Hard Cases

Airbnb Ireland Case: One More Piece in the Complex Puzzle Built by the CJEU Around Digital Platforms and the Concept of Information Society Service

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Abstract

In the Airbnb Ireland case the Court of Justice of the European Union (CJEU) is again called upon to rule on the concept of information society service, applying the test defined in the Uber Spain and Uber France cases. The CJEU concludes that Airbnb has neither created a new market nor exercises a decisive influence on the hosts, conclusions with which we disagree. The aim of this article is precisely to critically examine this judgment. The near future is also envisaged through an analysis of the Opinion of the Advocate General in the Star Taxi App case.

I. Introduction

The Airbnb Ireland judgement[1] comes in the context of a series of rulings of the Court of Justice of the European Union (CJEU) on the regulation of digital platforms, in particular on the question whether a platform lawfully operating in one Member State can automatically operate in another Member State or whether it can be subject to authorisation and operating requirements.

The Airbnb Ireland case is about a French legislation (Hoguet Act), which imposes a professional licence to carry out or support, even if in an ancillary capacity, among others, transactions on third party assets relating to the exchange, rental or sublease, seasonal or not, of empty or furnished buildings. According to the French authorities, this requirement applies to Airbnb. The case before the French courts eventually reached the Court of Justice of the European Union (CJEU), with Airbnb Ireland arguing that the imposition of a professional licence is contrary to European law, particularly in view of the principle of freedom of movement for information society services enshrined in Art 3 of Directive 2000/31/EC.[2]

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[1] Case C-390/18 *Airbnb Ireland*, [2019] EU:C:2019:1112.

[2] European Parliament and Council Directive 2000/31/EC of the of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal

The CJEU had already been called upon to rule on this issue in the Uber Spain[3] and Uber France[4] cases, which have now essentially set a course (and have been supplemented) in the Airbnb case. In the meantime, AG Szpunar, who was also responsible for the previous cases, has already delivered his Opinion in the Star Taxi App case,[5] allowing us to reflect on future developments in the matter. We will also refer to the Cali Apartments case,[6] although this case does not concern the digital platform itself, but the accommodation activity and the requirements relating to it.

One of the main criticisms that could be levelled at the CJEU is precisely that the decisions delivered in these cases could indirectly affect users' rights in the contractual relationship they establish with the platform. For instance, the exclusion from the scope of Directive 2000/31/EC may have the effect of allowing Member States to set more easily limits on the exercise of the activity in question, as in the Uber Spain and Uber France cases, but may radically prevent, without justification, the platforms concerned from having to comply with the rules on electronic contracts.

Following a framework of the Airbnb Ireland case, a study of the decision is undertaken, focusing on the qualification of Airbnb's activity as an information society service or accommodation service. The current state of play is then analysed, identifying the path taken so far by the CJEU and looking ahead to future decisions in this area.

II. Framework of the Airbnb Ireland Case

This section presents the Airbnb Ireland case, successively describing the Hoguet Act which gave rise to the case, the activity of Airbnb Ireland and the dispute itself.

1. The Hoguet Act

In France, the Hoguet Act,[7] which owes its name to the parliamentarian

Market ('Directive on electronic commerce') [2000] OJ L178/1

[3] Case C-434/15 *Asociación Profesional Elite Taxi* v *Uber Systems Spain, SL*, Judgement of 20 December 2017, EU:C:2017:981.

[4] Case C-320/16 *Uber France*, Judgement of 10 April 2018 EU:C:2018:221.

[5] Case C-62/19 Star Taxi App SRL v Unitatea Administrativ Teritorială Municipiul Bucureşti prin Primar General, Consiliul General al Municipiului Bucureşt Opinion of Advocate General Szpunar of 10 September 2020, EU:C:2020:692. The court's decision was delivered on 3 December 2020 (Case C-62/19 Star Taxi App, Judgement of 3 December 2020, EU:C:2020:980), date on which this study was already being published. The decision essentially follows the opinion of the AG.

[6] Joined Cases C-724/18 and 727/18 Cali Apartments SCI and HX v Procureur général près la cour d'appel de Paris and Ville de Paris, Judgement of 22 September 2020, EU:C:2020:743.

[7] 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, *Journal officiel de la République française. Lois et décrets* JORF (*version papier numérisée*) n° 0003 du 04/01/1970, 142.

who proposed it (Michel Hoguet), applies to all natural or legal persons who carry out or support, even if in an ancillary capacity, among others, transactions on third party assets relating to the purchase, sale, demand, exchange, rental or sublease, seasonal or not, of empty or furnished buildings, whether or not built (Art 1). These operations may only be carried out, under Art 3, by those who have a professional licence, whose attainment presupposes the fulfilment of certain requirements. The exercise of the activity in question without a licence constitutes a criminal offence (Art 14), especially sanctioned if the person concerned receives or holds money (Art 16).

2. Airbnb Ireland UC

Airbnb Ireland UC is a company established under Irish law, based in Dublin, which is part of the Airbnb group, composed of several companies owned directly or indirectly by Airbnb Inc, based in the USA.

In France, Airbnb Ireland provides an electronic platform enabling it to put in contact, on one side, hosts (professional or private) with homes to rent and, on the other side, people looking for such accommodation.

The payments are managed by Airbnb Payments UK Ltd, a company established under UK law, based in London.

Airbnb France SARL, a company established under French law, provides Airbnb Ireland with platform promotion services, in particular through advertising campaigns.

In addition to the provision of the platform, Airbnb Ireland also offers the hosts a number of other optional services such as the setting of the content of their offer, support with regard to pictures, the use of a tool to calculate the price, liability insurance and damage cover of up to eight hundred thousand euros.

Upon conclusion of the short-term rental contract, the guest transfers to Airbnb Payments UK the value of the rent plus six per cent to twelve per cent of that amount in respect of charges and the service provided by Airbnb Ireland.

Airbnb Payments UK will only transfer the rent to the host twenty four hours after the arrival of the guest.

Airbnb Ireland also offers a rating service with the possibility for each party to rate between zero and five stars, the rating being available on the platform.

According to the CJEU, each party to the short-term rental contract enters into two contracts, one with Airbnb Ireland for the use of the platform and the other with Airbnb Payments UK for payments made through the platform. This conclusion seems rather debatable to us, but we will not develop the subject further, as it goes beyond the scope of the study.

3. Dispute

The '*Association pour un hébergement et un tourisme professionnels*' (AHTOP) has lodged a complaint against Airbnb Ireland (hereinafter Airbnb)

for exercising activities of mediation and management of buildings and businesses without a professional licence under the Hoguet Act. Following the complaint, charges were lodged. Airbnb Ireland came to defend itself on the ground that it does not act as a real estate agent and that the application of the Hoguet Act is incompatible with European law, having regard to Directive 2000/31/EC.

The investigating judge of the *Tribunal de Grande Instance de Paris* decided to refer two questions to the CJEU for a preliminary ruling:

– Do the services provided in France by Airbnb Ireland via an electronic platform managed from Ireland benefit from the freedom to provide services established in Art 3 of Directive 2000/31/EC?

– 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?

III. Information Society Service vs Accommodation Service

According to the logic outlined by the CJEU,[8] the first question is essentially whether the activity carried out by Airbnb in France, which corresponds to that carried out by the company in most countries, constitutes an 'information society service' for the purposes of Art 2a of Directive 2000/31/EC, as opposed to an accommodation service (or, as will be seen below, a service in the field of accommodation).

An affirmative answer means that no Member State (in this case France) may, as a rule, impose restrictions on the exercise of the activity, such as requiring a professional licence, provided that the national provisions applicable in the country in which the service provider is established (in this case Ireland) are complied with.

In the Uber Spain and Uber France cases, the CJEU developed a reasoning on this issue, concluding in both decisions that Uber, as regards the UberPop service at issue in those cases,[9] does not provide services which can be qualified as information society services.[10] In both decisions, the CJEU considers that, in order to classify the service as an information society service, it is not sufficient

[8] This logic follows on from the Uber Spain and Uber France cases, but is debatable, as it is now clearer from the Opinion of AG Szpunar in the Star Taxi App case, a question developed later in this text.

[9] It remains to be seen what the CJEU would have ruled if the service in question had been another, namely that of UberX, where drivers are professionals. For the most part, it would certainly have concluded in the same line, but it would be interesting to see whether it would still qualify Uber's activity as intermediation, which would seem inappropriate to us. As far as services like UberX are concerned, it seems to us that Uber is the entity providing the services and is therefore not an intermediary in the carriage contract.

[10] This decision was, in essence, well received by legal experts and society, in particular in so far as it allows Member States to regulate the activity at stake. According to M. Sousa Ferro, 'Uber Court: A Look at Recent Sharing Economy Cases Before the CJEU' *EU Law Journal*, 74, 68-75 (2019), 'some of the differing views seemed to come from voices which professionally sided with Uber'.

that the conditions laid down in the concept, as defined in European law, are fulfilled; the service must also not form part of an overall service the main element of which is a service with a different legal classification.[11] According to the CJEU, the intermediation service provided by Uber (UberPop service) cannot be classified as an information society service because it is part of an overall service the main element of which is a transport service. The CJEU does not state that Uber provides transport services, which would appear to be incompatible with the qualification as an intermediary, but that it provides services in the field of transport.

Let us look at what the CJEU concludes with regard to Airbnb, dealing successively with the questions of the concept of information society service and the additional requirement laid down by the Court that it must not be integrated into an overall service the main element of which is a service with another legal qualification, in this case an accommodation service. At the end of this section, a brief reference is made to the decision of the CJEU on the second question raised.

1. Concept of Information Society Service

Art 2a of Directive 2000/31/EC does not directly define the concept of 'information society services' but refers to the definition contained in Arts 1-2 of Directive 98/34,[12] as amended by Directive 98/48.[13] However, this legislation was repealed by Directive 2015/1535,[14] so the relevant concept of information society service for the application of Directive 2000/31/EC is that set out in Article 1-1b of Directive 2015/1535.

An 'information society service' is to be considered 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

There are four conditions that should be met in order to comply with the concept: (i) remuneration; (ii) at a distance; (iii) by electronic means; (iv) at the individual request of a recipient of services.

The Court considers that the service is provided against remuneration (para 46), although the remuneration is received not by Airbnb Ireland but by another company in the same group (Airbnb Payments UK) and only the lessee pays.

[11] 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*, 173, 172-174 (2018).

[12] European Parliament and Council Directive 98/34/EC of the of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L204/37.

[13] European Parliament and Council Directive 98/48/EC of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L217/18.

[14] European Parliament and Council Directive 2015/1535/EU 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 [2015] OJ L241/1.

The different legal personality of the two companies in the Airbnb group should in our opinion be disregarded, not least because they appear before users as one and the same entity, a reasoning which should be used not only for this purpose but also to regulate the relationship between the different parties involved, in particular for the purpose of liability. The fact that it is only the lessee who pays the commission does not seem to us to rule out the verification of the assumption of remuneration.

There also does not seem to be any discussion as to whether the service is provided at a distance, ie without the simultaneous presence of the parties. In fact, none of the persons involved in the contractual scheme is physically and simultaneously present, and thus, the whole process takes place at a distance.

The same conclusion should be drawn as to whether the service is provided electronically, since the parties make contact through the electronic platform.

As regards the latter assumption, it is necessary that the service is provided 'at the individual request' of a recipient of services, defined in the aforementioned provision as a service 'provided through the transmission of data on individual request'. The recipients of the service are the users of the platform, ie the hosts and the guests. The host publishes an online advertisement while the guest sees and is interested in that advertisement (para 48). An individual request occurs whenever someone accesses the platform either to place an ad or to make a search among the ads placed.

The four conditions are therefore met.

2. Additional Requirement: Not to Be Part of an Overall Service Whose Main Component Is a Service Coming Under Another Legal Qualification

The CJEU holds that it is still necessary, in order to conclude that it is an 'information society service' for the purposes of Directive 2000/31/EC, that the intermediation service in question does not form part of an 'overall service whose main component is a service coming under another legal qualification' (para 50).

The case law outlined in the Uber Spain and Uber France cases is followed. As stated in para 40 of the decision in the first case cited, 'that intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service', thus ruling out the classification as an 'information society service'. The effect of that conclusion is devastating, since it does not simply rule out the application of the principle of freedom of movement laid down in Directive 2000/31/EC, but also rules out the application of all the provisions of the Directive, in particular those relating to contracts, which seems to be undesirable.[15]

[15] See M.Y. Schaub, 'Why Uber is an Information Society Service' *Journal of European Consumer and Market Law*, 109, 109-115 (2018).

Coming back to our decision, AHTOP argues that the activity 'forms an integral part of an overall service, whose main component is provision of an accommodation service', as Airbnb provides with services characteristic of the intermediation activity in real estate transactions (para 51).

While recognising that the service provided by the company is intended 'to enable the renting of accommodation', the CJEU considers that 'the nature of the links between those services does not justify departing from the classification of that intermediation service as an "information society service" and therefore the application of Directive 2000/31/EC to it' (para 52).

The Court has used several arguments to reach that conclusion, which will now be mentioned and critically analysed.

First, the intermediation service is dissociable from the property transaction itself, consisting in the provision of a structured list of the places of accommodation (para 53).

This statement is highly debatable,[16] since the ultimate purpose of making the list available is to conclude short-term rental contracts. It is an intermediation activity in the accommodation sector and not in a different sector. To reach this conclusion we would even waive the fact that additional services are typically contracted, such as those already mentioned, and which are successively disregarded for the purpose of changing the qualification of the Airbnb's activity in paras 59 to 63.

In para 64 it is stated that

> 'it is also paradoxical that such added-value ancillary services provided by an electronic platform to its customers, in particular to distinguish itself from its competitors, may, in the absence of additional elements, result in the nature and therefore the legal classification of that platform's activity being modified'.

We disagree as this does not seem at all paradoxical; on the contrary, if the platform stands out from its competitors by offering certain services, it is in the light of its offer that the analysis must be made and not in the light of those of its competitors. It would not shock a different qualification of Airbnb's activity vis-à-vis its competitors precisely because it offers distinct 'added-value' services. This 'added-value' may change the configuration of the business model and therefore the qualification of the company's activity.

The Court goes on to say that the intermediation activity, which presupposes 'the compiling of offers using a harmonised format, coupled with tools for searching for, locating and comparing those offers', is so relevant that the service 'cannot be regarded as merely ancillary to an overall service coming

[16] Similarly, A. Chapuis-Dopler and V. Delhomme, 'A Regulatory Conundrum in the Platform Economy, case C-390/18 Airbnb Ireland' *European Law Blog*, available at https://tinyurl.com/y9fbrj6y (last visited 27 December 2020).

under a different legal classification, namely provision of an accommodation service' (para 54).

While Airbnb does not provide accommodation services but acts as an intermediary between hosts and guests, it also seems clear for us that it provides services in the field of accommodation (in a connection with the concept of 'services in the field of transport' in Uber's cases). It would therefore perhaps be justified to subject it to the regulations to which other companies providing intermediation services in the field of accommodation are subject to, whether or not such services are provided exclusively at a distance and by electronic means. We do not intend to go against the idea of the Court that the success of Airbnb's business model lies in the unique characteristics of its intermediation activity, namely the presentation of offers in a harmonised manner and the search tools. It seems nevertheless that the fact that this is an original presentation of the accommodation does not detract from the qualification as an intermediary in a specific sector, which is that of accommodation,[17] and that it is not intermediation in general, with no obvious link to a sector.

It is also argued that the service in question is not indispensable for the provision of accommodation services from the point of view of hosts and guests (para 55). There is no way to contradict this statement, not least because short-term rental contracts were already concluded before the existence of this intermediation platform. In addition to the channels mentioned in that paragraph, the contact could also be personal, close to the place of accommodation, as in many summer holiday locations. It follows, moreover, that digital platforms are only one more channel of intermediation in accommodation services, which is the channel that currently dominates the market. To consider this channel as being outside the domain of accommodation means to favour it, from a regulatory point of view, over other channels. This could be one of the problems of qualifying this activity as a *mere* information society service.

In any case, even if we consider that it is not indispensable for the provision of accommodation services, it is indisputable that Airbnb and other platforms that have followed its model have completely revolutionised this market, which has gone from being small to becoming massive in many tourist locations, and is even a central element of urban policy in most large European cities which have changed as a result of the success of these platforms.

We therefore disagree with the CJEU decision where it argues that Airbnb has not created a market.[18] While identifying the creation of a market is a complex

[17] T. Rodríguez de las Heras Ballell, 'The Airbnb Ireland Case: The Importance of Business Model in the Platform Economy' *Andersen Tax and Legal*, 1, available at https://tinyurl.com/ybmnvnhp (last visited 27 December 2020) states that 'it is, in fact, an innovative model that competes with other real estate brokerage businesses'.

[18] Similarly, C. Busch, n 11 above, 173; L. Van Acker, 'C-390/18 - The CJEU Finally Clears the Air(bnb) Regarding Information Society Services' *Journal of European Consumer and Market Law*, 79, 77-80 (2020); A. Chapuis-Doppler and V. Delhomme, 'Regulating Composite Platform

task, Airbnb has at least reconfigured a small market, making it a very significant and relevant market.

The last argument is that the company does not fix or limit the price, but only makes an optional service available to the hosts to estimate the price (para 56). This difference is useful for the court as it clearly distinguishes Airbnb from Uber. The question is whether it is sufficient for this purpose not to fix or limit the price so that it is no longer a service in the field of accommodation.[19]

The Court even makes an explicit distinction between the intermediation service provided by Airbnb and the intermediation services provided by Uber (para 65), which is very useful and interesting, in order to draw the line between what is a mere information society service, a line which, according to the case-law of the CJEU, is between those two activities, which we consider to be open to criticism.

The key criterion, according to the Court, is the 'level of control' (para 66) or the 'decisive influence' (para 67) as regards the provision of the service in the main contract (accommodation or transport).[20]

It appears from para 68 that the services provided by Uber in the decisions referred to (UberPop) constitute the borderline for being regarded as a mere information society service. According to the Court, the evidence in the case does 'not establish that Airbnb Ireland exercises such a decisive influence over the conditions for the provision of the accommodation services to which its intermediation service relates'. It therefore appears necessary for it to exercise 'such' an influence, ie at least the same level of influence or control. And there is no doubt that Uber, even on the UberPop service, exercises greater control over the contract than Airbnb.[21]

We believe, however, that the line should be drawn at another point, considering that we are not dealing with a mere information society service in

Economy Services: The State-of-play After Airbnb Ireland' 5/2020' 1 *European Papers*, 411-428; E. Murati, 'Airbnb and Uber: Two Sides of the same coin' *Medialaws*, available at https://tinyurl.com/y7oyb5pf (last visited 27 December 2020).

[19] A. Chapuis-Doppler and V. Delhomme, n 18 above, 11, refers to a 'minimalist approach' which 'appears overly simplistic'.

[20] L. Van Acker, n 18 above, 80; C. Busch, n 11 above, 174. A. Chapuis-Doppler and V. Delhomme, n 16 above, consider, on the contrary, that the CJEU has not indicated that this is the determining criterion, leaving open the question of the relative importance of the two criteria.

[21] M. Sousa Ferro, n 10 above, 75, calls attention to the fact that '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'. According to the author, 'there is no real reason to justify distinguishing between Uber and Airbnb, for example'. A. Chapuis-Doppler and V. Delhomme, n 18 above, 11, even say that this part of the decision 'albeit crucial, is so short that it is hardly convincing', indicating that the Court 'cherry-picked the facts of the case to conclude that Airbnb provides an ISS'. It is also interesting to note that before the Airbnb Ireland case, there were those who predicted that the CJEU's ruling on Airbnb would be that it has a decisive influence on the accommodation service, see 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*, 93, 80-96 (2018).

situations where the company managing the platform, although not exercising as significant control over the user service provider as in the case of Uber, still plays a very important role.[22]

Airbnb provides intermediation services in the accommodation sector and has significant control over the hosts, who are dependent on it (for carrying out the activity) in most cases.[23] This control will, moreover, as a rule be more relevant to hosts than that of other older intermediaries operating in this market, who will be subject in France to the rules imposed by the Hoguet Act. In many countries, the public authorities themselves work directly with Airbnb and other digital platforms to better implement public policies in the accommodation sector, retaining these applications, for instance, tax payments to be paid by hosts and/or guests.[24] In the light of the CJEU ruling, such practices are likely to be contrary to European law as they restrict the free movement of information society services.[25]

The main problem with this decision is that the European Union, on the one hand, does not want to regulate in a harmonised way the provision of intermediation services in the field of accommodation and, on the other hand, does not respect the differences in the approach of the different Member States, accepting that they regulate the subject.[26] This situation leads to different treatment between companies acting through digital platforms and companies acting through other channels.

3. Direct Effect of the Directive

We will be briefer in considering the CJEU's answer to the second question, namely whether the French rules at issue in the case can be invoked against Airbnb.

Since French law, contrary to European law, provides for a licence to pursue an activity, the question is whether European law is directly applicable, with the relevant entities in the Member State refraining from applying domestic law, or

[22] E. Murati, n 18 above.

[23] This dependence has, moreover, already been recognised by the European Parliament and Council Regulation 2019/1150/EU of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57 of the Recital 2 states that 'given that increasing dependence, the providers of those services often have superior bargaining power, which enables them to, in effect, behave unilaterally in a way that can be unfair and that can be harmful to the legitimate interests of their businesses users'.

[24] C. Busch, 'Regulating Airbnb in Germany' *Journal of European Consumer and Market Law*, 41, 39-41 (2019).

[25] E. Murati, n 18 above.

[26] In this respect, with regard to Uber, see M. Sousa Ferro, n 10 above, 75. A. De Franceschi, 'Uber Spain and the «Identity Crisis» of Online Platforms' *Journal of European Consumer and Market Law*, 4, 1-4 (2018) refers that 'it may be now time to reconsider the competence of the EU Member States do regulate the conditions under which intermediation services such as *Uber* are to be provided'. Already following the Airbnb Ireland case, see L. Van Acker, n 18 above, 80; A. Chapuis-Doppler and V. Delhomme, n 16 above.

whether, on the contrary, national law should continue to apply until it is amended.

What is at stake is essentially the obligation for a Member State wishing to impose a measure restricting the free movement of an information society service to notify the European Commission and the Member State in which the service provider is established in advance.

The CJEU maintains that this is a clear, precise and unconditional obligation and must therefore be recognised as a provision having direct effect, which may be relied on by individuals before national courts (para 90). The Court thus concludes that

> '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'.

IV. Summary of the CJEU Case Law

In the Uber Spain and Uber France cases, the CJEU established case-law according to which a service provided by a digital intermediation platform, in order to be classified as an information society service, and therefore Directive 2000/31/EC to be applicable, must not only comply with the conditions which must be met in order to fulfil the concept (remuneration; at a distance; by electronic means; at the individual request of a recipient of services), but also not to form an integral part of an 'overall service whose main component is a service coming under another legal qualification'.

To answer this last question, the CJEU created a test which includes two decision criteria: (i) whether the platform has created a new market; (ii) whether the platform exercises a decisive influence on the service providers registered with it with regard to the conditions under which the service is provided.[27]

In the case of the UberPop service, the CJEU considers that the platform, on the one hand, has created a new market (in the field of urban transport) and, on the other hand, has a decisive influence on drivers, the latter conclusion being that it sets the price. The UberPop service is therefore not qualified as an information society service and restrictions may be imposed.

In the case of Airbnb, the CJEU considers that the platform has neither created a new market nor exercises a decisive influence on the hosts, conclusions regarding which we have already expressed our disagreement. The service provided by Airbnb is therefore qualified as an information society service and

[27] The Court does not seem to indicate three criteria, see P. Hacker, n 21 above, 85, but only two, which are intended precisely at answering the question of whether the service is part of an overall service whose main component is a service coming under another legal qualification.

no restrictions can be imposed.

We believe that, with the case law in the Airbnb Ireland case, it is difficult for any other intermediation platform not to qualify as an 'information society service' since the boundaries of both the concept of creating a new market and of decisive influence are drawn very close to one extreme.

In his Opinion in the Star Taxi App case, AG Szpunar, points out that the guidance previously given by the CJEU in 'specific circumstances (...) are not necessarily intended to apply in different circumstances'.

With a view to attempting to provide an insight into the future development of the issue, we will now undertake an analysis of the latter case and of the Opinion of the AG.

V. Prospects in Light of the Opinion of the AG in the Star Taxi App Case

The case concerns a smartphone application (Star Taxi App), which brings taxi users and taxi drivers together. After the search is made by the client, the application generates a list of taxi drivers, leaving the choice up to the client. The price is paid at the end of the trip directly to the driver. The company that manages the platform concludes a contract with each taxi driver, under which the latter is obliged to pay a monthly price and the latter is obliged to provide an application and provide a smartphone on which the application is installed. No quality control of the vehicles or taxi drivers is made by the platform, which only guarantees the inclusion of authorised and licensed taxi drivers.

The dispute arises when the Star Taxi App is sanctioned for failing to apply for authorisation under the Romanian law for the activity of 'taxi dispatching' ('activity related to the transport by taxi consisting in receiving customer bookings by telephone or other means and forwarding them to a taxi driver via a two-way radio'). The company disagreed with the application of the penalty and appealed to the court, which decided to refer several questions to the CJEU.

The Romanian court asks, in essence, whether the national legislation at issue in the case is compatible with European law, specifying, inter alia, whether the activity carried out by the company is to be regarded as an information society service.

Not surprisingly, the AG applies the test used in the Uber Spain, Uber France and Airbnb Ireland cases, concluding that it is an information society service. On the one hand, the conditions necessary for the concept to be fulfilled are met. On the other hand, the activity in question does not constitute an overall service the main element of which is a service with another legal qualification. The AG considers that not only does the platform not create a new market, but it also does not have a decisive influence on taxi drivers. As we noted in relation to the CJEU decision on Airbnb, it is unlikely that any digital

intermediation platform would not be qualified, with the test currently applicable, as providing an information society service.

The Opinion of the Advocate General is particularly interesting in this case because of the following reasoning.[28]

A very significant difference between the Star Taxi App case and the Airbnb Ireland case stems from the fact that the Star Taxi App holder is established in Romania, the country in which it intends to operate and in which the dispute takes place, while the company managing Airbnb is established in Ireland, and the dispute arises from operating in another Member State, in this case, France.

Qualified as an information society service in both cases, Directive 2000/31/EC applies. In the case of Airbnb Art 3 of the Directive is applicable. A Member State may not restrict the free movement of services provided by a person established in another Member State if the national provisions applicable in that other Member State are complied with. In the case of Star Taxi App Art 4 applies, which enshrines the principle of non-authorisation, which does not however, affect the 'authorisation schemes which are not specifically and exclusively targeted at information society services'. According to the Advocate General, that provision is intended 'to prevent unequal treatment between Information Society services and similar services which do not fall within that concept' (para 68). The Advocate General concludes in the Star Taxi App case that the Romanian rule is acceptable 'provided that the services governed by those provisions are found to be economically equivalent' (para 77).

The application of different provisions of the Directive, which are radically opposed in similar cases from the point of view of the unequal treatment of information society services and equivalent services other than information society services, whether or not the company is established in another Member State, in turn creates a situation of inequality which should be avoided, not least as an incentive to relocate.[29] When the sole purpose of changing the place where a company is established to another Member State may be to change the legal basis of the analysis in relation to Directive 2000/31/EC, it follows that the solution reached by the CJEU will certainly not be the most desirable to achieve the objective of justice.

Given that Art 4 of Directive 2000/31/EC does not apply to the Romanian legislation involved in the case, the AG then examines the compatibility of the authorisation scheme provided for therein with Directive 2006/123/EC which will apply because there is no conflict between the two directives in the case. The AG considers that it is for the Romanian court to assess whether the conditions laid down in Arts 9 and 10 of Directive 2006/123/EC[30] have been

[28] A. Jabłonowska, 'AG Opinion in Star Taxi App and the Limits of the Principle Excluding Prior Authorisation: Was Uber Spain really necessary?' *Recent Developments in European Consumer Law*, available at https://tinyurl.com/ych2jwbr (last visited 27 December 2020).

[29] E. Murati, n 18 above.

[30] In the Cali Apartments case, the main issue addressed by the CJEU also concerns the

complied with, but maintains that making the issuing of the authorisation 'subject to requirements that are technologically unsuited to the applicant's intended service' (namely 'to have a two-way radio, a secure radio frequency, staff holding a radio telephony operator certificate and a licence to use radio frequencies', a requirement apparently laid down by the Romanian legislation) will breach the criteria set out in Art 10. Such requirements are not acceptable if they apply in the context of an intermediation service through an application for smartphones, as they make access to the market concerned inadmissible.

The CJEU decision follows the Opinion of the AG. We shall now see to what extent the effects of the Airbnb Ireland judgement can be mitigated in the future with regard to the unequal treatment of intermediaries operating through digital platforms and intermediaries operating through other means.

application of these provisions, the Court concluding, among other aspects, that 'national legislation which, for reasons intended to ensure a sufficient supply of affordable long-term rental housing, makes certain activities consisting in the repeated short-term letting, for remuneration, of furnished accommodation to a transient clientele which does not take up residence there subject to a prior authorisation scheme applicable in certain municipalities where rent pressure is particularly severe is (i) justified by an overriding reason relating to the public interest consisting in combating the rental housing shortage and (ii) proportionate to the objective pursued, inasmuch as that objective cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective'.