

Airbnb and the Digital Services Act

For almost 20 years, the e-Commerce Directive (eCD) has served as the legal foundation for e-commerce activity in Europe. Its existence has allowed the platform economy - including so-called "Collaborative Economy" services and short-term rental platforms such as Airbnb - to flourish in the Single Market, to the benefit of European consumers, service providers, and local and national economies.

The recent decision¹ of the Court of Justice of the European Union (CJEU) confirmed Airbnb's status as a provider of Information Society Services under the eCD. The CJEU also provided some clarification on the extent and conditions under which national and local rules can be applied to such services.

Airbnb also understands that the platform economy and digital services have undergone significant changes since the year 2000 when the eCD first came into force. Airbnb did not exist at that time but now has 7 million listings worldwide (over 2.5 million of which are in the EU), with almost 100 million EUR a day being generated in direct economic impact by Airbnb hosts and guests across the EU.

We understand that innovation in business models often comes with additional regulatory scrutiny. Although Airbnb's users are connecting online over our platform - we appreciate that the most significant interactions take place *offline*, in the real world. We continue to work hard to ensure that our platform and hosts offer users a safe space to engage, both online and offline.

We have also cooperated with authorities at all levels in Europe, to introduce proportionate regulation for home-sharing² including at local level and on topics ranging from host registration to tourist tax remittance.

But broader concerns about online safety and the role of platforms in ensuring and overseeing content are inevitably leading European policy-makers to reassess existing digital regulatory frameworks. Some are demanding that platforms play a more active role in content moderation, for example. The Digital Services Act currently under discussion is indicative of these evolving societal expectations.

As a company, we have consistently indicated our desire to play a positive and constructive role in the development of new digital and sectoral policies affecting our business. We have put into practice this ambition in numerous cities, regions and countries throughout the EU. With this in mind, we would like to express our support for an updated legislative framework that sufficiently reflects the realities of digital services today and their rapid evolution, as well as their impact on European citizens and communities. Such a framework must take account of existing regulations that seek to protect the rights of consumers and citizens across the EU (such as consumer law, data protection and financial services regulation) but also consider the interaction with national and local regulation that is not typically harmonised at EU level.

We have outlined below some of the policy principles which we believe should apply to this upcoming discussion. The positions expressed in this paper should not be understood as

¹ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-12/cp190162en.pdf>

² <https://news.airbnb.com/en-uk/open-letter-to-european-governments/>

definitive – we will continue to engage and evolve our thinking as the policy conversation continues.

Encouraging proactive measures by platforms:

The safety of our community and the quality of accommodation services offered by our hosts is a priority for Airbnb. To that end, we are the first accommodation platform to have announced a range of measures³ to ensure greater trust and security for users. The measures will include the review of every listing and every host on Airbnb with the objective of 100% verification by 15 December 2020; rebooking or refunding any guest who finds upon check-in that a listing does not meet our accuracy standards; the launch of a new 24/7 Neighbour Hotline so that anyone can call us anytime with concerns regarding a listing in their community; and expanding our manual screening of high-risk reservations flagged by our risk detection models, with global rollout through 2020. As part of our ongoing commitment to working with cities around the world, we will also be launching a dedicated hotline during the course of 2020, where government officials can connect with appropriate Airbnb representatives about our new policies.

All of these measures go beyond what is legally required of short-term rental platforms and set a new industry standard for how platforms can take proactive measures to help ensure the safety of their users. We should ensure that any new legal framework for digital services encourages such actions. For example, by introducing a “Good Samaritan” principle to ensure that platforms can go the extra mile to engage with online content and ensure a safer environment for users, without increasing their liability as a result. Although this is unlikely to have been the intention when it came into force, the eCD currently disincentivises platforms from taking such proactive measures by threatening a loss of limited liability once a company has “knowledge” of any illegal content.

The Limited liability regime:

We would like to reiterate the importance of maintaining the limited liability regime in any future policy discussion on the regulation of digital services. This regime has played an essential role in encouraging innovation in the Digital Single Market, in preserving legal certainty for both platforms and their users, and protecting the fundamental rights of all internet users as defined in Articles 8 and 11 of the European Charter of Fundamental Rights. Users should continue to be held accountable for the content they post online.

At the same time, we acknowledge that the existing limited liability regime relates to the services offered by a platform, rather than to the platform itself. As such, a company with a hybrid business model, offering a diversity of services, may be responsible to a varying extent for the content it offers. Any future discussion should seek to clarify that a company may benefit from a limited liability regime for some of its services and not others, depending on the business model employed in each case.

Notice and Action protocols:

Today, platforms such as Airbnb are expected to take action against illegal content once a competent authority or actor has provided it with information to constitute actual knowledge of an illegality.

We would welcome greater clarity as to how these **notice and action** systems can work in a more transparent manner, consistent with the core legal principles of “actual knowledge”

³ <https://news.airbnb.com/trust-innovation-update-protecting-hosts-guests-and-communities/>

and “no general monitoring obligation” which have been further refined through various instances of CJEU case law, e.g. *L’Oreal vs Ebay*, *Sabam vs Netlog NV*. Rules regarding what constitutes illegal content in the context of short-term accommodation rental will always vary from jurisdiction to jurisdiction across the EU. For example, rules on what constitutes social housing and whether it is legal to list such housing on a short-term rental platform such as Airbnb. There is nevertheless a role for EU-wide principles to clarify the highly fragmented and localised context under which notice and action processes are currently applied to Airbnb’s activities. These notice and action processes could also vary according to the type of digital service being offered, as well as the various actors involved in offering these services: for example, it may not be appropriate to apply the same notice and action regime to both peer and professional activity.

A risk-based approach to addressing “harmful” content:

Airbnb invests heavily in risk detection and user verification systems and we seek to achieve an industry-leading position in trust and safety for our users. These tools enable us to minimise the risk of spam, fraud, threats of harm, intellectual property violations, and harassment, while supporting authenticity, reliability, risk-scoring, quality control, and more. However, not all platforms carry the same risk-profile when it comes to illegal content – for example hate speech – due to the nature of the services they offer, or the size of the platform.

Because Airbnb supports the idea that different services come with different responsibilities, we believe that any future framework should be sufficiently flexible and principles-based to allow service providers to react appropriately to the concerns that are specific to their services, and in a manner that is commensurate with their unique situations and abilities.

We would advise a cautious approach to regulating **harmful content**, given that defining content as such is highly subjective and depends greatly on context, meaning that platforms would become the de-facto arbiters of what constitutes harmful content online with a resulting risk to online freedoms.

Country of Origin:

A key legal tenet of the existing eCD is the Country of Origin or Home State Control principle, by which Information Society Service providers based in the EU are subject to the jurisdiction of only one Member State, rather than to tens of different regulatory approaches across the Union. This foundation of EU law should play an essential role in upholding the principles of the Internal Market and Digital Single Market, providing platforms - both established services and a new wave of innovative start-ups – with the necessary legal certainty to offer services in a consistent and predictable manner, to the benefit of guests and hosts alike across the EU.

However, despite the existence of the Country of Origin principle, many digital platforms are still struggling with significant regulatory fragmentation⁴ across the EU.

In the case of short-term rental platforms, this is twofold: firstly the regulations that apply to our users are often applied at municipal-level, as well as at regional and national level, thus increasing the regulatory inconsistencies and uncertainties for hosts, guests and local policymakers.

⁴ <https://ehha.eu/2019/01/31/ehha-calls-for-proportionate-short-term-rental-rules-across-europe/>

Secondly, member states (and local governments in member states) who wish to enforce obligations against platforms as an *exception* to the Country of Origin principle do not notify the Member State of Origin (Ireland in the case of Airbnb) or the European Commission of their intentions, as envisaged in the eCD. This is especially problematic in cases where local rules contradict or contravene fundamental EU legal frameworks, for example the free movement of information society services in the eCD. In this situation, there is no effective oversight of the demands being made on platforms (or the users of platforms) and therefore no ability to enter into dialogue to resolve those inconsistencies.

The Digital Services Act presents an opportunity to further clarify how the Country of Origin principle works in practice - including how and when derogations might apply - to ensure that the appropriate guidance and guardrails are in place to support local rules that are clear, fair and proportionate, whilst recognising our own obligations and responsibilities as an online platform.

Coordinated cross-border cooperation:

There has been some discussion of a potential EU-level regulatory or oversight authority for platforms, which we agree could add significant value - especially in further underpinning the Country of Origin principle.

In respect of our sector, such a body could be responsible for assessing the proportionality of local-level regulatory responses (including potential derogations from Country of Origin), and establishing relationships with existing oversight bodies, regulators and government authorities at National Level. This network of cooperation could help to resolve situations *before* any recourse to lengthy court proceedings, which are currently the only means open to platforms and our users to challenge the proportionality of local regulations.

For instance, where the European Commission is notified by member states of new laws impacting short term rental platforms (whether through the mechanism envisaged by the eCD or via the notification process in the Technical Standards directive) it could apply its expertise to assess the proportionality and legality of these measures.

Data sharing between private companies and public authorities:

Airbnb understands the need for decision-makers at all levels to access reliable data regarding digital platforms, in order to inform their policy making. This is why Airbnb and other short-term rental platforms have recently signed a landmark agreement with Eurostat - the European Commission's statistical department - to share a range of data corresponding to our historic and ongoing activities in Europe, while satisfying our statutory duty to protect individual users' privacy.

Such data will encourage a consistent approach to data-sharing by the sector and inform policy-making on a regional, national and European level. This agreement is an extension of the numerous ways in which Airbnb already shares data at municipal, regional and national level across the EU – and we will continue to share data at all levels with the aim of increasing transparency and understanding about our platform and community.

These data sharing agreements address many of the concerns of local and national regulators regarding how to obtain data from short-term rental platforms. Any subsequent discussion on whether to introduce obligatory data-sharing requirements for platforms in the framework of the Digital Services Act should bear in mind the specific nature of short-term

rental platforms, and the legal restrictions that exist in terms of how we treat personal data under GDPR, including how we share such data with governments and local authorities.

Supplemented by sector-specific rules:

Finally, in addition to a new horizontal regulatory framework for digital services, including potentially specific legal provisions for different kinds of services, we would like to highlight the simultaneous need for *vertical* policy tools to reflect the specificities of the short-term rental sector. Such policy tools could include guidance on how local registration schemes for short-term rental platforms and their communities can be developed in line with EU legal frameworks. Again, this could be a role for a single, coordinating regulatory authority.

Airbnb will continue to update its thinking on these topics as discussions evolve in relation to the Digital Service Act and the e-Commerce Directive. We stand ready to work with policy-makers at all levels to ensure the sustainable development of our services, and short-term rental platforms in particular, across Europe in the coming months and years.

Airbnb
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