

Tourism and digitalisation – Statement of Principles and Recommendations

1. Online Search Market

Fair competition

- “ There should be a competitive market for search: vertical and horizontal.
- “ Effect of search market dominance, brand-bidding and domain grabbing should be reviewed urgently.

Search neutrality

- “ Natural search outcomes should appear first and be readily identifiable as the official sites of providers accurately named in search terms.

Search transparency

- “ If a display is affected by payment it should always be clearly identified as such in all display formats.
- “ Subject to the proper identification of paid-for results, results provided must be displayed in a neutral and comprehensive manner and without discrimination and bias.
- “ Where results are selective it should be possible for consumer to ascertain selection criteria.

2. Transparency of Prices and Reviews

Unbundling

- “ The constituent parts of any price, including all applicable taxes knowable at time of transaction and optional add-ons, should be clearly displayed in order to allow accurate price comparison prior to sale. While this may be a current requirement, infringement is commonplace.

Price comparison services

- “ Subject to comparability of input data from various providers, comparison services should compare like with like. They should indicate clearly where any discrepancy in final price paid may still arise or where a precise comparison is not possible.

Personalised pricing should be declared

- “ The effect of any personal data on price, including data on individuals' browsing behaviour, should be transparent. The prevalence and effect of personalised pricing should be within scope of regulatory review.

Price and availability

- “ Any claim about availability and price must be unambiguous and accurate.

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Freedom to offer

- “ In general, suppliers should be able to offer their products and services to whomsoever they wish at a price they choose, subject to prohibition on geo-blocking.
- “ Providing they do not discriminate illegally businesses should be free to choose with whom they have commercial relations.

Payment charges

- “ Regulation about card usage charges must be enforced and scope for abuse minimised.
- “ The exchange rates displayed when consumer is offered choice of their home currency or local currency at ATM or retail point of sale must reflect actual cost to bank/retailer, with no hidden premium or benefit to bank or retailer resulting from selection of home currency. A hidden charge for certainty is not appropriate.

Review authentication

- “ It should be possible to distinguish authenticated reviews from others i.e. determine whether reviewer has booked or used service in question and/or whether reviewer has been authenticated. Where reviews are not authenticated this should be stated clearly.

Accountability

- “ Recognising that their contact details provided at time of review may become obsolete, reviewers should be reachable by review platform, and should remain accountable as far as practical,
- “ As they are accountable, reviewers should be able to delete or amend a review, or platform should delete review on request of verified reviewer.

Right of reply

- There should be a right of reply on behalf of the service provider reviewed if authenticated as such.

Significant change of circumstances

- Where there is a change of ownership or other major change it should be possible for owner or other appropriate person to notify review platform and for the change to be apparent in display of reviews and rating(s). For example, a rating for the period since the significant change should be provided.

3. Data Ownership, use and liability for 3rd party content

Duty to provide data to public authority

- Destinations need an accurate picture of commercial activity within their boundaries. For example, in addition to number of hotel visitors, they also need an accurate idea of the number of visitors in privately rented accommodation. Providers of paid-for accommodation, food, drink or transport services, or platforms providing consumer access to providers of these, as applicable, must make available aggregated consumer data to appropriate local authorities to this end. This will enable strategy to evolve that is based on actual activity.

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Availability of aggregate data to journey planners

- Transport service providers should be encouraged to share data in order for journey planning services to offer end-to-end options to consumers.

IP, personal and business data

- It should not be possible for data related to consumers or businesses to be sold to a third party without consumer's or business's consent. Such data includes, for example, personal browsing data or sales data of enterprises.
- If consent is not given by consumer or business, the provider's scope for reducing offer should be limited to preventing access to those services which require personal data in order to operate correctly.
- Protection of trademarks, domain names and Unfair Practice Directive are already in place. These should be considered in context of reviewing proposals around brand-bidding, brand-jacking etc.

4. Access to Digital Products and Services

Infrastructure and access

- Fast broadband access should be an infrastructure priority.
- Free wireless access for visitors to information in destination is desirable.

Multi-lingual information provision

- Information in language of main inbound markets should be developed for public transport systems, local listings etc.

5. DSM / Regulatory Review

Address anomalies

- Online sales for immediate or imminent use, e.g. for entrance to an attraction, should not be subject to impractical requirements e.g. post-sale cooling-off period.
- Any provision for rights of withdrawal should fully take into account the perishable nature of a service's constituent parts, the nature of related booking processes and any commitments to pay between provider and onward supply chain that may arise upon initial confirmation of booking.

Make compliance requirements easy to ascertain

- Requirements for compliance to online trading regulation should be easy to ascertain. See also 7 below.

Promote single market and EU competitiveness

- Regulation should acknowledge the borderless nature of the online marketplace and not cause or increase competitive advantage arising from non-EU establishment.

6. Digital Skills

Skills and training

- Provide support to the sector in order to up-skill micro and SMEs especially.

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Awareness

- Raise awareness of tools and platforms that are available.
- Support own-industry initiatives.

7. Sharing economy

Definition and regulatory scope

- Applicability and adequacy of existing regulation should be determined urgently.
- Clarification is needed. In common usage, 'sharing economy' or 'collaborative economy' refer to services offered in return for payment (commercial activity), usually traded on online platforms (usually referred to as peer-to-peer platforms).
- Regulation should focus on the actual activity or service that is offered to the public, not only on the means by which such activities or services are offered. Liability should be assessed regardless of channel to market.
- Use of any particular distribution platform may be largely incidental to the legal analysis required of the service offered and its implications, and should be considered separately from any duty the platform itself may have.

Registration requirements

- Registration of commercial activity should be mandatory, easy and inexpensive. It should entail a declaration that provider has the legal right to offer the service or asset in question for the use proposed.

Address fiscal loss

- Due taxes should be recovered.
- Online platforms should provide to appropriate authority an annual statement of income received by the service providers.
- Provision of same service should entail same tax treatment among providers, all other circumstances equal and recognising that variation in applicable national thresholds may apply.

Promote awareness of obligations

- Providers, many of whom will not be businesses, should be made aware of key sectoral and non-sectoral legal obligations and framework by appropriate local or national body (e.g. duty of care, duty to perform, public liability, especially in relation to food safety and provision of alcoholic drinks.)
- This objective will be easier to achieve if simple registration for commercial activity is mandatory: this should be a quick online process, allowing upload of certificates etc. As in 5 above, 'How to comply' should be easy to find out.
- Compliance requirements should be proportionate.

Right to offer

- Platforms should seek evidence that provider has the right to offer the service in question. This may relate to any requirement for registration. See 'Accountability' above.

Platform due diligence

- Where registration is mandatory in location of supply, platforms should only display registered suppliers, perhaps with applicable registration numbers to allow independent verification.

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Explanatory notes for NET recommendations

1. Online Search Market

- Consumer needs to know which results display is affected by payment: results whose display is affected by payment should always be clearly identified as such in all display formats.
- There is risk of prejudice especially to micro/SMEs unable to compete financially in market for ad words, play per click or similar.
- While it is arguable that search engine optimisation (SEO) is increasingly seen as a normal competence in web design, the ability to pay for prominence of results remains very influential.
- Search market dominance contributes to big data dominance and thus financial muscle. This is self-reinforcing as search engines learn more about individuals' online behaviour, optimise their algorithms accordingly, develop their ability to monetise such data and market their own services.
- Unfairness arises where owner of brand has not consented to its use or is in practice compelled to accept its use by a third party to drive traffic to its site before brand owner's site.
- As the internet is the overwhelmingly dominant source of information (whichever search engine is used) it is perverse and not in consumers' interests deliberately to de-prioritise listing of a non-paying result that most closely corresponds to search term(s) entered; to do so would be to put commercial interests ahead of accurate and neutral information provision / result delivery. This is potentially prejudicial.

2. Transparency of Prices and Reviews

- “ A recent UK parliamentary report stated: “We note concerns that online platforms can and do engage in personalised pricing, using personal data about consumers to determine an individual price for a particular good or service, without clearly communicating this to consumers. This is another worrying example of the lack of transparency with which some online platforms operate. We recommend that DG Competition build on the work of the Office of Fair Trading and investigate the prevalence and effects of personalised pricing in these markets. We also recommend that online platforms be required to inform consumers if they engage in personalised pricing.”
- “ Suppliers still offer discounts for paying with debit cards to circumvent requirement to charge only actual transaction cost of credit card use.
- “ Price comparison sites' ability to compare like with like is subject to the comparability of input data. Until or unless there is standardisation of relevant data (i.e. all airlines, for example, provide information in exactly the same format via their APIs), precise comparison may remain elusive.
- “ See CRS code of conduct (EC) 80/2009 regarding information display.
- “ Note that personalised pricing might be in consumer's favour. For example, a service provider detects via online analytics and tracking tools that individual has visited site repeated times, or visited a competitor's site during same session and made a similar search; this might lead the service provider to offer a discount to trigger a decision. Irrespective, the transparency requirement remains since consumer does not know if or how their behaviour or profile affects the price. The analogue version might be a consumer visiting a shop to buy a particular article on various occasions. The shop may

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offer a personal discount at their discretion based on consumer profile or behaviour. While this is an acceptable sales tactic, its reverse - a price increase - is not, unless the increase would apply to all consumers (e.g. the end of the sale).

- While reviewer's contact details may change, the likelihood is that an objection to a review is more likely to arise within a short period of the review's first publication, so the platform should still be able to contact the reviewer. If a reviewer is not contactable by platform, and reviewed service provider objects to misinformation in a review, platform remains liable and may choose to take down a disputed review.

3. Data Ownership, use and liability for 3rd party content

- There appears to be a strong public policy argument that local authorities need to know, for example, how much of their housing stock is available for local residents on a long-term basis, how much is offered on a short-term basis, and how much is used on a short-term basis. Following the advent of peer-to-peer platforms, the scope for uncontrolled, dramatic and rapid change in local activity and demographics is clear. This can have an effect on community cohesion, the perception of tourism, the sustainability of local goods and services (themselves part of a destination's appeal), and public services.
- Care needs to be taken to ensure that consent to use all personal data is the gatekeeper to services that are not dependent on such information for their utility to consumer.
- Regarding consent for sale of data: IATA (airline association) offers for sale several intelligence and statistics products (e.g. Paxis), which include elements identifying accredited agents (agent name, agent numeric code, etc.). The airlines that purchase those products can have access to a complete breakdown of each accredited agent's sales by destination, by airline and by fare class. This enables airlines to monitor the volumes sold by a travel agent on competing carriers and impose incentive schemes that may distort competition. Existing legislation (article 7(3) of EC Regulation 80/2009 on Computerised Reservation Systems) prohibits the identification of agents in commercial data sold to airlines, unless travel agent gives consent.

4. Access to Digital Products and Services

5. DSM / Regulatory Review

- We note inception impact assessment issued on 5th July 2016 related to single digital gateway which recognises challenges facing both businesses and consumers.
- The intra-European market for travel products is, potentially, a significant part of the digital single market. New PTD recognises this insofar as it is a maximum harmonisation directive seeking to regulate a marketplace increasingly conducted online. While the directive articles make explicit that compliance with one member state's insolvency protection is sufficient for sales throughout EU, scope for national variation remains, e.g. in penalties.
- Uncertainty about liability arising through non-sector-specific regulation remains and affects cross-border trade.

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6. Digital Skills

7. Sharing economy

- There is still debate whether supply led or demand led is a useful distinction since either may culminate in a commercial agreement - i.e. money from consumer to provider. Supply led: I am travelling from A to B, does anyone want to join me and share fuel costs? Information about supply is made available, potential 'demanders' can search to see if it coincides with their interests. BlaBlaCar is an example. Demand led: I am seeking paid-for or free accommodation in this location, or "I need a car to pick me up at this location". The demand is made available, and it is up to the providers to offer supply. Uber is an example.
- From a public policy perspective, consumers physical safety is paramount. In practice, safety may not be uppermost in the consumer's mind when reviewing options; price and choice may be more influential.
- Registration will allow all providers (many of whom will be private individuals for whom the activity is a sideline) to be kept informed of rights and duties related to the activity, and allow authorities to monitor and quantify the impact of sector. See 3 above.
- While this reverses normal assumption that provider must inform themselves of their legal obligations, a minimum level of compliance ABC would have a beneficial effect, not least on consumers, and would be consistent with the suggestion to require registration, since one of its chief benefits is that providers can be informed of relevant changes to regulatory environment.
- Right to offer matters: if someone sub-lets property without the right to do so, or in such a way that invalidates insurance, there is potential risk to consumer and wider community impact. e.g. Owner or other residents of what has hitherto been a residential building may prohibit or object to units being offered for short-term let. At a minimum, the right of such use, or the absence of a prohibition, should be declared to distribution platform (this is unrelated to implications of and liability for actual behaviour of user).
- To reduce fiscal loss, the suggestion is that, where payment is made via platform, a statement of any income should go direct from platform to the tax authorities. This is analogous to employer's duty to confirm payments to employees (e.g. form P60 in the UK).

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Applicable general principles

1. NET recalls and insists on the application of the accepted principle that regulation should only be considered if it is necessary, proportionate and enforceable. A test for necessity might be that, but for the regulation, serious and general consumer harm or public detriment is likely. Barriers to entry should be proportionate to risk. The following three principles in italics were set out in 2013/55/EU (on professional qualifications) and represent a recent EU expression of proportionality in regulation. In square brackets are suggestions of criteria that may be relevant to current topic.

(a) *requirements must be neither directly nor indirectly discriminatory on the basis of nationality or residence;* [or location in which search takes place, i.e. geo-blocking, unless there is an overriding domestic justification, such as illegality of service offered]

(b) *requirements must be justified by overriding reasons of general interest;* [clear risk to consumer safety; clear risk of harm to local social or economic viability] The threshold for these requirements may be lower and less general than one might first suppose: CJEU case law has to date defined the following as possible objectives in overriding reasons of general interest: efficient administration of justice; cohesion of the tax system; protection of recipient of services; consumer protection; protection of workers; professional ethics; intellectual property; cultural policy; historic and artistic treasures; diversity of opinion; language requirements. Held not admissible: administrative justifications (other than efficient administration of justice); technical differences between mechanisms intended to protect the same public interest.

(c) *requirements must be suitable for securing the attainment of the objective pursued* [e.g. successful tax collection or assurance of minimum acceptable standard of consumer safety] **and must not go beyond what is necessary to attain that objective.** [e.g. imposition of disproportionate health and safety requirements]

2. **Levelling down** of regulation should be considered, especially where ‘asymmetric’ compliance requirements are considered unfair, or where over-regulation is apparent. This is particularly true where non sector-specific consumer protection has developed since original sector-specific regulation.

3. **Good practice sharing is desirable.** Regulation is not the only means of improving or controlling the market. There is a spectrum of mechanisms that affect what is available, and there is a good argument for using the least restrictive mechanism necessary to achieve public benefit / diminish risk to an acceptable level. See McGrath 2016, Institute for Justice, from which following is adapted. From least restrictive to most restrictive, the order might be: 1. Market competition and private litigation; 2. Trade practice and consumer protection; 3. Inspections; 4. Bonding or insurance; 5. Registration; 6. Certification; 7. Licensing.

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Promotion of good practice and availability of (valid) consumer reviews are probably at least as influential on consumer protection and choice, and the quality and range of products and services. They are also much faster-acting and more responsive to market reality. Hence the need to consider how online review platforms themselves might be regulated, and the necessity of identifying and ensuring adequate minimum level of compliance.

4. **Simplicity is desirable; legal certainty is necessary.** Uncertainty and complexity are barriers to market entry. Does this apply to me? How do I comply? What does it cost? Can I justify that cost given the scale of my activity? Is there a risk to consumers if the rules have the effect of driving growth in the informal sector? Do digital and analogue regulation overlap and/or conflict?
5. **Innovation is a good thing.** It drives competition; develops new products and services; encourages a culture of improvement providing consumers are aware of new products and services. It cannot be fully anticipated by legislation, so care should be taken to avoid accidentally suppressing it. There is a strong bias towards the status quo as regulations and institutions evolve in response to existing activity and stakeholders. Over-prescriptive rules can magnify the negative impact of such bias. See 8 below.
6. **Elasticity of supply is desirable.** For example, some aspects of the sharing economy can play a part in absorbing peak demand, and so enables destinations to handle greater capacity and benefit from visitor spend they might not otherwise receive.
7. **Sector-specific regulation should only exist where general regulation does not or cannot adequately address the issue.**
8. **Sector-specific legislation especially must anticipate its own obsolescence.** It is very likely that market innovation will take place much more quickly than any change to the regulatory framework. That framework meanwhile may not achieve the protection it originally set out to provide, and might give rise to a market distortion if growth takes place beyond its scope (this happened with PTD). Regulation should be future-proofed by avoiding over-prescriptive definitions of the business models it seeks to regulate. It should allow for regular revision.
9. **Subsidiarity applies.** While the EU may set general objectives, the actual regulatory framework must remain at the most appropriate level; this will often be local.

We believe that tourism should not be socially or economically parasitic: it should be an integral factor for a destination's management. The interests of visitors and residents need to be aligned where possible.

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