

Comment & Analysis

Christoph Busch*

The Sharing Economy at the CJEU: Does Airbnb pass the 'Uber test'?

Some observations on the pending case C-390/18 – Airbnb Ireland

1. Introduction

The rise of digital platforms such as Uber and Airbnb has sparked a controversy about how to fit the new business models into existing legal categories and whether there is a need to adapt the regulatory framework to the new platform economy.¹ In December 2017, in a much publicised judgment, the CJEU held that Uber is not a just a digital intermediary providing 'information society services', but a transport service provider.² Consequently, according to the CJEU, Uber does not benefit from the 'internal market clause in Article 3(2) of Directive 2000/31/EC, which precludes Member States from restricting the freedom to provide cross-border information society services.

While Uber has discontinued its services in several EU Member States, the focus of the regulatory battle is now shifting towards short-term rental platforms.³ Thus, on 16 July 2018, the European Commission and a phalanx of national consumer authorities have called on Airbnb to comply with EU consumer law rules.⁴ At the same time, Member States are tightening their regulatory grip on short-term rentals. Now, the first request for a preliminary ruling concerning Airbnb has reached the CJEU. The following brief case note provides some very first reflections on the pending case.⁵

2. Facts and Questions

On 24 January 2017, the Association pour un hébergement et un tourisme professionnel (Ahtop) lodged a complaint with the Tribunal de grande instance de Paris about the commercial practices of Airbnb. Ahtop claimed that Airbnb violates Arts. 3 and 5 of the Loi Hoguet,⁶ which regulates the activities of real estate brokers.

Under Art. 3(1) of the Loi Hoguet 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 insurance. Moreover, Art. 5 of the Loi Hoguet 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 Loi Hoguet and can result in imprisonment and fines.

In response to the complaint by Ahtop, the Public Prosecutor's Office brought a criminal action against Airbnb Ireland for violating the Loi Hoguet. In its defence, Airbnb argued, that its commercial activities do not qualify as real estate brokerage and that the Loi Hoguet does not apply because it is incompatible with the E-Commerce Directive (2000/31/EC). Ahtop, which joined the criminal proceedings as "partie civile", in turn, argued that the commercial activities of Airbnb do not fall under Directive 2000/31/EC because they are not limited to connecting two parties via a platform, but

include additional services which are characteristic of the real estate business.

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 (Loi Hoguet) be invoked against Airbnb Ireland?

3. Comments

3.1. The 'Uber test'

The first question submitted by the referring court raises the issue whether the service offered by a sharing economy platform like Airbnb may be classified as an 'information society service' as defined in Article 2(a) of Directive 2000/31/EC. In order to reply to this question, it is necessary to apply the criteria elaborated by the CJEU in the case 'Uber Spain'⁷ and confirmed more recently in the case 'Uber France'⁸. It may be helpful to recall the main elements of the 'Uber test':

The definition Article 2(a) of Directive 2000/31/EC refers to Article 1(2) of Directive 98/34. Under this provision, an information society service is a service provided for remuneration, at a distance, by electronic means and at the individual request of a recipient. According to the CJEU the service offered by Uber meets, in principle, the criteria for classification as an information society service. However, the Court

* Professor of Law at the University of Osnabrück.

- 1 See eg Dariusz Adamski, Lost on the Digital Platform: Europe's Legal Travails with the Digital Single Market, 55 Common Market Law Review 719 (2018); see also Christoph Busch et al. The Rise of the Platform Economy: A New Challenge for EU Consumer Law?, EuCML 2016, 3.
- 2 CJEU, 20 December 2017, C-434/15, Asociación Profesional Elite Taxi v Uber Systems Spain SL, ECLI:EU:C:2017:981.
- 3 Too much of a good thing: The European Backlash against Airbnb is in full swing, The Economist, 21 July 2018, p. 22.
- 4 European Commission, Press release of 16 July 2018 – EU Consumer rules: The European Commission and EU consumer authorities push Airbnb to comply, IP-18-4453_en; for an overview of Airbnb's business model and a legal analysis see Vanessa Mak, Regulating Online Platforms – The Case of Airbnb, in: Stefan Grundmann (ed.), European Contract Law in the Digital Age, 2018, 87-102.
- 5 Case C-390/18, Airbnb Ireland.
- 6 Loi n° 70-9 du 2 janvier 1970 réglementant les conditions d'exercice des activités relatives à certaines opérations portant sur les immeubles et les fonds de commerce.
- 7 CJEU, Judgment of 20 December 2017, Case C-434/15, Asociación Profesional Elite Taxi v Uber Systems Spain SL, ECLI:EU:C:2017:981.
- 8 CJEU, Judgment of 10 April 2018, Case C-320/16, Uber France SAS, ECLI:C:2018:221.

concluded that Uber's service is 'more than an intermediation service'⁹ or – in the words of advocate general Szpunar – a 'composite service'.¹⁰

This analysis is essentially based on two criteria: First, the CJEU argued that Uber provides a digital platform for drivers and passengers 'without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers'.¹¹ In other words, Uber is not just an intermediary, but a *market maker*. Second, and more importantly, the CJEU underlines that Uber determines the maximum fare, receives the payment from the passengers which is partly transferred to the driver and partly kept by Uber as remuneration for the use of digital platform, and Uber exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can result in an exclusion of the driver from Uber's platform.¹² Therefore, the CJEU concludes that Uber 'exercises *decisive influence* over the conditions under which that service is provided by those drivers'.¹³ As a consequence, according to the CJEU the service provided by Uber must be regarded 'as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as an information society service'.¹⁴

3.2. The classification of Airbnb's activity – more than an intermediation service?

As in the case of Uber, the service offered by Airbnb meets, in principle, the criteria for classification as an information society service. The digital platform run by Airbnb is provided for remuneration, at a distance, by electronic means and Airbnb's services are provided at the individual request of a recipient.

However, similarly to the Uber Spain case, the question arises whether Airbnb is more than just an intermediation service and could be considered a 'composite service' whose main component is offering short term rentals. In other words, if Uber is essentially considered a transport service, could Airbnb be considered a short-term rental service?

3.2.1. Airbnb is a market maker

The first factor of the 'Uber test' is whether Airbnb is a *market maker*. Interestingly, Advocate General Szpunar, in his opinion in Uber Spain, argued that platforms for the purchase of flights or hotel bookings should be considered as providers of information society services 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'.¹⁵ If one applies this analysis to Airbnb, the outcome is not entirely clear.

On the one hand, one could argue that Airbnb provides only a digital distribution channel for hosts who, in the past, advertised holiday homes through off-line channels. On the other hand, it seems that 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.¹⁶ From this perspective, Airbnb can be considered a market maker.

It is doubtful, however, whether the factor of 'economically independent' activity is a suitable criterion for determining

whether a digital platform can be classified as an information society service. Airbnb recently announced that it will be possible to book not only homes but also hotels through its platform.¹⁷ At the same time, major hotel booking platforms like Booking.com are expanding their business into offering private holiday homes.¹⁸ In other words, it is becoming more and more difficult to draw a line between different business models in the platform economy.

3.2.2. Airbnb does not exercise 'decisive influence' over the accommodation service

The main factor of the 'Uber test' is whether the platform operator exercises 'decisive influence' over the provision of the services provided via the platform.¹⁹ While Airbnb does exercise a certain degree of control over the transactions concluded through its platform, it does not reach the same level as in the case of Uber.²⁰

For example, Airbnb exercises a certain influence over the terms and conditions under which the accommodation service is offered. Thus, Airbnb allows hosts to choose amongst three standardised cancellation policies (flexible, moderate and strict) that are enforced by Airbnb.²¹ Moreover, hosts that do not comply with a list of 'hospitality standards' (safety, security, fairness, authenticity, reliability) may be penalized by Airbnb or by platform users through the review system offered by the platform. However, there is no equivalent to the use of GPS technology for tracking drivers and there is no automatic exclusion of hosts falling below a certain level of user ratings.

More importantly, unlike Uber, Airbnb does not determine the remuneration for the services offered via the platform. While Uber fixes the price of transportation, hosts offering short-term rentals via Airbnb are, in principle, free to determine the price. However, Airbnb offers a dynamic pricing algorithm called 'Smart Pricing' that automatically adjusts nightly prices based on changes in demand (eg seasonality, special events).²² But even if hosts use the 'Smart Pricing' tool, they remain free to determine the minimum and maximum prices for their listings.

In summary, while Airbnb does create its own supply of private accommodations and exercises a certain degree of control over the accommodation service, based on the 'Uber test' its business model could still be classified as an information society service under Directive 2000/31/EC. This solution has also the advantage that the transparency requirements and the requirements concerning online contracting

9 CJEU, C-434/15 para. 37.

10 AG Szpunar, opinion of 11 May 2017 in case C-434/15, EU:C:2017:364, para. 28.

11 CJEU, C-434/15 para. 39.

12 Ibid.

13 Ibid.

14 CJEU, C-434/15 para. 40.

15 AG Szpunar, para. 34 (emphasis added).

16 See eg Anders Hansen Henten and Iwona Maria Windekilde, Transaction costs and the sharing economy, *Info* 18(1), 1-15 (2016).

17 Olivia Solon, Not just homes any more: Airbnb expands into hotels and luxury spots, *The Guardian.com*, 22 February 2018.

18 Raphaela Kwizdzinski, Booking.com wuchert im Airbnb-Segment, *Allgemeine Hotel- und Gastronomiezeitung*, ahg.de, 11 April 2018.

19 CJEU, C-434/15 para. 39.

20 But see Philipp Hacker, UberPop, UberBlack, and the Regulation of Digital Platforms after the Asociación Profesional Elite Taxi Judgment of the CJEU, *European Review of Contract Law* 2018, 80 at 93, who argues that Airbnb follows an 'intermediation plus control' business model that is similar to the one of Uber.

21 https://www.airbnb.co.uk/home/cancellation_policies.

22 Harriet Taylor, Airbnb launches 'Smart Pricing' for hosts, *CNBC.com*, 12 November 2015.

under the Directive 2000/31/EC are applicable to the intermediary platform.²³

3.3. Freedom to provide information society services and its limits

Since the intermediation services offered in France through the Airbnb platform are provided by Airbnb Ireland and – in the case of payment services – by Airbnb Payments UK Ltd, the services benefit from the freedom to provide services set out in Article 3 of Directive 2000/31/EC. According to this so-called ‘internal market clause’, Member States may not, in principle, restrict the freedom to provide services from other Member States, for reasons falling within the ‘coordinated field’, by introducing requirements, regardless of whether they are specifically designed for information society services or are of a general nature.²⁴

The ‘coordinated field’ covers, *inter alia*, requirements in respect of ‘the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification’ and ‘requirements concerning the behaviour of the service provider’.²⁵ Therefore, Article 3 of the French Loi Hoguet which requires to have an authorisation in order to provide real estate brokerage services would fall under the prohibition laid down in Article 3 (2) of Directive 2000/31/EC. The same applies to the Article 5 of the Loi Hoguet which sets out specific bookkeeping requirements for real estate brokers.

However, the principle of freedom to provide information society services under Directive 2000/31/EC is not unlimited. Under Article 3(4) of the Directive, Member States may take measures to derogate from Article 3(2) if they are necessary for reasons of public policy, public health, public security or the protection of consumers. Against this background, the second question of the referring court essentially concerns the issue whether the requirements laid down by the Loi Hoguet can be justified by one of the reasons mentioned in Article 3 (4) of Directive 2000/31/EC, in particular the protection of consumers.

It is doubtful, however, whether the authorisation requirement for real estate brokerage services meets the criterion of proportionality, expressly provided for in Article 3(4)(a)(iii) of Directive 2000/31/EC.²⁶ The same applies to the specific bookkeeping requirements laid down by the Loi Hoguet. While such requirements may be proportionate in cases where large amounts of money are kept in escrow by a real estate agent over a considerable time, it seems disproportionate for a short-term rental platform where individual transactions concern rather limited amounts. Moreover, Airbnb only withholds payments until 24 hours after check-in before transferring it to the host.²⁷ As a consequence, it seems likely that the CJEU concludes that the restrictive provisions concerning the profession of the real estate brokers under the Loi Hoguet cannot be invoked against Airbnb Ireland.

3.4. Future regulatory battles on the horizon

If the CJEU follows the line of argument sketched out above this does not mean that Member States are banned from regulating short-term rental services and correcting identified market failures.²⁸ Directive 2000/31 does not preclude requirements relating to offline activities that are provided via a digital platform.²⁹ 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 platforms. 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 the Services Directive 2006/123/EC.

When such policy objectives are implemented, platforms could play an important role as ‘regulatory intermediaries’. For example, platforms could enforce applicable thresholds for the maximum number of nights via automated limits.³⁰ Similarly, platforms could be required to verify whether hosts have fulfilled their registration duties by allowing only listings which display a valid registration number. It is an open question, however, whether such a duty would amount to a ‘general monitoring obligation’ prohibited by Art. 15(1) of Directive 2000/31/EC.

Interestingly, there is a very similar controversy on the other side of the Atlantic about the responsibility of short-term rental platforms for facilitating bookings for illegal rentals. In June 2018, the US District Court for the Central District of California upheld a law passed by the city of Santa Monica which prohibited short-term rental platforms from completing a booking transaction unless the listed property was properly registered with the city.³¹ HomeAway and Airbnb, who challenged the Santa Monica law, argued that it violates Section 230 of the Communications Decency Act (“CDA”), which – similar to Articles 14, 15 of Directive 2000/31/EC – provides broad immunity to online marketplaces for third-party listings. However, the California court held that the local law does not penalize hosting activities (which are protected by the CDA), but only seeks to prevent the platforms from facilitating business transactions on their sites that violate the law. This type of regulation, the court argued, falls outside the scope of the CDA protections. While the California ruling attracted some criticism,³² it seems to be in line with the established case law of the CJEU. Indeed, one could argue that a platform like Airbnb is more than a “passive” hosting platform (like Craigslist) and rather plays an “active role allowing it to have knowledge or control of the data stored.”³³ Hence, it would not benefit from the safe harbour provisions under Directive 2000/31/EC. Moreover, from a practical perspective, 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, a solution recently implemented by the city of San Francisco.³⁴ Maybe, one possible answer to the future legal battles around Airbnb and its competitors is what geeks might call “regulation by API”. ■

23 See also Martien Schaub, *Why Uber is an information society service*, EuCML 2018, 109 at 115.

24 Article 3(2) of Directive 2000/31.

25 Article 2(h)(i) of Directive 2000/31.

26 See also CJEU, Judgment of 21 July 2011, Case C-518/09, *Commission v Portugal*, ECLI:EU:C:2011:501, paras 68 et seq. (concerning authorisation requirements and financial guarantees for real estate brokerage services).

27 <https://www.airbnb.co.uk/help/article/92/when-am-i-charged-for-a-reservation>.

28 See Benjamin G. Edelman and Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber*, 19 *Stanford Technology Law Review* 293 (2016).

29 Cf. AG Szpunar, opinion in case C-434/15, para. 88.

30 Dominique Vidalon, *Airbnb puts automatic rental cap on central Paris offers*, Reuters.com, 14 November 2017.

31 *HomeAway.com, Inc. v City of Santa Monica*, 2018 WL 3013245 (D.C. Cal. June 14, 2018); see also *Airbnb, Inc. v City and Country of San Francisco*, 2016 WL 6599821 (N.D. Cal. Nov. 8, 2016).

32 See e.g. the case note by Eric Goldman at <https://blog.ericgoldman.org/archives/2018/03/section-230-doesnt-prevent-city-regulation-of-short-term-rental-services-again-homeaway-v-santa-monica-hmt>.

33 Cf. CJEU, Judgment of 12 July 2011, Case C-324/09, *L'Oréal v Ebay*, ECLI:EU:C:2011:474, para 116.

34 For more details see <https://api.sfgov.org>.