

## **SUBMISSION TO THE INFORMAL CONSULTATION ON THE WORKING DRAFT DEFAMATION AND MALICIOUS PUBLICATIONS (SCOTLAND) BILL**

*4 September 2017*

### **General remarks**

Founded in 2000, TripAdvisor is the world's largest travel website<sup>1</sup>, enabling travellers to plan and book their perfect trips. It offers advice from travellers and a wide variety of travel choices and planning features with seamless links to booking tools that check hundreds of websites to find competitive hotel prices.

TripAdvisor-branded websites make up the largest travel community in the world, reaching 415 million unique monthly visitors, and more than 535 million reviews and opinions covering more than 7.1 million accommodations, restaurants and attractions. The sites operate in 49 countries worldwide and in 28 languages.<sup>2</sup>

TripAdvisor has revolutionised and democratised the travel industry. Travellers are no longer limited to opinions and information on limited number of hotels in guidebooks, traditional mainstream journalism and properties' own marketing materials but have access to experiences of millions of other consumers, which help them to make more informed decisions. By offering the visibility to the smaller properties with little or no marketing budget it has also levelled the playing field for hospitality businesses.

The best travel advice comes from other travellers. We, therefore, stand for consumers having a voice and the right to share their genuine experiences concerning the places they visit, positive or negative, regardless of where they live, who paid the bill or who disagrees with their opinion. Owners have also a right to directly reply to reviews of their business, which ensures a balanced discussion and provides travellers with better information. This engagement creates also some business opportunity as 85% of TripAdvisor users say that an appropriate management response to a negative review improves their impression of the hotel.<sup>3</sup>

Transparency is good for consumers and businesses alike and improves service standards. 80% of business owners agree that online review sites like TripAdvisor have a positive impact on hospitality industry and service standards. The weight of lots of reviews also helps consumers build an accurate picture of a place.

TripAdvisor is a website built substantially upon user-generated content. It is free for hotels, restaurants and other establishments (like attractions) to appear on the website (create an account/ webpage) or for consumers to create a page about an establishment if they visited one not yet listed and want to review it.

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<sup>1</sup> Source: comScore Media Metrix for TripAdvisor Sites, worldwide, May 2017

<sup>2</sup> Source: TripAdvisor log files, Q1 2017

<sup>3</sup> Source: Independent PhocusWright study 'Custom Survey Research Engagement', September 2015

The ranking compares businesses based on their popularity, as measured by the quality (number of 'bubbles'), quantity (number of reviews), and recency of their content on TripAdvisor.

No one has greater incentive than us to protect the quality and accuracy of content on our site. If people did not find our information accurate they would not keep using us. That is the reason why since the beginning we have developed an active content moderation and integrity policy. One purpose of that policy is to fight what we call "review fraud" – that is, the submission of suspicious and non-genuine reviews. We are constantly enhancing these systems and our investigations. In doing so, we leverage a combination of best-in-class fraud identification and filtration technology with a team of over 300 content specialists, which represents not less than 10% of our employees. These automated systems also serve to screen out obviously unacceptable language, such as swear words and racial slurs.

Reviews are not published automatically. All reviews have to go through a strict process successfully before being published. Firstly, every single review goes through our automated tracking system, which maps the how, what, where and when of each review. If the algorithm detects something in clear breach of our house rules, referred to as our "Guidelines", it is not published and the user is informed and asks to write a new review complying with our Guidelines<sup>4</sup>. If there is some doubt about a review that has been flagged, our content team will assess whether or not to publish the review against our Guidelines.

In addition, the team examines every review that has been flagged by a business owner or a user using our dedicated, on-screen reporting tools if they consider that a review breaches our Guidelines and/or infringes their rights. They also conduct proactive investigations to catch would-be fraudsters, using techniques similar to those adopted in the credit card and banking sector. In 2016 alone, we identified, investigated and shut down more than 60 optimisation sites.

This moderation and integrity policy is explained on our website<sup>5</sup>, and TripAdvisor organizes special training events, also together with local trade and hospitality associations – on how to deal with consumers and reviews. The difficulty is sometimes for business owners to tell the difference between "defamatory" reviews and lawful, genuine negative reviews. Whilst our Guidelines and our user terms and conditions<sup>6</sup> prohibit users from posting defamatory or otherwise unlawful material, we support consumers' rights to share their genuine experiences, whether negative or positive, with each other. We believe that our moderation and integrity policy is effective as 94% of our users find hotel reviews on TripAdvisor to be accurate.<sup>8</sup>

As online reviews have a massive impact on the tourism sector in particular, TripAdvisor was also happy to contribute to and to be one of the first signatories of the 'Recommendations on the Responsible Use of Ratings and Reviews on Digital Platforms'<sup>9</sup> of the United Nations World Tourism Organization. Those best practices provide recommendations for all stakeholders, namely the platforms, the individuals and the businesses. For instance, platforms are advised to put moderation policy in place, individuals to avoid '*personal attacks*' in their reviews and the businesses to '*bear in mind that the large majority of reviews are unproblematic, either positive or negative; both tend to be well-founded*'. Those Recommendations reflect the work on online

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<sup>4</sup> <https://www.tripadvisor.com/hc/en-us/articles/200614797-Our-guidelines-for-traveler-reviews>

<sup>5</sup> <https://www.tripadvisor.com/hc/en-us/sections/200154967-Fraud>

<sup>6</sup> <https://tripadvisor.mediaroom.com/uk-terms-of-use>

<sup>8</sup> Source: PhocusWright Customs research, May 2015

<sup>9</sup> <http://www2.unwto.org/sites/all/files/wcterecommendationsratingsandreviews.pdf>

reviews done by the International Consumer Protection and Enforcement Network under the leadership of the CMA.<sup>10</sup>

### Comments on the working draft Bill

TripAdvisor welcomes this updating exercise regarding Scottish defamation law to make it more efficient and simple in a new economic environment, including the emergence of online platforms.

There are multiple types and sub-categories of online platforms relying on different business models. For instance, the TripAdvisor platform relies on content generated by third-party users to enable consumers to make informed decisions. A robust moderation and integrity policy was and continues to be, therefore, critical to the trust that users have in TripAdvisor.

Article 14 and 15 of the e-Commerce Directive (implemented in the UK by the Electronic Commerce (EC Directive) Regulations 2002) and the various national court rulings linked to it do already provide a legal framework giving some guarantees to the platforms to run and upgrade their services while protecting individuals and businesses. On the face of it, however, the Directive only exempts 'information society service providers' that are merely 'hosting' content uploaded by users on their website. Judges in some EU jurisdictions have decided on case-by-case basis that platforms like TripAdvisor were '*mere hosts*' even in cases where a moderation policy was in place.<sup>11</sup> TripAdvisor considers that to be the correct position, as TripAdvisor does not have editorial control over what its third parties users choose to write and does not amend their reviews once submitted.

Nonetheless, there remains real doubt and inconsistency as to whether some courts may erroneously adopt a counter-intuitively and counter-productively strict interpretation of the e-Commerce Directive, such that moderating user-generated content *at all* risks losing the protections of the e-Commerce Directive. In the case of defamation proceedings, in view of possible legal uncertainties and wrong interpretations of the e-Commerce Directive and of other defamation-related rules, clarification of the liability regime to exempt online platforms who have implemented a moderation process is therefore highly welcomed. It would avoid the absurd situation where an online platform doing nothing to secure its content would be able to benefit from the non-liability regime, while an online platform taking voluntary, responsible, proactive measures to detect clearly problematic content would be denied the benefit of it. Such a result would result in much more harmful material being posted online, not less. It would also help to prevent the chilling effect on users' freedom of speech that may otherwise result from claimant lawyers making legal threats against responsible, moderating internet platforms to force the removal of lawful, but critical user-generated content. Therefore, **the proposed provision included in Part I, Section 3, Subsection (3)(g) of the working draft bill exempting from its scope a person moderating a (online and offline) statement (for example, by removing obscene language or correcting typographical errors without altering the substance of the statement) is highly useful to give addition legal certainty to online platforms acting in good faith. We recommend that the stated, non-exhaustive list of examples of types**

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<sup>10</sup> <https://www.icpen.org/>

<sup>11</sup> Decision of Tribunal de Commerce de Paris in the case *La SARL Hotel Marengo vs TripAdvisor LLC*  
Decision of the Court of Imperia (Italy) in *Pascucci vs TripAdvisor LLC*  
Decision of the Court of Grosseto (Italy) in *Cala Piccola Spa vs TripAdvisor LLC*

**of moderation be expanded further to refer to automated moderation tools, such as filters, and manual screening processes with a view to accept or reject the statement against internal policy.** Part I, Section 3, Subsection (3)(g) could then read as follows: *‘Despite subsection (2), a person is not to be considered the author, editor or publisher of a statement if the person’s involvement with the statement is only (g) moderating offline and online statement (for example, by removing obscene language, correcting typographical errors without altering the substance of the statement or by using automated and/or human processes with a view to accept or reject the statement)’.*

This legal change will be aligned with developments at the EU level where the European Commission is developing legal guidance to promote *‘voluntary measures’* for online platforms, to secure the integrity of their content while guaranteeing the non-liability regime under the e-Commerce Directive. In addition, the UCPD Guidance published in May 2016 already raised the importance for online platforms to have policies in place to moderate online reviews. Furthermore, the UCPD guidance provides that *‘All reviews, even negative ones, provided they respect legislation against defamation and comply with the terms of service of the site, should be published and should not be pushed at the bottom of reviews to ensure the full and transparent information of consumers.’* It also recalls that *‘the control of reviews should be carried out with respect to users’ rights to anonymity in compliance with EU/national data protection laws and should not discourage online engagement or create barriers for consumers to post reviews’.*