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The house of cards the collaborative economy leased:
A study of the regulatory issues inherent within the short-term letting industry

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1. Introduction

In 2015, the European Commission defined the collaborative economy as "a complex ecosystem of on-demand services and temporary use of assets based on exchanges via online platforms"[1]. While in traditional e-services a consumer purchases a service from a platform, in the collaborative economy the consumer purchases the service from a prosumer[2] or a traditional trader who uses the interface that the platform provides to facilitate the purchase of the service.

As consumers, we enjoy the benefits of the collaborative economy. From being able to order services from the comfort of our smartphones while benefitting from reduced pricing for those services - although this price reduction is often due to less stringent regulations; we do not appreciate the regulatory framework that is there to protect both consumers and third parties until we ourselves are affected. Perhaps we ourselves will never be affected but if an economy is truly a collaboration, then we must think about everyone in that collaboration, not just ourselves. As tourists, the idea of a cheap place to stay and getting to experience neighbourhoods that we otherwise would not be able to, is enticing, as we do not have to consider the consequences: whether we add value to the area by visiting or force others out or whether a local business closes because they are paying commercial rates which our host is not. A tourist might encounter a standoffish neighbour and assume the area is unfriendly as they have been perfectly quiet and respectful without considering that the previous guest may not have been. As consumers especially when we are using services within the European Union, we expect to benefit from laws that would stringently protect our safety and that local laws would be enforced by organisations which facilitate short-term lets across Europe.

The EU has over the years enacted a number of Directives to help consumers and platforms alike. Platforms are offered broad immunity for the content their users post however there are limits on the immunity offered and while there is no general obligation to monitor, a

[1] "Upgrading the Single Market: more opportunities for people and business", Communication from the Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, (28.10.2015) COM/2015/0550 final

[2] "A neologism used in the context of the collaborative economy for "producing consumers", i.e. non-professional and/or occasional service providers through platforms." HATZOPOULOS, V., "Disarming Airbnb – Dismantling the Services Directive? Cali Apartments", [2021] CMLR, 58: 905–928, pg1

platform cannot retain their immunity provisions if they have actual knowledge or should have as a diligent economic operator of illegal activity by their users.

This paper will examine the liability of platforms which facilitate or link to short term listings under the E-Commerce Directive[3] (ECD) under which a short-term letting platform would be able to claim immunity from any illegal action by their users.

Short-term letting platforms may claim that they will or may remove illegal listings or listings from bad actors, however from experiences of third parties online[4] it did not appear as if they actually did this. The research for this paper took inspiration from the Oxford *"*Mystery Shopper*"*[5] test, whereby researchers contacted an ISP based in the UK and asked them to take down content that they stated was copyright material but was actually in the public domain. The ISPs took down the material without asking further questions with the researchers concluding that "the economic incentive for ISPs is simply to remove any content notified, otherwise do nothing to monitor content, and let end-users, the police and courts, and ultimately the ethics of the content providers decide what is stored and sent over their access networks"[6]. In order to examine whether this would also be true for short-term letting sites, a number were contacted to ask what their policy was regarding illegal lettings if it was not published online. If they had a policy or reporting function on their website or if they stated that they would remove illegal listings, then one or more of their properties based in Ireland which were known through research to lack planning permission to be used as such, were reported. This was in order to determine if short-term listing platforms should be able to use the immunity potentially granted to them by virtue of ECD.

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[3] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178

[4] "In Dublin, Airbnb Hosts Are Increasingly Likely to Be Professional Operators", NEYLON, L., Dublin Inquirer, 23rd January 2019, https://dublininquirer.com/2019/01/23/in-dublin-airbnb-hosts-are-increasingly-likely-to-be-professional-operators/.
https://www.airbnbhell.com/has-anyone-tried-airbnb-neighbor-complaint-system/
https://www.airbnbhell.com/airbnb-protect-hosts-neighbors/
Numerous other posts on message boards also quote Airbnb's standard answer as being "we're unable to take further action or mediate disputes regarding violations of local laws or 3rd party agreements"

[5] AHLERT,C., MARSDEN,C. and YUNG,C., "How 'Liberty' Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation*"* available at https://web.archive.org/web/20120324000935/http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/liberty.pdf, p.24

[6] Ibid, p.7

For the liability of platforms to be established, there needs to be illegal activity by the users of the short-term listing platforms[7].

The Digital Services Act (DSA)[8] is now enacted and applicable to all platforms and service engines as of February 17th 2024. It was not considered as part of this research paper as it has only been applicable to very large platforms (VLOPs)_and very large online search engines (VLOSEs) since the 25th August 2023 and the only platform studied as part of this paper which was been designated as a VLOP was booking.com[9]. The platforms studied as part of this paper were contacted prior to the enactment of the DSA.

This paper is intended to be read in conjunction with "[s]hort-term letting in Ireland: Case law, regulation and no enforcement"[10] which is an in-depth examination of the national regulations regarding short-term lettings in Ireland.

The benefits of the collaborative economy can often be limited to the platform, the prosumer or trader and the consumer while the negative effects can be much more widespread. During a housing crisis where tenants outnumber available tenancies, in a country or area that has poor enforcement of existing or new laws, it is short-term lets (STLs) that set what the minimum rental prices will be. If potential landlords can make more from short-term letting their properties for a few days than they can from renting to a tenant and enforcement is lax or penalties are slight, it is the inhabitants of the area that suffer at the hands of lazy bureaucracy, greed and prioritisation of tourists because they bring new money into the economy.

1.1 Classification of short-term lettings within the ECD framework as per case law

Under the ECD, Information Society Services (ISS) are defined as "any service normally provided for remuneration, at a distance, by means of electronic equipment for the

[7] ECD, supra at note 3, Recital 44, Art 14 and 15
[8] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), L 277/1, OJ L 277, 27.10.2022
[9] List of designed VLOPs and VLOSEs, available at https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses
While google is listed as a VLOSE, google hotels is not mentioned as a designated service
[10] Casserly, Z., "Short-term letting in Ireland: Case law, regulation and lax enforcement", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4777482

processing (including digital compression) and storage of data, and at the individual request of a recipient of a service"[11]. ISS are able to benefit from the liability protections which are afforded to them under Art 12-15 ECD, but the same is not true for intermediaries.

1.1.1 Separation of online and offline services, the *Ker-Optika* case

In 2010 the CJEU in the *Ker-Optika*[12] case came to the conclusion that a separation between an online service and an offline service was possible, and the same conclusion was subsequently followed in Vanderborght[13].

Ker-Optika concerned an e-commerce platform based in Hungary which offered contact lenses for sale. The sale of contact lenses in Hungary however was strictly regulated and could only be offered by qualified opticians or ophthalmologists, as such the Hungarian health authority prohibited Ker-Optika from selling these products online. Ker-Optika challenged this prohibition as being contrary to the ECD and a referral was sent to the CJEU.

The CJEU when examining the decision did not use the discrimination test established in *Keck*[14] but rather used the market access test established in *Italian Trailers*[15].

The CJEU held that a clear distinction could be made between the online service, the sale of the contact lenses[16] and the offline service, the delivery of the contact lenses[17] hence the online service was governed by the ECD but the offline service was not. Therefore the online service was an ISS but the offline service was not. It was deemed that the medical component of the provision could be separated from the sale because "[i]t can be carried out independently of the act of sale, and the sale can be effected, even at a distance, on the basis of a prescription made by the ophthalmologist who has previously examined the customer."[18]

As the online service was subject to the provisions of the ECD, the Hungarian health

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[11] Supra at note 3, Article 2(a)
[12] C-108/09 *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete* [2010] ECLI:EU:C:2010:725
[13] C-339/15 *Vanderborght* [2017] ECLI:EU:C:2017:335
[14] C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel* Mithouard [1993] ECR I-6097
[15] C-110/05 *Commission of the European Communities v Italian* Republic [2009] ECR I-519.
[16] Para 40 supra at note n. 12
[17] Para 31, ibid
[18] Para 37, ibid

authority could not restrict the sale of the contact lenses online because it was not the least restrictive way for them to achieve their stated health aims.

1.2 The Uber cases

Uber Spain[19] was the first case decided in relation to the new emerging collaborative economy considered whether the platform may be considered as the underlying service provider.

Elite Taxi in Spain sought a judgment that the actions of Uber Spain amounted to misleading practices and acts of unfair competition. The 3rd Commercial Court of Barcelona referred the case to the CJEU to determine "whether the services provided by that company are to be regarded as transport services, information society services or a combination of both"[20].

The CJEU in Uber Spain while drawing a distinction between the intermediation service offered by Uber and the transport service offered by the drivers, held that the

> "[t]hat intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as 'an information society service' within the meaning of ... Article 2(a) of Directive 2000/31 ... but as 'a service in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123."[21]

The Court was unable to separate the ISS as they held that Uber "simultaneously offers urban transport services, which it renders accessible, in particular, through software tools such as the application at issue in the main proceedings and whose general operation it organises"[22]

As AG Szpunar had noted in his opinion the importance of the platform exercising decisive influence over the service which the Court followed and added to

> "the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport

[19] C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL* [2017] ECLI:EU:C:2017:981
[20] Para 15, ibid
[21] Para 40, ibid
[22] Para 38, ibid

services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion."[23]

Hatzopolous' assessment of the judgment is that it runs contrary to what the Commission had set out in their European Agenda for the collaborative economy[24] which was a much more pro-platform stance[25]. While the Commission did consider that ISS may also be the providers of the underlying service[26] , they set out three criteria that would have to all be met so that it could be said the platform had significance influence or control over the underlying service and could therefore be considered as provider of the underlying service. While two of the three criteria[27] set out by the Commission were met in *Uber Spain*, the third criteria was ownership of the key asset used to provide the service which was not proven.

Uber France[28] concerned a private prosecution and civil action, taken against Uber in France for violations of a law introduced in 2014 which prevented any chauffeured vehicles (other than those legally registered as taxis) from charging a per-kilometre fee; any chauffeured vehicle was further required to return to their base or stop in an authorised parking place between fares; the use of software that showed the location of nearby

[23] Para 39, ibid
[24] European Commission, "A European Agenda for the collaborative economy" COM(2016) 356 final
[25] HATZOPOULOS, V, "After Uber Spain: the EU's approach on the sharing economy in need of review." European law review 44.1 (2019): 88-98.
[26] Supra note at n.24
[27] Ibid, "Price: does the collaborative platform set the final price to be paid by the user, as the recipient of the underlying service. Where the collaborative platform is only recommending a price or where the underlying services provider is otherwise free to adapt the price set by a collaborative platform, this indicates that this criterion may not be met.
Other key contractual terms: does the collaborative platform set terms and conditions, other than price, which determine the contractual relationship between the underlying services provider and the user (such as for example setting mandatory instructions for the provision of the underlying service, including any obligation to provide the service)."
[28] C-320/16, *Uber France*, [2018], EU:C:2018:221

available vehicles to potential customers in real-time was also prohibited. The Tribunal de Grande Instance in Lille referred the question of whether the new legislation introduced in 2014 was enforceable against Uber, given it was not notified to the Commission in advance which would be required for new legislation which would impact an ISS and also would the legislation fall within the Services Directive[29].

In Uber France, the CJEU held that the intermediation service was not an ISS but rather a transport service relying on the judgment in Uber Spain and therefore no prior notification of the measure was required to be made to the Commission. The legislation falling under the Services Directive was therefore unnecessary to answer.

The Uber test can be summarised as 1) is the market created by the service provider?In Uber it was established that (i) non-professional "drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers"[30] without Uber. 2) The decisive influence which Uber exercised over the service, that the company "determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion"[31].

The negative implications of Uber not being an ISS is summarised by Schaub, who states that the ruling that these platforms are not ISS and are instead engaged in transport services, therefore excludes them from the framework of the ECD which includes the "the transparency requirements and the requirements relating to online contracting" [32]. While EU consumer rights Directives have been cognisant of E-commerce since its naissance, there are exceptions for certain sectors such as transport services which are excluded from the various consumer rights Directives, such as the Services Directive[33] with the 2011 Consumer Rights Directive [34] which was in force at the time of this ruling stating "[p]assenger transport

[29] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, 27.12.2006, OJ L 376, 36–68
[30] Supra at note 39, at para 39
[31] ibid
[32] SCHAUB, M.Y., "Why Uber is an information society service Case Note to CJEU 20 December 2017 C-434/15 (Asociación profesional Élite Taxi)", [2018], 3 EUCML, 109-115, pg.115
[33] Supra note at n.29 , recital 21
[34] Directive 2011/83/EU of The European Parliament and of The Council of 25 October 2011 on Consumer rights

should be excluded from the scope of this Directive as it is already subject to other Union legislation or, in the case of public transport and taxis, to regulation at national level."[35] . The rulings in the *Uber* cases thereby put Uber and similar platforms outside the scope of EU law for consumers and ostensibly the internal market.

1.3 The *Airbnb Ireland* case

Criminal proceedings in France were brought against Airbnb for violation of the Hoguet law. This legislation dated from 1970 and required anyone engaged in "the purchase, sale, search for, exchange, leasing or sub-leasing, seasonal or otherwise, furnished or unfurnished, of existing buildings or those under construction"[36] possess a licence to do so and also keep specific records about the handling of money and imposed criminal penalties on those who failed to do so. The Tribunal de Grande Instance de Paris sought a preliminary ruling about Airbnb's status as an ISS or intermediary and whether the ECD was applicable.

In looking at whether Airbnb is an intermediary or an ISS, AG Szpunar[37] used the method from the cases *Uber France* [38]and *Uber Spain*[39] to calculate whether the platform has control of the transaction and is therefore a party to it or whether they are acting as merely a host. This case concerned whether French laws about the regulation of property services also applied to Airbnb and whether or not they should be subject to the same or if they are acting solely as a host. Airbnb claimed a lack of liability based on both the Service Directive and the ECD.

The classification of Airbnb as an ISS under the ECD was endorsed by Airbnb themselves, the Czech and Luxembourg Governments and also the European Commission[40] while the Association pour un hébergement et un tourisme professionnels (AHTOP), supported by the French and Spanish Governments were of the opinion that Airbnb does not satisfy the ISS

[35] Ibid, Recital 27
[36] C-390/18, *Airbnb Ireland*, [2019] EU:C:2019:1112. Para 13
[37] C-390/18 Opinion of Advocate General Szpunar, delivered on 30 April 2019, ECLI:EU:C:2019:336
[38] Supra note at n. 28
[39] Supra note at n. 19
[40] Supra note at n.37, para 22

exception and should be considered an intermediation service and therefore not able to benefit from the ISS exception.

In assessing the business model of Airbnb AG Szpunar noted that Airbnb did not just act as a platform to connect the host and user and that they also provided a rate and review system for host and guest[41] and when *"*a host receives mediocre ratings or negative comments or cancels confirmed reservations, AIRBNB Ireland may temporarily suspend the listing, cancel a reservation or even prohibit access to the site."[42]. He also noted that they also offer the host "(i) a framework defining the terms of his offer; (ii) a photography service; (iii) civil liability insurance; (iv) a guarantee for damage of up to EUR 800 000; and (v) a tool for estimating the price of his rental by reference to average market prices taken from the platform"[43] and accept payment for the listing via their payment system which releases the funds 24 hours after the guest has entered the property.

In both *Uber* cases and *Airbnb Ireland* the CJEU only seemed to be concerned with the relationship and control between the platform and the service provider; no analysis was done regarding the control which the platform was able to exercise over the consumer and what this would mean about the platform's connection to the underlying service.

Despite the fact that a STL has become so synonymous with Airbnb that it is used as a synonym for the former (in the same way Hoover and vacuum cleaner are used), the AG held that because an owner could create their own website to let out their property and held that Airbnb have not created a market in the same way that Uber had. Likewise in relation to control over the service the AG found that Airbnb did not exert decisive influence given that the standards for the accommodation are chosen by users although adhering to options put forward by Airbnb and that many of the other services they offer are "optional" and "ancillary" in nature. The payment facility offered by Airbnb was deemed to be "typical of the great majority of information society services"[44]

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[41] Ibid at para 29
[42] Ibid at para 30
[43] Ibid at para 31
[44] Supra at note n. 37, at para 77

In delivering its opinion[45] the CJEU relied heavily on AG Szpunar's opinion. In their judgment, they affirmed that Airbnb is an ISS. The CJEU further clarified the need for Member States to notify the Commission of laws which could affect the freedom to provide services by an ISS in a Member State where the provider is not established[46]. This applies ex-post facto[47] but only concerns measures which do not fall within a Member State's own field of competence and would apply to a restriction on the activities of an ISS[48].

The decision in Airbnb Ireland however has been seen by many to be contradictory to the rulings in *Uber Spain* and *Uber France* with Van Acker querying "whether the CJEU applied the theory or whether it rather reverse engineered the facts to make them fit within the theory."[49] The idea that Airbnb and other similar sites did not create the market would seem contrary to the huge growth in the amount of people who are short-term letting solely since their advent.

Using the *Ker-Optika*[50] criteria, the service which the platforms provide does not end as soon as one has booked the accommodation; the service is still provided when the offline portion of the service takes place and still exists beyond that point. If the offline portion of the service is cancelled then the online service will generally cease, however the online portion of the service cannot be cancelled and the offline portion of the service still takes place. In relation to STLs the online and the offline services are symbiotic. The platform generally provides the facility for the consumer to contact the owner while the offline service takes place and acts as the arbiter to any issues that may occur during the offline service. While the online and offline portion of service can be separated as was determined in *Ker-Optika*, the obligation that the platform has during the offline portion of the service cannot be discharged by the idea that their service during the offline portion of the service still takes place online.

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[45] Supra at note n.36
[46] Ibid at para 95
[47] Supra at note n.37, para 119
[48] Ibid , Footnote 64 "In order to be classified as a 'technical regulation', subject to the obligation to notify under the latter directive, a requirement laid down by national law must have the specific aim and object of regulating information society services in an explicit and targeted manner"
[49] VAN ACKER, L. "C-390/18 –The CJEU Finally Clears the Air(bnb) Regarding Information Society Services" (2020), EuCML(2), 77-80
[50] C-108/09, *Ker-Optika* [2010] EU:C:2010:725

No consideration in the decision was given to the funding of the intermediation service and how this differs from what we understand as traditional e-commerce. If the offline service does not take place due to it being cancelled either by owner or consumer, Airbnb is not paid. When the service takes place and they are paid, the remuneration is a percentage of the service price rather than a flat fee. If payment for the intermediation service cannot be separated from the payment for the offline service then it would appear as if it they should be classified as inseverable.

Hatzopulous notes in relation to the ruling in *Uber Spain* that the case cited in that ruling was *Grupo Itevelesa*[51] where the Court held that "the technical inspection activity of vehicles, even if not a transport service per se, must be excluded from the scope of the Directive as it constitutes a 'service in the transport sector'" [52] and therefore if the judgment's logic is followed "any ancillary activity offered by the platforms, in order to facilitate the provision of the underlying services (such as logistical support and other facilities offered by the electronic intervention) would transform the platforms as providers of the underlying services."[53]. Given the ancillary services which Airbnb offers as cited in the judgment it is unclear how their service was deemed to be entirely separate from the offline service as the *Grupo Itevelesa* judgment was not referenced in *Airbnb Ireland,* the Court's logic in differentiating the two is unknown. While a difference could be inferred from the physical nature of the ancillary services offered in *Grupo Itevelesa* and the purely online ancillary services offered in *Airbnb Ireland,* the ancillary services in *Uber Spain* were solely offered online also.

While the owner offers specific terms of their accommodation, Airbnb does not facilitate an owner to offer a separate contract to the consumer, rather both consumer and owner have to agree to the terms and conditions put forth by Airbnb. The argument that an owner could easily make a website and advertise the property themselves without an underlying platform in no way takes into account how technologically difficult this would be for many

[51] C-168/14, Gru*po Itevelesa and Others* [2015],
[52]HATZOPOULOS, V, *Chapter 10, The Internal Market and the Online Platform Economy* eds. GARBEN, S. GOVAERE, I., "Internal Market 2.0 " [2020] Hart Publishing, ebook edition
[53] ibid

people and it also does not bear scrutiny that similarly a provider of car rides in their own private vehicle could not similarly create an app or a website to offer the same service as Uber.

Many people who grew up in small towns knew the phone number of a local person who would offer car rides for remuneration in their personal vehicle, therefore while a service akin to Uber predates its inception it does not mean that Uber did not create a market and it also does not mean that STL platforms did not similarly create a market.

No evidence was presented that a similar number of consumers would firstly find, secondly trust, websites for STL properties where the host created the site and likely moderates reviews and thirdly book without the possibility of customer service from a larger provider.

The CJEU not considering that STLs offered through platforms are a separate market and rather deeming them to be one that predates the platforms, may be a ruling to their detriment when the idea of state aid is considered, this will be discussed further in section 3.2

2. STLs and the applicable European Directives

While the CJEU believes that STL platforms have created an entirely new market, the framework within which they would enjoy extremely broad liability protection has been in place in the EU for more than two decades now. However, this broad liability is not absolute and still requires platforms to act in as a diligent economic operator. This section will examine the types of platforms, their obligations and how they can benefit from the freedom from liability in the ECD and what in practice platforms actually do when they are sent a notice and takedown notification.

2.1 Types of short-term letting platforms

There are ostensibly two types of platforms which facilitate short-term lets (STLs), which have been categorised as either a) listing or b) searching sites: a) Listing sites are those which allow users to list their property i.e booking.com and b) searching sites are those which merely aggregate listings from other sites which could be within their parent organisation or could be entirely separate, i.e. google hotels.

On both listing and searching sites, there are different levels of control which the site exercises over the listing. For searching sites, the main difference usually is whether or not the site allows one to book on the site or if it redirects to the listing site.

Another site which may facilitate short-term lettings but would not fall into the above categories would be c) unrelated facilitator: these sites facilitate in a more benign way such as a site which is not involved in the business of short-term letting at all and derives no direct monetary benefit from a listing i.e. a wedding blog that lists interesting STLs for hen parties, a newspaper compiling a list of the best STLs in a location, etc.

2.1.1 Monetary benefit from short-term listings

In the sites studied as part of this paper, there were two types of remuneration identified for platforms which listed properties, flat or percentage. Percentage fees were much more common in platforms which only listed short-term lets and flat fees were more common in sites which also facilitated long term lets and property purchases.

In searching sites, it was not possible to identify what remuneration was offered if any, when users booked through the searching sites links. However, relying on Recital 18 of the ECD and the CJEU's decision in *Papasavvas*[54] it does not matter if the income is derived from the sale of a service as the sale of advertising on the site even if unconnected with the service, means the ISS was remunerated[55] therefore even a site that would be classified as an unrelated facilitator should follow the requisite European legislation around STLs or be potentially liable.

2.1.2 Information obligations of short-term letting platforms under the ECD

As will be seen in section 3 of this paper[56], the issue that the majority of local and national authorities have with STLs is the availability of information surrounding their location and who is running them but when the applicable laws in relation to the requisite provision of information are analysed, this information should be easily accessible to both competent authorities and consumers before the service is purchased.

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[54] Case C-291/13, *Sotiris Papasavvas* [2014] ECLI:EU:C:2014:2209
[55] Ibid, at para 28
[56] See also CASSERLY, Z, supra note at n.10

Under Art 5(1) of the ECD, the following information should be made easily, directly and permanently available to those who are accessing the service and competent authorities[57]

> "(a) the name of the service provider;
>
> (b) the geographic address at which the service provider is established;
>
> (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
>
> (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
>
> …
>
> (g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment."

2.1.3 Information to be made available under the Services Directive

The Services Directive[58] reiterates similar information[59] to be provided as the ECD but ensures that the consumer must have access to this information before the conclusion of a contract[60], and there is also an onus on Member States to ensure that that this information is provided[61].

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[57] Competent authorities are designated by each Member State in their transposition of the Directive, in Ireland the Competent Authority was the Office of the Director of Consumer Affairs (ODCA) who's responsibilities were amalgamated with the Competition Authority to form the Competition and Consumer Protection Commission (CCPC).

[58] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, 27.12.2006, OJ L 376, 36–68

[59] Ibid, Article 22(1) "1. Member States shall ensure that providers make the following information available to the recipient:(a)the name of the provider, his legal status and form, the geographic address at which he is established and details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means;(b)where the provider is registered in a trade or other similar public register, the name of that register and the provider's registration number, or equivalent means of identification in that register;(c)where the activity is subject to an authorisation scheme, the particulars of the relevant competent authority or the single point of contact;(d)where the provider exercises an activity which is subject to VAT, the identification number referred to in Article 22(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment ……."

[60] Ibid, Article 22(4)

[61] Ibid

In *Cali Apartments*[62] the CJEU established that the Services Directive applies to STLs[63]. Cali Apartments were offering apartments for STL in Paris through Airbnb without the requisite authorisation. Criminal proceedings were taken for violation of the law requiring authorisation before engaging in short-term letting and after being found guilty, a referral was sought to the CJEU to determine if the authorisation legislation in Paris was contrary to Art 56 TFEU (freedom to provide services) and the Services Directive.

When arriving at this decision the CJEU while ultimately coming to the same conclusion as AG Bobek had in his Opinion, differed in their reasoning for that conclusion. AG Bobek stated that “[i]n my view, the provision of short-term letting services for remuneration is a service of a distinctly economic nature. Obtaining a change of use of residential property is simply a requirement affecting access to the provision of that particular service.”[64] The CJEU established that “an activity consisting in the repeated short-term letting, for remuneration, whether on a professional or non-professional basis, of furnished accommodation to a transient clientele which does not take up residence there”[65] and held that the Services Directive applied in relation to the measures in this case because it was aimed specifically at those intending to provide a particular service rather than generally[66].
As Hatzopolous notes, this case “is not a case about the collaborative economy touching upon the Services Directive (as were the previous three), but rather a Services Directive case which happens to concern an activity facilitated by a platform”[67].

[62] Joined Cases C-724/18 and C-727/18, *Cali Apartments SCI and HX*, Judgment of the Court (Grand Chamber) of 22 September 2020, EU:C:2020:74

[63] Ibid, “32 It is therefore necessary to determine whether an activity consisting in the repeated short-term letting, for remuneration, whether on a professional or non-professional basis, of furnished accommodation to a transient clientele which does not take up residence there is covered by the concept of ‘service’ within the meaning of Article 4(1) of Directive 2006/123, and, if so, whether that service is nonetheless excluded from the scope of that directive under Article 2 thereof and whether national legislation such as that described in paragraph 28 above is itself excluded from that scope.
33 Regarding, first of all, the classification of the activity concerned, it is apparent from Article 4(1) of Directive 2006/123 that, for the purposes of that directive, ‘service’ means any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 TFEU.
34 In the present instance, the activity consisting in the letting of immovable property, as described in paragraph 28 above, exercised by a natural or legal person on an individual basis is covered by the concept of ‘service’ within the meaning of Article 4(1) of Directive 2006/123.”

[64] Para 40, ibid

[65] Para 32, supra at note 62

[66] Para 44, ibid

[67] Supra note at n.2

It should also be noted that under EU consumer legislation, contracts such as those for accommodation are treated differently under the distance selling regulations[68]. While a consumer has a 14-day cooling off period for the purchase of most goods or services online within the EU there is no such mandatory cooling off period for tourist accommodation. It is therefore even more fundamental that the information required under the Services Directive be provided prior to the consumer purchasing to the service because there is little recourse once the consumer has entered into such a contract.

2.1.4 Information required to be made available by the 2011 Consumer Rights Directive

The 2011 Directive[69] goes further than the ECD but only in relation to traders not just service providers. It requires that the information about the trader's name, address, etc. be made available to consumers before any contract is concluded[70] and it also establishes that the burden of proof that the trader complied with these regulations is on the trader[71]. The Directive also requires Member States to ensure that those persons or organisations which have "a legitimate interest in protecting consumer contractual rights should be afforded the right to initiate proceedings, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings"[72]

2.1.4.1 Are providers of short-term lets traders?

The definition of a trader as being someone who is acting "for purposes relating to his trade, business, craft or profession"[73] may not encompass all of those who are engaged in short-

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[68] This is a feature in every distance selling/consumer rights legislation and goes as far back as Art 3(2) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997.
See also Art 3, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, 22.11.2011, OJ L 304, 64–88

[69] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, 22.11.2011, OJ L 304, 64–88

[70] Ibid, Article 6 (1) as modified by Art 4(4) Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328

[71] Ibid, Article 6 (9)

[72] Ibid, recital 56

[73] Ibid, Article 2(2)

term letting provided they are not doing it often, however the law is not entirely clear on this matter and varies from Member State to Member State. Ireland for example relies on the UK badges of trade[74] . Whether frequent short-term letting would be considered trading depends on the degree to which the person engages in promotion of their letting, engagement with consumers etc., and whether their actions would fall under the *Noddy* test[75] . It is clear however that platforms should at the very minimum have the facility for the required trader information to be provided. Ireland, by copying the UK Consumer Rights Act 2015[76] put in place an onus on the trader to prove that they are not one[77].

2.1.5 Obligations of the Member States when it comes to enforcing the ECD

"Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established."[78]

This establishes that there is a positive obligation on Member States where the services originate to ensure that public interest objectives are being protected and that the competent authorities are supervising effectively.

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[74]Tax and Duty Manual Part 02-02-06, available at https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-02/02-02-06.pdf

[75] *Noddy Subsidiary Rights Company Ltd v. CIR* , [1966], 43 TC 458
The Noddy test determined that no singular circumstance was determinative of being involved in a trade or not. In *Noddy* what was taken into account was the memorandum of association, the time spent managing the affairs of the company, the active seeking out of customers, the skill and labour used when managing the licences. The lack of a physical office or staff could not prove that the activity was not a trade.

[76] Consumer Rights Act 2015, c. 15

[77] Consumer Rights Act 2022, Art 2 (3)

[78] Supra at note 3 , Recital 22,

2.1.6 Obligations of the Member States when it comes to enforcing the Services Directive

Under Article 27:

" 1. Member States shall take the general measures necessary to ensure that providers supply contact details, in particular a postal address, fax number or e-mail address and telephone number to which all recipients, including those resident in another Member State, can send a complaint or a request for information about the service provided. Providers shall supply their legal address if this is not their usual address for correspondence. Member States shall take the general measures necessary to ensure that providers respond to the complaints referred to in the first subparagraph in the shortest possible time and make their best efforts to find a satisfactory solution.

2. Member States shall take the general measures necessary to ensure that providers are obliged to demonstrate compliance with the obligations laid down in this Directive as to the provision of information and to demonstrate that the information is accurate."79

There is therefore not just a positive obligation on Member States to make sure that the information required is provided but a further obligation that they shall also take measures to ensure the service providers demonstrate that the provided information is accurate.

2.2 Limitation of liability under the ECD for ISS

"By the year 2000 or so, therefore a rough consensus had emerged in both Europe and the US that ISPs should in principle be left free from liability for content authored by third parties so long as they were prepared to co-operate when asked to remove or block access to identified illegal or infringing content."[80], as without this broad liability for content authored by third parties, an open internet would not be possible. The ECD provides for three types of activities where ISS may be exempt from liability: mere conduit, caching and hosting.

[79] Op cit. at note n.29

[80] EDWARDS L., WAELDE C., *Law and the Internet*, 3rd edn (Hart Publishing, Oxford), 2009, at pg. 61

2.2.1 Mere conduit and caching

Where ISS act as a mere conduit "i.e. as a relay station transmitting content originated by and destined for other parties"[81] as stated by Edwards they are acting as conduits such as the post office or telephone companies as a neutral carrier of information[82].
Caching is defined as an "ubiquitous technical process whereby local copies of remote web pages made by hosts when requested, in order to speed up the delivery of those pages on subsequent request"[83]

The ECD is very clear about the hands off conduct that an ISS needs to engage in to benefit from the mere conduit or caching exemption: "[a] service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission."[84] and any collaboration between an ISS and a service user to undertake illegal acts that go beyond conduit or caching will not be able to benefit from the liability exemptions.[85]

2.2.2 Hosting

The provision for limited liability for hosts is the one which is most important in relation to both listing and searching sites for short term lettings as they do not appear to fall under mere conduit/caching from the ruling in *Airbnb Ireland*[86].

In relation to hosting Article 14 of the ECD states

> "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

[81] Ibid, p.64
[82] ibid
[83] ibid
[84] Supra at note 3, recital 43
[85] Ibid, recital 44
[86]Supra at note 45

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."

2.2.2.1 Active versus passive hosting

The CJEU in *Google France*[87] held that "in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores"[88].

In *L'Oréal*[89] it was established that the ISS can have no "active role" that would allow it "it to have knowledge or control of the data stored" and that the operator "plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them"[90].

The Court again reiterated what had been emphasised in the previous *Google France* case referring to Recital 42: "mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored". However, the advice that eBay gives its

[87] Joined Cases C-236 to 238/08, *Google France v. Louis Vuitton*, [2010], EU:C:2010:159
[88] Ibid, at para 114
[89] Case C-324/09, *L'Oreal & others v. EBay International*, [2011], ECLI:EU:C:2011:474
[90] Ibid, at para 123

customers on optimising presentation may erase or negate their neutrality[91] more specifically the optimisation or promotion[92] of illegal goods.

Hatzopoulos gives the example of the ruling of the Dutch Supreme Court in *Duinzigt* where the Court held that

"an active platform (in the area of accommodation) is characterised by the fact that the provider and the client may not get into direct contact but have to go through the platform for their transaction to be concluded. Conversely, where the platform only provides the necessary contact details of the accommodation provider, then it will be considered a mere bulletin board. Further to this criterion, one may say that a platform which is being paid for the actual conclusion of a contract (by way of a commission) rather than for making public the service and contact details of its provider (by way of a registration fee, subscription or advertisement) is more likely to qualify as 'active'."[93]

While the Dutch Supreme Court's definition of an active platform in the area of accommodation is well thought out, they would appear to be missing certain criteria which would also indicate that the platform is active:

1. the underlying business of the platform: if a platform's main or sole business is a platform to procure accommodation then it would be difficult to claim they are not active in that respect, especially with regards to STLs if they have a search function or tab which may filter for same.
2. If the platform has contracted with another platform whose main or sole business is in the area of accommodation and they agree to host the other platform's content on their platform with the knowledge that the content is in the area of accommodation then they should be deemed to be active in that area by virtue of

[91] Ibid, at para 114 "[i]t is clear from the documents before the Court and from the description at paragraphs 28 to 31 of this judgment that eBay processes the data entered by its customer-sellers. The sales in which the offers may result take place in accordance with terms set by eBay. In some cases, eBay also provides assistance intended to optimise or promote certain offers for sale."

[92] Ibid, at para 116 "Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31."

[93] HATZOPOULOS, V.,*Collaborative Economy and EU Law* (2018) Bloomsbury, Ebook edition, Chapter IV, section A (i) (b)

agreeing to the content appearing on their site and being remunerated or paid a percentage or click through fee for this hosting.

2.2.3 No general obligation to monitor and actual awareness

Under Article 15 the ECD establishes that ISS which fall under Articles 12, 13 and 14 will be under no obligation to monitor the information which they transmit or store "nor a general obligation actively to seek facts or circumstances indicating illegal activity."[94] The *L'oreal* case also established that that even if the ISS is held not to have played an active role and therefore could rely on the ECD exemption from liability, it cannot rely on the exemption if "it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously"[95] .

CG v. Facebook, XY v. Facebook and *Glawischnig-Piesczek v. Facebook* are good examples of how Article 15 is established in practice and the need to monitor once aware of facts and expeditiously take down.

2.2.3.1 CG v. Facebook

McCloskey created a Facebook page called "[k]eeping our kids safe from predators" in August 2012 which published the private details of people in his local area with criminal convictions for child sexual abuse. One of the named persons (XY) sought an immediate injunction, which was granted requiring Facebook to remove the page because the comments were "threatening, intimidatory, inflammatory, provocative, reckless and irresponsible"[96]. XY also sought to impose a specific monitoring obligation on Facebook to monitor for republication; the court declined to impose this obligation on Facebook stating "such an order would lack the requisite precision, could impose a disproportionate burden and, further, would potentially require excessive supervision by the Court".

Thereafter McCloskey set up a new page entitled "[k]eeping our kids safe from predators 2" which republished a news article about a person known as CG who was released from prison. The discussion underneath was about his location and also violent threats against

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[94] Supra at note 3 , Art 15(1)
[95] Supra at note 89, at para 124
[96] *XY v. Facebook Ireland Ltd* [2012] NIQB 96

him. CG's solicitor contacted Facebook and their solicitor asked them to take down the information on the basis of defamation and risk to CG's life. Facebook responded that CG should use the online reporting tool which he did not want to do. On May 22nd 2013, 26 days after they had been notified by CG of the page, Facebook removed the page in question; shortly thereafter CG filed a case. The Court found that regulation 22 is "not an attempt to be prescriptive as to precisely how notice is to be given to a service provider or as to how actual knowledge is required"[97] but should be seen in a wider context and take into account all relevant information in this case by virtue of the previous litigation taken by XY against McCloskey, the letter sent by CG's solicitor and examining the page in question. Stephens J. concluded that Facebook "has considerable resources at its disposal and does not require to have spelled out to it on each occasion with inappropriate precision the particular laws of the UK which are in issue and which are being contravened"[98].

The Court of Appeal in Northern Ireland[99] assessed the actions of both McCloskey and CG finding that McCloskey's behaviour constituted private harassment and that Facebook by failing to take down the page expeditiously were liable for the tort of misuse of private information; also whether or not a claimant sufficiently identifies why content is illegal is not "determinative of the knowledge of facts and circumstances which fix social networking sites such as Facebook with liability"[100]. The Court stated that the unlawful activity must be apparent.

The Court of Appeal disagreed with the original judgement and held that Facebook did not have actual knowledge simply because of the XY case as that regarded defamation not privacy. However, they did have actual knowledge from the original complaint CG made and therefore when he made a further complaint about a Facebook page published by RS, the father of one of his victims which contained his photo, name, possible location and threats of violence, they should have acted expeditiously. Therefore they found Facebook liable for misuse of private information from the date that he had informed them about this new page to the date that they took it down (26 November until 4/5 December 2013).

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[97] *CG v. Facebook Ireland Ltd and Joseph McCloskey*, [2015] NIQB 11 at para 95
[98] Ibid at para 96
[99] *CG v. Facebook Ireland* Ltd *and Joseph McCloskey,* [2016] NICA 54
[100] Ibid, at para 69

While Facebook tried to argue that they were not liable because the information about the page had not been given to them through their online reporting tool, Morgan LCJ stated that there was no requirement to give notification in a particular form in order for that notice to be valid.

> "It is apparent, therefore, that the scheme of the 2002 Regulations is to set up an easily accessible notice and take down procedure so that a complainant can utilise the Regulation 22 mechanism to establish actual knowledge and thereby establish an entitlement to damages if there is a failure to take down an unlawful posting"[101]

The Court of Appeal held that Facebook was able to rely on regulation 19 and was not liable for the original post on the predators 2 page, however they were liable for failing to act expeditiously in removing the RS page as they already had notice given of the original page being reported. A sum of £2,000 and costs were awarded against Facebook for the eight to nine days the post was up.

2.2.3.2 Glawischnig-Piesczek v. Facebook

When an Austrian politician, Eva Glawischnig-Piesczek complained to Facebook about some defamatory posts, she asked that the posts be deleted and that the users' identity be disclosed to her. Facebook declined to remove the posts, the Austrian Commercial court ordered that Facebook "cease and desist from publishing and/or disseminating photographs showing"[102] Glawischnig-Piesczek "if the accompanying text contained the assertions, verbatim and/or using words having an equivalent meaning as that of the comment"[103], Facebook did not remove the content but disabled its access in Austria. The case was appealed to the Austrian Supreme Court who referred a number of questions to the CJEU:

> "(1) Does Article 15(1) of Directive [2000/31] generally preclude any of the obligations listed below of a host provider which has not expeditiously removed illegal information, specifically not just this illegal information within the meaning of Article 14(1)(a) of [that] directive, but also other identically worded items of information:–

[101] Ibid, at para 57
[102] Case C18/18, *Eva Glawischnig-Piesczek v. Facebook* Ireland Limited, [2019], ECLI:EU:C:2019:821 at para 14
[103] Ibid

worldwide;–in the relevant Member State;–of the relevant user worldwide; –of the relevant user in the relevant Member State?

(2) In so far as Question 1 is answered in the negative: does this also apply in each case for information with an equivalent meaning?

(3) Does this also apply for information with an equivalent meaning as soon as the operator has become aware of this circumstance?"

The CJEU stated that it was accepted by both parties that Facebook was a host provider as per Article 14 ECD but that the immunity from suit granted by this was not an immunity from legal obligations such as injunctions that may be imposed by national courts even if one of the alternate conditions of Article 14 is fulfilled, for example even if it was not liable, under Article 18, Member States are obliged to ensure that court actions "allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved."[104]

The CJEU held that the ISS had knowledge of the illegal information but failed to act expeditiously to remove or disable access to it as required under Article 14(1).
In answering the referring court's questions, they stated that under Article 15(1) a Member State Court is not prohibited from ordering a host to remove all information that it stores that is both identical to and of which the content is similar or conveys the same message and also that a national court can require a host to remove or block information worldwide.

2.3 Actual knowledge of short-term letting providers

In Appendix 1, there is a database of all the short-term letting providers that were contacted as part of this study to assess their notice and take down procedures. While some may not be considered hosts under the ECD in light of recital 42 and therefore would not benefit from the immunity provision, nevertheless for the purpose of this study each site was treated as if they would benefit from that exemption and as if they had no actual knowledge of illegal behaviour prior to being contacted as part of this research.
Any site which could benefit from ECD immunity must have a robust notice and take down procedure. Firstly, it was determined if they had a report function on their website; if they

[104] Ibid at para 26

did, this function was used to report one or more properties that they advertised on their site that research indicated was being operated as an illegal STL. No site studied as part of this research which had the functionality to report an illegal letting, would take down the posting, with many who responded by stating that they would not engage with 3rd party complaints.

A good portion of sites had no way of reporting a post and many searching sites had no way to contact them at all. In contrast to the *Oxford Mystery Shoppers* where they were given the benefit of the doubt that the content was illegal, the reports which were made were brushed off even when robust evidence was presented. It seems as if it is a 'don't ask don't tell' situation where platforms will only act if a Court or national/local authority orders them to do so or there is robust legislation in place to stop illegal listings.

Available information in the terms and conditions was used and dummy accounts were set up on sites to glean certain information about how the site operated; if they had a report function on listings or even an ability for non-users to contact; if they had a specific policy on illegal STLs available on their site; their involvement with the listings (whether they visit the property, marketing information and ability to alter advertisements); their indemnification policies; whether they ask users to affirm their ownership or right to STL the property and if they ask users to affirm they will abide by local laws.

It is clear from statements that short-term letting platforms have given that they are fully aware that their platforms are being used to sell illegal services[105].
Airbnb in their Initial Public Offering (IPO) documents filed with the American Securities and Exchange Commission (SEC) made their knowledge of illegal activity explicitly clear to their potential shareholders stating

> "[w]e are subject to a wide variety of complex, evolving, and sometimes inconsistent and ambiguous laws and regulations that may adversely impact our operations and discourage hosts and guests from using our platform, and that could cause us to

[105] "We know we have a problem and Ireland has a problem", Irish Independent, 20 June 2022, available at https://www.independent.ie/business/personal-finance/property-mortgages/airbnb-to-block-landlords-who-breach-letting-laws-we-know-we-have-a-problem-and-ireland-has-a-problem-41769318.html

> incur significant liabilities including fines and criminal penalties, which could have a material adverse effect on our business, results of operations, and financial condition."[106]

They even acknowledged that some cities/States are not enforcing applicable regulations, stating "a number of cities and countries have implemented legislation to address short-term rentals, there are many others that are not yet explicitly addressing or enforcing short-term rental laws, and could follow suit and enact regulations"[107].

They also acknowledged that they are aware of not just national or local laws that should prevent them from listing certain properties but also civil legal restrictions, stating

> "[o]ther private groups, such as homeowners, landlords, and condominium and neighborhood associations, have adopted contracts or regulations that purport to ban or otherwise restrict short-term rentals, and third-party lease agreements between landlords and tenants, home insurance policies, and mortgages may prevent or restrict the ability of hosts to list their spaces."[108]

While Airbnb dedicates pages 36-43 of their IPO filing to their legal obligations and potential legal issues and mentions the ECD and the restriction on liability several times, they do not mention the Services Directive at all.

If Airbnb is presumed to be a diligent economic operator then it should be presumed that all platforms are aware that their platforms are being used to advertise illegal STLs; this was further confirmed by the data from the study in Appendix 1.

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[106]Form S-1, Registration Statement under the Securities Act of 1933, Airbnb, Inc. , November 16, 2020, Registration No. 333- , p. 36, available at https://www.sec.gov/Archives/edgar/data/1559720/000119312520294801/d81668ds1.htm
[107] Ibid, p.37
[108] Ibid, p.36

2.4 The proposed new law from the Commission

In November 2022 the Commission published its long awaited and repeatedly delayed[109] review of the short-term letting laws in Europe[110]. The proposed law included a harmonisation of registration requirements and introduction of a unique registration number for all short-term rental properties in Europe, clarifying the responsibility of platforms to randomly check these rental numbers, streamlining data sharing between online platforms and public authorities, allowing the reuse of data to compile statistics and establishing an effective framework of implementation of these policies.

The Commission fails to note in their paper on the matter or subsequent proposal for a regulation[111] that the majority of the information should already be provided under the Service Directive/ Consumer Rights Directive and that service providers, traders and platforms are failing to ensure that this happens.

While European harmonisation of these rules around registration is a positive step forward, it should not negate that providing information about the provider is already a requirement for service providers (which encompasses all short-term letting providers as confirmed in *Cali Apartments*) under the Services Directive. Competent authorities should have access to this for traders under the ECD and both competent authorities and consumers should have access to the information regarding the service provider before the conclusion of a contract under the Services Directive and 2011 Consumers Directive. Enforcing legislation already enacted would be a more proactive and expedient avenue rather than enacting even more legislation. Enforcement of existing legislation could be monitored through the development of a programme that would scrape data from short-term listing sites and aggregate it so national/local authorities could see how many sites a particular property was on and how often it is booked based on initial availability and subsequent unavailability.

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[109] "Expectations high over delayed EU proposal on short-term rentals", Euractiv, 2nd November 2022, available at https://www.euractiv.com/section/digital/news/expectations-high-over-delayed-eu-proposal-on-short-term-rentals/

[110] Proposal for a Regulation of The European Parliament and of The Council on data collection and sharing relating to short-term accommodation rental services and amending Regulation (EU) 2018/1724, COM(2022) 571 final, 2022/0358 (COD) available at https://single-market-economy.ec.europa.eu/system/files/2022-11/COM_2022_571_1_EN_ACT_part1_v7.pdf

[111] ibid

The European Economic and Social Committee (EESC) in February 2023 recommended the Commission's proposal but further recommended that in place of the system of authorisations that "a system of insurance policies taken up by hosts for their units covering the bulk of risks arising from STR activities could replace the requirements for authorisation, as insurance companies would verify that the hosts comply with the rules when evaluating the policy"[112]. It is a unique suggestion but shifting the onus of ensuring compliance with the regulations on to the private market presupposes that people generally follow the law and get insurance when legally required[113]; it also means that the platform/national authorities will still have the responsibility of verifying a number, the only difference being one is an insurance number and one is a registration number. This proposal was ultimately not included in the draft legislation.

After a series of trilogues in Autumn/Winter 2023, the Commission, Council and Parliament agreed a draft regulation on STLs[114] which were approved by the European Parliament in plenary on February 29th 2024. This regulation will within 24 months from approval[115] seek to harmonise a registration system for those who engage in short-term letting and also data sharing by ISS who host short-term letting listings.

Under the draft regulation, the following is required to be provided under the registration system for every unit subject to a registration procedure

> "(1) the specific address of the unit including, where applicable the apartment number, mailbox number, the floor that the unit is on, land registry reference or any other type of information that enables it to be precisely identified;(2) the type of

[112] Opinion of the European Economic and Social Committee on the "Proposal for a regulation of the European Parliament and of the Council on data collection and sharing relating to short-term accommodation rental services and amending Regulation (EU) 2018/1724 [COM(2022) 571 final – 2022/0358 (COD)] available at https://webapi2016.eesc.europa.eu/v1/documents/EESC-2022-05400-00-00-AC-TRA-EN.docx/content

[113] Despite legally being required to hold insurance to drive the Motor Insurance Board Ireland estimates that 1 in 12 cars on the road are not insured, "1 in 12 vehicles on Irish roads not insured - Motor Insurer's Bureau of Ireland", 20th Feb 2023, RTE.ie, available at https://www.rte.ie/news/business/2023/0220/1357601-1-in-12-vehicles-not-insured-on-irish-roads-mibi/

[114] Provisional Agreement Resulting from Interinstitutional Negotiations, *Proposal for a regulation of the European Parliament and of the Council on data collection and sharing relating to short-term accommodation rental services and amending Regulation (EU) 2018/1724(COM(2022)0571 – C9-0371/2022 – 2022/0358(COD)*, available at https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/AG/2024/01-24/1293972EN.pdf

[115] Approval is also needed from the European Council after which the text will be published in the Official Journal

unit;(3) whether the unit is offered as a part or whole of the host's primary or secondary residence, or for other purposes;(4) the maximum number of available bed places and of guests that the unit accommodates; (4a) where applicable, whether the unit is subject to authorisation, under an authorisation scheme, to offer short-term rental accommodation services from the relevant competent authority, and if so, whether the host has obtained such authorisation"[116]

There is no requirement in the draft legislation to prove ownership or permission from the owner to STL a property. The regulation then goes on to list information that is required to be made available already to competent authorities under the ECD such as name, address etc[117] and also should be provided under the Services Directive/Consumer Rights Directive pre-contract to any consumers/potential consumers. The registration procedure will not ensure that what is required under the Services Directive/Consumer Rights Directive is available to consumers/potential consumers as the registration procedure mandates that personal data not be made available[118].

While the new legislation mandates that the ISS ensure compliance by design[119] , that ISS design their platforms to ensure that a registration number is shown, no similar provision is made for the data required to be provided to customers before a contract is concluded under the Services Directive.

Article 7 does mandate that ISS periodically monitor whether or not listings in an area are subject to a registration procedure. If the ISS becomes aware "concerning incorrect declarations of hosts, the misuse of a registration number, or invalid registration numbers"[120] then their duty is to inform the relevant authorities rather than remove or suspend the listings in question. Member States are required to "lay down rules on penalties applicable to infringements by online short-term rental platforms and, where appropriate by hosts"[121] the penalties must be "effective, proportionate and dissuasive"[122].

[116] Ibid, Article 5(1)a
[117] Ibid, Article 5(1)b and c
[118] Ibid, Article 4(2)b
[119] Ibid, Article 7
[120] Ibid, Article 7(2)
[121] Ibid, Article 15(3)
[122] ibid

The activity data (the number of nights for which a unit is rented and the number of guests that the unit was rented to per night, and their country of residence[123]) which must be submitted by ISS only has to be submitted monthly for large ISS[124] and quarterly for small or micro short-term rental platforms (those with less than 4,250 listings per month)[125] [126].

The EU institutions appear to have spent years developing a harmonised system that would not be necessary if Member States were enforcing the online information obligations that are already in place. Expanding the number of competent authorities under the ECD to request information and ensuring that ISS who advertise services are complying with the pre-contractual information that is already required would achieve the stated obligation of the new regulation which is to ensure that STLs are not "contributing to the decrease of available long-term housing and increase of rents and housing prices"[127]

3. Impact on other cities

While within the scope of this paper, it is not possible to study the national laws of each Member State in depth[128]. This section will deal broadly with the impact that short-term lettings are having on cities and towns and the recurrent issue is the lack of available data about properties being short-term let. It will also examine the issue alluded to in the previous section about whether due to the ubiquity of platforms, state aid is a concern when STLs are allowed even if just for a limited period per year. There will be a short examination about how platform liability is regulated in other anglo common law countries.

While short-term letting can be benign to an area if it is done in a very limited well controlled manner, this does not tend to happen in practice. The issue of pricing locals out of the area and of lack of demand for local services due to the transitory nature of STLs is of great concern. While one would hope that post pandemic there would have been a more

[123] Ibid, Article 3(11)
[124] Ibid, Article 9(1)
[125] Ibid, Article 9(2)
[126] While in larger countries that would not represent a significant number, in smaller EU Member States that number may vastly outnumber the amount of normal rental listings and not be a small or micro proportion of housing stock.
[127] Supra at note n.114, Recital 1
[128] For a full discussion in relation to Ireland see CASSERLY, Z. supra note at n.10

mature conversation on the impact of tourism and reliance of tourism on locals and the local economy, especially in relation to needed residential properties now becoming commercial STLs; however that does not appear to have happened in practice with Eurostat now reporting that the amount of nights spent in short-term lets now exceeds pre-pandemic levels by 22.6%[129].

3.1 Open letter from European cities to the European Commission asking them to intervene on the lack of available data

From research conducted for this paper it is clear that no platform studied (see database in Appendix 1) requires/facilitates their users to provide the data required under Art 22 of the Services Directive which must be made available before the Service is purchased[130].

The main issue in regulating STLs throughout Europe seems to be the availability of data. In their open letter[131] to the European Commission about the impact of STLs on their cities, Mayors/Deputy Mayors of some of Europe's most popular tourist destinations[132] and the organisation Eurocities which represents more than 200 European cities,[133] were signatories to the letter which stated that

> "illegal STHR [short term holiday rental] activities are difficult to counter as the platforms do not readily share the information authorities need to enforce the rules. Voluntary data exchange schemes have so far proven unsuccessful. As a consequence many cities have to invest considerably in professional capacity to check rental-data in alternative ways, to follow-up complaints and indications of illegal STR-activity, to impose fines, etc"[134]. They cite the 70 strong team employed by Barcelona to investigate illegal STLs as a consequence of data not being freely

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[129] "In the first half of 2023, guests spent around 237 million nights in EU short-term rental accommodation booked via online platforms. This is a significant growth compared with 2022 (199 million nights; +18.8 %); with nights spent far exceeding pre-pandemic levels (193 million nights in 2019; +22.6%). "
"Online booking platforms continued to grow in Q2 2023" available at https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20231002-1

[130] Supra at note n.59

[131] "Open letter on the need for legislative action on tackling illegal short-term rentals", 13 July 2022, available at https://eurocities.eu/wp-content/uploads/2022/07/Open-letter-on-the-need-for-legislative-action-on-tackling-illegal-short-term-rentals.pdf

[132] Signatories to the letter were the Deputy Mayor of Bologna, Deputy Mayor of Paris, Mayor of Lyon, Deputy Mayor of Vienna, Mayor of Arezzo, Executive City Councillor of Vienna, Mayor of Budapest, Deputy Mayor of Lyon, Mayor of Porto , Mayor of Florence, Deputy Mayor of Amsterdam, Deputy Mayor of Brussels, Deputy Mayors of Barcelona

[133] List of Eurocities members available at https://eurocities.eu/cities/

[134] Supra at note n.131

available from platforms. They also state that "constant litigation such as we have seen in the past years between European cities on the one hand and the platforms (refusing data-sharing) on the other, increases substantially the administrative costs for local governments."[135].

The proliferation by STLs in some of these cities is immense as stated in the letter "[i]n Amsterdam, for example, in 2013 there were about 4500 listings, which grew to 22000 by 2017. In Lisbon's historic district Alfama more than 55% of the apartments are now STHR. The center of Florence has seen an increase of STHR of 60% since 2015. The city of Kraków recorded an increase of 100% of STHR between 2014 – 2017."[136] And also the impact that STLs have on rents and house prices, liveability, noise disturbance, health hazards and the "slow disappearance of convenience stores"[137]is considerable.

The letter further goes on to request that the European Commission legislate to ensure that "[w]here registration of rentals is required by national or local rules, platforms should require, check and publish registration numbers before allowing the rental through their platform*"* [138] however despite citing the *Cali Apartments*[139] ruling earlier in the letter which held that STL hosts are service providers, they fail to note that it is a requirement under the Services Directive Art 22 (1) b and c and that if the service provider is subject to a registration/authorisation scheme that they must provide this number before the service is purchased. While the signatories to the letter favour the platforms being responsible for checking these registration numbers, if they are provided on the listing page or another page before booking (as they should be under the previously cited provision of the Services Directive), an algorithm by the local/national authority which would cross reference the provided registration numbers with their own database of registration numbers would not be too onerous. Under the ECD platforms are not liable for illegal activities on their platforms as long as they are not aware/ a diligent economic operator would not be aware of such illegal activity and as soon as they do become aware act expeditiously and prevent it

[135] ibid
[136] ibid
[137] VAN HEERDEN, S, BARRANCO, R., AND C. LAVALLE (eds), "Who Owns the city? Exploratory Research Activity on the financialisation of housing in EU cities"., EUR 30224 EN, Publications Office of the European Union, Luxembourg, 2020 as cited in supra at note n.131
[138] ibid
[139] Supra at note n.62

from happening in similar circumstance, as previously noted in section 2.2.3 the CJEU held that this did not constitute an obligation to monitor platforms.

Furthermore, national authorities could designate local authorities as competent authorities to request information under Art 5(1) of the ECD as noted in section 2.1.2 and local authorities could automatically request information on new listings in their locality.

Within the course of this research no legal actions appear to have been taken by any European countries/cities to specifically enforce the information required under the Services Directive/Consumer Rights Directive/ECD or to hold platforms liable for failing to ensure these are provided but these actions may have taken place nationally/locally without a resultant court case.

3.1.1 Letter from Airbnb to the Commission about enforcing the Services Directive and response by Parliamentarians

In response to the Commission's proposal to regulate STLs by way of a European wide registration system, Airbnb wrote a white paper on the proposal which was published to their website in December 2022[140]. In this white paper, Airbnb calls upon the Commission to insist that Member States enforce the Services Directive in spite of they themselves not enforcing the Services Directive by requiring all users to post the required information as detailed in section 2.1.3. They also repeatedly draw an arbitrary distinction between professional and non-professional hosts, in spite of the *Cali apartments* ruling stating clearly that the Services Directive applies to both types of hosts. Airbnb finish by making a bold request to the Commission to "to move faster and more efficiently to enforce the Services Directive and to protect the Single Market, including quickly raising issues of EU law with authorities when STR rules are clearly incompatible with EU legal frameworks, and in pursuing Infringement Proceedings against non-compliant Member States."[141] Airbnb is not wrong; it is clear from the research in this paper that the Commission is not enforcing the

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[140] "Data collection and sharing relating to short-term accommodation rental services - Airbnb position " available at https://news.airbnb.com/wp-content/uploads/sites/4/2023/01/EU-STR-Airbnb-position_Dec-2022-en-EN.pdf or https://web.archive.org/web/20230308152527if_/https://news.airbnb.com/wp-content/uploads/sites/4/2023/01/EU-STR-Airbnb-position_Dec-2022-en-EN.pdf

[141] ibid

Services Directive and Member States are not either but actually enforcing the Services Directive and insisting that the requisite information as detailed in section 2.1.3 is provided seems contrary to the other statements in Airbnb's white paper on this issue.

In March 2024, a group of 43 MEPs wrote to the Commission to ask that they not proceed with pilot infringements against Member States who had instituted laws around short-term letting, in which they cite the white paper from Airbnb which called on the Commission to institute enforcement proceedings for violation of the Services Directive as a reason that the Commission may be pursuing pilot infringement proceedings[142.] The MEPs cite a selective reading of the Services Directive. Similar to the discussion around the new legislation there is no comment on the fact that the majority of the legislation which Member States are attempting to bring in, does not even go as far as the data already required to be supplied under the Services Directive. Actually, enforcing those provisions of the Services Directive would be a much more expedient way to achieve the stated aims of the new legislation.

3.2 Liberalisation of short-term lets and state aid

While some cities have cracked down and made STLs wholly illegal or introduced rigorous registration systems, others have slightly liberalised their regulations subject to a set number of days per year or not enforced their regulation. There has been no corresponding notification to the Commission that there may be state aid issues at play[143].

3.2.1 De minimis

Before the advent of the internet, allowing individual homeowners to let their residential properties on a commercial basis would not have fallen under state aid rules due to de minimis[144]. This however no longer stands because platforms have become ubiquitous and

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[142] "Subject: infringements on short-term rental rules", Brussels, 11th March 2024, available at https://groenlinks.nl/sites/groenlinks/files/2024-03/STR-Infringement.pdf https://web.archive.org/web/20240325202705/https://groenlinks.nl/sites/groenlinks/files/2024-03/STR-Infringement.pdf

[143] This has been extrapolated by a search on the Commission's EC Search Aid Awareness database available at https://webgate.ec.europa.eu/competition/transparency/public/search

[144] Set at 200,000 EUR for a single undertaking in a three year period as per Article 3(2), Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid Text with EEA relevance, OJ L 352, 24.12.2013

will take a percentage or flat fee for the rental/advertisement[145]. It would be difficult to find a Member State where at least one of the platforms would not exceed the de minimis amount of state aid to be notified if liberalisation or lack of enforcement of all regulations surrounding STLs occurs. This would only apply in countries where previously STLs of residential homes for commercial purposes would have been illegal or unpermitted and have now been allowed in all or limited circumstances. Also state aid may occur where authorities do not enforce service providers' obligations under the Services Directive/ECD or traders' obligations under the Consumer Protection Directive 2011.

If a platform that is engaged in short-term letting is potentially benefitting from a form of state aid then it does not follow that a person engaging in short-term letting is also receiving aid that would be above the de minimis threshold. However, severing the connection between any advantage received by a person who is short-term letting and a platform that is taking a percentage of that income may be impossible and therefore any benefit to a small short-term letter could potentially be considered as state aid.

It should also be noted that in relation to de minimis state aid, the aid must be transparent aid which means it must be quantifiable before it is granted[146] so it is unlikely that it would apply to non-monetary aid such as not applying certain regulations to entities as detailed in section 3.2.3, as the amount of aid that would grant to each specific entity may not be known beforehand. While the Commission will accept the retrospective application of the de minimis regulation the following conditions must be met :

- "the entire amount of aid must be below the de minimis ceiling; in this regard, the use of average amounts per beneficiary is not acceptable, since it does not ensure that no undertaking benefitted from a total amount that exceeded that ceiling;"

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[145] It could be argued both ways that a short-term letting platform is not linked to the person letting for the purpose of de minimis calculations in respect of Commission Recommendation 2003/361/EC (8) and in Appendix I to Commission Regulation (EC) 800/2008 while there is a clear economic link, if we look at how the distinction in *Airbnb Ireland* (supra at note 45) about control and that of the Uber cases (supra at notes 38 and 39) they may decide to not apply a link for de minimis purposes.

[146] Art 2(4), Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid, OJ L 379, 28.12.2006 , Art 4, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid , OJ L 352, 24.12.2013, Art 4, Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L, 2023/2831, 15.12. 2023

- "when verifying retrospectively the amount of de minimis aid granted over any period of 3 fiscal years, a Member State must consider each 3 fiscal year period which includes the date on which the aid which should purportedly be excluded from recovery was granted ; and"
- "all the conditions laid down in the applicable Regulation, which can be applied retrospectively must be met"[147]

Therefore, if one entity has received aid above the de minimis ceiling then it cannot be applied retrospectively to any beneficiary even if the amount of aid they have received in a three-year period would be well below the threshold if it had been correctly notified.

3.2.2 Definition of the sector

In almost every aspect of competition law, defining the market or the sector is fundamental. There have been indicators how the CJEU may see the market for STLs given they have already stated that it has an impact on the accommodation market in general[148] but this is not dispositive of how the market will be defined especially since the CJEU in their judgement referred to the short-term lettings market. What will be interesting is to see if the market is for tourist accommodation in general or if short-term lettings themselves have characteristics which make them distinct from hotel stays[149]. While ability to cook for oneself may satisfy the criteria of being uniquely distinct from hotel accommodation, it would not distinguish it as a distinct market from any other self-catering tourist accommodation.

3.2.3 Non-monetary aid as a form of State Aid

While traditionally state aid has involved payments to companies/sectors or tax arrangements which provide a selective advantage and also distort inter State trade, this

[147] Para 101, Communication from the Commission — Commission Notice on the recovery of unlawful and incompatible State aid, C/2019/5396, OJ C 247, 23.7.2019

[148] "AIRBNB Ireland's electronic service has an impact on the short-term accommodation market and, in reality, on the accommodation market in general." Para 72, supra at note 45

[149] Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities*, ECLI:EU:C:1978:22

was expanded by the CJEU in *Banco Exterior de Espana* to also include "interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking"[150]. Therefore, failure to ensure that undertakings abide by legislation such as the ECD, Services Directive, various fire safety and building legislation etc would likely be seen as state aid. A defence to claims of state aid would obviously be that this legislation is not being enforced against any undertakings but that brings more challenges because there is a positive duty on the Member States to ensure that these Directives are being followed.

Hatzopoulos and Roma further posit a theory that because participants in the collaborative economy "face fewer (if any) complex and time-consuming regulatory requirements, such as undergoing authorization/licensing procedures, being registered with the competent professional body, passing capacity tests, being subject to professional disciplinary rules, having to underwrite professional insurance policies etc."[151] that the State will not receive the revenue that these regulatory requirements generally cost economic participants, as such the State is placed at a loss while benefitting the collaborate economy participant.

> "The Court has already held that procedural advantages selectively awarded, which favour the cost structure of an undertaking in relation to its competitors may constitute state aid. Could that case law expand and also cover more broadly "regulatory advantages"? Articles 107 et seq. TFEU could, then, assume a function similar to that played by national rules on "fair competition"." [152]

If we expand that concept further it would also hold that lax enforcement or selective enforcement of legislation against certain undertakings would also constitute state aid. While the issue of lax or selective enforcement of existing legislation has not yet come before the Courts, the Petitions Committee in the European Parliament considered Uber's lack of compliance with local and or national regulations. The Commission in response to the petition stated that they "found 'no indications that any State resources have been used or have been foregone by the State in the course of the licensing procedures for provision of taxi and PHV services in the United Kingdom'" [153]. With regards to the Commission's response at the Petitions Committee, Hatzopolous asks "how it is ever possible to lift an

[150] Para 13, Case C-387/92, *Banco Exterior de Espana v. Ayuntamiento de Valencia*, EU:C:1994:100
[151] HATZOPOULOS, V., Roma, S., "Caring for sharing? Collaborative economy under EU law", (2017) 54 Common Market L. Rev. 81
[152] ibid
[153] HATZOPOULOS, V, *The Collaborative Economy and EU Law* [2018] Hart Publishing, ebook edition

authorisation requirement without foregoing the corresponding licensing fees. Hence, the issue of regulatory permissiveness as a state aid is bound to re-emerge."".

It could even be argued in some cases that lax or selective enforcement of existing legislation has actually provided more benefits to the economy of a Member State if looked at from a micro level, since a STL is more profitable than a long term rental and therefore usually provides more tax revenue for the State and also because tourists generally spend more and bring new money into the economy they are seen as an advantage to the revenues of the State. However, those same tourists may similarly pay even more for a hotel room if the STL was not available. Further what would have to be considered is the cost to the State of reduced amounts of tax revenue from long term residents, the cost of homelessness services in areas with finite amounts of accommodation and as noted above local businesses closing. If the State is profiting by lax or selective enforcement of existing legislation and it is found that this is not state aid, then it would follow that this should be available to every undertaking.

3.3 Inherent issues in verifying the legality of a property that can be short-term let

In order to actually provide a platform where someone could legally post their short-term letting it would appear that there are a number of inherent issues in the market that a platform would need to overcome to be a diligent operator in that market. Awareness or expected awareness as a diligent operator of any of these issues would make it nearly impossible for a platform to facilitate STLs without in depth verification which negates the reason that a lot of people advertise their STL with a platform.

3.3.1 Fire safety

It would be incumbent on a diligent economic operator to ensure that every property being let through their platform is compliant with all fire safety regulations for overnight accommodation. It is clear from the platforms studied in Appendix 1 that none of them visited the properties that were available for STL on their platform. Even in the exceptional case when a host was expected to make an affirmative declaration that they were

complying with the requisite fire safety regulations, they were still allowed to list their property as not containing a smoke alarm[154].

3.3.2 Verifying legal listings with shared spaces

No platform studied as part of this paper (see Appendix 1) ensures that the user has permission to let their property. Even in countries where short-term letting may be legal there is an added complication when it comes to properties with shared entrances or common areas, such as apartments or subdivided houses. If the other residents have not explicitly consented to the STL and the use of entrances/common areas for this purpose then a platform that facilitates/participates in the listing would be liable in legal actions for this use. Therefore, it would stand that unless the contracts/planning permission involved in these shared spaces explicitly stated that the properties may be used for commercial purposes the other residents involved would have a cause of action even if the letting itself is legal.

3.3.3 Non-freehold properties

In countries such as the UK where properties are often on leaseholds or a freehold may be owned by a number of residents, usually the hold will state what purpose the property may be used for and will often exclude commercial purposes. Penalties for violation of the leasehold/freehold agreement are usually contained within the contract and can be as severe as having to forfeit the property for non-compliance. It would appear that in order for a platform to be a diligent economic operator they would have to examine the nature of the hold on the real property that is being advertised on their site.

3.3.4 Mortgages

The vast majority of mortgages contain a clause about the nature of the property and whether or not it may be used for commercial purposes. Use as a STL could potentially invalidate a mortgage contract and similarly leave the mortgage provider open to being named in a suit by a person who has been harmed by the use of the property as a STL. However, as we have discussed previously the name and address of the person are rarely

[154] CASSERLY, Z. supra note at n.10, section 1.2.1

easily available, in spite of the requirements in the ECD, Services Directive etc. While this argument would not stand for STL platforms or even local authorities who are able to get the requisite information and verify that a STL is allowed or not, even the most diligent mortgage provider [155] would not be expected to recognise photos of properties as mortgages that they hold.

A diligent platform would ask users to verify if they had a mortgage[156] or not and if they answered affirmatively, ask to see evidence of same to verify that they were not violating this existing contract by hosting the listing on their platform.

3.3.5 Insurance

While a number of platforms insured the owner while their property was being used as a STL, none of those studied offered insurance outside that time period. Use as a commercial property for even a short period would invalidate the terms of the vast majority of insurance contracts, unless the insured has made it explicitly clear to their insurer that the property is used as a STL. While there is no statutory requirement in any European country to possess house insurance, it is required under most mortgage contracts, where there are lease/free holds or shared communal spaces and also in the majority of apartments or subdivided buildings.

Similar to the above sections it would appear that if a platform was a diligent economic operator they would investigate if the person advertising their property had a contractual obligation to have their property insured at all times and make sure that they possess such an insurance before using their property for the commercial purpose of short-term letting.

3.4 Platform liability beyond Europe

Within the scope of this paper it is obviously not possible to provide a similar level of analysis about the regulatory regimes surrounding STLs in every country, however I will give

[155] An argument could be made that since the ubiquity of STLs with the advent of STL platforms that if the mortgage provider has not written to their customers making it explicitly clear that this is a commercial use then they may be liable, this would likely only arise however in limited cases.
[156] None studied even asked for proof of ownership or right to STL the property (see Appendix 1)

a brief overview of platform liability or lack thereof in North American and Antipodean countries that follow the Anglo common law tradition.

3.4.1 United States of America

During a period in time when most home internet users were relying on dial up and the idea of devices in everyone's pockets that could access the internet at high speed was more science fiction than reality, the Clinton Government sought to regulate the internet with the Communications Decency Act (CDA)[157]. Although the Act largely sought to regulate the issue of "decency" online, this aspect of the Act was deemed to be incompatible with the first amendment[158]. However, what survived was s.230 which was deemed to be severable from the provisions relating to decency. The main provisions of S.230 are 1. Treatment of Publisher or Speaker: Section 230 ensures that online platforms are treated as distributors rather than publishers of content provided by third parties. This means that they are not held liable for content created by users. "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[159]

2.Immunity for Good Samaritan Blocking and Screening: Online platforms are shielded from liability when they voluntarily restrict access to or remove content they consider objectionable.

> "No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)."[160]

Unlike the ECD there are no notice and takedown provisions under s.230. Despite the broad protections afforded by s.230, there have been ongoing debates about its scope, particularly

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[157] Title V of the Telecommunications Act of 1996
[158] *Reno v. American Civil Liberties Union,(*1997) 521 U.S. 844
[159] S. 230 (c) 1
[160] S. 230 (c) 2

in situations where online platforms are accused of facilitating or enabling illegal activities. During the Trump administration there were calls to either rewrite or abolish s.230 with President Trump issuing an executive order[161] instructing federal agencies to limit social media's "unchecked power to censor, restrict, edit" or otherwise manipulate user content. This executive order was in relation to perceived bias against conservative opinions on social media which were being moderated in line with s.230 c (2) rather than the immunity from suit provision in s.230 c (1). This executive order was rescinded by President Biden on May 14th 2021[162].

S.230 in practice affords incredibly broad immunity towards ISS in one of the earliest cases after the passage of s.230, the 4th Circuit Court of appeals in *Zeran*[163] held that s.230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[164] With the Court further finding that "[t]hus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred. The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech."[165]

While s.230 offers incredibly broad immunity and unlike Europe does not impose obligations once an ISS becomes aware of illegal content it does not offer total immunity as seen in *Doe v. I*nternet Brands[166] where the 9th circuit court of appeals held that in spite of previous rulings such *as Barnes v. Yahoo*[167] where a site was held not liable for failure to remove an

[161] Executive Order on Preventing Online Censorship, May 28, 2020, available at https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-preventing-online-censorship/
[162] Executive Order on the Revocation of Certain Presidential Actions and Technical Amendment, 14th May 2021, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/14/executive-order-on-the-revocation-of-certain-presidential-actions-and-technical-amendment/
[163] *Zeran v. America Online*, Inc., 129 F.3d 327 (4th Cir. 1997)
[164] Ibid, pg. 3
[165] Ibid
[166] *Doe v. Internet Brands*, Inc. , 824 F.3d 846 (9th Cir. 2016)
[167] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-03 (9th Cir.2009)

offensive post by a 3rd party, Doe did not base her case on the ISS being a publisher or content moderator rather she took an action based on failure to warn.

> "The duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes such content. Any obligation to warn could have been satisfied without changes to the content posted by the website's users. Internet Brands would simply have been required to give a warning to Model Mayhem users, perhaps by posting a notice on the website or by informing users by email what it knew……. Posting or emailing such a warning could be deemed an act of publishing information, but section 230(c)(1) bars only liability that treats a website as a publisher or speaker of content provided by somebody else: in the words of the statute, "information provided by another information content provider."[168]

It is unclear if a concept such as failure to warn could be extended to situations where there is not a statute that mandates it such as in *Internet Brands*. It would seem the best way for Local Authorities/State Authorities in the US to combat illegal short term listings would be to impose a duty to warn on STL providers in their catchment area; it would not require them to take down the listing or modify it but could require a STL provider to make them aware of certain potential issues such as fire safety and hold them liable if they fail to do so in spite of s.230.

S.230 has been tested in relation to STLs by both Homeaway and Airbnb[169]. Both challenged legislation brought in by the City of Santa Monica.

In relation to s.230 the 9th circuit court of appeals held that

> "[i]t does not require the Platforms to review the content provided by the hosts of listings on their websites. Rather, the only monitoring that appears necessary in order to comply with the Ordinance relates to incoming requests to complete a booking transaction—content that, while resulting from the third-party listings, is

[168] Supra at note n.166

[169] *HomeAway.com v. City of Santa Monica*, No. 18-55367 (9th Cir. 2019)

> distinct, internal, and nonpublic. As in *Internet Brands*, it is not enough that the third-party listings are a 'but-for' cause of such internal monitoring"[170].

They also held that "the Platforms face no liability for the content of the bookings; rather, any liability arises only from unlicensed bookings."[171]

The court of appeals found that the provisions brought in by Santa Monica did not violate the platforms' first amendment rights. This affirmed a previous decision by the 9th circuit in relation to whether s.230 and the first amendment could protect Airbnb from criminal sanctions due to a new law in San Francisco; however the Court found that the first amendment did not apply and in relation to s.230 "[c]ongress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet" even when a claim "might have a marginal chilling effect on internet publishing businesses.""[172]

The most interesting case in the US in terms of potential nuisance/negligence actions by 3rd parties in relation to STLs is the Roomates.com case[173]. The 9th Circuit Court sitting en banc held that because Roomates.com was designed to solicit and enforce housing preferences that may be illegal, they cannot then benefit from s.230 immunity [174]

> "By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of the information. And section 230 provides immunity only if the interactive computer series does not 'creat[e] or develop[]' the information 'in whole or in part'. See 47. U.S.C. S.230 (f) 3"

The 9th circuit had previously held that minor edits for spelling and grammar to a user's content would not strip s.230 immunity because there was no "development" of the

[170] Ibid, pg 14
[171] Ibid, pg 17
[172] *Airbnb, Inc. v. City and County of San Francisco,* No. 3:16-CV-03615-JD, slip op., 2016 WL 6599821 (Nov. 8, 2016), pg.10
[173] *Fair Housing Council of San Fernando Valley v. Roommates.com*, LLC, 521 F.3d 1157 (9th Cir. 2008)
[174] Ibid, pg.20

content[175].It was also held in that case that the website could lose their s.230 privileges if they had reviewed and selected that content for inclusion on their site, therefore it may be that any approval process for a STL may void s.230 immunity in the US. In the database in Annex 1 an analysis of the potential modification STL platforms can make to their users' advertisements, the control to change those advertisements and also reuse their content and optimisation that is offered.

In the *Internet Brands*[176] case the 9th Circuit contrasted and clarified their own opinion in *Carafano*[177] where they found a website not liable for user posted content clarifying that "even if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as a developer."[178] The Court held that in *Carafano* the content had been created without assistance or encouragement by the site. They contrasted that with Roomates.com and held that

> "[u]nlike *Carafano*, where the website operator had nothing to do with the user's decision to enter a celebrity's name and personal information in an otherwise licit dating service, here, Roommates.com is directly involved with developing and enforcing a system that subjects subscribers to allegedly discriminatory housing practices"[179]

It is unknown if this could be extended to STL listings in areas where a local/State authority has put a limitation or ban on STLs but that that location where the limitation/ban has been enacted is still available via a dropdown menu or is autofilled in a search for that area.

It would be conjecture to speculate about the application of the above ruling to potential cases against websites that provide STLs. The determinants of such may rely on the control that the STL website can exert over the content, price, use of the house for specific reasons etc. and the involvement of the provider in the service, for example customer service being

[175] *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003)
[176] Supra note at n.166
[177] *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003)
[178] Supra at note n.173, pg. 22
[179] Pg. 23, ibid

offered and the ability to cancel a listing or the use of artificial intelligence in analysing user behaviour and cancelling certain listings[180].

It should also be noted that s.230 only provides immunity for the platform over the listing, it does not provide immunity for the subsequent service provided or any nuisance or negligence claims that come from that service, involvement such as a payment facility and providing customer support could well mean that the listing and immunity derived from the listing can be severed from the service.

3.4.2 Canada

While Canada does not have legislation analogous to the ECD or even s.230, it has taken steps to reduce liability for ISS in specific contexts such as copyright:

> "Canada's Copyright Act and its Broadcasting Act both contain provisions that limit the liability of content hosts, search engines, and telecommunications companies for hosting or transmitting content that violates copyright, but they do not address the specific issue of intermediary liability (or lack thereof) for harms relating to the substance of the content posted on online platforms and services. This means that the law applicable to these questions has been developed by the courts through general common law principles"[181].

Some province specific legislation has also been enacted to limit intermediary liability such as the IT Framework Act in Quebec.

In 2020 Canada ratified the Canada-United States-Mexico Agreement (CUSMA) which states

> "no Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed,

[180] "Airbnb turns to AI to help prevent house parties", BBC, 26th October 2023, available at https://www.bbc.com/news/business-67156176

[181] KRISHNAMURTHY, V. ET AL , "CDA 230 Goes North American? Examining the Impacts of the USMCA's Intermediary Liability Provisions in Canada and the United States", July 2020, Cyberlaw Clinic, Harvard Law School, Berkman Klein Centre for Internet and Society, available at https://ssrn.com/abstract=3645462

> or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information"[182].

A footnote added to the agreement specifies that "a Party may comply with this Article through its laws, regulations, or application of existing legal doctrines as applied through judicial decisions". However, when ratifying the agreement, the Canadian Government in their implementation bill[183] did not introduce any legislation which would have provided specific immunity for ISS thereby relying on the footnote to the provision that application of existing legal doctrines would suffice.

If we examine a case since the CUSMA has been ratified where a party sought to rely partly on the immunity they felt was conveyed by 19.17 (2) we can see that it had very little impact on the immunity of an ISS.

In *A.B. c. Google*[184] the Quebec Superior Court was asked to rule on a case where in 2007 the plaintiff was wrongly identified as a child molester by a third party on a website which was then the top search result for the plaintiff when his name was searched on Google. When it was requested that they take down the search result which linked to the defamatory post

> "Google variously ignored the Plaintiff, told him it could do nothing, told him it could remove the hyperlink on the Canadian version of its search engine but not the U.S. one, but then allowed it to re-appear on the Canadian version after a 2011 judgment of the Supreme Court of Canada in an unrelated matter involving the publication of hyperlinks"[185].

Eventually Google agreed to remove the ""STC", i.e. snippet (short extract from the website), title of the website, and cache (stored snapshot of the website at issue) attached to the hyperlink for the Defamatory Post, but not the hyperlink itself"[186] and only on the Canadian version of Google. Nothing would be removed on international versions of Google.

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[182] 19.17(2)
[183] Canada–United States–Mexico Agreement Implementation Act (S.C. 2020, c. 1)
[184] *A.B. c. Google*, 2023 QCCS 1167
[185] Ibid at para 6
[186] Ibid at para 7

The plaintiff periodically contacted Google when the STC reappeared and when the content of the website was reused by other websites which allowed the content to still appear to Canadian users. Even without the STC and cache, the website was still the top search result on Google Canada when the plaintiff's name was searched. The plaintiff took a case against Google seeking injunctive relief and damages.

Under the IT framework legislation[187] ISS are not responsible for content as long as they are unaware that it may be illicit[188]. Similar to the ECD, the legislation also does not impose on ISS an obligation to monitor[189]. Google attempted to argue that since the signing of the CUSMA that all legislation regarding internet liability should be interpreted as broadly as the s230 of the CDA, but this was rejected by the Court. Jurisdictional arguments made by Google were also rejected.

It was further argued by Google that merely hyperlinking to another page did not constitute publication and argued that they were a neutral intermediary. The Court relying on Google's own previously published statements about its role as a curator of information[190], held that that they could not therefore claim to be a neutral intermediary especially given their explicit knowledge that the post was defamatory.

Therefore we can assume that Article 19.17 (2) will have little impact on the liability of intermediaries in Canada which will be based on common law principles of liability which will largely rest on the platform's knowledge of the illegal content and involvement in the

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[187] Act to establish a legal framework for information technology, CQLR c C-1.1

[188] "s. 22. A service provider, acting as an intermediary, that provides document storage services on a communication network is not responsible for the activities engaged in by a service user with the use of documents stored by the service user or at the service user's request.
However, the service provider may incur responsibility, particularly if, upon becoming aware that the documents are being used for an illicit activity, or of circumstances that make such a use apparent, the service provider does not act promptly to block access to the documents or otherwise prevent the pursuit of the activity. Similarly, an intermediary that provides technology-based documentary referral services, such as an index, hyperlinks, directories or search tools, is not responsible for activities engaged in by a user of such services. However, the service provider may incur responsibility, particularly if, upon becoming aware that the services are being used for an illicit activity, the service provider does not act promptly to cease providing services to the persons known by the service provider to be engaging in such an activity."

[189] Ibid, s.27

[190] Para 278, supra at note 184

curation of that content.

3.4.3 Australia

With typical Australian bluntness, Pappalardo and Suzor describe "[o]nline intermediary liability law in Australia" as "a mess"[191]. Australia was one of the first jurisdictions to recognise the challenges that would be faced by websites and ISPs and in 1992 put into place a regime which would restrict their liability [192]as long as they are "not aware of the nature of the content"[193] and similar to European law imposes no general obligation to monitor[194].With regard to awareness of content:

> "[u]nder both defamation law and consumer protection law, for example, where the intermediary exercises some level of judgment and editorial control, courts have variously explained that the intermediary 'accepts responsibility' or 'consents to the publication'. This is a version of the 'Good Samaritan' problem, where intermediaries who voluntarily take on some responsibility to moderate have a greater legal risk of exposure than those who do not exercise any editorial control"[195].

Even in the case of a passive publisher, refusal to remove content once it is aware is seen as consent[196]. The manner of the notification has been a factor in Australian case law[197] which is interesting to contrast with the ruling in *CG v. Facebook*[198]

Pappalardo and Suzor note that "[i]n two recent cases, *Google Inc v. Australian Competition and Consumer Commission and Roadshow v. iiNet*, the High Court of Australia rejected the extension of existing doctrine to impose liability for large, general-purpose intermediaries." Therefore, under Australian law it remains to be seen if this would apply to a large general-purpose intermediary that carves out a niche for itself in a manner such as Google Hotels

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[191] PAPPALARDO, K., SUZOR, N., "The Liability of Australian Online Intermediaries" [2018] SydLawRw 19; (2018) 40(4) Sydney Law Review 469
[192] Schedule 5, Clause 91, Broadcasting Services Act 1992 (Commonwealth of Australia)
[193] ibid
[194] ibid
[195] Supra at note n.191
[196] Para 28, "To say as a general principle that if an entity's role is a passive one then it cannot be a publisher, would cut across principles which have formed the basis for liability in the newsagent/library type cases and also in those cases where someone with power to remove a defamatory publication chooses not to do so in circumstances where an inference of consent can be drawn" , *Trkulja v. Google Inc LLC & Anor* (No 5) [2012] VSC 533 (12 November 2012)
[197] Para 91, *High Court of Australia, Roadshow Films Pty Ltd v. iiNet Limited* [2012] HCA 16, April 20, 2012
[198] Supra at note 99

has in the tourist accommodation space. "Courts are struggling to differentiate between secondary actors that merely provide a general purpose system that happens to be used for wrongful purposes, and those that create a system that actively solicits wrongful conduct."[199], therefore it is unlikely that listing platforms could be seen as anything but the latter.

There does not appear to be much case law about the obligation to monitor except for in copyright cases.

In relation to STLs there has been no national regulation of STL although there have been some regional attempts to limit STLs due to the ongoing housing crisis. Similar to many other regional restrictions there appears to have been a lack of enforcement[200] of the extremely generous caps[201]. When the Australian federal housing minister was asked to comment on the lack of enforcement of the STL regulations in New South Wales, she declined to comment[202]. Other regions have opted for a small tax on STLs to help fund social and affordable housing but this is not expected to come into force until 2025[203].

3.4.4 New Zealand

As Austin stated, New Zealand has taken quite a "piecemeal fashion"[204] to regulating platform liability, while there are quite robust provisions for restrictions of liability in relation to copyright but to date there is no restriction of liability for ISS engaged in e-commerce.

New Zealand Courts have not

[199] Supra at note n.191
[200] "No penalties dished out yet for Airbnb cap breakers", Australian Financial Review, 21 June 2023, available at https://www.afr.com/property/residential/crackdown-on-airbnb-style-rentals-a-farce-20230721-p5dq4r
[201] A further reduction of the cap in Byron Shire except in high tourism areas will take place from September 2024, "NSW greenlights Council's request for Airbnb cap", 27 September 2023, available at https://www.governmentnews.com.au/nsw-greenlights-councils-request-for-airbnb-cap/
[202] Supra at note n.200
[203] "Australian-first 7.5% levy to hit all Airbnb and short-stay accommodation in Victoria", The Guardian, 20 September 2023, available at https://www.theguardian.com/australia-news/2023/sep/20/victoria-airbnb-short-stay-accomodation-levy-7-5-housing-crisis
[204] Austin, G.W., "Chapter 9 Common Law Pragmatism: New Zealand's Approach to Secondary Liability of Internet Service Providers" published in "Secondary Liability of Internet Service Providers", Ius Comparatum – Global Studies in Comparative Law, ed Dinwoodie, G.W., Volume 25 (2017)

> "engaged with questions such as the relevance to primary liability of the possibility of imposing secondary liability on ISPs. And, for the most part, there has been no opportunity to determine, as a matter of decisional law, whether liability standards for ISPs are, or should be, different from secondary liability standards adopted in other contexts"[205]

In the 24 years since the New Zealand law commission published their E-commerce study there has been no adoption of their recommendations. "In broad outline the Commission recommended enactment of a new statutory provision confirming that ISPs would generally be immune from liability unless they have actual knowledge of the existence of information on a website which would be actionable at civil law or constitute a criminal offence, and fail to remove promptly any offending information of which they have knowledge. To date, the Commission's recommendation has not been adopted."[206]

It is interesting that when New Zealand proposed action reducing liability for E-commerce they still limited it to ISPs rather than the more expansive way that the US and Europe proposed limiting liability for ISS as well.

While there have been some regional attempts to regulate STLs in New Zealand, they were coupled with the local authorities admitting that they would be difficult to enforce[207] and imposing no obligation on platforms to ensure that those listing on their platforms were legally allowed to do so[208]. The New Zealand government set up a working group in 2020 to "develop a better understanding of the sector's impact on tourism, and the rental market, and look at its contribution to overall economic activity"[209] but this working group was paused amid the Covid-19 pandemic and there are "no plans to resurrect the group"[210] in spite of a rental crisis exacerbated by increased rental standards which do not apply to properties that are STL[211].

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[205] Ibid, pg.214
[206] ibid
[207] "New rules governing Christchurch's Airbnb sector 'difficult' to enforce", Stuff.co.nz, 8 April 2022, available at https://www.stuff.co.nz/national/128282739/new-rules-governing-christchurchs-airbnb-sector-difficult-to-enforce
[208] This was appealed to the Environmental court which upheld that the local Council had a right to impose restrictions but those restrictions were watered down following mediation https://newsline.ccc.govt.nz/news/story/final-rules-released-for-short-term-visitor-accommodation
[209] Supra at note n.207
[210] ibid
[211] "Rental properties for long-term tenants must now meet much higher standards, such as for heating and insulation, that do not apply if a property is listed as a short-term holiday rental on platforms like Airbnb"

In the context of the nature of STL platforms and in light of the ruling by the CJEU[212] in *Airbnb Ireland*[213] [214], although there is no explicit protection from liability in the context of E-commerce where a suit is not taken on the basis of copyright, the Courts in New Zealand in relation to defamation have imposed an actual knowledge test[215] although this was in relation to Facebook which they held should not be held to a higher standard "than that of an organiser of a public meeting"[216]. Whether this actual knowledge test could extend to reducing liability for a platform that is engaged solely or even partly in the business of STL remains to be seen given their knowledge of the sector and their direct involvement in the transaction.

Conclusion

From the research conducted for this paper there does not appear to be a lack of regulation on this issue, but there appears to be a lack of enforcement. There is a pre-supposition that ISS engaged in STLs are diligent economic operators. They have not been obliged to engage in compliance by design to ensure that the legally required pre-contractual information is supplied; however if they are engaged in non-compliance by design then they will struggle to maintain the generous protections from liabilities which States have built into their legislation to maintain an open internet. It seems as if the major issue of lack of information to local/national authorities could be overcome by enforcing existing legislation rather than introducing more.

The Digital Services Act has become the new avenue under which the EU hopes to somewhat tame the internet, however if the previous perfectly fine legislation was not enforced then it does not bode well for this new Act.

The ruling in *Cali Apartments* should have been a turning point for enforcement of the Services Directive at EU level but this has not happened. While short-term letting has been the focus of this paper it is clear from a wider look at the collaborative economy that the

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"Couch surfing and sleeping in vans: New Zealand's housing crisis grips Queenstown", The Guardian, 7th July 2023 available at https://www.theguardian.com/world/2023/jul/08/new-zealand-housing-crisis-couch-surfing

[212] Has no precedence on Courts outside Europe but interesting to consider in the context

[213] Supra at note n.45

[214] Elements of the control exercised by the platforms over listings can be seen in Appendix 1

[215] *Murray v. Wishart* [2014] NZCA 461; [2014] 3 NZLR 722 at para 144

[216] ibid

Services Directive is not being followed. While the legislation was conceived when the internet was well established, the emergence of the collaborative economy was either not envisaged or underestimated.

When the new STL Directive was created by the trilogue, the information to be made available in relation to a registration under the scheme was much less than the details required by the Services Directive. How many people engaged in a service such as short-term letting would feel comfortable with that amount of data about themselves being available to everyone online? However, the Services Directive was conceived to protect consumers rather than service providers and as such that amount of data was deemed necessary. It is obvious that not providing that data has made it extremely difficult for local/national authorities to investigate illegal STLs. It would likely be similarly difficult for a consumer to take legal action against a service provider without the information required under the Services Directive.

While it could be said that the involvement of a platform within a transaction would limit the need for the data in the Services Directive to be made available, that would only work in an *Uber* situation where the Court has held that the service the platform provides is also part of the underlying service. In the *Airbnb Ireland* case the platform is not part of the underlying service and therefore the information under the Services Directive should have been made available.

As regards the awareness of the platforms, it is clear from this research that they are aware their platforms are being used to advertise illegal STLs. The ECD and other legislation around the world gives platforms generous immunity provisions. It is obvious this immunity is needed for the internet to function successfully. It would be an impossible standard to fulfil if we expected a social media company to monitor every post which is why there is no general obligation to monitor and an actual knowledge test. The level of knowledge is however qualified by the business of the platform, a message board where someone could advertise anything would not be held to as high a standard of actual knowledge if someone advertised an illegal STL as a company where their sole or an important part of their business is STLs.

The modified study akin to the Oxford Mystery Shopper study was conducted to give platforms the benefit of the doubt that they would act if specifically requested by a member of the public. However, it transpired that even if they had a reporting mechanism they would not remove a listing or even do any further investigation. The broadest immunity cannot prevent a platform who fails to do their duty in relation to notice and take down request. It is unlikely that a platform could claim they would have taken down illegal listings if asked, if they have failed to take down or investigate other claims about illegal listings.

Even if there was more than enough housing available in a market that it would not matter if some was used for non-residential purposes, the reality of what Barron J. said in *McMahon* would still stand that the residential use of a property and the commercial use are simply not compatible[217].

The effect that short-term lettings have on the property market, lives of people who live next door to them or close by are not outweighed by the benefits to the platforms, owners and tourists.

[217] *McMahon and Others, Plaintiffs, v. The Right Honourable the Lord Mayor, Aldermen and Burgesses of Dublin, Defendants* [1996] 3 IR 509.

Appendix 1

Name	Also trading as	Platform for listing or searching only	Report Function on individual listing page	Policy on website about illegal lets	Facility for non users to contact	Response to query	Shows listings from other sites not from the same group	information on how to market property	Asks to verify own property and or have permission to let it out	Asks owners to indemnify them	Website can alter or reuse content of ad	Asks owners to abide by local laws	URL of T&Cs	visits properties before listing	Entire property rental listings hosted	Percentage of booking or flat fee (if allows listing)	Allows users to book on website	Requires that properties which are searchable on the site provide all the details required under the Services Directive before the service can be purchased either on their own site or partner site
Airbnb		Listing	Yes	No	Neighbour complaint facility	They will pass on a complaint but will not remove an illegal listing as they state they are "unable to take further action or mediate disputes regarding violations of local laws or 3rd party agreement"	No	Yes. Entire section on how to improve listings (http://archive.is/WkWJG)	Does not ask to make an affirmative declaration but included in terms and conditions	Yes	Yes (14.2)	Yes	http://archive.is/gHxqF	No	Yes	Percentage	Yes	No
Bedandbreakfast.eu		Listing and searching	No	No	Online contact form for "other"	Directed to terms and conditions for answer to query which did not contain any relevant information for 3rd party complaints	Yes (booking.com)	Webcare team will help with presentation page and contact regularly with tips	Does not ask to make an affirmative declaration but included in terms and conditions	Yes	Yes (8)	Law of NL or other applicable laws	https://bbimages.eu/download/en/terms_of_use.pdf	No	Yes	Flat fee or percentage	Yes	No
Booking.com		Listing	No	No	Have to register for account to contact	Customer service only deals with "direct enquiries about existing or potential bookings" and also provides "support to our partners". I was directed to their media enquiries who did not reply.	No	Yes. Entire section on how to improve listings(http://archive.fo/dLX9U)	Does not ask to make an affirmative declaration but included in terms and conditions	Yes	Yes (2.1.3)	Yes	https://archive.is/fiQyq	No	Yes	Percentage	Yes	No
	Priceline	Searching	No	No	Online contact form (automatic acknowledgement email)	Directed to terms and conditions for answer to query which do not contain any relevant information	No	n/a listings come from booking.com	n/a STR listings come from booking.com	n/a	n/a	n/a	n/a	n/a	n/a	n/a	Yes	No
	Agoda	Searching	No	No	Online contact form only works with booking number, couldn't locate email eventually contacted via facebook	No response	No	n/a listings come from booking.com	n/a STR listings come from booking.com	n/a	n/a	n/a	n/a	n/a	n/a	n/a	Yes	No
	Kayak	Searching	No	No	Online contact form for "anything else"	No response	Yes (booking.com, hotels.com, expedia)	n/a listings come from booking.com and expedia	n/a STR listings come from other sites	n/a	n/a	n/a	n/a	n/a	n/a	n/a	Transfers for booking	No
Expedia		Listing and searching	No	No	Online contact form for "other"	Responded that they were unable to assist with pre-booking queries but suggested I contact their sales team to make a reservation!	No	Yes. Entire section including photo tips http://archive.is/zOpCU	Does not ask to make an affirmative declaration but included in terms and conditions that the "partner" has permission to enter into contracts in	Yes	Yes	Yes	http://archive.fo/abl2t	No	Yes	Percentage	Yes	No

									relation to the property									
	Homeaway	Listing	No	Yes. States that they will remove in a timely manner but did not when contacted	Email address on UK/French sites legal@homeaway.com	No response to multiple contact attempts	No	Yes. Entire section http://archive.is/JZ3ce	Does not ask to make an affirmative declaration but included in terms and conditions that the "partner" has permission to enter into contracts in relation to the property	x	Yes (4.5)	Yes (2.4)	http://archive.is/K09dF	No	Yes	Flat fee or percentage	Yes	No
	Vacationrentals.com	Listing and searching	No	Redirects to homeaway who have a policy	Redirects to homeaway help	No response to multiple contact attempts to homeaway	No	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	No	Yes	Flat fee or percentage	Yes	No
	Arbitel	Listing and searching	No	Redirects to homeaway who have a policy	Redirects to homeaway help	No response to multiple contact attempts to homeaway	No	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	No	Yes	Flat fee or percentage	Yes	No
	toprural	Listing and searching	No	Redirects to homeaway who have a policy	Redirects to homeaway help	No response to multiple contact attempts to homeaway	No	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	No	Yes	Flat fee or percentage	Yes	No
	fewo-direkt	Listing and searching	No	Redirects to homeaway who have a policy	Redirects to homeaway help	No response to multiple contact attempts to homeaway	No	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	No	Yes	Flat fee or percentage	Yes	No
	Homelidays	Listing and searching	No	Redirects to homeaway who have a policy	Redirects to homeaway help	No response to multiple contact attempts to homeaway	No	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	No	Yes	Flat fee or percentage	Yes	No
	VRBO	Listing and searching	No	Redirects to homeaway who have a policy	Redirects to homeaway help	No response to multiple contact attempts to homeaway	No	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	Redirects to homeaway section as above	No	Yes	Flat fee or percentage	Yes	No
	Travelocity	Listing and searching	No	No	Online contact form for "other" (automatic acknowledgement)	Will only respond to concerns from customers not 3rd parties	No	Redirects to expedia see above	Redirects to expedia see above	Redirects to expedia see above	Redirects to expedia see above	Redirects to expedia see above	Redirects to expedia see above	No	Yes	Percentage	Yes	No
	Trivago	Listing and searching	No	No	Online contact form for "other" (automatic acknowledgement)	"Unable to provide the information requested"	No	n/a listings come from expedia partner sites	n/a listings come from expedia partner sites	n/a listings come from expedia partner sites	n/a listings come from expedia partner sites	n/a listings come from expedia partner sites	n/a listings come from expedia partner sites	n/a listings come from expedia partner sites	n/a listings come from expedia partner sites	n/a listings come from expedia partner sites	Transfers for booking	No
Fivestar		Listing	No	No	Telephone contact only. Found admin email in GDPR document	No response	No	Has a magazine on their website which offers tips	No	Disclaims warranties but does not ask to indemnify	Yes	No apart from false information or copyright violations	http://archive.is/o0SQu	No	Yes	Flat fee	Yes allows to submit booking request	No
Cybevasion	gites.fr	Listing and searching	No	No	Info email address	Responded to email and told me that they have so many policies in place	Yes (booking.com)	Yes. Espace proprietere	No	States its released from liability but	Yes (10)	No mention in contract apart from copyright	http://archive.is/gMRwV	No	Yes	Flat fee	No direct booking but email facility and phone number	No

						it would take hours to tell me about them and they simply don't have the time (perhaps they should write their policies down so they can copy/paste).		offers information		does not require indemnification							publication and for others transfers to booking.com in partnership with gites.fr/cybevasion	
Holidayhomes direct		Listing	No	No	Info email address	No response	No	Yes. Blog which contains information on how to market (http://archive.is/WWbiN)	No	Yes	Yes	Yes	http://archive.is/d2cSM	No	Yes	Flat fee	No direct booking but email facility and phone number publication	No
Schibsted Media Group	Daft media group	Listing	Yes	No	Info email address (automatic acknowledgement)	We do not deal with complaints from neighbours, such as complaints regarding planning permission etc. When I used the report function on a specific page no action was taken	No	Yes (http://archive.is/u2V3t)	Implied in T&C but does not ask to make an affirmative declaration	Yes	Yes (10)	Yes (10(j))	http://archive.is/LXiru	No	Yes	Flat fee	No direct booking but email facility and phone number publication	No
	Let.ie	Listing	Yes	No	Redirects to Daft Info email address (automatic acknowledgement)	We do not deal with complaints from neighbours, such as complaints regarding planning permission etc. When I used the report function on a specific page no action was taken	No	Redirects to Daft for owners which has a help section containing marketing information	Implied in T&C but does not ask to make an affirmative declaration	Yes	Yes (10)	Yes (10(j))	http://archive.fo/EkaPb	No	Yes	Flat fee	No direct booking but email facility and phone number publication	No
	Rent.ie	Listing	Yes	No	Redirects to Daft Info email address (automatic acknowledgement)	We do not deal with complaints from neighbours, such as complaints regarding planning permission etc. When I used the report function on a specific page no action was taken	No	Redirects to Daft for owners which has a blog for marketing	Implied in T&C but does not ask to make an affirmative declaration	Yes	Yes (10)	Yes (10(j))	http://archive.is/3I25P	No	Yes	Flat fee	No direct booking but email facility and phone number publication	No
TripAdvisor		Listing and searching	No	No	Have to register for account to contact	Will remind "users" of their responsibilities but will not remove a listing	Yes	Dedicated rental blog http://archive.fo/3fI97	Refers to owners in contract repeatedly but does not explicitly state what an owner is	Yes	Yes (5.1.5)	Yes (2.4)	http://archive.is/3T6WB	No	Yes	Percentage or flat fee	Yes	No
	Holidaylettings .co.uk	Listing and searching	No	No	Contact form but only for owner/traveller. Contacted via social media	No response	Yes	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	No	Yes	Percentage or flat fee	Yes	No
	Vacationrental s.com	Listing and searching	No	No	Contact form but only for owner/traveller. Contacted via social media	No response	Yes	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	No	Yes	Percentage or flat fee	Yes	No
	Niumba	Listing and searching	No	No	Contact form but only for owner/traveller. Contacted via social media	No response	Yes	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	No	Yes	Percentage or flat fee	Yes	No
	Housetrip	Listing and searching	No	No	Contact form but only for owner/traveller. Contacted via social media	Will take complaints about illegal listings from registered guests	Yes	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	No	Yes	Percentage or flat fee	Yes	No

	Flipkey.com	Listing and searching	No	No	Contact form but only for owner/traveller. Contacted via social media	No response	Yes	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	Redirects to tripadvisor section as above	No	Yes	Percentage or flat fee	Yes	No
WIMDU		Searching (Listing also pre Sept 2018)	No	No	Info email address (automatic acknowledgement)	Only the creator of an ad can remove it or if a local authority intervenes (pre september 2018). Post Sept 2018 contact partner sites	Before september 2018 now only redirects	n/a	n/a	n/a	n/a	n/a	n/a	n/a	Yes	n/a	Redirects to other sites	No
Hometogo		Searching	No	No	info email address	No response	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Redirects to other sites	No
	Casamundo	Searching	No	No	info email address	No response	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Can book and pay on site but says that it is with a partner site	No
Left travel	Rentbyowner	Searching	No	No	info email address	No response	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Redirects to other sites	No
	Rentalhomes.com	Searching	No	No	info email address	No response	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Redirects to other sites	No
	Stays.io	Searching	No	No	info email address	Won't remove an illegal listing	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Redirects to other sites	No
	Bedroomvillas	Searching	No	No	info email address	No response	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Redirects to other sites	No
The Irish Times		Searching	n/a redirects to myhome when clicking on a property	No	info email address	No response	No	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Redirects to myhome.ie	No
	Myhome.ie	Listing	Yes	No	Online contact form (automatic acknowledgement response)	Won't remove an illegal listing suggests contacting advertiser	No	Yes, advice section http://archive.is/Pquvz	No	Yes (9)	Yes (7)	Only in relation to communications and submissions	http://archive.fo/p2wFj	No	Yes	Flat fee	Gives contact information	No
	Irish Examiner	Searching	n/a redirects to myhome when clicking on a property	No	info email address	No response	No	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Redirects to myhome.ie	No
	Breakingnews.ie	Searching	n/a redirects to myhome when clicking on a property	No	info email address	No response	No	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Redirects to myhome.ie	No
Booked.net	ibooked.co.uk	Searching	No	No	No contact facility as far as I can see. Contacted via social media	No response	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Yes	No
Checkinly		Searching	No	No	No contact facility as far as I can see no social media either	No way to contact (states that they are a partner of booking.com)	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Redirects to booking.com	No
Viamichelin		Searching	No	No	Info email address (automatic acknowledgement)	Stated that they are unable to remove content from their own website	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Transfers for booking to booking.com in partnership with viamichelin	No
Lonelyplanet		Searching	No	No	Online contact form for "other" (automatic	Will not take down content, directs to contact booking.com	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Transfers for booking to booking.com with	No

					acknowledge ment)												lonely planet banner	
Hikersbay		Searching	No	No	Info email address	No response	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Transfers for booking to booking.com with hikersbay banner	No
Getaroom		Searching	No	No	Online contact form for "other" (automatic acknowledge ment)	No response	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Does not transfer per se but url is secure.booking.com at the last stage but still with getaroom graphics surrounding the page	No
9Flats		Searching	No	No	Info email address	No response	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	n/a	Redirects for booking	No
Google Hotels		Searching	No	No	Reported through form	Told me that they could not remove content from 3rd party sites that their listings come from	Yes	n/a	n/a	n/a	n/a	n/a	n/a	No	Yes	na	Redirects for booking	No

*Research conducted prior to the introduction of the DSA.
Some platforms studied may have exited the STL market since this research was conducted but were active in Ireland at the time they were contacted

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