Airbnb – Perspectives for the New Commission

Overview

At a time of growing inequality, the collaborative economy provides a powerful tool of economic opportunity for people across Europe. Airbnb offers European citizens the opportunity to book a range of travel-related services through its online platform, including rooms or accommodation to rent, as well as one-of-a-kind experiences hosted by locals looking to share their passions and knowledge. This paper will focus on the former: our short-term rental (STR) platform which has allowed millions of individuals worldwide to connect with one another and to rent their home or spare room to generate additional revenue. With Airbnb, 97% of the price set by the host for a night booked, stays with the host. Our community also bolsters local economies with almost half of guest spending taking place in the communities where they stay.

Airbnb aims to be a responsible partner to governments and authorities Europe-wide. To this end, we have proactively engaged with numerous local, regional and national regulators on everything from data-sharing agreements, to the implementation of effective and proportionate online registration schemes. For example, Airbnb has recently signed agreements with both the Danish and Estonian tax authorities to provide relevant information on host earnings, or provide tools to our hosts to make it easier for them to share such information directly.

However, STR platforms are also exposed to a realm of disproportionate, overly-complex and oft-times legally contradictory regulations in European markets today. This complexity is multiplied by the fragmented rules – not only at national, but also at regional and municipal levels – that also apply to the users of platforms such as ours. We understand the necessity of proportionate and evidence-based regulation at all levels and over a number of years we have consistently demonstrated a willingness to engage with governments to develop and implement effective regulatory models. What is more, Airbnb understands that the interplay between the European, national and local regulatory environments is a sensitive issue – that municipalities want to define their own rules for STR activities and there will always be certain differences across the region in terms of how cities and regions approach such regulation.

However, the picture remains far too fragmented and inconsistent – no single company could possibly achieve regulatory convergence alone. Addressing this regulatory fragmentation and the inconsistent application of EU legal frameworks is essential: platforms, as well as their users, require stable and predictable regulatory environments if they are to deliver maximum value to communities across Europe. Guidance from the European Commission on how existing (and potentially future) EU legislation frames the discussion at municipal-level can help provide much-needed consistency and predictability for all stakeholders.

We outline some of our major regulatory challenges in more detail below.

Key challenges

1) Data Governance:

There are a number of ways in which Airbnb shares aggregated and individual host and guest data with local authorities, governments and public organisations, in line with the legal bases for such activity. But we also receive demands for personal data which are at odds with EU data protection law, specifically GDPR. Our key challenges relate to:

- Requests that lack any obvious legal basis. Cross-border demands for personal data are especially difficult, since a "legal obligation" on Airbnb to comply is often lacking. "Consent" of the user cannot necessarily be relied upon as it may not be given, and can also be withdrawn freely for this kind of demand. While "legitimate interests" may provide us with an option, there remains a risk if the platforms seek to rely on their legitimate interests as the legal basis to process or share personal data. This problem is compounded at local level, where municipal governments often have limited experience with GDPR and the limitations it imposes on data sharing for authorities and platforms alike. This can exacerbate tensions between municipalities and platforms, whereby our response to data-sharing demands based on legal constraints is not always fully understood by local authorities and can lead to frustration.

- Authorities at all levels fail to appreciate and understand their own legal limitations and obligations under GDPR in terms of what they can do with the personal data we share. For example, personal data shared with tax authorities to assist in fighting tax fraud (income tax or tourist tax), cannot then subsequently be shared with local authorities to assess compliance with local STR rules without the subject's permission, unless this is expressly permitted under local law.

- Laws which seek to place excessive obligations on platforms to collect new categories of personal data that go beyond those we collect in the normal course of our business, often with those categories of personal data being somewhat at odds with the stated or actual purpose of the law. This not only raises questions of inconsistency with data protection rules, but also with several other EU rules and principles such as the framework set out in the e-Commerce Directive.

CASE STUDY 1: Disproportionate data-sharing requests in Spain, France, Munich

Spain: The Spanish government adopted a Royal Decree in 2017 which requires every individual or company intermediating in the leasing of dwellings for touristic purposes to periodically (quarterly, based on Ordinance HFP/544/2018) report detailed information to the national tax agency with the stated aim of preventing tax fraud. The required information includes identification of the owner and lessor (in our case the host) of the listing; identification of the building address and cadastral number; and identification of the booking guest (inc. tax ID number). Highly punitive penalties are envisaged for non-compliance.

The data sharing obligation is far-reaching and includes data we do not require to run our business, for example the cadastral number of the property and data of those who are strangers to our platform (i.e. where the Airbnb host is not the owner, the decree requires us to collect the owner's details from our host). The law also requires companies in scope to collect data that does not appear to align with the stated purpose of the decree. For example, the requirement to share guest personal data - including that of foreign guests - does not seem entirely aligned with the intended objective of the decree of fighting tax fraud. These requirements sit somewhat uneasily with the existing provisions of the GDPR, notably regarding the proportionality and necessity of data for the processing objective.

France: A draft implementing decree of Article 145 of the Elan housing law has recently been notified to the Commission, which intends to define how and how often French cities can request data from short-term rental platforms. The data relates to the number of days properties are rented on platforms (as well as the address of these properties and their registration number, if applicable), in order to verify that primary homes are not rented for more than the legal cap of 120-days per year. However, this draft decree in its current form goes beyond the stated purpose of Article 145 and creates disproportionate burdens on platforms. Indeed, this decree could extend to regular data-sharing obligations with each of the 35,000 French cities, all of which have the legal discretion to determine the frequency and geographical scope of the data requests.

The current objectives of the draft decree are unlikely to be met as a result of the current text:

- Firstly, requiring platforms to verify that primary homes are not rented more than 120-days a year is difficult, as STR properties may be rented on multiple platforms.
- Secondly, verifying the presence of the registration number could be achieved through less extensive and intrusive measures.
- Thirdly, verifying that secondary homes comply with a change of use regulation cannot be achieved by collecting the number of rental days.

These measures are not justified in particular by public safety objectives, as by default registration does not apply unless cities choose to implement it and thus be subject to the draft decree. These measures are also disproportionate, in breach notably of the freedom to provide services. The heavy processing of personal data, without clear purpose, would also be disproportionate and potentially breach EU data protection rules. Finally, instead of encouraging the collaborative economy, the draft decree places the onus on platforms to monitor general host compliance with the 120-night cap and to build new tools for this end. This obligation appears in contradiction with Article 15 of the e-Commerce Directive ("No general obligation to monitor").

Munich: At municipal-level, the City of Munich has served two requests to Airbnb Ireland for host data based on the Munich Housing Ordinance, which includes an obligation for service providers under the e-Commerce Directive to share data upon request in order to facilitate the city in determining host compliance. One of these requests in particular relates to all user data for Munich without probable cause.

We filed legal actions against both requests, including the fact that the data requests: i) infringe GDPR since the law and the Ordinance include no express legal basis relating to personal data and no reference to GDPR; ii) the requests are too broad, disproportionate and infringe users' (hosts') right to privacy and Airbnb's rights as a company.

The local law has not been notified to the Commission as per Directive 2015/1535 on technical regulations and rules on Information Society services.

2) Fragmented short-term rental rules for Airbnb hosts:

Some European jurisdictions have established obligations for operators of STR (i.e. Airbnb "hosts"). The nature of these rules, as well as their efficacy and proportionality, varies enormously from city to city. Some jurisdictions have introduced purposefully complex and burdensome requirements for platform hosts which fail to distinguish between professional and non-professional ("peer") activity, and which introduce prior declaration and registration obligations and/or impose far-reaching and restrictive rules on the provision of STR services, thus amounting to de-facto authorisation schemes according to EU law.

Across Europe, hosts are exposed to very different and frequently changing levels of legal and financial exposure – for example, in some jurisdictions, non-compliance with local rules can be a criminal offence and is punishable as such, notwithstanding the underlying disproportionality or unenforceability of those rules.

The Commission has already outlined its preliminary view that certain types of market access restrictions might be in the public interest, when there is clear evidence that such interventions are necessary and would achieve the desired goal in a systematic and consistent manner. However, often, and in contradiction to this view, these restrictive regimes: (i) are not evidence-based, (ii) have been adopted without proper analysis (a) of the causality between the alleged "problem" and the provision of STR services, and (b) of the effective contribution of the restrictions to solving the problem, (iii) are not part of a comprehensive approach aimed at achieving the stated objective in a consistent and systematic manner.

There is still a need for common guidance or rules at EU level that: i) define what a proportionate online registration system would look like; ii) set a threshold for professional versus non-professional (peer) host activity, and iii) clearly establishes the obligations for collaborative platforms within this regime; and iv) specify that a registration system cannot be separated from the underlying STR rules: a registration system only makes sense if the underlying rules are proportionate and necessary to achieve the public interest objective and provided that such an objective is also protected in a systematic and consistent manner (i.e. not one that is solely targeted in a discriminatory manner against STR services). Airbnb urges the Commission to open infringement proceedings against those municipalities, other authorities, and member states that establish purposefully burdensome rules for EU citizens renting accommodation via online platforms, as an effective means to clarify the limits of what is legally acceptable in this regulatory space.

CASE STUDY 2 – Disproportionate STR rules in Amsterdam, Madrid, Berlin and Brussels

Amsterdam: the Amsterdam Housing Regulation of December 2015 (amended in 2018 and to be amended again shortly) imposes a strict authorisation regime in relation to the provision of STR services in Amsterdam.

This authorisation regime has been adopted by the Amsterdam municipal authorities on the basis of national housing legislation, which prohibits any operation which results in the so-called withdrawal of a residential space from its housing purpose, unless a permit is granted by the municipal authorities.

The Amsterdam authorities considered this rule to be applicable in relation to STR services, which are in principle prohibited unless a permit is granted by those authorities. Such a permit is extremely difficult – if not impossible – to obtain for the providers of STR services (B&Bs and holiday rentals alike), as the procedure for obtaining any such permit is particularly burdensome, and the authorities may refuse to grant the permit on unsubstantiated grounds (impact on housing stock or on quality of life in the neighbourhood), or grant the permit under very strict conditions (e.g. by requiring to compensate for the withdrawal of a space from the housing stock by creating in turn an equivalent residential space in the housing stock). These strict requirements also include that: the holiday rental takes place a maximum of 30 days per year; that no more than four people per night are accommodated; the main occupant reports to the municipal authorities each time a holiday rental starts in their property.

The authorisation regime constitutes a significant restriction on the rights and freedoms of the providers of STR services in Amsterdam (as guaranteed under EU law). This restriction is inadmissible as the justifications invoked by the Amsterdam authorities in order to justify the Regulation do not fall within the grounds of justification admitted under EU law. Such restriction is, in any event, not necessary or proportionate to attain the objectives pursued. In particular, the Amsterdam authorities do not demonstrate that the requirements imposed by the Amsterdam Housing Regulation are needed to genuinely meet any of the objectives pursued, and that no less restrictive measures exist.

Madrid: In Madrid, STR hosts are struggling with a highly problematic interaction between local (urban planning) and regional (tourism policy) rules.

The Region of Madrid has recently passed a Tourism Decree that removes the minimum term of 3 months/ 90 days of rental before a house is considered a touristic dwelling. This means that any house is now considered a touristic dwelling from the first day of rental and thus must abide by a range of requirements laid out in the Decree.

However, the real challenge lies at the intersection between this change to the regional tourism rules, and a recently-adopted Urbanism Ordinance – the Special Urbanism Plan (the "Plan") – by Madrid City Hall. The objective of the Plan, according to the City Hall, is to

effectively ban 95% of all tourism dwellings in the main districts of Madrid City. Most of those tourism dwellings are already registered before the regional government, but the Plan will require them to have a supplementary urbanism permit from the City Hall in order to operate. Officially the Plan was meant to exclude the rental of rooms and entire homes rented out for less than 90 day per year from its remit. However, the recent changes to the regional Tourism Decree – which render de-facto any rented space a touristic dwelling from day one of rental – means that City Hall cannot legally limit the application of its Ordinance to professional rentals alone. Thus the stipulations of this Decree will apply to all touristic dwellings, even if many of these requirements are impossible for short-term rental hosts to comply with, such as requiring listings in entire homes to have a direct access to the street in order to obtain a permit. The vast majority of homes in Madrid do not have this independent entrance or access.

The de-facto banning of STR activity as a result of the Plan by Madrid City Hall is a clear breach of the Services Directive since it is not appropriately justified and the measure is totally disproportionate.

Berlin: The 2013 Berlin Law prohibiting the misuse of dwellings and its implementing regulations impose strict requirements in relation to the provision of STR services in Berlin (with very severe fines being imposed in case of a breach).

STR services are in principle prohibited in Berlin unless specifically authorised by the competent district office. The Berlin Law only provides for very limited derogations from the requirement to obtain a prior authorisation. STRs which do not fall within such derogations are only authorised in very limited instances, i.e. where it is demonstrated that there are public interests or legitimate private interests that override the default public interest in maintaining the property as a purely residential property.

Whether subject to or exempt from prior authorisation, the provision of STR services in Berlin is also subject to a prior registration requirement (i.e. a registration number for each rented dwelling, which should be published in the rental advertisements). The Berlin Law also imposes restrictive requirements on online platforms (e.g. information obligations or a requirement to take down any listing(s) relating to a dwelling offered for STR without authorisation or without registration number).

The requirements imposed by the Berlin Law constitute significant restrictions on the rights and freedoms of the providers of STR services and online platforms (as guaranteed under EU law). These restrictions are inadmissible as the justifications invoked by the Berlin authorities in order to justify the Berlin Law do not fall within the grounds of justification admitted under EU law. Such restrictions are, in any event, not necessary or proportionate to attain the objectives pursued. In particular, the Berlin authorities do not demonstrate that the requirements imposed by the Berlin Law are genuinely needed to meet any of the objectives pursued, and that no less restrictive measures exist.

Brussels: Various onerous registration and licensing requirements have also been

introduced by the City of Brussels. The rules regulate in a detailed and restrictive manner the provision of “homestay accommodation” and “tourism residence” services by imposing:

- An overly burdensome and complex prior declaration and registration procedure, amounting to an authorisation scheme within the meaning of EU law, under which (i) the applicant is required to provide an excessive amount of information, documents and certificates, (ii) the procedures to obtain certain documents or certificates and a registration number are excessively lengthy, and (iii) failure by the Administration to meet the procedural time-limits set for the processing of the application is not subject to any sanctions and, even worse, leads to an implicit refusal decision.
- Numerous and extremely far-reaching requirements on the provision of the accommodation services that apply indistinctly to any kind of service providers, i.e. very high regulatory standards that are designed and intended for the professional hotel sector rather than STR by private individuals on an occasional basis. For example: a reception shall be accessible from Monday-Friday and the host shall be offered a personal welcome, lighting set at 100 lux with a light switch at the entrance to the room and either bedside lamps or control of the main lighting from within reach of the beds, and a wardrobe containing at least two hangers per guest.
- Quantitative restrictions on the provision of homestay accommodation services (max. one accommodation composed of max. five rooms) and tourist residences that are the main residence of the service provider (max. 120 days per year).
- The obligation for hosts to insert their contact details and their registration number in all advertisements (including online advertisements) which has the effect of imposing on platforms the requirement to process and publish personal data.
- Severe administrative fines in case of non-compliance with any aspect of the rules.

In January 2019, the European Commission sent a Letter of Formal Notice to Belgium regarding the authorisation procedure and general requirements that the Brussels region applies to tourist accommodation service providers, as a breach of the EU Services Directive and the Treaty of Freedoms. The Brussels region now has to make the necessary changes to its STR rules to ensure alignment with EU law.

3) Inconsistent application of EU legal frameworks to short-term rental platforms:

We are frequently faced with requirements at national or local level that contravene key principles of EU law relating to the regulation of e-Commerce platforms. Specifically:

- Governments and municipalities fail to notify and consult the European Commission on laws affecting platforms, contrary to the Technical Regulations directive (n° 2015/1535) and to the e-Commerce Directive.

- Governments fail to respect the country of origin principle in the e-Commerce Directive.

- Many local STR rules place excessive monitoring and compliance obligations on the platforms themselves, going far beyond the notice and take-down framework envisaged by the e-Commerce Directive.

- This also extends to excessive requirements in terms of data collection and sharing which, in addition to contravening the country of origin principle, often lack a clear legal basis for compliance under the GDPR and/ or infringe other aspects of the GDPR (see further details in point 1 of this document).

- The imposition of disproportionate local rules also runs contrary to the freedom to provide services established in the Services Directive and in Article 56 of the TFEU.

This fragmentation of the digital single market as it applies to STR platforms creates significant burdens and uncertainty for all economic actors. It also undermines the entry to market of new start-ups, which struggle with related and excessive compliance costs. Where platforms such as Airbnb do choose to push back on local or national rules our only effective recourse is litigation, which is costly, politicised, lengthy and potentially distortive of competition. Smaller companies do not have recourse to this option.

CASE STUDY 3 – Clarity in the application of French real-estate law

The applicability of French real-estate law to the Airbnb homes marketplace: in a case currently before the CJEU, the hotel lobby 'Association pour un hébergement et un tourisme professionnel' ("Ahtop"), has accused Airbnb of an infringement of the law regulating the conditions for the exercise of real-estate activities (the "Loi Hoguet").

In his Opinion of the 30th April, Advocate-General Szpunar confirmed the Airbnb position: that the Airbnb homes marketplace qualifies as an Information Society Service as per Article 3 of the e-Commerce Directive; that as such, the Airbnb marketplace is bound by the rules that regulate its activity in the member state of origin (Ireland) and that any derogation from the free movement is only permissible on a 'case-by-case' basis and provided the conditions laid down in the directive are met. Furthermore, a Member State which proposes to adopt measures restricting the free movement of an information society service originating in another Member State must first notify the Commission AND ask the Member State of origin to take measures in respect of information society services, before possibly adopting a legal measure with restrictive effect.

If confirmed in the Final Decision of the Court, this case will do much to clarify the framework of rules that apply to Airbnb's marketplace activities under the e-Commerce Directive. Though it would not exempt Airbnb users from the jurisdiction of local or national STR rules, it has the potential to ensure greater consistency in the application of the e-Commerce Directive to platforms EU-wide, not least by emphasising the importance of notification frameworks in regulating STR platforms, thus preventing fragmentation.

4) Market distortion:

There are multiple examples of national law or processes that adversely affect the Airbnb platform specifically, and ignore the diversity of business models, and diversity of platforms, present in the STR sector. It is essential that platforms are able to compete freely in order to ensure healthy competition in the interests of European consumers, and national and local economies. Some examples of market distortion include:

- Those national "digital service tax" proposals that seek to include Airbnb in their scope, but are written in a way that leaves our most direct competitors out of scope. An example here would be Airbnb's provision of intermediary payment services for the transactions which take place on our platform, and which allow us to offer better consumer protections than some of our competitors and yet also render us more vulnerable to national digital tax proposals that target revenues. This perverse effect is made even more impactful because many providers of STR services (hosts) advertise their listings on multiple platforms, some of which would be subject to these taxes and others not. As a matter of principle, platforms offering similar services should be treated in the same way.

- As part of a "multilateral control" audit, Airbnb has been working with twelve EU member states (plus Norway) to agree a new protocol, compliant with the GDPR, that will provide tax authorities with certain personal data of hosts to ensure that their VAT and income tax obligations are satisfied. This kind of coordinated process has been a useful model to create a harmonised framework, but there is no certainty that this process will be replicated for the other major STR platforms. If Airbnb is the only platform engaging in this way, we will be at a disadvantage. Some STR providers will determine that they are more comfortable using platforms that do not have such fair communication with tax authorities.

- National law that favours one new business model over another in contravention of EU law, thus giving a significant advantage to our competitors. The example below serves to illustrate this in more detail.

CASE STUDY 4 – Market distortion in Italy

The Italian Tax Decree: The Italian Tax Decree (Decree 50/2017 converted into law n. 96, 21 June 2017) – known locally as the "Airbnb tax" – requires platforms acting as payment intermediaries to act as withholding agents for both tourist and income tax for each transaction occurring from STR activity.

When the law entered into force, several large platforms announced they would consequently abandon online payments. Given that Airbnb has a business model that allows only for online payments it is thus considered the main target of this law.

Compliance is near to impossible. Airbnb cannot possibly know the income tax regime that applies to each host on our platform and it would be highly burdensome for Airbnb to assess which activities would be covered by the income tax flat rate.

As regards the tourist tax obligation: more than 1000 cities in Italy have introduced a tourist tax, each with a different tariff, categorisation system and seasonal variations. Airbnb has signed agreements with more than 20 municipalities in Italy for the collection and remittance of tourist tax, but more harmonisation is required at national level - for example, based on a nationally-determined flat-rate for tourist tax - if this is to be realistically achieved country-wide in all municipalities that have such a tax.

Not only does the Italian Tax Decree discriminate against Airbnb's business model, it also disadvantages the consumer by encouraging the use of cash payments which offer significantly less or no protections and guarantees, and which also stand to promote fiscal evasion. Airbnb is trying to collaborate with the government to establish a fair obligation that applies to all. We have suggested, for example, that the withholding obligation be abolished in favour of data-sharing -- an obligation that would apply to all platforms and would provide the government with the information required for tax control purposes.

In addition to the Tax Decree, the so-called 'Italian Growth Decree', recently converted into law n.58, 28 June 2019, extends withholding obligations to the Italian entities of STR platform groups, along with related liability profiles, irrespective of the remit of those local entities. This severely compromises the sustainability of local businesses that would be exposed to potential liability and sanctions - and it is in contradiction to the European freedom of establishment and provision of services.

Requests to the next European Commission:

Airbnb supports the development and implementation of appropriate European regulation and binding frameworks. We believe that a clear and consistent legal framework for our business will lead to better outcomes for all stakeholders, and we welcome the opportunity to work with governments of all shapes and sizes to develop policy solutions that address real challenges in an effective way. But we cannot do this single-handedly, and we cannot do it if the outcome is an increasingly fragmented regulatory landscape.

Bearing in mind the challenges highlighted in this paper, we believe the following actions at EU-level would help provide further clarity to municipalities, governments, platforms and platform users alike:

1. Working groups convened by the Commission and comprised of municipalities, governments and industry to facilitate **European protocols** or **industry codes of conduct** for STR. These could build on regulatory solutions (best practices) that are already in place in many European locations.

2. **New legislative instruments** and/ or **guidance from the Commission** to ensure effective enforcement of key cross-border issues for the collaborative economy, and to clarify the relationship between local rules and existing EU regulation (e-Commerce Directive and Services Directive in particular). For example: thresholds for peer versus professional activity (relevant because this affects other policy areas such as consumer protection and

taxation); guidance to frame local or national registration and authorisation schemes; and obligations and responsibilities of municipal authorities in instigating personal data-requests.

3. If the **e-Commerce Directive** is to be revised, we suggest the inclusion of specific protocols for STR platforms including: i) safe harbours that apply when platforms work proactively with municipalities and governments; ii) which clarifies (and enforces) the exceptions to free movement, including timely action against Member States for breaches of the law by municipal or national authorities, and which iii) clarifies the extent to which platforms should monitor and potentially enforce policies around non-compliant activity on their platforms, whilst respecting the unique characteristics of new business models.

4. A **review of the Single Market** which reinforces the notification process at European level, addresses the current fragmented approach for STR activities, and prioritises timely action on breaches of EU law (i.e. Commission Complaints).

5. A single **European regulator** for the Collaborative Economy (or for platform activity with a dedicated focus on STR), to ensure a consistent application of EU law impacting the sector and to act on breaches in a timely manner.

6. A framework for **aggregate data-sharing** across the industry (Eurostat) which is consistent with public company reporting obligations and GDPR, and which is understood by all to centralise national demands for data (except on compliance issues).

July 2019