, the following policy principles were identified:

*9. Where mandatory obligations are imposed on accommodation providers, the cooperation of online platforms with public authorities can facilitate compliance by accommodation providers with their obligations, to the extent that this does not amount to a general obligation to monitor or active fact-finding on online platforms merely offering intermediation services in the form of online hosting.*

*10. Compliance with existing legal obligations imposed on accommodation providers can be facilitated by requiring online platforms to advertise registration numbers of accommodation providers (where applicable) and by them helping apply the relevant thresholds (where applicable), for example by disconnecting accommodation providers exceeding the threshold or informing the relevant public authorities and the accommodation providers once a threshold is reached - to the extent that this does not amount to a general obligation to monitor or active fact-finding for online platforms.*

*11. Online platforms sharing relevant data with competent authorities (e.g. on frequency, location and income generated) in line with data protection rules<sup>26</sup> can facilitate evidence-based policy-making.*

### **Consumer legislation and trust & transparency mechanisms**

The success of collaborative short-term accommodation rentals is driven by strong consumer interest. Boosting consumer confidence will promote the long-term development of collaborative short-term accommodation rental services.

Under the Unfair Commercial Practices Directive, in business-to-consumer relationships, traders are prohibited from engaging in commercial practices which are contrary to the requirements of

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<sup>23</sup> Article 14(1) of the E-Commerce Directive. Its Article 14(3) makes clear that this liability exemption does not extend to orders by courts or administrative authorities to prevent or terminate infringements.

<sup>24</sup> Article 15(1) of the E-Commerce Directive.

<sup>25</sup> See Article 15(2) of the E-Commerce Directive and its Recitals 47 and 48.

<sup>26</sup> For details see below.

professional diligence and, in particular, in misleading actions and omissions.<sup>27</sup> Accommodation providers not acting as 'traders'<sup>28</sup> are not bound by that Directive or by other EU consumer and marketing legislation in their transactions with consumers.<sup>29</sup> However, that does not mean that in that case such providers are not subject to similar rules of national law which apply e.g. in relations between consumers; that will depend per Member State.<sup>30</sup>

EU law on the protection of personal data, namely the General Data Protection Regulation<sup>31</sup> that entered into force in May 2018, stipulates inter alia that personal data may only be shared with third parties on the following conditions: A legal basis for such processing or sharing must be found pursuant to Article 6 GDPR. Such legal basis may exist if, for example, the data subject has given consent to the data processing for a specific purpose, or if there is a legal obligation set forth in EU or Member State legislation for specific operators to share certain personal data with public authorities.

Regarding the latter case, under European data protection rules as they stand now, Member States are allowed to adopt legislative measures that oblige online platforms to share certain personal data with public authorities, where these measures are necessary to safeguard certain recognised legitimate public objectives. In this regard, public security and important economic or financial interests, e.g. taxation matters, could be considered particularly important in the collaborative economy context.

On this basis, the following policy principles were identified:

*12. Online platforms enabling traders to identify themselves can increase transparency for consumers.*

*The express identification of accommodation providers acting as traders can facilitate the awareness of consumers that a transaction is covered by applicable consumer law. Regularity, profit-seeking motive, and a high level of income could indicate that an accommodation provider may qualify as a trader.<sup>32</sup>*

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<sup>27</sup> Articles 5-7 of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004, OJ 2005/L 149/22 ("Unfair Commercial Practices Directive").

<sup>28</sup> According to Article 2(b) of the Unfair Commercial Practices Directive, the term 'trader' is defined as any natural or legal person who is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.

<sup>29</sup> European Commission: 'A European Agenda for the Collaborative Economy'; COM(2016)356, p. 9.

<sup>30</sup> Note that the European consumer protection rules are currently under revision. In the meanwhile, the Commission published several legislative proposals called "A New Deal for Consumers", see [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=620435](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=620435). This proposal, if adopted, includes an Article 2 "Amendments to Directive 2011/83/EU" which would render the principles 12 and 13 mandatory, see detail below.

<sup>31</sup> Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016/L 119/1.

<sup>32</sup> Compare Commission proposal for "A New Deal for Consumers", COM(2018) 185 final; see footnote 30. The newly proposed "Article 6a of Directive 2011/83/EU would contain additional information requirements for contracts concluded on online marketplaces, such as mandatory provision of whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the online marketplace.

13. *Online platforms informing consumers about whether they select or check accommodation providers and on what basis, as well as what criteria they use for the listing and/or ranking of accommodation providers, contributes to transparency for consumers.*<sup>33</sup>

14. *Actions by online platforms to promote the trustworthiness of user reviews and ratings and to verify the identity of authors of reviews contribute to genuine and independent consumer ratings and reviews. Disclosing such actions contributes to transparency for consumers.*<sup>34</sup>

### **Effects on Employment**

The impact of the growth of collaborative short-term accommodation rental services on employment remains unclear at present. Studies show that their impact is uncertain. Further research and more data are required in this regard.<sup>35</sup> In many cases its impact is however indirect, as accommodation providers often personally welcome guests and manage their properties during and after renting them out. At the same time, there is a rising interest in companies offering ancillary services to accommodation providers, such as advertisement, check-in services, cleaning etc.

EU and national labour law in principle equally apply to all workers, irrespective of the type of business that employs them. Yet, establishing who is a worker and who is self-employed can be difficult as the digital economy transforms labour markets and boundaries between the self-employed and workers can be increasingly blurred. The European Commission's Communication on the collaborative economy<sup>36</sup> provides some orientation on the existence of an employment relationship in line with EU labour law and jurisprudence.

On this basis, the following policy principles were identified:

15. *Opportunities for increased entrepreneurship and participation in the labour market as well as fair working conditions and adequate and sustainable social protection constitute important policy objectives.*

16. *Member States guidance on who qualifies as a worker and on how to apply national and EU employment rules can facilitate the correct application of labour law in the collaborative economy.*

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<sup>33</sup> Said proposal for Article 6a of Directive 2011/83/EU would also introduce the mandatory provision of the main parameters determining ranking of offers presented to the consumer as result of his search query on the online marketplace.

<sup>34</sup> As explained in the European Commission's Communication: 'Tackling Illegal Content Online'; COM(2017)555, pp. 10-13, voluntary actions undertaken by online platforms to proactively detect, identify and remove illegal content need not mean that such online platforms play an active role and thus cannot be exempted from the liability exemption of Article 14 of the E-Commerce Directive.

<sup>35</sup> The Commission, together with the Joint Research Centre, developed the COLLEEM research project (see <https://ec.europa.eu/jrc/en/colleem>.) A report on "Platform Workers in Europe" was published in 2018 and tries to contribute to the debate on the socio-economic impact of digital labour platforms and its policy implications, providing tentative answers to some simple but important questions about this emerging phenomenon.

<sup>36</sup> European Commission: 'A European Agenda for the Collaborative Economy'; COM(2016)356, pp. 12-13.

## **Tax obligations & cooperation**

Online platforms and accommodation providers active in the collaborative economy are subject to applicable tax rules. The principle of tax neutrality implies that similar tax obligations should apply to similar services to ensure a level playing field and fair tax burden sharing.

Administrative procedures related to tax compliance of accommodation providers can cause disproportionate burden and compliance costs and can therefore justify policy action, including specific tax schemes using thresholds, Member States' guidance and information campaigns and the cooperation of public authorities with online platforms.

The responsibility to comply with individual income and/or tourist tax obligations normally lies with the accommodation provider. The responsibility of enforcing tax rules constitutes a core task of public authorities. However, online platforms can be in a position to facilitate compliance of accommodation providers with their tax obligations.

On this basis, the following policy principles were identified:

*17. In line with the principle of tax neutrality, similar tax obligations should apply for comparable services while taking into account the administrative burden that tax compliance imposes in particular on occasional services providers.*

*18. Member States' guidance and information campaigns can help increase the awareness and understanding of applicable tax obligations and ways to comply with them, thereby reducing compliance costs and administrative burden. Specific tax schemes for income generated up to a set threshold are another means to avoid disproportionate compliance costs and administrative burden in particular for private citizens occasionally renting out their properties.*

*19. Online platforms informing accommodation providers of their income and/or tourist tax obligations (in close coordination with tax authorities) as well as their total income generated annually (in so far as this information is available to online platforms and does not amount to a monitoring obligation for the online platforms) can facilitate the compliance of accommodation providers with applicable tax obligations. Online platforms sharing information on income generated with relevant public authorities (subject to compliance with data protection rules) can equally facilitate the compliance of accommodation providers with applicable tax obligations.*

*20. Cooperation agreements between public authorities and online platforms can facilitate tax collection and reduce administrative burden. Such cooperation agreements can, in accordance with the applicable law, foresee the opportunity for online platforms to collect/withhold and remit taxes to responsible authorities (in particular as regards tourist tax).*