

The Impact of CJEU Case Law on the National Rules of Alternative Tourism¹

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Abstract: The alternative tourism has a disturbing effect, mainly, on commercial competition between traditional tourism service providers and those from alternative tourism, on the taxation of income from alternative tourism, on the protection of service users. Many tourist cities are experiencing a housing crisis because of the homeowners opting for short-term rentals rather than long-term ones. Legislative responses do not usually go beyond the adoption of local rules requiring authorizations before providing such services. In the connected cases C-724/18 and C-727/18 (*Cali Apartments, HX v. Procureur général près la cour d'appel de Paris, Ville de Paris*), the CJEU had the opportunity to rule on whether the authorization of the alternative tourism services provision is compatible with EU legislation. It was determined that a national law establishing a regime that requires prior authorization for short-term rental activities, provided that the rules are justified by an imperative public interest, is not incompatible with the EU Services Directive (2006/123). By passing the Order of the Minister of Entrepreneurship and Tourism no. 510 of February 22, 2022, our national legislator took one step farther, adopting a national authorization system. According to this order, all persons offering short term rental services (including natural persons) are economic operators/professionals, who are required to get a classification certificate from the central public authority responsible in the field of tourism. The inclusion of the service provider in the category of professionals represents an approach that protects the general interest, respects the principles of fairness and non-discrimination, and gives back to the consumer of such services the guarantee of his/her protection.

Keywords: alternative tourism, CJEU, tourism classification certificate.

Introduction

Alternative tourism mainly refers to short term rentals via online platforms, to the preparation of a traditional meal, *Eatwith*³ type, where hosts cook and serve food in their own home to tourists interested in authentic experiences,

¹ A version of this subject was published in Romanian language in the Romanian Review of Private Law, no. 1/2024, under the title: *Limitele capacității de a închiria locuințe în regim hotelier. Evoluții legislative naționale și europene*, pp. 172-188.

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³ Platform based in London, UK, available in Romania; [Online] at: <https://intercom.help/eatwith/en/articles/1498027-terms-and-conditions>, accessed 20.02.2024).

to tourism guide services, offered via *Showaround*-type platforms⁴, where natural persons provide tour guide services, without being certified. Regarding the last type of activities, in Romania were adopted in 2023⁵ rules, which require obtaining a tour guide certificate, non-compliance with the rules triggering administrative sanctions. However, in this paper, we will only deal with the short-term rentals (hereinafter, STRs).

The alternative tourism has a disturbing effect on commercial competition between traditional tourism service providers and those from alternative tourism, on the taxation of income from alternative tourism, on the protection of service users/consumers, to name just a few. The alternative tourism has also led to the housing crisis in many tourist cities, with homeowners choosing short-term rentals over long-term rentals. As a reaction to the negative effects of short-term rentals, the public authorities have taken various measures, especially of a local or regional nature⁶.

Despite the accelerated development of the alternative tourism in the EU and its often-negative effects, the European legislator has chosen not to intervene significantly, leaving this task to the member states. The Regulation 2024/1028 on the collection and exchange of data related to short-term rental services⁷ of April 11, proves a „delicate”/minimum intervention. Although in the preamble of the Regulation⁸ it is acknowledged that STRs, beyond the opportunities for guests, hosts and the entire tourism ecosystem, generate challenges for local communities and public authorities, among others by contributing to the decrease in the availability of long-term rental housing and the rent increase and house prices, the Regulation only deals with solving the problem of data availability on STRs, such as the identity of the hosts, places where these services are provided and their duration.

The Regulation though is without prejudice *to national, regional or local rules governing access to short-term housing rental services or the provision of these services by hosts* [art. 2(2)(a)] and recognizes the compatibility of national

⁴ Platform based in Lithuania available in Romania; [Online] at: <https://www.showaround.com/info/terms-of-service>, accessed 21.02.2024.

⁵ Order no. 180/2023 of the Ministry of Economy, Entrepreneurship and Tourism approving the Methodological Norms of August 2, 2023 regarding the conditions and criteria for the selection, training, attestation and use of tourist guides, M. Of. no. 734 of August 9, 2023.

⁶ See, for instance, S. Nieuwland, and R. van Melik, *Regulating Airbnb: how cities deal with perceived negative externalities of short-term rentals*, Current Issues in Tourism, vol. 23, issue 7, 2018, pp. 811–825, <https://doi.org/10.1080/13683500.2018.1504899>; D. Czischke, G. van Bortel, *An exploration of concepts and policies on ‘affordable housing’ in England, Italy, Poland and The Netherlands*, Journal of Housing and the Built Environment, vol. 38, 2023, pp. 283–303, <https://doi.org/10.1007/s10901-018-9598-1>

⁷ Regulation (EU) 2024/1028 of the European Parliament and of the Council of 11 April 2024 on data collection and sharing relating to short-term accommodation rental services and amending Regulation (EU) 2018/1724, OJ L, 29.4.2024.

⁸ Point 1 from the Regulation 2024/1028 Preamble.

authorization of short term rental activities with the European law⁹ (the EU Services Directive), taking into account (probably) what the CJEU has already decided in the cases C-724/18 and C727/18 (*Cali Apartments, HX v. Prosecutor general près la cour d'appel de Paris, Ville de Paris*).

Next, we will clarify, first, the place of the alternative tourism of the STRs as part of the collaborative economy. We will, then, turn to the source of the „boldness” of the Romanian legislator that made it impose an authorization for STRs activities, namely the cases C-724/18 and C-727/18. In the last part, we will analyze the impact of CJEU case law on national legislation, discussing the effects of the national rules on the challenges of STRs.

1. The alternative tourism, part of the collaborative economy

For clarity, first, the concept of collaborative economy, its evolution, and the place of the alternative tourism within the collaborative economy will be discussed. Then, the CJEU ruling will be briefly analyzed as a response to one of the challenges of the alternative tourism.

1.1. Collaborative economy and the place of alternative tourism

The alternative tourism¹⁰ is a subdivision of the collaborative economy. At the outset, the collaborative economy was set apart from the traditional economy primarily by its approach to asset management, which involved utilizing idle resources within an economy¹¹, and by the involvement of online platforms, which enabled the matching of supply and demand. STRs are one of the specialized activities associated with the collaborative economy.

The idea of collaborative economy was born with *Couchsurfing*, an online platform launched in 2004 in the USA, but whose concept dates back to 1999¹².

⁹ Points 11 and 12 of the Regulation 2024/1028 Preamble.

¹⁰ Some aspects of this subject were also addressed in the author's works: *The Short-Term Tourist Rentals in Romania*, chapter VIII, in Apollònia Martínez Nadal (ed.), *La Regulación Del Alquiler Turístico : Una Aproximación De Derecho Comparado. Short-Term Tourist Rental Regulation : A Comparative Law Approach*, Aranzadi Publishing House, 2022, ISBN 9788411244350, pp. 181-200; *Regimul juridic al prestatorului de servicii român în contractele electronice internaționale specifice economiei colaborative* [The legal regime of the Romanian service provider in the international electronic contracts specific to the collaborative economy], published in the magazine "Dreptul" no. 3/2019, pp. 22-41, ISSN 1018-0435.

¹¹ The Competition Council, *Implicațiile dezvoltării economiei colaborative asupra mediului concurențial și a politicii de concurență* [The implications of the development of the collaborative economy on the competitive environment and the competition policy], p. 7, [Online] at: https://www.consiliulconcurentei.ro/wp-content/uploads/2020/05/dc-implicatiile_dezvoltarii_economiei_colaborative.pdf, accessed 23.6.2024.

¹² „In 1999, Casey Fenton scored a cheap ticket to Iceland, but needed a place to stay. He sent an e-mail to more than 1,500 students in Reykjavik asking for a place to crash, even

Then, one of the founders of the platform, Casey Fenton, a student in Boston, bought a cheap ticket Boston- Reykjavík, Iceland, but was unable to find accommodation there that he could afford financially. To find a solution, he chose to „hack” the university's database and sent 1,500 random emails asking for accommodation in student rooms. He received several offers and thus managed to live a completely different cultural experience, as if he had access „behind the scenes”¹³. This is how the idea of alternative tourism was born, at a low price, without intermediaries, oriented towards authentic experiences, accessible to everyone, since the accommodation was free. This was the genuine collaborative economy, which, however, turned out to be a myth. Although *Couchsurfing* still exists, even if it „died” four times¹⁴, as a devastating effect of the pandemic users of the platform must register and pay a financial contribution¹⁵.

Other online platforms quickly adopted the collaborative economy concept, turning it into a successful business model¹⁶, in the shadow of its cooperative and collaborative principles, which prioritized sharing costs, reciprocity in service delivery, and cooperation in the use of goods rather than profit¹⁷.

Those who owned lodging spaces but were unable to operate them as hotels due to either not meeting the requirements to be classified as tourist structures or not having followed the authorization procedure for other reasons were very supportive of the collaborative economy concept in the tourism industry. The act of only registering on an online platform, devoid of additional procedures or operating permits, offered an opportunity to earn a steady income stream by entering the alternative tourism business „through the back door” and remaining there. Progressively, the houses that were rented for a medium or a long term were withdrawn from the market and made available as STRs, through Airbnb-type platforms.

Online platforms were the catalyst that transformed, at an accelerated pace, the foundations of the collaborative economy. Using Airbnb as an example, the most popular platform worldwide, even within the European Union (hereinafter, EU), reveals that the platform is no longer able to be included in the collaborative economy. Airbnb is a multinational corporation with its parent

on someone's couch. The result was a new network of friends who offered to show him the *real Reykjavik*” (from the website *Entrepreneur*, G. Moran, *How Couchsurfing Got its Start, and Landed VC Millions*, December 9, 2011, [Online] at: <https://www.entrepreneur.com/article/220724> accessed 23.6.2024).

¹³ K. Mikołajewska-Zajac, A. Marton, *The Four Deaths of Couchsurfing and the Changing Ecology of the Web*, Internet Histories, vol. 6, issue 1-2, 2022 p. 75, <https://doi.org/10.1080/24701475.2022.2057751>

¹⁴ *Ibidem*.

¹⁵ [Online] at: <https://about.couchsurfing.com/about/terms-of-use/>, accessed 25.4.2024.

¹⁶ S. Ranchordas, *On Sharing and Quasi-Sharing: The Tension between Sharing-Economy Practices, Public Policy, and Regulation*, p. 263, in Albinsson, P.A., Yasanthi Perera, B., (eds.), *The Rise of the Sharing Economy. Exploring the Challenges and Opportunities of Collaborative Consumption*, Praeger (ebook), 2018.

¹⁷ D. Selloni, *CoDesign for Public-Interest Services*, Springer (ebook), 2017, p. 16.

company headquartered in California. In Europe, Airbnb has its seat in Dublin, Ireland as a limited liability company¹⁸. Airbnb is listed on the NASDAQ stock exchange in New York and has a value of approximately 88 billion dollars¹⁹. In addition, according to a journalistic article, cited by NASDAQ²⁰, Airbnb represents one of the most effective investments in stocks regarding the AI market, as the Airbnb platform uses high-performance AI models in the provision of services specific to STRs (including *LLM - Large Language Models, computer vision models, machine learning, AI - powered Photo Tour tool*, launched in winter 2023) and recently acquired GamePlanner.AI²¹ for \$200 million²². Not bad at all for a company that only intermediates STRs contracts, whose main goal is *to create a world where anyone can belong anywhere*²³.

The enthusiasm of the new „actors” in the (world) tourism market has led to the expansion of this type of tourism, with both positive and negative consequences, depending on the interests pursued or affected.

For instance, in 2022, just in the EU, 547 million nights of accommodation—roughly 1.5 million tourists per night—were reserved through four large online platforms: Airbnb, Booking.com, Expedia Group, and Tripadvisor²⁴. From October 2022 to October 2023, the number of nights booked increased to roughly 654 million²⁵. The impact of STRs, however, is not fully documented because the statistics relied solely on data from the four platforms with which Eurostat, acting on behalf of the European Commission, came to a collaboration agreement in March 2020²⁶. Under this agreement, the platforms agreed to share information about the number of guests and nights of accommodation, but not the identities of the guests or hosts.

¹⁸ [Online] at: <https://www.airbnb.co.uk/about/company-details>, accessed 28.4.2024.

¹⁹ On December 28, 2023, Airbnb's shares called ABNB had a value of \$ 88,209,622.91 8, i.e. \$88 billion market capitalization, information available [Online] at: <https://www.nasdaq.com/market-activity/stocks/abnb>, accessed. 5.3.2024.

²⁰ K. Drury, *4 Top Artificial Intelligence (AI) Stocks to Buy Before 2024*, December 27, 2023, [Online] at: <https://www.nasdaq.com/articles/4-top-artificial-intelligence-ai-stocks-to-buy-before-2024>, accessed 28.1.2024.

²¹ [Online] at: <https://news.airbnb.com/airbnb-has-acquired-gameplanner-ai/>, accessed 8.2.2024.

²² [Online] at: https://www.crunchbase.com/organization/gameplanner-ai/signals_and_news, accessed 8.2.2024.

²³ [Online] at: <https://businessmodelanalyst.com/airbnb-mission-and-vision-statement/>, accessed 8.2.2024.

²⁴ [Online] at: <https://www.europarl.europa.eu/news/en/headlines/economy/20231127STO15403/short-term-rentals-new-eu-rules-for-more-transparency>, accessed 19.2.2024.

²⁵ [Online] at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Short-stay_accommodation_offered_via_online_collaborative_economy_platforms_-_monthly_data, accessed 19.2.2024.

²⁶ [Online] at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/cn-20200305-1>, accessed 19.2.2024.

When Regulation 2024/1028 is implemented (starting from May 20, 2026), comprehensive data will be acquired as the platforms will be required to supply it.

Romania is not an exception to this world *trend* of alternative tourism, although, compared to other European states at the top of the list of tourists' preferences²⁷, it has not faced extreme negative situations (dislocation of local population, excessive tourism with devastating consequences on the quality of life of the locals, on the development of cities, on the environment, on the housing crisis, etc.). Romania is ranked 23rd in the most recent Eurostat statistics, ahead of Slovenia, Slovakia, Finland and Sweden²⁸.

Nonetheless, a certain CJEU's decision prompted the Romanian lawmaker to take action in order to offset the detrimental impacts of STRs.

1.2. *Cali Apartments, HX v. Procureur général près la cour d'appel de Paris, Ville de Paris* – in response to STRs challenges

In the related cases C-724/18 and C727/18 (*Cali Apartments, HX v. Prosecutor general près la cour d'appel de Paris, Ville de Paris*), the CJEU, at the request of the French Court of Cassation, interpreted the EU Services Directive (Directive 2006/123/EC²⁹) and confirmed the compatibility of European law with the authorization procedure for STRs activities.

The facts³⁰ concern the STR of a studio apartment located in Paris, that was rented without the prior authorizations required by French national law (the Construction and Housing Code). As a result, two decisions rendered by the Paris Court of Appeal resulted in the imposition of cumulative fines of 20,000 euros and the restoration of the studio apartment's purpose as a home/changing back to its residential purpose. The owners of the studio apartment, Cali Apartments and HX, appealed the decisions, claiming that the EU Services Directive and the principle of EU law supremacy were not followed and that, among other things, French law restricts the free provision of services without a compelling public interest reason. The CJEU was asked multiple questions by the French Court of Cassation, essentially requesting an interpretation of the Services Directive in relation to the dispute.

The CJEU answered that the Services Directive is applicable to STRs activities and that a national law subjecting such activities to prior authorization

²⁷ From the statistical map made available by the European Commission, it can be seen which states are seriously "affected" by this type of alternative tourism:

https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Short-stay_accommodation_offered_via_online_collaborative_economy_platforms_-_monthly_data#Mediterranean_regions_popular_in_Q2_2023, accessed 19.2.2024.

²⁸ [Online] at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Short-stay_accommodation_offered_via_online_collaborative_economy_platforms_-_monthly_data, accessed 19.2.2024.

²⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/36, 27.12.2006.

³⁰ Points 19-25 of the decision.

falls within the scope of the notion of „authorization regime” specified in the Directive. The CJEU has determined that the Services Directive (art. 10, para. 2) *„must be interpreted as not precluding national legislation introducing a scheme which makes the exercise of certain activities consisting in the letting, for remuneration, of furnished accommodation subject to prior authorisation, which is based on criteria relating to the fact that the premises in question are let ‘repeatedly for short periods to a transient clientele which does not take up residence there’ and which gives the local authorities the power to specify, within the framework laid down by that legislation, the conditions for granting the authorisations provided for by that scheme in the light of social diversity objectives and according to the characteristics of the local housing markets and the need to avoid exacerbating the housing shortage, making those authorisations subject, if necessary, to an offset requirement in the form of the concurrent conversion of non-residential premises into housing, provided that those granting conditions are in line with the requirements laid down by that provision and that that requirement can be met under conditions that are transparent and accessible.”*³¹.

The Advocate General appreciated in his conclusions that *„(...) there is a further degree of complexity in terms of the overall balance to be struck in cases in which the freedom to conduct business is not limited for everybody in the same way, in the name of a social or communitarian interest. In that scenario, some individuals are allowed to freely conduct their desired business, while others are not. The rights and interests of would-be providers of certain services are weighed against (and potentially limited by) not only the social interests of the community, but also, horizontally, against exactly the same rights of other individuals. One person’s freedom to provide services thus competes with the interest of others wishing to in provide exactly the same service. In a world of scarce resources, capacities, and authorisations, the price of granting access to one person can often be denying the same to his or her neighbour.”*³².

In France, the rules in the matter of STRs are of an increased complexity; there are provisions in several normative acts, with regional applicability, under expressly established conditions. Thus, the French legislator provides, among other things: in the Tourism Code, that *a person who offers for rent a furnished space for tourist use, regardless of whether this space is classified or not, must declare this in advance to the mayor of the commune in which it is located the furnished space, and in the Construction and Housing Code that in communes with more than 200,000 inhabitants and in those of Hauts -de Seine, Seine Saint Denis and Val de Marne, the modification of the regime of use of residential spaces is subject to prior authorization, and that the rental of a furnished space intended for housing repeatedly and for short periods to occasional clients who do not establish their domicile in the respective space constitutes a change in the regime of use*³³.

³¹ Point 4 of the decision.

³² Point 95 of the Conclusions of the Advocate General, Mr. Michal Bobek, presented on April 2, 2020 in related cases C - 724/18 and C -727/18.

³³ Points 12-14 of the CJEU decision in the cases C-724/18 and C-727/18.

Although there is no data to confirm that the Romanian legislation (the Order of the Minister of Entrepreneurship and Tourism no. 510 of February 22, 2022)³⁴, as will be presented below, had as its source the CJEU case law, the latter could be seen as an effective catalyst for change. The judgments issued by the CJEU in the interpretation of European law, based on art. 267 lit. b) TFEU (ex-art. 234 TCE)³⁵, represents a source of law, even for continental law legislation, where case law, traditionally, is not³⁶.

2. The rules applicable to STRs in Romania

To understand the context of the adoption of the rules on STRs, we will, first, briefly discuss the evolution of the phenomenon, in order to, then, comment on the current rules in this sector of the alternative tourism in Romania.

2.1. The evolution of STRs

The rental of villas, apartments, or rooms in family homes for tourist purposes was and is used in traditional tourism; these properties represent tourist structures, classified in the specific legislation³⁷.

The term „traditional tourism” refers to the sort of rentals associated with hotels and other tourist structures, which either joined the market prior to the emergence of internet platforms or continue to do so independently of them. The mere fact that hotels choose to use online platforms to be more „visible” in their market does not make them platform dependent. However, if it concerns small hotels, a situation of economic dependence could be created, as shown, for instance, in the dispute between a small hotel in Germany, *Wikingerhof*, and the *Booking.com* platform (case C-59/19). In the EU, rules have been adopted in this regard in the so-called P2B Regulation³⁸. Unlike the traditional tourism, for the alternative tourism online platforms are the *raison d'être*; alternative tourism does not exist „outside” the platforms.

³⁴ Order no. 510 of February 22, 2022 of the Ministry of Entrepreneurship and Tourism for the amendment and completion of the Methodological Norms regarding the issuance of classification certificates of tourist structures with accommodation and public catering functions, of tourism licenses and patents, approved by the Order of the President of the National Tourism Authority no. 65/2013, M. Of. no. 200 from March 1, 2022.

³⁵ The Treaty on the Functioning of the European Union (TFEU), consolidated version, OJ C 202 of 7 June 2016.

³⁶ C.T. Ungureanu, I.A. Toader, *Drept civil. Partea Generală. Persoanele* [Civil Law. General Part. Persons.], 5th Edition, Hamangiu Publishing House, Bucharest, 2022, p. 28.

³⁷ Art. 2, lit. b) from the 2013 Methodological Norms regarding the issuance of classification certificates of tourist structures with accommodation and public catering functions, of tourism licenses and patents, M. Of. no. 353 bis of June 14, 2013, with subsequent amendments and additions.

³⁸ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on the promotion of fairness and transparency for businesses using online intermediation services, OJ L 186/57 of 11.7.2019.

Going back to STRs, in order to carry out this activity, the owners of the villas/apartments/rooms for rent had to have a *certain form of organization* (authorized natural persons, individual or family businesses, commercial companies or other type of legal entity constituted according to the law³⁹) and obtain a *classification certificate* (following a complex procedure), i.e. a *document* issued by *the central public authority responsible* in the field of tourism, which represents a codified form of synthetic presentation of the level of comfort, the quality of the facilities and the services provided⁴⁰. These tourist structures had to meet a series of *mandatory minimum criteria*, which were specified in detail in the legislation⁴¹.

Outside of this organized framework of traditional tourism, the renting of villas/apartments/rooms for tourist purposes, via online platforms, such as Airbnb, took place without the fulfillment of any condition regarding the quality of the owner, holding a classification certificate or other specific conditions. This „ease” of housing exploitation, mainly due to the evolution of technology, was particularly attractive and was exploited with interest, especially in large cities with tourist potential and in mountain and seaside resorts.

This type of business first aroused the interest of small entrepreneurs, who found that STR brings clearly superior benefits compared to long-term rental and that they do not have to comply with any of the rules imposed on hoteliers in the tourism industry. From small entrepreneurs, the business of STRs came to the attention of real estate investors, bigger or smaller, who were stimulated, perhaps, to a certain extent, by the offers of other entrepreneurs-intermediaries, who were offering them assistance. There are real estate agencies, which offer real estate as an investment for STRs, accompanied by other services, including home furnishing after the purchase, advice to make the investment more efficient, assistance in obtaining the necessary permits, etc.⁴².

Also, property management companies have emerged⁴³, which are taking care of all aspects related to the rental, in exchange for a commission, which varies around 20% of the value of the earned sums⁴⁴. The administrator oversees: the reservations, the communication with the guests, the interior *design*, the equipment of the property with everything is necessary for being rent, the cleaning, the repairs, the maintenance services, the service providers, the payment

³⁹ Art. 2, lit. a) from the Methodological Norms of 2013, currently modified by Order of the Minister of Entrepreneurship and Tourism no. 510 of February 22, 2022.

⁴⁰ Art. 2, lit. d) from the 2013 Methodological Norms.

⁴¹ Appendix no. 1.7 to the Methodological Norms of 2013.

⁴² [Online] at: <https://www.storia.ro/blog/ghid-imobiliar/totul-despre-inchirierea-in-regim-hotelier-sfaturi-de-amenajare> , accessed 19.2.2024.

⁴³ For example, Cityhome [Online] at: <https://cityhome.ro/>, accessed 19.2.2024; RentAway from Braşov [Online] at: <https://rentaway.ro/> , accessed 19.2.2024.

⁴⁴ Property concept [Online] at: <https://propertyconcept.ro/administraterea-proprietatii/>, accessed 19.2.2024.

of utilities and maintenance⁴⁵. The owner just needs to relax and collect the profit (after the initial investment).

If the hosts do not enter into management contracts, but prefer to control the business themselves, directly, they can still use companies, that offer cleaning services, along with other services related to STRs, such as legal assistance for individuals who choose to become hosts⁴⁶.

Until February 22, 2022, STRs did not benefit from any specific legislation, being subject to certain general provisions. Any property owner could list his/her property on an Airbnb-type platform. Theoretically, a tenant/lessee could do the same, but only with the written consent of the lessor/owner, as the art. 1833 Civil Code provides.

If the owner of an apartment or, in general, of a building in a condominium (by condominium being understood according to art. 2 letter h) from Law 196/2018⁴⁷, a *real estate consisting of land with one or more constructions, in which there are at least 3 individual properties represented by homes and homes or spaces with another purpose, as the case may be, and undivided shares of joint ownership*) made the decision to list his/her property on an Airbnb-type platform, in order to provide STRs services, then it could be considered that *he/she is changing the purpose of the building* and that he/she would have needed the prior written consent of directly affected owners with whom the space subject to change adjoins, horizontally and vertically (art. 40 of Law 196/2018). Simultaneously with obtaining the consent of the neighboring owners, he/she should also have concluded a document by which the owner declared the activity that was to be carried out in that space, as well as the number of people based on which the expenses per number of people were to be calculated, a document that had to be submitted, in copy, to the president of the owners' association. If the owner decided to change the purpose of the home without the necessary approvals, the act would have been sanctioned as an administrative contravention [art. 102 para. (1) lit. g) from Law 196/2018].

In practice, however, such formalities did not take place. No disputes were identified between the neighboring owners and the owner of the property who rented it on short term, regarding the change of purpose of the property, although in *Flash Eurobarometer 495 Short-term rentals in the EU*, published in October 2021⁴⁸, 21% of Romanians interviewed said that the effect of STRs on their quality of life, in the neighborhoods where they live, was rather negative, and 68% reported an increase in inconveniences related to this type of rental, especially regarding noise, crowding, household waste⁴⁹.

⁴⁵ *Idem*.

⁴⁶ Like, for example, Holidays Host by SC Global Apps SRL, [Online] at: <https://www.holidayshost.eu/administrare-apartamente-regim-hotelier/acte-necesare-inchiriere-apartament-in-regim-hotelier/>, accessed 19.2.2024.

⁴⁷ Law no. 196/2018 regarding the establishment, the organization and the functioning of owners' associations and the administration of condominiums, M. Of. no. 660 of July 30, 2018.

⁴⁸ [Online] at: <https://europa.eu/eurobarometer/surveys/detail/2279>, accessed 9.2.2024.

⁴⁹ European Commission, *Flash Eurobarometer 495 (Short-term rentals in the EU)*, GESIS, Cologne, 2022, p. 3 and 22, <https://doi.org/10.4232/1.13855>.

Individual home owners were not required to seek permission from their neighbours in order to alter the original purpose of their residence. They could change the original purpose of their home, following only the general rules.

2.2. Rules applicable from February 22, 2022

After several failed attempts⁵⁰, the most promising of which - the Tourism Law - stalled in May 2023, a legislation was adopted, which went almost unnoticed. Thus, by Order of the Minister of Entrepreneurship and Tourism no. 510 of February 22, 2022 (hereinafter, Order 510/2022), natural persons, who offer short-term accommodation, have been qualified as *economic operators*. According to this order, *an economic operator is the natural person, the authorized natural person, the individual or family enterprise, the company or other legal person constituted according to the law, which carries out accommodation, public catering and other specific services in tourist structures as owner and/ or their administrator, respectively the company or other legal entity established according to the law, which carries out economic activities specific to tourism agencies;*" [art. 2 lit. a)].

To legally carry out STRs activities, the *natural persons*, owners of tourist structures with accommodation functions such as apartments and/or rooms for rent in family homes, are required to get a *classification certificate* from the central public authority responsible for tourism. Among the necessary documents are: *the consent of the association of tenants/owners or the consent of the owners with whom the natural person has common walls, horizontally and vertically*; in this document should be mentioned the activities to be carried out in the respective tourist structure; *the document from which the property right over the tourist structure results, as well as the address of the respective unit* (art. 4.1¹). According to art. 4.1² *the natural persons can request classification only for a maximum number of 7 rooms classified under the type of tourist structure as apartments and/or rooms for rent in family homes, regardless of the number of homes in which they are located*.

In parallel, certain clarifications regarding STRs come from the fiscal legislation, which precedes the Order 510/2022. According to the Fiscal Code, STR of rooms located in personally owned dwellings is defined as *offering the possibility of staying for a period of a minimum of 24 hours and a maximum of 30 days in a calendar year to any person who travels for tourist purposes outside his/her usual living environment* [art. 83 para. (3)]. Every income from any source, including the STRs, is taxable⁵¹. The owner's income from tourist rentals is taxed differently, depending on *the number of rooms rented*.

⁵⁰ As the Law Proposal from 2016 on *Access Economy*, which, however, got stuck on the path of the legislative procedure, first, in April 2017, and then in April 2020, when it received an opinion from the Legislative Council, with many amendments [Online] at: http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=16140 , accessed 19.2.2024; another attempt was the Tourism Law from 2019, which had a few provisions regarding short term rentals [Online] at: https://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=18052 , accessed 19.2.2024 and which was blocked in 2023.

⁵¹ I. M. Costea, *Drept financiar. Note de curs* [Financial Law. Course notes], 7th Edition, Hamangiu Publishing House, Bucharest, 2021, pp. 213-215; C.F. Costas, *Drept fiscal* [Fiscal Law], Universul Juridic Publishing House, Bucharest, 2016, pp. 234-238.

3. Effects of current legislation on STRs

Alternative tourism, generally, and STRs, particularly, have caused distortions at least on consumer protection, commercial competition, income taxation. The 2022 rules are an effective approach that will make these detrimental effects progressively lessen.

3.1. Protection of alternative tourism services consumers

Who may or may not be a consumer, depends on the characterization of the service provider. Two requirements must be satisfied for the user to be considered a consumer: the consumer's actions (the conclusion of the STR contract) must be for a private purpose unrelated to his or her professional activity and the other contractual party must be a professional⁵².

Should the STR service provider be a natural person - defined as an *economic operator* under Order 510/2022 - then the user will be deemed a consumer, and the protective rules pertaining to consumer contracts will be applied. The economic operator is a type of professional as referred to in art. 3 Civil Code, which includes the categories of merchant, entrepreneur, *economic operator*, as well as any other persons authorized to carry out economic or professional activities⁵³. As the natural person is now an economic operator all users of STRs enjoy automatically consumer protection rules. Before 2022, when the service provider was a natural person, the user was deemed his/her equal contractual party and the contract was not a consumer one, unless the user proved the natural person was a professional⁵⁴.

The user of alternative tourism services benefits from all the rights granted to the consumer, from domestic or European legislation, including the protective rules in the field of private international law regarding the competent authority to solve disputes and the applicable law. For example, if a tourist with his/her habitual residence or domicile outside Romania, concludes a STR contract with a natural person, regarding a room/apartment located in Romania, and later misunderstandings arise between the parties, the tourist will be able to invoke the application of the rules of the European regulations, respectively the provisions of the Brussels I bis Regulation⁵⁵ (art. 17-19) regarding jurisdiction and of the Rome I

⁵² G. van Calster, *European Private International Law*, 2nd Edition, Hart Publishing, USA, 2016, p. 90; C.T. Ungureanu, *Drept internațional privat european în raporturi de comerț internațional* [European private international law in international commercial relations], Hamangiu Publishing House, Bucharest, 2021, pp. 188-190.

⁵³ Art. 8 (1) from the Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code.

⁵⁴ For a detailed presentation, see C.T. Ungureanu, *The legal regime...op. cit.*, pp. 22-41.

⁵⁵ Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351 of 20.12.2012.

Regulation⁵⁶ (art. 6), regarding the applicable law. According to art. 18 para. (1) of the Brussels I bis Regulation, the tourist can bring an action against the service provider, either before the courts of the member state in whose territory the latter has his/her domicile, or before the courts of the place where the consumer has his/her domicile. Regarding *the applicable law*, according to art. 6 para. (1) of the Rome I Regulation, the law of the habitual residence of the consumer is applicable.

3.2. Lack of protection of the natural person as alternative tourism service provider

Since the natural person offering alternative tourism services is a professional, he or she abides by the rules applicable to professionals, including those pertaining to their contractual arrangement with the platform where the property or properties are listed. If, prior to the rules of 2022, he/she had the opportunity to assert his rights as a platform user/consumer in connection with the unenforceability of abusive contractual clauses, for example, he/she is currently limited to using the general rules.

When it comes to abusive clauses, professional parties to adhesion contracts concluded with platforms have little success in invoking them because, under EU law and member state national laws resulting from the implementation of European directives, the right for the annulment/ineffectiveness of abusive clauses is reserved to consumers⁵⁷. However, Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services⁵⁸, known as the P2B Regulation (*platform to business*), could offer to a certain extent protection to professionals, in the category of which the provider of alternative tourism services as a natural person, also falls. The Regulation applies to companies using online intermediation services, which are defined in art. 2.1 as being „[...] *any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession*;”. According to P2B Regulation, the platforms „[...] *have superior bargaining power, which enables them to, in effect, behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users and, indirectly, also of consumers in the Union* [...]”⁵⁹. The superiority is based on *the economic dependence* of businesses, which reach consumers through

⁵⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177 of 4.7.2008.

⁵⁷ The abusive clause is defined in art. 4 para. (1) from Law no. 193/2000 on abusive clauses in contracts concluded between traders and consumers, which transposes the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

⁵⁸ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, JO, L 186/57, 11.7.2019.

⁵⁹ Recital 2 of the P2B Regulation.

platforms. For example, platforms „*might unilaterally impose on business users practices which grossly deviate from good commercial conduct, or are contrary to good faith and fair dealing*”⁶⁰.

The provisions of the Regulation play the role of *overriding mandatory rules*⁶¹, as they apply *irrespective of the law otherwise applicable* [art. 1(2)]. The sanction for non-compliance with the provisions of the P2B Regulation regarding the terms and conditions (contractual clauses) imposed on platform users is their *nullity* [art. 3 (3)].

3.3. Effects on commercial competition between traditional and alternative tourism service providers

Among other benefits, hosts using STRs did not have to comply with any of the formalities imposed on traditional tourism service providers. The latter advocated for fair competition⁶² through their groups, using the slogan "Same market, same rules."⁶³. The issue of unfair competition between unclassified and classified tourism structures in Romania has been somewhat resolved by the new rules from 2022.

To legally enter into STR contracts for their properties, according to Order 510/2022, natural persons must obtain a *classification certificate*. The classification certificate should be requested from the public central authority responsible for tourism (Ministry of Economy, Entrepreneurship and Tourism)⁶⁴. To get the certificate, several documents must be submitted:

- a standardized request filed by the owner of the room/apartment, which must include, in addition to the identification data of the owner and of the property to be included in the tourist circuit, the classification category (stars); the owner must submit the document proving the ownership; a tenant, who has a subletting clause in the contract, cannot request a classification certificate;
- a standardized sheet regarding the nominal classification of accommodation spaces by category and type, as provided in the 2013 Methodological Rules⁶⁵; this requirement seeks to ensure a certain quality of

⁶⁰ *Idem*.

⁶¹ For details regarding the overriding mandatory rules, C.T. Ungureanu, *Overriding mandatory rules in international commercial contracts dispute resolution. A Romanian perspective*, in Cuadernos de Derecho Transnacional, Vol. 12, no. 2/2020, pp. 784-794.

⁶² C. Colomb, T. Moreira de Souza, *Regulating short-term rentals. Platform-based property rentals in European cities: the policy debates*, Property Research Trust, 2021, pp. 28-29, <https://doi.org/10.52915/KKGD3578>

⁶³ T. Aguilera, F. Artioli, C. Colomb, *Explaining the diversity of policy responses to platform-mediated short-term rentals in European cities: a comparison of Barcelona, Paris and Milan*, Environment and Planning A: Economy and Space, Vol. 53, no. 7/2019, pp. 1689-1712, <https://doi.org/10.1177/0308518X19862286>

⁶⁴ [Online] at: <https://turism.gov.ro/web/autorizare-turism/>, accessed 5.5.2024.

⁶⁵ Methodological Rules from June 10, 2013 regarding release of classification certificates of tourism structures with accommodation functions and public food, of licenses and tourism patents, M. Of. no. 353 bis of June 14, 2013.

services offered to guests, STRs providers complying this way with the same rules as traditional tourism service providers; for instance, an apartment should have one or more bedrooms (5 bedrooms maximum), a lounge (living room), vestibule and an ensuite bathroom; a 5 stars apartment should have 1 bathroom for 2 persons; a 4 stars or less should have at least 1 bathroom for 4 persons⁶⁶;

- the consent of the owners' association or the consent of the owners with whom the applicant has common walls, horizontally and vertically, from which the activities to be carried out in the respective tourist structure shall result; this requirement aims to avoid conflict situations in multi-apartment buildings and ensure the quality of life of co-owners/tenants.

According to art. 13(2) of the same Methodological Rules, obtaining the classification certificate, *does not exempt the economic operator from complying with the provisions of Law no. 359/2004 regarding the simplification of the formalities for the registration in the trade register of natural persons, family associations and legal persons, their fiscal registration, as well as from the following authorizations: sanitary, sanitary-veterinary, fire safety, environment and labor protection, as appropriate*. This means that natural persons providing STRs must obtain other authorizations in addition to the classification certificate. If they operate in the same market, then they must follow the same rules. For example, the need to obtain the fire safety authorization (mandatory even before the Order 510/2022, but whose existence was difficult to prove) also emerges from Law no. 307/2006 on fire protection⁶⁷; art. 30 stipulates, among other things, that in case of modification of constructions or *change of their purpose*, a *fire safety approval or authorization* must be issued at the request of *the natural* or legal person who finances and carries out new investments or interventions in existing constructions or, as the case may be, of the beneficiary of the investment. Also, a health authorization is required for activities that pose a risk to the health of the population, which in the case of natural persons is done through a declaration on their own responsibility⁶⁸.

In addition, art. 4.1² of the Order 510/2022 *permits economic operator-natural person to request the classification of up to 7 rooms under the categories of tourist structures (apartments, and/or rooms in family homes), regardless of the number of homes in which these are located*. Therefore, in the event that natural persons aim to operate entire blocks of flats as hotels, making investments

⁶⁶ Art. 14 (2), letter j) from Annex 4 of the 2013 Methodological Rules.

⁶⁷ M. Of. no. 297 of April 17, 2019.

⁶⁸ See in this regard, Order of the Ministry of Health no. 1030 of August 20, 2009 regarding the approval of sanitary regulation procedures for location, development, construction projects and for the operation of the objectives that carry out activities with a risk for the health of the population, (M. Of. no. 603 of September 1, 2009), which in Article 5 provides that *The procedure for the health authorization of the operation based on the self-responsible declaration applies to all natural persons or legal entities carrying out one of the activities included in annex no. 2 and which are not subject to registration in the trade register, and in annex 2 the activities related to hotel rentals are: 5520 - Accommodation facilities for holidays and short-term periods and 5590 - Other accommodation services*.

in this regard, they must take the necessary steps to fit them into other tourist structures, not apartments or rooms for rent, as STRs.

3.4. Effects on the taxation of income from STRs. EU Regulation 2024/1028

It is possible that the taxation of income from STRs will be facilitated by the compulsory classification certificates. The Ministry of Economy, Entrepreneurship and Tourism keeps a record of tourist structures run by natural persons. However, complete data on this type of activity cannot be made available unless the platforms, which intermediate STRs, are required to provide them to the authorities.

Although the European legislator has passively assisted the development of the so-called collaborative economy for a long time, without having any regulatory initiative, in April 2024 the EU Regulation 2024/1028 on data collection and sharing relating to short-term accommodation rental services, applicable from 20 May 2026, was adopted. Mainly, the European normative act establishes measures regarding:

- registration of hosts, through a simple online procedure, each host receiving a number, which will facilitate identification by the authorities;
- increased security measures for users, in the sense that the platforms will be required to check the accuracy of the details of the properties offered for rent and will do random checks; the authorities will be able to order the stopping of non-compliant listings or/and their elimination and will be able to impose sanctions on the platforms [which will have to be established by the member states, according to art. 15 (3) of the Regulation];
- data sharing measures; to receive data from the platforms about the activity of hosts a digital single point of entry will be created to help local authorities monitor rental activities and improve tourism; for micro and small platforms with an average of up to 4,250 listings, a simpler data sharing system will be implemented.

With the application of the Regulation, the national authorities will have several `tools` at their disposal to ensure the taxation of income from STRs.

3.5. Sanctions for non-compliance with the rules

Government Decision no. 1267 of December 8, 2010 regarding the issuance of classification certificates, licenses, and tourism patents⁶⁹ establishes the sanctions applicable in case of non-compliance with the rules. According to art. 7 it is *prohibited to operate tourist structures without a provisional authorization for operation, without classification certificates, with expired classification certificates or with a different structure of the premises than that established in the classification certificate*. As art. 15 reads, the following facts (among others) are contraventions: *carrying out the activity in unclassified or provisionally unauthorized tourist structures; the offering, marketing of tourist services and/or tourist service packages*

⁶⁹ M. Of. no. 866 of December 23, 2010.

by travel agencies for unclassified, provisionally unauthorized tourist structures or with withdrawn classification certificates. Art. 16 (1) specifies the sanctions that apply in the case of contraventions, which consist of substantial fines. For example, for carrying out the activity in unclassified or provisionally unauthorized tourist structures, the fine that can be applied varies from 40000 RON to 50000 RON (8000 – 10000 euros).

The detection of contraventions and the application of sanctions are handled by personnel with control duties within the authority of the Ministry of Economy, Entrepreneurship and Tourism. On the Ministry's website there is a detailed list of tourist structures with classification certificates, which, on February 15, 2024⁷⁰, included 2136 natural persons who had obtained the certificate. The list updated on April 23, 2024⁷¹ contained 4607 natural persons, which means that the authorization mechanism is already starting to work, although, still, many such tourist structures operate without classification certificates. From the Eurostat statistics⁷² (which is based on data provided by the four major platforms with which it collaborates – *Airbnb*, *Booking.com*, *Expedia Group* and *Tripadvisor*) 868,584 nights of accommodation were offered in Romania between January and March 2023.

Conclusions

The Romanian legislator opted for a simple and effective solution to solve the challenges of the alternative tourism activities. The inclusion of the service provider in the category of professionals represents an approach that protects the general interest, respects the principles of fairness and non-discrimination, and gives back to the consumer of such services the guarantee of his/her protection.

The CJEU decided that the authorizations for STRs services imposed by the member states are compatible with the European law and EU Regulation 2024/1028 has confirmed this line of action. National and local authorities have the opportunity to mitigate the effects of excessive tourism facilitated by the platform industry and restore balance on the tourism market, according to the tradition and specific approach of each national law of the EU member states.

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⁷⁰ [Online] at: <https://turism.gov.ro/web/autorizare-turism/>, accessed 20.2.2024.

⁷¹ *Ibidem*.

⁷² [Online] at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20231002-1>, accessed 20.2.2024.

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