

Journal of Comparative Urban Law and Policy

Volume 4
Issue 1 *Festschrift II in Honor of Julian Conrad
Juergensmeyer on the Occasion of His
Retirement: International Perspectives on Urban
Law & Policy*

Article 29

2020

Collaborative Economy, Tourist Accommodation and Their Impact in the Context of Sustainable Urban Development: Is Artificial Intelligence a Possible Answer?

Juli Ponce
University of Barcelona, jponce@ub.edu

Follow this and additional works at: <https://readingroom.law.gsu.edu/jculp>



Part of the [Comparative and Foreign Law Commons](#), [Environmental Law Commons](#), [Land Use Law Commons](#), and the [Urban Studies Commons](#)

Recommended Citation

Ponce, Juli (2020) "Collaborative Economy, Tourist Accommodation and Their Impact in the Context of Sustainable Urban Development: Is Artificial Intelligence a Possible Answer?," *Journal of Comparative Urban Law and Policy*. Vol. 4 : Iss. 1 , Article 29, 529-562.

Available at: <https://readingroom.law.gsu.edu/jculp/vol4/iss1/29>

This Article is brought to you for free and open access by Reading Room. It has been accepted for inclusion in *Journal of Comparative Urban Law and Policy* by an authorized editor of Reading Room. For more information, please contact gfowke@gsu.edu.

**COLLABORATIVE ECONOMY, TOURIST ACCOMMODATION AND
THEIR IMPACT IN THE CONTEXT OF SUSTAINABLE URBAN
DEVELOPMENT: IS ARTIFICIAL INTELLIGENCE A POSSIBLE
ANSWER?¹**

Dr. Juli Ponce Solé²

1. THE COLLABORATIVE ECONOMY (CE): IN PARTICULAR, TOURIST APARTMENTS
2. THE NEGATIVE EXTERNALITIES OF THE CE AND THEIR IMPACT ON SIGNIFICANT PUBLIC INTERESTS
3. PUBLIC INTERVENTION AND CE REGULATION IN THE ACCOMMODATION SECTOR: THE SHORTCOMINGS AND LIMITS OF REPUTATIONAL MECHANISMS
4. HOW TO REGULATE: PRINCIPLES OF GOOD REGULATION AND BETTER OR SMART REGULATION FOR THE CE AND ACCOMMODATION
5. THE DIFFERENT TYPES OF REGULATION OPEN TO THE CE IN THE ACCOMMODATION SECTOR IN SPAIN
6. REGULATION AND FLEXIBILITY. IS ARTIFICIAL INTELLIGENCE A POSSIBLE ANSWER? FUTURE POSSIBILITIES FOR ALGORITHMIC REGULATION AND THE NIRVANA FALLACY.
7. BIBLIOGRAPHY

It is a pleasure to join the second Festschrift in honour of Julian Conrad Juergensmeyer, Professor and Ben F. Johnson, Jr. Chair in Law at Georgia State University College of Law, and Editor-in-Chief of the *Journal of Comparative Urban Law and Policy*, who has announced his retirement on June 30, 2020, after 55 years of teaching law.

¹ This study forms part of the research project entitled “Democratic regeneration, good administration and public integrity: the role of administrative law in the face of the crisis of public institutions” (DER2014-57391-C2-1-R), lead researcher: Juli Ponce.

² Dr. Juli Ponce Solé, Professor of Administrative Law, University of Barcelona. TransJus Research Institute of the University of Barcelona jponce@ub.edu ; http://www.ub.edu/instituttransjus/index_ENG%20-%20Copia.html

I had also the honor of participating in the previous Festschrift, which commemorated his 45th year of Law teaching in 2010, with an article included entitled A 2020 VIEW OF URBAN INFRASTRUCTURE: A FESTSCHRIFT SYMPOSIUM IN HONOR OF JULIAN CONRAD JUERGENSMEYER Fall 2010/winter 2011, volume 42, Number 4/Volume 43, Number.³

Now, changing the topic, I will deal with a comparative view of current urban law and policy issues related to tourist apartments and their impact on cities and affordable housing in an international and comparative context. Although I consider different countries, I will take as a case study the situation in a specific European country, Spain, with several references to a city that has developed regulations to address the problem: Barcelona.

First, I will consider the so-called collaborative Economy (CE) in relation to tourist apartments and cities. Then, I will consider the negative externalities of the CE and their impact on significant urban public interests. Thirdly, I will study the possible public intervention and CE regulation in the accommodation sector, focusing on the shortcomings and limits of reputational mechanisms. After that, I will suggest ideas for regulating those issues, in accordance with the principles of good regulation in the framework of the international movement, which goes beyond urban issues, including the so-called better or smart regulation. Finally, I will focus on the possible different types of regulation of CE, introducing some final reflections about the possible role of artificial intelligence and algorithmic regulation in the future.

1. THE COLLABORATIVE ECONOMY: IN PARTICULAR, TOURIST APARTMENTS⁴

The collaborative economy (henceforth CE) is the expression that will be used here to refer to what is also known as the *sharing economy*, *peer-to-peer economy*, *mesh* or *collaborative consumption*⁵. As is well known, it is essentially a question of economic possibilities that are opened up by the information technology (IT) in existence, which encourages the increased sharing of certain goods (among them

³ “Affordable Housing as Urban Infrastructure: A Comparative Study from a European Perspective” (pp. 223-245)

⁴ This study focuses on tourist apartments in the large cities rather than tourist chalets and apartments in coastal and island resorts which can have a different sort of problems and solutions.

⁵ On the range of names applied and their differences, see EU, RANCHORDAS, 2016

being what most interests us here, namely accommodation⁶) and a growth in the division between the ownership and use of property.⁷

IT progress (which implies a reduction in transaction costs and in the information asymmetry between the parties involved) and the economic crisis (leading to citizens' increased interest in new opportunities for obtaining income) explain the expansion of these forms of economy. In particular, the first factor means that it is possible to substantially reduce the costs of obtaining, storing, processing and communicating the information needed to identify, locate, establish contact with and put in touch large numbers of people interested in mutually beneficial agreements that may have a positive effect on the city as a whole; among other examples of this phenomenon may be included, as the European Parliament points out: the generation of business opportunities for expansion and employment; the promotion of the cultural, free-time and leisure activity sectors; the international recognition of cities; the more efficient and sustainable use of existing resources, or giving consumers greater power.⁸

However, the European Parliament has also pointed out that several negative consequences may also exist, in the face of which it “notes that there is ample room for manoeuvre for national, regional and local authorities to adopt context-specific measures in order to address clearly identified public interest objectives with proportionate measures fully in line with EU legislation; calls on the Commission therefore to support the Member States in their policy-making and in adopting rules consistent with EU law.”

This paper will be specifically concerned with the collaborative economy with regard to tourist accommodation, where the above-mentioned professional model has made considerable inroads in the context of the use of dwellings for tourist accommodation; this trend is currently reaching remarkable levels, including the participation of real estate investment funds attracted by the sector's high

⁶ Such as, for example, the well-known Airbnb platform: <https://www.airbnb.cat/>

⁷ The literature on the CE is already considerable. Apart from the works that will be referred to in the course of this paper, in Spanish, see, for example, DOMÈNECH, G. “Economía colaborativa y Administración local”, *Anuario del Gobierno local*, 2015/16, pp. 35 et seq., and “La regulación de la economía colaborativa (el caso “Úber contra el taxi””, *Revista Cefelegal*, núms. 175-176 (agosto-septiembre de 2015), pp. 61 et seq., and LORA TAMAYO, M., “Economía colaborativa y alojamiento”, pp. 283 et seq. in *La regulación de la economía colaborativa: Airbnb, Blablacar, Uber y otras plataformas*. Valencia: Tirant lo Blanch, 2017.

⁸ European Parliament Resolution of 15th June 2017, on a European Agenda for the collaborative economy: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0271+0+DOC+XML+V0//EN>

profitability. Thus, in Madrid, half the tourist apartments are controlled by investment funds.⁹

In the same way, the original idea of renting out housing while the owner was away has given way to the revival of the age-old institution of sub-tenants, in a context of economic crisis, as a simple means of making ends meet on the part of the owner or as a way to pay the mortgage.¹⁰

In addition, the question of tourist apartments should be understood in the framework of tourism, which might be called Spain's leading industry, on which more than 11% of the GDP relies, contributing 110,000 M euros to the economy.¹¹ It is therefore a difficult undertaking to consider the challenge of tourist housing adequately since it affects a wide range of both private and public interests and, ultimately, society as a whole.

2. THE NEGATIVE EXTERNALITIES OF THE CE AND THEIR IMPACT ON SIGNIFICANT PUBLIC INTERESTS

However, apart from advantages, the CE may also involve, as has already been mentioned, many *negative externalities* that affect the well-being not only of those taking part in the collaboration, but also of third parties (neighbours, the inhabitants of the cities) and, ultimately, society as a whole.¹² As is widely known, in the case of tourist apartments (henceforth TAs), that is, short-term rentals, such negative externalities or, to use language that is no longer related to the field of economics but rather juridical in nature, these serious impacts on matters of public interest can be classified under different headings:

- Inconvenience and disturbances for established residents caused by the short-term users of these apartments and for the city as a whole, including its public spaces, which become overcrowded as a consequence of the tourists staying in short-term rental apartments. This is logical in a city such

⁹ According to a report by Madrid City Council, which is reported on here: http://cadenaser.com/emisora/2017/05/05/radio_madrid/1493982867_637484.html

¹⁰ Article in *The Guardian*, "The reluctant Airbnb host: why I rent my spare bedroom to pay my own rent", 1st August 2017. Article in *El País*: "Los usuarios de Airbnb cambian la esencia de la plataforma", 2nd August 2017, which pointed out that fewer than 25% of landlords in Spain use Airbnb in accordance with the original model. 47% of users of the platform in Madrid do so in order to obtain additional income that enables them to make ends meet.

¹¹ *El País*, "Qué hacer con la primera industria de España?", 2nd August 2017.

¹² Hence the need for their regulation, as will be seen below.

as Barcelona, which receives some 19 million tourists per year who spend a few days there.

- Unfair competition for the hotel sector.
- Non-payment of the corresponding taxes, since they operate illegally and clandestinely.
- The lack of security in these apartments arising from the use to which they are put, as well as risks for public health, noise, and the lack of privacy.
- The decline in the offer of long-term affordable housing for those in need of a place to live, since owners prefer to market these properties as tourist apartments because of the higher financial returns.
- The gentrification of certain urban districts and, in general, urban imbalances caused by what has been dubbed *touristification*,¹³ including the intensive use of urban public spaces.
- Changes to shops in the vicinity, associated with changes in the inhabitants, with a consequent loss of local retailers to satisfy the needs of permanent residents.
- Problems of mobility.¹⁴
- Pressure on the real estate market, which makes housing prices in the city in general increase. Although this is an aspect that is sometimes disputed, the currently available objective data support the validity of this conclusion.¹⁵

¹³ Article in the newspaper *Público*: “Los pisos turísticos devoran la ciudad: consecuencias del “efecto Airbnb”, 10th April 2017: <http://www.publico.es/sociedad/turistificacion-pisos-turisticos-devoran-ciudad.html>

¹⁴ In the case of Barcelona, see the report by the city’s *Síndica de Greuges* (Ombudsman service) “Referent a l’actuació d’ofici de referència en matèria de turisme i el seu impacte en la qualitat de vida del veïnat de Barcelona” dated 12th June 2015, referring to these impacts.

¹⁵ For the case of Amsterdam, see the study by the University of Amsterdam by VAN DER BIJL, V., “The effect of Airbnb on House prices in Amsterdam”, consultable at: https://vastgoedkennis-data.vakliteratuur.info/Server/getfile.aspx?file=docs/publicaties/site/UVA/Bijl_VM.pdf. For the case of 100 cities in North America, see the following study made available in Spanish by CityLab in August 2017: “Nuevas investigaciones muestran que Airbnb sí contribuye al aumento de los alquileres. Un análisis preliminar de 100 áreas metropolitanas sugiere esta empresa sería uno de los factores del alza del costo de la vivienda en EEUU” <http://www.univision.com/noticias/citylab-vivienda/nuevas-investigaciones-muestran-que-airbnb-si-contribuye-al-aumento-de-los-alquileres>

Such impacts on overall urban general interests, these negative externalities (gentrification, the reduction in the long-term housing offer and the increase in its price, with the consequences as regards its accessibility, commercial changes, the impact on the use of public spaces ...) are often omitted in studies drawn up from the point of view of competition by, for example, the CNMC (*Comisión Nacional de los Mercados y la Competencia*; in English, the National Commission on Markets and Competition) and in doctrinal analyses. The overall consequences of thousands of micro-decisions, which SCHELLING refers to from the point of view of Economics,¹⁶ which generate *market failures* that are potentially detrimental to the standard of living of people in these urban spaces, are not taken into account for the general public interest.¹⁷

The effect of these negative impacts on *people's rights* exercised in the urban space (the right to housing, the right to environment ...) and on the increasingly consolidated *right to the city*, included in international texts such as the recent New Urban Agenda (adopted at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III) in Quito) or the European Charter for the Safeguarding of Human Rights in the City,¹⁸ signed by several Spanish cities, tends to be forgotten. This *right to the city*, currently undergoing juridical definition,¹⁹ is linked with a further powerful idea for urban management and innovation in the field of law: the idea that the city, in itself, is *common*, recalling Elionor Ostrom's works, that is, a common good, subject to competition for its use, which may lead to *tragedies* that affect the weakest more seriously. Hence, the importance of regulations to avoid them.²⁰

From a social, environmental and economic point of view, this right to the city is rooted in and linked with *the juridical principle of sustainable urban and regional development*, a principle explicitly recognised by Spanish legislation (at the state

¹⁶ SCHELLING, *Micromotivos y macroconducta* (1989), Fondo de Cultura Económica, México.

¹⁷ PONCE SOLÉ, J. "Urbanisme, barris, dret a la ciutat: volem una societat (in)justa, (in)decent, (in)segura, (in)sostenible?", *Nous Horitzons*, N^o. 195, 2009 (issue devoted to: El barris invisibles), pp. 12-25, available online at: <http://www.noushoritzons.cat/ca/file/139211/download?token=iXyvLa8V>

¹⁸ BANDRES, JM. "El derecho a la ciudad" *Cuadernos de derecho local*, Número 35, 2014, pp. 97-103.

¹⁹ For example, PONCE SOLÉ, J., "El dret a la ciutat i els drets en la ciutat", *Blog de la Revista Catalana de Dret Públic*, 22 de novembre de 2017, available online at: <http://eapc-redp.blog.gencat.cat/2017/11/22/el-dret-a-la-ciutat-i-els-drets-en-la-ciutat-juli-ponce-sole/>

²⁰ FOSTER, S. and IANONE, C., Foster, Sheila and Iaione, Christian, *The City as a Commons* (August 29, 2015). 34 *Yale L. & Pol'y Rev.* 281 (2016). Available online at: <https://ssrn.com/abstract=2653084>

level, which can be roughly compared with the U.S. federal level: article 2 et seq. of the *Texto Refundido estatal de la ley de suelo de 2015*; consolidated text of the State Land Act of 2015; as well as much regional legislation) and by case law in Spain, such as, among many examples, in the Ruling of the Supreme Court of 12th July 2017, cassation appeal 1859/2016, in which the cancellation of a development plan was upheld because of the unreasonably high amount of new housing envisaged, which had failed to take into account key features for the decision and had not justified it adequately, thereby affecting this principle.²¹

For the moment, let us simply remember article 3 of the Consolidated text of the State Land Act of 2015, mentioned in the ruling discussed above (the italics are mine):

“Article 3. Principle of sustainable urban and regional development.

1. Public policies related to land regulation, planning, occupation, transformation and use have as their common aim the use of this resource in accordance with public interest and according to the *principle of sustainable development*, notwithstanding the specific aims attributed to them by the Law.

2. By virtue of the principle of sustainable development, the policies referred to in the previous paragraph shall promote the rational use of natural resources, *harmonising the requirements of the economy, employment, social cohesion, equal treatment and opportunities, people’s health and safety, and environmental protection*, contributing in particular to:

c) *The adequate prevention of risks and dangers for public health and safety and the effective elimination of any disturbance to either of them.*

3. The public authorities shall draw up and develop, in the urban environment, the policies for which they are respectively responsible, in accordance with the *principles of competitiveness and environmental, social and economic sustainability, territorial cohesion, energy efficiency and functional complexity*, endeavouring to ensure that this environment is adequately endowed, and that land is occupied efficiently, combining its uses in a functional way. In particular:

²¹ The ruling can be consulted at:

<http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&database=TS&reference=8106572&links=&optimize=20170724&publicinterface=true>

Many others can be found in RAMOS MEDRANO, J.A. “El concepto de urbanismo sostenible del Texto Refundido de la ley del suelo en la reciente jurisprudencia”, *RDUyMA*, núm. 297, 2015, pp. 105 et seq.

a) They shall make possible its residential use in dwellings that constitute primary residences *in a safe and healthy urban context that is accessible to all, of a suitable quality and socially integrated*, provided with the infrastructure, services, materials and products that eliminate or, when appropriate, minimise, through the application of the best technology available on the market at a reasonable price, contaminating emissions and greenhouse gases, water and energy consumption, and waste production, and improve their management.

g) *They shall integrate as many uses as might be compatible with the residential role within the urban fabric* in order to contribute to the balance of cities and residential areas, favouring the diversity of uses, bringing services, amenities and infrastructure closer to the community of residents, as well as social cohesion and integration.

j) *They shall evaluate, as appropriate, the perspective of tourism, and shall allow and improve responsible use for the purpose of tourism.*

4. The public authorities *shall promote the conditions to ensure that the citizens' rights and obligations laid down in the following articles are real and effective, by adopting the town and regional planning measures that may be necessary to ensure a balanced outcome, favouring or containing, as appropriate, the processes of land occupation and transformation.*

Land linked to a residential use by town and regional planning shall guarantee the right to enjoy suitable and decent housing in accordance with the terms laid down by the legislation on the subject."

With regard to the above-mentioned right to the city, the Catalan ombudsman has precisely referred to the "right to the city", understood as the right to dispose of a public space where the citizens' different uses can be accommodated in a balanced way together with the citizen's right to live with as little inconvenience as possible.²²

For all the above-mentioned reasons, *I will here place special emphasis on the role of public regulation in general and, more specifically, as regards town and housing planning in the CE in connection with TAs in order to protect the right to the city and the juridical principle of sustainable urban development. This includes the case of established urban areas as well* (see the Rulings of the Supreme Court of 30th September 2011 and of 29th March 2012, cassation no. 1294/2008 and 3425/2009,

²² Síndic de Greuges de Catalunya, *El derecho a la convivencia*, Marzo 2017: http://www.sindic.cat/site/unitFiles/4339/Informe%20convivencia%20urbana_castella_def.pdf

respectively). For this reason, special attention will be paid to town-planning regulations and tourist apartments and houses.

It should also be taken into account that the progressive professionalization of relations through online platforms and *the entry into the market of investment funds interested in the short-term high returns of TAs* may have a noticeable impact on the city in the future: at the time of writing these lines, more than half the TAs in some large Spanish cities, such as Madrid, are already in the hands of such funds.²³

In other words, and somewhat bluntly: the search for capital gains that made Spanish cities “explode outwards” in the prodigious decade prior to the onset of the great crisis in 2008 may be repeated along with the wide range of social, economic and environmental casualties well-known to us all. This time, however, the damage will be in the heart of the cities, which are liable to be “gutted” and swiftly transformed into areas that it will be difficult to sustain socially, environmentally, and economically unsustainable areas in the years to come.

Of course, there is no lack of examples of cities in other countries that have declined into a state of decay. Detroit, a paradigm of the capitalist city, is one example where the focus on a primary use (in this case industrial) has led to a critical social and economic situation.²⁴

3. PUBLIC INTERVENTION AND THE REGULATION OF THE CE IN THE ACCOMMODATION SECTOR: THE INSUFFICIENCY AND LIMITS OF REPUTATIONAL MECHANISMS

All the reasons presented are both important and of sufficient public interest to justify public intervention to regulate TAs. In this respect, I do not share the opinions that minimise the negative externalities described above and state them to be “less proven and meaningful than the scientifically demonstrated consequences of atmospheric pollution.”²⁵ On the one hand, for example, because adequate proof

²³ http://cadenaser.com/emisora/2017/05/05/radio_madrid/1493982867_637484.html

²⁴ The following web page may be consulted:

http://www.lasexta.com/programas/salvados/mejores-momentos/de-ser-el-corazon-de-la-industria-del-pais-a-una-zona-marginada-el-declive-del-cinturon-del-oxido-de-eeuu_2017032658d815890cf2cbe7cfedd5a1.html

²⁵ RODRÍGUEZ FONT, M., “La regulació de l’allotjament col·laboració a Catalunya: anàlisi de les propostes de l’activitat catalana de la competència”, *Revista Catalana de Dret Públic*, núm. 53, desembre 2016, p. 177. The sentences of the civil and criminal chamber of Catalonia’s High Court of Justice that are cited by the author fail to convince me of the decreasing size of negative externalities since they are limited to questions that affect a home-owners’ association. As is obvious, nothing is said or denied in them as regards the impact that they may produce on other

is clearly visible in consequences such as the increase in housing prices or gentrification, mentioned above. Be that as it may, although this proof may be debatable or considered inconclusive at the moment, the existence of indications that are at least solid, such as the ones referred to, should lead us to apply the precautionary principle in the social field in order to ensure urban sustainability, which would give rise to the public intervention required to guarantee the latter. As is pointed out in the Supreme Court Ruling of 7th November 2017, referring to the town-planning context and scientific uncertainty and the risks:

“...there are data that substantiate that there is no absolute scientific certainty, but rather, in contrast, there is evidence that it may come about in future; in the face of such situations, the public administration *cannot remain impassive and must act with the due diligence inherent to the right to good administration.*”

There has recently been a noticeable increase in sensitivity in regards to the impact that both public and private activity may have on social cohesion and sustainability. Growing awareness about the importance of socially sustainable development, together with economic and social development, allow present and future generations to improve their capacity to generate well-being. This awareness is leading to reflection about the need for a precautionary principle to crystallise among us in the social field, in much the same way as the precautionary principle has already done so in regards to the environment. This precautionary principle with regard to social matters should be accompanied by the establishment of true social impact assessments (SIAs), once again comparable to the already well-established environmental impact assessments, which, however, fail to cover the social impact of private activities, as emphasised by FOSTER, who cites several rulings by U.S. state courts that have examined public decisions because of the failure to take significant social impacts into account in the decision-making process.²⁶ Environmental sustainable development can thus inspire among us specific juridical approaches transferrable to the social field, which can trigger a realistic assessment of the impact that possible activities are likely to have on the collectives that they are going to affect and can enable us to avoid or promote the adoption of normative measures to protect public interests if there is no certainty in regards to the impact that they may have on social cohesion and sustainability.

general interests linked to the city, such as the ones referred to here (housing price increases, gentrification, etc.).

²⁶ FOSTER, S., “The City as an Ecological Space: Social Capital and Urban Land Use”, *Notre Dame Law Review*, Vol. 82:2, December 2006, pp. 527 et seq.

In this respect, the Spanish Supreme Court Ruling of 5th December 2016, appeal number 378/2013, before Judge Suay Rincón, once again points out that the obligations of due care or due diligence associated with the right to good administration require a certain administrative behaviour in decision-making processes (in this specific case the adoption of regulations) in order to guarantee social sustainability.²⁷

In fact, this type of public intervention has been undertaken both abroad (in the U.S.²⁸ and in Europe,²⁹ as is shown by the cases of New York or Berlin, with a total prohibition of this type of activity,³⁰ but also in Brussels, with a series of qualitative requirements that must be fulfilled for a TA to be able to operate) and in Spain.

²⁷ “*The evaluation of the social impact contributes to the reassessment of a procedure that cannot be understood as a mere formality, insofar as it guarantees the realisation of citizens’ rights. (...)*

But the progress in the provisions concerning the social and environmental impact brought together in Royal Decree 1083/2009 (article 1.2), within the contents of the report on the analysis of regulatory impacts in addition to that of its own contents (article 1.1), has taken longer to make itself/themselves felt, despite the unambiguous connection, on the one hand, with the concept of social sustainability, already included even in the Constitution itself (section 135.4), from which it does not seem unreasonable to deduce the need to demand an additional effort of motivation to explain the reasons that lead to the adoption of certain regulations that have a negative impact on social rights (in this respect, dissenting opinions were expressed to constitutional rulings 49/2015 and 139/2016), and while in the case of environmental matters case-law has come to enshrine the requirement to put forward a reinforced motive to support the adoption of a retrogressive measure on the basis of the environmental principle of non-retrogression – Rulings of 13 June 2011 RC 4045/2009, 30 September of 2011 RC 1294/2008, and of 29 March 2012 RC 3425/2009- as a consequence, in turn, of the principle of environmental sustainability, it does not seem that the precautionary principle can imply lesser requirements as regards social questions; and, on the other hand, as regards the right to good administration, contemplated in article 41 of the Charter of Fundamental Rights of the European Union, which in its roots also contains the requirement to observe a duty of care in decision-making with the due consideration of all the interests involved and the significant facts; and this must be duly reflected in the report analysing the regulatory impact.

Nevertheless, it cannot be ignored that, in addition to the subsequent coming into force of the legal texts that now constitute the normative frame of reference (Laws 39 and 40/2015) in the aforementioned terms ...”

²⁸ *White paper* Realtor, 2011, which contains good practices recorded in a large number of U.S. municipalities <https://www.nar.realtor/sites/default/files/reports/2011/short-term-rental-housing-restrictions-white-paper-2011-09.pdf>

²⁹ UE, Ranchordas, 2016: <http://ec.europa.eu/DocsRoom/documents/16950/attachments/1/translations/en/renditions/native>

³⁰ See, for example, the study “Identificación de mejores prácticas internacionales en la regulación de la oferta de vivienda particular para uso turístico”, drawn up by CEAT (Confederación española de hoteles y alojamientos turísticos). Available online at:

In fact, at a legal level, from the perspective of tourism, it is well known that State Act 4/2013 added a paragraph e) to article 5 of the Spanish Urban Rental Act (*Ley de Arrendamientos Urbanos* – LAU), excluding TAs from its scope, as long as specific sectorial regulations were in existence, a situation that, for example, arises in Catalonia, the autonomous community that will be taken as an example for reference purposes, with the regulation introduced in 2002 in the Tourism Act for Catalonia (art. 50, with regard to tourist accommodation companies), and subsequently developed by Decree 59/2012, of 20th November, concerning tourist accommodation establishments and tourist apartments.

This regulation required, in a first stage, prior notification to be able to exercise any TA activity, a requirement that was subsequently replaced by a responsible declaration (the current article 50 of the Act, modified in 2017³¹), in addition to registration in a specific administrative Register and a series of technical requisites (articles 65 et seq. of the Decree).

From the standpoint of housing and town-planning, and making use of the Catalan example in this case once again, in 2007 the Catalan Act on the right to housing (LDHC) added a brief reference to TAs in articles 3 and 19, which after a modification in 2011 became known as *dwelling with economic activities* (*viviendas con actividades económicas*).³² In turn, the town-planning legislation in force in Catalonia foresees no specific requirements in regards to this type of dwelling, with the exception of a brief reference added in 2015 with regard to non-developable land,³³ although article 68.6 of Decree 159/2012 mentioned above reminds one that:

<http://www.ithotelerero.com/wp-content/uploads/2014/02/identificacionbuenaspracticasinternacionalesoctubre2013.pdf>

In Berlin, for example, “specifically in the district of Pankow, it is forbidden to let private dwellings for tourist stays of fewer than 28 days, for two main reasons: to prevent increases in housing prices for residents and to avoid the nuisance and discomforts caused by tourists to local residents.” In the USA, “... and more specifically in San Francisco, letting a dwelling to tourists or for short-term stays of fewer than 32 days is totally prohibited. In New York, the situation is similar to that in San Francisco, but the ban concerning rentals occurs when these last fewer than 30 consecutive days”.

³¹ LAW 5/2017, of 28th March, on fiscal, administrative, finance and public sector measures, and on the creation and regulation of taxes on shopping centre, on stays in tourist accommodation, on radiotoxic elements, on bottled sugar-sweetened beverages and on carbon-dioxide emissions.

³² Art. 155 of Law 9/2011, of 29 December, on the promotion of economic activity.

³³ Art. 47, 8 bis, introduced by Law 3/2015, of 11th March: “Dwellings for use by tourists are compatible with the legally established use of family housing.”

“It is not possible to make use of a dwelling for the purposes of tourism if this is prohibited by the regulation of uses in the area where it is located or it is prohibited by the statutes of the community duly registered in the Property Register in buildings subject to the Horizontal property regime.”

Even so, the Town-planning law in force in Catalonia, modified in 2015³⁴, states in article 9.8 that:

“Town-planning regulations and ordinances concerning the building and use of land cannot establish constraints on land use that involve restrictions as regards the access to or exercise of economic activities that violate the principles and requisites established by the Services Directive. The overriding reasons relating to the public interest that, in agreement with the same Services Directive, may allow an exception to the application to be made shall be established by regulation. These restrictions shall conform to the principles of necessity, proportionality and non-discrimination and be appropriately justified in the project memorandum taking into account the remaining public interests considered in the plan.”

At present, as is well known, the City Council of Barcelona - a large city that is particularly active in this field- after the suspension of the prior notification of the commencement of activities involving the establishment and/or expansion of TAs in certain areas, in force since 2014 and completed by other subsequent regulations that broadened its scope – has passed a Special Town-planning regulation on Tourist apartments (PEUAT), which came into force in March 2017.³⁵

Within the existing legal framework, what options do public authorities have to protect public interests affected by tourist apartments?

The first question that has to be answered is whether or not it is a good idea to contemplate a specific regulation or if it can be dispensed with. Although answering this question is basically a matter of political concern, the reply cannot ignore the existing legal framework, which imposes active obligations on public administrations and which therefore, as will be seen, makes such a regulation necessary in order to protect the public interest.

The converse possibility of not establishing any regulation would be to understand that the reputational mechanisms generated by the platforms themselves are

³⁴ Law 16/2015, of 21st July, on the simplification of the economic activity of the Administration of the Generalitat and local government bodies in Catalonia and the promotion of economic activity.

³⁵ See: <http://ajuntament.barcelona.cat/pla-allotjaments-turistics/es/>

sufficient to guarantee the public interests at risk. Hence, the CNMC (the National Commission on Markets and Competition) went so far as to sustain in its provisional document of March 2016 in regards to the public regulation of minimum requisites and fixtures and fittings that:

“Originally, the justification for these restrictions lay in the existence of asymmetric information between the owners of the accommodation (who were aware of all its features) and the users (who lacked this information). Furthermore, without Internet and the new platforms’ systems of reputation, there were substantial costs involved in searching for information, which were offset by a system of public certification. In such a context, the need for a degree of regulation to indicate the quality and the characteristics of the accommodation could be justified on certain occasions. For example, at the time, the existence of asymmetric information could have been the justification for the need to regulate hotel ranking by stars from the outset. The number of stars (to a maximum of five) indicated the quality and the features of the accommodation, thereby reducing the search costs and guiding the consumer as regards the services that he or she might expect to find in the establishment.

Nowadays, however, online information systems and accommodation commercialisation platforms include a series of characteristics that offer sufficiently believable information to the users who might rent these properties and substantially reduce the search costs for them, without the intervention of public resources. The platforms enable them to find out the real characteristics of the accommodation, its location, and to compare it with other similar establishments, etc.

Similarly, previous users’ ratings of the same accommodation offer potential users increasingly refined information on the establishment’s quality and features, its fixtures and fittings, and, where appropriate, the host. Following on from the previous example, the development of platforms and portals that facilitate this information has reduced or even eliminated the asymmetric information between the two parties: users seeking accommodation have at their disposal a large amount of information at a very low cost.”

In my opinion, this statement is simplistic and fails to take into account the defects and limitations of reputational mechanisms in reality, as is emphasised by several studies, such as that carried out by the *UK Competition & Market Authority* in 2016, and doctrinal analyses (see Ranchordas, 2016). This set of empirical analyses and studies reveals that:

- Reputational mechanisms built on the basis of guests' opinions fail to take into account such aspects as safety, fire risks or negative effects on third parties as they focus on certain aspects, of an aesthetic nature, for instance, and they are carried out by individuals with no specialised knowledge of these subjects.
- In addition to being restricted in scope, they are unreliable, because there is a tendency to offer favourable opinions on the accommodation, in view of the fact that negative ones may affect the users themselves unfavourably as guests; for this reason, the majority of reviews tend to be positive, but incomplete and cautious.
- Both reviewers and reviewees offer written communications that do not provide additional information based on non-verbal communication, such as posture and intonation; they are expected to provide written comments that match a certain network of users if they hope to continue using the platform.
- A large number of comments are unreliable, inexact, false, incomplete or useless.

In brief, self-regulation, even if it were to be supported by serious and stringent reputational instruments, which as has been seen is not the case, would be unable to cover the full range of public interests and the negative externalities that public regulation endeavours to correct, such as, for example, safety, health, fire risks, traffic, nuisance to third parties, impact on the nature of the district and of the city, etc.

In this respect, in view of the considerable public interests involved and the failures of reputational mechanisms, what is known as the baseline scenario option (not doing anything, not regulating) does not seem to be acceptable in a social and democratic state of law.

The ruling of the High Court of Justice of the Canary Islands of 21st March 2017, in the light of the objection to Decree 113/2015, of 22nd May, as a result of which the Regulation of Vacation dwellings in the Autonomous Community of the Canary Islands was passed, dismissed the case presented by the Spanish Federation of Holiday Rentals Associations (FEVITUR) and the National Commission on Markets and Competition (CNMC) with regard to the minimum fixtures and fittings in holiday rentals, inasmuch as:

“The objection to article 10 (minimum fixtures and fittings) is justified insofar as the user's freedom to opt for more basic services that can be offered at a lower price is being restricted. *However, the requirement of a minimum standard of quality in a product that should be classified as touristic cannot be understood to encroach*

upon entrepreneurial freedom. This refers to fixtures and fittings that are usually found in a dwelling, and which are associated with the product offered, notwithstanding that some aspects of the regulation may be considered to have been excessively detailed, but this cannot be seen as an effective barrier to the free exercise of the activity.”

In addition, we might insist on the need to protect the right to the urban environment, what is known in the terminology more commonly used nowadays as the above-mentioned *right to the city* of residents in these municipalities. It includes the protection of citizens’ rights in the urban space. For example, it is important to consider the impact that *noise* has on the right to intimacy, as has been pointed out by the Spanish Constitutional Court and the European Court of Human Rights in their case law; the right to housing, which is harmed by TAs’ tendency to reduce the amount of accessible housing available and their effect on urban balances and the type of shops; residents’ right to physical integrity, which may be endangered by fires or other incidents, as well as the contribution of all concerned to public expenditure (section 31 of the Spanish Constitution); and finally the possible impact on the image of the city. All these problems require public intervention in order to correct the inefficiencies, the market failures that generate negative externalities.

As the CNMC itself points out in its document of 2016, when it differentiates the positive externalities from the negative ones:³⁶

“In contrast, a negative externality represents a cost for third-parties not considered in the price. The clearest example of negative externality is the case of environmental pollution caused by gas emissions, with negative consequences for society as a whole.

³⁶ “The second group of possible market anomalies is the existence of **externalities**, which result in not all the effects derived from production or consumption being directly reflected in the market price as there are economic costs or profits that are not internalised and, therefore, they are not reflected in market prices, in such a way that said prices do not reflect the social value of goods.

Externalities can be positive or negative. When the effect represents a benefit not foreseen in the price, it is a positive externality, such as, for example, those that are derived from private research and innovation which, in addition to the direct profit that the company obtains, generate a clear public benefit. However, without public intervention (for instance, by means of a legal system of patents), this work would not be undertaken or less than the optimum amount would be carried out”, CNVM, *CONCLUSIONES PRELIMINARES SOBRE LOS NUEVOS MODELOS DE PRESTACIÓN DE SERVICIOS Y LA ECONOMÍA COLABORATIVA*, March 2016

For this reason, this type of situation usually requires an incentive /correction by means of the establishment of taxes/the provision of subsidies for correction purposes, the creation of property rights markets, *or by means of regulation, in order to achieve the socially desirable level.*”

In view of the public interests at stake, and the wide range of negative externalities presented above, internationalisation by means of prices (through taxation) would seem to be insufficient. In this respect, and reflecting its disagreement with the CNMC, the Catalan Competition Authority (ACCO) has pointed out that:

“In order to promote respect for these principles - an essential task in the field of promoting competition – the ACCO has analysed, as did the National Commission on Markets and Competition (CNMC), what the most suitable tools to limit the externalities that arise from this activity might be. More specifically, the CNMC considers that the best way would consist of Pigovian taxes. Nevertheless, this solution would present the following problems at least:

- It is difficult to define the tax that will result in the desirable level of activity.
- It does not permit a zero-growth rate for the activity to be attained (there will always be someone that is willing and able to pay to stay in a particular district).
- It discriminates in favour of visitors with greater purchasing power, a circumstance that could even aggravate some of the negative externalities presented (e.g. pressure on price levels).
- A different tax for the same activity depending on the district also constitutes something of an innovation.
- It is a tool that might already be in use but, for the moment at least, it does not seem to have been sufficient.”³⁷

In addition, as this body points out, it should be kept in mind that regulation can suppose a constraint on the offer, whereas the tax only has an impact on demand.

³⁷ ACC, *Una regulación dinámica en el ámbito del alojamiento turístico*, December 2016, available at: http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/20161220-ob-31-regulacio-dinamica-esp.pdf.

In this respect, therefore, the application of taxation as a way of internalising negative externalities seems to be insufficient in this sector, for the reasons expounded and ACCO's reasoning.³⁸

Moreover, in this specific case of the right to the city and the values involved, the Pigovian solution is of no use for protecting the delicate public interests involved.³⁹

If a legal person taking part in the market (an owner) or a short-term rental company (or tourist apartment letting company) creates impacts that affect third parties (the residents in the apartment blocks where the TAs are located, who suffer noise; inhabitants in the city, who encounter higher rents or are unable to find local shops, which disappear, etc.), and the latter have to pay high prices for housing and products or are directly forced to leave the city, would we be in a similar situation? Would we solve the negative externalities (to use economic terminology) or the serious impact on questions of general interest (public order; the right to housing, the urban environment, segregation ...) by means of a tax that those who trade in TAs would pay and which would have repercussions as regards the rents at which they are let?

I consider that we have good reasons to doubt whether this would be the case. Consequently, it would seem that other measures of intervention will have to be designed to correct these market failures and protect public interest. This will be the subject that I will reflect on below.

On the other hand, the solution that involves establishing a market for transferring rental rights presents several problems of complexity and efficiency that will be discussed in the last part of this study. For all these reasons, in no way should regulation be considered a mechanism that can be ruled out as a necessary step to internalise the negative externalities seen here.

³⁸ I therefore do not share the opinion of RODRIGUEZ FONT, M., "La regulació...", op.cit. p. 176.

³⁹ By way of example, let us imagine a soft drink company that pollutes a river whose water is drunk by a village's inhabitants and, as a result, they are forced to pay for expensive bottled water (produced by another company); in this case, there is a clear negative externality, insofar as the first company's actions give rise to a social cost that it does not bear, since it is not reflected in the price of the products that it manufactures, but rather it falls upon a third party – namely the inhabitants of the village. In such a situation, the externality would disappear if, for example, that company were to be obliged to pay a tax equivalent to the cost of contaminating the river, a cost that would surely be reflected in the price of the soft drinks that it produces.

In the text, this example will be carried over to the section on urban environment and the right to the city.

Be that as it may, what should be made clear is that *far from being a technical decision* (whether economic or juridical), the decision to internalise externalities, to undertake the process by means of Pigovian taxes, or through a rental right market, derived from the so-called Coase theorem, these *are political and public policy decisions, which should be taken by the public authorities legally entitled to do so*, including local government bodies inasmuch as they are responsible for regulating town-planning and housing.⁴⁰

It is, therefore, essential to have an efficient and flexible system of regulation, one that is adapted to the Collaborative Economy, which will have to consider the need for regulation and the contents of the same case by case, making use of mechanisms such as checklists, a tool for *ex ante* regulatory impact assessment.⁴¹

4. HOW TO REGULATE: PRINCIPLES OF GOOD REGULATION AND BETTER OR SMART REGULATION FOR THE CE AND ACCOMMODATION

As intervention is both necessary and possible, since there are powers of intervention and competences over different matters, it could be regulatory or otherwise. Without ruling out other alternatives, I believe that regulation (of different types, including the all-important town-planning regulation, as will be seen below) is required, as has already been stated.

Such regulation will have to take into account the principles of *better or smart regulation* embodied at an international level by the OECD, at the European level by the EU, and at the Spanish and Catalan level by means of the principles of good regulation in articles 4 et seq. of the State Sustainable Economy Act of 2002, which have now been replaced by the principles of good regulation brought together in State Act 39/2015 on Common Administrative Procedure (PONCE, 2016). In addition, the provisions of legislation on transparency and good government, such as Catalan Law 19/2014, on transparency, information access and good government, which devotes a chapter to the improvement of regulatory quality and also affects ordinances and local plans, will have to be taken into account during its preparation.

Thus, any such future regulation should have a suitable *ex ante* assessment process, as has already been pointed out, sufficient public consultation, and the necessary *ex post* assessment, which enable it to be as closely adapted as possible to the CE, allowing both innovation and flexibility, but protecting the substantial public

⁴⁰ See, for example, NAREDO, J.M., *La economía en evolución*, Siglo XXI de España Editores, Madrid, 2nd edition, 1996, pp. 266 et seq.

⁴¹ Before taking the decision to regulate, a phase of reflection is advisable, for example on the basis of the checklist recommended by the OECD.

interests involved, in line with what RANCHORDAS has sustained in different studies. Twenty-first century phenomena cannot continue to be regulated with juridical techniques dating from the nineteenth century.

Therefore, it is recommended that what are known as *sunset clauses*, or clauses with fixed time duration, should be adopted and, if possible, some *experimentation* should be undertaken before it comes into effect (e.g. sandboxes), in accordance with what is foreseen at present by, for example, the above-mentioned Catalan Law 19/2014, in the section referring to good regulatory governance.⁴²

Among the principles of good regulation mentioned, this flexible, modern regulation would in particular have to respect the limit of the proportionality principle (very relevant in the European legal context), ensuring that its sub-principles of appropriateness, adequacy and proportionality *sensu stricto*, well known and widely used in case law, are not violated. This means that it will be essential to define clearly the general interests pursued. Moreover, as has been pointed out, it is also necessary to select the least restrictive alternative for the rights of the owners and entrepreneurs linked with the CE, provided that it allows the general interests involved to be protected effectively, and to justify and to substantiate that the benefits of regulation are greater than its costs, with benefits and costs being understood in the widest sense (social, economic, environmental).

Similarly, among these costs, the possible restrictions to the competition that may be generated will have to be weighed; this should not prevent regulation as long as it is necessary and appropriate.⁴³ As the CNMC points out, regulations will be perfectly possible and valid, provided they comply with the principles of efficient economic regulation, that is to say, in many cases they may well be both necessary (there is a market failure that justifies a possible intervention to protect an overriding reason relating to the public interest) and proportionate (there are no

⁴² Art. 64.4: “The Public Administration may promote pilot schemes prior to the approval of new regulatory measures in order to test their suitability. Such pilot schemes shall be applied by means of agreements signed with the bodies representative of the sectors involved, with the effects and conditions determined by the agreement”.

On the need for *smart regulation* in the face of the collaborative economy:
<https://www.theguardian.com/science/political-science/2015/may/20/smarter-regulation-for-the-sharing-economy>

⁴³ On this question, bear in mind as regards the town-planning sector the report of the Catalan Competition Authority “Recomendaciones sobre la regulación detallada de los usos del suelo desde la óptica de la competencia”, December 2014, available on-line at:

http://acco.gencat.cat/web/.contento/80_acco/documentos/archivos/actuaciones/SE_8_2014_USO_S_DE_EL_SOL_CAT.pdf

other alternatives that lead to smaller distortions in the market and allow public interest to be equally efficiently protected).⁴⁴

When analysing the land market in Spain, the CNMC itself recognises that town-planning regulation is justified by market failures and public interest aims,⁴⁵ a fact that is also recognised by the Catalan Competition Authority (ACCO) when it states that “town-planning is understood to be a necessary and advisable function.”⁴⁶ Moreover, in a report published at the end of 2016, with regard to the regulation of TAs, this body maintained, in line with the ideas expressed here, that:

“the ACCO is aware that this activity can lead to a series of externalities that, among others, might include:

- nuisance to neighbours
- “denaturalisation” at the district/city level
- housing and rental price increases
- increases in product prices
- intensive use of infrastructure/anti-social behaviour

Thus, the ACCO does not dismiss the possibility that externalities that might possibly justify the restriction of the activity may be present, but at all events such a reaction should be proportionate and represent the minimum possible distortion for competition, this being essential to contain these externalities at a level that is considered acceptable.”⁴⁷

⁴⁴ Or in the words used literally by the CNMC, in the opposite sense, it can be the case that regulations “fail to match the principles of efficient economic regulation, that is to say, in many cases they are unnecessary (there is no market failure that might justify a possible intervention to protect an overriding reason relating to the public interest) or they are disproportionate (there are alternatives that generate fewer market distortions). This regulation limits competitive pressure in the markets and leads to a loss of well-being for society (higher prices, lower quality, less variety and less encouragement for innovation)”.

⁴⁵ CNMC, *Problemas de competencia en el mercado del suelo en España*, 2013

⁴⁶ AUTORIDAD CATALANA DE LA COMPETENCIA, *Recomendaciones sobre la regulación detallada de los usos del suelo desde la óptica de la competencia*, 2014

⁴⁷ ACC, *Una regulación dinámica en el ámbito del alojamiento turístico*, December 2016, available on-line at:
http://acco.gencat.cat/web/.content/80_accoco/documents/arxiu/actuacions/20161220-ob-31-regulacio-dinamica-esp.pdf.

Finally, the OECD has pointed out that “Land use restrictions often serve valuable social purposes.”⁴⁸

What these institutions and others remind us is simply that in each exercise of regulatory power, whether on town-planning or other matters, an evaluation of the impacts on competition should be included alongside other impacts when assessing *ex ante* during the drawing up of drafts of legislation, plans, ordinances and regulations. I use the word “remind” because this demand is naturally derived from the obligations arising from the right to good administration and from the legal principles of good regulation now included in laws 39 and 40/2015.

It is therefore essential to incorporate, by legal mandate, a specific assessment of whether the regulation presents restrictions for competition (whether by limiting the number or range of market operators, or by limiting competition among operators, or by the reduction of incentives to compete) in the necessary evaluation of regulatory impacts carried out *ex ante*.

If the answer is affirmative, it will be necessary to consider whether these restrictions are prohibited or not. If they are not, the following step will be to consider if they are required in order to pursue objectives of public interest (which, it should be stated, is already done when the test of proportionality is applied in the drawing up of the regulation, within its sub-principle of *adequacy*). If the answer is positive, the following question will be whether the restrictions are proportionate, in the sense that their benefits, in a broad sense, outweigh their costs (which overlaps with the proportionality principle, in its dimension as a sub-principle of proportionality *sensu stricto*). Finally, once the previous questions have been answered, it will be necessary to analyse whether or not there are any less restrictive alternatives that enable the public interest to be served equally efficiently (which is also carried out from the standpoint of the proportionality principle within its sub-principle of *necessity*).⁴⁹

⁴⁸ OECD, *Policy Roundtables. Land Use Restrictions as Barriers to Entry*, 2008, p. 7.

⁴⁹ On *Competition advocacy* and juridical norms, see: OCDE, *Guía para evaluar la competencia* (<http://www.oecd.org/daf/competition/reducingregulatoryrestrictionsoncompetition/39680183.pdf>); EU: *Better regulation: a guide to competition screening*, 2005 (http://ec.europa.eu/competition/publications/legis_test.pdf); COMISIÓN NACIONAL DE LA COMPETENCIA: *Trabajando por la Competencia. Recomendaciones a las administraciones públicas para una regulación de los mercados más eficiente y favorecedora de la competencia*, 2008 (http://www.cnmec.es/Portals/0/Ficheros/Promocion/Guias_y_recomendaciones/recomendaciones.pdf); *Guía para la elaboración de Memorias de competencia*, 2009 (http://www.cnmec.es/Portals/0/Ficheros/Promocion/Guias_y_recomendaciones/Guia%20para%20Administraciones%20Publicas.pdf); AUTORIDAD CATALANA DE DEFENSA DE LA

It should, thus, be noted that *what is known as competitive impact analysis is, in fact, none other than the application of the proportionality principle bearing in mind only the impacts on competition, that is with a limited perspective*. The correct application of the proportionality principle, including this type of impact, should already incorporate an analysis of competition, which the bodies responsible for overseeing tend to consider from what might be called the *tunnel effect*: they only consider this factor. However, competition should be contextualised with other negative and positive impacts in the assessment that has to be performed.

Furthermore, it should also be kept in mind that all the assessment necessary to undertake the regulatory impact evaluation (including, but not exclusively, the impacts on competition) should be carried out for the sake of the obligations that the regulator has, derived from *the citizens' right to good administration*, which requires careful consideration, with the due diligence and care, of all the facts and interests involved in decision-making, as European and Spanish jurisprudence and case-law have emphasised for many years. In addition, this assessment, a positive obligation, is independent of the application of the test of proportionality, to ensure that the limits of the latter, which are formulated in negative terms, not positively as are the obligations of good administration, are not exceeded.⁵⁰

It should be taken into account that, in regards to the establishment of what is least burdensome and ensuring that the benefits outweigh the costs, there is scope for discretion on the part of the regulator, which he or she is legitimately responsible for within the framework of a Democratic State of Law. In this kind of State, there is a constitutional functional distinction that prevents functional spheres from being invaded by certain powers in relation to others (as is concisely expressed, as regards the judicial power, by art. 71 of the *Ley de la Jurisdicción Contencioso-Administrativa* (the Law regulating the Administrative Jurisdiction)).

Another prominent aspect of the regulation is its relation to the EU Services Directive. In view of the possible uncertainty that initially existed regarding the application of the Services Directive and the rules for transposition of the same to this matter (laws 17/2009 and 20/2013), it should now be pointed out that:

- In principle, if the regulation deals with town-planning, this field is excluded from the above-mentioned Directive (see recital 9 of the same). In

COMPETENCIA, Metodología para evaluar el impacto competitivo de las normas (EIC)
http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/guia_aic_v17_08_10_final_esp.pdf

⁵⁰ PONCE SOLÉ, J. “Los jueces, el derecho a una buena administración y las leyes de transparencia y buen gobierno”, study included in the *Newsletter* prepared by the INAP in January 2017: <http://laadministracionaldia.inap.es/noticia.asp?id=1507021>

this respect, the Rulings of the High Court of Justice of Catalonia, no. 199 of 2nd April 2014, no. 620 of 2014 of 5th November, and no. 431 of 16th July 2014, referring to the Plan of Uses for *Ciutat Vella* passed by the Barcelona City Council on 23rd July 2010.

- However, it has been seen that art. 9.8 of the Catalan Town-planning law indicates that town-planning and building and land-use ordinances can establish constraints in regards to land use that involve restrictions on access to or the exercise of economic activities, provided that the principles and requisites established by the Services Directive are respected.

Be that as it may, as regards the regulation not of the town-planning aspects but of the activity itself, this would be possible as long as it were motivated by overriding reasons relating to the public interest, as defined by the regulation in force⁵¹ and interpreted by the Court of Justice of the European Union, which include reasons of public order, public safety, public health, protection of consumers' rights to health and safety, protection of the environment and the urban environment, and social policy objectives, among others. The ideas expressed above would thus allow both regional and municipal regulation to be based on overriding reasons relating to the public interest.

In this respect, and insofar as municipal town-planning regulations are concerned, the Supreme Court Ruling of 19th October 2016 (cassation appeal no. 2625/2015) on the plan of uses for the town of Sabadell is of particular interest, endorsing the municipal regulation. As a consequence, it is perfectly possible for a town-planning regulation to protect important public interests for cities, limiting the use of TAs, provided that it is implemented in accordance with the principles of good regulation

⁵¹ The Directive itself includes in recital 40 an open list of overriding reasons relating to the public interest and Recital 56 of the Services Directive states that:

“(56) According to the case law of the Court of Justice, public health, consumer protection, animal health and the protection of the urban environment constitute overriding reasons relating to the public interest. Such overriding reasons may justify the application of authorisation schemes and other restrictions. However, no such authorisation scheme or restriction should discriminate on grounds of nationality. Further, the principles of necessity and proportionality should always be respected”.

For its part, Law 17/2009 of 23 November, on free access to service activities and their exercise, provides a closed list of overriding reasons relating to the public interest, which in any case cannot limit the Directive itself, art. 11.

mentioned above (in this respect, GARCÍA BERNALDO DE QUIRÓS, 2017, 23 et seq.)

5. THE DIFFERENT TYPES OF REGULATION OPEN TO THE CE IN THE ACCOMMODATION SECTOR IN SPAIN

Finally, with regard to how this regulation should be articulated, the following possibilities (which may be concurrent rather than alternatives), at least, would be feasible:

- a) State regulations based on sections 149.1.1 SC and 149.1.18 SC and on other possible parts of the Constitution (remember the regulation for reasons of safety).
- b) Autonomous community regulations based on their competences in the fields of tourism and housing, as already exist in several Autonomous Communities.
- c) Municipal regulations based on their competences in the fields of town-planning, housing and tourism.

I will focus on the last point.

From the town-planning point of view, it should be remembered, for instance, that article 68.6 of the above-mentioned Catalan decree 159/2012 states that a dwelling may be used for tourism purposes if it is not prohibited by the regulation on uses in the sector where it is located or by the statutes of the (owners') community duly inscribed in the Property Register in buildings subject to the Horizontal property regime.

The possibilities that this regulation opens up are of interest, for instance those referring to the prohibition of this type of use in certain zones of the city, provided that the reason why is suitably justified (as is already done in New York and Berlin; it has been seen that there is no lack of reasons of public interest) or those that allow it, but consider it to be a modification of use (from residential to TAs) and linked to the existence of compensation for the use of premises of equal surface for housing purposes, as is the practice in Paris.

It should, however, be noted that, unlike this case, in Catalonia and Barcelona, because of the town-planning law in force, changes in use of this type are not subject to licence, but rather to a declaration on the part of the person responsible, art. 187b is (in contrast, they are subject to this requirement, if they change to residential use ...). If it was sought to establish a licence, it would be necessary to modify the law, a municipal ordinance alone not being sufficient.

This regulation could be developed by means of supra-municipal planning, such as, for example, in the Catalan case and more specifically in the Barcelona metropolitan area through the currently applicable General Metropolitan Plan of 1976 or the future Town-planning Master Plan, or by means of a general urban development plan.

In this context, the classification of uses established by planning could be further refined so as, in the first instance, to differentiate the *use as a dwelling* from other accommodation uses. The dwelling function should be restricted to use as the habitual place of residence for individuals, families and other units of co-existence in buildings (that is they should be the place of residence where the people involved are registered, they should occupy it for a period greater than 183 days per year, as stated by art. 2 of the State Land Act). That is to say, in order to avoid the negative impacts described, a town-planning regulation could take advantage of this classification to protect this urban use, prohibiting any others if necessary, which would provide a link with the concept of the home employed by the case law of the European Court of Human Rights, which states that this is not autonomous, but rather it depends on factual circumstances, such as a tie with the dwelling.⁵²

Other accommodation uses that could be called *residential uses* would include those for purposes such as hotels, collective shared accommodation (care and nursing homes, old people's homes, youth hostels, etc.) and tourist accommodation (hotels, guest houses, hostels, etc.), with this last category including TAs, since the substance of such residential uses, their reality and their impact are not the same as those of the previously mentioned uses for dwelling purposes.

This distinction could be extended to professional activities carried out in the home (doctors, lawyers, etc.), second homes, and rooms within the dwelling rented for monetary compensation being recognised as falling in the category of dwelling.

Because of its significance, this last possibility warrants somewhat more attention. It is clear that rooms in a dwelling being made available by the individual registered as the usual resident to a third party departs from the professionalised model and is closer to a relationship between equals, in which the non-professional owner obtains a return for a part of the dwelling, which is rented by persons belonging to the growing number of fellow citizens of constantly increasing age, who the crisis

⁵² The case of ŠKRTIĆ v. CROATIA of 5th December 2013, citing other previous ones such as *Buckley contra the United Kingdom*, 25th September 1996, *Gillow contra the United Kingdom*, 24 November 1986, *Wiggins v. the United Kingdom*, no. 7456/76, and *Prokopovich v. Russia*.

and the new property bubble have forced to live together.⁵³ In this field, I consider that it is important to differentiate between service providers, who share time, goods, skills or knowledge, and do so on an occasional and non-professional basis, and who are understood to be *peers or citizens*, from service providers that act professionally.⁵⁴ In this respect, it seems reasonable to include this possibility within the town-planning use of the dwelling and accept the use of rooms by third parties as comparable and equivalent. Needless to say, a limit to the number of rooms should be established so that this does not degenerate into a residential use for tourist accommodation (in other words, at the very least a guest house *de facto*, with all the negative effects that can easily be deduced).

Once the distinction between a use as a dwelling and a residential use (which would include TAs) has been established, the next step would be to define the incompatibility of the two uses, prohibiting or restricting the latter in certain parts of the city (for instance only to the ground floor of apartment blocks), if it were necessary to protect all the public interests mentioned above, as long as this were carried out in accordance with the principles of good regulation by means of suitable assessment *ex ante*.

Fundamentally, we would return to the essence of zoning (with its roots going back more than a century in Germany and the United States, where it is known as *Euclidean Zoning*, after the well-known ruling of the US Supreme Court in the case of *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926)), since, as is self-evident, not all urban uses can be compatible in all situations.

It is precisely the task of town-planning classification to protect major public interests such as those explained here, by dividing space into zones and preventing certain uses from being established alongside others in certain zones with good justification, or restricting such mixtures, among other reasons to make the “residential use in dwellings constituting habitual places of residence” possible, as

⁵³ See, for example, “Compartir piso no es solo para estudiantes”, *El Periódico de Cataluña*, 30th September 2017: http://archivo.elperiodico.com/ed/20170930/pag_030.html

⁵⁴ In this respect, for example, the Report of the Interdepartmental Commission on the Collaborative Economy of the Generalitat of Catalonia (September 2017) points out that these two different realities: the professionals (who often perform the activity, for profit and with a substantial amount of business) must have a set of regulations that ensures competition in terms of equality, regardless of the channels that they use, whereas private individuals need not carry out these activities in accordance with the same requisites as the former group. The report is available online at: http://economia.gencat.cat/web/.content/70_economia_catalana/arxius/economia-colaborativa/Informe-economia-colaborativa.pdf

is pointed out in art. 3.3 of the State Land Act.⁵⁵ Rather than a violation of economic competition, this is what the very essence of town-planning administration should be seen as, as long as it is undertaken after due reflection and assessment, as has repeatedly been stated, a point to which I will return in a few lines.

Because, as HUTCHINSON points out in an *American Planning Association* publication, *tourist apartments and houses have similar uses to those of a dwelling, but they actually function more in line with commercial uses.*⁵⁶

This is exactly what case law in the field of private relationships has repeatedly stated when it points out the difference between using an apartment as a habitual place to live and using it to carry out a “hotel-like” activity offering “lodgings/accommodation.”⁵⁷

⁵⁵ By way of example, De GUERRERO MANSO, M.C., *La Zonificación de la ciudad: Concepto, Dinámica y Efectos*, Aranzadi, 2012.

⁵⁶ HUTCHINSON, N., “Short-Term Vacation Rentals: Residential or Commercial use?” *Zoning News*, March, 2002, p. 1.

⁵⁷ As the ruling of the Provincial Court of Barcelona of 9th October 2015, citing another of its rulings of 11th March 2010 reminds us: <<Case law constantly proclaims that tourist apartments should be discontinued, because it is not a question of changing the use of commercial premises or a dwelling, but instead the insertion of a hotel business in a substantial part of a building mainly intended for private residential purposes, “excessive use” of the common infrastructure, for which the apartment block is not prepared, and which is none other than the reflection of the inevitable consequences of its industrial exploitation (Ruling of the Supreme Court of 22nd November 2008); the change in purpose from commercial premises to tourist apartments should necessarily involve a modification to the foundational horizontal property title deeds, in order to adjust the participation percentages in the common expenses that all joint owners are obliged to pay (Ruling of the Provincial Court of Murcia 23/2007). Article 553-47 of the Catalan Civil Code states that “the owners and occupiers of apartments or commercial premises shall not, within their private space or in the rest of the property, undertake activities that the statutes prohibit, that are prejudicial for the building, or that contravene the general provisions concerning disturbing, unsanitary, noxious, dangerous or illicit activities”. >>

For its part, the civil section of the Supreme Court, insists on the distinction between the use of a dwelling to live and other uses, from the perspective between private parties, but which, by pure logic, is extensible in general terms. Thus in the Ruling of 23rd November 2015:

“Bearing that in mind, in this specific case, it does not appear that the idea that the apartments on the upper floors should be used as dwellings was used in the generic and usual meaning equivalent to apartment or singular flat, as is understood by the Court of First Instance, it cannot be forgotten that in the aforementioned notarial documents a clear and careful differentiation is drawn between apartment, with a generic meaning, and dwelling, a specific term and that it is the defendants themselves that when they, alone, grant the deed constituting the system for horizontal division specify that the use of the upper floors for dwellings, a term that, as the Supreme Court Ruling of 2nd June 1970 states, in accordance with the official dictionary of the language means

Similarly, mention should be made of the possibilities of municipal ordinances, but also of the legal limits that presuppose that the matter must be regulated by an act of Parliament before an ordinance intervenes, a limit derived from section 53.1 of the Spanish Constitution in relation to sections 35 and 38 of the same document (the so-called legal reservation). This should not prevent municipal regulatory power, inherent in constitutionally recognised municipal autonomy, from regulating TAs without contradicting the existing legal framework, making use of its already mentioned competences, in the development of the criterion of local freedom to regulate respecting laws (the so-called “positive link”), as is pointed out by the Ruling of the Supreme Court 22/05/2015 Cassation Appeal number: 2433 / 2013.

This also implies the possibility of categorising infringements and sanctions on the basis of articles 139 et seq. of the *Ley de Bases de Régimen Local* (Law regulating the Basis of Local Government) as regards whatever might be required for the protection of civic coexistence.

6. REGULATION AND FLEXIBILITY. IS ARTIFICIAL INTELLIGENCE A POSSIBLE ANSWER? FUTURE POSSIBILITIES FOR ALGORITHMIC REGULATION AND THE NIRVANA FALLACY

In brief, while tourist apartments have positive features such as those alluded to, they give rise to negative externalities as well, also described. These latter aspects are the ones that require smart regulation, with appropriate *ex ante* and *ex post* assessment and with a degree of flexibility that one can endeavour to achieve in various ways, some of them put forward above.

However, in the future one might envisage other regulatory techniques that might be called in *real time*, making use of the possibilities offered by technology. In that sense, the use of Artificial Intelligence (AI) could be of interest. The market already offers this kind of solution as a part of the so-called smart city.⁵⁸ Moreover, cities are beginning to use them as tools to manage TAs. This is the case of the city of

dwelling, habitation, home, and that as it is grammatically established in the constituent document, the expression “used as a dwelling”, excludes any other function, unless in each specific case it can be combined, without altering the substance, with other additional activities. But furthermore, the lodging business that the defendants installed in the building involved in the lawsuit is far from being the accommodation of boarders in their own dwelling...”

⁵⁸ See, for example, <https://bismart.com/en/products-for/cities/>

Barcelona, for example, which is using a web crawler, i.e. a search bot to detect tourist lets advertised on the various websites.⁵⁹

Thus, when looking into future developments to explore, the combination of *algorithmic regulations*, the use of *big data* and the possibility of establishing a publicly controlled market for transferring shared rights (which could be inspired by the well-known transfers of urban land use), derived from the so-called Coase “theorem”, mentioned above, could provide even greater flexibility, although within a framework of constantly increasing flexibility, as has been proposed by MILLER, translated to Spanish by LORA-TAMAYO, and other scholars, with regard to the specific case of London.⁶⁰

A system of this type would definitely offer flexibility but it would introduce a noticeable degree of complexity into the system and present practical problems of implementation, as has been pointed out by MILLER and, whatever the case, it would require sophisticated administrative regulation.

Be that as it may, the use of artificial intelligence in connection with administrative decision-making in general and, more specifically, with regulation, what is known as algorithmic regulation or *regulation by robot*, is still in its initial stages, as is emphasised by COGLIANESE and LEHR in general and for the case of the United States,⁶¹ and even more so in the case of Spain.⁶² For this reason, at present it is impossible to imagine juridical objections to a regulation that prohibits TAs, with

⁵⁹https://habitatge.barcelona/en/noticia/more-spotters-and-inspectors-to-combat-illegal-tourist-accommodation_506487

⁶⁰ See MILLER, Stephen R., “First Principles for Regulating the Sharing Economy”, *Harvard Journal on Legislation* 147 (2016). Available online at: <https://ssrn.com/abstract=2568016> , LORA TAMAYO, M., op.cit., and Quattrone, G., Proserpio, D., Quercia, D., Capra, L., and Musolesi, M. (2016, April). “Who benefits from the sharing economy of Airbnb?” In *Proceedings of the 25th International Conference on World Wide Web* (pp. 1385-1394). International World Wide Web Conferences Steering Committee. Available online at: http://www.ucl.ac.uk/~ucfamus/papers/www16_airbnb.pdf

⁶¹ Coglianese, C., and Lehr, D. (2016). “Regulating by Robot: Administrative Decision Making in the Machine-Learning Era”. *Geo. LJ*, 105, 1147, available online at: <https://pdfs.semanticscholar.org/e2d1/5f6b2bc234fa8df6eb986652adc7e3b10584.pdf>

⁶² Projects based on the use of big data are starting to be developed at the international level. In the tourism sector, the following web sites may be consulted: <http://www.toscanapromozione.it/newsshow/showEvidenza/94/test>; In general, see this initiative by the University of Chicago, <http://dsapp.uchicago.edu/> which has opened a parallel European line <https://dssg.uchicago.edu/europe/>

the aim of serving the public interest and of avoiding the negative externalities described, on the basis of not using this kind of technology.

It would not be appropriate to declare regulation to infringe established rights as there may be a less restrictive alternative for property owners' rights; this is based on the possibility of a hypothetical algorithmic regulation with a transfer market of shared rights that might allow greater flexibility (an idea that has already been suggested by the ACCO in the aforementioned report published in 2016, even though rather vaguely and imprecisely).

In legal terms, it should be kept in mind that proportionality in its dimension of necessity incorporates a discretionary margin that cannot be renounced by the regulatory administration in order to decide which alternative actually serves the public interest *hic et nunc* within the practical, human and technical possibilities available at each moment, which cannot be replaced either by advisory administrative bodies or judicial ones. The obligations of good administration, linked with the due diligence or care, do not require an ideal solution, but rather the best possible one in the existing context; for this reason, this would be a case in which, to cite Voltaire, the best would (hypothetically) be the enemy of the good (what is feasible today), giving rise to a *Nirvana fallacy*, which is attributed to the economist DEMSETZ, in the sense that a logical mistake is made if real things are compared with unavailable alternatives, leading to a tendency to suppose that there is always a perfect solution for a specific problem.⁶³

By creating a false dichotomy that offers a clearly advantageous option – although, at the same time, non-existent in practical reality - the *Nirvana fallacy* can be used to attack any contrary idea as imperfect. The choice that it offers is not between real-world solutions, but between a realistic possibility and another, unreal solution that would be *better*.

In juridical terms this would suppose an unconstitutional substitution by judges of the regulator's discretionary power.

A single absolute vision that competition should be defended therefore involves a clear risk of forgetting the serious impact of tourist apartments on the public interest and the technical and organisational administrative framework that really exists to protect it. Hence, when drawing up regulations and, when appropriate, during their

⁶³ H. Demsetz, "Information and Efficiency: Another Viewpoint," *Journal of Law and Economics* 12 (April 1969): 1, cited by Kirzner, Israel M. (1978). *Competition and Entrepreneurship*. p. 231.

subsequent monitoring, it is essential to take into account the necessary assessment of all the potentially affected relevant interests, not just some of them.

7. BIBLIOGRAPHY

BANDRES, JM. “El derecho a la ciudad” *Cuadernos de derecho local*, no. 35, 2014, pp. 97-103.

COGLIANESE, C., and LEHR, D. 2016 “Regulating by Robot: Administrative Decision Making in the Machine-Learning Era” *Geo. LJ*, 105, 1147, available online at: <https://pdfs.semanticscholar.org/e2d1/5f6b2bc234fa8df6eb986652adc7e3b10584.pdf>

DE GUERRERO MANSO, M.C., *La Zonificación de la ciudad: Concepto, Dinámica y Efectos*, Aranzadi, 2012.

DEMSETZ, H. 1969, “Information and Efficiency: Another Viewpoint” *Journal of Law and Economics* 12, April

DOMÈNECH, G. “Economía colaborativa y Administración local”, *Anuario del Gobierno local*, 2015/16, pp. 35 et seq., and “La regulación de la economía colaborativa” (el caso “Uber contra el taxi””, *Revista Cefelegal*, nos. 175-176 (agosto-septiembre de 2015), pp. 61 et seq.

FOSTER, S. and IANONE, C., Foster, Sheila and Iaione, Christian, *The City as a Commons* (August 29, 2015). 34 *Yale L. & Pol'y Rev.* 281 (2016). Available online at: <https://ssrn.com/abstract=2653084>

FOSTER, S., “The City as an Ecological Space: Social Capital and Urban Land Use”, *Notre Dame Law Review*, Vol. 82:2, December 2006, pp. 527 et seq.

GARCIA BERNALDO DE QUIRÓS, J., 2017, “La aplicación del derecho de la competencia en la regulación y en la gestión del uso del suelo”, CASSES, L., (Dir). *Anuario de la Competencia 2016*, ICO-UAB-Marcial Pons, pp. 21 et seq.

HUTCHINSON, N., “Short-Term Vacation Rentals: Residential or Commercial use?”, *Zoning News*, March, 2002, p. 1

KIRZNER, ISRAEL M., 1978. *Competition and Entrepreneurship*

LORA TAMAYO, M., “Economía colaborativa y alojamiento”, pp. 283 et seq. in *La regulación de la economía colaborativa: Airbnb, Blablacar, Uber y otras plataformas*. Valencia: Tirant lo Blanch, 2017

MILLER, Stephen R., 2016, “First Principles for Regulating the Sharing Economy”, *Harvard Journal on Legislation* 147, Available online at: <https://ssrn.com/abstract=2568016>

NAREDO, J.M., *La economía en evolución*, Siglo XXI de España Editores, Madrid, 2nd edition, 1996, pp. 266 et seq.

PONCE SOLÉ, J. “Los jueces, el derecho a una buena administración y las leyes de transparencia y buen gobierno”, study included in the *Newsletter* prepared by the INAP in January 2017: <http://laadministracionaldia.inap.es/noticia.asp?id=1507021>

PONCE SOLÉ, J., “El dret a la ciutat i els drets en la ciutat”, *Blog de la Revista Catalana de Dret Públic*, 22 November 2017, available online at: <http://eapc-rmdp.blog.gencat.cat/2017/11/22/el-dret-a-la-ciutat-i-els-drets-en-la-ciutat-juli-ponce-sole/>

PONCE SOLÉ, J. “Urbanisme, barris, dret a la ciutat: volem una societat (in)justa, (in)decent, (in)segura, (in)sostenible?”, *Nous Horitzons*, N°. 195, 2009 (Ejemplar dedicado a: El barris invisibles), pp. 12-25, available online at: <http://www.noushoritzons.cat/ca/file/139211/download?token=iXyvLa8V>.

QUATTRONE, G., PROSERPIO, D., QUERCIA, D., CAPRA, L., and MUSOLESI, M., 2016 “Who benefits from the sharing economy of Airbnb?” in *Proceedings of the 25th International Conference on World Wide Web* (pp. 1385-1394). International World Wide Web Conferences Steering Committee, available online at http://www.ucl.ac.uk/~ucfamus/papers/www16_airbnb.pdf

RANCHORDAS, 2016 *Home-Sharing in the Digital Economy: The Cases of Brussels, Stockholm, and Budapest*, report prepared for the European Commission: <http://ec.europa.eu/DocsRoom/documents/16950/attachments/1/translations/en/renditions/native>

RODRÍGUEZ FONT, M., “La regulació de l’allotjament col·laboratiu a Catalunya: anàlisi de les propostes de l’activitat catalana de la competència”, *Revista Catalana de Dret Públic*, no. 53, December 2016

SCHELLING, *Micromotivos y macroconducta* (1989), Fondo de Cultura Económica, Mexico.

SÍNDIC DE GREUGES DE CATALUNYA, *El derecho a la convivencia*, March 2017:

http://www.sindic.cat/site/unitFiles/4339/Informe%20convivencia%20urbana_castella_def.pdf

VAN DER BIJL, V., “The effect of Airbnb on House prices in Amsterdam”, available online at:

https://vastgoedkennis-data.vakliteratuur.info/Server/getfile.aspx?file=docs/publicaties/site/UVA/Bijl_VM.pdf