



## Platforms as Private Governance Systems – The Example of Airbnb

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## ABSTRACT

Online platforms create legal systems that can best be described as private governance systems. By private governance we refer to the fact that a private actor can take on the roles as regulator, implementer and dispute resolution body, thereby mirroring the classical roles of the state and potentially replacing state governance with an alternative, private legal order. As an example, the Airbnb platform ([www.airbnb.com](http://www.airbnb.com)) regulates the rights and duties between users of the platform (hosts and guests), it implements these rights and duties by facilitating supervision mechanisms such as ratings and reviews, and it provides dispute resolution mechanisms for the users. The increasing societal role and impact of online platforms makes it pertinent to consider to what extent these private governance systems can safeguard the public values and interests which state legal orders seek to promote and protect. In this article, we use the concept of private governance to make a case study of the private legal order of Airbnb. Our analysis shows that the private governance system created by Airbnb is concerned not only with commercial matters, but also with public values as known in state legal orders. However, it also shows that the private governance system created by Airbnb can have an undermining effect on state legal orders.

## 1. INTRODUCTION

It is well-known that private actors can create their own private legal orders. Private actors can thus, to a large extent, establish their own rules and standards of behavior and play a significant role in the implementation and enforcement of such private rules and standards. In this way, private actors can take on the role of the state as both regulator, implementer and dispute resolution body, and replace state governance with private governance. Online platforms, which facilitate transactions between their users (“peers”), are a very clear example of the phenomenon of such private governance.<sup>1</sup> For instance, the core function of the Airbnb platform is to act as an intermediary between platform users who wish to offer accommodation services (“Hosts”) to other platform users (“Guests”).<sup>2</sup> In this connection, Airbnb regulates the main rights and duties of Hosts and Guests, it implements these rights and duties by facilitating supervision mechanisms such as ratings and reviews, and it provides dispute resolution mechanisms for the

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<sup>1</sup> For an overview of these platforms, see *e.g.* Pierre Hausemer and others, *Exploratory study of consumer issues in online peer-to-peer platform markets – Final Report* (European Commission, 2017).

<sup>2</sup> See [www.airbnb.com](http://www.airbnb.com) for details. In fact, Hosts may also offer other kinds of services on the Airbnb platform such as, for instance, guided tours and other “events”. In this article, we focus on the accommodation services offered on the Airbnb platform.

parties.<sup>3</sup> Other examples of such online platforms include eBay and Uber.

Platforms often see themselves as creators of private legal orders with their own visions and political agendas, to a wide extent detached from state legal orders. For example, the eBay website includes a section on “Government Relations”, which includes the following statements: “We focus on providing buyers and sellers with the ability to move goods via the internet with minimal legislative interference” and “We envision a world of technology-enabled commerce that is open, diverse and inclusive for all”.<sup>4</sup> The website also includes a section on “Responsible business” with the following statement: “We have created a trusted, transparent marketplace based on the strong ethical values we follow as a business.”

Airbnb’s website includes similar statements. For example, Airbnb states in its “Nondiscrimination Policy” that “While we do not believe that one company can mandate harmony among all people, we do believe that the Airbnb community can promote empathy and understanding across all cultures”. Furthermore, “we commit to do more than comply with the minimum requirements established by law” and finally:

Airbnb’s members bring to our community an incredible diversity of background experiences, beliefs, and customs. By connecting people from different backgrounds, Airbnb fosters greater understanding and appreciation for the common characteristics shared by all human beings and undermines prejudice rooted in misconception, misinformation, or misunderstanding.<sup>5</sup>

It is clear from those statements that the platforms are striving to create their own private legal orders that are as unaffected by state law as possible.<sup>6</sup> The platforms also draw up a picture of their platforms as representing a different and “better world” which the users become part of by using the platforms. Thus, not only can there be commercial advantages by using the platforms but the users also acquire a “do good”- identity. In this regard, the platforms apparently seek to govern not only the commercial aspects of their activities but also to ensure

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<sup>3</sup> See section 3.

<sup>4</sup> See ‘Government Relations’ (Ebay Inc) <[www.ebayinc.com/our-company/government-relations/](http://www.ebayinc.com/our-company/government-relations/)> accessed 11 October 2018.

<sup>5</sup> See ‘Nondiscrimination Policy’ (Airbnb Inc) <[www.airbnb.com/terms/nondiscrimination\\_policy](http://www.airbnb.com/terms/nondiscrimination_policy)> accessed 11 October 2018.

<sup>6</sup> The Airbnb Terms of Service emphasize that “Hosts alone are responsible for identifying, understanding, and complying with all laws, rules and regulations that apply to their Listings and Host Services”, see ‘Terms of Service’ (Airbnb Inc, 16 April 2018) <[www.airbnb.com/terms](http://www.airbnb.com/terms)> accessed 11 October 2018.

certain public values such as consumer protection and nondiscrimination.

Through the lens of the concept of private governance, this contribution provides a case study of the private legal order of Airbnb.<sup>7</sup> The aim of our study is two-fold. First, we will show that the Airbnb platform provides a system of private governance that is concerned not only with commercial matters but also with public values as known from state legal orders, in particular consumer protection and non-discrimination (section 3). Secondly, we will show that the Airbnb platform challenges the applicability and effectiveness of statutory consumer protection and nondiscrimination laws, and that it can hereby have an undermining effect on state governance (section 4). We begin with an analysis of the contractual setup established by Airbnb (section 2).

## 2. AIRBNB CONTRACTUAL SETUP

The Airbnb “Terms of Service” describe the nature of the services provided by Airbnb:<sup>8</sup>

1.1 The Airbnb Platform is an online marketplace that enables registered users (“**Members**”) and certain third parties who offer services (Members and third parties who offer services are “**Hosts**” and the services they offer are “**Host Services**”) to publish such Host Services on the Airbnb Platform (“**Listings**”) and to communicate and transact directly with Members that are seeking to book such Host Services (Members using Host Services are “**Guests**”).

1.2 As the provider of the Airbnb Platform, Airbnb does not own, create, sell, resell, provide, control, manage, offer, deliver, or supply any Listings or Host Services, nor is Airbnb an organiser or retailer of travel packages under Directive (EU) 2015/2302. Hosts alone are responsible for their Listings and Host Services. When Members make or accept a booking, they are entering into a contract directly with each other. Airbnb is not and does not become a party to or other participant in any contractual relationship between Members, nor is Airbnb a real estate broker or insurer. Airbnb is not acting as an agent in any capacity for any Member, except as specified in the Payments Terms.

These and other provisions in the Terms of Service make it clear that use of the Airbnb platform establishes (principally) two different

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<sup>7</sup> For another case study of Airbnb focusing on private law perspectives and challenges for European consumer and market law, see Vanessa Mak, ‘Private Law Perspectives on Platform Services’ EuCML (2016) 19.

<sup>8</sup> Terms of Service (n 6).

contractual relationships:<sup>9</sup> One between Airbnb and a registered user (which we will refer to as “the user contract”) and one between a Host and a Guest (which we will refer to as “the rental contract”).

### 2.1. THE USER CONTRACT – B2C OR B2B

To use the Airbnb platform for offering or booking accommodation, the user must register on the Airbnb platform in order to become a “Member”. In this connection, the user must accept the Airbnb Terms of Service, which in the preamble incorporate by reference several other terms and policies into the agreement, including the “Payments Terms of Service”, “Nondiscrimination Policy”, “Airbnb Privacy Policy”, “Host Guarantee Terms and Conditions” and “Airbnb Guest Refund Policy”.<sup>10</sup> The user can read the content of these terms and policies by clicking on links provided by Airbnb but can also accept the terms and policies without clicking on any of these links. Users are required to provide only limited information about their identity and, in general, Airbnb does not request them to verify their identity.<sup>11</sup>

Whereas Airbnb is undoubtedly acting in a commercial capacity, the users (Guests as well as Hosts) may be acting for private purposes or for purposes relating to their trade, business or profession. In principle, a user may interchangeably use the Airbnb platform for both private and commercial purposes. Currently, the user contract does not require Hosts or Guests to provide information about the purpose of their transactions. This has implications for the applicability of statutory consumer protection laws to the legal relationship between Airbnb and its users, which we will analyze further in section 4.<sup>12</sup>

### 2.2. THE RENTAL CONTRACT – C2C, B2B, C2B OR B2C

The rental contract governs transactions between a Guest, who has made a booking, and a Host, who has accepted this booking. The booking system provides two types of booking procedures, namely

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<sup>9</sup> Other provisions in the Terms of Service also emphasize these separate contractual relationships, including Section 7.1.7 addressing terms specific for Hosts: “When you accept or have pre-approved a booking request by a Guest, you are entering into a legally binding agreement with the Guest and are required to provide your Host Service(s) to the Guest as described in your Listing when the booking request is made.” See also Section 8.1.2 addressing terms specific to Guests: “Upon receipt of a booking confirmation from Airbnb, a legally binding agreement is formed between you and your Host, subject to any additional terms and conditions of the Host that apply, including in particular the applicable cancellation policy and any rules and restrictions specified in the Listing.” See also section 3.

<sup>10</sup> Terms of Service (n 6).

<sup>11</sup> Terms of Service (n 6) and Section 1 of the ‘Privacy Policy’ (Airbnb Inc, 16 April 2018) <[www.airbnb.com/terms/privacy\\_policy](http://www.airbnb.com/terms/privacy_policy)> accessed 11 October 2018, Section 2.4.

<sup>12</sup> It may also have implications for other areas of law, including tax law.

“normal booking” and “instant booking”. Under the normal booking procedure, a potential Guest shall submit a booking request to the Host, who may choose to accept or reject the booking request. Under the instant booking procedure, the Host has already accepted any booking request from potential Guests in advance. The Host can restrict the availability of such instant booking so that it is only available to 1) Guests who meet Airbnb’s requirements or 2) Guests who meet Airbnb’s requirements and also have a) provided a government issued ID and/or, b) recommendation from other Hosts.

As mentioned, the user contract presupposes that a Host and a User will enter into a separate rental contract and dictates, to a large extent, the main terms and conditions of the rental contract. However, the user contract does not require users to enter into any explicit (written) agreement. As mentioned, the user contract requires users to provide only limited information about their identity to Airbnb, which Airbnb generally does not verify. Also, when Guests and Hosts (de facto) enter into rental contracts, Airbnb does not ensure that they obtain verified information about each other. Consequently, the Airbnb platform generally does not ensure that users, who enter into a rental contract, will have credible information about the identity of their contractual counterpart.

Since users of the Airbnb platform may be acting for private and/or commercial purposes, the rental contract may govern both C2C, B2B, B2C or C2B transactions. As mentioned, the user contract does not require Hosts and Guests to provide information about the purpose of their transactions and this has implications for the applicability of statutory consumer protection laws to the legal relationship between Airbnb and its users, which we will analyze further in section 4.

### 2.3. A CONTRACTUAL TRIANGLE

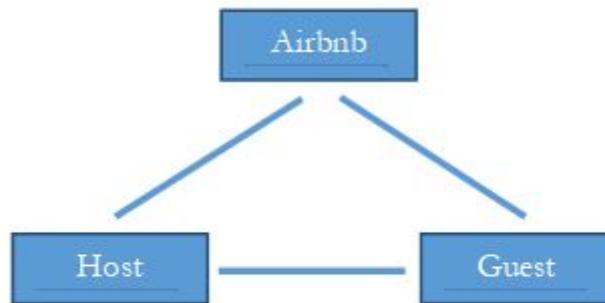
A closer examination of the contractual setup may require a more nuanced understanding of the contractual relations: The terms of the user contracts dictate, to a large extent, the main terms and conditions of rental contracts as well. For instance, Section 7 of the Terms of Service contains detailed rules for Hosts Listings, such as rules on the minimum information about the Host, the use of pictures, animations and videos, requirements of deposits, etc.<sup>13</sup> Further, Section 7.2.3 contains a clause, according to which Hosts “present a warrant” (towards Airbnb), that they will not breach the terms of the rental contract.<sup>14</sup> Further, the Airbnb platform offers some surveillance with contract compliance as well as some sanctions in case of breach. Thus, the full

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<sup>13</sup> See also, e.g., Section 8 of the Terms of Service (n 6) on “Terms specific for Guests”.

<sup>14</sup> In Section 7.1.3 of the Terms of Service (n 6), it is stated that “(a)ny terms and conditions included in your Listing, in particular in relation to cancellations, must not conflict with these Terms.”

picture of the contractual setup that forms the basis for a specific transaction seems to take the shape of a contractual triangle with three contractual relations:<sup>15</sup>



Under the Terms of Service (Section 1.2), it reads “Airbnb is not and does not become a party to or other participant in any contractual relationship between Members.” This attempt to avoid involvement in the contractual relation between Hosts and Guests is further supported by the explicit disclaimers of liability contained in Section 17 of the Terms of Service. The viability of this construction can be questioned. When taking the actual involvement of Airbnb in the contractual relation between Hosts and Guests into consideration, it could be considered whether Airbnb is not subject to some kind of responsibility for the performance of the rental contract and if so, whether the general disclaimer in Section 17 in the given circumstances can be set aside as unconscionable or as an unfair contract term.<sup>16</sup>

Further, in the light of Airbnb’s overall business model, the contractual triangles take the character of a contractual *cluster* or a *network*. In such networks, one may observe an increased contractual duty of loyalty between the participants<sup>17</sup> and a tendency to lower the bar for direct actions and tort law claims.<sup>18</sup>

<sup>15</sup> The picture of the contractual triangle – or “a tripartite relationship” – is also used by Vassilis Hatzopoulos, *The Collaborative Economy and EU Law* (Oxford: Hart Publishing, 2018), chapter 2, where five different platform models are identified for the purpose of examining market access and consumer protection issues. See also Christiane Wendehorst, ‘Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive’, *EuCML* (2016) 30.

<sup>16</sup> In this contribution we do not pursue this question further. On the platform’s liability for illegal content on the platform, see n 63.

<sup>17</sup> See for instance Emily M. Weitzenboeck, *A Legal Framework for Emerging Business Models* (Edward Elgar Publishing 2012), 186-243 and Hugh Collins ‘Introduction’ in Gunther Teubner, *Networks as Connected Contracts* (Hart Publishing 2011), 14-15.

<sup>18</sup> See for instance Matthias E. Storme, ‘A civilian Perspective on Network Contracts and Privity’, [2017] Vol. 85 No. 6 *The George Washington Law Review* 1739-1776 and

Leaving aside these more fundamental considerations as to the strict “separation” of the three contractual relations in the triangular setup, it is the clear starting point under the principle of privity of contract that a contract between two parties does not have effect for a third party. This means that as a general rule, the contract between Airbnb and the Host cannot be relied upon by the Guest and the contract between Airbnb and the Guest cannot be relied upon by the Host.

In particular, it is clear that a contract between two parties cannot impose burdens on a third party. However, one may ask if the established contractual setup may confer rights on a third party under the doctrine of third party beneficiary law. In other words, it could be asked whether the Guest can be regarded a third party beneficiary of the contract between Airbnb and the Host and whether the Host can be regarded a third party beneficiary of the contract between Airbnb and the Guest. Several jurisdictions recognize the concept of the third party beneficiary contract.<sup>19</sup> Quite clearly and as the above mentioned reference shows, by entering into the user contract, the user undertakes to live up to certain obligations that will *in fact* benefit the other user. However, in order for the user to be able to base a legal claim on the contract, three requirements must be fulfilled.<sup>20</sup> Firstly, the contractual parties must *intend* to confer a right on the third party. Secondly, the parties must confer a *specific right* on the third party. Thirdly, the third party must be *identifiable*. Normally, it is not a requirement that the third party existed or was identified at the time of entering into the contract,<sup>21</sup> but the third party must be identifiable, for instance, as belonging to a specific group or class.<sup>22</sup> It seems doubtful whether the Airbnb contractual setup fulfills these requirements. In particular, it must be presumed that it will often be difficult to show the required intention on

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(from the origin of this line of theory) John N. Adams and Roger Brownsworth, ‘Privity and the Concept of a Network Contract’, Vol 10, Iss. 1 Legal Studies, 12-18. See also Vassilis (n 15) 61 on the connection between the tripartite relationship and tort law issues. These matters are not further pursued in this contribution.

<sup>19</sup> See for instance for German law: Bürgerliches Gesetzbuch (BGB) 328, French law: Code Civil (Cc) art. 1121, English Law: The Third Party Beneficiary Rights Act and for US law: The Restatement Second § 302 ff. The concept is also recognized in Scandinavia, Torsten Iversen, ‘Tredjemandsaftaler’, [1994] Tidsskrift for Retsvidenskab 12. Also in what could be called “general international contract law”, the concept of the third party contract is recognized as reflected in articles 5.2.1.-5.2.6 of the UNIDROIT Principles, Article 6:110 of the PECL, article 78 of the CESL and the DCFR article 9:301.

<sup>20</sup> See Katerina P Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing 2015) 197.

<sup>21</sup> See DCFR 9.301 where this is specified.

<sup>22</sup> Mitkidis (n 20) 198.

the part of the user to confer a right on the other user to hold it responsible for infringements of the contract with Airbnb.

### 3. AIRBNB AS A PRIVATE GOVERNANCE SYSTEM

As described in section 1, platforms like Airbnb have become powerful societal players, which take on roles that from a constitutional law perspective are recognizable as regulators, implementers and dispute resolution bodies. In this section, we will explore whether the Airbnb platform as a system of private governance is also concerned with public values as known from state legal orders, in particular consumer protection and non-discrimination. We will focus in particular on the extent to which such values become part of the relation between the Host and the Guest with Airbnb acting in the role of a “state”.

#### 3.1. AIRBNB AS REGULATOR

The Airbnb contractual setup described above aims to govern activities on the Airbnb platform. Interestingly, Airbnb regulates not only commercial aspects of these activities but also aspects of general public interest such as consumer protection and nondiscrimination.

With regard to consumer protection, some elements of the Airbnb concept aim at protecting the Guest against misconduct of the Host. As an example, Guests are required to pay in advance, but Airbnb holds the funds in escrow until 24 hours after the Guest has checked in.<sup>23</sup> Another example of a rule that arguably provides some protection of the Guest against misuse (forgery) concerns the content of the “listing” of a Host:<sup>24</sup>

When creating a Listing through the Airbnb Platform you must (i) provide complete and accurate information about your Host Service (such as listing description, location, and calendar availability), (ii) disclose any deficiencies, restrictions (such as house rules) and requirements that apply (such as any minimum age, proficiency or fitness requirements for an Experience) and (iii) provide any other pertinent information requested by Airbnb.

This duty of disclosure is comparable to Article 5 of the EU Directive on consumer rights.<sup>25</sup> However, it expands this duty of disclosure beyond the scope of EU consumer law.<sup>26</sup>

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<sup>23</sup> ‘Payment Terms of Service’ (Airbnb Inc, 16 April 2018) <[https://www.airbnb.com/terms/payments\\_terms](https://www.airbnb.com/terms/payments_terms)> accessed 11 October 2018, Section 7.2.

<sup>24</sup> Terms of Service (n 6) Section 7.1.1.

<sup>25</sup> Council Directive 2011/83/EU of 27 June 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive

With regard to nondiscrimination, Airbnb has a separate Nondiscrimination Policy.<sup>27</sup> In this policy, Airbnb presents itself as “at its core, an open community dedicated to bringing the world closer together by fostering meaningful, shared experiences among people from all parts of the world”, and lays down and explains two “foundational principles” that apply to Hosts and Guests, namely “inclusion” and “respect”.<sup>28</sup> The Nondiscrimination Policy provides “specific guidance for Hosts” in the form of a number of rules about what Hosts may or may not do. According to the rules, it is prohibited for a Host to reject a Guest or impose special terms on a Guest based on race, skin color, ethnicity, nationality, religion, sexual orientation, sexual identity or marital status. It is also prohibited to discriminate on the basis of sex unless the Host shares rooms with the Guest. In contrast, it is permitted for the Host to reject Guests for other reasons. For instance, Hosts can reject smokers to keep the home a non-smoking area. In Europe, these private rules find parallels in the state legal orders which will be described in section 4.<sup>29</sup>

### 3.2. AIRBNB AS IMPLEMENTER

Airbnb has also created systems that fill out the role of supervision, control and enforcement of the contractual setup. The fundamental tool in this regard is the review system, which primarily is of a non-legal nature and based on reputation of users. Like many other platforms, Airbnb “outsources” core implementation tasks to the customers themselves while the platform primarily takes on the role of facilitator of exchange and disclosure of relevant information:

Within a certain timeframe after completing a booking, Guests and Hosts can leave a public review (“**Review**”) and submit a star rating (“**Rating**”) about each other. Any Ratings or Reviews reflect the opinion of individual Members and do not reflect the opinion of Airbnb.<sup>30</sup>

In practice, both Guests and Hosts review each other, and Airbnb posts detailed reviews on Listings and Member profiles. Based on

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97/7/EC of the European Parliament and of the Council Text with EEA relevance [2002] OJ L304/64.

<sup>26</sup> See section 4.2.2.

<sup>27</sup> Nondiscrimination Policy (n 5).

<sup>28</sup> Ibid.

<sup>29</sup> Non-discrimination is a fundamental right and goal throughout Europe, see, in particular, TEU Articles 2 and 3(3), Article 14 of the European Convention on Human Rights, Articles 20-26 of the EU Charter on Fundamental Rights, and the EU directives implementing the principle of equal treatment (Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC).

<sup>30</sup> Terms of Service (n 6) Section 10.1.

reviews, each Member builds its reputation on the platform. Airbnb supports the reputational effect by granting Hosts the position of “Super-hosts”, which is displayed for Guests or to withdraw this badge. Reviews are also used as a tool in the booking system so that Hosts can choose to only rent out to Guests who have previously been well reviewed by their previous Hosts.

Apart from facilitating this review system, Airbnb may also undertake a more active role as implementer. Airbnb emphasizes that it has no obligation to monitor the access to or use of the Airbnb Platform by any Member (...), but has the right to do so (...).<sup>31</sup> In this regard, Airbnb may use several means to enforce its rules and policies on the platform. Most severely, Airbnb may terminate the contractual relationship with the user and/or stop providing access to the Airbnb platform.<sup>32</sup> Airbnb reserves the right to do this in three situations: First, if the user has materially breached his obligations under the user contract. Secondly, if the user has “violated applicable laws, regulations or third party rights”. Thirdly, if “Airbnb believes in good faith that such action is reasonably necessary to protect the personal safety or property of Airbnb, its Members, or third parties (for example in the case of fraudulent behavior of a Member).<sup>33</sup>

Airbnb may also take other measures against a user, including refuse to surface, delete or delay any Listings, Ratings, Reviews, or other Member Content; cancel any pending or confirmed bookings; limit your access to or use of the Airbnb Platform; temporarily or permanently revoke any special status associated with your Airbnb Account; temporarily or in case of severe or repeated offenses permanently suspend your Airbnb Account and stop providing access to the Airbnb Platform.<sup>34</sup>

If a Host cancels a booking, Airbnb may publish an automated review on the Listing cancelled by the Host indicating that a booking was cancelled”. In addition, “Airbnb may (i) keep the calendar for the Listing unavailable or blocked for the dates of the cancelled booking, and/or (ii) impose a cancellation fee, unless the Host has a valid reason for cancelling the booking pursuant to Airbnb’s Extenuating

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<sup>31</sup> Terms of Service (n 6) Section 14.

<sup>32</sup> See Terms of Service (n 6) Section 15.4 and the Nondiscrimination Policy (n 5).

<sup>33</sup> Ibid.

<sup>34</sup> See Terms of Service (n 6) Section 15.5 and the Nondiscrimination Policy (n 5).

Circumstances Policy or has legitimate concerns about the Guest's behavior.<sup>35</sup>

Whereas Airbnb can use the review system and system of sanctions mentioned above as important means of implementing its rules and policies, the Airbnb booking system (described in section 2.2) can challenge the implementation of the Nondiscrimination Policy.<sup>36</sup> For Hosts, their first name and their profile photo are part of their public profile page.<sup>37</sup> Accordingly, the Airbnb platforms requires Hosts to accept that their sex, race and ethnic origin are publicly available. Airbnb thus invites potential Guests to consider this information before making a booking request, which may make the Host a victim of discrimination. For Hosts, it will generally be very difficult to prove such discrimination.

Under the normal booking procedure, a potential Guest shall submit a booking request to the Host, who may choose to accept or reject the booking request. In this connection, Airbnb will share certain information about the Guest with the Host, which includes the full name of the Guest, the full name of any additional Guests, and other information that the Guest agrees to share.<sup>38</sup> Apparently, this may also include a profile picture.<sup>39</sup> Again, potential Hosts may consider the provided information about sex, race and ethnic origin of the potential Guest(s), which may make the Guest a victim of discrimination, and again, such discrimination might be difficult to prove.

### 3.3. AIRBNB AS DISPUTE RESOLVER

Airbnb has created its own system for solving certain types of disputes between its users (the "Resolution Center"). In particular, users can use the Resolution Center to send or request money for refunds (*e.g.* in cases of cancellation) or to send or request money for damage claims related to bookings.<sup>40</sup> The Terms of Service describes the dispute resolution procedure for damage claims as follows:<sup>41</sup>

If a Host escalates a Damage Claim to Airbnb, you will be given an opportunity to respond. If you agree to pay the

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<sup>35</sup> See Terms of Service (n 6) Section 9.3.

<sup>36</sup> This topic has attracted significant attention in recent legal scholarship in the US. See, *inter alia*, Jamilla Jefferson-Jones 'Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Sharing Economy' [2016] Vol. XLIII Fordham Urban Law Journal, [www.ssrn.com/abstract=2772078](http://www.ssrn.com/abstract=2772078) accessed 11 October 2018, and Nancy Leong and Aaron Belzer 'The New Public Accommodations: Race Discrimination in the Platform Economy' [2017] 105 Georgetown Law Journal 1271 <[www.ssrn.com/abstract=2687486](http://www.ssrn.com/abstract=2687486)> accessed 11 October 2018.

<sup>37</sup> See Privacy Policy (n 11) Section 3.3.

<sup>38</sup> *Ibid* Section 3.2.

<sup>39</sup> *Ibid* Section 1.1.

<sup>40</sup> Terms of Service (n 6) Sections 9.8 and 11.

<sup>41</sup> *Ibid* Section 11.2.

Host, or Airbnb determines in its sole discretion that you are responsible for the Damage Claim, Airbnb Payments will collect any such sums from you and/or against the Security Deposit (if applicable) required to cover the Damage Claim pursuant to the Payments Terms. Airbnb also reserves the right to otherwise collect payment from you and pursue any remedies available to Airbnb in this regard in situations in which you are responsible for a Damage Claim, including, but not limited to, in relation to any payment requests made by Hosts under the Airbnb Host Guarantee.

It is not mandatory for Hosts to use the Resolution Center to pursue damage claims, whereas the Guest cannot oppose to the procedure. The procedure allows Airbnb not only to make a decision but also to enforce this decision and collect the sum from the user and/or from the security deposit.<sup>42</sup> With regard to damage claims, the function of the Resolution Center is clearly to help the Host get “access to justice”.

Airbnb may also facilitate the resolution of other types of disputes between users, including violations of the Nondiscrimination Policy or applicable statutory laws, e.g. concerning consumer protection and nondiscrimination. However, Airbnb has no obligation to do so.<sup>43</sup> We are unaware of any publicly available empirical data about the use of the Airbnb Resolution Center to resolve such other types of disputes.

Obviously, the Resolution Center’s decision is not binding, but the Guest will need to take legal action against the Host (and/or Airbnb) to recover. We will return to this aspect in section 4.

The private dispute resolution system completes the private legal order, which, taken as a whole, is a comprehensive system of private governance. It parallels the state legal order by offering “services” with regard to both regulation, implementation and dispute settlement and by being concerned not only with commercial matters but also with matters of general public interest such as consumer protection and anti-discrimination.

#### 4. AIRBNB AND THE UNDERMINING OF STATE GOVERNANCE

If a user is unsatisfied with the private governance mechanisms offered by Airbnb, the user may instead seek to use traditional state governance mechanisms to enforce his contractual rights (under the user contract and/or the rental contract) as well as to enforce his rights under

<sup>42</sup> A Host can require a security deposit, see Terms of Service (n 6) Section 7.2.2 for details.

<sup>43</sup> In Section 1.3 of the Terms of Service (n 6), Airbnb states: “*While we may help facilitate the resolution of disputes, Airbnb has no control over and does not guarantee (i) ..., (ii) ..., or (iii) the performance or conduct of any Member or third party.*”

applicable statutory laws. In this section, we will show that the Airbnb platform challenges the applicability and effectiveness of traditional state governance mechanisms when it comes to the obligations of Airbnb and its users. We will limit our analysis in this section to situations where the Host offers its accommodation services within the EU, and both the Host and the Guest have their residence in the EU.

#### 4.1. GOVERNING LAW

Airbnb offers its platform services to users in the EU from a subsidiary incorporated under the laws of Ireland, except for payment services, which Airbnb offers (so far) through a subsidiary incorporated under the laws of the UK.<sup>44</sup> The Hosts often have their domicile in the country where they provide their services, whereas Guests generally come from all over the world. Consequently, the law applicable to the contractual relationships between Airbnb, Hosts and Guests can be of material importance. The Rome I Regulation will govern the law applicable to the contractual setup presented in section 2, when both the Host and the Guest have their residence in the EU.<sup>45</sup>

With regard to *the user contract*, the Terms of Service include the following provision on applicable law for users with residence in the EU:<sup>46</sup>

If your Country of Residence is outside of the United States and China, these Terms will be interpreted in accordance with Irish law. The application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) is excluded. The choice of law does not impact your rights as a consumer according to the consumer protection regulations of your Country of Residence.

The Rome I Regulation generally allows the parties to choose the law applicable to their contract. Article 3 of the Regulation requires that such a choice is made expressly or is clearly demonstrated by the terms of the contract or the circumstances of the case. The assessment of this requirement is subject to an autonomous interpretation of the choice of law agreement, which is not restrained by national rules of interpretation.<sup>47</sup> In our view, the above provisions are sufficiently clear to constitute a choice of law agreement for the contractual relationships between each of the two Airbnb subsidiaries and its users. This means

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<sup>44</sup> See the Terms of Service (n 6) and the Payment Terms of Service (n 22).

<sup>45</sup> Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6. However, this Regulation does currently not apply in Denmark.

<sup>46</sup> The Payments Terms of Service (n 22) include a similar provision.

<sup>47</sup> Franco Ferrari (ed): Rome I Regulation (Sellier European Law Publisher 2015) 95.

that, as a starting point, Irish law applies to the contract between Airbnb and users with residence in the EU.

However, Article 6 of the Rome I Regulation includes a special rule on consumer contracts, *i.e.* contracts concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional).<sup>48</sup> Under Article 6, a choice of law provision in a consumer contract may not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable to the contract.<sup>49</sup> Apart from such mandatory consumer protection law, a choice of law clause in a consumer contract that meets the requirements under Article 3 of the Rome I Regulation is binding on the consumer. Consequently, although Irish law applies to the contract between Airbnb and the consumer, mandatory consumer protection law in the consumer's country of residence will also be applicable to the contract and may override the written terms of the contract. The above-mentioned clause in the Terms of Service ("*The choice of law does not impact your rights as a consumer according to the consumer protection regulations of your Country of Residence*") is in line with this.<sup>50</sup>

With regard to the *rental contract*, some of its terms may be dictated by the user contracts. However, the user contract does not define the law applicable to the rental contract. Under the Rome I Regulation, a Host and a Guest may choose the law applicable to their contract and, if they do not make such a choice, the law of the country where the property is situated shall govern the rental contract.<sup>51</sup> This means that if the Host and the Guest have not made a specific choice of law, the law of the country where the rented property is located will apply. In practice, this will often be the law of the country where the Host has its place of residence. The special provision on the law applicable to consumer contracts in Article 6 of the Rome I Regulation does not apply to the

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<sup>48</sup> Article 6 does not apply to certain types of consumer contracts; see Article 6(4).

<sup>49</sup> Rome I Regulation (n 45) Article 6(2).

<sup>50</sup> Actually, the clause appears to go even further, since the wording of the clause seems to refer to *any* national consumer protection law, whether mandatory or not. However, since the clause merely states that "the choice of law" does not "impact" statutory consumer protection laws, other provisions in the user contract may still deprive consumers of non-mandatory consumer rights. To what extent the user contract derogates from non-mandatory consumer protection laws in the country, where the consumer has his habitual residence, will depend on a comprehensive legal analysis. It falls outside the scope of this paper to conduct such an analysis, but it is noteworthy that Airbnb does not guide consumers about how the terms affect their statutory consumer rights.

<sup>51</sup> Rome I Regulation (n 45) Article 3.

rental contract.<sup>52</sup> As mentioned in section 2.2, Airbnb does not encourage users to enter into an explicit (written) rental contract. Thus, it seems fair to assume that most rental contracts will not include an agreement on the applicable law.<sup>53</sup> Consequently, the law applicable to the rental contract will normally be the law of the country where the property is situated.

In sum, with regard to the user contract, consumer users will maintain (at least) their mandatory consumer rights under the statutory laws of the EU Member State in which they have their residence. The law applicable to the rental contract will normally be the laws of the EU Member State where the Host offers the accommodation service, and statutory consumer protection laws will normally apply to B2C rental contracts (and, to some extent, to C2B rental contracts), but not to C2C rental contracts.<sup>54</sup> Since statutory consumer protection laws differ across the EU Member States, we will use a part of the EU consumer law acquis in our analysis below to illustrate the role of statutory consumer protection laws without taking into account the specific transposition of this EU law acquis into national law in specific Member States. For the same reason, we will generally not include other statutory consumer protection laws in our analysis.

## 4.2. STATE GOVERNANCE OF THE AIRBNB-USER RELATIONSHIP

### 4.2.1. ENFORCING THE USER CONTRACT THROUGH THE STATE LEGAL ORDER

The user contract stipulates that users have a number of obligations with regard to their transactions on the Airbnb platform, and the user contract also provides Airbnb with significant means to act in order to ensure that users comply with these obligations (as described in section 3). However, Airbnb does not take upon itself a general obligation to use these means to ensure that users comply with their obligations.<sup>55</sup> As mentioned, the user contract also explicitly stipulates that Airbnb is generally not liable for anything related to transactions between users.<sup>56</sup> Thus, the wording of the user contract does not provide users with a

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<sup>52</sup> Ibid Article 6(4)(c).

<sup>53</sup> In the same vein, see Hatzopoulos (n 15) 173.

<sup>54</sup> On the different types of rental contracts, see section 2.2.

<sup>55</sup> See, in particular, Terms of Service (n 6) Section 1.3: *“While we may help facilitate the resolution of disputes, Airbnb has no control over and does not guarantee (i) the existence, quality, safety, suitability, or legality of any Listings or Host Services, (ii) the truth or accuracy of any Listing descriptions, Ratings, Reviews, or other Member Content (as defined below), or (iii) the performance or conduct of any Member or third party. Airbnb does not endorse any Member, Listing or Host Services.”*

<sup>56</sup> See, in particular, Terms of Service (n 6) Sections 1, 14, 16 and 17. For details about the contractual setup, see section 2.

basis for raising and enforcing a claim against Airbnb concerning their transactions with other users.<sup>57</sup>

#### 4.2.2. ENFORCING STATUTORY LAW THROUGH THE STATE LEGAL ORDER

As mentioned in section 4.1, *statutory consumer protection laws* will often apply to the relationship between Airbnb and users acting for purposes not relating to their business, trade or profession.<sup>58</sup> Within the EU, these include national laws transposing the EU consumer law *acquis*, which include, *in particular*, the Directive on unfair commercial practices, the Directive on consumer rights and the Directive on unfair contract terms.<sup>59</sup> The scope of the obligations that the EU consumer law *acquis* imposes on commercial platforms is subject to some legal uncertainty.<sup>60</sup> As an example, Airbnb is required to act with a degree of professional diligence commensurate to its specific field of activity, and to avoid misleading its users by either action or omission. In particular, Airbnb may have an obligation to enable commercial Hosts to comply with applicable laws and consumer Guests to clearly understand with whom they are possibly concluding contracts.<sup>61</sup> However, these requirements do not apply to private (non-commercial) Hosts under the EU law consumer *acquis*.<sup>62</sup> In addition, statutory law does not impose on Airbnb any general obligation to monitor content provided by users (such as the hosts' listings) or to carry out fact-finding.<sup>63</sup> In general, the unclear status

<sup>57</sup> On the legal uncertainty related to this contractual triangle, see section 2.3.

<sup>58</sup> See section 2.

<sup>59</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64, and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

<sup>60</sup> See, in particular, Commission (n 1). More specifically about the implementation and application of Directive 2005/29/EC on unfair commercial practices (n 59), see Commission, 'Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' (Secretariat-General) COM [2016] 163 final.

<sup>61</sup> See the Directive on unfair commercial practices (n 59) in particular Articles 2, 5, 6 and 7, and Commission Staff Working Document (n 60) 114.

<sup>62</sup> Some EU Member States impose such requirements even on private Hosts under their national statutory laws. As an example, see Section 2(3) of the Danish Consumer Contract Act.

<sup>63</sup> See Article 15(1) of Council Directive Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1 and Commission Staff Working Document (n 58). Interestingly, the EU Commission has recently presented a proposal for a legislative package, which, if adopted, will introduce certain new transparency

of the platform's contractual partner may make it difficult to assess the applicability of consumer protection laws.

*Statutory nondiscrimination laws* aim to provide effective, proportionate and dissuasive remedies to victims of discrimination.<sup>64</sup> However, it is not clear from these laws whether Airbnb has any obligations (or can incur any liability), if a user of the Airbnb platform discriminates against another user on the basis that Airbnb has contributed to such discrimination. On the one hand, the Airbnb platform provides a system under which discrimination based on sex, race and ethnic origin can easily happen (as mentioned in section 3.2). On the other hand, Airbnb, by its antidiscrimination policy, clearly seeks to prevent any kind of discrimination between users, and Airbnb clearly waives any liability for anything related to the transactions between users. Against this background, it is not unlikely that the platform setup under which Airbnb has not actively exercised discrimination itself will have as a consequence that Airbnb escapes the reach of applicable statutory nondiscrimination laws in the EU.

Since Airbnb offers its services in the EU from companies in Ireland and the UK, public authorities in other EU Member States generally have no jurisdiction to enforce the law against Airbnb. The scope for action of the authorities will be limited to giving guidance to the users about their rights and obligations, supporting users in filing a claim to a competent public authority in Ireland or the UK, or encouraging legal action against Airbnb. In general, the platform setup is demanding in terms of the degree of cooperation between public authorities in different Member States that may be necessary in this regard.<sup>65</sup>

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requirements on platforms such as Airbnb, see Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers' (COM(2018) 183 final), and the proposals for two new EU Directives (COM(2018) 184 final and COM(2018) 185 final). On the need to adjust the current consumer protection regime in the EU to accommodate the particular needs emerging from the platform economy, see also Christoph Bush and others, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?', *EuCML* (2016) 3, and Research group on the Law of Digital Services, 'Discussion Draft of a Directive on Online Intermediary Platforms', *EuCML* (2016) 164.

<sup>64</sup> The relevant Directives are mentioned in more detail in section 4.3.2.

<sup>65</sup> With regard to consumer protection, see, in particular, Council Regulation (EC) 2004/2006 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2004] OJ L364/1 (the Regulation on consumer protection cooperation). Regulation (EU) 2017/3494 will replace this Regulation from 17 January 2020. The European Commission has recently announced that it intends to step up coordination with partners outside the EU, see Commission, A New Deal for Consumers (n 61) 10. With regard to nondiscrimination (equal treatment) laws, the EU Directives have established a network of bodies for the

When consumer protection laws are not enforced by public authorities, the user may be left with the option to turn to *dispute resolution*. However, even if the user can establish a claim against Airbnb, the user agreement contains an arbitration clause, a “no class actions or representative proceedings” clause and a “jury trial waiver” clause, which will probably prevent users from any effective access to the US public civil justice system.<sup>66</sup> In the EU, the arbitration clause will not be binding on the users to the extent they are qualified as consumers but will rule out court proceedings in other situations.<sup>67</sup> Representative proceedings are currently only available in some EU Member States under their national laws, and it will require a detailed analysis of each jurisdiction to assess whether the “no class actions or representative proceedings” clause constitutes a valid waiver of a right to use such collective redress mechanism.<sup>68</sup>

In sum, a user wishing to rely on a state legal order to pursue rights against the platform will face several challenges, many of which are due to the fact that the platform setup escapes the reach of national statutory regulation and thereby undermines its effectiveness.

### 4.3. STATE GOVERNANCE OF RELATIONS BETWEEN USERS

#### 4.3.1. ENFORCEMENT OF CONTRACTUAL RIGHTS IN THE STATE LEGAL ORDER

The contractual obligations of a user vis-a-vis another user may follow, in particular, from the contractual setup (described in section 2 above). However, the Airbnb contractual setup generally does little to

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promotion of equal treatment. See, *inter alia*, Article 13 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22, and Article 12 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

<sup>66</sup> See Terms of Service (n 6) Section 19. On the validity of such dispute resolution clauses, see also Hatzopoulos (n 52) 180-183.

<sup>67</sup> See, in particular, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29. In several jurisdictions, national arbitration acts also explicitly provide that an arbitration agreement is not binding for a consumer. See *e.g.* Danish Arbitration Act Section 7(2).

<sup>68</sup> However, see Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L110/30, which has not been a success in practice, and the proposal in Commission, 'Proposal for a Directive of the European Parliament and of the Council on Representative Actions for the Protection of the Collective Interests of Consumers, and Repealing Directive 2009/22/EC' COM(2018) 184 final for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.

support such contractual claims between users. The user contract (which each user enters into with Airbnb) includes a catalogue of rights and obligations of users, but it does not ensure a clear contractual basis for one user to raise a claim against another user.<sup>69</sup> For instance, although the concept of third party beneficiary law is familiar in many state legal orders, it is highly uncertain whether it would be possible for the guest to enforce the user contract's consumer protection provisions and Airbnb's antidiscrimination policy against the guest on this basis.<sup>70</sup> Moreover, the user contract presupposes the existence of the *rental contract*, but Airbnb does very little to ensure that users actually enter into an explicit (clear) rental contract. Consequently, it is reasonable to presume that the contractual regulation governing transactions between two specific users (a Host and a Guest) will often be unclear, and it will thus be difficult to establish a (clear) contractual basis for a claim that can be enforced either by public authorities or by courts. In some jurisdictions, it may not be possible to enforce contractual obligations that implement public law rules aiming to safeguard matters of general public interest.<sup>71</sup>

#### 4.3.2. ENFORCEMENT OF STATUTORY LAW IN THE STATE LEGAL ORDER

With regard to *statutory consumer protection laws*, the Airbnb platform does not ensure that users disclose the purpose of their transactions, *i.e.* whether they are acting in a commercial or private capacity. This can make it difficult to assess whether statutory consumer protection laws apply to a specific transaction.<sup>72</sup> As an example, it can be difficult for a Guest to know whether the Host is acting for commercial or private purposes (which will usually determine whether consumer protections laws apply to their legal relationship). Currently, Airbnb does not require users to provide and share the relevant information in this regard. Also, Airbnb does not currently provide an easily accessible link to the Online Dispute Resolution (ODR) platform on its website with relevant information related to dispute resolution pursuant to the EU Regulation on consumer ODR applies.<sup>73</sup>

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<sup>69</sup> See section 2.3.

<sup>70</sup> *Ibid.*

<sup>71</sup> Under Danish law, this follows from the principle that the Executive generally has a monopoly to enforce such types of public law rules, unless explicitly provided for by the law. This also affects the arbitrability of such disputes under Danish law, see the Danish Supreme Court's decision reported in the Danish Weekly Law Reports as U 1999.829 H.

<sup>72</sup> As discussed in section 2. The legislative package recently proposed by the EU Commission (n 63) includes a proposal for new disclosure requirements in this regard. See also the recent developments mentioned in section 5.

<sup>73</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, [2013] OJ L165/1. This is about to change, see section 5.

With regard to *statutory nondiscrimination laws*, regulation exists both at the EU level and at the national level.<sup>74</sup> However, also in this respect, traditional distinctions such as the distinction between private affairs and public enterprise may render inapplicable fundamental nondiscrimination regulation to the user relation. For instance, it is subject to legal uncertainty whether private hosts must comply with Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services. This Directive applies to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.<sup>75</sup> Is it thus unclear, whether the Directive applies to a private person renting out a single room in his/her private home.<sup>76</sup>

Public authority *implementation* and enforcement of statutory laws against the users may also face difficulties. The Airbnb regulation does not ensure adequate and correct information about the users' identities, and it is subject to legal uncertainty to what extent applicable statutory consumer protection laws impose an obligation on Airbnb to obtain and share such information.<sup>77</sup> A commercial host is probably subject to such an obligation vis-a-vis consumer guests.<sup>78</sup> Since Airbnb does not ensure that hosts fulfil this requirement, and since the requirement does not apply to consumer hosts, there is a significant risk that many guests may not know the full (true) identity of their host. Thus, the lack of information about the identity of users (and, for consumer protection, about the purpose of specific transactions between users) can undermine the opportunities for public enforcement of statutory laws against users.

The lack of an obligation to disclose the identity of the user may also short circuit the general principle of *access to justice*, since in order to raise a claim against another user, it is crucial to know the identity of that user.

In sum, also with regard to the relationship between the users, the reach of the state legal order may be limited due to the special platform

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<sup>74</sup> See n 29. Furthermore, many EU Member States have adopted comprehensive national legislation to implement the principle of equal treatment.

<sup>75</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37, Article 3(1).

<sup>76</sup> The preparatory works to the Danish Act transposing the Directive into Danish law assume that the Directive will generally not apply to such a transaction.

<sup>77</sup> See section 4.1.

<sup>78</sup> Under the Directive on unfair commercial practices (n 59). The Directive on consumer rights (n 25), which includes specific disclosure requirements in Article 5, does not apply to contracts for rental of accommodation for residential purposes, see Article 3(3)(f) of the Directive.

setup, which thereby also to some extent has an undermining effect on the state legal order.

## 5. CONCLUSION

As described in section 3, Airbnb offers a private governance system that, on the face of it, may seem to be a complete parallel to the state governance system comprising regulation, implementation and dispute resolution and addressing not only commercial but also public values. However, it is difficult to assess the effectiveness of this private governance system. The user contract generally does not *require* Airbnb to enforce the contractual rights and obligations of its users. We are unaware of any publicly available information about Airbnb practices in this regard. Furthermore, since Airbnb generally does not verify the identity of its users, it will properly be quite easy for a suspended user to register again as a new user of the Airbnb platform.<sup>79</sup> It is unclear, whether the reputational schemes (user reviews and ratings) provide users with a general incentive to comply with Airbnb rules and policies. Thus, to a large extent the protection granted under the private governance system may be more apparent than real.

At the same time, as described in section 4, turning to enforcement by state legal orders can be complicated. First of all, the Airbnb system is based on a complicated triangular contractual setup and the extent to which state legal orders can give effect to rights and duties within this framework may be limited and require the use of third party constructions or other network lines of reasoning not familiar to traditional, national legal systems. Secondly, the private governance system challenges the state legal order in even more fundamental ways. At the general level it does so by blurring basic dichotomies as business/consumer, public/private, transnational/local, transparency/anonymity. The result can be said to be an undermining effect on the state legal order. For example, the platform operates a peer-to-peer system that does not fit into the classical distinctions between *business and consumer*. This makes it difficult to assess the applicability of consumer protection laws. Also, the applicability of other statutory protective laws such as antidiscrimination laws may become uncertain because of the blurring of the line between *what is private and what is public*. Moreover, the (often) *transnational character* of the contractual relationship between the host and the guest challenges public authority implementation of protective statutory law, since public authorities are generally limited to exercise their jurisdiction within territorial boundaries. The limited role that public authorities can potentially play may push the user in the direction of dispute resolution mechanisms. However, the potential for using a national court system (as well as alternative dispute resolution) is to some extent undermined by the fact

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<sup>79</sup> As described in Section 2.1.

that Airbnb facilitates contracting with effectively *unknown contractual parties*, since there is no identity disclosure requirement in the system. This short circuits the potential role played by national courts and arbitrators which would be the last resort for a user trying to pursue rights in the state legal order.

On 16 July 2018, the European Commission and EU consumer authorities officially called on Airbnb to align their terms and conditions with EU consumer rules and be transparent on their presentation of prices.<sup>80</sup> The call included a requirement that Airbnb shall clearly identify if an offer is made by a private Host or a professional Host, as the consumer protection rules differ, and a requirement that Airbnb should provide an easily accessible link to the EU ODR platform pursuant to the EU ODR Regulation.<sup>81</sup> It is worth noting that the Commission does not require Airbnb to disclose the identity of Hosts. On 20 September 2018, the European Commission announced that Airbnb has committed to comply with these demands before the end of 2018.<sup>82</sup> Based on our analysis above, we expect that this will hardly be enough to accommodate the need to safeguard the public values related to consumer protection.

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<sup>80</sup> European Commission, Press release IP/18/4453.

<sup>81</sup> See n 73.

<sup>82</sup> European Commission, Press release IP/18/5809.