

222
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CITIES VERSUS SHORT-TERM RENTAL PLATFORMS: the European Union battle

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Municipal regulations restricting short-term rentals are being scrutinised at EU level.

Protracted legal battles regarding enforcement and liability issues have created a spatio-temporal zone of legal uncertainty allowing for a new dynamic to emerge in the public regulation of private capital.

The new prospects of a Digital Services Act has uneased the sector, as it opens up the possibility of a more thorough re-examination and re-actualisation of EU regulatory frameworks.

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The relationship between online short-term rental platforms and local governments has proven itself conflict-ridden. As these platforms deployed across the globe, cities were the first to feel the full force of their effects. Digital intermediation enabled processes of touristification that penetrated deep into the urban fabric, unfettered by existing regulations and zoning laws. In cities with high numbers of visitors, the reallocation of housing units to more profitable short-term stays has caused significant displacements of local tenants and reduction of the long-term residential stock. This has contributed to the emptying-out of historic neighbourhoods and the inflation of housing prices. Faced with popular discontent and protest, many municipal governments have implemented measures to contain and even reverse these trends. The tug-of-war between cities and platforms continues, as local authorities try to reign in what have now become global tech giants, with mostly uneven results.

In the European Union, this “glocal” stand-off has scaled up and taken on continental dimensions. On one side, there are companies such as Homeaway, Booking, Housetrip and the well-known Airbnb, that accounts for **62% of the sector’s estimated total EU revenues**. On the other, a loose and multifaceted network of cities, which are also prominent tourist destinations. Their terrain of dispute is the EU institutional complex, with the European Commission and the European Court of Justice (ECJ) as key actors. The contentions centre on the interpretation of “old” EU regulations, written in times prior to the emergence of these digital platforms, as well as on the expected drafting of a new Digital Services Act by the end of

2020. The outcome of these contentions has the potential to significantly flatten-out the uneven regulatory terrain in which cities and platforms have dug out different positions. The resulting European-wide “rules of the game” could shift, in rapid strides, the fate of the contending parties.

The following text analyses the main aspects of this ongoing dispute and highlights how it presents yet another critical juncture in the processes shaping the meaning of sovereignty and democracy in the EU. As local residents struggle to lay claim to their cities, platforms and their users have been empowered by the ways in which private enterprise freedoms are enshrined in EU law. How the European single market evolves in the digital age will determine to a large extent with whom sovereignty lies in the continent’s urban centres.

Taking on cities from a distance and simultaneously

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relations with European cities have been hostile; many local governments have proven favourably lax, and negotiated city deals and agreements have been reached with numerous others. Nevertheless, many of these negotiations are still fraught with problems, legal battles and pending hefty fines. Platforms are seeking a centralised top-down position in the EU from which to simultaneously overcome all these hurdles. The Corporate Europe Observatory has recently published two reports documenting how these companies have entered the lobbying ecosystem in Brussels (Haar, 2018; Tansey & Haar, 2019). Their main lobbying vehicle is the European Holiday Home Association (EHHA), founded in 2013 and whose **website** boasts a short-term rental industry with a capacity of 20 million beds and a yearly turnover of 80 billion euros.

At a distance from the “local” problems in cities, these figures have been looked upon favourably by many EU staff and politicians centred on boosting economic growth within a competitive single market. In 2017, the EU parliament **resolution** on a “Eu-

ropean Agenda for the collaborative economy” stated that “tourism sector home-sharing represents an excellent use of resources”, “is concerned about the risk of fragmentation of the single market” and “condemns, in this regard, the regulations being imposed by some public authorities, which seek to restrict the supply of tourist accommodation via the collaborative economy.” The European Commission had a year prior taken on a **formal complaint** filed by EHHA on restrictive legislation allegedly violating EU laws in Barcelona, Berlin, Brussels and Paris. Following the last European elections, EHHA filed a second formal complaint against Amsterdam and Berlin.

European city networking

In this context, city governments have also attempted to up their game and act collectively at EU level. Yet, despite the 2016 “**Pact of Amsterdam**” on the Urban Agenda of the EU called upon “bodies representing Urban Authorities, to contribute to the further development of the Urban Agenda,” (Art. 33), there are no binding mechanisms in the EU’s decision-making processes for them to do so. The Urban Agenda Partnerships are thematic multi-stakeholder groups which include cities, but are of a consultative nature. Beyond this framework, in order to influence Council decisions, cities must go through individual national governments; when it comes to the European Parliament, their place is in informal “Intergroups” along a list of other actors; and to “express their views” to the Commission they can engage in “systematic dialogue” (Heinelt, 2017). The European Committee of the Regions (CoR), on the other hand, is an advisory board in which a few city representatives are mixed in with regional authorities. At best, cities can aspire to be “agenda setters” and impact upon policy-making in similar ways interest groups do. The CoR’s **opinion** on the platform economy **adopted** early December 2019 does indeed reflect this effort. It “deeply regrets the crowding out of local residents” and insists that “citizens and businesses must be aware of applicable local rules and obligations”, among other city-informed proposals.

It is more often than not through informal rather than formal channels that cities are acting. City networks are increasingly cities’ tool of choice to exercise “soft power” and shape transnational agendas (Foster & Swiney, 2019). Eurocities is the main network of Europe’s largest cities, with over 140 members. However, drawing a unified position and strategy on specific issues from its numerous and heterogeneous membership can often be an arduous process and result in rather broad lowest common denominators.

An additional difficulty presented to this and all city networks is related to the uncoordinated political cycles of cities. As political representatives constantly change at different times and places, political alliances are shifting and unstable. In consequence, arguably the most active and vociferous European city network on the specific issue of short-term rental platforms has been working on a more ad-hoc, informal and flexible basis to aggregate and amplify shared positions in key conjunctures. With the City of Amsterdam and its Brussels Office in a leading role, and a set of alliances that have been made visible in two press releases, with **fourteen** and **ten** signatories respectively. In early 2020, the network is set to hold a political conference in Brussels to further showcase their demands. Additionally, two related international initiatives, the **Cities for Adequate Housing Declaration**, presented at the High-Level Political Forum at the United Nations in New York in July 2018, and the **Sharing Cities Declaration** presented at the Sharing Cities Summit in Barcelona in November 2018, are worth noting.

As the then Deputy Mayor of Amsterdam **expressed** in the first Sharing City Summit in 2016, “a few of the big disruptors have been talking to all the Cities present separately, yet it took us a few years before we started talking to each other”. Cities have since been trying to gather collective clout through policy exchange and learning processes, shared public declarations and press campaigns, and common lobbying activities. The Deputy Mayor of Barcelona during the 2018 Sharing Cities Summit further envisioned a “**syndicate of cities**” to tackle global tech giants which still has to fully take shape.

Municipal regulations under scrutiny

Municipal regulations restricting short-term rentals are being scrutinised at EU level. The Commission’s **communication** on the “European Agenda for the collaborative economy” in 2016 already stated that under the Treaty on the Functioning of the European Union (TFEU) and the Services Directive “service providers are not to be subject to market access or other requirements, such as authorisation schemes and licensing requirements, unless they are non-discriminatory, necessary to attain a clearly identified public interest objective and proportionate to achieving this interest.” How the principles of non-discrimination, public interest and proportionality are concretely interpreted in this context, however, has been an element of ambiguity and dispute. The communication further elaborated that absolute bans and quantita-

tive restrictions on short-term rentals should only constitute a measure of last resort. Clearly favouring, when need be, the setting of temporal limits, such as a maximum number of days per year that landlords can rent out housing to tourists. The aforementioned “formal complaints” by EHHA to the Commission seek further clarification and action in this regard.

These developments are starting to exert pressure against existing regulations in some cities. Whereas there is little available information regarding the follow-up to these complaints, as they are initially channelled through non-public conversations mediated by national governments, in January 2019 the Commission did initiate an “**infringement procedure**” against Brussels due to breach of the Services Directive. The city-region of Brussels had in place a series of measures officially aimed at **upholding public safety, creating a level-playing field in the tourism accommodation market and avoiding tax evasion**. These included a number of specific rules for the authorization procedure, fire safety certification, quality of the unit and the type and number of furniture and amenities required. However, these measures have been deemed to violate the principle of proportionality by the Commission; a decision celebrated

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by the EHHA as step against “**overly-stringent**” regulations. This step puts further pressure on Brussels to modify their regulations, and a failure to do so could result in the matter being referred to the ECJ.

An important **case** that has reached the ECJ in the course of judicial disputes concerns regulations in the city of Paris and the capacity of cities more generally to quantitatively restrict short-term rentals. Paris has an **authorisation scheme** in place for the change of use of residences to short-term rentals that seeks to prevent any further loss to the long-term housing stock in central areas. The real-estate society Cali Apartments took the municipality to the courts claiming that such a scheme breaches the Services Directive for not being proportional or justified by an overriding reason relating to the public interest. It moreover argued that the criteria of “social diversity objectives” and avoiding “exacerbating the housing shortage”, which underpin the municipality’s discretionary powers to enact such measures, do not fulfil the requirements for clarity and objectivity laid down in the directive. The outcomes of such disputes delimit the degree of sovereignty left to local authorities to deal with the digital transformation of their cities.

Digital regulatory evasion

Not only are municipal regulations currently under scrutiny from the EU, but existing EU laws have also been proving a serious obstacle in the way of their effective enforcement. In particular, the E-Commerce Directive has been harnessed by platforms to elude providing data about their users to municipal authorities, avoid having to systematically monitor their website for user-uploaded content that violates local laws and exempt themselves from any related liability issues. Lack of obligation to cooperate with municipal author-

With the EU already on shaky grounds, the fast-changing landscape of the so-called “fourth industrial revolution” and digitally-driven transformations of the economy and everyday life present a further challenge.

ities makes identifying and persecuting illegal activity enabled by the platform a very difficult and arduous task. The Commission encourages platforms to “take voluntary action to fight illegal content”, but little else. Amsterdam is a paradigmatic case in point. The city government had reached an agreement with Airbnb at the end of 2016 to collaborate in the enforcement of a hosting limit of 60 days per year. Yet, since early 2019 the company has refused to abide by new legislation halving the limit to 30 days, questioning its legality and considering there is another “better way forward”.

The protective shield the E-Commerce Directive provides to short-term rental platforms is conditioned on the contested issue of whether they can be considered an “information society service” to which the Directive applies in the first place. This is related to whether their intermediation is understood as being of a passive character, as little more than an online advertising bulletin board for an already existing short-term rental market. Along these lines, EHHA argues that platforms provide a “neutral hosting service” for third parties. This view has been challenged in the courts by a French hoteliers’ association in a case against Airbnb, considering the company provides more than just intermediation, not falling short from a short-term rental service that should be subject to local laws. In words of its representative, “Airbnb not only creates relationships between two people, it creates a short-term rental market, helps fix the prices, centralizes payments, provides insurance services, publishes and advertises it.”

The case worked its way up to the ECJ and the outcome has been favourable to Airbnb. Unlike in a previous case concerning Uber, which was finally classified as a taxi service, the Advocate General of the ECJ published

an opinion in April 2019 concluding that Airbnb constituted an “information society service”, as it “does not exercise control over the essential procedures of the provision of those services”. The court’s final judgement in December 2019 validated this opinion.

Beyond the intricacies involved in interpreting a legal text written 20 years ago, the outcome of this case has strong political underpinnings. Networked local governments had already raised alarm about holiday rental platforms getting a *carte blanche* as a result. In an “Open letter to European Governments and Regulators”, Airbnb expressed disappointment at the “comments from a small number of cities” for misrepresenting “the collaborative relationship we want to have”. This “small number”, nevertheless, included many of Airbnb’s largest European markets, such as Amsterdam, Barcelona, Berlin, Paris and Vienna, amongst others. Following the final ECJ decision, Airbnb sent a letter to European mayors expressing it nevertheless continues to be committed to “innovative solutions to the challenges facing cities”.

Protracted legal battles regarding enforcement and liability issues have created a spatio-temporal zone of legal uncertainty allowing for a new dynamic to emerge in the public regulation of private capital. Traditionally, regulatory tensions between local authorities and transnational capital are often set against the backdrop of the threat of capital flight, disinvestment and/or delocalisation. In this case, private companies have instead insisted on maintaining their presence in the concerned territories, whilst evading those local regulations deemed problematic.

A new directive on the horizon

In the past years, the short-term rental sector has had its head set on achieving a favourable interpretation of current EU “hard law”, whilst following the development of “soft law” instruments, such as the aforementioned EU Agenda for the collaborative economy. In its “feedback” to the Commission in 2017, Booking.com pointed out that they “strongly believe there is no need for additional legislation”, and that they “fear that a regulatory EU initiative would punish all online platforms, instead of those few platforms that display unfair practices.” EHHA’s and ETTSA’s (European Technology & Travel Services Association) joint “roadmap” also insists on the convenience of the “existing applicable regulatory framework”. The new prospects of a Digital Services Act has uneased the sector, as it opens up the possibility of a more thorough re-examination and re-actualisation of EU regulatory frameworks. In a

recent **position paper** ET TSA insists that, “the digital services act should maintain the key principles of the E-Commerce Directive.”

Given that current EU frameworks were proving quite a challenge for city governments, the drafting of a new regulatory environment could open up new horizons, or definitely foreclose them. In any case, the CoR’s opinion is that a “thorough update” is necessary and acknowledges that the Digital Services Act is a key part of this process. It argues that platforms differ significantly from the traditional business model upon which the existing EU regulatory framework is based and laments that reliance on outdated legislation has left “highly political decisions up to the courts rather than the European and regional legislators”. The discussions around a new directive could give the floor back to politicians rather than judges.

Another crossroads for the EU

This dispute strikes at the heart of some of the most contested issues surrounding the nature of sovereignty and democracy in the EU. With the EU already on shaky grounds, the fast-changing landscape of the so-called “fourth industrial revolution” and digitally-driven transformations of the economy and everyday life present a further challenge. These changes call for new social contracts fit for current conditions, including a “New Deal” on data for the digital society (Bria, 2019). Whoever drives the constituent processes of these new institutionalities will ultimately determine their form and content. To what extent will they emerge bottom-up from cities or descend top-down from the EU superstructures?

The urban roots of European democratic traditions are well known, yet their development has been contradictory and often mystified. The foundational cornerstone of the liberal tradition is a property-owning democracy, which only subsequently became more inclusive through successive suffrage extensions. Airbnb is promoting a neoliberal iteration of these origins in the figure of the “**Airbnb Citizen**”, an initiative to link up and bring together “hosts” at local level. With this notion the company seeks to create its own sense of community based around the market-mediated exchanges the platform enables and engage in “**grassroots**” lobbying. Yet the city has also originated a different kind of democratic politics, whose subject is the urban inhabitant that derives claims to citizenship not from property, but from their condition as users of the urban environment. The social movements confronting Airbnb draw mainly from tenants and low-income users of public space who come together through neighbourly community links. The first type of politics pursues the right to dispose of property, free from unjustified State intervention. The second pursues a right to the city.

Behind the “Airbnb Citizen” are mostly the owners of the capital invested in the company and the landlords who rent out their properties. Yet, there is also a sub-stratum of tenants and low-income homeowners who sublet and relinquish the privacy of their homes to pay their bills. Many are compelled to participate in a platform which ultimately shares responsibility in the low-income and high-price housing context in which they are trapped. Others would in a different context still want to occasionally rent out their homes for some extra cash. Either way, these dilemmas and opportunities cannot be resolved at the individual level, but only collectively. It is at the latter level that public institutions come into play and the two types of politics unevenly interact. Local governments lay within closer reach of the urban inhabitant than EU bodies, whereas both institutions are porous towards the propertied. These dynamics explain in part the institutional frictions between some European cities and EU frameworks on the regulation of short-term rental platforms.

Such contradictory political undercurrents have also manifested themselves through the language of sovereignty. As the CoR’s opinion poignantly highlights, there is a “territorial dimension” to the apparent immaterial character of digital circulation. Networked local governments have claimed “**city sovereignty**” and “**more powers to better regulate the real estate market**”. Municipal authorities, they insist, “have always been allowed to organize local activities through urban planning or housing measures,” and current developments seem, “to imply that this will simply no longer be possible in the future when it comes to Internet giants.” EU treaties, in effect, do uneasily uphold both the principle of subsidiarity and proximity, as well as single-market harmonization. In its present terms, however, the latter is underpinning a *de facto* transfer of sovereignty –the power to exercise final authority over a territory– to the owners of residential space. And, by extension, to the platforms that are enabling an algorithm-but-tressed market distribution of this space. In a time when the question of sovereignty within the EU is increasingly framed as a pulse between nationalism and cosmopolitanism, this case reminds us that it is also about democracy.

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