

Airbnb and Uber: two sides of the same coin

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Court of Justice of the European Union, 19 December 2019, C-390/18, *Ahtop v. Airbnb Ireland*

Art. 2(a) of Directive 2000/31/EC, which refers to Art. 1(1)(b) of Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, must be interpreted as meaning that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation, while also providing a certain number of services ancillary to that intermediation service, must be classified as an “information society service” under Directive 2000/31.

Summary

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Keywords

Online Platforms – Uber – Airbnb - Internal Market – E-Commerce

1. Introduction

Has Airbnb, in the context of its activity, created an offer with the meaning of the judgments in *Uber Spain* and *Uber France*?¹

Online platforms, mainly due to sectors digitalization², are transforming marketplaces as they create new multi-sided markets connecting service providers and users, in a way that generates new network effects and distributes them among the participants in the ecosystem³. By dramatically reducing transaction costs and enabling coordinated transaction globally, platforms are disrupting the existing balance between customers

¹ Opinion AG Szpunuar, Case C-390/18, *Airbnb Ireland vs. Association pour un Hébergement et un Tourisme Professionnel (AHTOP)* (2019), § 55 hereinafter only “Opinion”.

² Digitalization takes the form of the creation of a data layer on top of the physical world. Sensors extract data from the physical world (from computers, from smartphones, from Internet of Things sensors, etc.) and a parallel virtual map of the world is constructed. Artificial intelligence (AI) makes it possible to automate the management of the large amount of data extracted from reality.

³ J. Montero, *Regulating Transport Platforms: The Case of Carpooling in Europe*, in M. Finger – M. Audoin (eds.), *The Governance of Smart Transportation Systems*, Dordrecht - Heidelberg - London - New York, 2019, 13 ss.

and suppliers. Existing regulatory framework fail to coherently address this paradigm shift that blurs established lines between traditional legal categories, such as business and consumer, personal and professional, and worker and contractor. Traditional EU regulation, which focus mainly on balancing the interest of two contracting parties, is now confronted with a triangular relationship between a platform, a supplier and a user. Legislators, judges and lawyers across the globe are struggling to determine the legal status of online intermediaries⁴. Therefore, one of the first regulatory challenge around online platforms is to define their legal status⁵: mere facilitator, broker or supplier of integrated service? If platforms do not provide a merely intermediation service, instead, they provide material services (i.e. transportation, accommodation etc) then, often is required a license and full liability for their provisions towards users. In general, online platforms are not designed to provide their own accommodation or transport services, but to facilitate the contracting of services provided by third parties. However, the intermediation service provided by platforms is particularly powerful. Indeed, even the notion of internet intermediaries, defined by the OECD⁶ as entities that «bring together or facilitate transactions between third parties on the Internet», is increasingly replaced in common parlance by the more palatable term of “platform”, which evokes a role that goes beyond one of mere messenger or connector, and extends to the provision of a shared space defined by the applications within which users can carry out their activities and generate value⁷.

Acting as an intermediary has several advantages for the platform⁸ and it is usually expressed in the platform operator’s terms of service. Nevertheless, it’s doubtful whether such a declaration is sufficient for reducing the role of the platform to an intermediary. The EU Commission had underlined that whether an online platform also provides the underlying service has to be established on a case by case basis⁹. Among protesters, traditional transport operators, in particular, have challenged before Courts all around Europe the legality of transport platforms, accusing them for unfair competition. This has certainly been the case of Uber, but also of BlaBlaCar in a specific market: Spain.

⁴ See preface, B. Deveolder (ed.), *The Platform economy unravelling the legal status of online intermediaries*, New York, 2018.

⁵ See G. Resta, *Digital platforms under Italian law*, in U. Blaurock – M. Schmidt-Kessel - K. Erler (eds.), *Plattformen*, Baden-Baden, 2018, 97 ss.

⁶ See OECD, *The economic and social role of Internet intermediaries*, at oecd.org, 9.

⁷ L. Belli – N. Zingales, *Online Platforms’ Roles and Responsibilities: a Call for Action*, in L. Belli – N. Zingales (eds.), *Platform regulations: how platforms are regulated and how they regulate us*, FGV Direito Rio, 2017, 25 ss.

⁸ a) The electronic intermediary service will benefit from the principle of freedom to provide services as guaranteed in EU legislation — Article 56 TFEU and Directives [2006/123] and [2000/31]; b) they cannot be held responsible for any ill-execution of the underlying contract (service) or for damage accruing therefrom under Art. 3 E-Commerce directive; and c) they can claim to be fully absolved from any liability, including for misrepresentation, offensive or illegal content, under Articles 13,14. 15 of the E-Commerce Directive.

⁹ The key criteria to be considered are: a) the circumstance that the collaborative platform sets the final price to be paid by the user; b) the fact that the platform sets other key contractual terms; and c) the fact that the platform owns the key assets used to provide the underlying service. See European Commission, *A European agenda for the collaborative economy*, COM(2016) 356, 6.

BlablaCar, a ridesharing company¹⁰ has been held by the Madrid Commercial Tribunal to be a mere intermediary, not in competition with traditional coach and train service¹¹. The European Commission guidelines on platform economy, found a concretisation in the CJEU *Uber Spain* judgement of 20 December 2017, where the Court declared that an intermediation service such as UberPOP must be classified as “a service in the field of transport” within the meaning of EU law¹². Uber Spain was memorable for introducing a new test for determining whether an online platform provides an information society service caught by the *lex specialis* of the E-Commerce Directive or whether it provides a composite service governed by general EU law on the freedom to provide services (or not, if the service relates to transport)¹³. Almost two years after Uber decision, the focus of the regulatory battle shifted towards short term rental platforms¹⁴. Similar to Elite Taxi, in *Airbnb Ireland*, an association of real estate brokers based in Paris challenged the fact that Airbnb advertises rental opportunities online without having been duly authorized to do so through a professional card. Its delivery is subject to the fact that an applicant has a demonstrable professional qualification, provide financial guarantees and have professional liability insurance. Of course, Airbnb and, above all, its hosts have none. Airbnb contests that these restrictions are not applicable to the extent that its activities fall within the scope of the E-Commerce Directive. Thus, following - or departing - from the Uber judgement, the CJEU was required to rule on whether Airbnb is a market maker not limited to matching demand and supply, but engaged in offering the underlying service as well. By its judgment of 19 December 2019, the Grand Chamber of the Court¹⁵ held that Airbnb’s intermediation service is an information society service regulated under Directive 2000/31 on electronic commerce¹⁶. Unlike UberPop, in *Airbnb ECJ* took a different view which will have some important implications on the debate of how to regulate platform economy in general. Recently, another request for a preliminary ruling has reached ECJ from the highest Italian administrative Court *Consiglio di Stato*¹⁷. Luxemburg judges are called this time to assess the compatibility with EU law of the so called “Airbnb law”¹⁸.

¹⁰ Which matches individuals driving to some long-distance destination with other individuals wishing to go to that same destination.

¹¹ The Commercial Court in Madrid decided that BlaBlaCar was only mediating in the provision of the carpooling service, and furthermore, that the underlying carpooling services mediated by BlaBlaCar are private services that can be provided with no license as the price is below EUR 0.19/km, the legal reference to reimburse expenses to civil servants when traveling with their own car; that is, the service is being provided with no profit. See *Confesbus v Blablacar* SJM M 6/2017 (2 February 2017) ES:JMM: 2017:364.

¹² CJEU Case C-434/15, *Elite Taxi vs. Uber* (2017).

¹³ See M. Finck, *Distinguishing internet platforms from transport services*, in *CMLR*, 55, 2018, 1619 ss.

¹⁴ See C. Busch, *The Sharing Economy at the CJEU: Does Airbnb pass the ‘Uber test’? Some observation on the pending case C-390/18 - Airbnb Ireland*, in *EuCML*, 7, 2018, 172 ss.

¹⁵ CJEU Case C-390/18, *Airbnb Ireland vs. AHTOP* (2019).

¹⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereafter “E-Commerce Directive”).

¹⁷ Council of State (Consiglio di Stato), sez. IV, order (*ordinanza*) 11 July – 18 September 2019, no. 6219.

¹⁸ See Art. 4, paras. 4, 5 and 5-bis, Law Decree 24 April 2017, no. 50 (“*Disposizioni urgenti in materia*

2. The Airbnb Ireland

Like other platform services, Airbnb has become a favourite of digitally savvy consumers who know that some of the greatest benefits of our globalizing society can be found online. Offering a platform through which hosts can advertise their apartments to potential guests worldwide, Airbnb provides a real, and in many ways attractive, alternative to visitors who are looking for something else than a hotel room¹⁹. Hosts as well as guests can only make use of Airbnb's website for bookings once they have registered as users. Guests can contact hosts through their listings to make a reservation. The site makes it possible to send messages to hosts to request further information and, if desired, to negotiate further terms about the rental. Once host and guest agree on a booking, the guest can confirm the booking and pay for it through the Airbnb website. Airbnb holds the payment in escrow until the guest has arrived at the accommodation and releases it to the host 24 hours after the guest checks in. For its services, Airbnb charges hosts and guests a commission fee which constitute the main income that Airbnb itself makes from the website and enable the company to make a profit. The emergence of Airbnb comes with some clear benefits, but it also entails undeniable economic, social and environmental drawbacks which have given authorities in different countries²⁰ the need to come up with balanced legislation that considers the various interests at play (lessors, tourists, neighbours, residents).

2.1. Factual and legal background

On 24 January 2017, Association *pour un hébergement et un tourisme professionnel* (Ahtop) lodged a complaint with the *Tribunal de grande instance* of Paris about the commercial practices of Airbnb. Ahtop claimed that Airbnb violates Arts. 3 and 5 of the Hoguet law, which regulates the activities of real estate brokers. Under Art. 3(1) of the Hoguet law real estate brokers are required to have a professional card issued by the local chamber of industry and commerce. The card is only issued to applicants who demonstrate their professional qualification, provide a satisfactory financial guarantee and have a professional liability insurance²¹. Moreover, Art. 5 of the Hoguet law requires real estate brokers to keep a register which contains a documentation of payments received by their clients. A violation of the above requirements constitutes a criminal act under the Hoguet law and can result in imprisonment and fines²². In response to the

finanziaria, iniziative a favore degli enti territoriali, ulteriori interventi per le zone colpite da eventi sismici e misure per lo sviluppo)”.

¹⁹ V. Mak, *Private Law Perspectives on Platform Services: Airbnb: Home Rentals between AYOR and NIMBY*, in *EuCML*, 5, 2016, 19 ss.

²⁰ See A.I. Nadal, *Regulating Airbnb in Spain*, in *EuCML*, 8, 2019, 42 ss.; C. Busch, *Regulating Airbnb in Germany – status quo and future trends*, in *EuCML*, 8, 2019, 39 ss.; E. Terryn, *The sharing economy in Belgium – a case for regulation?*, in *EuCML*, 5, 2016, 45 ss.; M. Bartoloni, *Stop ai «furbetti» degli affitti brevi: Airbnb dovrà riscuotere la cedolare*, in *Il Sole 24 Ore*, 18 February 2019.

²¹ Opinion, § 9.

²² *Ivi*, § 9.

complaint by Ahtop, the Public Prosecutor's Office brought a criminal action against Airbnb Ireland for violating the Hoguet law. In its defence²³, Airbnb argued, that its commercial activities do not qualify as real estate brokerage and that the Hoguet law does not apply because it is incompatible with the E-Commerce Directive²⁴. Ahtop, which joined the criminal proceedings as "parte civile", in turn, argued that the commercial activities of Airbnb do not fall under E-Commerce Directive because they are not limited to connecting two parties via a platform, but include additional services which are characteristic of the real estate business²⁵. Against this background, the Tribunal de grande instance de Paris on 7 June 2018 sent a request for a preliminary ruling to the CJEU and asked the following two questions: 1) Do the services provided in France by Airbnb Ireland via its electronic platform, which is operated from Ireland, fall under the freedom of services guaranteed by Art. 3(2) of Directive 2000/31/EC? 2) Can the restrictive provisions concerning the profession of the real estate brokers under Act No. 70-9 of 2 January 1970 (the Hoguet law) be invoked against Airbnb Ireland?

2.2. Opinion of Advocate General Szpunar

Advocate General Szpunar delivered his opinion on 30 April 2019. In order to answer the first question, he first made a few general observations about Airbnb Ireland's activities²⁶ and if those activities fall within the concept of "information society service"²⁷. He noted that the Airbnb's service is an electronic service provided at a distance (the intermediation function and payment) while the accommodation itself is not²⁸. Therefore, in order to clarify the division line he turned to UberPop, where CJEU had already been requested to rule on the classification of mixed services (online vs. material), establishing the criterion of new market creation and the exercise of decisive influence over it²⁹. According to AG Szpunar, as to the first criteria, of whether Airbnb has created an offer within the meaning of the Uber judgments, the question must be answered negatively for the following reasons³⁰. First, unlike UberPop's platform, Airbnb Ireland's platform is open to professional hosts and non-professional

²³ The Czech and Luxembourg Governments and the Commission share the same view; Opinion, § 22.

²⁴ Ivi, § 15.

²⁵ On the other hand, French and Spanish Governments supported this different position; Opinion, § 23.

²⁶ Ivi, §§ 25 to 33.

²⁷ An information society service is defined by art. 1(2) of Technical Standards Directive «as a service (i) provided for remuneration, at a distance, by electronic means (ii) and at the individual request of a recipient of services (iii)». As he already observed in UberPop, the first and the third leg of the test did not appear problematic and focused in the second leg as far as here «the line between the component of the services that is provided by electronic means and that which is not so provided is sometimes blurred». See Opinion, § 37.

²⁸ Ivi, § 41.

²⁹ Ivi, § 44.

³⁰ Ivi, § 56.

hosts. Second, the accommodation services are not inseparably linked to the service provided by Airbnb Ireland by electronic means, in the sense that they can be provided independently of that service and they retain their economic interest³¹.

Having answered negatively to the first criterion, the next step was to determine whether Airbnb Ireland exercises control over the conditions governing the provision of the short-term accommodation services. AG Szpunar stressed that the criterion relating to the creation of a supply is merely an indication of whether a service provided by electronic means forms an inseparable whole with a service having a material content, instead, «it is the decisive influence exercised by the service provider over the conditions of the supply of the services having material content that is capable of rendering those services inseparable from the service that that provider provides by electronic means»³². Consequently, it cannot be concluded that Airbnb Ireland's electronic service satisfies the criterion relating to the exercise of control over the accommodation services for the following reasons. First, Airbnb Ireland does not exercise «control over all the economically significant aspects of the short-term accommodation service, such as price, the location and standards of the accommodations»³³. Second, the fact that Airbnb also offers other services, namely a photography service, civil liability insurance and a guarantee for damage, does not prevent Airbnb from being classified as an «information society service», «provided that those other services are not inseparable from the service provided by electronic means, in the sense that the latter service does not lose its economic interest and remains independent of the services having a material content»³⁴. Therefore, as a matter of EU law, a service consisting in connecting, via an electronic platform, potential guests with hosts offering short-term accommodation, in a situation where the provider of that service does not exercise control over the essential procedures of the provision of those services, constitutes an information society service within the meaning of Art. 2(a) of E-Commerce Directive.

As regards to the second question, namely, whether the Hoguet Law is enforceable against Airbnb Ireland, the Advocate General observed that Airbnb activity falls *prima facie* within the scope E-Commerce Directive and in order for a requirement, laid down by a Member State other than that in which the provider of the information society services is established, to be enforceable against that service provider and to result in the restriction of the free movement of those services, that requirement must be a measure that satisfies the substantive and procedural conditions laid down by that directive (Art. 3(4)(a)(b))³⁵. In other terms, Art. 3(1) of Directive 2000/31 imposes on the Member States of origin the obligation to ensure that the information society services provided by a service provider established in their territories comply with the national provisions applicable in those Member States that fall within the coordinated

³¹ And, as the Luxembourg Government observed, professional and non-professional hosts can offer their assets via more traditional channels or they may create a website devoted solely to their accommodation that can be found with the help of search engines. Ivi, §§ 58-59.

³² Ivi, § 67.

³³ Ivi, § 71.

³⁴ Ivi, § 85.

³⁵ Ivi, §§ 123 to 146.

field³⁶. In contrast with that general obligation, in order not to “dilute” the principle of freedom to provide information society services (Art. 3(1) of Directive 2000/31), Art. 3(4) of that directive might be understood as authorising Member States other than the Member State of origin to derogate from the free movement of services only in an indirect manner. Accordingly, in the light of the substantive requirements³⁷ laid down by E-Commerce Directive in Art. 3(4)(a) the AG Szpunar took the view that a Member State other than the Member State of origin «may derogate from the free movement of information society services only by measures taken on a “case-by-case” basis»³⁸ and the measures adopted shall not concern the information society services *per se* but a *given* service. He avoided to enter into the merit of whether if the Hoguet law satisfies these substantive conditions required by E-commerce Directive in Art. 3(4)(a) for three reasons. First, France itself did not provided any evidence that the substantive conditions are fulfilled by the concerned national law³⁹. Second, in any case «the requirements laid down by the Hoguet law raise doubts as to their proportionality»⁴⁰. Finally, it is for the national court to determine whether, having regard to all the factors brought to its attention, the measures at issue are necessary in order to ensure the protection of consumers and are also proportionate to those objectives⁴¹.

On the other hand, procedural conditions (Art. 3(4)(b) of E-Commerce) require that a Member State which proposes to adopt measures restricting the free movement of information society services originating in another Member State must first notify the Commission of its intention and ask the Member State of origin to take measures in respect of information society services⁴². According to Advocate General these two procedural conditions were not fulfilled by France⁴³ and, consequently, that failure to notify entails the sanction of unenforceability of a measure against the provider of those services⁴⁴ – Airbnb Ireland.

³⁶ In the words of Art. 2(h) of Directive 2000/31: «“coordinated field”: requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them. The coordinated field concerns requirements with which the service provider has to comply in respect of: a) the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification; b) the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider».

³⁷ It follows from Art. 3(4)(a)(i) of Directive 2000/31 that derogations from the free movement of information society services are permitted, in particular, when they are *necessary* for reasons relating to public policy, the protection of public health, public security or the protection of consumers; it must be taken against an information society service which actually undermines those objectives or constitutes a serious and grave risk to those objectives and it must be *proportionate* to those objectives.

³⁸ Opinion § 135.

³⁹ Ivi §§ 127-129.

⁴⁰ Ivi, § 136.

⁴¹ Ivi, § 137.

⁴² Ivi, § 138.

⁴³ Ivi, §§ 139-140.

⁴⁴ Ivi, §§ 150-151.

2.3. Judgement of the Court

The Grand Chamber of the Court⁴⁵ concurred with Advocate General Szpunar, classifying Airbnb's intermediation service as an information society service regulated under E-Commerce Directive. The Court considered a number of elements to determine that the main component of the service provided by Airbnb Ireland is intermediation service. First, the Court underlined that, in principle, Airbnb's service intermediation satisfies all the conditions, laid down in Art. 1(1)(b) of Directive 2015/1535, to which Art. 2(a) of E-Commerce Directive refers, as an "information society service", distinct from the subsequent service to which it relates⁴⁶. However, this will not be the case «if it appears that that intermediation service forms an integral part of an overall service whose main component is a service coming under another legal classification» (i.e. UbePop)⁴⁷. Second, to underline the separate nature of such intermediation service in relation to the accommodation services to which it relates, the Court noted, that Airbnb services consists essentially of providing a tool for presenting and finding accommodation for rent, - facilitating the conclusion of future rental agreements - and that constitutes the essential feature of the electronic platform managed by Airbnb Ireland. Consequently, Airbnb services «constitutes a service which cannot be regarded as merely ancillary to an overall accommodation service»⁴⁸ and «it is in no way indispensable to the provision of accommodation services, since the guests and hosts have a number of other channels in that respect, some of which are long-standing»⁴⁹. Third, the Court stated that there was nothing in the file to indicate that Airbnb sets or caps the amount of the rents charged by the hosts using that platform. At most, «it provides them with an optional tool for estimating their rental price having regard to the market averages taken from that platform, leaving responsibility for setting the rent to the host alone»⁵⁰. In addition, the other services offered by Airbnb Ireland are «merely ancillary to the intermediation service provided by that company»⁵¹. Therefore, «unlike the intermediation services at issue in the Uber Spain judgments, neither that intermediation service nor the ancillary services offered by Airbnb Ireland make it possible to establish the existence of a decisive influence exercised by that company over the accommodation services to which its activity relates, with regard both to determining the rental price charged and selecting the hosts or accommodation for rent on its platform»⁵². In a nutshell, for the Court, Airbnb is solely a virtual market place, matching demand and supply, thus having no control whatsoever over hosts and guests. By its second question, the referring court asks the Court of Justice whether the

⁴⁵ CJEU Case C-390/18, *Airbnb Ireland*, cit (hereinafter the "Judgment").

⁴⁶ *Ivi*, § 49.

⁴⁷ *Ivi*, § 50.

⁴⁸ *Ivi*, § 54.

⁴⁹ The Court referred to estate agents, classified advertisements, whether in paper or electronic format, or even property lettings websites, see § 53 and § 55.

⁵⁰ *Ivi*, § 56.

⁵¹ *Ivi*, §§ 57 to 64.

⁵² *Ivi*, § 68.

Hoguet legislation is enforceable against Airbnb Ireland. In other terms, whether Art. 3(4) of Directive 2000/31 must be interpreted as meaning that, in criminal proceedings with an ancillary civil action, an individual may oppose the application to him or her of measures of a Member State restricting the freedom to provide an information society service which that individual provides from another Member State, where those measures do not satisfy all the conditions laid down by that provision. The Court recognized that Hoguet law is restrictive of the freedom to provide information society services and the fact that that law predates the entry into force of Directive 2000/31 cannot have had the consequence of freeing the French Republic of its notification obligation⁵³. The notification obligation is a mechanism for monitoring that the freedom to provide information society services between Member States is limited only according to the given exceptions. Therefore, «a Member State's failure to fulfil its obligation to give notification of such a (restriction) measure may be relied on by an individual, not only in criminal proceedings brought against that individual, but also in a claim for damages brought by another individual who has been joined as civil party⁵⁴». As concerning the second question, the Court, unlike AG Szpunar, did not enter at all into the discussion of whether the Hoguet Law satisfied the substantial conditions required by E-Commerce Directive. To rule for the Court was sufficient to note that France did not meet none of the procedural conditions laid down by the E-Commerce Directive.

3. Analyse and comment

In Airbnb Ireland, the ECJ has delivered an important judgement on the law applicable to Airbnb but more in general to online platforms. The Court has answered to a question asked also by academics, namely, what is the platform operator's role: mere facilitator, broker or supplier of integrated services?⁵⁵ To put it in EU internal market terms, do online platforms provide an information society service and do they also supply an underlying service in the end?⁵⁶ If platforms do not provide a merely intermediation service, instead, they provide material services (i.e. transportation, accommodation etc) then, often is required a license and full liability for their provisions towards users. Unlike UberPop, in the Airbnb the Court confirmed that it provides an intermediation service which must be classified as an "information society service"

⁵³ Ivi §§ 81 and 87.

⁵⁴ Ivi, § 100.

⁵⁵ Any discussion of the legal issues raised by digital platforms faces at the outset two main difficulties. The first is the lack of a clear and widely shared definition of what a digital platform is. The second is the stark heterogeneity of the issues involved, which are not limited to a single discipline, but lie at the interface of different branches of the legal system, like consumer law, competition law, administrative law, labour law, data protection, etc. See G. Resta, *Digital platforms under Italian Law*, cit., 100; see K. Sein, *Legal problems of electronic platform economy – Estonian perspective*, in U. Blaurock – M. Schmidt-Kessel - K. Erler (eds.), *Plattformen*, cit., 80; see preface by B. Deveolder (ed.), *The Platform economy unravelling the legal status of online intermediaries*, cit.

⁵⁶ See M. Inglese, *Regulating the Collaborative Economy in the European Union Digital Single Market*, Heidelberg - New York - Dordrecht – London, 2019, 20.

regulated under E-Commerce Directive. Accordingly, the law of the state of establishment applies (Ireland) and the recipient states (France and the rest) can only impose restrictions on a limited number of general interest grounds, restrictions have to pass a proportionality test and they have to be notified to the Commission and the state of establishment. Thus, Airbnb benefit from free movement principles and can be required only to obeys the laws of the state where it is established. The significance is considerable. Being subject to the laws of 27 different countries could mean substantial additional administrative and legal costs.

3.1. Airbnb as market maker

The first criteria of the “Uber test” is whether a digital platform is a market maker. According to ECJ⁵⁷ and AG Szpunar⁵⁸ Airbnb provides merely a digital distribution channel which is open to all categories of hosts and the accommodation services are not inseparably linked to the service provided by Airbnb Ireland by electronic means, in the sense that they can be provided independently of that service and they retain their economic interest. To AG Szpunar, Airbnb does not defer from online intermediaries for the purchase of flights or hotel bookings as «the supply made by the intermediary represents real added value for both the user and the trader concerned, but remains economically independent since the trader pursues his activity separately»⁵⁹. As business ideas, both ridesharing and accommodation letting have been around for some time. But in both models a new digital platform has revolutionised their scale and success. The “economic interest” in both cases actually lies in the efficiency and popularity of the platform – not whether the users of the platform could operate independently of it⁶⁰. Further, platforms like Airbnb extend the market for residential accommodation and create a new supply of short-term rentals that would not exist without those platforms. Indeed, it is an essential element of the business model of sharing economy platforms to overcome the transaction costs, the trust and reputational barriers that, in the past, restricted sharing activities. From this perspective, Airbnb can be considered a market maker⁶¹. However, as AG Szpunar underlined, «it is not sufficient that a service provider creates a new supply of services that are not provided by electronic means [...] the creation of those services must be followed by the maintenance, under the control of that provider, of the conditions under which they are provided»⁶². In other terms, «it is the decisive influence exercised by the service provider over the conditions of the supply of the services having material content that is capable of rendering those ser-

⁵⁷ Judgement, § 55.

⁵⁸ See Opinion, § 58.

⁵⁹ AG Opinion, Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain* (2017), § 34.

⁶⁰ For an overview see D. Poyton, *What makes Uber and Airbnb different in the eyes of the EU – and why it matters*, in *theconversation.com*, 20 December 2019.

⁶¹ See C. Busch, *The Sharing Economy at the CJEU*, cit., 173.

⁶² Opinion § 65.

vices inseparable from the service that that provider provides by electronic means»⁶³.

3.2. Airbnb does not exercise “decisive influence” over the accommodation service

The second criterion of the “Uber test” is whether the platform operator exercises “decisive influence” over the provision of the underlying services. According to AG Szpunar⁶⁴, first, and confirmed by ECJ, later, Airbnb Ireland does not exercise decisive control over all the economically significant aspects of the short-term accommodation service, such as price, the location and standards of the accommodations⁶⁵. In addition, «the provision of other services offered by Airbnb Ireland are optional in nature by comparison with the service provided by electronic means and separable from the service provided by electronic means»⁶⁶. However, although Airbnb does not exercise a decisive influence over accommodation services itself, the accommodation marketing is focused on the platform and not on the supplier. For example, sometimes Airbnb use discounts for guests on the platform, intervening on the prices set by the hosts. The value to suppliers lies in the platform itself – the usability and market reach of Airbnb and Uber. Both enjoy a position of influence over their end-service suppliers because without them, success would diminish considerably. In those terms, Airbnb could be better categorised as a predominant intermediary.

3.3. Future regulatory battles on the horizon

Although ECJ qualified Airbnb as an intermediary, this does not mean that Member States are banned from regulating short-term rental services and correcting identified market failures⁶⁷. E-Commerce Directive does not preclude requirements relating to offline activities that are provided via a digital platform. Indeed, social policy objectives such as ensuring available and affordable housing or the protection of the urban environment is probably best addressed by policy action targeting accommodation providers, not platforms⁶⁸. The E-Commerce and Service Directive⁶⁹ have been criticized to belong to another era⁷⁰. On one hand, E-Commerce Directive has the aim to create

⁶³ Opinion, § 67.

⁶⁴ Ivi, § 71.

⁶⁵ Judgement, § 68.

⁶⁶ Opinion, § 82.

⁶⁷ See B. Edelman - D. Geraldin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber*, in *Stanford Technology Law Review*, 19, 2016, 293 ss.

⁶⁸ See C. Busch, *The Sharing Economy at the CJEU*, cit., 174.

⁶⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (hereafter “the Service Directive”).

⁷⁰ In these terms, see Corporate Europe Observatory, *UnFairbnb. How online rental platforms use the EU to defeat cities' affordable housing measures*, 2 May 2018.

a legal framework that ensures the free movement of “information society services” between Member States. E-Commerce Directive is a *lex specialis*⁷¹ in relation to the Service Directive, to extent that it applies only to information society services i.e. mere intermediation and does not extend to affecting in the provision of the underlying service⁷². The provision of such service in the EU is, in principle, subject to no prior authorization in the providers home State (Art. 4) and benefit from the “internal market clause (Art. 3(2)), according to which all other (host) member States are precluded from raising any obstacles. Subsequently, “information society services” smart move is to pick a base in a Member State with favourable conditions, in this case Ireland. Moreover, under this Directive, authorities are not allowed to impose a “general obligation” to monitor activity on the website⁷³. This could mean that, for instance, Airbnb can be asked to act on a specific suspicion of an illegal listing, but in principle it cannot be asked to check systematically if listings are illegal. Therefore, housing rented conditions through Airbnb is *de facto* unregulated by E-commerce Directive. Indeed, this was also pointed out by AG Szpunar «that the conditions of renting the accommodations, that is to say, of the services provided by the hosts, do not come within the scope of Directive 2000/31 and must be assessed in the light of other provisions of EU law»⁷⁴. On the other hand, the Service Directive is supposed to have “horizontal” application and to cover most services. Several activities, however, are excluded, i.e. transportation services, financial services, healthcare services etc. Market access for those collaborative platforms which do fall within its scope will be facilitated, both at the level of taking up the activity (at home member state) and that of offering services in other (host) state. Under the Service Directive, the requirement of a prior authorization is not excluded (as in the case of E-Commerce Directive), but it needs to be justified, necessary and proportionate (Art. 9). It is under this Directive where the accommodation sector is included⁷⁵. Therefore, any restrictions imposed by Member States on short-term rentals, in particular authorization or notification requirements, will have to be assessed in the light of that directive.

One of the immediate effects of this decision is that Airbnb can now require to all Member States to review all the obligations imposed on him. For instance, are they included in the closed list of grounds that justify restrictions? Are they proportionate? Have the restrictions been notified? In Germany, municipalities like Hamburg, Berlin and Munich have enacted over the past years local regulations that impose limitations on short-term rentals. In particular, under the new Hamburg’s housing law hosts renting out individual rooms or an entire apartment have to notify their rental activity to the city in order to obtain a registration number (“Housing Protection Number”)⁷⁶.

⁷¹ V. Hatzopoulos, *The collaborative economy under EU law*, London, 2018, 31.

⁷² V. Hatzopoulos and S. Roma, *Caring for sharing? The collaborative economy under EU law*, in *CMLR Rev.*, 54, 2017, 82 ss.

⁷³ Art. 15(1) of E-Commerce Directive.

⁷⁴ Opinion, § 90.

⁷⁵ See European Commission, *Handbook on the implementation of the Services Directive*, 2007, 10.

⁷⁶ Hamburgisches Wohnraumschutzgesetz, zuletzt geändert durch das Dritte Gesetz zur Änderung von Vorschriften im Bereich des Wohnungswesens v. 23.10.2018, HambGVBl. 2018, 349.

Second, the law imposes a maximum limit for short-term rentals of eight weeks per calendar year. For short-term rentals exceeding this limit a special permit is required. Third, hosts have to notify the city's administration about the duration of any guest's stay. Finally, the new law explicitly states that online intermediaries like Airbnb must ensure that no listings are published on their platform without a publicly visible registration number⁷⁷. In Spain as well different measures has been taken by municipalities to regulate the short-term rent conditions. However, currently there is no legal requirement for registering or authorizing platforms that serve to commercialize short-term tourist stays, nor are there any related professional regulations (as there are, for example, for travel agencies and real estate agencies) that are specifically applicable⁷⁸. While Italy has been more active in this aspect through the so called "Airbnb law". The law imposes to Airbnb (and to other similar platforms) the obligation to hold directly 21% on the sums collected by the landlords and then to transfer every amount to the Italian tax authorities⁷⁹. It seems that this provisions hinder the freedom to provide services (protected by Art. 56 TFEU), as far as Airbnb is required to operate as a substitute tax in the first case, or responsible for paying the tourist tax, in the second case, assuming charges and responsibilities completely unrelated to the service provided. Second, the law introduces the obligation to telematic real estate brokerage portals to appoint a tax representative in Italy and to act as tax manager. Airbnb opposed to comply with these measures, arguing that they restrict the freedom to provide information society services granted to intermediaries within the internal market. Therefore, the *Consiglio di Stato* asked if the provisions of Articles 4, 5 ss. of Directive 1535/2015/EU, Art. 8 of Directive 98/34/EC and Art. 56 TFEU preclude national legislation which, without prior notification to the European Commission, imposes on the operator of a telematic real estate brokerage portal the above restrictive measures⁸⁰. As it was already underlined above, if substantial and procedural conditions are not met by Member States who wish to restrict a given "information society service", the legal consequence is the inapplicability to the intermediary of the restrictive measures. Therefore, it is highly possible that the *Consiglio di Stato* will withdraw it request for a preliminary ruling.

4. Conclusion

Although with a different outcome, the Court had another chance to assess the effectiveness of the criteria used in Uber Spain. Since Uber and Airbnb belong to the "sharing economy" category⁸¹ within the huge ecosystem of online intermediaries, it

⁷⁷ C. Busch, *Regulating Airbnb in Germany – status quo and future trends*, cit., 39-41.

⁷⁸ See A.I. Nadal, *Regulating Airbnb in Spain*, cit., 42-45.

⁷⁹ For an overview see, C. Dell'Oste – M. Finizio, *Affitti brevi, il Consiglio di Stato rinvia alla Corte Ue la legge Airbnb*, in *Il Sole 24 Ore*, 18 September 2019.

⁸⁰ Council of State (Consiglio di Stato), order no. 6219/2019, cit., § 10.

⁸¹ Platforms cover a wide-ranging set of activities including online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services, payment systems, and platforms for the collaborative economy. For more information on platforms classification see A. Strowel – W. Vergote, *Digital platforms: to regulate or not to*

was “easier” for Court to re-use the same criteria. However, if in the future the Court will be confronted again to unravel the legal status of online intermediaries falling outside this category, then, perhaps, the Court must use additional criterion. For instance, some scholars argue that there is a better way for courts to resolve these platform-or-service-provider transactions⁸². Accordingly, they suggest decision-makers to adopt a functionalist approach to these questions. To implement such a functionalist approach, courts should compare platform-enabled transactions to analogous transactions that are not facilitated by any platform or other third party. That comparison will in turn allow courts to assess the extent to which the platform is usurping aspects of what would otherwise be a relationship between service and customer into a triadic relationship in which the platform has its own relationships with the other two parties. In any case, the impression and the ECJ’s message is that platforms should limit their influence over the activities of users if they wish to benefit from free movement provisions of E-Commerce Directive. However, this is not what regulators or consumers need. Beyond regulatory and judicial solutions, platforms could play an important role as “regulatory intermediaries”. Indeed, Airbnb has undertaken collaborative efforts with public authorities in matters related to short-term tourist rentals in different EU States⁸³. For example, Airbnb could enforce applicable thresholds for the maximum number of nights via automated limits as required from some local house law⁸⁴. Similarly, Airbnb could be required to make sure that information is actually exchanged between guests and hosts. The French legislator has already taken this step by introducing the duty of the platform to inform consumer in a loyal, clear and transparent manner about the capacity of the provider and the rights and obligation of the contracting parties, when consumer is put in contact with professional or non-professional⁸⁵. It is an open question, however, whether such a duty would amount to a “general monitoring obligation” prohibited by Art. 15 of E-Commerce Directive. An alternative to monitoring (tracking, red lamps etc) is to oblige the platform to “guide” users to comply with the applicable information obligations or other duties. Summarising, collaboration is probably the most effective and pragmatic way to achieve results within the platform economy, rising controls over the provision of goods and services and favouring transparency and good practices. As a matter of fact, platforms tend evolve towards a more active intervention into the provision of goods or services. It will be not be a surprise if Airbnb owns hotels in the coming years. Therefore, the challenge

regulate?, in B. Deveolder (ed.), *The Platform economy unravelling the legal status of online intermediaries*, cit., 3 ss.; P.J. Dittrich, *Online platforms and how to regulate them: An EU overview*, policy paper no. 227, 14 June 2018, Jacques Dolders Institute Berlin.

⁸² See C. Garden – N. Leong, *The Platform Identity Crisis: Responsibility, Discrimination, and a Functionalist Approach to Intermediaries*, in N. Davidson – M. Finck – J. Infranca (eds.), *The Cambridge Handbook of the law of the Sharing Economy*, Cambridge, 2018, 457.

⁸³ For instance, in 2018 they signed with the regional government of Andalusia to facilitate the online registration of tourism dwellings on the Airbnb platform itself and with the City Council of Barcelona to detect and remove illegal dwellings from the platform, see A.I. Nadal, *Regulating Airbnb in Spain*, cit., 45.

⁸⁴ It could be rather easy to verify the legality of listings via an application program interface (API) that connects the platform with a database of registered hosts provided by the city.

⁸⁵ See [Art. L.111-7, II French Code de la Consommation](#), available at [Legifrance](#).

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awaiting legislators is to determine whether legislative change is required as a consequence of these evolutions.