OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 2 April 2020(1)

Joined Cases C-724/18 and C-727/18

Cali Apartments SCI (C-724/18)
HX (C-727/18)
v
Procureur général près la cour d'appel de Paris,
Ville de Paris

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling — Freedom of establishment — Directive 2006/123/EC — Scope — Repeated letting of furnished accommodation for residential use for short periods to a transient clientele which does not take up residence there — National legislation and municipal rules making that letting subject to prior authorisation and offsetting — Justification — Objective of ensuring sufficient and affordable long-term rental housing — Proportionality)

I. Introduction

1. Cali Apartments and HX ('the Appellants') have been fined for the unauthorised letting of their respective studios in Paris, France. Under French law, the repeated letting of furnished accommodation for short periods to a transient clientele which does not take up residence there is subject to authorisation. The Appellants have challenged that authorisation requirement before the national courts as being incompatible with their freedom to provide services under EU law.

2. In this case, the Court is again invited to consider the extent to which the EU legislation on services is to be applied to various activities in the peer-to-peer economy carried out through digital platforms. However, in contrast to the previous cases that focused primarily on the nature of the activities offered upstream by the platforms themselves, (2) the present case is concerned with the social and societal effects of such services downstream on their respective 'markets', such as the housing market in Paris.

3. The present cases pose three broad questions of principle. The answer to the first two questions is, in my view, not overly difficult: does national legislation that makes the letting of furnished accommodation for short stays subject to an authorisation issued by the relevant mayor fall within the scope of Directive 2006/123/EC on services in the internal market (3) ('the Services Directive')? If so, can the putting in place of an authorisation scheme for this type of service be justified by overriding reasons

relating to the public interest, in particular ensuring the supply of affordable long-term housing and the protection of the urban environment?

4. The affirmative answer that I suggest that Court should give to both of these questions nonetheless opens up the truly thorny third issue raised by the referring court: what criteria or measures would be proportionate to the public interest objectives pursued? As regards the municipal rules of the City of Paris, to what extent can the grant of such an authorisation be made conditional upon an offset requirement in the form of the concurrent conversion of non-residential premises into housing?

II. Legal framework

A. EU law

5. Recital 9 of the Services Directive states that:

‘This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.’

6. Recital 27 reads as follows:

‘This Directive should not cover those social services in the areas of housing … These services are essential in order to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity and should not be affected by this Directive.’

7. Article 2 defines the scope of the Services Directive. It provides that:

‘1. This Directive shall apply to services supplied by providers established in a Member State.

2. This Directive shall not apply to the following activities:

(a) non-economic services of general interest;

…

(j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;

…’

8. Article 4 defines several terms used in the Services Directive:

‘For the purposes of this Directive, the following definitions shall apply:

1) “service” means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty;

2) “provider” means any natural person who is a national of a Member State, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who offers or provides a service;

…

6) “authorisation scheme” means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;

7) “requirement” means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;

8) “overriding reasons relating to the public interest” means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;

…’

9. Article 9, which opens Chapter III of the Services Directive, dedicated to freedom of establishment for providers, lays down rules regarding authorisation schemes:

‘1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

a) the authorisation scheme does not discriminate against the provider in question;

b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

…’

10. Article 10 of the Services Directive sets out the conditions for the granting of an authorisation:

‘1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.

2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;

(b) justified by an overriding reason relating to the public interest;

(c) proportionate to that public interest objective;

(d) clear and unambiguous;

(e) objective;

(f) made public in advance;

(g) transparent and accessible.

…

7. This Article shall not call into question the allocation of the competences, at local or regional level, of the Member States' authorities granting authorisations.'

11. Article 11 of the Services Directive concerns the duration of an authorisation.

'1. An authorisation granted to a provider shall not be for a limited period, except where:

(a) the authorisation is being automatically renewed or is subject only to the continued fulfilment of requirements;

(b) the number of available authorisations is limited by an overriding reason relating to the public interest;

or

(c) a limited authorisation period can be justified by an overriding reason relating to the public interest.

…'

12. Article 12 of the Services Directive, entitled 'Selection among several candidates', concerns situations where the number of authorisations available for a given activity is limited. Article 13 lays down rules regarding authorisation procedures. For their part, Articles 14 and 15 of the Services Directive respectively set out the prohibited requirements and those subject to evaluation.

B. French law

1. Tourism Code

13. Article L. 324-1-1 of the Code du tourisme (Tourism Code) provides that:

'Any person letting furnished tourist accommodation, whether or not the accommodation is classified as such for the purposes of this Code, must have made a prior declaration thereof to the mayor of the municipality in which the accommodation is located.'

2. Construction and Housing Code

14. Article L. 631-7 of the Code de la construction et de l'habitation (Construction and Housing Code) provides that, in municipalities with more than 200 000 inhabitants, change of use of residential premises is subject to prior authorisation under the conditions set out in Article L. 631-7-1 of that code.

15. Loi n° 2014-366 du 24 mars 2004 pour l'accès au logement et un urbanisme rénové (Law No 2014-366 of 24 March 2014 on access to housing and the regeneration of urban planning) added a final, sixth, paragraph to Article L. 631-7 of the Construction and Housing Code. That provision states that 'the repeated letting of furnished accommodation for residential use for short periods to a transient clientele which does not take up residence there constitutes a change of use under that provision'.

16. Article L. 631-7-1 of the Construction and Housing Code lays down the procedure for obtaining the authorisation provided for in Article L. 631-7:

‘Prior authorisation for change of use shall be granted by the mayor of the municipality in which the property is located ... It may be subject to an offset requirement in the form of the concurrent conversion of non-residential premises into housing.

Authorisation for change of use shall be granted on an individual basis. It shall cease to have effect upon the definitive termination, for any reason, of the beneficiary’s professional practice. However, where authorisation is subject to an offset requirement, it is the premises, and not the individual, which are granted that status. The premises offered as an offset shall be listed in the authorisation which is published in the property file or entered in the land register.

...

For the application of Article L. 631-7, a decision adopted by the municipal council sets the conditions for granting authorisations and determining the offset requirements by quartier (neighbourhood) and, where appropriate, by arrondissement (district), in the light of social diversity objectives, according to, inter alia, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage. ...’

17. A temporary authorisation scheme may also be established by the municipal council, under Article L. 631-7-1-A of the same code, which provides that a decision adopted by the municipal council can establish a temporary authorisation scheme for change of use, allowing natural persons to let residential premises for short periods to a transient clientele which does not take up residence there. The decision sets the conditions for the granting of that temporary authorisation by the mayor of the municipality in which the premises are located. It also determines the criteria for that temporary authorisation, which may relate to the duration of the rental contracts, the physical characteristics of the premises and the location of the premises, according to, inter alia, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage. Those criteria may vary according to the number of authorisations granted to the same owner.

18. According to Article L. 631-7-1-A of the Construction and Housing Code, it is not necessary to obtain an authorisation for change of use if the premises constitute the lessor’s main residence for the purposes of Article 2 of the Law of 6 July 1989; that is to say, if the dwelling is occupied for at least eight months per year, except owing to professional obligations, health reasons or *force majeure*, by the lessor or his/her spouse or by a dependant.

19. Article L. 651-2 of the Construction and Housing Code lays down the penalties and measures applicable in the event of non-compliance:

‘Any person who infringes the provisions of Article L. 631-7, or who fails to comply with the conditions or requirements under that article, shall be liable to pay a fine of EUR 25 000.’

3. Municipal Regulation of the City of Paris setting the conditions for granting authorisations and determining the offset requirements

20. Article 2 of the Règlement municipal de la Ville de Paris fixant les conditions de délivrance des autorisations de changement d’usage de locaux d’habitation et déterminant les compensations en application de la section 2 du chapitre 1er du titre III du livre IV du Code de la construction et de l’habitation (Municipal Regulation of the City of Paris setting the conditions for granting authorisations and determining the offset requirements) provides that:

‘I – Offsetting consists in the conversion into housing of premises having a use other than housing on 1 January 1970 or in respect of which planning authorisation is granted to alter the intended use thereof after 1 January 1970 and which have not previously been used by way of offset.

The premises offered by way of offset must, cumulatively:

(a) consist of housing units and be of a standard and a surface area equivalent to the premises that are the subject of the change of use, with cases being considered on the basis of the suitability of the premises for housing purposes. The premises offered by way of offset must meet the standards laid down in the Decree of 30 January 2002 concerning the characteristics of decent housing;

(b) be located in the same arrondissement (district) as the residential premises that are the subject of the change of use.

Surface areas shall be calculated in accordance with Article R 111-2 of the Construction and Housing Code.

II – In the areas covered by enhanced offsetting designated in Annex No 1, by way of derogation from subparagraph (a) of paragraph I, premises offered by way of offset must be twice the surface area of those which are the subject of a change of use application, unless those premises are converted into rental social housing which is the subject of an agreement concluded pursuant to Article L 351-2 of the Construction and Housing Code for a minimum period of 20 years.

By way of derogation from subparagraph (b) of paragraph I, rental social housing that offsets converted premises in the area covered by enhanced offsetting may be located in any part of those areas. However, if the converted premises are located in the 1st, 2nd, 4th, 5th, 6th, 7th, 8th or 9th districts, where the housing shortage, by comparison with the level of activity, is particularly severe, a maximum of 50% of the converted surface area may be offset outside the district in which the conversion is to take place.

Those districts are characterised by a ratio of the number of salaried jobs to the number of working residents, as measured by the INSEE [French National Institute of Statistics and Economic Studies], that is higher than the average in Paris.

Where all of the units offered by way of offset may be located outside the district in which the conversion is to take place, the number of housing units offered by way of offset must, at the very least, be identical to the number of housing units removed.

If premises are converted and offset by one and the same owner within a single property unit, in connection with a rationalisation of the living space within that property unit, the minimum surface required, for the purpose of offsetting, shall be the surface area of the converted premises.’

III. Facts, procedure and the questions referred

21. The Appellants each own a studio apartment located in Paris.

22. In 2015, the municipal services of the City of Paris conducted an investigation in order to determine whether the Appellants were letting their studios as short-stay furnished accommodation on the Airbnb platform without authorisation. Following that investigation, the Procureur de la République (Public Prosecutor) lodged an application for interim measures against the Appellants. The Tribunal de grande instance de Paris (Regional Court, Paris, France) ordered the Appellants to pay a fine and to change the use of the property back to residential. The City of Paris intervened in the proceedings.

23. On appeal, by two judgments of 19 May 2017 and 15 June 2017 regarding each of the Appellants, the Cour d’appel (Court of Appeal, Paris, France) confirmed that the studios at issue, which were offered for rent through the Airbnb platform, had been let without prior authorisation of the mayor of Paris for short periods to a transient clientele, which is contrary to the provisions of Article L. 631-7 of the Construction and Housing Code. The Cour d’appel (Court of Appeal) ordered the Appellants, Cali Apartments and HX, to pay fines of EUR 15 000 and EUR 25 000 respectively. The proceeds from the fines were to be paid to the City of Paris.

24. The Appellants filed appeals on points of law before the Cour de cassation (Court of Cassation, France), the referring court. According to the Appellants, the judgments delivered on appeal infringe the principle of the primacy of EU law, in so far as the Cour d'appel (Court of Appeal) had not established that an overriding reason relating to the public interest could justify the restriction on the freedom to provide services that the legislation at issue amounts to. Nor did the Cour d'appel (Court of Appeal) establish that the objective pursued by that legislation could not be attained by means of a less restrictive measure, as required by Article 9(b) and (c) of the Services Directive.

25. It is within that factual and legal context that the referring court poses the following questions for a preliminary ruling to the Court of Justice:

'(1) Having regard to the definition of the purpose and scope of application of [the Services Directive], as set out in Articles 1 and 2 thereof, does that directive apply to the repeated letting for short periods, against consideration, including on a non-professional basis, of furnished accommodation for residential use, not constituting the lessor's main residence, to a transient clientele which does not take up residence there, particularly in the light of the concepts of "providers" and "services"?

(2) If the above question is answered in the affirmative, does national legislation such as that provided for in Article L. 631-7 of the [Construction and Housing Code] constitute an authorisation scheme for the abovementioned activity for the purposes of Articles 9 to 13 of [the Services Directive], or solely a requirement subject to the provisions of Articles 14 and 15?

In the event that Articles 9 to 13 of [the Services Directive] are applicable:

(3) Should Article 9(b) of that directive be interpreted as meaning that the objective of tackling the shortage of rental housing constitutes an overriding reason relating to the public interest capable of justifying a national measure which requires authorisation to be obtained, in certain geographical areas, for the repeated letting of furnished accommodation for residential use for short periods to a transient clientele which does not take up residence there?

(4) If so, is such a measure proportionate to the objective pursued?

(5) Does Article 10(2)(d) and (e) of the directive preclude a national measure which requires authorisation to be obtained for the "repeated" letting of furnished accommodation for residential use for "short periods" to a "transient clientele which does not take up residence there"?

(6) Does Article 10(2)(d) to (g) of the directive preclude an authorisation scheme whereby the conditions for granting authorisation are set, by decision of the municipal council, in the light of social diversity objectives, according to, inter alia, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage?'

26. By order of the President of the Court of 18 December 2018, Cases C-724/18 (concerning Cali Apartments) and C-727/18 (concerning HX) were joined for the purposes of the written and oral procedures and the judgment.

27. Written observations were submitted by the Appellants, the City of Paris, the Czech and German Governments, Ireland, the Greek, Spanish, French, Netherlands and Polish Governments, and the European Commission. All of them, with the exception of the Polish Government, participated at the hearing that took place on 19 November 2019.

IV. Assessment

28. Questions 1 and 2 raise the issue of the applicability of the Services Directive to the cases at hand. While Question 1 pertains to the scope of that directive, Question 2 seeks to determine which specific

provisions of the directive are applicable to the cases at hand among those relating to 'authorisation schemes' and those relating to 'requirements' within Chapter III of the Services Directive.

29. Considering that the rules requiring authorisation for the letting of furnished accommodation for short periods to a transient clientele constitute an 'authorisation scheme', the referring court subsequently enquires, by Questions 3 to 6, whether that scheme complies with the provisions dedicated to those schemes, laid down in Articles 9 and 10 of the Services Directive. In particular, Questions 3 and 4 concern the justification for and the proportionality of the rules at issue. By Question 5 and 6, the referring court enquires whether those rules fulfil the other conditions for granting authorisation that are laid down in Article 10(2) of the Services Directive.

30. The structure of this Opinion follows the logic of the legal issues identified by the referring court. I will first examine whether the Services Directive is applicable to the cases at hand (A) and identify the relevant provisions (B). I will then move on to the issue of the compatibility of the contested authorisation scheme, as regards both its establishment and the specific conditions laid down therein, with the different conditions deriving from Article 9(1) and Article 10(2) of the Services Directive (C).

31. Before embarking on that analysis, it is necessary to clarify the object of the overall analysis. Is the analysis to be conducted by reference to the national provisions (reproduced above in points 13 to 19 of this Opinion), the municipal provisions of the City of Paris (above, point 20), or both read together?

32. Admittedly, the referring court poses its questions only in relation to the national provisions that make the repeated letting of furnished accommodation for residential use for short stays subject to authorisation by the competent authority/mayor. (4) However, the national provisions only set the overall framework for such authorisations. They empower municipal councils to adopt rules in order to expand on that framework. (5)

33. In exercise of those powers, the City of Paris adopted specific rules, laid down in the municipal regulations, setting the conditions for granting authorisations and determining the offset requirements. To an extent, it is the municipal rules that give concrete content to the general national framework. The municipal rules are also relevant in practical terms in the French context since the money generated from fines for the unauthorised letting of furnished accommodation for short-term stays appears to go, in full, to the budget of the commune where the premises are located.

34. Through the Services Directive, the EU legislator has acknowledged the importance of taking into account the *local* arrangements with regard to the competent authorities granting authorisations, in at least two ways. First, the very framework of analysis deriving from Article 10(2) of the Services Directive requires the examination of *specific* authorisation schemes, thus, as the case may be, of schemes as fleshed out by local and national provisions. (6) Second, Article 10(7) of the Services Directive makes clear that the conditions for the granting of an authorisation must not call into question the allocation of the competences, at local or regional level, of the Member States' authorities granting authorisations.

35. In sum, the authorisation scheme at issue in the present case is a package of national *and* municipal rules. In assessing the compatibility of such a legislative package with EU law, its entire content must be examined, not just its individual layers. After all, any would-be Parisian service provider would look at it from that viewpoint as he or she would logically be subject to both layers of regulation, not just the national one. That is also the approach taken in this Opinion.

A. Applicability of the Services Directive

36. Does the Services Directive apply to the repeated letting for short periods, for consideration, including on a non-professional basis, of furnished accommodation for residential use, not constituting the lessor's main residence, to a transient clientele which does not take up residence there?

37. All of the participants in the proceedings have taken the view that the Services Directive is applicable in the present cases, except for the German Government and Ireland.

38. According to the German Government, Article L. 631-7 of the Construction and Housing Code does not govern a service but the change of use of residential premises. That provision applies not only to providers seeking to let their premises for short stays to a transient clientele, but to any individual seeking to change the use of residential premises. Such a change of use could consist, for example, in the use of the premises as housing for homeless people or for refugees. Those activities are expressly excluded from the scope of the directive by recitals 9 and 27 and by Article 2(2)(j). The same should apply to rules on changes of use aimed at ensuring the availability of sufficient and affordable housing.

39. According to Ireland, the Construction and Housing Code contains rules governing the development and use of land, in particular residential property. Article L. 631-7 of the Construction and Housing Code lays down detailed rules regarding change of use and mixed use of residential property. In the light of recital 9 of the Services Directive, which states that the directive does not apply to 'rules concerning the development or use of land, town and country planning, [or] building standards', that directive does not apply to Article L. 631-7 of the Construction and Housing Code. The objective of the French rules is to tackle the shortage of rental housing, which is an important social policy objective, through the effective regulation of land use and urban planning, and not to affect access to or the exercise of a certain activity.

40. In my view, the provision of short-term letting services for remuneration is a service of a distinctly economic nature. Obtaining a change of use of residential property is simply a requirement affecting access to the provision of that particular service.

41. It is rather clear that, in view of the activity in question, none of the exemptions set out in Article 2(2) and (3) of the Services Directive apply.

42. Article 2(2)(j) of the Services Directive, which excludes social services relating to social housing, referred to by the German Government, is clearly not applicable to the case at hand. The argument based on the fact that the same rules, with which an owner has to comply in order to use the property for economic purposes, could potentially apply to changes of use of property for other, non-economic purposes, such as social housing, is, in view of the clear facts of the present case, highly speculative and need not be dwelt upon in any detail.

43. Equally, in view of the profitable nature of the consideration for the service, (7) the activity at issue clearly cannot be qualified as a non-economic service of general interest within the meaning of Article 2(2)(a) of the Services Directive. Therefore, that exemption is not applicable either.

44. It would rather appear that the letting of accommodation, as any other service in the field of tourism, was intended to fall within the scope of the directive. Although there is no explicit mention to that effect in the Services Directive, recital 33 states that *real estate services* and consumer services, such as those *in the field of tourism*, are also covered by the directive. In addition, while certainly not binding, (8) the European Commission's *Handbook on implementation of the Services Directive* also confirms that renting activities are included among the activities that can be considered as services. (9)

45. The other argument made by the German Government and especially by Ireland, referring to recital 9, merits deeper reflection. That recital states that 'this Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity'.

46. I consider it useful to reproduce recital 9 in full here. It is clear from a reading of the recital in its entirety, including its first sentence, as well as the second half of the second sentence, why the arguments made by Ireland and the German Government fail to convince.

47. First, it should be recalled that recital 9 is just a recital. (10) There is no corresponding operative provision in the Services Directive setting out a block exemption, similar to those in Article 2(2) and (3) of the directive. In my view, a recital cannot, on its own and without any corresponding provision in the text, create a new block exemption, which is not mirrored anywhere else in the operative text of the EU measure. (11)

48. Second, even if the analysis were not to stop there, which in my view it could and should, it might be added that, in any case, recital 9 is concerned with a different subject matter than that relating to the addition of an area-related exemption from the scope of the directive.

49. In its first sentence, recital 9 starts by confirming the general rule that the directive applies to requirements which affect access to a service activity. Thus, any rules in any area that set out a precondition for access to a service, including requirements relating to a change of use of a property, fall within the scope of the directive. But there is a qualification: the directive applies 'only' to such requirements.

50. That is why the second sentence opens with 'therefore', adding a list introduced with an illustrative 'such as'. However, far from adding area-related block exemptions to the scope of the directive, that part of the second sentence simply confirms that would-be service providers cannot challenge a generally applicable regulatory regime on the ground that it impedes their unlimited freedom to provide services. Thus, such providers cannot ask for a special regulatory regime, that would differ from that applicable to 'individuals acting in their private capacity', as the recital concludes.

51. Put simply, recital 9 merely reaffirms that generally applicable rules that do not specifically regulate services and that apply to everyone, individuals and service providers alike, are to remain untouched by the Services Directive. That reassurance applies across the board to any area of (regulatory) law. That is also why, logically, the list is illustrative only and begins with 'such as', and could also include other areas, (12) such as environmental standards or food safety rules, for example. Finally, that is also the reason why there is no corresponding operative provision in any of the articles of the directive mirroring the content of recital 9: that recital was never meant to exclude any specific area(s) from the scope of the directive. It was simply meant to provide reassurance that the provisions of the directive cannot be used in the way that would undermine or render meaningless any generally applicable regulatory regime in a Member State.

52. At the hearing, the European Commission mentioned, by way of an example of the aim of recital 9, a hypothetical challenge that could be taken by a driver, coming from a country where vehicles are driven on the right side of the road, against the national traffic rule in a Member State where they are driven on the left, as constituting a requirement limiting his access to the provision of services in another Member State. Without wishing to enter into the no doubt passionate debate concerning the extent to which Article 56 TFEU or the Services Directive could in fact be applicable to transport services, the example given is quite telling. One can think of a number of other examples: a potential service provider challenging town plans or other planning provisions; challenges being taken against the way in which tax returns are filed; how criminal records registries are administered; or how environmental standards on emissions and pollution are enacted; and so forth. The national rules in any of these generally applicable regulatory regimes could be challenged always with the same argument, namely that the existence of those very rules is a limitation of unfettered freedom to provide services.

53. As stated in recital 9, that was precisely what was supposed to be excluded. The common denominators of all of those examples are remoteness and instrumentality. Rules governing (access to) the service fall within the scope of the directive, while generally applicable rules that do not differentiate in any way between providers and other individuals do not. As the first sentence of recital 9 confirms,

requirements relating to conditions of access to the provision of a service are clearly included, *from whatever area of law* they might emanate.

54. That logic is very different from the argument advanced by Ireland and the German Government, who essentially suggest reading the phrase 'rules concerning the development or use of land, town and country planning' as another block exemption from the scope of the directive. Hence, any national rules touching upon use of land or town or country planning could never fall under the scope of the directive. That is not and cannot be the case.

55. Third, in a similar vein, the distinction between rules on property upon which recital 9 is based, depending on whether they specifically regulate or affect the access to, or the exercise of, a service activity, has already been addressed by the Court in *Visser*. (13)

56. The case in *Visser* concerned rules contained in a municipal zoning plan prohibiting the activity of retail trade in goods other than bulky goods in geographical zones situated outside the city centre of a Dutch municipality. In that context, within the assessment of the zoning plan, the Court focused on the economic activity at issue rather than on the nature of the plan itself as a measure pertaining to town planning and land use. The Court noted in particular that 'the specific subject matter of the rules at issue in the main proceedings, even if their objective … is to maintain the viability of the city centre of [that] municipality … and to avoid there being vacant premises within the city as part of a town and county planning policy, remains that of determining the geographical zones where certain retail trade activities can be established'. (14) On that basis, the Court concluded that those rules were addressed only to persons who are contemplating the development of those activities in those geographical zones, and not to individuals acting in their private capacity.

57. It follows from that judgment that, when confronted with rules on property, where property is used for profitable endeavours, the Court distinguishes between the *specific subject matter* and the overall *objective* of the rules at issue. The fact that the (main) objective primarily relates to town planning does not prevent those rules from being covered by the Services Directive if their specific subject matter is an economic activity. In line with recital 9, the Services Directive is applicable to rules that regulate or specifically affect the taking up or the pursuit of a service activity. (15)

58. It is thus clear from *Visser* that rules regarding the use of property fall within the scope of the Services Directive to the extent that they touch upon economic activities, thereby having an impact on access to the market for services or the exercise of a service activity. (16)

59. In the present cases, like in *Visser,* the rules at issue also have a dual nature. They are part of a set of rules subjecting to authorisation 'changes of use' of property intended for housing, which suggests a close connection with land use or town planning. However, those rules are also crucial for access to and the exercise of a given service activity.

60. Fourth and finally, however, there is one peculiarity of this case that makes it different from *Visser*, and perhaps reflects, albeit in a different way, the reservations expressed by the German Government and Ireland. In *Visser*, although the rules were applicable without distinction, they could be said to have targeted, because of their nature, one special group of providers. The economic activity that was in fact being targeted by the zoning plan at issue could reasonably only have been carried out by a specific, dedicated group of service providers.

61. In the present case, in contrast to *Visser*, there is no discernible (professional) group of service providers. Nor is there any clearly definable group of service recipients. Both sides are non-professionals.

62. In this respect, I would agree that rules for change of use of a property are, in a way, applicable without distinction to any changes in the use of a property, not necessarily limited to the short-term rental of furnished accommodation. But that is partially because of the very nature of the peer-to-peer economy, in which the dividing line between professional and non-professional providers has vanished. (17) In such

an environment, it will often be only by generally applicable rules that any such activity can in fact be regulated. In other words, if everybody is a service provider, then a criterion that says that the only rules that are caught are those specifically aiming at a service activity (and not those applicable to all other individuals acting in their private capacity) loses much of its distinguishing capacity.

63. In sum, it suffices if the generally applicable rules, of whatever nature, regulate or affect access to the provision of a service, thus coming back to the basic statement in the first sentence of recital 9. That is clearly the case in the present case, where the national legislature has chosen to make approval of the change of use of the property the key condition for access to a certain type of clearly economic service: short-term rental of furnished accommodation. In my view, therefore, any such national rules clearly fall within the scope of the Services Directive.

B. The relevant provisions of the Services Directive

1. Authorisation scheme or requirement

64. By Question 2, the referring court essentially wonders which provisions of the Services Directive should apply in the main proceedings: from Chapter III, is it Section 1 (Articles 9 to 13) on authorisations, dealing with authorisation schemes and relevant conditions, or Section 2 (Articles 14 and 15) on prohibited requirements or those subject to evaluation?

65. Article 4(6) of the Services Directive defines an *authorisation scheme* as 'any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof'.

66. Article 4(7) defines a *requirement* as 'any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations'.

67. Authorisation schemes and requirements imposed by the Member States have in common the fact that they are, in principle, both prohibited by the Services Directive – or the Treaties (18) – since those schemes or requirements are assumed to restrict access to, or the exercise of, a service activity. However, they differ as to the nature of the restriction in question.

68. An authorisation scheme possibly entails the issuance of an *ex ante individual decision* to an applicant, in the form, as stated by the Court in *Visser*, of 'an expressly worded document obtained by [service] providers following a procedure that they were required to undertake' in order to develop their economic activities. (19) It can be, for instance, an authorisation sought by a person to operate the transport of passengers by water, or to operate a window prostitution business; (20) a concession granted by public authorities of property relating to leisure-oriented business activities; (21) an authorisation for the storage of pyrotechnic articles intended for retail sale; (22) or an authorisation to confer certain university degrees. (23)

69. By contrast, the existence of a *requirement* does not necessitate an *ex ante* individual decision granting a subjective right. A requirement is a general and impersonal rule that exists and applies to all service providers, irrespective of any action undertaken or procedure followed in order to obtain the type of individual decision sought authorising their envisaged activity. For instance, it can be, like in *Visser*, a prohibition, contained in a zoning plan approved by the municipal council of a city, on the activity of retail trade in goods in a certain area of that city, (24) as well as any other general rule or limitation applicable *ex lege* to a given type of service activity.

70. Turning to the cases at hand, it should be stressed at the outset that Chapter III of the Services Directive, which contains the provisions on authorisation schemes and on relevant requirements, is

applicable to the factual situations at issue in the main proceedings despite the fact that there is no cross-border element. Indeed, according to the Court, the provisions of Chapter III are equally applicable to purely internal situations. (25)

71. As regards the provisions of Chapter III that are specifically applicable to the present cases, it is quite clear that the rules at issue amount to an authorisation scheme, not a requirement. Property owners who would like to let their furnished accommodation for short stays must follow an administrative procedure to obtain from the mayor, subject to the fulfilment of conditions, a formal administrative authorisation. That authorisation allows them to put their premises for rent on the market for short-term furnished accommodation, in other words, to exercise service activities.

72. Accordingly, the national legislation, together with the implementing municipal regulations at issue, constitutes an authorisation scheme within the meaning of Article 4(6) of the Services Directive. It follows that the present cases are to be examined from the perspective of Section 1 of Chapter III relating to authorisations, in particular Articles 9 and 10.

2. Articles 9 and 10 as the framework for analysis

73. Questions 3 and 4 relate to Article 9(1), while Questions 5 and 6 focus on Article 10(2). In order to answer those questions, it is necessary to determine the scope of Articles 9 and 10 and the relationship between them.

74. Article 9(1) of the Services Directive prohibits Member States from making access to a service activity or the exercise thereof subject to an authorisation scheme unless (a) the authorisation scheme does not discriminate against the provider in question; (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest; (c) the objective pursued cannot be attained by means of a less restrictive measure.

75. For its part, Article 10(2) specifies the criteria on which authorisation schemes are to be based, in order to preclude the competent authorities from exercising their power of assessment in an arbitrary manner. The criteria must be (a) non-discriminatory; (b) justified by an overriding reason relating to the public interest; (c) proportionate to that public interest objective; (d) clear and unambiguous, (e) objective; (f) made public in advance; and (g) transparent and accessible.

76. Among the participants to the proceedings before the Court that have explicitly taken a position on the scope of Article 9(1) and Article 10(2) of the Services Directive, the German, Spanish and French Governments essentially argue that Article 10 applies to the municipal level (the deliberation of the municipal council), as opposed to the national provisions authorising the adoption of measures at the municipal level. Only the former must therefore be examined in the light of the criteria laid down in Article 10(2).

77. According to Ireland and the Commission, while Article 9 concerns the lawfulness of an authorisation scheme, Article 10 refers to the conditions that must be fulfilled in order to obtain such an authorisation within an authorisation scheme which is in itself justified (thus the individual application of the scheme). Since the Appellants have not applied for an authorisation in the framework of the main proceedings, Article 10 is not relevant to settle the present disputes.

78. The Netherlands Government maintains for its part that Article 9 applies to the authorisation scheme itself, while Article 10 concerns the individual, usually local, conditions for authorisation. However, since they both set the conditions for authorisation, the national legislation *and* the municipal regulations are to be assessed with regard to Article 10.

79. I assume that part of the uncertainty about these issues is due to the fact that, as already outlined above, the origin of the rules is split between two layers of governance, and the national court posed its

questions with regard to the national layer of the rules only, (26) while invoking a number of provisions of the Services Directive.

80. Moreover, there is indeed some substantive overlap between Article 9(1) and Article 10(2) of the Services Directive. I admit that, although it is possible to identify an abstract, conceptual difference between the two articles, when focusing on the details, and above all when examining the criteria separately or the conditions within an authorisation scheme, the boundary between them becomes somewhat blurred.

81. However, having made those allowances, I would suggest that Article 9 aims at a *different stage* of the authorisation process than Article 10. Article 9 is concerned with the issue whether in fact there can be an authorisation scheme for a given type of service. (27) Article 10 goes one step further. Once the test of Article 9 is satisfied, and the need for an authorisation scheme established, Article 10 focuses on the particular criteria that must be fulfilled by specific authorisation schemes. Article 10 makes clear that an authorisation scheme should be devised in a way that fulfils all seven criteria laid down in the second paragraph thereof. (28) The fact that 'authorisation schemes shall be *based on criteria*' confirms that Article 10 primarily concerns the specific design of authorisation schemes. Those schemes must be arranged upstream in such a way that, when deciding on individual applications for authorisation downstream, the competent authorities are precluded from exercising their power of assessment in an arbitrary manner, as required by Article 10(1).

82. In a nutshell, the question under Article 9 is: 'does there need to be an authorisation scheme for this type of service activity at all?' While the question under Article 10 is 'what criteria and conditions come under such an authorisation scheme?'

83. In view of that division of tasks between the two articles, the issue as to where the rules come from (national, regional or local) is immaterial. It is likely that in practice, with regard to rules in the Member States, the higher level of governance will set the overall framework (including the pronouncement on the need for an authorisation scheme in the first place), with the lower or local levels of governance being tasked with fleshing out or locally adapting the details (including detailed or additional conditions of the authorisation schemes).

84. That division of tasks is logical. However, it is also entirely circumstantial. It cannot be entirely excluded that Article 9 might apply to rules of local origin, while Article 10 might apply to rules of national origin. (29) The key issue is the content of the regulation, not its origin.

85. In the context of the present case, the issue whether there is any need for an authorisation scheme in the first place is to be examined against the three conditions listed in Article 9(1). However, the specific conditions under which such an authorisation will be issued, including in particular the offset requirement as devised by the City of Paris, is to be assessed against the conditions of Article 10(2).

C. Compatibility of the authorisation scheme with the Services Directive

86. In this part of the Opinion, I will address the overriding reasons of public interest that have been put forward to justify the authorisation scheme (1), before turning to the key issue of proportionality (2). I shall conclude with several remarks on the other conditions that authorisation schemes must meet under Article 10(2) of the Services Directive (3).

87. Before doing so, however, it is useful to recall the overall context of the present cases. Two rights under the Charter of Fundamental Rights of the European Union ('the Charter') are particularly relevant in this context: Article 16 (freedom to conduct business) and Article 17 (right to property).

88. It is settled case-law that the protection afforded by Article 16 of the Charter covers the freedom to exercise an economic or commercial activity. (30) The freedom to conduct a business is not absolute, but must be viewed in relation to its social function. (31) Thus, the freedom to conduct a business may be

subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest. In general, pursuant to Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. (32)

89. Article 17 of the Charter is a rule intended to confer rights on individuals. (33) However, the right to property enshrined in that article is also not absolute and its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union. (34)

90. In accordance with Article 52(3) of the Charter, when interpreting Article 17, the case-law of the European Court of Human Rights ('ECtHR') relating to Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') must be taken into account as the minimum threshold of protection. (35)

91. In that respect, the second paragraph of Article 1 of Protocol No 1 to the ECHR entitles States to *control the use of property* in accordance with the general interest. That is especially the case in the field of housing, as a central concern of social and economic policies. According to the ECtHR, in order to implement such policies, the legislature must have a wide margin of appreciation both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures. However, an interference must achieve a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The possible existence of alternative solutions does not in itself render the contested legislation unjustified. Nevertheless, that legislation must not impose a disproportionate and excessive burden on owners as to take it outside the State's margin of appreciation. (36)

92. I wish to stress three points that are, in my view, crucial for the entire compatibility analysis that follows, both in terms of the identification of an overriding reason of public interest and (in particular) as regards the examination of proportionality.

93. First, although they are assessed, in view of the structure of the cases brought before this Court, from the perspective of the Services Directive and the freedom of establishment, neither the freedom to conduct a business nor the right to property are absolute. Far from it: both can be limited. In particular, the Strasbourg case-law already quoted displays a great degree of wisdom in embracing a notably light touch with regard to national measures concerning only the *control of the use* of (immovable) property. In other words, provided that the control of use is not so severe a limitation that it de facto amounts to expropriation or depreciation of the property by stealth, even considerable limitations of those rights are allowed.

94. Second, that translates into the intensity of the review. In my view, at both stages – identification of an overriding reason relating to public policy and, in particular, proportionality – a number of solutions are conceivable. It is not necessarily the case that the only proportionate solution will be the one that is the least onerous for the individual property owner; that is only one of the factors to be taken into account in a rather complex equation. Rather than just one solution, there are a range of conceivable solutions that would pass the test of proportionality: not just one inevitable outcome, but more of a corridor, a zone of conceivable solutions, containing a range of outcomes that can all be deemed proportionate.

95. Third, 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.

1. Overriding reason relating to the public interest

96. Article 9(1)(b) of the Services Directive requires that the need for an authorisation scheme is justified by an overriding reason relating to the public interest. Article 10(2)(b) requires that the criteria on which authorisation schemes are based are themselves justified by such an overriding reason. In view of the fact that the exact same wording is used in both provisions in this specific respect, I believe that the existence of an acceptable public interest can be assessed jointly for both purposes: the need to establish an authorisation scheme under Article 9, as well as the criteria contained therein under Article 10.

97. The Appellants consider that there is no overriding reason relating to the public interest that could justify the provisions at issue. The other participants to the proceedings before the Court have mentioned several possible grounds of justification, namely combating a housing shortage; offering affordable and sufficient housing; social housing policy; the protection of the urban environment; resisting pressures on land; the protection of consumers; the efficiency of tax inspections; fair trading; and the protection of the recipients of housing services.

98. According to the City of Paris and the French Government, the aim of the provisions at issue is primarily to combat housing shortages (and, in that connection, rising prices) in certain locations (usually tourist hot spots), which are due, at least in part, to the fact that owners tend to prefer to let their residential premises for short stays rather than long stays. (37)

99. Without wishing to comment upon or to discount in any way any of the other aims suggested in the course of these proceedings, I have no hesitation in accepting that combating a structural housing shortage, on the one hand, and the protection of the urban environment, on the other, can indeed be put forward in order to justify, together or separately, both the establishment of the authorisation scheme – under Article 9(1)(b) – and its concrete shape and the conditions contained therein – under Article 10(2)(b).

100. Article 4(8) of the Services Directive explicitly recognises the protection of the urban environment and social policy objectives as overriding reasons relating to the public interest. Those aims are already so broadly phrased that they can certainly encompass more specific objectives falling thereunder.

101. Furthermore, recital 40 of the Services Directive makes clear that the concept of ‘overriding reasons relating to the public interest’ has been developed by the Court and ‘may continue to evolve’. In that respect, albeit in the context of free movement of capital, the Court has accepted a number of possible grounds for justification that are relevant for the present disputes. In particular, it explicitly accepted grounds connected to housing policy in order to resist different types of pressure on land. (38) The Court has also accepted requirements guaranteeing sufficient housing for certain categories of the local population or the less well-off (39) and national provisions aiming at maintaining the viability of the city centre of a commune in the interests of good town and country planning. (40) The Court has also already taken into account ‘certain features specific to the situation on the national market in question in the main action, such as a structural shortage of accommodation and a particularly high population density’. (41)

102. The fact that there is already enough support in the case-law of the Court for accepting that the aims of combating a structural housing shortage and the protection of the urban environment should not detract from the fact that both of them are also warranted regardless of the existence of such case-law. As already stated, the category of ‘overriding reasons relating to the public interest’, like any other category of ‘legitimate aims’, is not a static, closed list. In the context of the Services Directive, Article 4(8) clearly contains just a sample, preceded by the word ‘including’.

103. In sum, combating a housing shortage and seeking to ensure the availability of sufficient and affordable (long-term) housing (in particular in large cities), as well as the protection of the urban

environment, are valid justifications for the establishment of authorisation schemes broadly based on social policy. Such reasons can equally be invoked to justify the criteria of an authorisation scheme.

104. However, since both the French Government and the City of Paris invoked primarily the aim of combating (long-term) housing shortages in certain areas for both the need to introduce the authorisation scheme as such and its individual conditions, in particular the contested offset requirement in the City of Paris, I shall now turn to the examination of the proportionality of the means chosen in the light of that particular objective.

2. Proportionality

105. Under Article 9(1)(c) of the Services Directive, the establishment of an authorisation scheme is lawful if the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective. Pursuant to Article 10(2)(c), the conditions or criteria for granting authorisation must be proportionate to the public interest objective pursued.

106. The Appellants argue that the authorisation scheme at issue is not suitable to achieve the aim of combating the shortage of housing inasmuch as it does not necessarily dissuade owners from offering their premises as short-term furnished lettings. The Appellants are of the opinion that, in Paris, the offset requirement is overly restrictive and makes it difficult, or even impossible, to let furnished premises to tourists. Less restrictive legal mechanisms could have been contemplated, such as the establishment of a tax. The City of Paris is of the view that no less onerous measure could achieve the aim pursued, be it a declarative system or a limitation of the number of nights during which furnished premises can be let for short stays.

107. The governments of the Member States that have taken a position on proportionality are of the view that the provisions at issue are suitable and proportionate.

108. The Commission considers that the referring court has not provided sufficient information in order to determine whether the (national) rules at issue are proportionate. However, some elements suggest that those provisions may actually be proportionate, such as the exclusion from their scope of owners' main residence, the offset mechanism, the municipal implementation and the option to introduce temporary authorisations.

109. Proportionality entails that the measures at issue are suitable for ensuring the achievement of the objective pursued, do not go beyond what is necessary to achieve that objective and that other less restrictive measures do not enable the same result to be achieved. (42)

110. In my view, whilst the establishment of the authorisation scheme under Article 9(1) of the Services Directive is proportionate, the proportionality of the offset requirement, being the key condition for the granting of authorisation, is somewhat more questionable in the light of Article 10(2).

(a) Proportionality of the need for authorisation under Article 9(1)(c)

111. First, as expressly stated in Article 9(1)(c) of the Services Directive, an authorisation scheme will typically be proportionate when *ex post* inspections are not sufficient to reach the aim pursued.

112. Second, in order to be proportionate, the determination of whether there is a need for an authorisation scheme should be based on specific data concerning the housing market in the cities where the establishment of such an authorisation scheme is envisaged. The Commission stated at the hearing that national schemes ought to be based on specific evidence regarding the housing market situation. I agree. However, without wishing to downplay the relevance of such evidence for the national arrangements, such evidence is paramount at local level, precisely for the purposes of finding a proportionate solution in view of the specific local circumstances.

113. Third, authorisation schemes must be fair and open to all in terms of access to the short-term housing market. As required under Article 9(1)(a), authorisation schemes cannot be discriminatory. Discrimination on grounds of nationality (43) is not the only form of discrimination that is excluded. The fact that the directive applies to purely internal situations (within Chapter III) suggests that the non-discrimination criteria apply more broadly to other grounds, such as those mentioned in Article 21(1) of the Charter.

114. In that context, I do not see anything that would cast doubt on the need to establish an authorisation scheme per se, in view of the stated aim of combating a housing shortage and preserving the long-term housing market.

115. First, if the aim is to maintain the availability of certain goods or services on a particular market (long-term housing), then *ex post* inspections, by which time it will inevitably be found that those goods or services have left that market to move to another, apparently more profitable, market (short-term housing), would certainly be anything but effective. Thus, if the aim is regulating or preventing market exit, then *ex ante* authorisations to exit are inevitable.

116. Second, although there might be disagreement as to the conclusions to be drawn from the data assembled by the French Government and the City of Paris, there is no denying that a problem exists. The French Republic has devised a solution to that problem, which, as far as the need to subject property owners to an authorisation scheme is concerned, has incorporated proportionality into its design. It contains several flexibility mechanisms. In particular, its territorial scope is limited to cities with more than 200 000 inhabitants (44) and an authorisation is not needed for the letting of a main residence. (45) In addition, it would appear that cities may also establish a temporary authorisation scheme, which cannot be subject to an offset, allowing natural persons to let residential premises for short periods to a transient clientele which does not take up residence there.

117. Third, it has not in any way been suggested that only certain owners of property would be subject to the authorisation scheme, thus making the authorisation scheme in itself discriminatory. The authorisation scheme is applicable to anyone wishing to let on a short-term basis in Paris.

118. Admittedly, apart from the establishment of an authorisation scheme, a range of other measures could certainly also help to achieve the aim pursued by the national legislation. A city confronted with a long-term housing shortage due to the letting of furnished premises for short stays could decide to impose a tax on the owners or tenants for premises that are rented out for a few days or weeks; a cap on the number of overnight stays per year; or a maximum proportion of premises that can be rented for short stays, and so on.

119. However, I am not sure that any of those solutions would, by definition, be more effective than the crude simplicity of an *ex ante* authorisation scheme. If the aim is indeed to limit (or to redirect) supply and, by denying authorisations for short-term letting, to keep a certain critical amount of housing for the long-term rental market, then what could be more effective than an authorisation scheme? To tax (presumably heavily) the undesired service? Such a tax is likely to be immediately challenged as a (disproportionate) restriction in its own right. Moreover, it is likely to distort further other markets, while simply not solving the initial problem: an immediate long-term housing shortage.

120. In sum, authorisation schemes are clearly a means permitted by the Services Directive. (46) In the specific context of the present cases, I see nothing that would render an authorisation scheme disproportionate per se. Finally, in general terms, unless it is simply not possible to explain rationally why an authorisation scheme was established, or it is clearly discriminatory, such schemes, in particular in the special area of social choices relating to housing policy, are likely to be firmly within the permissible corridor of proportionate outcomes. (47)

(b) Proportionality of the offset requirement under Article 10(2)

121. It should be noted at the outset that, in structural terms, the national provisions on authorisation schemes allow for the establishment of proportionate authorisation schemes by large French cities. The fact that 'conditions for granting authorisation are set by decision of the municipal council, in the light of social diversity objectives, according to, inter alia, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage' (48) underlines the empowerment of the local level. The requirement to take into account the specific features of the local housing market is likely to guarantee that each authorisation scheme is tailored to local circumstances, so that, in theory, it would not go beyond what is necessary to combat the housing shortage.

122. That said, it is difficult to assess the actual proportionality of the specific authorisation scheme at issue, and in particular of the criteria and conditions on which that scheme is based under Article 10(2) of the Services Directive.

123. In its order for reference, the referring court focuses on the national provisions, leaving the municipal level out of the picture. In addition, the order for reference as a whole is rather economical as to the amount of information and the level of detail provided. The Court has little information available to it regarding the functioning of the specific rules of the City of Paris. As a consequence, the Court is ill-equipped to determine whether the criteria laid down in Article 10(2) of the Services Directive are fulfilled.

124. It is therefore primarily for the referring court, in view of the distribution of tasks between this Court and national courts, to assess the compatibility of the conditions for authorisation under national law with Article 10(2) of the Services Directive. (49) The general guidance that this Court can provide to assist the referring court, based on the documents relating to the main proceedings and on the written and oral observations that have been submitted to the Court, (50) will necessarily be commensurate with the level of information provided by the referring court.

125. Of the conditions and criteria in the authorisation scheme that are potentially relevant, there was one that emerged relatively clearly from the Paris municipal rules: the offset requirement. The compatibility of that requirement with the Services Directive, in the specific way in which it has been enacted by the City of Paris, will be for the referring court to assess. Based on the arguments presented before this Court, it seems that particular attention would have to be paid to the compliance of the offset requirement with Article 10(2)(c) (proportionality), but also with Article 10(2)(a) (prohibition of discrimination).

126. It would appear from the written submissions of the Appellants and of the City of Paris, and from the discussion at the hearing, that, in Paris, offsetting is *compulsory* in order to obtain the authorisation to let furnished accommodation for short stays. Subject to verification by the referring court, in practice, a person seeking to let his or her furnished flat for a short duration, for instance, to an American in Paris, must buy commercial premises (not just anywhere in Paris, but in the same arrondissement (district) or even neighbourhood) of the same size as the flat (or even twice the size in certain areas under housing pressure) and turn them into residential premises.

127. Prima facie, the way in which that compulsory offset is devised is very effective in order to attain the aim pursued: to keep roughly the same amount of housing space for the long-term housing market. But it is perhaps so effective that it begins, in a way, to completely defeat the purpose of asking for an authorisation in the first place. If an owner has to substitute the apartment that he or she wishes to take off the long-term residential market by providing the same or apparently an even greater amount of square meters and making it available to the same market, why bother taking the first apartment off that market in the first place? Can such a condition be considered proportionate?

128. As stated by the City of Paris at the hearing, an owner of a number of properties or a property developer should not find it too difficult to fulfil the offset requirement. Thus, as far as they are concerned, it is likely that such a requirement does not make the authorisation scheme of the City of Paris disproportionate.

129. However, that observation raises another issue: is the offset requirement devised by the City of Paris also proportionate with regard to 'non-professional owners', typically natural persons owning just one extra flat, and their conditions of access to the short-term letting market for furnished accommodation?

130. The example that springs to mind is a non-professional landlord who happens to own a 20 m^2 studio in the heart of Paris, which is not his or her main residence, since that individual lives on the outskirts of the city. Since the authorisation scheme and its key offset condition applies to all owners, such landlords must also buy a commercial premises in the same neighbourhood, of the same size or double, and turn it into (long-term) residential housing in order to let the small studio on the market of his or her choice. Is such a requirement also proportionate with regard to such property owners?

131. That last question hints at the real issue that appears to arise from the conditions within the authorisation scheme. That issue can be framed either in terms of the proportionality of the offset requirement for certain social groups (under Article 10(2)(c)) or as an issue of discrimination (under Article 10(2)(a)). As already suggested above, (51) there is no reason to read the prohibition of discrimination in Article 10(2)(a) as involving discrimination on the basis of the nationality of the service provider only. It may also involve discrimination on other grounds, in particular those already listed in Article 21(1) of the Charter. Property is one of the grounds already listed.

132. All this, including the actual operation of the offset requirement, will be for the referring court to verify. However, to my mind, it would be somewhat difficult to explain why access to an apparently rather profitable market for a certain type of service should in reality be reserved only for the better off, who can satisfy the offset requirement, and who would typically be legal persons or property developers, as suggested by the City of Paris. Unless that was indeed the intention behind the drafting of those rules, (52) why should effective access to such services (53) be reserved, metaphorically speaking, to those already playing Monopoly (*grandeur nature*)?

133. All of these elements are ultimately for the referring court to address under Article 10(2) of the Services Directive. However, in concluding this section, I wish to make one general remark. While the Appellants at the hearing maintained that the offset requirement might be outdated and unsuitable in a digital economy, I do not share that view. In general and per se, an offset requirement could indeed be a way to address a housing shortage problem. It cannot be stated that that requirement is, in and of itself, incompatible with Article 10(2)(c) of the Services Directive.

134. It is possible to imagine a number of scenarios in which such a requirement may be proportionate in a municipal context, notably by carving out some exceptions to it, such as limiting the offset requirement to premises above a certain size; or limiting it to owners with more residential properties; or issuing temporary authorisations not subject to offset, which would be periodically reviewed and potentially redistributed.

135. Finally, the overall logic of a corridor of proportionate outcomes (54) should also be applicable here, particularly when assessing the proportionality of the individual conditions. If sufficient leeway for locally adapted choices is not allowed, any of those conditions could ultimately be challenged since they will inevitably have the effect of stepping on somebody's toes. The bottom line is overall social fairness, and the adoption of non-discriminatory measures following evidence-based decision-making and a transparent legislative and deliberative process carried out within the community concerned.

136. Within such a framework, local diversity as to the specific authorisation conditions is not only permissible; it is even desirable. If it is accepted that the local level is allowed to adopt rules and flesh out the conditions for authorisation schemes, (55) then the proportionality of such rules is likely to depend on the taking into account of the local circumstances and specificities. It is certainly true that such local divergences will create differences within a Member State in terms of access and the locally applicable regimes, an idea with which the Commission in particular showed some intellectual unease at the hearing. (56) That, however, is the necessary price to be paid for having a Union that respects regional and local self-government in its Member States pursuant to Article 4(2) TEU.

3. Compliance with other criteria under Article 10(2) of the Services Directive

137. By Questions 5 and 6, the referring court essentially seeks to ascertain whether the two national provisions relating to the authorisation schemes at issue comply with the *specific* obligations of Article 10(2) of the Services Directive.

138. In particular, in Question 5, the referring court enquires whether the concept of repeated letting of furnished accommodation for residential use for short periods to a transient clientele which does not take up residence there (57) is based on clear, unambiguous and objective criteria (Article 10(2)(d) and (e) of the Services Directive). Apart from the proportionality aspect that has just been addressed, I understand from Question 6 that the referring court wishes to determine whether the national provision empowering municipal councils to set the specific conditions for granting authorisation (58) is based on criteria that are themselves clear and unambiguous, objective, made public in advance, transparent and accessible (Article 10(2)(d) to (g) of the Services Directive).

139. The Appellants contend that the terms used by the legislation at issue are too imprecise, such as the notion of a 'short period' and of 'transient clientele which does not take up residence'. In addition, the conditions for obtaining the authorisation are not sufficiently clear. By relying on the objective of social diversity or on the need to avoid exacerbating the housing shortage, the legislation at issue enables the municipalities to decide on a discretionary basis the conditions under which authorisations are to be issued. The Appellants also claim that it is difficult in practice to access the deliberations of the municipal council even if they are published in the city hall and online. The former entails going to the city hall, while the latter is not sufficient because the website is not always updated and is not user-friendly.

140. According to the City of Paris and the French Government, the conditions are objective, known in advance, and fully accessible by various means. The French Government hints in particular at the fact that, at the time of the relevant facts, the notion of 'transient clientele which does not take up residence' was defined by Article D. 324-1 of the Tourism Code as clientele renting accommodation for one day, one week or one month.

141. The Commission considers that the notions used in the French legislation are not precise and transparent enough with regard to the cumbersome administrative procedure provided for therein.

142. If the information and detail provided by the referring court with regard to the issues addressed previously in this Opinion are scarce, I must admit that with regard to these particular questions of the referring court, there is virtually nothing to go on with in the order for reference. It is also apparent from the arguments of the various parties to these proceedings that made any submissions on those issues, that they differ as regards the rules (national or municipal) that are relevant to the assessment of compliance with the specific obligations laid down by Article 10(2)(d) to (g) of the Services Directive. While some of them look at the alleged vagueness of notions in the national legislation, others discuss the way in which the local ordinances are published.

143. In those circumstances, I can only provide a few relatively vague and abstract remarks. I understand the concept of *clarity* in Article 10(2) as referring to the need to make criteria easily understandable for everybody by avoiding ambiguous language. *Objective* criteria aim at ensuring that all operators are treated fairly and impartially and that applications are assessed on their own merits. *Transparency*, *accessibility* and *publicity* guarantee that the authorisation scheme is comprehensible for all potential applicants and that the different steps in the procedure are known in advance. (59)

144. Admittedly, Article L. 631-7, sixth paragraph, of the Construction and Housing Code (the 'repeated' letting of furnished accommodation for residential use for 'short periods' to a 'transient clientele which does not take up residence there') contains somewhat vague concepts. But that is entirely understandable in view of the fact that it is supposed to leave some leeway for the municipal councils to specify further the meaning of those concepts.

145. I do not think that this Court should engage in abstract essays on what might reasonably be covered by the notion of 'short periods', (60) which is key for the purposes of cases concerning the *short-term* letting of furnished accommodation. It can only be suggested that if a few days or a few weeks obviously fall within the natural meaning of 'short periods', that would probably not be the case for periods stretching beyond several months, nor, a fortiori, for an entire year. Presumably, the longer the period, the less suitable the authorisation scheme. Beyond a certain period, it is doubtful that such a scheme would continue to be suitable for achieving the aim of combating a *long-term* housing shortage. However, a number of (different) solutions are of course entirely permissible within the realm of the reasonable and thus proportionate.

146. Finally, as regards accessibility and publicity, I fail to see the Appellants' point as to why it is not sufficient to have the municipal rules published in the city hall and online on the City of Paris website. Beyond that general statement, it is not the role of this Court to become a substitute web-master (or *arbiter webelegantiae*) for the City of Paris website, by engaging in discussion of whether or not that interface is sufficiently updated and accessible to everyone, in particular to potential applicants for authorisation.

V. Conclusion

147. I propose that the Court answer the questions posed by the Cour de cassation (Court of Cassation, France) as follows:

– Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market is applicable to national and municipal provisions governing access to the service consisting in the repeated letting for short periods, for consideration, including on a non-professional basis, of accommodation for residential use to a transient clientele which does not take up residence there;

– If such national and municipal provisions establish a procedure for obtaining a decision allowing access to the provision of such services, those provisions constitute an authorisation scheme pursuant to Articles 9 to 13 of Directive 2006/123;

– Article 9(1)(b) of Directive 2006/123 is to be interpreted as meaning that the objective of tackling a shortage of long-term housing constitutes an overriding reason relating to the public interest capable of justifying a national measure which requires authorisation to be obtained, in certain geographical areas, for the repeated letting of accommodation for residential use for short periods to a transient clientele which does not take up residence there;

– Directive 2006/123 is to be interpreted as allowing national and municipal provisions that subject to authorisation the repeated letting of furnished accommodation for residential use for short periods to a transient clientele which does not take up residence there, provided that those provisions comply with the requirements laid down by Article 10(2) of Directive 2006/123, in particular with the conditions of proportionality and non-discrimination, which is for the referring court to verify.

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1 Original language: English.

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2 See, notably, judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112), concerning Airbnb; and judgments of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981), and of 10 April 2018, Uber France (C-320/16, EU:C:2018:221), concerning Uber.

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3 Directive of the European Parliament and of the Council of 12 December 2006 (OJ 2006 L 376, p. 36).

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4 Articles L. 631-7 and L. 631-7-1 of the Construction and Housing Code.

5 While the national legislation lays down the general condition of a prior authorisation to let furnished accommodation for short-term stays, the municipal rules are to flesh them out in accordance with Article L. 631-7-1, fourth paragraph, of the Construction and Housing Code. That article empowers the municipal council to set the conditions for granting authorisations and determining the offset requirements by quartier (neighbourhood) and, where appropriate, by arrondissement (district).

6 See further points 81 to 85 of this Opinion.

7 The French Government noted at the hearing, without being contradicted by any other party on this point, that short-term letting of furnished accommodation was on average 1.8 times more profitable than long-term letting of furnished accommodation.

8 It has, however, an interpretative value. See, to that effect, judgment of 23 December 2015, Hiebler (C-293/14, EU:C:2015:843, paragraph 32).

9 ‘Member States will have to ensure that the rules of the Services Directive apply to a wide variety of activities, whether provided to business or to consumers … [such as] … rental and leasing services …, etc.’ European Commission (Directorate-General for the Internal Market and Services), Office for Official Publications of the European Communities, 2007, p. 10.

10 See Opinion of Advocate General Szpunar in Joined Cases X and Visser (C-360/15 and C-31/16, EU:C:2017:397, points 130 to 139).

11 See, to that effect, judgments of 12 July 2005, *Alliance for Natural Health and Others* (C-154/04 and C-155/04, EU:C:2005:449, paragraph 59), and of 21 December 2011, *Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866, paragraphs 42 and 43). But see, for a more generous approach to the normative weight of a recital, judgment of 25 July 2018, *Confédération paysanne and Others* (C-528/16, EU:C:2018:583, paragraphs 44 to 46 and 51).

12 Otherwise, it would be indeed a rather singular drafting approach, to say the least, if that list were to be construed as a list of (block) exceptions to the scope of the directive, which could be added to at will and without any overall, guiding criteria as to their nature.

13 Judgment of 30 January 2018, X and Visser (C-360/15 and C-31/16, EU:C:2018:44) (‘*Visser*’).

14 Ibid., paragraph 124.

15 Ibid., paragraphs 123 to 124.

16 Apart from recital 9, first sentence, also insisting on access to, or the exercise of, a service activity, see Article 4(6) and Article 9(1) of the Services Directive.

17 On the challenges posed by the peer-to-peer economy for legal regulation in general, see, for example, Conseil d'État, *Puissance publique et plateformes numériques: accompagner l'"ubérisation"*, Étude annuelle 2017, La Documentation Française, 2017.

18 Regarding in particular authorisation regimes under provisions of the Treaties, see, for example, judgments of 24 March 2011, Commission v Spain (C-400/08, EU:C:2011:172, paragraphs 65 to 70), and of 22 June 2017, Unibet International (C-49/16, EU:C:2017:491, paragraph 33 and the case-law cited).

19 See *Visser*, paragraph 115.

20 Judgment of 1 October 2015, Trijber and Harmsen (C-340/14 and C-341/14, EU:C:2015:641), where it was taken for granted that the two sets of rules at issue constituted authorisation schemes.

21 See judgment of 14 July 2016, Promoimpresa and Others (C-458/14 and C-67/15, EU:C:2016:558, paragraph 41).

22 See judgment of 26 September 2018, *Van Gennip and Others* (C-137/17, EU:C:2018:771).

23 See judgment of 4 July 2019, Kirschstein (C-393/17, EU:C:2019:563, paragraph 64).

24 See *Visser*, paragraphs 119 to 120.

25 See *Visser*, paragraph 110.

26 Above, points 31 to 35.

27 Thus also reflecting the overall principle that unless absolutely necessary, access to the provision of services should not be made subject to any authorisation scheme (see above point 67).

28 Some of those criteria have also been mentioned by the Court in the context of primary law provisions on freedom to provide services and freedom of establishment. See, to that effect, for example, judgments of 3 June 2010, *Sporting Exchange* (C-203/08, EU:C:2010:307, paragraph 50 and the case-law cited), and of 13 February 2014, *Sokoll-Seebacher* (C-367/12, EU:C:2014:68, paragraph 27), where the Court required prior authorisation schemes to be based on objective, non-discriminatory criteria which are known in advance by the undertakings concerned.

29 As also confirmed by the Commission's *Handbook on implementation of the Services Directive*, at p. 26: 'the criteria established in Article 10(2) should apply to authorisation schemes governing access to and exercise of service activities *at all levels*'. My emphasis.

30 See, for example, judgments of 22 January 2013, Sky Österreich (C-283/11, EU:C:2013:28, paragraph 42); of 17 October 2013, Schaible (C-101/12, EU:C:2013:661, paragraph 25); and of 4 May 2016, Pillbox 38 (C-477/14, EU:C:2016:324, paragraph 155).

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31 See judgments of 22 January 2013, Sky Österreich (C-283/11, EU:C:2013:28, paragraph 45 and the case-law cited); of 17 October 2013, Schaible (C-101/12, EU:C:2013:661, paragraph 28); and of 21 December 2016, AGET Iraklis (C-201/15, EU:C:2016:972, paragraph 85).

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32 See, for example, judgments of 22 January 2013, Sky Österreich (C-283/11, EU:C:2013:28, paragraphs 46 to 48), and of 20 December 2017, Polkomtel (C-277/16, EU:C:2017:989, paragraph 51).

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33 See, for example, judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraph 68 and the case-law cited).

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34 See, for example, judgment of 13 June 2017, Florescu and Others (C-258/14, EU:C:2017:448, paragraph 51 and the case-law cited).

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35 See, for example, judgments of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraph 37); of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, paragraph 49); and of 12 February 2019, *TC* (C-492/18 PPU, EU:C:2019:108, paragraph 57).

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36 See, for example, ECtHR, 19 December 1989, *Mellacher and Others v. Austria* (CE:ECHR:1989:1219JUD001052283, §§ 45, 48, 53 and 55), concerning rent reductions imposed by the State on owners for social purposes, leading to a deprivation of part of their income from the property; ECtHR, 19 June 2006, *Hutten-Czapska v. Poland* (CE:ECHR:2006:0619JUD003501497, §§ 167, 224 and 225), finding disproportionate the burden imposed upon landlords by a State rent-control scheme, notably aiming at combating the shortage of flats available for lease at an affordable level of rent in Poland; ECtHR, 26 September 2006, *Fleri Soler and Camilleri v. Malta* (CE:ECHR:2006:0926JUD003534905, §§ 60, 68 and 75), concerning a State measure subjecting the applicants' property to a continued tenancy; ECtHR, 12 June 2012, *Lindheim and Others v. Norway* (CE:ECHR:2012:0612JUD001322108, §§ 134 to 135), finding a disproportionate social and financial burden on the lessor due to the fact that lessees could demand an indefinite extension of ground lease contracts on unchanged conditions instead of redemption.

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37 It might be recalled that the French Government suggested at the hearing that short-term furnished letting was significantly more profitable than long-term letting (see above, footnote 7).

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38 See, for example, judgments of 23 September 2003, Ospelt and Schlössle Weissenberg (C-452/01, EU:C:2003:493, paragraph 39), where the Court notably held that encouraging a reasonable use of the available land by resisting pressure on land is a valid social objective, and of 1 October 2009, Woningstichting Sint Servatius (C-567/07, EU:C:2009:593, paragraphs 29 to 30 and the case-law cited), where the Court recalled that national rules may restrict free movement in the interest of objectives directed at resisting pressure on land or at maintaining, as a town and country planning measure, a permanent population in rural areas.

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39 See, for example, judgment of 8 May 2013, Libert and Others (C-197/11 and C-203/11, EU:C:2013:288, paragraphs 49 to 52).

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40 See *Visser*, paragraphs 134 to 135.

41 See judgment of 1 October 2009, Woningstichting Sint Servatius (C-567/07, EU:C:2009:593, paragraph 30), in relation to the requirement of a prior authorisation to invest in a construction project. See also, to that effect, judgment of 15 October 2009, Busley and Cibrian*Fernandez* (C-35/08, EU:C:2009:625, paragraph 32).

42 See, recently for example, judgment of 7 November 2018, Commission v Hungary (C-171/17, EU:C:2018:881, paragraph 80).

43 Thus between domestic and foreign providers of services. See, for example, judgment of 20 February 2001, Analir and Others (C-205/99, EU:C:2001:107, paragraph 25 and the case-law cited).

44 Article L. 631-7, first paragraph, of the Construction and Housing Code. While obtaining an authorisation is an obligation in those cities, it would appear that the legislation does not preclude smaller cities from adopting an authorisation scheme if the characteristics of their housing market require it.

45 Article L. 631-7-1-A, fifth paragraph, of the Construction and Housing Code. In order to be characterised as the lessor's main residence, the dwelling must be occupied for at least eight months per year, except owing to professional obligations, health reasons or *force majeure*, by the lessor or his/her spouse or by a dependant.

46 See the examples provided in point 68 of this Opinion.

47 Above, points 92 to 95.

48 Article L. 631-7-1, fourth paragraph, of the Construction and Housing Code.

49 See, for example, judgment of 4 July 2019, Kirschstein (C-393/17, EU:C:2019:563, paragraphs 66 to 82).

50 See, for example, judgment of 26 September 2018, *Van Gennip and Others* (C-137/17, EU:C:2018:771, paragraphs 79 to 81 and the case-law cited).

51 Above, point 113 of this Opinion.

52 In such an unlikely scenario, although it indeed might be suggested, somewhat cynically, that such a condition is in fact proportionate to that *specific* objective, that affirmation would be likely to prompt an avalanche of further questions.

53 When there are no reasonable capital or property-holding requirements inherent in the nature of the service to be authorised, one might add. There are of course other kinds of service activities for which capital, status or property holding requirements would be entirely appropriate.

54 Above, points 92 to 95.

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55 See Article 10(2) in conjunction with Article 10(7).

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56 Although it was not entirely clear whether under the heading of proportionality, or rather under the heading of the clarity and unambiguity of such local legislation.

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57 Article L. 631-7, sixth paragraph, of the Construction and Housing Code.

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58 Article L. 631-7, fourth paragraph, of the Construction and Housing Code.

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59 See also, to that effect, the European Commission's *Handbook on implementation of the Services Directive*, p. 25.

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60 At the hearing, the Appellants suggested that 'short periods' have been defined in different ways by French cities, apparently ranging from three or eight consecutive months to almost one year.