Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 11 May 2017[1]

Case C-434/15

Asociación Profesional Elite Taxi
v
Uber Systems Spain SL

(Request for a preliminary ruling from the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3 of Barcelona, Spain))

(Reference for a preliminary ruling — Services in the internal market — Passenger transport — Use of IT tools and a smartphone application — Unfair competition — Requirement for authorisation)

Introduction

1. Although the development of new technologies is, in general, a source of controversy, Uber is a case apart. Its method of operating generates criticisms and questions, but also hopes and new expectations. In the legal field alone, the way Uber works has thrown up questions concerning competition law, consumer protection and employment law, among others. From an economic and social standpoint, the term 'uberisation' has even emerged. This request for a preliminary ruling therefore presents the Court with a highly politicised issue that has received a great deal of media attention.

2. The subject matter of this case is, however, much narrower. The interpretation that the Court has been asked to provide must serve only to ascertain where Uber stands in terms of EU law, in order to determine whether, and to what extent, its functioning falls within the scope of EU law. The main issue is therefore whether possible rules on how Uber operates are subject to the requirements of EU law, in the first place those relating to the freedom to provide services, or whether they fall within the scope of the shared competence of the European Union and the Member States in the field of local transport, a competence which has not yet been exercised at EU level.

1 Original language: French.

Legal context

European Union law

3. Article 1(2) of Directive 98/34/EC[2] provides:

'For the purposes of this Directive, the following meanings shall apply: …

2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

   For the purposes of this definition:

   – "at a distance" means that the service is provided without the parties being simultaneously present,

   – "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

   – "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

   An indicative list of services not covered by this definition is set out in Annex V.

   …'

4. Article 2(a) and (h) of Directive 2000/31/EC[3] provides:

'For the purpose of this Directive, the following terms shall bear the following meanings:

(a) "information society services": services within the meaning of Article 1(2) of [Directive 98/34];

…

(h) "coordinated field": requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

2 Directive 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 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34'). Although Directive 98/34 was repealed on 7 October 2015 in accordance with Article 11 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), it applies *ratione temporis* to the facts in the main proceedings. Indeed, the wording of Article 1(1)(b) of Directive 2015/1535 is essentially the same.

3 Directive 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 L 178, p. 1).

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

– the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

– the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;

(ii) The coordinated field does not cover requirements such as:

…

– requirements applicable to services not provided by electronic means.'

5. Article 3(1), (2) and (4) of Directive 2000/31 provides:

'1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

…

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

– the protection of public health,

– public security, including the safeguarding of national security and defence,

– the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

…'

6. Under Article 2(2)(d) of Directive 2006/123/EC: [4]

'This Directive shall not apply to the following activities:

…

(d) services in the field of transport, including port services, falling within the scope of Title V of the Treaty;

…'

7. The first sentence of Article 3(1) of that directive provides:

'If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions.'

Spanish law

8. There is some confusion surrounding the description provided by the referring court, the parties to the main proceedings and the Spanish Government of the applicable national legal framework. I will set out the key features below, as they result from both the order for reference and the various written observations submitted in the course of these proceedings.

9. First, so far as concerns national rules on transport, Article 99(1) of Ley 16/1987 de Ordenación de los Transportes Terrestres (Law 16/1987 on the organisation of land transport) of 30 July 1987 provides that an authorisation for public passenger transport must be obtained in order to carry out transport of that nature as well as any intermediary activity in the conclusion of such contracts. Nonetheless, the defendant in the main proceedings states that Ley 9/2013 por la que se modifica la Ley 16/1987 y la Ley 21/2003, de 7 de julio, de Seguridad Aérea (Law 9/2013 amending Law 16/1987 and Law 21/2003 of 7 July 2003 on air safety) of 4 July 2013 abolished the requirement to hold a specific licence in order to provide intermediary passenger transport services. However, it is not clear whether this reform was implemented across Spain as a whole.

4 Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

10. At regional and local level, domestic legislation is supplemented, as regards taxi services, by various regulations adopted by the autonomous community of Catalonia and the metropolitan area of Barcelona, including the Reglamento Metropolitano del Taxi (Regulation on taxi services in the metropolitan area of Barcelona), adopted by the Consell Metropolitá de l'Entitat Metropolitana de Transport de Barcelona (Governing Board of the transport management body for the metropolitan area of Barcelona), of 22 July 2004, which requires platforms such as that at issue in the main proceedings to have the necessary licences and administrative authorisations in order to pursue their activity.

11. Lastly, Ley 3/1991 de Competencia Desleal (Law 3/1991 on unfair competition) of 10 January 1991 defines as unfair competition, in Article 4, professional conduct contrary to the rules of good faith, in Article 5, misleading practices and, in Article 15, infringements of the rules governing competitive activity conferring a competitive advantage in the market.

Facts, the main proceedings and the questions referred for a preliminary ruling

The Uber application

12. Uber is the name of an electronic platform [5] developed by Uber Technologies Inc., a company having its principal place of business in San Francisco (United States). In the European Union, the Uber platform is managed by Uber BV, a company governed by Netherlands law and a subsidiary of Uber Technologies.

13. With the aid of a smartphone equipped with the Uber application, the platform allows users to order urban transport services in the cities covered by it. The application recognises the location of the user and finds available drivers who are nearby. When a driver accepts a trip, the application notifies the user of such acceptance and displays the driver's profile together with an estimated fare to the destination indicated 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 application. The application also contains a ratings function, enabling drivers to be rated by passengers and passengers to be rated by drivers. Average scores falling below a given threshold may result in exclusion from the platform.

14. The transport services offered by the Uber platform are divided into different categories depending on the quality of the drivers and the type of vehicle. According to information supplied by the defendant in the main proceedings, at issue in those proceedings is a service by the name of UberPop, whereby non-professional private drivers transport passengers using their own vehicles.

15. The fare scale is drawn up by the operator of the platform based on the distance and duration of the trip. It varies according to the level of demand at any given time, so that the fare may, during peak times, exceed the basic fare several times over. The fare is calculated by the application and charged automatically by the platform operator, who withholds a proportion in respect of its fee, usually between 20% and 25%, and pays the remainder to the driver.

5 Although I use the term 'platform' in this Opinion to describe the system for connecting drivers and passengers with one another and for booking transport services, no conclusions should be drawn from it regarding the nature of the platform. In particular, this term does not mean that a mere intermediary is involved, since Uber is not an intermediary, as I will explain below.

The main proceedings

16. Asociación Profesional Elite Taxi ('Elite Taxi') is a professional organisation representing taxi drivers in the city of Barcelona (Spain). On 29 October 2014, Elite Taxi brought an action before the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3 of Barcelona, Spain) asking the court, inter alia, to make an order against Uber Systems Spain SL ('Uber Spain'), a company governed by Spanish law; to declare that its activities, which allegedly infringe the legislation in force and amount to misleading practices, are acts of unfair competition; to order it to cease its unfair conduct consisting of supporting other companies in the group by providing on-demand booking services by means of mobile devices and the internet, when that is directly or indirectly linked to use of the digital platform Uber in Spain; and to prohibit it from engaging in such activities in the future. According to the referring Court's findings, neither Uber Spain nor the owners or drivers of the vehicles concerned have the licences and authorisations required under the Regulation on taxi services in the metropolitan area of Barcelona.

17. Uber Spain denies having committed any infringement of transport legislation. It argues that it is the company governed by Netherlands law, Uber BV, which operates the Uber application in the European Union, including in Spain, and that the applicant's claims should therefore be directed at that company. Uber Spain claims that it performs only advertising duties on behalf of Uber BV. It repeated those assertions in its observations in this case.

18. Since this concerns a question of fact, it is for the referring court to decide which of the two companies mentioned above should be the addressee of a possible injunction. I have nonetheless assumed that the company Uber BV operates the Uber application in the European Union.[6] This is the premiss — which is not without consequences from the perspective of EU law — on which my analysis will be based. In this Opinion, I shall use the term 'Uber' to refer to the electronic booking platform as well as its operator.

19. I should also point out that, as regards the subject matter of the main proceedings, there is no question here of blocking the Uber application on smartphones or otherwise rendering it unusable. No order or any other measure to that effect has been applied for. In the main proceedings, the only point in issue is the possibility of Uber providing the UberPop service in the city of Barcelona by means of that application.

Questions referred for a preliminary ruling and procedure before the Court

20. As the Juzgado Mercantil No 3 de Barcelona (Commercial Court No 3 of Barcelona) considered that an interpretation of several provisions of EU law was required in order to enable it to give a decision in the case pending before it, it decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Inasmuch as Article 2(2)(d) of [Directive 2006/123] excludes transport activities from the scope of that directive, must the activity carried out for profit by the defendant, consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources — in the words of the defendant, "smartphone and technological platform" interface and software application — which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service, as defined by Article 1(2) of [Directive 98/34]?

6 See, in addition to the information supplied by the defendant in the main proceedings, Noto La Diega, G., 'Uber law and awareness by design. An empirical study on online platforms and dehumanised negotiations', *European Journal of Consumer Law*, No 2015/2, pp. 383 to 413, particularly p. 407.

(2) Within the identification of the legal nature of that activity, can it be considered to be … in part an information society service, and, if so, ought the electronic intermediary service to benefit from the principle of freedom to provide services as guaranteed in [EU] legislation — Article 56 TFEU and Directives [2006/123] and … [2000/31]?

(3) If the service provided by [Uber Spain] were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, is Article 15 of the Law on Unfair competition — concerning the infringement of rules governing competitive activity — contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorisation schemes, when the reference to national laws or legal provisions is made without taking into account the fact that the scheme for obtaining licences, authorisations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment?

(4) If it is confirmed that Directive [2000/31] is applicable to the service provided by [Uber Spain], are restrictions in one Member State regarding the freedom to provide the electronic intermediary service from another Member State, in the form of making the service subject to an authorisation or a licence, or in the form of an injunction prohibiting provision of the electronic intermediary service based on the application of the national legislation on unfair competition, valid measures that constitute derogations from Article 3(2) of Directive [2000/31] in accordance with Article 3(4) thereof?'

21. The request for a preliminary ruling was received at the Court on 7 August 2015. Written observations were lodged by the parties to the main proceedings, the Spanish, Finnish, French and Greek Governments, Ireland, the Netherlands and Polish Governments, the European Commission and the European Free Trade Association (EFTA) Surveillance Authority. With the exception of the Greek Government, those interested parties, together with the Estonian Government, were represented at the hearing held on 29 November 2016.

Analysis

22. The national court refers four questions for a preliminary ruling: the first two concern the classification of Uber's activity in the light of Directives 2000/31 and 2006/123 as well as the FEU Treaty, while the second two concern the conclusions which must, if necessary, be drawn from that classification.

The classification of Uber's activity

23. By its first two questions, the national court essentially enquires whether Uber's activity falls within the scope of Directives 2006/123 and 2000/31 as well as the provisions of the FEU Treaty on the freedom to provide services.

24. In order to reply to these questions, it is necessary, in the first place, to analyse that activity in the light of the system laid down by Directive 2000/31 and the definition of 'information society service' set out in Article 1(2) of Directive 98/34, a definition to which Article 2(a) of Directive 2000/31 refers.

25. In the second place, it will be necessary to determine whether that activity is a transport service or service in the field of transport for the purposes of Article 58(1) TFEU and Article 2(2)(d) of Directive 2006/123. The free movement of services in the field of transport is achieved within the framework of the common transport policy[7] and those services are therefore excluded from the scope of Directive 2006/123 pursuant to the abovementioned provision.

Uber's activity in the light of Directive 2000/31

26. In order to assess whether Uber's activity falls within the scope of Directive 2000/31, reference should be made to the definition of information society services set out in Article 2(a) of that directive. The definition refers to Article 1(2) of Directive 98/34.

27. Under that latter 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. The test as to whether a service is for remuneration and is provided upon individual request does not appear to be problematic. However, the same cannot be said of the test as to whether a service is provided at a distance by electronic means.

28. As briefly explained in the section dealing with the facts of the main proceedings, Uber essentially makes it possible to locate a driver, with the aid of a smartphone application, and connect him with a potential passenger for the purpose of supplying urban transport on demand. We are therefore dealing with a composite service, since part of it is provided by electronic means while the other part, by definition, is not. The question is whether such a service falls within the scope of Directive 2000/31.

– Composite services under Directive 2000/31

29. The aim of Directive 2000/31 is to ensure the effectiveness of the freedom to provide information society services. Those services are defined, in Article 2(a) of the directive, by reference to Article 1(2) of Directive 98/34. Under that latter provision, information society services are, inter alia, '*entirely* transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means'.[8]

30. Of course, some supplies comprise components which are not transmitted by electronic means, because they cannot be dematerialised. The online sale of physical goods is a good example of this since it necessarily falls within the scope of information society services, according to recital 18 of Directive 2000/31. Directive 2000/31 also states that the coordinated field, namely the body of legal rules applying to an information society service and on the basis of which Member States may not, in principle, restrict the activities of providers established in other Member States, does not cover requirements applicable to services not provided by electronic means.[9] Member States are therefore free, subject to the limits which may be imposed by other provisions of EU law, to restrict providers' freedom pursuant to rules concerning services not provided by electronic means.[10]

31. However, in order for Directive 2000/31 to attain its objective of liberalising information society services, liberalisation confined to the electronic component alone must have a real impact on the possibility of pursuing the activity. This is why the legislature focused on services that are, in principle, entirely transmitted by electronic means, any supplies that may be made by other means being simply incidental to such services. It would be pointless only to liberalise a secondary aspect of

7 See Article 90 TFEU, read in conjunction with Article 58(1) TFEU.

8 Second indent of the second subparagraph of Article 1(2) of Directive 98/34. Emphasis added.

9 Article 2(h) and Article 3(2) of Directive 2000/31.

10 See, to that effect, judgment of 2 December 2010, *Ker-Optika* (C-108/09, EU:C:2010:725, paragraphs 29 and 30).

a composite supply if that supply could not be freely made on account of rules falling outside the scope of the provisions of Directive 2000/31. Not only would such apparent liberalisation fail to attain its objective, it would also have adverse consequences, leading to legal uncertainty and diminished confidence in EU legislation.

32. For this reason, an interpretation of the notion of information society services which brings online activities with no self-standing economic value within its scope would be ineffective in terms of the attainment of the objective pursued by Directive 2000/31.

33. In the case of composite services, namely services comprising electronic and non-electronic elements, a service may be regarded as entirely transmitted by electronic means, in the first place, when the supply which is not made by electronic means is economically independent of the service which is provided by that means.

34. This situation arises, in particular, where an intermediary service provider facilitates commercial relations between a user and an independent service provider (or seller). Platforms for the purchase of flights or hotel bookings are one example of this. In those cases, 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.

35. By contrast, where the provider of the service supplied by electronic means is also the provider of the service not supplied by such means or where he exercises decisive influence over the conditions under which the latter service is provided, so that the two services form an inseparable whole, I think it is necessary to identify the main component of the supply envisaged, that is to say, the component which gives it meaning in economic terms. For a service to be classified as an information society service, this main component must be performed by electronic means.

36. This is the case, for example, with the online sale of goods. In online sales, the essential components of the transaction, namely the making of the offer and its acceptance by the purchaser, the conclusion of the contract and, more often than not, payment, are performed by electronic means and fall within the definition of information society service. That was the finding of the Court in its judgment in *Ker-Optika*.[11] The delivery of the goods purchased is simply the performance of a contractual obligation, so that the rules applying to the delivery should not, in principle, affect the provision of the main service.

37. However, I do not think that Directive 2000/31 must be interpreted as meaning that any trade-related online activity, be it merely incidental, secondary or preparatory in nature, which is not economically independent is, per se, an information society service.

38. I will now examine Uber's activity in the light of the foregoing considerations.

– Uber's activity

39. The outcome of this analysis will depend, to a large extent, on whether Uber's activity must be regarded as a whole comprising, first, a supply whereby passengers and drivers are connected with one another by means of the electronic platform and, secondly, the supply of transport in the strict sense, or whether these two supplies must be regarded as two separate services. I will begin by considering this question.

11 Judgment of 2 December 2010 (C-108/09, EU:C:2010:725, paragraphs 22 and 28).

40. When classifying an activity in the light of the relevant legal provisions, a number of factual assumptions must be made. Given that the factual information provided by the referring court is incomplete and the service at issue was suspended in Spain as a result of various injunctions, my analysis will be based on the information available concerning Uber's operating methods in other countries. [12] These operating methods are roughly similar. In any event, it is for the referring court to carry out the definitive factual assessments.

41. What is Uber? Is it a transport undertaking, a taxi business to be blunt? Or is it solely an electronic platform enabling users to locate, book and pay for a transport service provided by someone else?

42. Uber is often described as an undertaking (or platform) in the 'collaborative' economy. I do not think there is any point in discussing the precise meaning of that term here. [13] What is relevant as far as Uber is concerned is that it certainly cannot be considered to be a ride-sharing platform. [14] Drivers on the Uber platform offer passengers a transport service to a destination selected by the passenger and, accordingly, are paid an amount which far exceeds the mere reimbursement of expenses incurred. It is therefore a traditional transport service. Whether or not it is regarded as forming part of a 'collaborative economy' is irrelevant to its classification under the law in force.

43. In its written observations, Uber claims that it simply matches supply (the supply of urban transport) to demand. I think, however, that this is an unduly narrow view of its role. Uber actually does much more than match supply to demand: it created the supply itself. It also lays down rules concerning the essential characteristics of the supply and organises how it works.

44. Uber makes it possible for persons wishing to pursue the activity of urban passenger transport to connect to its application and carry out that activity subject to the terms and conditions imposed by Uber, which are binding on drivers by means of the contract for use of the application. There are numerous terms and conditions. They cover both the taking up and pursuit of the activity and even the conduct of drivers when providing services.

45. Thus, in order to access the Uber application as a driver, you must have a car. [15] The vehicles permitted to drive on behalf of Uber must satisfy certain conditions which seem to vary depending on the country and city. As a general rule, however, they must be four- or five-door passenger vehicles subject, at least, to an age limit. The vehicles must have passed a roadworthiness inspection and comply with the provisions on mandatory insurance. [16]

46. Drivers must obviously be in possession of a driving licence (held for a specific period) and have no criminal record. In some countries, a list of traffic offences is also required.

12 The way in which Uber functions is already the subject of extensive academic writings. See, in particular, Noto La Diega, G., op. cit.; Rogers, B., 'The Social Cost of Uber', *The University of Chicago Law Review Dialogue*, 82/2015, pp. 85 to 102; Gamet, L., 'UberPop (†)', *Droit social*, 2015, p. 929; and Prassl, J., and Risak, M., 'Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork', *Comparative Labor Law & Policy Journal*, vol. 37 (2016), pp. 619 to 651. The factual issues relating to Uber's operating method are also apparent from decisions of Member States' national courts such as, for example, judgment of the London Employment Tribunal of 28 October 2016, *Aslam, Farrar and Others -v- Uber* (Case 2202551/2015); decision of the Audiencia Provincial de Madrid No 15/2017 of 23 January 2017 in an action between Uber and the Asociación Madrileña del Taxi; and order of the Tribunale Ordinario di Milano of 2 July 2015 (cases 35445/2015 and 36491/2015).

13 On the notion of the collaborative economy see, in particular, Hatzopoulos, V., and Roma, S., 'Caring for Sharing? The Collaborative Economy under EU Law', *Common Market Law Review*, No 54, 2017, pp. 81 to 128, p. 84 et seq. The Commission has proposed a definition of this notion in its communication entitled 'A European agenda for the collaborative economy' (COM(2016) 356 final, p. 3). However, being so broad, it is doubtful the definition could be used to mark out a sufficiently differentiated type of activity which would warrant specific legal treatment.

14 Ride sharing involves sharing a common journey, determined by the driver and not the passenger, in return for at the most, for the driver, reimbursement of part of the travel costs. Contact between drivers and potential passengers is facilitated by online applications. It is therefore a sort of 'hitchhiking 2.0'. In any case, it is not a gainful activity.

15 Uber denies making vehicles available to drivers but, through its Ubermarketplace service, it acts as an intermediary between drivers and car hire and leasing businesses.

16 However, it is not clear if this refers to the requirements applying to vehicles intended to be used in the paid transport of passengers or simply the formalities applying to vehicles for private use.

47. Although there are no rules on working time within the framework of the Uber platform, so that drivers may pursue that activity alongside others, it is apparent that most trips are carried out by drivers for whom Uber is their only or main professional activity. Drivers also receive a financial reward from Uber if they accumulate a large number of trips. In addition, Uber informs drivers of where and when they can rely on there being a high volume of trips and/or preferential fares. Thus, without exerting any formal constraints over drivers, Uber is able to tailor its supply to fluctuations in demand.

48. The Uber application contains a ratings function, enabling drivers to be rated by passengers and vice versa. An average score falling below a given threshold may result in exclusion from the platform, especially for drivers. Uber therefore exerts control, albeit indirect, over the quality of the services provided by drivers.

49. Lastly, it is Uber that sets the price of the service provided. That price is calculated based on the distance and duration of the trip, as recorded by the application by means of GPS. An algorithm then adjusts the price to the intensity of the demand, by applying an appropriate multiplier to the basic fare when demand increases as a result of, for instance, an event or simply a change in the weather conditions, such as a storm.

50. Although Uber's representatives stated at the hearing that drivers are, in principle, free to ask for a lower fare than that indicated by the application, this does not seem to me to be a genuinely feasible option for drivers. Although drivers are theoretically given such a discretion, the fee Uber charges is the amount resulting from the fare as calculated by the application. Since any reduction in the fare paid by the passenger is to the detriment of the driver, it is unlikely that drivers would exercise that discretion.[17] Consequently, I think it is hard to deny that the fare is set by Uber.

51. Thus, Uber exerts control over all the relevant aspects of an urban transport service: over the price, obviously, but also over the minimum safety conditions by means of prior requirements concerning drivers and vehicles, over the accessibility of the transport supply by encouraging drivers to work when and where demand is high, over the conduct of drivers by means of the ratings system and, lastly, over possible exclusion from the platform. The other aspects are, in my opinion, of secondary importance from the perspective of an average user of urban transport services and do not influence his economic choices. Uber therefore controls the economically significant aspects of the transport service offered through its platform.

52. While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect,[18] makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.

53. The foregoing leads me 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,[19] by Uber or on its behalf. The service is also presented to users, and perceived by them, in that way. When users decide to use Uber's services, they are looking for a transport service offering certain functions and a particular standard of quality. Such functions and transport quality are ensured by Uber.

17 See judgment of the London Employment Tribunal cited in footnote 12, paragraph 18.

18 The high number of drivers allows the desired result to be achieved without having to exercise direct and individual control over each of them. On the other hand, the high number of passengers ensures effective and relatively objective control over drivers' conduct, relieving the platform of that task.

19 I am not addressing here the classification of the legal relationship between Uber and its drivers, which is a matter for national law.

54. The above finding does not, however, mean that Uber's drivers must necessarily be regarded as its employees. The company may very well provide its services through independent traders who act on its behalf as subcontractors. The controversy surrounding the status of drivers with respect to Uber, which has already resulted in court judgments in some Member States,[20] is wholly unrelated to the legal questions before the Court in this case.

55. The same is true regarding the question of ownership of the vehicles. The fact that Uber is not the owner is, in my view, irrelevant, since a trader can very well provide transport services using vehicles belonging to third persons, especially if he has recourse to such third persons for the purpose of those services, notwithstanding the nature of the legal relationship binding the two parties.

56. On the other hand, I take the view that the finding made immediately above prevents Uber being treated as a mere intermediary between drivers and passengers. Drivers who work on the Uber platform do not pursue an independent activity that exists independently of the platform. On the contrary, the activity exists solely because of the platform,[21] without which it would have no sense.

57. That is why I think it is wrong to compare Uber to intermediation platforms such as those used to make hotel bookings or purchase flights.

58. Similarities clearly exist, for instance as regards the mechanisms for booking or purchasing directly on the platform, the payment facilities or even the ratings systems. These are services offered by the platform to its users.

59. However, in contrast to the situation of Uber's drivers, both hotels and airlines are undertakings which function completely independently of any intermediary platform and for which such platforms are simply one of a number of ways of marketing their services. Furthermore, it is the hotels and airlines — and not the booking platforms — that determine the conditions under which their services are provided, starting with prices.[22] These undertakings also operate in accordance with the rules specific to their sector of activity, so that booking platforms do not exert any prior control over access to the activity, as Uber does with its drivers.

60. Lastly, such booking platforms give users a real choice between several providers whose offers differ on a number of important points from the users' perspective, such as flight and accommodation standards, flight times and hotel location. By contrast, with Uber, these aspects are standardised and determined by the platform, so that, as a general rule, the passenger will accept the service of the most quickly available driver.

61. Uber is therefore not a mere intermediary between drivers willing to offer transport services occasionally and passengers in search of such services. On the contrary, Uber is a genuine organiser and operator of urban transport services in the cities where it has a presence. While it is true, as Uber states in its observations in the case, that its concept is innovative, that innovation nonetheless pertains to the field of urban transport.

20 See, in particular, judgment of the London Employment Tribunal cited in footnote 12.

21 Or a similar platform, as the model underpinning Uber has, since its creation, been replicated, although without achieving the same prominence.

22 The fact that some platforms conclude rate parity agreements with hotels, under which hotels agree to refrain from offering rates elsewhere which are lower than those offered on the platform in question, is immaterial. These agreements do not involve the setting of prices for the services by the platform, but a commitment concerning the rate-related treatment of different trading partners. All the same, the competition authorities of several Member States have questioned rate parity clauses, which led to the establishment of the European working group on online booking platforms, under the aegis of the Commission.

62. I must also point out that classifying Uber as a platform which groups together independent service providers may raise questions from the standpoint of competition law.[23] However, I will not develop this point further, as it oversteps the boundaries of the present case.

63. Under Uber's operating system, the connecting of potential passengers and drivers with one another does not, therefore, have any economic value of its own because, as explained above, drivers working for Uber do not pursue — at least when they are driving in the context of Uber's services — an independent economic activity. Within the framework of that service, first, Uber's drivers are only able to locate passengers through the Uber application and, secondly, that application allows only drivers working on the platform to be located. One is thus inseparable from the other and together they form a single service. I do not think that the supply of transport in the strict sense can be regarded as being of secondary importance, either.

64. It is true that the innovative nature of the Uber platform is to a large extent based on the use of new technologies, such as GPS and smartphones, in order to organise urban transport. However, the innovation does not stop there: it also extends to the organisation of the transport itself, without which Uber would be a mere taxi booking application. Accordingly, within the context of this service, it is undoubtedly the supply of transport which is the main supply and which gives the service economic meaning. Users look for drivers with one aim in mind: to be transported from A to B. Hence the connection stage is merely preparatory in order to enable the main supply to be performed in the best possible conditions.

65. The supply whereby passengers and drivers are connected with one another is therefore neither self-standing, nor the main supply, in relation to the supply of transport. Consequently, it cannot be classified as an 'information society service'. Such a classification would not permit the attainment of the objectives of liberalisation underpinning Directive 2000/31 because, even if the connection activity were liberalised, Member States would be free to render its pursuit impossible by imposing rules on the transport activity. Thus, the only outcome of such liberalisation would be that the Member State where the service provider is established would be able to benefit from the establishment (as a result of investments, new jobs and tax revenue), while preventing the provision of the service on its territory pursuant to the rules on supplies not covered by Directive 2000/31.[24] Such a situation would undermine the entire rationale behind the freedom to provide information society services as organised by the directive, which is based on the supervision of the legality of the provider's operations by the Member State where he is established and the recognition of that supervision by other Member States.[25]

66. The above situation, where the functioning of the platform is not formally prohibited but, on account of the actual model used by the UberPop service, is based on non-professional drivers, the transport activity cannot be pursued in compliance with the law, has another unwanted effect. It has been shown that Uber uses a number of methods, which have been reported in the press, to prevent the authorities running checks on its drivers, such as temporarily disconnecting the application in some areas. Uber also offers legal and financial assistance to drivers who have been penalised for

23 For example, the use by competitors of the same algorithm to calculate the price is not in itself unlawful, but might give rise to hub-and-spoke conspiracy concerns when the power of the platform increases. Regarding possible problems associated with the Uber model from the standpoint of competition law, see Hatzopoulos, V., and Roma, S., op. cit., pp. 110 and 120, as well as Ezrachi, A., and Stucke, M.E., 'Artificial Intelligence & Collusion: When Computers Inhibit Competition', *CCLP Working Paper 40*, Oxford 2015, p. 14. Also see judgments of 22 October 2015, *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717), and of 21 January 2016, *Eturas and Others* (C-74/14, EU:C:2016:42, paragraphs 27 and 28 and the case-law cited), as well as my Opinion in that case (C-74/14, EU:C:2015:493).

24 I note that, according to the information available, the UberPop service was prohibited in the Netherlands, the Member State of establishment of the company Uber BV, by judgment of the College van Beroep voor het bedrijfsleven of 8 December 2014 (AWB 14/726, ECLI:NL:CBB:2014:450). See Hatzopoulos, V., and Roma, S., op. cit., p. 91.

25 See Article 3(1) and (2) of Directive 2000/31.

providing transport services without the requisite authorisation. Drivers themselves have various ways of evading checks.[26] Thus, this incomplete — or simply apparent — liberalisation, whereby one component of a composite activity is liberalised while another remains regulated, creates legal uncertainty, giving rise to grey areas and encouraging infringements of the law.

Uber's activity in the light of Directive 2006/123

67. It is not surprising that Uber's activity, as described in the preceding points, namely as a single supply comprising both the identification of an available driver and the trip booking as well as the supply of transport *stricto sensu*, may be regarded as a service in the field of transport within the meaning of Article 2(2)(d) of Directive 2006/123.

68. Although the wording of that provision, which excludes 'services in the field of transport' from the scope of Directive 2006/123, does not seem to be sufficient in itself to reach such a finding, recital 21 of the directive leaves no doubt as it states that the services in question include 'urban transport [and] taxis'. It is therefore not necessary to enter into discussions as to whether Uber's services constitute a kind of taxi service: all forms of urban transport are mentioned and Uber is certainly one of them.

69. Uber's activity will also have to be classified as falling within the scope of the exception to the freedom to provide services laid down in Article 58(1) TFEU and be subject to the rules laid down in Article 90 et seq. TFEU. 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. If it is accepted, as I have submitted, that Uber provides urban transport services, it must then be regarded, if not as a carrier in the strict sense, then at the very least as an organiser of transport services.

70. Thus, without there even being any need to examine the judgment in *Grupo Itevelesa and Others*,[27] which the national court mentioned in its order for reference, it must be concluded that Uber's activity constitutes a service in the field of transport within the meaning of Article 2(2)(d) of Directive 2006/123. It is therefore excluded from the scope of that directive. Furthermore, Uber's activity is covered by the exception to the freedom to provide services contained in Article 58(1) TFEU and is governed by the provisions of Article 90 et seq. TFEU.

Conclusion on the first and second questions referred for a preliminary ruling

71. To summarise the foregoing considerations, my opinion is that, in the case of composite services, consisting of a component provided by electronic means and another component not provided by such means, the first component must be either economically independent of the second or the main component of the two in order to be classified as an 'information society service'. Uber's activity must be viewed as a whole encompassing both the service of connecting passengers and drivers with one another by means of the smartphone application and the supply of transport itself, which constitutes, from an economic perspective, the main component. This activity cannot therefore be split into two, for the purpose of classifying a part of the service as an information society service. Consequently, the service must be classified as a 'service in the field of transport'.

26 Including Greyball software, which makes it possible to avoid checks by the authorities. See 'Uber Uses Tech to Deceive Authorities Worldwide', *The New York Times* of 4 March 2017.

27 Judgment of 15 October 2015 (C-168/14, EU:C:2015:685).

72. I therefore propose that the Court should answer the first and second questions referred for a preliminary ruling as follows:

– Article 2(a) of Directive 2000/31, read in conjunction with Article 1(2) of Directive 98/34, must be interpreted as meaning that a service that connects, by means of mobile telephone software, potential passengers with drivers offering individual urban transport on demand, where the provider of the service exerts control over the key conditions governing the supply of transport made within that context, in particular the price, does not constitute an information society service within the meaning of those provisions.

– Article 58(1) TFEU and Article 2(2)(d) of Directive 2006/123 must be interpreted as meaning that the service described in the preceding point constitutes a transport service for the purposes of those provisions.

73. It will, of course, be for the referring court to assess, in the light of its own factual findings, whether the activity at issue in the main proceedings meets the test on control set out above. Nonetheless, I note that several courts in different Member States have already ruled to that effect.[28] This could serve as guidance for the referring court, in the spirit of a justice network.

Final remarks

74. In view of my proposed answers to the first and second questions referred for a preliminary ruling, the third and fourth questions have become irrelevant. In my final remarks, I would like, however, to analyse the legal effects of the possibility of classifying the supplies provided by Uber as a self-standing service, confined to connecting passengers and drivers with one another, which would therefore not cover the supply of transport in the strict sense. Such a service would undoubtedly be treated as an 'information society service', but I do not think it would be necessary to address the question whether that service falls within the field of transport.

The connection service as an information society service

75. To recap, Article 1(2) of Directive 98/34 provides that an information society service is a service provided for remuneration, at a distance, by electronic means and at the individual request of a recipient. A service that connects potential passengers and drivers with one another by means of a smartphone application would certainly meet those criteria.

76. As regards the remunerated nature of the service, under the Uber system, part of the fare paid by the passenger goes to the operator of the platform. The connection service is thus remunerated by the passenger once the supply of transport has been completed.

77. This service, examined separately from the supply of transport, is also provided at a distance, since the two parties, Uber and the recipient of the service, are not simultaneously present. It is performed with the aid of a smartphone application that operates by means of the internet, which is clearly covered by the notion of provision by electronic means. It is indeed the only way of booking a trip on the Uber platform. Lastly, the service is provided not in a continuous manner, but at the request of the recipient.

78. Uber's service, as described in point 74 of this Opinion, therefore falls within the scope of the provisions of Directive 2000/31.

28 See, in particular, the national decisions cited in footnote 12 of this Opinion.

79. Since the Uber application is managed and provided, to both drivers and passengers alike, on the territory of the European Union by the company Uber BV established in the Netherlands, in other Member States, including Spain, such provision is effected within the framework of the freedom to provide services, governed, in particular, by Article 3(2) and (4) of Directive 2000/31.

80. Pursuant to those provisions, 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. The coordinated field covers, inter alia, under the first indent of Article 2(h)(i) of Directive 2000/31, requirements in respect of 'the taking up of the activity …, such as requirements concerning … authorisation …'. On the other hand, the third indent of Article 2(h)(ii) provides that the coordinated field does not cover 'requirements applicable to services not provided by electronic means'.

81. It follows that the requirement to have authorisation in order to provide intermediation services in the conclusion of urban transport contracts on demand, if it is still in force [29] and in so far as it applies to the connection service provided by the Uber platform, would fall within the scope of the coordinated field and would therefore be caught by the prohibition laid down in Article 3(2) of Directive 2000/31. By contrast, all the requirements applying to drivers, as regards both the taking up and pursuit of the transport activity, fall outside the coordinated field and, consequently, the prohibition, since the transport service, by its very nature, is not provided by electronic means.

82. Under Article 3(4) of Directive 2000/31, Member States may take measures to derogate from the freedom to provide information society services if they are necessary for reasons of public policy, public health, public security or the protection of consumers.

83. Although the fourth question referred for a preliminary ruling precisely concerns the justification for the domestic measures at issue, the national court does not set out in its request the reasons which might warrant making the intermediary activity in the field of transport subject to an authorisation requirement. In its observations, the Spanish Government puts forward reasons such as traffic management and road safety. However, these seem rather to be reasons which may justify the requirements imposed on drivers providing transport services.

84. So far as specifically concerns intermediary services, the only reason put forward by the Spanish Government which could apply to Uber is that relating to transparency in fixing prices, which falls within the scope of consumer protection. I recall that, under the Uber system, the fare is set not by the driver but by the platform. Nevertheless, it seems to me that such transparency could be ensured by means which are less restrictive than the requirement to have authorisation for the intermediary activity, such as a passenger information obligation. Such a requirement would thus not meet the criterion of proportionality, expressly provided for in Article 3(4)(a)(iii) of Directive 2000/31.

85. The complexity of the action in the main proceedings arises, however, from the fact that its aim is to have penalties imposed on Uber for allegedly engaging in acts of unfair competition towards the applicant's members. [30] Those acts are said to be the result not only of the fact that Uber pursued the intermediary activity in the conclusion of transport contracts without having the necessary authorisation, but also of the fact that drivers who provide transport services within the framework of the Uber platform do not satisfy the conditions laid down in Spanish law applicable to such services. Those conditions are not covered by Directive 2000/31 or by Directive 2006/123, since they undoubtedly fall within the field of transport.

29 See my remarks on the issue in point 9 of this Opinion.

30 I recall that the main proceedings do not concern the actual functioning of the Uber application, but rather the provision of the UberPop service in the city of Barcelona.

86. Do the provisions of Directive 2000/31 therefore prevent the imposition of penalties on Uber on account of unfair competition resulting from the activity of drivers providing transport services on that platform? As explained above,[31] Uber is not, in my view, a mere intermediary between passengers and drivers. It organises and manages a comprehensive system for on-demand urban transport. Accordingly, it is responsible not only for the supply whereby passengers and drivers are connected with one another, but also for the activity of those drivers. The same would be true even if the connection supply were to be regarded as independent of the supply of transport in the strict sense, since these two supplies would ultimately be performed by Uber or on its behalf.

87. The interpretation to the effect that, in order to ensure the effectiveness of Directive 2000/31, Uber's activity as a whole should benefit from the liberalisation provided for in that directive must, in my view, be rejected. Such an interpretation would be at odds with the express provisions of Directive 2000/31, under which only requirements concerning services provided by electronic means are covered by the prohibition laid down in Article 3(2) of the directive.[32] In accordance with that interpretation, any economic activity could theoretically fall within the scope of Directive 2000/31, because all traders are currently in a position to offer services by electronic means, such as information on goods or services, bookings, appointments or payment.

88. Directive 2000/31 thus does not preclude requirements relating to the activity of transport in the strict sense being established in national law or the imposition of penalties on Uber for failing to comply with those requirements, including by means of an injunction ordering it to discontinue the service. Uber's activity, at least as far as the UberPop service is concerned, in issue in the main proceedings, is organised in such a way that Uber cannot, as matters stand, comply with the requirements. Uber relies on non-professional drivers who, as they do not have an urban transport licence, by definition, do not satisfy the requirements concerned. Treating the connection activity as an information society service would not alter that finding, since the services of drivers fall outside the scope of Directive 2000/31. This demonstrates the artificiality of distinguishing between a service that is provided by electronic means and one that is not, where the two supplies are so closely linked to each other and are provided by the same person.

89. However, I do not think that the need to ensure the effectiveness of the rules on the provision of transport services *stricto sensu* can warrant the establishment, as a preventive measure, of the requirement to have authorisation for intermediation services in general. Unlawful activities in that field can be countered only with a system of enforcement.

90. In conclusion, I take the view that, if the service of connecting potential passengers and drivers with one another were to be regarded as independent of the supply of transport in the strict sense and, therefore, as an information society service, Article 3(2) of Directive 2000/31 would preclude the requirement to have authorisation in order to provide such a service, unless that requirement was justified on one of the grounds listed in Article 3(4) and was proportionate to the aim pursued, which seems to me to be unlikely. However, this would have no real legal effect, since the connection service has no economic meaning without the supplies of transport which, by contrast, the national legislature may make subject to numerous requirements.

31 See, in particular, points 43 to 53 of this Opinion.

32 See Article 3(2) of Directive 2000/31, read in conjunction with the third indent of Article 2(h)(ii). That provision is confirmed by recital 18 of the directive.

Applicability of Directive 2006/123

91. As regards the applicability of Directive 2006/123, I do not consider it necessary to examine the question whether a service that connects, by means of a smartphone application, potential passengers with drivers offering urban transport on demand is covered by the concept of service in the field of transport within the meaning of Article 2(2)(d) of that directive.

92. Article 3(1) of Directive 2006/123 provides that precedence is to be given to provisions of other acts of EU law governing the access to and exercise of a service activity in specific sectors if those provisions conflict with the directive. Even though Directive 2000/31 is not one of the acts listed in that provision, the wording 'these [acts] include' clearly suggests, in my view, that the list is not exhaustive and is confined to acts the inclusion of which is not self-evident per se. Directive 2000/31 is a *lex specialis* in relation to Directive 2006/123 to the extent that, even in the absence of Article 3(1) of Directive 2006/123, it would have to be given precedence in keeping with the adage *lex posterior generali non derogat legi priori speciali*.

93. Therefore, if the connection activity were to be regarded as being covered by Directive 2000/31, it would fall outside the scope of Directive 2006/123.

Conclusion

94. In view of all of the foregoing considerations, I propose that the Court should answer the questions referred by the Juzgado Mercantil No 3 de Barcelona (Commercial Court No 3 of Barcelona, Spain) for a preliminary ruling as follows:

(1) Article 2(a) of 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'), read in conjunction with Article 1(2) of 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, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that a service that connects, by means of mobile telephone software, potential passengers with drivers offering individual urban transport on demand, where the provider of the service exerts control over the key conditions governing the supply of transport made within that context, in particular the price, does not constitute an information society service within the meaning of those provisions.

(2) Article 58(1) TFEU and Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as meaning that the service described in the preceding point constitutes a transport service for the purposes of those provisions.