



## **Uber Court: a look at recent sharing economy cases before the CJEU**

Miguel Sousa Ferro\*

*ABSTRACT: This paper describes and discusses the two recent judgments of the CJEU regarding the clarification of the concept of information society services, both of which concern Uber. Although these cases concern Uber, what is, a contrario, important to consider from the case-law is the broader context of the implication(s) of this case-law for EU law and the national regulation of the new sharing economy services – namely in what may affect the pending Airbnb case.*

*KEYWORDS: Uber – Airbnb – sharing economy – services – CJEU.*

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\* Professor at the Faculty of Law of the University of Lisbon.

## I. Introduction

At the national level, the controversies sparked by new sharing economy platforms such as Uber have tended to be more about socio-economic changes, than about the law.

Taxi users were surprised to find that they could have access to a better service for cheaper prices, and understandably resistant to return to the old ways. Taxi drivers, who invested in their business on the assumption of a certain regulation of the activity, deemed it unfair to have unregulated competition on the market, which had to support fewer costs.

Residents of inner cities in Europe became progressively worried about the desertification of their neighborhoods, with greater and greater percentages of houses taken up by short-term renting to tourists. The hotel sector refused to put up with competition from an unregulated, non-taxed activity.

These questions present fundamental political challenges, that must first and foremost be dealt with at the national and local level.

At the European Union (EU) level, however, the skirmishes in this war have, so far, limited themselves to the legal battlefield, and it's the Court of Justice of the EU (CJEU) which has been called to arbitrate the disputes. There is, of course, a political backdrop. The national courts which have referred questions to the CJEU are, in essence, faced with attempts to preserve the status quo. The Court's answers, inevitably, will assist, hinder or be irrelevant for these attempts.

The following sections will discuss the two judgments already delivered by the Court on this issue, as well as provide some thoughts on what to expect from an additional case which is now pending.

This paper will purposely go around the proliferous economics debate which has also been spurred by this topic,<sup>1</sup> focusing exclusively on the legal issues discussed in judgments in question.

## II. C-434/15 *Uber Spain*

On 20 December 2017,<sup>2</sup> the CJEU answered a referral from a Barcelona court, faced with a dispute between *Élite Taxi* (a professional taxi drivers' association) and Uber Spain, similar to many others occurring throughout the EU. Faced with a perceived passivity of administrative authorities, the taxi sector sought to obtain judicial remedies to prevent the continuation of Uber's (and, by extension, its drivers') unlicensed operations, *maxime* on the grounds that they infringed national rules on passenger transport and, as a result, also unfair commercial practices law.

The importance of the case was stressed by it being decided by the Grand Chamber, and by the fact that 8 Member States (MS) and two supranational authorities intervened. It is interesting to note that the applicant in the national case, 5 MSs and the 2 supranational authorities all tried to persuade the Court not to reply.

The Court was asked to clarify if, under EU law, services provided by Uber were; "*transport services*", "*information society services*", or a combination of both. It was up to the national court, of course, to interpret these concepts under national law. But EU

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<sup>1</sup> See, e.g.: J. Gata, "A economia de partilha," *Revista de Concorrência e Regulação*, ano VII, n.º 26 (abr.-jun., 2016): 193.

<sup>2</sup> Judgment *Uber Spain*, case C-434/15, EU:C:2017:981.

law could restrict the national legislator's ability to limit Uber's activity. Indeed, under EU law, if Uber provided merely an information society service, no authorization could be required and no (relevant) barriers to freedom of services could be imposed by MSs.<sup>3</sup> But if they were "transport services", they would not benefit from the freedom to provide services, but would instead be under the common transport policy.<sup>4</sup> MSs would be free to restrict their provision, namely imposing licensing requirements.<sup>5</sup>

According to the CJEU, closely following the AG's Opinion,<sup>6</sup> in principle, an app's intermediation service is separate from the transport service itself and tends to be an "information society service".<sup>7</sup>

But, in Uber's case, the CJEU found that there is a bundled service which includes more than an intermediation service.<sup>8</sup> It doesn't simply connect the supply and demand of transport services, it organizes and provides these transport services itself.<sup>9</sup> The Court justifies this finding because: (a) without the intermediary platform, service and demand for this type of transport service would not exist (this is what the AG referred to as "creating the supply");<sup>10</sup> (b) Uber has decisive influence over the conditions under which the service is provided (control of price and quality).<sup>11</sup>

The Court thus concluded that: "*an intermediation service such as [Uber], the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport' within the meaning of Article 58(1) TFEU. Consequently, such a service must*

<sup>3</sup> See Articles 2(a) and 3(2) and (4) of Directive 2000/31 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 178/1). See also article 1(2) of Directive 98/34 of the European Parliament and of the Council, of 22 June 1998, laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204/37), replaced by Directive 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 2015 L 241/1).

<sup>4</sup> See Articles 56(1) and 58(1) TFEU and recital 21 and articles 2(2)(d) and 9(1) of Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376/36).

<sup>5</sup> As one author summarized it: "*the categorization of a service into a particular category affects the extent to which those services may be subject to regulation. The providers of electronic intermediation services have to date benefitted from a regulatory approach which not only limits regulation but in some instances protects them also from liability in the interests of developing the market in such services*" – L. Woods, "Why Uber isn't Appy: the ECJ defines the difference between transport and digital services", EU law Analysis, December 21, 2017, available at: <http://eulawanalysis.blogspot.com/2017/12/why-uber-isnt-appy-ecj-defines.html>.

<sup>6</sup> Opinion of AG Szpunar in case C-434/15 *Uber Spain* EU:C:2017:364.

<sup>7</sup> Case C-434/15 *Uber Spain* EU:C:2017:981, paras. 34-35.

<sup>8</sup> Doctrine focused on the analysis of national law had also been arriving at the same conclusion – see, e.g.: J. Campos Carvalho, "Enquadramento jurídico da atividade da Uber em Portugal", *Revista de Concorrência e Regulação* anoVII, n.º 26 (2016): 221.

<sup>9</sup> *Idem*, paras 37-38.

<sup>10</sup> Opinion of AG Szpunar in case C-434/15 *Uber Spain* EU:C:2017:364, para 43.

<sup>11</sup> Judgment *Uber Spain*, case C-434/15, paras. 39-40. In what concerns price control, in a note which may be of importance for future cases, it must be stressed that, as recognized by the AG (para 50), Uber drivers may opt for a lower price. So, the issue is not that Uber "sets" the prices; it is that it recommends a price which drivers are "unlikely" to divert from. Importantly, the AG qualified the type and degree of control exercised by Uber as typical, for all practical purposes, of a "*traditional employer-employee relationship*" (para 52).

*be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31*".<sup>12</sup>

The case's outcome was, by no means, a foregone conclusion. The Court made it seem simple. But one should remember that the Court had previously found that the online sale of goods was an information society service, even though the goods were then physically delivered.<sup>13</sup> According to AG Szpunar,<sup>14</sup> the decisive criteria to distinguish between the two situations is the identification of the "main component" of the exchange. He argued that a sale and purchase agreement is the main component, with the delivery being incidental (mere performance of the obligation), making it an online service. By contrast, the performance of the transportation service itself is the main component, the online contract being merely incidental secondary or preparatory thereto.

This is, arguably, an instance of splitting of hairs,<sup>15</sup> which may account for why the CJEU avoided this discussion. In so doing, however, it was not entirely honest. At least the AG tried to provide an explanation to distinguish previous cases. The Court was quite unclear on why Uber's service, even if understood as a bundle, should not be deemed an information society service, because it is contracted online.<sup>16</sup>

Finally, it should be noted that the Court hinted that, as has happened in the past when national laws create obstacles to the circulation of products/services in the internal market, for which the Treaty does not provide an efficient solution, the way to get around this is for the EU legislator to step up and harmonize the regulation of Uber's activity across the EU.<sup>17</sup>

### III. C-320/16 *Uber France*

While the previous case was still pending, a court from Lille placed the Court with additional questions. The CJEU replied, also by Grand Chamber, on 10 April 2018.<sup>18</sup>

The context of the referral was somewhat different. France had legislated, in

<sup>12</sup> *Idem*, operative part. It should be noted that these criteria are similar, but not identical (less demanding), to those put forward by the European Commission in its Communication *A European agenda for the collaborative economy*, COM(2016) 356 final, 2 June 2016.

<sup>13</sup> CJEU, case C-108/09 *Ker-Optika* EU:C:2010:725, paras. 22 and 28. As summarized in G. Ester, "The 'decisive influence' test: the ECJ judgment on Uber," *International Litigation Newsletter* (May, 2018), available at: <https://www.perezllorca.com/wp-content/uploads/es/actualidadPublicaciones/ArticuloJuridico/Documents/180503-iba-international-litigation-the-decisive-influence-test-the-ecj-judgment-on-uber-ger.pdf>, the CJEU here "ruled that the sale of contact lenses over the internet qualified as an information society service and, therefore, the Hungarian regulation which established that the marketing of contact lenses could only be carried out in establishments specializing in medical instruments was contrary to Directive 2000/31".

<sup>14</sup> Opinion of AG Szpunar in case C-434/15 *Uber Spain* EU:C:2017:364, paras. 35-37.

<sup>15</sup> It seems artificial to argue, as the AG does, that the objective of liberalization of information society services, in the case of these services, could not be achieved because MS would "be free to render its pursuit impossible by imposing rules on the transport activity" (para. 65). It seems to me that this is precisely the core of the dispute. If it were an information society service, MS would not be free to impose restrictions except as provided by EU rules on information society services. The distinctions became even more tenuous when, in his subsequent Opinion, the AG tried to say that relationships between a franchisor and its franchisees should also not be treated as Uber (Opinion of AG Szpunar in case *Uber France*, case C-320/16, para. 22, EU:C:2017:511).

<sup>16</sup> With similar criticism, Ester, *supra* note 14.

<sup>17</sup> Judgment *Uber Spain*, case C-434/15, paras. 46-47.

<sup>18</sup> Judgment *Uber France*, case C-320/16.

2014, to make it a crime to provide a service such as Uber's, if the drivers were not licensed to provide transport services under national law.<sup>19</sup>

Fundamentally, the issue was the same. And, indeed, the CJEU's ruling was extremely succinct. It merely reaffirms the previous judgment, noting that the services in this case were essentially the same, and drawing the same consequences.<sup>20</sup>

It concluded: *“Article 1 of Directive 98/34 (...) and Article 2(2)(d) of Directive 2006/123 (...) must be interpreted as meaning that a provision of national law that lays down criminal penalties for the organization of a system for putting customers in contact with persons carrying passengers by road for remuneration using vehicles with fewer than 10 seats, without being authorized to do so, concerns a ‘service in the field of transport’ in so far as it applies to an intermediation service that is provided by means of a smartphone application and forms an integral part of an overall service the principal element of which is the transport service. Such a service is excluded from the scope of application of those directives.”*<sup>21</sup>

The case could have been tackled somewhat differently, if the Court had approached it as the AG did.<sup>22</sup> Considering how it did approach it, the case turned out to be virtually identical to the previous one. Still, there were important psychological differences between the two. It is one thing to say that MSs are free to impose rules restricting the cross-border supply of bundles of information society and transport services. It is perhaps harder to say that they are free to send citizens of other MSs to jail for infringing those rules. And yet, failing a reversal of the prior judgment, that was the unavoidable conclusion.

On a final note, a third case was submitted to the Court, relating not to the UberPop service, as the previous two, but to Uber Black. However, the German court withdrew its referral.<sup>23</sup>

#### IV. What's to come: C-390/18 *Airbnb*, and etc.

Once again, a French first instance court has asked the Court to clarify the applicability of EU law to the shared economy. This time, the case, which is still pending, concerns Airbnb.<sup>24</sup> Just as before, hotel associations are arguing that Airbnb is providing its services in violation of French national rules on real estate agents and intermediaries, which namely requires licensing. The issue is whether Airbnb's platform should be considered to provide an information society service and thus covered by the freedom to provide services. In other words, how does Airbnb fare under the test set out by the Court in its Uber cases?

To answer this question, it is necessary to clarify the test set out by the CJEU.

To begin with, I find it meaningful that the Court stated that, as a rule, intermediary apps are information society services. There are exceptions to this rule, and Uber is one of them, but I would argue that such exceptions should be

<sup>19</sup> Subject to criminal penalties such as imprisonment, a fine, the prohibition on exercising a social or professional activity, the closure of the undertaking's establishment and the confiscation of property.

<sup>20</sup> CJEU, case C-320/16 *Uber France* EU:C:2018:221, paras. 18-26.

<sup>21</sup> *Idem*, operative part.

<sup>22</sup> The case brought up a novel issue, about whether the French rules relating to these should have been notified as rules on services within the meaning of the provisions of EU law on technical notification – see: Opinion of AG Szpunar in case C-320/16 *Uber France* EU:C:2017:511, which was largely focused on an autonomous analysis of this issue.

<sup>23</sup> Judgment *Uber Germany*, case C-371/17, EU:C:2018:313.

<sup>24</sup> Judgment *Airbnb*, case C-390/18 (lodged on 13 June 2018).

interpreted restrictively.

When looking at such an intermediary app or online service, the issue is not whether it is, by itself, an information society service – that is the necessary consequence of its nature. The real issue is whether that information society service forms part of a bundle, a “composite service”, including an online and an offline service. This is the question which the Court answered.

According to the Court, there is a composite service (and, thus, for practical purposes, the direct supply of the service by the app provider to the ultimate clients) if two cumulative requisites are met:

**a) The platform itself is a “market maker”<sup>25</sup>**

This is a problematic requisite, since it’s never met in absolute terms. The decision as to whether a platform creates or merely expands/optimizes the market will always be a matter of degree. Surely, the Court was not suggesting that private drivers would not be able to offer their unlicensed services on the passenger transport by road market without Uber. The reality of several MSs, at least historically, shows this not to be so. The issue is that Uber and similar platforms make it so much easier to do so. But that is not the same as creating the market.

On the other hand, we cannot reduce this requisite of market creation to saying that without the app, there wouldn’t be a market for transport services provided by an app. That would be tautological. It is precisely the fact that the services provided through the app compete with services provided through other means that causes taxi drivers to want to suppress those competing services.

More importantly, whether or not an app or online platform creates a market, which would not be able to exist without it, should have no bearing on determining whether the downstream offline activity is independent and dissociable, in its functioning, from the upstream online activity. By the same rationale, the market for any online service or bundle only exists because, upstream, there are internet providers, but this should have no relevance in the discussion of whether these activities constitute a composite.

I would argue, therefore, that the *crux* of the matter lies in the second requisite.<sup>26</sup>

In any case, AG Szpunar has argued that Airbnb and, in fact, all “platforms for the purchase of flights or hotel bookings”, do not pass this test, since the app/online service, in these cases, does not create the market (hotels, rooms and flights are marketed in other ways) or limit access to the market.<sup>27</sup>

**b) The app/online service exercises “decisive influence” over the offline service being provided**

If an app or online platform controls, at least to a large extent, the price, quantity and quality of the service provided, it is deemed to exert decisive influence over the provision of that service, with the consequence that it must be analyzed as a bundle or composite service.

AG Szpunar argued that this test is not met by Airbnb and the like, because, unlike Uber, such platforms offer a real choice between several providers, with

<sup>25</sup> In the expression of C. Busch, “The Sharing Economy at the CJEU: Does Airbnb Pass the ‘Uber Test’? – Some Observations on the Pending case C-390/18 – Airbnb Ireland,” *Journal of European Consumer and Market Law*, vol. 7, issue 4 (2018): 172.

<sup>26</sup> Similarly, see Busch, *supra* note 26.

<sup>27</sup> Opinion of AG Szpunar in judgment *Uber Spain*, case C-434/15, paras. 33-34 and 57-60, EU:C:2017:364.



heterogenous products/services, and merely connect supply and demand, agents remaining wholly independent when determining their terms of supply.<sup>28</sup>

Despite what some authors have suggested,<sup>29</sup> all indications point to the fact that the Airbnb judgment will say that an app/online platform such as this one does qualify as an information society service.<sup>30</sup>

But the discussion doesn't really stop here. As noted above, there is a hidden part of the debate, which was addressed by the AG, but which the Court tackled only very superficially.

Regardless of whether an activity is provided wholly by one undertaking (e.g., selling on its website and mailing the products to the clients), or whether it is provided as a composite where the app/online service has decisive influence over the downstream service providers, one still needs to ask which is the principal component: the online or the offline one. The Court decided this implicitly in the first judgment, and in the second judgment it specifically said that the app was the "*principal element*". But why is it? AG Szpunar's attempt to explain this part was rather unpersuasive.

Why is ordering a toaster online the principle activity (rather than having it physically delivered), but riding a taxi is the principle activity (rather than ordering it online)? Is this a distinction between goods and services? Does it mean that all services contracted online will not be the principal element of the contracted bundle?

The problem has not been made easier by the CJEU's judgment in case *Vanderborght*, where the Court found that online advertising for dental services was an information society service, distinct from the provision of the dental services themselves.<sup>31</sup>

The Court has avoided this issue, and in so doing, it has done a poor service to legal certainty in the future, not just for apps and online platforms, but for the concept of information society services and for e-Commerce as a whole. The partial upside is that this issue only becomes relevant if the Court first determines that we are in the presence of a composite service, i.e. that the decisive influence test is met. Thus, the Court will be able to avoid this discussion in a large number of cases (such as the Airbnb one).

## V. Conclusion

The Court's judgments split academics. Empirically, it seems to me that most scholars who had approached the problem primarily from a national law perspective, agreed with the rulings. But even among those specialized on EU law, opinions diverged.<sup>32</sup> And while some of the differing views seemed to come from voices which professionally sided with Uber,<sup>33</sup> others seemed to independently arrive at

<sup>28</sup> Opinion of AG Szpunar in case C-434/15 *Uber Spain* EU:C:2017:364, paras. 33-34 and 57-60.

<sup>29</sup> See, e.g.: J. M. Regules, "The ECJ's Uber judgment," 2018, available at <https://www.maastrichtuniversity.nl/blog/2018/04/ecj%E2%80%99s-uber-judgment>.

<sup>30</sup> As is thoroughly argued in Busch, *supra* note 26.

<sup>31</sup> CJUE, case C-339/15 *Vanderborght* EU:C:2017:335. See also Opinion of AG Szpunar in case C-320/16 *Uber France* EU:C:2017:511, paras. 18-21.

<sup>32</sup> For a favorable opinion, see, e.g.: P. Hacker, "UberPop, UberBlack, and the Regulation of Digital Platforms after the Asociación Profesional Elite Taxi Judgment of the CJEU," *European Review of Contract Law*, vol. 14, issue 1 (2018): 80.

<sup>33</sup> See, e.g., D. Geradin, "For a Facts-Based Analysis of Uber's Activities in the EU: Addressing Some

cogent arguments against the Court's position.

On the one hand, some of the opposing voices seemed to overestimate or misunderstand the impact of the judgment. It's unfair to say, for example, that these judgments amount, in practice, to a "*de facto ban on Uber's activities*";<sup>34</sup> as demonstrated by the fact that Uber continued to operate in several MSs.

Setting aside the details of the legal justification, I prefer to look upon it as a balanced assessment of the current equilibrium in the transfer of sovereign powers from the Member States to the EU, and a welcomed restraint on the part of the Court to expansively interpret Internal Market provisions in such a way which would circumvent that negotiated transfer and excessively restrict the freedom of MSs to regulate an activity which, so far, they did not intend to allow the EU to regulate. As the Court rightly pointed out, EU institutions are empowered to legislate so as to harmonize the provision of services such as Uber's across the EU's territory – all that is lacking is the will to do so, which emphasizes the need to respect the differences in national approaches to the issue.

It so happens that, as a citizen and consumer of taxi services, I dislike this outcome. But, from a legal perspective, I find it reasonable. And I am lucky to live in a country where the Government has shown itself sensitive to the need to open up the market to the efficiencies and improvements brought by apps such as Uber.

On the other hand, I agree that there are reasons to be concerned about the lack of clarity and the insecurity created by these judgments, in so far as other platforms and services are concerned. This decisive influence test may turn out to be a convenient way for the Court to distinguish those activities which it believes MSs should have control over, from those which it believes they shouldn't. But one can't help find it somewhat artificial.

Schaub argued: "*the decision of the CJEU to exclude the booking application from the scope of the e-Commerce Directive is incorrect and unnecessary. Possibly, this decision was prompted by the desire to ensure that Member States can apply and enforce national rules relating to transport services. Yet, classification of Uber as an information society service would not have precluded this*".<sup>35</sup>

This final point is, I believe, the crucial one. There is no real reason to justify distinguishing between Uber and Airbnb, for example. As long as these undertakings cooperate with the authorities and provide information on their service providers, which they can be compelled to do under national law, MSs remain free to regulate and tax the activity of undertakings and persons providing services via the app/online platform, which is exactly what has happened with Airbnb. Against this backdrop, one may perhaps argue that it was Uber's aggressive and non-transparent corporate policy that caused it to be treated differently. As a matter of policy, that may be reasonable but, as a matter of law, it does not seem entirely coherent.

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Misconceptions," *CPI Antitrust Chronicle* (September 2017).

<sup>34</sup> M. Colangelo and M. Maggolino, "Uber in Europe: Are There Still Judges in Luxembourg?," *CPI Antitrust Chronicle* (May 2018).

<sup>35</sup> M. Y. Schaub, "Why Uber is an information society service," *Journal of European Consumer and Market Law*, vol. 7, issue 3 (2018): 109.