

It looks like a duck, walks like a duck, quacks like a duck. But is it a taxi? A commentary on the Opinion of Advocate General Szpunar in Case C-434/15 - Asociación Profesional Elite Taxi v Uber Systems Spain SL

Free movement of services - E-commerce Directive - Services Directive - Transport - Collaborative economy - Single Digital Market

Anne Looijestijn-Clearie, Senior Lecturer in European Law, Radboud University Nijmegen, a.looijestijn@jur.ru.nl, 18 July 2017

Introduction

Uber looks like a taxi service and acts like a taxi service. But is Uber a taxi service? This is the question which the Court of Justice of the EU (CJEU) will have to answer in Case C-434/15, *Uber Systems Spain (Uber Spain)*.^[1] The activities of Uber are controversial and have given rise to questions concerning, competition law, consumer law and employment law. A number of domestic courts have prohibited the activities of Uber in their country.^[2] Apart from *Uber Spain*, two further preliminary references have also reached the CJEU concerning the activities of Uber. In the case *Uber Belgium BVBA*,^[3] the CJEU declared the request for a preliminary ruling inadmissible^[4] whereas a case against Uber France SAS is at present pending before the CJEU.^[5] The *Uber Spain* case presents the CJEU with an issue which has received a great deal of media attention, not in the least because this is the first case concerning the collaborative (sharing) economy which the CJEU will have to decide. Advocate General Szpunar handed down his Opinion in this case on 11 May 2017. In this blog, I will discuss the Opinion of the Advocate General.

How does Uber operate?

Uber is an electronic platform developed by Uber Technologies Inc., a company based in San Francisco (USA). In the EU, the Uber platform is operated by Uber BV, a company governed by Dutch law and a subsidiary of Uber Technologies Inc.

The case at hand concerns the Spanish company, Uber Spain SL (Uber Spain), which operates the UberPop service. This service brings potential passengers into contact

with unlicensed drivers who use their own vehicles to pick up passengers for low fares.

It is possible, using a smartphone equipped with Uber app, to order urban transport in the cities where Uber operates. The app recognises the location of the user and finds drivers who are available nearby. When a driver accepts a trip, the app notifies the user of the acceptance and shows the driver's profile together with an estimated fare to the destination requested by the user. Once the trip has been completed, the fare is automatically charged to the bank card which the user is required to enter when signing up to the app. The amount of the fare is calculated by Uber based on the distance and duration of the trip. Uber deducts a percentage of the fare, usually between 20% and 25%, and pays the remainder to the driver.

The app also has a ratings function which enables drivers to be rated by passengers and vice versa. Average scores falling below a certain level may result in a driver's (or passenger's) exclusion from the platform.

Factual Background and Preliminary Questions

Asociación Profesional Elite Taxi (Elite Taxi) is a professional organisation of taxi drivers in the city of Barcelona. In October 2014, Elite Taxi brought an action before a Spanish court asking this court to order Uber Spain to cease using the UberPop service in Barcelona because use of this service allegedly amounts to unfair competition. In particular, Elite Taxi maintained that Uber Spain is not entitled to provide the UberPop service in the city of Barcelona because neither Uber Spain nor the owners or drivers of the vehicles have the licences and authorisation required under the city of Barcelona's Regulation on taxi services.

Since the Spanish court considered that an interpretation of several provisions of EU law was necessary in order for it to give judgment, it referred four questions to the CJEU for a preliminary ruling.

The first two questions concern the classification of Uber's activities in the light of EU law. Does Uber provide:

- A transport service?

- An electronic intermediary service or an information society service within the meaning of Article 1(2) of Directive 98/34/EC (the Technical Standards Directive)?^[6]

Then, if Uber's activities can be considered in part to be an information society service, can the electronic intermediary service benefit from the freedom to provide services as guaranteed in Article 56 TFEU and Directives 2006/123/EC (the Services Directive)^[7] and Directive 2000/31/EC (the E-commerce Directive).^[8] The second two questions concern the conclusions which must be drawn from that classification.

The Opinion of Advocate General Szpunar

Uber's activities in the light of the E-commerce Directive

Uber Spain argued that since the Dutch company, Uber BV, operates the Uber app in the EU including Spain, Elite Taxi should have brought its action against that company and not against Uber Spain SL which only provides advertising for Uber services in Spain. AG Szpunar states that since this is a question of fact, it is for the domestic court to decide which of the two companies should be the addressee of a possible injunction. The AG nonetheless assumes that the Dutch company, Uber BV, operates the Uber app in the EU and should be the defendant in the case. This is important for the existence of a cross-border element.

AG Szpunar starts by examining whether the services offered by Uber can be classified as information society services falling within the scope of the E-commerce Directive. If this is the case, the licences and authorisations required by the city of Barcelona may be incompatible with Article 3(2) of this directive.

In order to do so the AG examines whether the service provided by Uber falls under the definition of 'information society services' laid down in Article 2(a) of the E-commerce directive. This provision refers to services within the meaning of Article 1(2) of the Technical Standards Directive. Pursuant to the latter provision, an information society service is "(...) any service provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". Determining whether the service provided by Uber is for remuneration and at the individual request of a recipient raises no problems. The main problem is establishing whether the service supplied by Uber is provided at a distance by electronic means. Furthermore, the AG emphasises that in order to be considered an

'information society service', a service must be entirely transmitted by electronic means.^[9]

The AG claims that, although this is for the domestic court to determine on the basis of the facts, the service carried out by Uber is a composite service, since part of it is provided by electronic means (connecting potential passengers with drivers) while the other part (the transport of passengers) is, by definition, not provided by electronic means. This raises the question as to whether Uber's service falls within the scope of the E-commerce directive, the objective of which is to ensure the effectiveness of the freedom to provide information society services in the EU.

AG Szpunar distinguishes two situations where a composite service would be treated as being entirely transmitted by electronic means and thus qualify as an 'information society service'. The first is that where the service which is not provided by electronic means is economically independent of the service which is provided by such means. AG Szpunar gives the example of intermediation platforms for the purchase of flight tickets or for making hotel bookings.^[10] In such situations, the service provided by the intermediation platform is economically independent of the services provided by an airline company or a hotel since the latter pursue their activity independently of the platform. Airlines and hotels themselves decide on the conditions under which their services are provided and the price to be paid. Consequently, in such cases, the service provided by the booking platform consists in merely intermediating between the customer and the hotel or airline company. This service is entirely transmitted by electronic means and can, therefore be classed as an 'information society service' within the meaning of the E-commerce Directive.

The second situation is that where, by contrast, the provider of the service supplied by electronic means also provides the services not supplied by such means or where he exercises decisive influence over the conditions under which the service not provided by electronic means is supplied, so that the two services form an inseparable whole. In such a situation, according to the AG, it is necessary to identify the main component of the service, i.e. the component which gives the service meaning in economic terms. In this situation, in order for a service to be classified as an 'information society service', the main component of this service must be performed entirely by electronic means. Here the AG gives the example of the online sale of goods.^[11] In online sales, the main components of the transaction (the making of the offer and acceptance by the purchaser, the conclusion of the contract and, usually, payment for the goods) are performed entirely by electronic means and

consequently fall within the definition of the term 'information society service'. The delivery of the goods is secondary to the contract so that the rules applying to the delivery should not, in principle, affect the supply of the main service.

AG Szpunar goes on to examine the activities of Uber in the light of these observations. Important is whether Uber's activities must be regarded as a whole comprising, first the connecting of passengers and drivers to one another and, second, the supply of transport, or whether these two activities must be considered to be separate services.

The AG first points out that Uber cannot be regarded as a ride-sharing platform because the destination is selected by the passenger (not the driver) and Uber's drivers are paid far more than the mere reimbursement of the expenses incurred.

With regard to the first situation (the service not provided by electronic means is independent of the service provided by such means), the AG observes that Uber cannot be regarded as a mere intermediary between drivers and passengers. The drivers who operate on the Uber platform do not pursue an autonomous activity that is independent of the platform (like an airline or hotel). On the contrary, the activities of the drivers exist solely because of the platform, without which these activities would have no sense. Although similarities may exist as regards the activity of Uber and those carried out by booking platforms, there are significant differences. Both hotels and airline companies function completely independently of the intermediary platform. This is not the case with Uber's drivers. Furthermore, hotels and airline companies themselves determine the conditions under which their services are supplied and the price to be paid. Such companies also operate in accordance with the rules for the specific sector which means that booking platforms do not exercise prior control over access to the activity, as Uber does with its drivers. Lastly, such booking platforms give the user a real choice between different service providers offering different services and conditions which are important from the consumer perspective. This is not the case with Uber.^[12]

As far as the second situation is concerned, the AG points out that Uber controls the economically important aspects of the urban transport service offered through its platform for the following reasons.^[13]

- Uber lays down the conditions which the drivers must fulfil in order to take up and pursue their activity and imposes requirements with regard to the conduct of drivers when providing services.
- Uber financially rewards drivers who collect a large number of trips and informs them of where and when they can rely on there being a large volume of trips and/or advantageous fares. This enables Uber to tailor its supply to fluctuations in demand, without exerting any formal constraints over drivers.
- Uber exerts control, albeit indirectly, over the quality of the drivers' work, which may even result in the exclusion of drivers from the platform.
- Uber effectively determines the price of the service (the fare to be paid).

These observations lead the AG to conclude that "Uber's activity comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and that this service is provided, from an economic standpoint, by Uber or on its behalf."^[14] Consequently, Uber cannot be regarded as a mere intermediary between passengers and drivers. Furthermore, in the context of the composite service offered by Uber, it is undoubtedly transport (i.e. the service not provided by electronic means) which forms the main component of the service and gives it economic value.

AG Szpunar decides that, in relation to the supply of transport, the app whereby passengers and drivers are connected with one another by electronic means is neither self-standing (the first situation) nor the main component of the service (the second situation).^[15]

Consequently, the service offered by Uber cannot be classified as an 'information society service'. Instead the service amounts to the organisation and management of a comprehensive system for on-demand urban transport.

The fact that the concept developed by Uber is innovative does not change the fact that Uber must be regarded as an organiser and operator of urban transport services.

Taking into account the fact that the supply of transport forms, from an economic perspective, the main component, while the services of connecting passengers and drivers with each other by means of the app is a secondary component of the service, the AG concludes that the CJEU's answer should be that the service offered by Uber must be classified as a service in the field of transport. Even though the methods which Uber uses to deliver the transport service are innovative, the core service is nevertheless transport.

Uber's activities in the light of the Services Directive

According to AG Szpunar, the activities of Uber do not fall under the Services Directive. The reason for this is that Article 2(2)(d) of this directive excludes 'services in the field of transport' from its scope of application. Furthermore, it is clear from recital 21 of the preamble to the Services Directive that 'services in the field of transport' within the meaning of this directive include urban transport and taxis.

Uber's activities in the light of Article 56 TFEU

Furthermore, the AG observes that Uber cannot invoke Article 56 TFEU in order to be able to carry out its activities without the necessary licences or authorisations. The reason for this is that Article 58(1) TFEU states that the free movement of services does not apply to services in the field of transport. Such services are subject to the provisions of the TFEU relating to transport (Articles 90 *et seq.*)

Article 91(1)(b) TFEU expressly mentions "the conditions under which non-resident carriers may operate transport services within a Member State" as an area in which rules must be laid down within the framework of the common transport policy.

Final remarks

AG Szpunar does not seem to be fully convinced by the solution which he adopted and which is discussed above. He goes on to examine, under the title 'Final remarks',^[16] the legal effects of the possibility of classifying Uber's booking app as a self-standing service, separate from the transport service, which should be treated as an 'information society service' falling within the scope of application of the E-commerce Directive.

Since the Uber app is operated and provided, to both drivers and passengers alike, by the Dutch company, Uber BV, in other Member States, including Spain, these activities are governed by Article 3(2) and (4) of the E-commerce Directive. Article 3(2) prohibits Member States from restricting the freedom to provide information society services from other Member States, for reasons falling within the coordinated field, unless such restrictions can be justified on the one of the grounds mentioned in Article 3(4). Under Article 2(h)(i) of the E-commerce Directive, the coordinated field covers, *inter alia*, requirements in respect of "the taking up of the activity (...) such as requirements concerning (...) authorisation." However, the third indent of Article

2(h)(ii) states that the coordinated field does not cover requirements applicable to services not provided by electronic means.

Consequently, the requirement to have authorisation in order to provide intermediation services for the provision of urban transport on demand would fall within the scope of the coordinated field and would be caught by the prohibition contained in Article 3(2) of the E-commerce Directive. By contrast, all the requirements imposed on drivers, as regards the taking up and pursuit of the transport activity, fall outside the coordinated field and, thus, the prohibition, since the transport service itself is not provided by electronic means.

This leads the AG to conclude that regarding the service of connecting potential passengers with drivers as independent from the transport service and as an 'information society service' would preclude the requirement to have authorisation to provide such a service, unless such requirement can be justified under Article 3(4) of the E-commerce Directive. This would, nevertheless, have no legal effect, since the activities of the drivers fall outside the scope of the E-commerce Directive and thus may be subjected to licensing requirements by the city of Barcelona.

Conclusion

AG Szpunar concludes that the service offered by Uber cannot be classified as an 'information society service' within the meaning of the E-commerce Directive. The service provided by Uber is a 'service in the field of transport' which is excluded under Article 2(2)(d) from the scope of application of the Services Directive.

The service provided by Uber falls under Articles 90 *et seq.* TFEU relating to transport. This means that Uber cannot rely on Articles 56 *et seq.* TFEU on the free movement of services to challenge the licensing and authorisation requirements of the city of Barcelona. The field of transport falls under the shared competence of the EU and the Member States. This competence has not yet been exercised at EU level. This means that the Member States are competent to adopt their own laws and regulations in this field. Consequently, the city of Barcelona can impose licensing and authorisation requirements on Uber.

If the service of connecting potential passengers and drivers with each other were to be regarded as a self-standing service falling under the E-commerce Directive, the city of Barcelona can still impose licensing requirements on Uber's drivers because the

activities of the drivers (the provision of transport services) is not covered by the E-commerce Directive as such services are not, by definition, provided by electronic means.

Discussion

We will, of course, have to wait and see whether the Grand Chamber of the CJEU follows the Opinion of AG Szpunar. If this is the case, this could level the playing field between Uber and traditional taxi firms operating in the EU, as far as rules concerning licensing, insurance and safety are concerned. Of concern to Uber may also be the *ober dictum* remarks made by the Advocate General concerning the employment status of Uber's drivers^[17] and competition law.^[18]

If the CJEU decides along the same lines as the Advocate General, it is, nonetheless, difficult to predict what ramifications this will have for other companies operating within the framework of the collaborative or sharing economy. Although there are similarities, the business models of certain of such companies, for example Airbnb, differ in a number of respects from that of Uber. Airbnb does not exercise control over the persons renting out the rooms advertised on its site. Also on its website, Airbnb goes to great lengths to emphasise that it does not set the prices charged. The prices and conditions are set by the persons renting out the rooms. On the other hand, like the services supplied by Uber, those provided by Airbnb exist solely because of the platform.

The collaborative economy has also attracted the attention of the European Commission. In June 2016, as part of its Digital Single Market strategy, the Commission published a communication entitled 'A European agenda for the collaborative economy'^[19] in which it emphasised the opportunities which the collaborative economy presents for both consumers and entrepreneurs. In this document, the Commission seems to be adopting a softer approach towards the collaborative economy than AG Szpunar. The Commission states: "In view of the significant benefits that new collaborative economy business models can bring, Europe should be open to embracing these new opportunities. The EU should proactively support innovation, competitiveness and growth opportunities offered by the modernisation of the economy." However, the Commission is also careful to point out that "it is important to ensure fair working conditions and adequate and sustainable consumer and social protection."^[20] Nonetheless, the Commission also

points out that Member States should not permit unjustified and disproportionate obstacles to market access.

Collaborative economy business models provide many opportunities and benefits, but they should not be permitted to operate outside the law. The difficult issue is finding the proper way to regulate such activities.^[21] In the above-mentioned communication, the Commission emphasises that existing EU legislation, such as the E-commerce Directive, the Services Directive and legislation in the field of consumer protection, already apply to the collaborative economy. It could, however, be that the rules of the pre-internet age no longer suffice and that a new regulatory approach is necessary to deal with such business models, given the speed of developments and the ever-changing nature of such business models. To some extent, the Commission may also be of the view that innovative business models require innovative forms of regulation. Further to its recently concluded Fitness Check of consumer and marketing law and evaluation of the Consumer Rights Directive,^[22] on 30 June 2017, the Commission launched a public consultation with regard to a targeted revision of EU consumer legislation.^[23] Approximately half of the legislative changes proposed in the consultation are related to the digital economy including online services and platforms.

Whatever the outcome of the *Uber Spain* case, the ruling of the CJEU is likely to provide further fuel for the debate about how to regulate businesses operating within the framework of the collaborative economy.

[1] ECLI:EU:C:2017:364.

[2] See, V. Hatzopoulos & S. Roma, "Caring for Sharing? The Collaborative Economy Under EU Law", *Common Market Law Review* 54: 2017, p. 90-92.

[3] Case C-526/15, *Uber Belgium BVBA v Taxi Radio Bruxellois NV*, ECLI:EU:C:2016:830. Available only in the Dutch and French languages.

[4] See Article 53(2) of the Rules of Procedure of the Court of Justice of the European Union.

[5] Case C-320/16, *Criminal proceedings against Uber France SAS*.

[6] Directive 98/34/EC 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 and of rules on Information Society services, OJ 1998, L204/37. This directive has since been replaced by 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 rules on Information Society services, OJ 2015, L241/1.

[7] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006, L376/36.

[8] 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 (Directive on electronic commerce), OJ 2000, L178/1.

[9] See Article 1(2) of Directive 98/34/EC.

[10] See paragraphs 33-34 of the Opinion.

[11] See paragraphs 35-36 of the Opinion.

[12] See paragraphs 56-61 of the Opinion.

[13] See paragraphs 43-49 of the Opinion.

[14] See paragraph 53 of the Opinion.

[15] See paragraph 65 of the Opinion.

[16] See paragraphs 75-90 of the Opinion.

[17] See paragraph 54 of the Opinion.

[18] See paragraph 62 of the Opinion.

[19] COM(2016) 356 final.

[20] *Ibid*, p. 16.

[21] See B.G. Edelman & D. Geradin, "Efficiencies and Regulatory Shortcuts: How should we regulate companies like Airbnb and Uber?", 19 *Stan. Tech. L. Rev.* 293(2016).

[22] http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332 (accessed 17-07-2017).

[23] http://ec.europa.eu/info/consultations/public-consultation-targeted-revision-eu-consumer-law-directives_en (accessed 17-07-2017).