

SMART CITIES AND AIRBNB:  
PLATFORMS AS “REGULATORY INTERMEDIARIES”  
IN SHORT-TERM RENTAL MARKET?

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SUMMARY: 1. Introduction. – 2. Regulatory Intermediation in Short-term Rentals Market. – 3. Home-sharing Platforms as Regulatory Intermediaries: The Cases of France and Italy. – 4. Conclusion.

1. *Introduction*

This chapter was first conceived before the Coronavirus pandemic outburst, when the rise of home-sharing platforms like Airbnb, Homeaway, and Wimdu still seemed to be unrelenting, and cities around the world were struggling in their attempts to regulate short-term rentals. The pandemic has changed the scenario dramatically, hitting hard the whole travel industry. Airbnb was forced to lay off around 25% of its employees and it is likely to earn less than half of what it earned in 2019.<sup>1</sup> Travel restrictions have dried up the revenues of hosts in tourist destinations to the point that many are willing to return their houses to residents and students in the attempt to reduce their losses. It is impossible at the moment to envisage when the travel will fully return, but it will likely be different, with longer stays and a surge of rural destinations, which are perceived to be safer and secluded.<sup>2</sup>

It may seem therefore untimely and even counter-intuitive to investigate the effectiveness of short-term rental regulations in cities emptied by tourists.

On the contrary, this standstill period could be a unique opportunity for critical reflection on the instruments developed by lawmakers and municipal authorities to manage short-term rentals in recent years.

This chapter has this purpose. More precisely, it aims to review the increasing trend of public authorities to directly involve home-sharing platforms in the implementation, monitoring, and enforcement of relevant regulations, making them “regulatory intermediaries”, as described by Christoph Busch.<sup>3</sup> Having regard to the technological aspects of this process, combined with the involvement of private actors in the city governance, this trend can certainly be regarded as a part of the wider rise of Smart City. The basic idea is to streamline the system of the enforcement of short-term rentals rules and to make it more efficient, taking advantage of the technological capacity of platforms and their huge data set. As will be shown, the outcomes of this “regulatory

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<sup>1</sup> Airbnb, ‘A Message from Co-Founder and CEO Brian Chesky’ (5 May 2020) Airbnb <<https://news.airbnb.com/a-message-from-co-founder-and-ceo-brian-chesky>> accessed 20 September 2020.

<sup>2</sup> A. Roth, ‘New Travel, New Travelers: Who Are the New Guests on Airbnb?’ (24 August 2020) Airbnb <<https://news.airbnb.com/new-travel-new-travelers-who-are-the-new-guests-on-airbnb/>> accessed 20 September 2020.

<sup>3</sup> C. Busch, ‘Self-Regulation and Regulatory Intermediation in the Platform Economy’, in M. Cantero Gamito and H.-W. Micklitz (eds), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes* (Edward Elgar 2019) 115.

intermediation” are, however, controversial. The analysis is focused on regulatory intervention in the realm of public law, having regard to rules introduced to guarantee the right to housing, e.g. the limitation of overnight stays within one year, or to agreements reached with platforms to collect tourist taxes. Since it is impossible to cover, within this short contribution, the wide variety of different regulations and agreements adopted across Europe, the study is limited to two significant cases: the French regulation on “night limits” in large cities and the local agreements between Airbnb and Italian municipality for the collection of “*imposta di soggiorno*”.

First, the notion of “regulatory intermediation” is introduced and examined with respect to its application to home-sharing platforms. Then, the issues arising from French regulation and Italian local agreements are briefly described, highlighting the strengths and weaknesses of this kind of regulatory approach. The identification of the shortcomings will eventually be brought to a conclusion, where some ways forward are proposed.

## 2. *Regulatory Intermediation in Short-term Rentals Market*

Traditionally, political science research on regulation and regulatory processes focused on the relationship between the regulators (or rule-makers) and recipients of the regulation (or targets). Only recently has the attention of scholarship shifted to a third subject, the so-called “regulatory intermediary”. By this expression, in their seminal contribution, Abbott, Levi-Faur, and Snidal identify “any actor that acts directly or indirectly in conjunction with a regulator to affect the behavior of a target”.<sup>4</sup> They observed that “in many circumstances, regulators lack direct access to their targets, means of influence or other capabilities necessary to regulate them, and sufficient channels for information gathering”.<sup>5</sup> Therefore, regulator suffering from these shortcomings seeks to overcome them by involving a third party in the regulatory process: the regulatory intermediary.

This notion of regulatory intermediary is quite broad so that it encompasses a great variety of subjects ranging from “private sector actors, such as for-profit certification companies, accounting firms, or credit ratings agencies; civil society groups, such as NGO” to “governmental bodies, such as transgovernmental agency networks or international organizations”.<sup>6</sup> According to the definition proposed, “even states can be intermediaries, for example, by promoting the compliance of other states with a mandate from the UN Security council”.<sup>7</sup> Abbott, Lavi-Faur, and Snidal focused their analysis on intermediaries formally charged with tasks of intermediation between regulators and targets. But subsequent scientific research went on to contemplate further hypotheses, also including regulatory intermediaries with an informal character.<sup>8</sup> The spectrum of activities that can be carried out by intermediaries is also

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<sup>4</sup> K. W. Abbot, D. Levi-Faur and D. Snidal, ‘Theorizing Regulatory Intermediaries’ (2017) 670 *Annals of the American Academy of Political and Social Science* 14, 19.

<sup>5</sup> *Ibid.*, 15.

<sup>6</sup> *Ibid.*, 18.

<sup>7</sup> *Ibid.*, 15.

<sup>8</sup> S. Ména, L. Brès and M.-L. Salles-Djelic, ‘Exploring the formal and informal roles of regulatory intermediaries in transnational multistakeholder regulation’ (2019) 13 *Regulation & Governance* 127.

quite broad, ranging from the implementation of the rules, to the monitoring of application and enforcement of the same, up to the certification of compliance.

As noted by Christoph Busch, this broad notion of “regulatory intermediary” fits well with the case of home-sharing platforms, since “public authorities are involving platforms in their regulatory activity, drawing on their superior operational capacities and direct access to data and effective means of influencing the behavior of platform users”.<sup>9</sup> In particular, Busch recognises the application of this intermediation process in relation to the enforcement of limits on overnight stays introduced by local regulations and state laws; and with regard to the agreements concluded with the platforms for the collection of tourist taxes.<sup>10</sup>

The purpose of the rules on night caps is to reduce the profit margin of the short-term rentals and thus discourage property owners from taking dwellings that were available for long-term leases and convert them to short-term Airbnb listings. For example, the city of Amsterdam introduced a 30-day cap; in Berlin, entire apartments can be rented out for a maximum of 90 days; in France, a 120-day limitation of overnight stays was recently introduced for primary residences.

The reason for the involvement of platforms, in this case, is linked to the fact that the municipalities face serious difficulties in ensuring compliance: especially in large tourist destinations, where short-term rentals can amount to thousands, it becomes impossible for municipal offices, with limited staff and resources, to verify whether hosts comply with the limit. This may entail complex investigations, cross-data analysis, and even on-site inspections since online advertisements make very little data available (not even the exact address of the accommodation). Moreover, as Oskam observed, “this labour-intensive detective work is apparently insufficient to deter hosts” from circumventing rules.<sup>11</sup> Even where the municipality officers make use of software that extrapolates and processes the data publicly available from the advertisements posted online, it is almost impossible to pull reliable data on the overnight stays. This software only enables the competent offices, for instance, to pinpoint accommodations that are advertised online but not registered; or to assume that there have been overnight stays not communicated to the competent offices by cross-matching non-available dates and guest reviews. However, it is impossible to calculate the exact number of overnight stays on this basis, since the relevant data are only available to the home-sharing platforms, which jealously guard the right to privacy of their users and are reluctant to hand data to public authorities.

The same goes for the collection of the tourist taxes: some hosts may not have registered their accommodations, which therefore do not appear in the databases of municipalities. Others may not correctly register their guests and stays. Others may even decide not to collect the tourist tax (in Italy, it is the duty of the host to collect the tax from tourists). Therefore, to identify any violations, it would be necessary to make use of software, to carry out cross-analysis, documentary checks, and door-to-door investigations.

The first benefit of involving platforms in the enforcement of these regulations is therefore effectiveness. As Busch stated, citing Michèle Finck, “platforms have a much

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<sup>9</sup> Busch (n 3), 120-121.

<sup>10</sup> Ibid., 121-123.

<sup>11</sup> J. A. Oskam, *The Future of Airbnb and the ‘Sharing Economy’ The collaborative Consumption of our Cities* (Channel View Publications 2019), 99.

higher success rate in ensuring tax and legal compliance than public regulators, as they can, ‘through a simple twisting of code’, secure that platform users pay taxes and comply with time-limits”.<sup>12</sup> A further advantage is given by the considerable simplification of administrative aspects and procedural burdens, both for platform users and public administrations. Once the limit of nights is reached, the advertisement is automatically delisted, without the need for any intervention by the host or the municipality. The tourist tax is collected via platform together with the payment of the stay.

The overall picture thus looks very promising in terms of simplification and improvement of the governance of the short-term rentals market. However, upon closer inspection, several issues emerge that are worthy of attention. First of all, transparency issues have been raised vis-à-vis the platforms since the data they process to perform their regulatory intermediation tasks are still not shared with public authorities. Airbnb sometimes consents to data transfers in aggregate form but in such a way as to prevent identification of single users or to render control by the authorities particularly complex. These aspects cast a shadow on the reliability of the regulatory intermediation of platforms since checking the enforcement correctness depends on an act of trust of the municipal administrations in the platforms. The latter, in any case, have no real interest in uncovering any evasive behaviour of their users and thus damage the reputation of the platform itself. Besides, there are elements to question the legitimacy of the contents of the tourist tax agreements. And doubts emerge even about the very effectiveness of the regulatory intermediation mechanism because many aspects still remain beyond the control of the platforms.

### *3. Home-sharing Platforms as Regulatory Intermediaries: The Cases of France and Italy*

Issues of transparency, legitimacy, and effectiveness can be further explored through the analysis of two specific cases: the French regulation on overnight stays and the agreements between Airbnb and Italian municipalities for the collection of tourist tax.

In recent years, France has been among the most active European Member States in regulating tourist rentals, adopting three important laws, which followed one another over a few years and reformed the legal framework for tourist rentals.<sup>13</sup>

The French law distinguishes between primary and secondary residences.

To rent out their primary residence, owners do not need any authorisation, registration being necessary (and sufficient) in large cities. However, it is not possible to rent out the primary house for more than 120 days a year. If the owners intend to exceed this limit, they are required to file a change of use of the dwelling, which will thus be considered a secondary residence.

For secondary residences (i.e. dwellings where the owners live less than four months a year) it is necessary to distinguish between the areas in which they are located; in fact, where the house is located in areas with shortages of rental housing (cities with over

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<sup>12</sup> Busch (n 3), 122 citing M. Finck, ‘Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy’ (2017) Law Society and Economy Working Papers 1, 21 <<https://ssrn.com/abstract=2990043>> accessed 20 September 2020.

<sup>13</sup> Loi n° 2014-366 du 24 mars 2014 pour l’accès au logement et un urbanisme rénové (Loi ALUR) (2014); Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique (2016); Loi n° 2018-1021 du 23 novembre 2018 portant évolution du logement, de l’aménagement et du numérique (Loi ÉLAN) (2018).

200,000 inhabitants and some departments close to Paris), the owner must request authorisation for the change of use. In some areas, where the shortage of rental housing is particularly severe (e.g. in Paris), in order not to further reduce the property stock on the rental market, such an authorisation is made conditional by the municipal rules upon an offset requirement in the form of the concurrent conversion of non-residential premises into housing.<sup>14</sup> Single room rentals in a primary residence are, however, not subject to any registration or authorisation scheme.

In order to monitor compliance with this regulatory framework, registration duties are prescribed for hosts along with the duty for platforms to remove advertisements without registration numbers displayed and to block accommodations that have reached the abovementioned 120-day cap.

In June 2018, on the basis of an agreement with the French government, Airbnb and other home-sharing platforms committed themselves to introduce an automatic tool to ensure that primary residences cannot be booked for more than 120 days per year.<sup>15</sup>

The actual performance of this enforcing mechanism is highly controversial. Starting from 1 January 2019, platforms are required to transmit a series of data to the municipalities for each calendar year, including the address of the accommodation and the number of overnight stays.<sup>16</sup> Airbnb first published data in late December 2019 that shows only about 4100 hosts have exceeded the 120-day cap, all of them allegedly in accordance to exemptions provided by law.<sup>17</sup> The platform presented the results as a great success, claiming that the automatic block reduced the number of residences rented out for more than 120 days by more than 40%.<sup>18</sup> The City of Paris contested the data provided by Airbnb, arguing (on the basis of data processed by the site InsideAirbnb) that the platform does not properly communicate the data and does not fully apply the 120-day cap.

There are serious elements to question platform enforcement activity.

First of all, the platform does not verify if the information regarding the status of the accommodation is correct. Hosts may enter false or incomplete information and Airbnb is not able to check it since it would entail documentary and door-to-door inspections. Exceptions provided by law offer simple workarounds to hosts. As data analysis and simple Internet research have shown, it is easy for hosts to recategorise an entire house as a single room, circumventing the overnight stays limits.<sup>19</sup> But the aspect that challenges the effectiveness of the entire control mechanism is that the automatic cap

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<sup>14</sup> Various aspects of this regulatory framework have been recently reviewed by the Court of Justice of the EU found to comply with EU law: see Court of Justice of the EU (Grand Chamber), Joined Cases C-724/18 and C-727/18, *Calvi Apartments SCI and HX v Procureur général près la cour d'appel de Paris and Ville de Paris*, judgment of 22 September 2020.

<sup>15</sup> Airbnb, 'World premiere: Airbnb, Abritel/HomeAway, Le Bon Coin, TripAdvisor commit to sustainable tourism together with the French Government' (16 June 2018) Airbnb <<https://news.airbnb.com/world-premiere-airbnb-abritel-homeaway-le-bon-coin-tripadvisor-commit-to-sustainable-tourism-together-with-the-french-government/>> accessed 20 September 2020.

<sup>16</sup> Décret n° 2019-1104 du 30 octobre 2019 pris en application des articles L. 324-1-1 et L. 324-2-1 du code du tourisme et relatif aux demandes d'information pouvant être adressées par les communes aux intermédiaires de location de meublés de tourisme.

<sup>17</sup> E. Donada, 'Location à Paris : les chiffres publiés par Airbnb sont-ils sous-estimés ?' (24 December 2019) Libération <[https://www.liberation.fr/checknews/2019/12/24/location-a-paris-les-chiffres-publies-par-airbnb-sont-ils-sous-estimes\\_1770765](https://www.liberation.fr/checknews/2019/12/24/location-a-paris-les-chiffres-publies-par-airbnb-sont-ils-sous-estimes_1770765)>.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.; see also Oskam (n 11) 97.

is admittedly applied by Airbnb only to listings that have a registration number.<sup>20</sup> This means that 80% of Parisian listings are outside the control of the platform since only 20% (as both the town hall and Airbnb confirmed) have applied for and obtained a registration number.<sup>21</sup> The reluctance to share additional data (such as the listings' URL) to facilitate the municipality's checks does not allow for a clear picture of the number of violations. But this certainly does not speak in favour of the platform, which in doing so feeds requests for greater transparency.

Issues that are partly similar and partly different arise with respect to the various agreements reached between Airbnb and numerous Italian cities for the collection of the tourist tax.<sup>22</sup> On the basis of such agreements, the guest is basically required to pay the tax at the time of stay via payment platform, which then remits to city authorities the entire amount of the taxes collected on a regular basis (so-called collect and remit mechanism). In this case, there is no legal obligation for the platforms to collect the tax. These are commitments undertaken voluntarily which benefit intermediaries, users, and local administrations. The latter have a "guaranteed revenue" and are relieved from controls and administrative tasks. The hosts do not have to ask the guest for the tax, fulfil registration duties, and pay it back to the city. The guests pay it all in one lump sum. The platform obtains an *ad hoc* simplification of the tourist tax for its users and also enjoys a certain return in terms of reputation, being able to present itself as "willing to cooperate" with the local administrations.

The counterpart for this tourist tax collection service consists, as seen, in the *ad hoc* simplification of the amount and the calculation of the same tax only for Airbnb. However, the terms of the simplification are subject to negotiation between the parties and Airbnb is likely to have a greater contractual weight.<sup>23</sup>

In some cases, the Airbnb rate is fixed, in others, it is calculated as a percentage (for example 6%) on the amount for the stay, but is often different from that applied to the other apartments rented out for tourists. This raises issues of legitimacy: given that the taxpayers of the tourist tax are tourists, how can the different treatment between guests staying in a flat rented on Airbnb and those who instead stay overnight in another booked on a different platform be justified? Having regard to the fact that the same host can advertise her or his home on different home-sharing platforms, how can it be that tourists who stay at different times in the same apartment, but book through different portals, pay different taxes? Another controversial aspect is related to the data shared with the municipalities: Airbnb merely transfers the total number of nights and taxes recovered. These elements are far from useful for understanding if Airbnb did its job. Once again, the platform is willing to transfer only aggregate and statistical data.

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<sup>20</sup> D. Lacaze, 'Ces villes où Airbnb met en place la limitation automatique à 120 jours par an' (2 January 2019) BFM Immo <<https://www.lavieimmo.com/immobilier-paris-36806/ces-villes-ou-airbnb-met-en-place-la-limitation-automatique-a-120-jours-par-an-44374.html>>.

<sup>21</sup> *Ibid.*

<sup>22</sup> For an overview of the current agreements in Italy see Airbnb, 'Occupancy tax collection and remittance by Airbnb in Italy' <[https://www.airbnb.co.uk/help/article/2287/occupancy-tax-collection-and-remittance-by-airbnb-in-italy?\\_set\\_bev\\_on\\_new\\_domain=1600418677\\_YGujf9TIWpCFNL%2F0](https://www.airbnb.co.uk/help/article/2287/occupancy-tax-collection-and-remittance-by-airbnb-in-italy?_set_bev_on_new_domain=1600418677_YGujf9TIWpCFNL%2F0)>. For an example of such agreements (with English translation) see: 'Agreement concerning the implementation, collection and remittance of Tourist Tax' between the City of La Spezia and Airbnb Ireland <<http://www.speziarisorse.it/servizi-online/imposta-di-soggiorno/>>.

<sup>23</sup> Oskam (n 11), 94.

The agreements usually provide for mechanisms to allow the municipality offices, upon request and in specific cases, to control the correctness of the collection, which however appear to be surrounded by cautions and reservations in sharing more detailed data.

#### 4. *Conclusion*

This chapter has examined the concept of regulatory intermediation in its applications to home-sharing platforms. In the context of the wider rise of the Smart City, the involvement of platforms for enforcing short-term rental regulations can be regarded as a way to simplify and improve controls and effectiveness of the rules. The analysis of two case studies – the French 120-day cap and the Italian local agreements for the tourist tax collection – shed some light on the shortcomings of such an approach. The controls are apparently not as effective as one might have imagined. Users have workarounds and the platform does not seem able (or willing) to identify them. The existing information asymmetry, increased by platforms' reluctance to share data, places public authorities in the position of not being able to assess whether platforms comply with their obligations, and implement the rules correctly. Their superior operational capabilities and the greater bargaining power also seem to trigger processes of capture of the regulator by the intermediary. This is the case of the agreements for the collection of tourist taxes.

The only way forward is to overcome the information asymmetries. A possible solution is to introduce new disclosure obligations for the platforms. Examples are offered by France in 2019<sup>24</sup> and by the City of Vienna in 2016.<sup>25</sup> However, this kind of regulatory intervention has the drawback of adding further administrative burdens. The most promising solution, as highlighted by different authors, would be instead to introduce APIs tailored to government auditing purposes.<sup>26</sup> A significant example in this sense is offered by the API adopted by the city of San Francisco.<sup>27</sup> To avoid excessive fragmentation and complication of the process, a single regulatory initiative at the European Union level would be more appropriate. Encouraging steps in this regard can be seen in the agreement concluded by the Commission with Airbnb, Booking.com, Expedia Group, and Tripadvisor on statistical data sharing.<sup>28</sup> But the road is still long.

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<sup>24</sup> Décret n° 2019-1104 du 30 octobre 2019 (n 16).

<sup>25</sup> Busch (n 3), 122.

<sup>26</sup> Finck (n 12), 23, Busch (n 3), 123.

<sup>27</sup> Busch (n 3), 123.

<sup>28</sup> European Commission, 'Commission reaches agreement with collaborative economy platforms to publish key data on tourism accommodation', Press Release, 5 March 2020 <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_194](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_194)> accessed 20 September 2020.