

EU CHARTER ON THE DEVELOPMENT OF GUIDING PRINCIPLES ON THE COLLABORATIVE ECONOMY IN THE SHORT-TERM ACCOMMODATION RENTAL SECTOR

INTRODUCTION

The European Commission's collaborative economy guidelines published in June 2016 were a necessary and commendable first step towards the development of consistent and proportionate rules for the collaborative economy and, specifically, the short-term accommodation rental industry across Europe. The guidelines identified two main challenges to the balanced development of the collaborative economy in the EU: a lack of clarity on the applicable legislation, and regulatory fragmentation. They also sought to provide clarity on applicable EU rules and invited EU Member States to review and, where appropriate, revise existing legislation according to the guidance.

Following on from the June 2016 Communication, the Commission launched **a project specifically for the short-term accommodation rental sector** on 14 February 2017. In its background paper, circulated in advance of the opening plenary, the Commission stated that the aim was "to identify best practices and, on that basis, produce a set of shared guiding policy principles which Member States could agree to consider when developing policies and regulation in this sector. Policy principles will be based on existing EU legislation and its application to the collaborative economy, as set out in the June 2016 Commission Communication."

To feed into this project, the Commission has held a range of workshops on key issues including:

- Market access requirements for accommodation providers
- Requirements for platforms
- Differentiating between peers and professional providers
- Consumer legislation and trust and transparency mechanisms
- Tax obligations and cooperation

During the opening plenary Hubert Gambs, Director for Modernisation of the Single Market in DG GROW, stated that the focus of the workshops on the short-term accommodation rental sector was **due to its economic importance and the observed market fragmentation**. He added that the purpose was not to prepare the introduction of new EU legislation, or amend existing EU legislation. The envisaged outcome, according to Gambs, would instead be a set of shared guiding policy principles that authorities could consider in case they decide to develop policies or regulation applicable to collaborative short-term accommodation rental services in accordance with EU law.

In tandem with this work, the European Commission has continued to lead on this subject area by commissioning **a range of detailed studies on the collaborative economy**. An exploratory study of consumer issues in peer-to-peer platform markets was published on 12 June 2017. Similar studies are under way in areas including taxation and the environmental impact of collaborative economy activity. In addition, the Commission has published a range of analytical papers, including a series of reports looking at market access requirements in the short-term accommodation rental sector across a range of European cities.

However, despite such initiatives and the Commission's guidelines, fragmentation of the single market continues. Even as the Commission undertakes this work, rules have been introduced at a Member State level which are not proportionate and which risk causing further fragmentation of the single market. This is in addition to disproportionate rules that were in place before the guidelines. For example:

- In Barcelona, platforms are being held responsible for the obligation for users to register their activity with local authorities.
- There are uncoordinated attempts to distinguish between professional and non-professional activity, or the point at which activity encounters new regulations. In Amsterdam, day limits are used. In France, secondary homes and pieds-à-terre are subject to the same strict licensing requirements as applied to professional investors. France has just introduced income thresholds above which individuals will be considered self-employed. These measures are not always able to establish a reasonable distinction and a harmonised framework needs to be developed which is supportive of genuine peer-to-peer activity.
- In Berlin, the renting out of whole properties is heavily restricted. The implication of such measures is that only short-term accommodation rentals where the host is in residence (renting out less than 50% of his or her home) counts as 'amateur' activity. This unfairly discriminates against people with a second home, which many people reside in for some proportion of the year.
- In Brussels, private individuals renting out their home on a short-term basis have to comply with a range of obligations, including the requirement to provide a wardrobe with at least two hangers per guest.
- Pressure is being put on platforms to collect taxes from users for which they are not responsible, which threatens platforms' intermediary liability exemption and is also impossible for smaller operators to comply with. A new law in Italy will, for example, require platforms to collect from hosts a 21% tax on rental fees and remit it to national tax authorities, as well as collect city taxes on a mandatory basis. Platforms will also have general monitoring obligations imposed on them which contradicts EU law. In France, platforms have to inform hosts of their tax obligations and provide information to the French Government on host revenue accrued (from 1 January 2019).

The European Commission's political leadership has noted the fragmentation of single market rules in the collaborative economy. European Commission Vice-President for the Digital Single Market Andrus Ansip stated in a recent speech that: "Unfortunately, the landscape for regulation and practice on the ground is far from uniform across Europe. This is holding back the development of the collaborative economy. In the meantime, we are all losing out".¹

Many of the regulations that are being developed in Member States are not being developed in a technologically neutral way and often favour one business model over another. This presents a challenge not only for the ability of companies to comply with regulations, **but also for competition in the sector as not all businesses are competing on a level playing field.** This is a particular challenge for smaller companies who may not have the resources to comply with the new requirements.

The industry is very supportive of the work that is being undertaken by the Commission to support the fair development of such an important growth sector. In particular, the creation of a set of shared guiding policy principles that authorities could consider in case they decide to develop policies or regulations applicable to collaborative short-term accommodation rental services is an essential step towards stopping further fragmentation of the single market. **The purpose of this paper is to lay out the industry's thoughts on policy principles which could be adopted into the Commission's Charter which will be presented and endorsed by the Council of the EU Competitiveness Council on 30 November 2017.**

¹ https://ec.europa.eu/commission/commissioners/2014-2019/ansip/announcements/speech-vice-president-ansip-conference-collaborative-economy-ljubljana_en

KEY ISSUES AND PROPOSED CHARTER CONTENT

1) Market access requirements for short-term accommodation rental providers (defined as private hosts and property managers operating on behalf of private and professional hosts)

Legislative framework

- Under EU law, in particular the fundamental freedoms of the Treaty and the Services Directive,² service providers are not to be subject to market access or other requirements, such as authorisation schemes and licensing requirements, unless they are non-discriminatory, necessary to attain a clearly identified public interest objective³ and proportionate to achieving this interest.⁴
- The Services Directive requires national authorities to review existing national legislation to ensure that market access requirements continue to be justified by a legitimate objective. They must also be necessary and proportionate.
- Where short-term accommodation rental providers are legitimately required to obtain authorisations on the basis of national law, Member States are to ensure that the conditions to obtain them are, among other things, clear, proportionate and objective and that the authorisations are in principle granted for an unlimited period of time.⁵
- Relevant administrative procedures and formalities must be clear, transparent and not unduly complicated, whereas their costs for the providers must be reasonable and proportionate to the cost of the procedure in question and the procedures must be as speedy as possible and subject to tacit approval.⁶

Issues

- There are a range of existing Member State regulations in place that contravene EU law and the existing law in some instances effectively prohibits the activity entirely.
- New regulations are also being developed in Member States which will contravene EU law if they are implemented.
- The fragmentation of the single market is escalating despite the Commission's guidelines outlined in the June 2016 Communication 'A European Agenda for the Collaborative Economy'.
- There is a disconnect between what is happening at a national and local level in Member States which further fragments the market.
- Compliance costs are high, especially for new entrants into the market.
- Member States are applying different market access requirements (e.g. authorisation schemes, notification and registration obligations, minimum quality standard requirements) which leads to additional fragmentation.
- New regulations are often introduced by local authorities without any built-in processes to enforce these rules. This often leads to non-proportionate requests to platforms, for example in the area of data sharing (beyond what is allowed under EU data protection law), or to conclude 'voluntary agreements' to enforce of the local law on behalf of the authorities without any legal checks and balances in place for businesses and citizens alike.

² See Article 9 and 16 of Directive 2006/123/EC ('the Services Directive') and Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU).

³ For a list of overriding reasons relating to the public interest under the Services Directive see its Article 4 (8).

⁴ See Recital 39 and Article 4 (6) of the Services Directive.

⁵ See Articles 10 and 11 of the Services Directive.

⁶ See Article 13 of the Services Directive.

Industry guidance

- When a legal framework is necessary, the industry supports the introduction of a properly designed and applied registration system with registration numbers.
- Where there are rules regarding the visibility of registration numbers on web platforms, the industry commits to create a dedicated field for this number and communicate the applicable rules to its partners.
- To the extent that the industry has received information from the authorities of the national and/or local market access requirements applicable to short-term accommodation rental services, the industry will communicate these requirements to hosts.
- Where there are limitations on the number of nights in which owners can let their property, the industry commits to communicate to owners what these limits are.
- The industry commits to provide anonymous data (e.g. number of active hosts in a certain area) on the activity when requested by local authorities.

Member State guidance

- New rules must be well-communicated, clear, easy-to-implement and enforceable.
- Before implementing any new market access requirements, Member States and local authorities should undertake detailed quantitative analysis to determine whether there is demonstrable evidence of a regulatory gap. Any new requirements should be based on clear and compelling evidence.
- Any registration system for hosts should be simple, online and immediate.
- Member States should have consistent dialogue with all market players to identify existing examples of local and national market access requirements that are disproportionate.
- Member States and local authorities should work in partnership with the industry and other stakeholders when developing new regulations to ensure that any new rules are not unduly complicated to follow. There should always be a consultation period and an analysis of whether new rules are in line with best practice and EU law.
- Platforms providing only intermediation services should not be subject to market access requirements such as business authorisation and licensing requirements. There may be grounds for companies that are more involved in the transaction to be subject to additional market access requirements but this should be determined on a case-by-case basis.

2) Differentiating between peers and professional providers

Legislative framework

- EU legislation does not establish expressly at what point a peer becomes a professional services provider in the collaborative economy.⁷

Issues

- Member States are approaching the issue in different ways e.g. income thresholds, day limits, residency restrictions.

⁷ The Services Directive for example defines service providers as any natural or legal person who offers any self-employed economic activity, normally provided for remuneration (see Article 4 (2)). This means that any economic activity could be captured by the rules of this Directive regardless of the frequency it is offered and without requiring that the provider necessarily acts as 'professional'.

- There is consensus that a distinction can be a means to facilitate the proportionate regulation of the sector.
- Day limits are an arbitrary method which unnecessarily restrict the market and the ability of individuals to let out their homes for short periods. They can also be difficult for authorities to enforce. In addition, day limits are often unnecessary as many private homes can be empty for short periods throughout the year and would not be used for longer-term rental as owners reside in them for most of the year.
- Income thresholds can be an arbitrary means of distinguishing between amateur and professional activity. If thresholds are set at a low figure, they can also lead to homeowners who are manifestly amateur owners being categorised as professionals and therefore subject to disproportionate requirements. Income thresholds also are likely to require regular review to keep in line with inflation and other economic indicators.
- In some instances, policymakers seek to put a limit on the ability of individuals to let out their secondary residence, or holiday home, as a way of limiting the activity. This could result in leaving homes, which will not be placed on the long-term rental market, lying empty for large parts of the year.

Industry guidance

- The industry believes that the most sensible, fair and simple way to differentiate between peer and professional activity is to focus on residency. An individual should be able to let out their home, or secondary home, for short periods while they are away. Enabling peers to let out their homes on a short-term basis provides a way not just to supplement incomes and generate revenue for tax authorities, it enables a more optimal use of assets and ensures that consumer demand can be met in areas where the existing supply of accommodation for tourists and other travellers may be insufficient. Other methods of establishing a distinction such as income thresholds, or day limits, can often be set in an arbitrary way and are more complex to enforce.

Member State guidance

- Member States should avoid the implementation of arbitrary methods of distinguishing such as day limits and income thresholds and focus on residency.
- Individuals with one to three properties, in one Member State or across the EU, which they reside in for part of the year should be permitted to let them out on a short-term basis and be subject to minimal requirements.
- An individual or company that lets out multiple properties on a short-term basis throughout the year, particularly within a specific city or region, could be regarded as a professional and subject to additional, but proportionate, requirements.
- In specific areas of cities or regions where there is evidence of short-term letting creating pressures on housing, there may be a case for added requirements for providers such as a licensing system. Any additional requirements on peer providers should be based on rigorous analysis and designed in partnership with all stakeholders.

3) Requirements for platforms

Legislative framework

- Under EU law, online platforms, as providers of information society intermediary services, are under certain conditions exempted from liability for the information they store.⁸

⁸ Article 14 of the e-Commerce Directive.

- The applicability of this exemption from liability will depend on the legal and factual elements relating to the activity performed by the collaborative platform and applies where the activities in question qualify as hosting services under the terms of the e-Commerce Directive.⁹ To do so, their conduct must be merely technical, automatic and passive.¹⁰
- The exemption from liability applies on the condition that the platform does not play an active role which would give it knowledge of, control over, or awareness of the illegal information - and, where it nonetheless obtains such knowledge or awareness, acts expeditiously to remove it.
- Whether or not a short-term accommodation rental platform can benefit from such liability exemption will need to be established on a case-by-case basis, depending on the level of knowledge and control of the online platform in respect of the information it hosts.
- However, from existing EU case law it can be presumed that platforms that merely present the information provided to them in a searchable format without promoting the specific offers should be treated as information service providers hosting contacts from accommodation providers.¹¹
- Member States cannot impose on short-term accommodation rental platforms, to the extent that they provide hosting services, a general obligation to monitor or to actively seek facts or circumstances indicating illegal activity.¹²
- Short-term accommodation rental platforms may merely assist the provider of the underlying services by offering the possibility to carry out certain activities that are ancillary to the core information society services offered by the platform to intermediate between the provider of the underlying services and their users (e.g. by providing payment facilities, insurance coverage, aftersales services etc.) This, in itself, does not constitute proof of influence and control as regards the underlying service. Similarly, offering user rating or review mechanisms is not in itself proof of significant influence or control.¹³

Issues

- Member States have implemented rules which disregard the liability status of online intermediaries and impose disproportionate rules on platforms.
- Member States are devising new rules which directly and indirectly threaten the liability exemption and platforms are, in some instances, having a general illegitimate obligation to monitor imposed on them and being forced to collect and remit taxes on behalf of hosts.
- The liability regime, which is a crucial pillar of Europe's digital economy, is under threat.
- National law does not require platforms in other sectors (e.g. eBay, Craigslist, Amazon Marketplace) to undertake such action on behalf of individuals so it is disproportionate and unfair to expect short-term accommodation rental platforms to be responsible for such activity.
- The industry would like to take more proactive measures to support policymakers to address public policy concerns (e.g. housing stock pressures associated with short-term accommodation rental activity) however they have concerns that undertaking such actions might jeopardise their liability exemption. The industry therefore welcomes the commitment from the Commission to

⁹ In the context of the collaborative economy hosting can broadly speaking be understood as the activity of dealing with the storage of customer data and providing the venue where users meet providers of the underlying services. The exemptions under Articles 12 and 13 of the e-Commerce Directive would usually not apply in this regard, as collaborative platforms normally do not provide 'mere conduit' or 'caching' services within the meaning of those provisions.

¹⁰ As per section 4 of the e-Commerce Directive.

¹¹ See CJEU C-324/09 L'Oréal SA and Others v eBay International AG and Others.

¹² As set out in Article 15 (1) of the e-Commerce Directive.

¹³ See pages 6 and 7 of the Commission's Communication on the Collaborative economy.

provide clarification guidance on the liability regime by the end of 2017 and encourages Member States to engage in this process.

Industry guidance

- As per the e-Commerce Directive, the industry will remove illegal listings once duly notified by the relevant authority.¹⁴
- To the extent that the industry receives information regarding the laws applicable to hosts from the authorities, the industry will continue providing and developing methods for explaining the applicable laws to hosts (for example by sending educational e-mails and regular reminders, showing pop-ups, providing information on a dedicated webpage).

Member State guidance

- Member States and local authorities should always have a consultation period with industry and the EU, and undertake an analysis of whether new rules will be in contravention of EU rules for online intermediaries.
- Member States should work in partnership with industry to ensure that the Commission's guidance on liability and notice-and-action procedures (expected by the end of 2017) is adhered to.

4) Consumer legislation and trust

Legislative framework

- EU consumer and marketing legislation is based on the distinction between a 'trader' and a 'consumer'. A trader is a person 'acting for purposes relating to his trade, business, craft or profession';¹⁵ a 'consumer' is a person acting 'outside his trade, business, craft or profession'.¹⁶
- When applied to the participant categories in the collaborative economy, these criteria determine the respective rights and obligations of the parties under existing EU consumer and marketing legislation.¹⁷
- EU consumer law applies to any collaborative platform that qualifies as a 'trader' and engages in 'commercial practices' vis-à-vis consumers. Providers of the underlying services also qualify as traders if they act 'for purposes relating to their trade, business, craft or profession'.
- Conversely, EU consumer and marketing legislation does not apply to consumer-to-consumer transactions. Therefore, if neither the short-term accommodation rental service provider nor the user qualifies as a trader, the transactions between them will fall outside the scope of this legislation.
- Member States currently approach this issue differently and under current EU law, this question must be answered on a case-by-case basis.
- In line with the Unfair Commercial Practices Directive, all traders must comply with professional diligence duties and not mislead consumers.

¹⁴ As set out in Articles 13, 14 and 15 of the e-Commerce Directive.

¹⁵ Article 2(b) Directive 2005/29/EC ('Unfair Commercial Practices Directive').

¹⁶ Article 2(a) Unfair Commercial Practices Directive.

¹⁷ For business to consumer transactions in the collaborative economy, the Unfair Commercial Practices Directive, Directive 2011/83/EU ('Consumer Rights Directive') and Directive 93/13/EEC on Unfair Terms in Consumer Contracts would apply. For business to business transactions, Directive 2006/114/EC on Misleading and Comparative Advertising would apply.

Issues

- European Commission analysis has shown that EU Consumer and Marketing Law Directives are still fit for purpose. However, there are issues related to limited redress possibilities; diverging enforcement across Member State; rights not being fully adapted to the digital world; and low awareness of consumer rights.¹⁸
- A Commission exploratory study of consumer issues in peer-to-peer (P2P) platform markets identified a range of broad consumer issues which arise from the activities of P2P platforms: transparency and clarity about the nature of transactions; reliability of review and rating systems; discrepancies around platform responsibilities and liability; access to redress for peer consumers and peer providers; and data protection concerns. Key findings from this report include:
 - Most active users are satisfied or very satisfied with their experience, but over 55% had at least one problem with P2P platforms over the last year.
 - Half of those who experienced a problem did nothing to address the issue. 60% of consumers were not aware of who is responsible if something goes wrong.
 - Peer-to-peer accommodation platforms provide fewer trust-building mechanisms than other platforms.
 - Peer-to-peer accommodation platforms are less systematic in terms of verifying identity and user data and that their review systems are less advanced than platforms in other sectors (e.g. sale of goods, ride-sharing).¹⁹
- Consumers using short-term accommodation rental services may not be aware of what consumer protection mechanisms are in place to protect them, who is responsible and what means of redress are available.
- Some stakeholders argue that the same consumer protection rules should apply to those who let out their home on a short-term basis and commercial operators including hotels or bed and breakfast owners.
- Residents in local communities have concerns that a growth in short-term accommodation rental activity may negatively impact residential amenity and cohesion.
- The industry has strong rating and review mechanisms in place in which guests are encouraged to provide feedback and owners are, on some platforms, able to leave feedback on guests. Platforms act as the host of such reviews but remain neutral. Feedback mechanisms are an important way of providing consumers with more information and choice.

Industry guidance

- The industry should have processes in place to ensure that user complaints are addressed and fraud is tackled.
- In accordance with the e-Commerce Directive, the industry should have fraud detection mechanisms in place and remove fake listings once duly notified by the relevant authority.
- The industry should recommend best practices to the guests about their stay (e.g. respect for neighbours, acting in a non-discriminatory manner vis-à-vis their potential guests).
- The industry should look to delist owners from their platform in instances where there are multiple and verified examples of anti-social behaviour linked to the property of an owner.
- The industry should work individually and collectively via trade associations with local authorities to address any concerns raised by local residents and authorities.

¹⁸ http://europa.eu/rapid/press-release_IP-17-1448_en.htm

¹⁹ http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=77704

- The industry should engage with local authorities to address any concerns raised by them or local residents.

Member State guidance

- Consumer protection regulations should always be proportionate to the nature of the activity.
- Professional hosts should be subject to health and safety rules such as health and safety checks by authorities. Member States and the industry should work together collaboratively to raise awareness among consumers of the applicable rules.
- Any new consumer protection rules specifically designed for the short-term accommodation rental sector should only be designed where there is demonstrable evidence of a regulatory gap and be proportionate.

5) Tax obligations and cooperation

Legislative framework

- Short-term accommodation rental service providers and platforms are subject to taxation rules, just like other participants in the economy.²⁰
- Member States should aim at proportionate obligations and a level playing field. They should apply functionally similar tax obligations to businesses providing comparable services.²¹

Issues

- There are differences in tax practices across the EU relating to collaborative economy activity.
- Tax authorities have difficulty in identifying the taxpayers and the taxable income.
- Amateur owners are not always aware of their tax obligations.
- The short-term accommodation rental sector has a wide variety of business models. Not all businesses are able to collect and remit taxes simply and some activity is also conducted offline between owner and guest.
- Member States are imposing disproportionate taxation obligations on platforms and new requirements are not being developed in a technologically neutral way.
- Disproportionate tax obligations can have a particularly negative impact on smaller businesses which may not have the resources to comply with taxation requirements.
- Platforms provide new opportunities to assist tax authorities and taxpayers with their tax obligations, especially because of the increased traceability of transactions enabled by the intermediation of online platforms.

Industry guidance

- Platforms will look into making available to hosts a summary of their activity (e.g. number of nights they have let out their property, income accrued) on an annual basis, to facilitate compliance with local regulations.
- The industry should inform their hosts of their general obligation to pay taxes. To the extent that the information on tax rules are provided by the national authorities, the industry should inform their hosts of applicable national tax rules.

²⁰ See page 13 of the European Commission's Communication on the Collaborative economy.

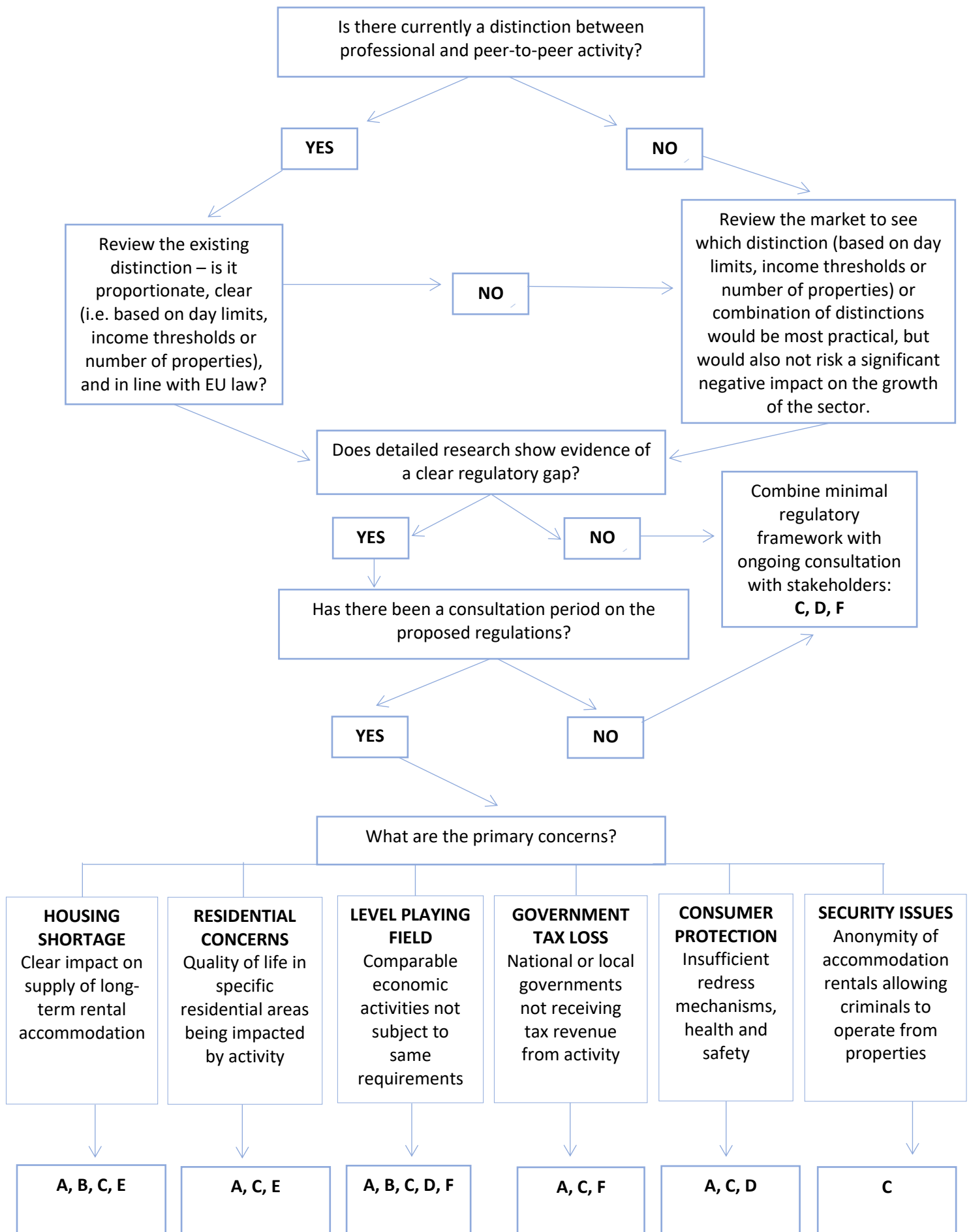
²¹ See page 13 of the European Commission's Communication on the Collaborative economy.

- Platforms may choose to collect city taxes on a voluntary basis, subject to business model, and supports other voluntary measures to facilitate tax collection.

Member State guidance

- Member States, or local authorities, should not mandate that platforms should collect taxes on behalf of hosts and remit to the national or city tax authority. Such agreements should be on a voluntary basis and only following a period of consultation with industry. The obligation for paying tax should always remain with the person/entity legally responsible and compliance should not be pushed to platforms that do not handle payments and therefore should have no legal obligation to pay taxes on behalf of hosts.
- Member States should undertake an impact assessment of what the impact will be on all market participants, especially SMEs, when developing new taxation rules that will apply to short-term accommodation rental activity.
- Member States should develop guidance to assist hosts with their tax obligations.

TOOL BOX FOR A BALANCED POLICY APPROACH



Regulatory key

- A) National host registry** – Policy makers may consider creating a national host registry. Hosts have to register their property for short-term rental services and get a registration number. This system should be simple, online and immediate. Preferably the register should be national. National authorities are thus able to monitor the size of the market. It will also allow national tax authorities to monitor hosts and audit them more easily.
- B) Mandatory display of a field to indicate a registration number when listing a property** – The industry displays a field to enable hosts to provide, if applicable, their respective registration numbers when they list their property.
- C) Industry self-regulatory measures** – These include the following:
- To the extent that the authorities have informed the industry of the rules applicable, inform hosts of the relevant legal requirements.
 - Provide anonymous data to authorities upon request, allowing them to monitor the market.
 - As per the e-commerce directive, the industry will remove illegal content once duly notified by the relevant authority.
 - Have processes in place to ensure that complaints from users are addressed.
 - Tackle fraud.
 - Work with authorities to address concerns raised by residents.
 - Recommend best practices to the guests about their stay (e.g., respect of neighbours).
 - Inform their hosts to act in a non-discriminatory manner vis-à-vis their potential guests.
- D) Enforce EU consumer law on professional hosts only** – The professional-amateur distinction means that all professional hosts qualify as ‘traders’ and are therefore subject to consumer law.
- E) Licensing requirements** – In specific areas of cities or regions where there is evidence of short-term letting creating significant pressure on housing, there may be a case for added requirements for amateur providers such as a license or a registration system.
- F) Voluntary tax collection agreements** – Member States, or local authorities, should not mandate tax collection and remittance for platforms. They should work constructively towards tax collection agreements, but the obligation should remain on the person responsible for the economic activity i.e. the host.