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CJEU ruling on legal qualification of Airbnb services, note d'observations sous CJUE (GC), 19 décembre 2019, C-390/18

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Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 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;

2. The second indent of Article 3(4)(b) 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 were not notified in accordance with that provision.

Note d'observations¹

CJEU ruling on legal qualification of Airbnb services

I. INTRODUCTION

1. A French association representing the professional accommodation and tourism sector² initiated a criminal case against Airbnb on the grounds that Airbnb was mediating and managing buildings and businesses without a professional licence, in breach of the so-called Hoguet Law of 1970.³

That law requires those who engage in real estate activities⁴ to hold a professional licence to secure that they have sufficient professional credentials, financial guarantees, and insurance coverage. They also need to comply with certain accounting rules. Any person carrying out such activities without the licence may face

criminal sanctions of up to 2 years imprisonment and a fine of 30.000 Euros.

The case was initiated against Airbnb Ireland UC established in Dublin (Ireland) which operates the well-known platform used to search, book and pay for accommodation. Linked to this platform, another company, Airbnb Payments UK Ltd, established in London provides online payment services and manages the payment activities of Airbnb in the European Union.⁵ Next to offering the service connecting guests and hosts, Airbnb also offers other services such as:

- a format for hosts to present the content of their offer (with a photography service as an option);
- a payment service whereby guests transfer to Airbnb Payments UK the rental price to which is added 6% to 12% to cover the charges and the service provided by Airbnb Ireland. Airbnb Payments UK holds the money on behalf of the guest and 24 hours after the guest checks in, sends the money

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² Association pour un hébergement et un tourisme professionnels.

³ Law No. 70-9 of 2 January 1970 regulating the conditions for the exercise of activities relating to certain transactions concerning real property and financial goodwill (*JORF* of 4 January 1970, p. 142).

⁴ The law refers to the "purchase, sale, search, exchange, lease or sub-lease".

⁵ Since then, Airbnb moved its payment operations to Luxembourg because of Brexit.



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to the host. Both hosts and guests, conclude a contract with Airbnb Ireland for the use of that platform and with Airbnb Payments UK for the payments made via that platform;

- civil liability insurance and a guarantee against damages for up to EUR 800 000 (as an option);
- a tool for estimating the rental price having regard to the market averages taken from that platform;
- an evaluation tool where the host and the guest can leave an evaluation on a scale of zero to five.

Airbnb Ireland denied acting as a real estate agent and argued that the Hoguet Law is inapplicable because it is incompatible with the Electronic Commerce Directive 2000/31 (ECD).⁶

2. The investigating judge was uncertain whether the service provided by Airbnb Ireland should be classified as an 'information society service' (ISS) within the meaning of the ECD and if so whether it precludes the Hoguet Law from being applied. He referred the following questions to the Court for a preliminary ruling:

1. Do the services provided via an electronic platform managed from Ireland benefit from the freedom to provide services established in Article 3 of the ECD?

Article 3 of the ECD is the internal market clause of the directive, whereby each Member State must ensure that ISS provided by a service provider established on its territory complies with the national provisions applicable in the Member State in question which fall within the coordinated field. Other Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society

services from another Member State. Also, under the ECD, ISS cannot be subjected to prior authorisations or any equivalent requirements that are specifically and exclusively targeting those services.⁷

2. Are the restrictive rules relating to the exercise of the profession of real estate agent in France laid down by [the Hoguet Law] enforceable against Airbnb Ireland?

II. AIRBNB PROVIDES AN INFORMATION SOCIETY SERVICE

3. The ECD covers ISS which are defined in the Regulatory Transparency Directive⁸ as:

"any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services"

For the purposes of this definition:

- *"at a distance"* means that the service is provided without the parties being simultaneously present;
- *"by electronic means"* means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by

⁷ Article 4 of the ECD.

⁸ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1-1. The Directive sets up a procedure whereby Member States must notify to the European Commission all draft technical regulations on products and information society services before they are adopted in national law. Since these measures can lead to trade barriers, Member States must ensure that they act in a transparent manner, by giving the Commission and the other Member States the possibility to examine the drafts and to comment on these drafts or to issue detailed opinions. He notification triggers a three month standstill period to allow the Member States and/or the Commission to react.

⁶ 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, OJ 2000 L 178, p. 1.



radio, by optical means or by other electromagnetic means;

- “at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.

The court had to decide whether the 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 services, while also providing a certain number of other services must be classified as an ISS.

4. The Court found that the service is an ISS for the following reasons:

- the service is provided for remuneration;
- the service is provided electronically and a distance: the host and the guest are connected by means of an electronic platform without the platform, on the one hand, or the host or guest, on the other, being present at the same time.
- the service is provided at the individual request of the recipients of the service: it involves both the placing online of an advertisement by the host and an individual request from the guest who is interested in that advertisement.

It ruled in essence that Article 2(a) of the ECD which refers to Article 1(1)(b) of the Regulatory Transparency Directive, 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 the Regulatory Transparency Directive.

On the optional services provided by Airbnb (photography service, damage guarantee, etc.), the Court stated that these services are ancillary to the main service and do not modify the specific characteristics of the main ISS.⁹

III. THE UBER TEST IS NOT SATISFIED

5. The French association representing the professional accommodation and tourism sector sought to rely on the Court’s previous ruling of 20 December 2017 in the case involving UberPOP, the initial unlicensed peer-to-peer taxi service of Uber.¹⁰ In that case, the Court held that the platform was not providing an ISS but a transport service.

In the Uber case, the Court’s reasoning was that Uber was providing a mixed service, with an element provided by electronic means and another ‘material’ element, the transport service. The Court found that as Uber exercised a decisive influence over the conditions under which transport service is provided by the non-professional drivers it cannot be classified as an ISS. The court ruled that if the intermediation service forms an integral part of an overall service whose main component is a service coming under another legal classification, it cannot be classified an ISS. This has become known as the ‘Uber test’.

To arrive at that conclusion, the court relied on two arguments. First, without the Uber platform, the ride would not take place, the market would not exist. Uber is therefore a ‘market maker’ and not just an intermediary.¹¹ Second, because Uber sets the maximum fare and exer-

⁹ See para 44 and following of the ruling.

¹⁰ *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, Case C 434/15, EU:C:2017:981. The decision was subsequently confirmed by the CJEU, Judgment of 10 April 2018, Case C-320/16 ECLI:EU:C:2018:221.

¹¹ Christophe Busch, “The sharing economy at the CJEU: Does Airbnb pass the ‘Uber test’? Some observations on the pending Case C-390/18 – *Airbnb Ireland*”, (2019) *Journal of European Consumer and Markets*.



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cises a degree of control over the quality of the vehicles used, and the conduct of drivers, the service provided by Uber forms an integral part of the main (transport) service.

The French association argued that the service provided by Airbnb forms an integral part of an overall service, whose main component is the provision of an accommodation service. Airbnb Ireland does not just connect two parties through its electronic platform of the same name, it also offers additional services which are characteristic of an intermediary activity in property transactions, it claimed.

6. In line with the Opinion delivered by its Advocate General,¹² the Court recognised that the intermediation service does not form an integral part of the overall accommodation service.

The essential feature of the platform managed by Airbnb is the creation of a structured list of the places of accommodation available on the electronic platform for the benefit both of the hosts who have accommodation to rent and persons looking for that type of accommodation

The court's reasoning also included the following key arguments:

- Airbnb's service is in no way indispensable to the provision of accommodation services since the guests and the hosts have other channels at their disposal, such as estate agents, classified advertisements or property-letting websites. In other words Airbnb is not indispensable for the hosts.
- it is not apparent that Airbnb sets or caps the rent charged by the hosts. It only provides them with an optional tool for estimating the rental price leaving responsibility for setting the rent to the host alone;

- all the services provided by Airbnb are ancillary in nature given that, for the hosts, they do not constitute an end in themselves, but rather a means of offering accommodation services in the best conditions.

7. In short, contrary to the Uber case, Airbnb does not exercise the same level of control (or decisive influence) over the conditions for the provision of the accommodation services to which its intermediation service relates, in particular the price, or the selection of hosts or accommodation put up for rent on its platform, nor is the service provided by Airbnb indispensable for the hosts, since they have other ways of renting their accommodation.

IV. CRITICAL APPRAISAL OF THE LEGAL QUALIFICATION

8. There is a very fine line between these two cases: in one case the collaborative platform Airbnb is providing an ISS whereas in Uber, the platform is providing a transport service and not an ISS. The decisive influence and 'market maker' are the main criteria taken into consideration in the case law of the CJEU. These criteria might seem reasonable but will need to be assessed on a case-by-case basis, taking also into consideration that these collaborative platforms are constantly evolving and offering new services and features and often amend their rules. Each and every of these elements could tilt the balance towards one legal qualification or another.

Let us take the example of Airbnb Plus, which the platform describes as "*a selection of only the highest quality homes with hosts known for great reviews and attention to detail. Every home is verified through in-person quality inspection to ensure quality and design*".¹³ Airbnb Plus accommodation also needs to meet a long list of criteria and be highly equipped. All these

¹² Opinion of Advocate General Szpunar, Case C-390/18, delivered on 30 April 2019.

¹³ <https://www.airbnb.co.uk/plus>.



criteria are set by the platform itself. Further, Airbnb organises its own photography service for Airbnb Plus accommodation; hosts cannot provide their own photos. Had the CJEU examined this specific service, it may have come to the conclusion that the platform exercises a decisive influence over the accommodation service and may have disqualified that service as an ISS.

The pricing factor probably largely influenced the Court, but here too it must be noted that Airbnb does set a minimum price per night (\$10).¹⁴

The market maker (or indispensability) criterion is also extremely subjective in our view. It is not that clear that hosts have many alternative ways of letting on a very short term basis accommodation in such an easy manner as going through the Airbnb platform. It could be argued – just as in the Uber case – that the platform is indispensable (a market maker).

9. The European Commission had already sketched out some of the principles applied by the CJEU in these cases in an interesting Communication of 2016 setting out a European Agenda for the Digital Economy.¹⁵

In this Communication, the Commission provided in our view a clearer and simpler analysis of the legal qualification of platforms which appears to be more in keeping with the definition of an ISS, which in our view does not require any interpretation since it is utterly clear. It must be noted however that communications are not legally binding, whereas the CJEU's ruling provides authoritative interpretation of EU legislation.

On the qualification of the activity of the platform, the Communication stated that as long

as collaborative platforms provide a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services, they provide an information society service. So, this would be the case for the vast number of platforms, including Uber and Airbnb.

10. However, the Communication also recognised that these platforms can *also* be considered as offering other services in addition to the ISS they offer. Hence, a platform could *also* be providing the underlying service (e.g. transport or short-term rental service) and therefore could *also* be subject to the relevant sector-specific regulation, including for instance a business authorisation and licensing requirements. It goes on to specify the cases where a collaborative platform also provides the underlying service.

11. The Communication advises that a case by case analysis should be carried out. It puts forward the following factual and legal criteria to determine if the collaborative platforms exercise a significant level of control or influence over the underlying service:

- *“Price: does the collaborative platform set the final price to be paid by the user, as the recipient of the underlying service. Where the collaborative platform is only recommending a price or where the underlying services provider is otherwise free to adapt the price set by a collaborative platform, this indicates that this criterion may not be met.*
- *Other key contractual terms: does the collaborative platform set terms and conditions, other than price, which determine the contractual relationship between the underlying services provider and the user (such as for example setting mandatory instructions for the provision of the underlying service, including any obligation to provide the service).*
- *Ownership of key assets: does the collaborative platform own the key assets used to provide the underlying service?”*

¹⁴ See here: <https://www.airbnb.com/help/article/1233/how-do-i-set-custom-weekly-or-monthly-pricing>.

¹⁵ 2.6.2016 COM(2016) 356 final.



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The Communication states that when these three criteria are *all* met, there are strong indications that the collaborative platform exercises a significant influence or control over the provider of the underlying service, which may in turn indicate that it should be considered as *also* providing the underlying service (in addition to an information society service).

The Commission already seemed mindful of the legal qualification of the type of services provided by Airbnb and even Booking service since it also said that conversely, collaborative platforms may merely assist the provider of the underlying services by offering the possibility to carry out certain activities that are ancillary to the core ISS offered by the platform (e.g. by providing payment facilities, insurance coverage, aftersales services etc.). This, in itself, does not constitute proof of influence and control on the underlying service. The communication goes as far as concluding that:

“a collaborative platform providing services in the short-term rental sector may only provide information society services and not also the accommodation service itself if, for example, the provider of the accommodation service sets its own prices and the platform does not own any of the assets used for that service provision. The fact that the collaborative platform may also offer insurance and rating services to their users need not alter that conclusion”.

12. In short, in the Airbnb case the Commission and the CJEU arrived at the same conclusion but by using a different reasoning. All is fine for Airbnb, which is considered as an ISS whereas Uber is negatively affected as according to the case law of the CJEU it is not an ISS and is therefore unable to benefit from the favourable regime of the ECD. If the reasoning of the Commission had been followed, Uber would also be considered as an ISS and would benefit from its main governing principles.

13. It is true however that, as Van Cleynenbreugel¹⁶ points out, previous CJEU case law – albeit handed down 10 years ago and in the context of the online sale of contact lenses (our emphasis) – had already identified two different scenarios involving mixed or coupled services, of which ISS services were part. A first case is where the ISS is followed by the physical delivery of goods. In this case, the CJEU found that the ISS and the other services need to be clearly distinguished.¹⁷ The ISS is governed by the ECD, whereas the other services (e.g. retailer or transporter) are governed by other provisions of EU law. In the second scenario, ISS are offered together with other off-line services, not involving the delivery of goods. In this situation the court decided in the same case that when ISS are considered to be part of a composite offline service, they will no longer be considered as separately existing services under EU law. And this is what was also recognised in the Uber case almost 10 years later, but in a different context.

V. NATIONAL RESTRICTIONS: WHEN CAN THEY APPLY?

14. The second important question is the extent to which a Member State is allowed to apply its local laws to Airbnb given that it is providing an ISS and is therefore subject to the rules of the member state in which it is established, while also benefiting from the freedom to provide services principle.

This also means that Member States – in principle – cannot, for reasons falling *within the coordinated field of the directive*, restrict the freedom to provide information society

¹⁶ Pieter VAN CLEYNENBREUGEL, “Accommodating the freedom of online platforms to provide services through the incidental direct effect back door: Airbnb Ireland”, (2020), 57, *Common Market Law Review*, Issue 4, pp. 1201-1228.

¹⁷ Case C-108/09, *Ker-Optika bt v ÁNTSZ Dél-dunántúli Regionális Intézete*, ECLI:EU:C:2010:725.



services from another Member State. Also, under the ECD, ISS cannot be subjected to prior authorisations or any equivalent requirements that are specifically and exclusively targeting those services.¹⁸

15. The CJEU recalled in this case that, according to the ECD, EU countries can however take measures restricting the freedom to provide services against a given ISS if a number of substantive and procedural conditions are fulfilled. The substantive conditions are that:

- the measures are necessary in the interests of public policy, the protection of public health, public security or the protection of consumers;
- the ISS actually undermines those objectives or constitutes a serious and grave risk to those objectives;
- the measures taken must be proportionate to those objectives.

Further, the Member State in question must notify the Commission and the Member State on whose territory the service provider is established of its intention to adopt restrictive measures.¹⁹ This allows the Commission and the Member States to ensure that the measures are necessary for overriding reasons and to ask the Member State to modify them or to refrain from applying or adopting the measures if they are not justified and constitute an obstacle to the freedom to provide services.

The CJEU noted in this case that the French Government failed to notify the Hoguet Law to the Commission and to the republic of Ireland and hence, the law cannot be enforced against Airbnb.

The court applied by analogy its previous case law in *CIA Security International* relating notifi-

cations under Directive 2015/1535²⁰ and ruled that because the notification rule is sufficiently clear, precise and unconditional it has direct effect and, therefore, it may be invoked by individuals before the national courts, including in criminal proceedings with an ancillary civil action.²¹ In short, if a member state fails to notify a national measure, it has serious practical consequences as it will not be enforceable against private entities.

16. It must be noted however that there are plenty of local restrictions that have been adopted to frame the activities of Airbnb and which are applied in practice.

This is because either:

- Restrictions have been notified and have satisfied the scrutiny of the European Commission and the Member States, which would deem the restrictions to be justified, for instance on consumer protection grounds.
- Restrictions apply to the hosts themselves and not to Airbnb directly.
- Restrictions address questions that are not governed by the ECD or by the country of origin clause of the directive, for instance taxation.

VI. OUTLOOK²²

17. The criteria set-out in the Uber and Airbnb case law on the legal qualification of collaborative economy platforms is in our view not

²⁰ See footnote 7.

²¹ CJEU judgment of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172.

²² Addendum: since the drafting of this article, the proposed regulation on the Digital Services Act was published by the European Commission and does not propose any changes to the legal qualification of collaborative economy platforms (RDTI Brèves). The CJEU ruled on 3 December 2020 that the service provided in Romania by Star Taxi App that connects taxi drivers and passengers does not provide a transport service but an information society service (Case C-62/19, EU:C:2020:980).

¹⁸ Article 4 of the ECD.

¹⁹ Article 3(4)(b) of the ECD.



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adapted to the platform economy. It leads to a situation where there is a considerable level of legal uncertainty on the legal qualification of the services they provide, leading to important differences in terms of providing pan-European services. Further, the articulation between country of origin rules and national laws is particularly complex.

This situation will probably not encourage new entrants, and it is therefore not surprising that large US companies are dominating the market. This in turn is leading to tension between Member States who are trying to impose their local laws to counter some of the negative effects on the more traditional and locally regulated sectors (taxis and hotels in this case).

Collaborative economy platforms are probably there to stay and should be regulated at the EU level in a comprehensive, practical and reasoned manner. This should then alleviate some of the tensions at national level and make it easier for platforms to enter the market, leading to increased consumer welfare.

The European Commission is set to propose a Digital Services Act (with a possible review of the ECD) at the end of 2020.²³ This would be the right time to also consider what could be further harmonised or at least clarified at the EU level in relation to the legal qualification of collaborative economy platforms.

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²³ European Commission Consultation to seek views on digital services act package available at <https://ec.europa.eu/digital-single-market/en/news/commission-launches-consultation-seek-views-digital-services-act-package>.

