

## **Dutch non-paper on the Digital Services Act package and the short-term holiday rental of residential spaces**

### *Context*

When the E-Commerce Directive came into force in 2000, the world looked, logically, different from today. The internet was still in its infancy and there was no platform economy yet. The reality has changed a lot in just twenty years. For example, the internet has become an indispensable part of our societies and the digital platforms that have emerged over the years hold very important (key) positions, both societal and economical. On the one hand, these developments bring opportunities, renewal and innovation to which the Netherlands is positive. On the other hand, it is a condition that public interests - also in the digital public space - can be sufficiently safeguarded. Since this is increasingly difficult in practice, the Netherlands has already argued<sup>1</sup> that there is a need to restore the balance between economic freedoms on the one hand and public interests on the other. A good example in which this necessity becomes clear is the short-term holiday rental of residential spaces via platforms that offer digital services<sup>2</sup>.

### *Background: short-term holiday rental of residential spaces*

Since the rise of platforms, the number of short-term holiday rentals has increased significantly. A good example to illustrate this is the situation in the municipality of Amsterdam. In 2018, there were about 30.000 advertisements on AirBNB, compared to only 7.000 in 2014. The number of residential spaces that were rented out to tourists in Amsterdam at least once a year was more than 21.000 in 2018, compared to more than 19.000 in 2017. It has been found that this large-scale short-term holiday rental of residential spaces has negative effects on, inter alia, the housing market, liveability, social cohesion, safety and the level playing field for other providers of such accommodation. These public interests are therefore under great pressure, and similar trends can be seen in a large number of other European cities<sup>3</sup>. In order to limit these negative effects, there is a need to impose rules on both the providers of residential spaces for short-term holiday rental and the platforms on which these residential spaces are offered:

- **Rules regarding providers.** To tackle the problem primarily at the source, namely the providers, in The Netherlands new legislation<sup>4</sup> will enter into force on the 1<sup>st</sup> of January 2021. This will create competences for local authorities to introduce authorization schemes for the short-term holiday rental of residential spaces. This is possible under the Directive on services in the internal market (2006/123/EC), which has been confirmed by the Court of Justice of the European Union (CJEU)<sup>5</sup>. Therefore, the European *acquis* appears to be sufficient on this point.
- **Rules regarding platforms.** In the second place, it is also necessary to set rules with regard to the platforms on which the residential spaces concerned are being offered. For example in countering illegal activities, such as the placement of illegal advertisements (because they do not have a registration number, because a (local) night criterion has been exceeded, et cetera). And, moreover, by creating safeguards for access to information that governments need in order to be able to effectively enforce legislation. However, imposing rules on platforms is more difficult under the European *acquis*, because the roles and responsibilities that have been assigned to such platforms are not clearly defined. In addition, there are (still) too many uncertainties regarding the rules that Member States can impose on platforms that offer information society services under the eCommerce Directive<sup>6</sup>.

On this last point, a clarification and/or reconsideration of the European legal framework is therefore desirable.

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<sup>1</sup> Dutch non-paper on the revision of the e-Commerce Directive (Digital Services Act).

<sup>2</sup> Like Airbnb, Booking.com, Expedia, etc.

<sup>3</sup> As Amsterdam, Athens, Barcelona, Berlin, Bologna, Bordeaux, Brussels, Cologne, Florence, Frankfurt, Helsinki, Krakow, London, Milan, Munich, Paris, Porto, Prague, Utrecht, Valencia, Vienna and Warsaw described in their joint [position paper](#).

<sup>4</sup> 'Wijziging van de Huisvestingswet 2014 in verband met de aanpak van ongewenste neveneffecten van toeristische verhuur van woonruimte (Wet toeristische verhuur van woonruimte)'.

<sup>5</sup> See the judgment in case C-724/18.

<sup>6</sup> 2000/31/EC. The judgement in case C-390/18 made clear that the intermediation service of platforms such as Airbnb must be classified as an 'information society service' under Directive 2000/31/EC.

### *Safeguards that the DSA-package can introduce*

The Netherlands welcomes the Digital Services Act package<sup>7</sup> announced by the European Commission (EC), which, *inter alia*, will modernize the current legal framework for digital services<sup>8</sup>. The EC focuses on strengthening the digital internal market, and on reviewing and harmonizing the responsibilities of online platforms and information society services. Within these objectives, and from the perspective of the short-term holiday rental of residential spaces, the Netherlands considers it in the first place important that this package / the EU *acquis* provides in the following basic safeguards:

- **More responsibilities for platforms.** In general, there is a need to reconsider and review the role and responsibilities of platforms on certain points. For example in countering illegal activities, such as the placement of illegal advertisements (because they do not have a registration number, because a (local) night criterion has been exceeded, *et cetera*). Furthermore, it can be helpful when the DSA introduces a clearer distinction between different types of platforms and the services they offer. Based on this, roles and responsibilities of platform can be better defined.
- **Access to data for effective enforcement.** Governments need better access to data from platforms in order to be able to effectively enforce (local) laws and regulations – in the most far-reaching case in the form of a data-sharing obligation. This is why the EC must provide clear guidance on the (im)possibilities of European law on this point. Where necessary, new safeguards need to be introduced to guarantee access to data for governments. It goes without saying that important basic conditions must be met at all times. For example, only the minimum data required for effective enforcement may be exchanged. The obligations, especially where personal data are concerned, must also fit within the frameworks of fundamental rights and freedoms; be proportional, proportionate, efficient and practicable; and do not disproportionately infringe the privacy of citizens. For the short-term holiday rental of residential spaces, such a safeguard would ensure that (local) authorities could effectively enforce the rules that apply to the providers of these residential spaces.

In the second place, the Netherlands attaches great importance to removing the current ambiguities concerning the rules that member states can impose under the eCommerce Directive on platforms that offer information society services. Particular attention should be paid to the Country of Origin (CoO)-principle:

- **Clarification and, where necessary, improvement of the CoO-principle.** The case of the short-term holiday rental of residential spaces illustrates that public interests are increasingly under pressure due to the economic freedom that digital services enjoy. The DSA must restore this balance, whereby Member States must have sufficient perspectives within the scope of the CoO-principle to set rules for services that are provided on their own territory, but where the provider of the service is not established. As the EU *acquis* is not clear on this point, it is firstly necessary to clarify the functioning of the CoO-principle. For example by providing more insight into the options and margin of maneuver of member states<sup>9</sup>. And by introducing simpler, more effective and more transparent procedures for the introduction of national rules. If it turns out in practice that such a clarification is sufficient, then from the point of view of this case, the CoO-principle does not need any further adjustments. However, where it appears in practice that this clarification is not sufficient (enough), the CoO-principle will have to be improved.

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<sup>7</sup> [https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf), p13.

<sup>8</sup> <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>.

<sup>9</sup> The Netherlands is of the opinion that based on such clarifications it should, in the case of short-term holiday rental of residential spaces, already be possible under the eCommerce Directive to impose obligations on providers of information society services. More specifically by appealing to the term 'public policy' as described in article 3(4)(a)(i) of this Directive.