

HOTREC Position Paper on the EU Digital Services Act

Towards a balanced relationship between hospitality establishments and online platforms

HOTREC welcomes the Commission's commitment to submit a proposal for a Digital Services Act package, in particular:

- A revision of the E-Commerce Directive;
- A 'New Competition Tool' addressing the gatekeeper role of large online platforms;
- A possible specific on the collaborative economy.

For hospitality and tourism, online marketplaces, social networks, collaborative economy websites and search engines have in many regards changed the way customers book their accommodation, select their means of travelling, out and discover local restaurants, bars and attractions. It has expanded choice and possibilities for consumers, invigorated competition, fuelled innovation and put new destinations on the map.

Over the past decade, the European Union has developed key legislation to prevent abuses for consumers and businesses which rely on platforms, which we consider as significant improvements. These are steps in the right direction, and there are still gaps to address. It is crucial that a renewed framework ensures that what is illegal offline is also illegal online. The digital single market cannot succeed without users' trust in online platforms that respect all applicable legislation and the legitimate interests of users and business partners.

We see that the E-Commerce Directive, adopted 20 years ago, is not adapted to the reality of the digital environment today and offers unfair competitive advantages to platforms compared to traditional companies – in our case, hotels, bars, restaurants and cafes. Hotels in particular, many of which are small or micro-enterprises, are not in a position to engage on an equal footing with online travel agent (OTA) websites, which are specialized platforms offering consumers access to hotel and other forms of accommodation.

Meanwhile, rapidly emerging collaborative economy services for accommodation have been only lightly regulated at best, leading to unequal business conditions between hotels and short-term rental (STR) services for tourist accommodation and undesirable effects in destinations, such as housing shortages and over-tourism.

These issues are exacerbated by the fact that the current regulatory framework has failed to keep up with the rapid emergence of gatekeeper platforms which largely determine on which basis potential customers will engage with hotels and thus play a systemic shaping the overall market. The fact that two companies that two companies control a market share of 85% in the online hotel booking market needs to be addressed. At the same time, smaller platforms operating on the same market impose very similar terms and conditions as the two dominant players to both business partners and consumers, creating an overall market situation of dependence for business partners and little choice in practice for consumers.

Towards a coherent framework for various platform activities

Internet platforms have significantly evolved over the past 20 years and created a wide range of different ways in which users and companies interact with content providers, traders and other individuals offering goods and services.

In this regard, we recommend avoiding a ‘one-size-fits all’ of Internet platforms in the Digital Services Act. It would be very difficult to arrive at a single, legally relevant and future-proof definition of online platforms at EU level, owing to factors such as the great variety of types of existing online business models and their areas of activity.

Definitions of Internet platforms would benefit from taking the following distinctions into account when addressing online platforms with a commercial activity:

- whether the platform is offering ‘active’ or ‘passive’ intermediation;
- their type of business model and the area of activity;
- whether the platform is offering intermediation for a wide range of commercial offers (e.g. catalogue of hotels) or a specific commercial offer (hotel’s or hotel chain website only offering rooms in its own establishments);
- whether (payment) transactions can be made via the platform or are facilitated by the platform and the number and type of parties involved in the transaction (intermediation, C2C, B2C, B2B);
- whether the platform includes user-generated content (e.g. user reviews);
- the size of the platform, in particular to avoid burdening micro-enterprises and SMEs with requirements with which only large international platforms have the resources to ensure compliance with.

The type of responsibility platforms take for the content they circulate should first and foremost depend on whether they are playing an active or passive role. Intermediaries which show a capacity to have control over content by curating, selecting, using or modifying it in order to optimise or promote it should as such be considered as ‘active intermediaries’.

The legal liability regime for hosting intermediaries with regard to user-uploaded content and the general monitoring prohibition set out in Article 15 of the E-Commerce Directive should only be preserved for passive intermediaries. Any intermediaries whose interventions have an editorial function and show a certain degree of control over the data, through tagging, organizing, promoting, optimising, presenting or otherwise curating specific content for profit-making purposes should not benefit from safe harbour provisions due to their active nature.

Furthermore, the territorial scope of the future Digital Services Act should be extended to cover the activities of companies and service providers established in third countries, when they offer services or goods to consumers or business users in the Union

Setting the right balance for the accountability and oversight of platforms

The Digital Services Act is an opportunity to firmly establish that ‘what is illegal offline is also illegal online’ in the EU. Voluntary actions and self-regulation by platforms have brought some benefits and

D-0820-342-JL

improvements, but frequent and recurrent abuses and offers of illegal services have also shown why stricter regulation is crucial.

‘Active’ online platforms offering commercial services or products must be held liable and accountable for illegal actions or any dissemination of illegal content. They should be incited to regularly monitor the content they circulate and act swiftly with duty of care, with a human decision to take down any identified illegal content on their own initiative. It is also important to require that platforms verify the information and identity of the undertakings with which they have a contractual commercial relationship, and regularly conduct random monitoring to ensure that the information they provide is accurate and ensure that no illegal offers appear on their websites. Concerning platforms of “restaurants at home”, platforms should monitor that the host really respects regulations, such as those related to hygiene or sales of alcohol.

Such proactive actions undertaken by platforms should not, however, exempt them from liability and accountability for content, nor prevent any third parties to have recourse against the decision of the platform. Once illegal content is taken down, platforms should also be held responsible to ensure that it does not reappear. In the area of STR, it should also be noted that many local authorities set out an annual threshold limiting the number of overnight stays a host can offer (e.g. 120 nights per year limit in Paris and 17 other French cities). This implies that an STR offer may only become illegal once the annual threshold is met. Regular checks are therefore crucial.

Furthermore, it should be possible for third parties, in particular business partners of commercial platforms and their consumers to flag any illegal content, with necessary backstops to avoid abusive or unjustified third-party flagging. It should be reciprocally possible for active platform operators to address content provided by third-parties to ensure that it is not misleading or abusive. This is important to prevent the proliferation, for example, of ‘fake’ reviews of establishments in the hospitality sector, or tackle misleading or illegal offers provided by third parties on platforms.

The illegality of content should be assessed on the basis of national and/or local laws or court decisions. Any penalties or sanctions for failing to act swiftly against illegal content should be appropriate and proportionate to the potential damage caused by the content and the role, nature and type of activity of the platform.

INFOGRAPHIC: 3 tiers of platforms shaping the hospitality sector

- search engines – brand-bidding issue

- meta-search engines – vertical concentration issue

- Strict terms and conditions and unfair practices by hotel and restaurant booking platforms

Accountability goes hand-in-hand with transparency

To support the fight against illegal content, services and offers and to prevent any abuses, it is essential that online platforms' content policies are intelligible and published in an easily accessible manner for third-party businesses and consumers alike. It must in particular be clear to third parties how complaints regarding content will be handled and what procedures will be followed, including to which extent decisions and evaluations may be automated (via algorithms) and at which stage a human decision intervention may be taken.

In a similar vein, we would welcome that the Digital Services Act further reviews the practice of End User Licensing Agreements (EULAs) and Terms and Conditions Agreements (T&Cs) and to seek ways to allow greater and easier engagement for consumers and business partners, including in the choice of clauses. EULAs and T&Cs are often accepted by users without reading them and, moreover, when a EULA and T&Cs does allow for users to opt-out of clauses, service providers may require users to do so at each use, to encourage acceptance of clauses.

Identifying and addressing a systemic role on the market

We welcome the European Commission's intention to introduce, as part of the future Digital Services Act package, a 'New Competition Tool' based on ex-ante regulation to tackle systemic and dominance issues specific to digital markets, as well as a tool to prevent market tipping. We believe that internal market regulation adopted under the Digital Services Act and competition policy need to be carefully and intrinsically linked together in order to ensure a fair competitive environment.

The digital market benefits from a great variety of different types of platforms in terms of size, from micro-enterprises to large platforms with a global outreach and a systemic power in their field of activity. We believe that the European Commission's competition framework should focus on those platforms which, through network effects, are able to act as de facto "online gatekeepers" of the digital economy. Beyond requirements to tackle illegal content and prevent illegal behaviour, their capacity to create bottlenecks through inflexible terms of access, limit access to operating systems' functionalities or access to user transactions' data should be carefully assessed and acted upon.

Size and market share are particularly important to assess to which extent a platform plays a dominant/systemic role in the digital economy. Further criteria could include:

- considerations such as whether the undertaking is active to a significant extent on multi-sided markets, the size of its network (number of users/individual accounts);
- the extent to which smaller platforms use terms and conditions for business partners and consumers that are very similar to those imposed by larger players;
- the presence of network effects, vertical integration and barriers to entry;
- financial strength and ability to access data;
- whether the platform is an unavoidable partner and creates a strong degree of dependence for business partners;
- the importance of its activity for third parties' access to supply and markets.

Company size should also be carefully considered in order to be avoid wherever possible additional burden for micro-, small and medium size enterprises. Additional requirements on systemic

D-0820-342-JL

platforms, which have the necessary resources at their disposal to ensure strict self-reporting and auditing, should not lead to additional requirements for those businesses that use them. Asymmetrical ex-ante rules on large platforms with significant network effects, acting as gatekeepers, would ensure a level-playing field for all digital operators. Additionally, and where relevant, ex-ante regulation should also effectively cover the platforms which are not based in the European Union.

Assessment of systemic platforms' activities and impact should be taken by regulators and any self-reported information provided by systemic platforms should be transparently audited and verified.

We also invite the European Commission to explore other ex-ante remedies that prevent the creation of new systemic platforms. In addition to reactive ex-ante mechanism, the Digital Services Act should envisage pre-emptive mechanisms that prevent the creation of digital gatekeepers.

Good governance to address the development of collaborative economy services

The application of the Country of Origin principle for information society services has in many regards helped develop the E-Commerce landscape in the EU over the past 20 years and should remain the backbone of the EU Internal Market for digital service in the future Digital Services Act.

Preserving a strong application of the Country-of-Origin principle is key for digital services. However we believe that the application of this principle must be examined separately when it comes to so-called 'collaborative economy' services. Such services – such as short-term rental of accommodation (STR), meal-sharing services, food delivery and ride-hailing - have grown tremendously over the past 15 years and have a significantly higher and specific local impacts.

Beyond the fact that such services are typically listed and offered via platforms operating globally, the actual provision of services is executed locally and intrinsically linked to the presence of the service provider (STR host, home cook, driver) in a specific geographical location. Incidentally, local, regional and national authorities have introduced specific rules for such services, but the application of the Country of Origin principle has at times presented challenges for the application of such rules and fomented an extensive array of case law.

When it comes to collaborative economy services, we consider that there is a case to establish a coherent governance framework that confers local and national regulators with much needed certainty to uphold measures of public interest and develop new rules without fear of it leading to litigation. This should be addressed in a separate framework to the Digital Services Act, focusing on collaborative economy services. Within the strict parameters of tackling this issue, the Country of Origin principle needs to be fine-tuned to ensure that social, fiscal, environmental, health and safety and public order measures can be developed, and properly implemented where necessary.

Due to the essential nature of the Country of Origin Principle, any fine-tuning, even if it is only meant to improve the supervision of the collaborative economy to ensure a level playing field, should be

handled in an extremely delicate manner. Sufficient assessment as to its impact should be ensured, while spill-over effects to any other areas of the economy should be avoided at all costs, in order to guarantee the proper functioning of the Single Market.

In the area of short-term rentals (STR) for tourist accommodation, attempts by local and national regulators to establish schemes to register properties and their owners, collect taxes, uphold health and safety standards and fair competition with hotels and other forms of professional accommodation services must be given the necessary flexibility by the EU legislators. Likewise, the execution of meal-sharing services can imply compliance with local rules on registration, alcohol sales, taxation, professional qualifications and food safety.

A framework that enables Member States and local authorities to curtail the potential negative side-effects the collaborative economy can have on the public interest, services of general interest, affordable housing, competition, health, safety and hygiene requirements and the performance of public administration is much needed. At the same time, we note that compliance with a multitude of different legal and regulatory instruments across the EU would create an unnecessary degree of complexity for platforms offering collaborative economy services. It is urged that the principle of proportionality is respected and enforced in these situations

We believe that the way forward in the Digital Services Act lies in a coherent framework for the exchange of data between platforms, hosts and administrations and 'smart' regulation that facilitates compliance with registration, tax collection and other measures of public interest. The Digital Services Act should stay clear from overriding Member States and public administrations' capacity to determine and establish measures of public interest (within the parameters of the Country of Origin Principle), but it should provide Member States with guidance on how such regulatory frameworks can be set up where desired.

Digital technologies in particular can be mobilized to develop 'intelligent' registration, oversight and tax collection schemes. In order to optimize such a process, it is important to establish an obligation for collaborative economy platforms to verify the information, identity and location of the partners with whom they have a commercial relationship, and to ensure that the information provided to authorities is accurate, regularly reported and up-to-date.

INFOGRAPHIC: fine-tuning the Country of Origin principle in the area of collaborative economy services:

- EU creates necessary derogations for collaborative economy services and provides guidance on how to set up 'intelligent' data exchange and regulatory schemes for authorities that wish to achieve certain ends (registration, taxation, security, affordable housing, safety, health and hygiene requirements)

- Platforms are required to regularly share specific data sets with authorities to ensure regulatory coherence and ensure compliance by local service providers

- Local service providers are identified and located by relevant authorities

- Relevant authorities can regulate according to local and national public interest concerns and requirements



D-0820-342-JL

Towards a fair competitive balance between collaborative economy and 'traditional' services

We take the view that a level playing field in the internal market between the platform economy and the "traditional" offline economy, based on the same rights and obligations for all interested parties - consumers and businesses - is needed. In this light, we stand ready to support the development of a specific initiative addressing collaborative economy by the European Commission which would aim to create a fair competitive balance between STR accommodation providers and 'traditional' hoteliers, as well as between meal-sharing platforms and restaurateurs, create legal certainty at European level and an approach that facilitates the sharing of platform data with market surveillance authorities.

We would also draw attention to the fact that competitive balance can also be achieved by imposing less strict regulation on hotels and restaurants at national level. However, action at EU level is required and can only address the fact that the provisions of the E-Commerce Directive have promoted unequal business conditions in the platform economy at the expense of traditional businesses.

Furthermore, we consider that the Digital Single Act or a specific initiative on the collaborative economy should not tackle the issue of platform workers, as this is first and foremost and national issue to be addressed at Member State level. Collaborative economy workers are mainly active in mobility and food services, which are by nature services that cannot be relocated: there is therefore no need to establish a harmonized status at EU level. In the area of STR, should a host need to employ or sub-contract activities to a worker, then the owner of STR should be considered as a professional accommodation provider and follow the same strict rules and regulations established at national level for accommodation professionals.