

Consultation on the Digital Services Act and the Digital Markets Act

Dear Mr. Dooley,

Airbnb welcomes the opportunity to provide feedback to the Department of Enterprise, Trade and Employment on the recent Digital Services Act and Digital Markets Act proposals. We understand the need to make Europe's platform economy stronger, more trusted and more competitive and believe that the Commission's proposals represent a positive step forward in this regard.

The Department of Enterprise, Trade and Employment is an important stakeholder for Airbnb. Dublin is home to our EMEA Headquarters. We are a large investor in Ireland where we employ circa 400 across 14 functions. We stand ready to engage with the Department of Enterprise, Trade and Employment as its work continues on these important legislative proposals.

The Digital Services Act (DSA)

The DSA proposal marks an important evolution of the existing rules currently enshrined in the EU's E-Commerce Directive. Airbnb welcomes the fact that the DSA proposal reaffirms the country of origin, limited liability regime and no general monitoring principles as the backbone of Europe's platform economy, whilst also providing greater legal clarity in support of those platforms looking to go above and beyond to ensure the safety of their users. We also support the fact that new due diligence obligations vary according to the size of the platform, which strikes the balance between ensuring that platforms do more to limit illegal content, whilst avoiding overly burdensome and disproportionate requirements.

On the detail of the proposal, there are a number of specific issues we would like to take the opportunity to raise in the wake of the Council's upcoming work:

- **Orders to Act against illegal content (Art 8) / Orders to provide information (Art 9):** we welcome the steps taken in this proposal to clarify how local and national authorities can flag illegal content and request information to a platform that is legally established in another Member State. We understand that this has been a bone of contention for many local authorities in particular, and will help provide clearer legal parameters for local requests when in conformity with EU law. These articles also create more certainty for platforms about the information to be contained in such Orders in order to identify the specific item of illegal content.

It is, however, equally important that the DSA contains a clear and effective means for a platform to challenge the frequent submission of disproportionate or unsubstantiated Orders which contravene EU law, without recourse to lengthy and costly court

proceedings (as exists for example in Art 19(5)). Without an effective checks and balances system, there is no opportunity for an assessment of the local rules and requirements in the context of EU law, nor an ability to enter into dialogue to resolve inconsistencies. This is particularly important for a Collaborative Economy platform such as ours, where platforms may receive Orders not only from 27 national authorities, but from hundreds of local authorities across the EU. Furthermore, we also believe this would place additional burdens on the Irish regulatory authority (for those platforms in their jurisdiction), if they are required to take action in relation to a large number of (potentially unsubstantiated) Orders.

- **Notice and Action mechanisms (Art 14):** The DSA also introduces a dedicated notice and action mechanism to any individual or entity in the platform ecosystem, and confirms the content that has to be included in a Notice in order for “actual knowledge” to be conferred on the platform.

Whilst we very much support the ambition of the Commission to set out how a Notice and Action mechanism should work, the current wording of Art 14(3) suggests that a platform will be deemed to have actual knowledge of an illegality once the elements mentioned in Art 14(2) are fulfilled. However, in many instances individuals will not have (and cannot be expected to have) sufficient understanding of the relevant legal frameworks in order to ascertain the illegality of the content hosted on a platform. This is especially the case in the short-term rental sector where illegal content and activity straddles a number of legal and jurisdictional frameworks, including local and regional urban planning rules, tourism and short-term rental rules, as well as national and European legal frameworks.

The DSA should strike a balance between ensuring illegal content is dealt with responsibly and swiftly, whilst also avoiding unrealistic and overly burdensome liability provisions being placed on the platform. A platform should only be deemed to have actual knowledge of illegal content or an illegal activity if it receives a court order, or if the illegality is blatant – meaning that based on the information received, a customer support representative – without having a legal background and without needing to rely on a lawyer – would be able to determine that the content is illegal, and would be able to make an accurate assessment as to the appropriate action to be taken by the platform. A platform cannot be understood to have “actual knowledge” of an illegality simply as the result of a Notice being issued which meets the requirements set out in Art. 14.

Furthermore, as with the legal provisions for the issuing of Orders by local and national authorities, there is similarly a need for an effective redress mechanism by which a platform - and potentially an affected user (for example a host or guest in our case) - can challenge the frequent submission of unsubstantiated Notices by the same individual or entity.

- **Cross-border cooperation and the role of the Digital Services Coordinator (DSC), Section 1, Arts 38-46:** the Commission proposal aims to improve coordination between various Member State authorities responsible for digital issues, whilst reiterating the importance of the country of origin principle. The role of the Digital Services Coordinator in the country of establishment of a platform - Ireland in Airbnb's case - will be key in avoiding the fragmentation of the digital single market and in upholding the core principles of the DSA.

Given the fundamental role played by the DSC in ensuring the consistent application of the DSA, it is essential that the lead DSC in the country of establishment has sufficient knowledge of the range of platform services covered by the Regulation, including short-term rental services. The landscape of illegal activity is uniquely complex for Collaborative Economy platforms such as Airbnb, which touches on highly specific and localised housing, tourism and zoning rules among other areas. This is further complicated by the fact that local rules can be unclear, disputed or even invalid, and can themselves vary enormously even within any one Member State. In Ireland the rules impacting our business are overseen by a myriad of stakeholders. Some of these are expected interlocutors for digital companies – including the Department of Enterprise, the Office of the Revenue Commissioners and the Data Protection Commission. Others are specific to the short-term rental sector, including the Department of Housing, Local Government and Heritage and local authorities throughout Ireland.

This patchwork of rules and regulatory authorities is replicated across the EU. As the lead DSC in our country of establishment, the relevant Irish authority will be responsible for applying and enforcing the DSA including - for example - in assessing the validity of local Orders. For our sector, this enforcement responsibility could include aspects such as assessing the relevance of a Notice flagging supposed illegal content in Barcelona - where the determination of illegality will require an understanding of highly-localised urban planning rules and registration requirements, and regional tourism decrees. It is essential that the sector-specific expertise required to assess the broad range of platform activities feeds into the work of the lead DSC, and that this crucial inter- and *intra*-Member State coordination is sufficiently acknowledged in upcoming Council discussions.

Similarly, this need for sector-specific expertise should be kept in mind in the formation and set-up of the European Board of Digital Services Coordinators (outlined in Section 2). Though Art. 48 makes reference to the involvement of other competent authorities as well as experts and observers, it is important that concerns relating to certain platform services - such as STR services - are not neglected due to the fact that they do not traditionally fall within the competence of the majority of Member State DSCs, many of which are likely to come from the Audiovisual and media regulatory authorities.

- **Traceability of traders (Art. 22):** Art. 22 requires online platforms to collect, verify and disclose certain information about traders using the platform to offer goods or services. These new requirements potentially contradict similar rules for transparency requirements under the so-called Consumer Omnibus Directive (Directive (EU) 2019/2161).

We are concerned that the requirement according to Art. 22 (2) to make reasonable efforts to assess the reliability of the information provided by traders does in fact amount to a general monitoring obligation, in particular where this information changes over time. This seems to be in conflict with Art. 7 (no general monitoring obligations)¹. Furthermore, Art. 22 (6) which requires the platform to make certain information available to recipients of the service, seems to contradict Art. 22 (5) which requires platforms to disclose the collected information only under limited circumstances. It also seems to be at odds with Art. 22 (7) which requires platforms to design and organise their online interfaces in a way that enables traders to comply with their pre-contractual information obligations, which would include the information referred to in Art. 22 (6). It should not be the obligation of the platform to decide which information a trader needs to make available to consumers and to make sure this is accurate and up to date.

The Digital Markets Act (DMA)

In the run up to the publication of the DMA proposal, Airbnb acknowledged the real competitive concerns that exist in certain sectors and that new rules may be required to protect competition and ensure balance in those sectors.

In that regard, we would like to take this opportunity to reiterate that Airbnb operates in the highly competitive accommodation and experience sectors – competing with online and offline providers and distributors, including other platforms, hotel websites, travel aggregators, offline travel agencies and many others. Both guests and accommodation providers use multiple channels (known as “multi-homing”) to list and book accommodation. Some sites facilitate this activity, for example by offering API connections or by allowing customers to import their listing content directly from other sites (e.g. Booking.com allows import of Airbnb listing data).

We would like to raise several issues which we believe would help provide clarity to all stakeholders as negotiations progress:

- Firstly, we believe there is a need for a flexible definition of the term “monthly active end users” (Art. 3.2(b)) which recognises the fact that platform users engage differently according to the type of digital service on offer. For example, an end user on an advertising-supported social media platform, where a visit to the platform would

¹ See also Recital 28 of the Omnibus Directive which explicitly states that providers of online marketplaces should not be required to verify the legal status of third-party suppliers.

presumably count as 'active use', should be counted differently to an end user on a marketplace where a single visit does not necessarily generate revenue. For transactional services, a "user" should be understood as someone who books or purchases. In this regard, enforcement will require detailed knowledge and expertise of various business models and sectors.

- Secondly, we believe that - in addition to the existing threshold by which a platform may be deemed a gatekeeper - it may also be relevant to provide a minimum threshold under which platforms are clearly *not* gatekeepers. This would help provide some much-needed business certainty for smaller businesses.
- It is important for different business models to be recognised more explicitly in the DMA, and for organising principles to be set around specific business activities in specific settings, rather than a fixed, one-size-fits-all list of obligations for all gatekeeper platforms. This is to ensure that rules are relevant and curated to sectoral specificities, and actually work to deter the competitive concerns at hand. Once again, this will require specific expertise and knowledge of a range of different business models.
- Finally, it will be important to ensure consistency between the DMA and the numerous competition initiatives currently being negotiated and adopted at national level, especially regarding the dos and don'ts lists of practices for gatekeeper platforms. It is paramount to avoid a contradictory network of ex-ante business obligations which would seriously undermine the ability of digital companies to do business in the EU.

Airbnb looks forward to participating in the upcoming discussions on the DSA. We stand ready to work with policy-makers in Ireland and at all levels, to ensure the sustainable development of our services, and short-term rental platforms in general, across Europe in the coming months and years.

Kind regards,

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