



Directive (EU) 2015/2302 on package travel and linked travel arrangements

Airbnb Ireland UC Consultation Response

Airbnb Ireland UC (**Airbnb** or **We**) is a private unlimited company registered in Ireland, which operates the website www.airbnb.com (**the Airbnb Platform**) for users residing in the European Union and other jurisdictions. The Airbnb Platform is an online marketplace which registered users (**Hosts**) can use to create advertisements (**listings**) about the services they wish to offer for sale, such as accommodation, experiences, events and other services. These services are made available by Hosts to other users of the Airbnb Platform (known as **Guests**).

The Airbnb Platform provides the means by which Hosts and Guests may communicate and transact with each other directly. Airbnb does not itself own, sell, provide, advertise or offer for sale any of the services. When a Guest books a service offered for sale by a Host on the Airbnb Platform, the contract (and the obligation to pay) arises directly between the Guest and the Host.

Airbnb does not itself sell accommodation, services, or package holidays as an organiser, retailer or agent. Nevertheless, there are certain aspects of the Consultation which may touch upon Airbnb, and Airbnb is making this submission in its capacity as a facilitator of 'linked travel arrangements' (**LTAs**) within the meaning of Directive EU 2015/2302 (**the Package Travel Directive**) implemented in Ireland by the European Union (Package Travel and Linked Travel Arrangements) Regulations 2019 (S.I. 80/2019 - **the Irish Regulations**).

As a facilitator of LTAs, Airbnb welcomes the opportunity to address certain questions in the Commission's Consultation Paper and Interim Report of 7 August 2019 (together, **the Consultation**).

General comments

Before addressing specific questions in the Consultation, Airbnb would like to highlight the following three key principles which underlie our submission:

1) **Maximum Harmonisation**

The Package Travel Directive is a maximum harmonisation directive, meaning that Member States must not introduce in their national law more stringent provisions than the requirements of the Directive (see Article 4 of the Package Travel Directive). In this regard, Airbnb notes question 5.2 of the Consultation Paper, which asks whether

the 'existing licensing and bonding regime' (i.e. under the Transport (Tour Operators and Travel Agents) Act 1982 as amended by the Package Holidays and Travel Trade Act 1995 (the **1995 Act**)) should be extended to include all package travel and LTAs within the scope of the Package Travel Directive. Since licensing regimes are not required under the Package Travel Directive, Airbnb considers that extending the current Irish licensing regime (which we understand applies only to 'tour operators' and 'travel agents' as defined, arranging or selling travel out of Ireland) is neither envisaged by nor proportionate to the aims of the Package Travel Directive, and is not consistent with the maximum harmonisation principle in the Directive.

2) **Proportionality**

Airbnb considers that legislation which seeks to implement the Package Travel Directive in Member States should be proportionate to the aims of the Directive. The insolvency protection rules under the Package Travel Directive and the Irish Regulations exist to protect consumers where travel services which form part of an LTA are not performed as a consequence of the facilitator's insolvency. The proportionality principle underpins the Package Travel Directive, which seeks to strike a balance between a high level of consumer protection and the competitiveness of business (as evidenced in Recitals 5, 51 and 52 of the Directive). Airbnb considers that, regardless of which financial protection option(s) is chosen following the Consultation:

- a) Any amendments to the Irish Regulations should clarify that insolvency protection is not required where an LTA facilitator does not receive any funds from travellers. Where an LTA facilitator does not receive any funds from travellers, there is no risk that the travel services which form part of any such LTA would not be performed as a consequence of the LTA facilitator's insolvency.
- b) Any requirements for insurance or other financial protection should be limited to turnover arising specifically from the sale of travel services benefiting from protection under the Package Travel Directive and not a company's entire turnover. Airbnb has provided comments on the definition of 'eligible turnover' referenced in the Consultation below.

3) **Flexibility**

Airbnb considers that the security arrangements chosen must be flexible enough to take account of (a) the broad range of different business models which will be subject to the Package Travel Directive and the Irish Regulations and (b) the dynamic and evolving ways in which the travel market is responding to the growth of the internet. For these reasons, retaining flexibility in the Irish Regulations is essential. In that regard:

- a) Airbnb agrees with the Consultation Paper (at Paragraph 4.1) that Option H ('firm level insurance') should always be available for firms wishing to operate outside of the bonding options (whichever bonding option is chosen).
- b) Airbnb considers that the Commission's existing discretion under the Irish Regulations to take into account a range of different factors in considering the amount of security required should be widened under any amending legislation, such as to give the Commission express discretion not to require insolvency protection where there is no risk that the travel services which form part of a LTA will not be performed as a consequence of facilitator insolvency.
- c) Airbnb considers that recourse to trust accounts (considered at Section 3.1.4 of the CEPA Report) should be available for traders wishing to operate outside of the bonding options. In order to maximise flexibility and avoid double-protection Airbnb considers that the Irish Regulations should at least allow for recourse to this option in appropriate circumstances at the discretion of the Commission.

Responses to questions

We have set out our responses to questions 5.2, 5.3, 5.4 and 5.5 of the Consultation below:

- 1 **Question 5.2 - Should the licensing and bonding regime be extended to include all package travel and Linked Travel Arrangements within the scope of the new EU Directive? If not, what do you believe would be the most appropriate arrangement for these sales?**

Proposed Licensing regime

- 1.1 There is no requirement under the Package Travel Directive for traders covered by the Package Travel Directive to hold a licence. The Package Travel Directive is a maximum harmonisation directive, meaning that Member States must not introduce in their national law more stringent provisions than the requirements of the Directive (see Article 4 of the Package Travel Directive). Airbnb believes that requiring traders subject to the Package Travel Directive to hold licences would not be consistent with the principle of maximum harmonisation under the Package Travel Directive.
- 1.2 In addition, Airbnb believes that such a requirement would be disproportionate and unduly burdensome, since adequate protection for travellers is already achieved through the requirements under the Package Travel Directive.

Insolvency protections and bonding

- 1.3 Airbnb believes that the application of financial protection requirements should be proportionate to the aims that such protections seek to achieve under the Package

Travel Directive, particularly given the maximum harmonisation principle. In this regard, Airbnb agrees that the Irish legislation should be flexible enough to allow the Commission to apply insolvency requirements in a manner which is proportionate to the risk presented by the activity of the relevant trader. Recital 40 of the Package Travel Directive is instructive in this regard, stating that “*for the insolvency protection to be effective, it should cover the foreseeable amounts of payments affected by the organiser’s insolvency and, where applicable, the foreseeable cost for repatriations.*” Recital 40 goes on to state that “*effective insolvency protection should not have to take into account highly remote risks [...] where to do so would disproportionately affect the cost of the protection.*”

1.4 Airbnb has made some specific submissions in relation to the requirement for proportionality in our response to question 5.3 of the Consultation.

2 **Question 5.3 - Are there other reforms that you think should have been considered that would ensure appropriate levels of protection for consumers of package travel/Linked Travel Arrangements?**

2.1 As mentioned above, it would be helpful if the current legislation could be amended to confirm that insolvency protection is not required in situations where a facilitator of LTAs does not receive traveller money. It is Airbnb's reading of the Package Travel Directive that the requirement on traders facilitating LTAs to provide security for the refund of all payments received by the trader from consumers only applies where a travel service which is part of an LTA *'is not, or will not be performed as a consequence of the insolvency of the trader'*:

2.1.1 Article 19(1) of the Package Travel Directive requires Member States to ensure that traders facilitating LTAs provide security for the refund of all payments received from travellers *insofar as a travel service which is part of an LTA is not performed as a consequence of their insolvency.*

2.1.2 Section 22A(1) of the 1995 Act (inserted by Section 19 of the Irish Regulation) requires a trader facilitating LTAs to provide security in accordance with the requirements specified in the Act, for the refund of all payments received by the trader from travellers *where a travel service which is part of an LTA is not, or will not be, performed as a consequence of the insolvency of the trader.*

2.2 It is clear that where a trader or facilitator of LTAs does not receive funds from consumers, there is no risk that the travel services that form part of the LTA would not be performed because of that trader's insolvency.

2.3 In order to provide legal certainty for industry participants, it would be helpful if the Irish legislation could clarify that the insolvency protections provided for in the Irish

Regulations do not apply in circumstances where traders facilitating LTAs do not receive payments from consumers. We believe that such a clarification would be in line with the European Commission's understanding of the insolvency protection requirements for LTAs as set out in the European Commission Transposition Workshops:

2.3.1 In a meeting of 25 February 2015, the European Commission was asked how insolvency protection for LTAs should be calculated. The Commission stated, *The principles for calculating the necessary insolvency protection are the same – see Article 19 (1) third sentence. **However, the different risks stemming from LTAs as opposed to packages and the type of LTA that a particular trader offers may be taken into account, e.g. whether or not the traders requests/accepts pre-payments and whether repatriation has to be covered or not. If a trader facilitating an LTA does not receive any money from a traveller, he does not need to offer insolvency protection.***

2.3.2 In a later European Commission Transposition Workshop (13 June 2016), the European Commission was asked:

"If the trader facilitating an LTA does not receive any money from travellers because the traveller directly transfers the payments to the accounts of the travel service providers or to a trust account. May the trader facilitating the LTA delete/cross out the passages on insolvency protection from/in the forms or Annex II as there is no provision for cases where no money is received?"

The European Commission answered:

"If the traveller directly transfers payments to the accounts of the travel service providers or the traveller transfers the payments to a trust account which cannot be affected by the trader's insolvency, there is no reason for insolvency protection.

According to the standard information forms in Annex there is insolvency protection only where the facilitator receives money ("to refund your payments to XY") and where the services are not performed because of that trader's insolvency. That cannot be the case if the facilitator received no money from the traveller. The forms also explain that the insolvency protection does not cover the insolvency of the service provider."¹

2.4 Therefore it would be helpful if the Irish legislation could clarify that the insolvency protections provided for in the Irish Regulations (amending the 1995 Act) do not apply

¹ Transposition of Directive (EU) No 2015/2302 on Package Travel and Linked Travel Arrangements - Workshop with Member States 13 June 2016, Minutes page 17 https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=35324

to in circumstances where traders facilitating LTAs do not receive payments from consumers.

- 2.5 Airbnb considers that, at the very least the Commission should have flexibility and discretion not to require insolvency protection where there is no risk that the travel services which form part of the LTA will not be performed as a consequence of the LTA facilitator's insolvency (e.g. because the money is held in a trust account which cannot be affected by the trader's insolvency). Airbnb notes that the Commission already has discretion under the existing legislation to take into account a range of different factors when carrying out its functions under Section 24 of the 1995 Act (inserted by Section 21 of the Irish Regulations titled '*Arrangements for certain types of security*'). These factors include, for example, the arrangements made by a trader facilitating LTAs to ensure adequate finances are available to discharge the trader's actual or potential obligations and the manner in which the trader is carrying on its business.

3 **Question 5.4 - Which reform options do you think the Department of Transport, Tourism and Sport should pursue? Do you agree with the proposal to pursue Option F? Why and if not why not? If you consider another option to be preferable, why?**

- 3.1 As outlined above, Airbnb considers that any reform of the Irish legislation should clarify that insolvency protection is not required where an LTA facilitator does not receive payments from travellers (for example where a facilitator uses a third party payments company or where those funds are held in a segregated and protected trust account).

- 3.2 Our comments on Option F and in particular the definition of 'eligible turnover' are set out in response to question 5.5 below.

- 3.3 Regardless of which bonding option is chosen, Airbnb agrees with the Commission paper (para 4.1) that Option H (Firm level insurance) should always be available for firms wishing to operate outside of the bonding options (whichever bonding option is chosen).

- 3.4 For the reasons mentioned above, Airbnb considers that recourse to trust accounts (considered at Section 3.1.4 of the CEPA Report) should be available for traders wishing to operate outside of the bonding options.

4 **Question 5.5 - Do you agree with the proposal in options D, E and F to base bonds on eligible turnover, which excludes immediate supplier payments bills paid in arrears, rather than projected licensable turnover? Do you agree that it is then appropriate to increase bonding to double the current proportion?**

- 4.1 Regardless of which option is chosen, Airbnb considers that any requirements for insurance or other financial protection should be limited to turnover arising specifically

from the sale of travel services benefiting from protection under the Package Travel Directive and not the entire turnover of the trader.

4.2 We have three submissions on the definition of 'eligible turnover' which was defined in the consultation as 'projected licensable turnover' (**PLTO**) excluding payments passed onto supplier immediately and bills paid in arrears.

4.2.1 First, the Consultation seems to refer to PLTO as defined under the Travel Agents (Licencing) Regulations 1993 (i.e. the total of receipts estimated by an applicant for a travel agent's licence in respect of overseas travel contracts over the course of the travel period) (see Interim Report at p16). This definition does not make sense in the context of facilitators of LTAs under the Package Travel Directive. For traders subject to the Package Travel Directive we assume the relevant base definition would be 'projected turnover' as defined by the Irish Regulations. The Irish Regulations define 'projected turnover' as *'the total of receipts estimated by an organiser or a trader facilitating linked travel arrangements **in respect of package travel contracts or linked travel arrangements**, as appropriate, to be sold or offered for sale during the period of security...being arranged by such organiser or trader* (Section 21 inserting Section 24(8) of the 1995 Act). It would be helpful if the Commission could clarify this very important point.

4.2.2 Second, we consider that - in order to comply with the principles of maximum harmonisation and proportionality under the Package Travel Directive - the definition of turnover taken into account by the Commission in calculating the amount of insolvency protection required should be linked to travel service combinations covered by the Package Travel Directive (and not the entire turnover of the facilitator). Including the entire turnover of the facilitator goes beyond the requirements of the Package Travel Directive and unfairly prejudices traders whose turnover may relate to travel services which explicitly fall outside the Package Travel Directive (such as, for example, single travel services).

4.2.3 Third, we note that the current definition of 'eligible turnover' being considered in the Consultation excludes payments passed onto suppliers immediately on the basis that consumer payments are less at risk in the event of a travel organiser insolvency as suppliers are still able to fulfil their portion of the holiday. Applying the same logic, it would appear to us that the definition of 'eligible turnover' should also exclude payments passed on to third party payment processors and/or payments held in separate trust accounts as such payments are also not at risk in the event of an LTA facilitator's insolvency.

5 Request for clarifications

- 5.1 Airbnb notes that the Commission seems to make a distinction between LTAs or other travel arrangements that include travel, and LTAs and arrangements that do not include travel. For example: Paragraph 1.8 of the Commission Paper states that package holidays and linked travel arrangements *'not including travel'* are excluded from the scope of the Consultation. Paragraph 3.4 then states that the proposals related to insolvency protection would apply to *'all package holidays and LTAs that fall under the scope of EU PTD II and which include a travel component'*.
- 5.2 It would be helpful if the Commission would clarify:
- 5.2.1 How the Commission defines a “travel component”; and
 - 5.2.2 How the Commission intends to deal with insolvency arrangements in relation to package holidays and LTAs that do not include a “travel component”.

We hope these comments are helpful and we would like to thank the Commission for giving us the opportunity to provide comments on the Consultation. We would welcome the opportunity to comment further on the proposed legislative changes as these develop.

Airbnb Ireland UC

2 October 2019