Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 30 April 2019[1]

Case C-390/18

in the presence of:
YA,
AIRBNB Ireland UC,
Hotelière Turenne SAS,
Association pour un hébergement et un tourisme professionnel (AHTOP),
Valhotel

(Request for a preliminary ruling from the investigating judge of the Tribunal de grande instance de Paris (Regional Court, Paris) (France))

(Reference for a preliminary ruling — Freedom to provide services — Directive 2000/31/EC — Connection of hosts, whether businesses or individuals, with accommodation available to rent with persons seeking that type of accommodation — Additional provision of various other services — National legislation laying down restrictive rules for the exercise of the profession of real estate agent)

I. Introduction

1. In the judgments in *Asociación Profesional Elite Taxi*[2] and *Uber France*,[3] the Court held that an intermediation service the purpose of which is to connect non-professional drivers using their own vehicles with persons wishing to make urban journeys, which is inherently linked to a transport service, does not constitute an information society service and is excluded from the scope of Directive 2000/31/EC.[4]

2. The present case also relates to the problem of the classification of services provided via electronic platforms. The Court is requested by the investigating judge of the Tribunal de grande instance de Paris (Regional Court, Paris) (France) to determine whether a service consisting in connecting hosts with accommodation to rent with persons seeking that type of accommodation corresponds to the definition of 'information society services' and thus benefits from the free movement of services, as guaranteed by Directive 2000/31.

1 Original language: French.

2 Judgment of 20 December 2017 (C-434/15, EU:C:2017:981, paragraph 48).

3 Judgment of 10 April 2018 (C-320/16, EU:C:2018:221, paragraph 27).

4 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).

II. Legal framework

A. EU law

3. The alleged facts occurred during the period between 11 April 2012 and 24 January 2017. In that regard, it should be noted that, with effect from 7 October 2015, Directive (EU) 2015/1535[5] repealed and replaced Directive 98/34/EC.[6] Article 2(a) of Directive 2000/31 defines 'information society services' by reference to Article 1(1) of Directive 2015/1535, which provides:

'For the purposes of this Directive, the following definitions apply:

…

(b) "service" means 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:

(i) "at a distance" means that the service is provided without the parties being simultaneously present;

(ii) "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;

(iii) "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 I;

…'

4. The definition of 'information society service' in Article 1(b) of Directive 2015/1535 is essentially identical to that given in Article 1(2) of Directive 98/34. Furthermore, references to Directive 98/34 are to be construed as references to Directive 2015/1535.[7] For those reasons, the analysis concerning the classification of a service as an 'information society service' within the meaning of Directive 2015/1535, to which I shall therefore refer in this Opinion, is, to my mind, capable of being transferred to the provisions of Directive 98/34.

5. In the words of Article 2(h) of Directive 2000/31:

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

…

5 Directive 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). See Article 10 of that directive.

6 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 (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').

7 See Article 10 of Directive 2015/1535.

(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.

(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 goods as such,

– requirements applicable to the delivery of goods,

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

6. Article 3 of that directive reads as follows:

'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.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

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.

5. Member States may, in urgent cases, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.'

B. French law

7. Article 1 of Law No 70-9 of 2 January 1970 regulating the conditions of the exercise of activities relating to certain transactions concerning real property and business assets, in its consolidated version, ('the Hoguet law') [8] provides:

'The provisions of the present law shall apply to natural or legal persons who habitually engage in or provide their assistance, even on an ancillary basis, to transactions affecting the assets of others and relating to:

1. The purchase, sale, search, exchange, letting or sub-letting, seasonal or otherwise, furnished or unfurnished, of existing property or property under construction;

…'

8. Article 3 of the Hoguet law provides:

'The activities referred to in Article 1 may be practised only by natural or legal persons in possession of a professional licence issued, for a period and according to the procedures determined by decree in the Council of State, by the President of the district Chamber of Commerce and Industry or by the President of the departmental Chamber of Commerce and Industry of Île-de-France, specifying those transactions that they may carry out.

This licence may be issued only to natural persons who meet the following conditions:

1 they provide proof of their professional ability;

2 they provide proof of a financial guarantee permitting the reimbursement of funds …;

8 *JORF* of 4 January 1970, p. 142.

3 they obtain insurance against the financial consequences of their professional civil liability;

4 they are not disqualified for or prohibited from practising …'

9. Furthermore, Article 5 of that law states:

'The persons referred to in Article 1 who receive or hold sums of money … must comply with the conditions laid down by decree of the Council of State, in particular the formalities of keeping records and issuing receipts and the other obligations arising under the mandate.'

10. A decree therefore requires that special registers, records and detailed accounts be kept, with the aim of preserving the interests of individuals who entrust funds to intermediaries.

11. Last, Article 14 of the Hoguet law states that failure to hold a professional licence is to be punishable by 6 months' imprisonment and a fine of EUR 7 500. Furthermore, under Article 16 of that law a term of imprisonment of 2 years and a fine of EUR 30 000 may be imposed on a person who handles sums of money in breach of the obligation to hold a professional licence (Article 3) or of the obligation to maintain special registers, records and detailed accounts (Article 5).

III. The facts of the main proceedings

12. AIRBNB Inc., a company established in the United States, is the parent company of the AIRBNB group.

13. AIRBNB Ireland UC, a company governed by Irish law established in Dublin (Ireland), is part of the AIRBNB group and is wholly owned by AIRBNB Inc. AIRBNB Ireland administers, for all users established outside the United States, an online platform designed to connect, on the one hand, hosts (professionals and individuals) with accommodation available to rent with, on the other hand, persons seeking that type of accommodation.

14. Following a complaint against an unknown person, together with an application to join in the proceedings as civil party, lodged by, in particular, the Association pour un hébergement et un tourisme professionnel (AHTOP), the Prosecutor's Office, Paris (France) on 16 March 2017 issued an initial indictment for handling of funds, for activities involving mediation and management of real property and business activities by a person not in possession of a professional licence, in accordance with the Hoguet law, and for other offences, alleged to have been committed between 11 April 2012 and 24 January 2017, and changed the status of AIRBNB Ireland to a 'témoin assisté' (a person who is not merely a witness, but to some extent a suspect).

15. AIRBNB Ireland denies acting as a real estate agent and claims that the Hoguet law is inapplicable on the ground that it is incompatible with Directive 2000/31.

IV. The questions for a preliminary ruling and the procedure before the Court

16. It was in those circumstances that the investigating judge of the Tribunal de grande instance de Paris (Regional Court, Paris) (France), by decision of 6 June 2018, received at the Court on 13 June 2018, decided to stay proceedings and to refer the following questions to the Court:

'(1) Do the services provided in France by the company AIRBNB Ireland via an electronic platform managed from Ireland benefit from the freedom to provide services provided for in Article 3 of [Directive 2000/31]?

(2) 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 the company AIRBNB Ireland?'

17. Written observations have been lodged by AIRBNB Ireland, AHTOP, the French, Czech, Spanish and Luxembourg Governments and the European Commission. Those parties, with the exception of the Czech and Luxembourg Governments, were represented at the hearing that was held on 14 January 2019.

V. Analysis

A. The first question

18. By its first question, the referring court seeks, in essence, to ascertain whether the services provided by AIRBNB Ireland must be considered as falling within the classification of 'information society services' within the meaning of Article 1(1)(a) of Directive 2015/1535, to which Article 2(a) of Directive 2000/31 refers, and as benefiting, therefore, from the free movement ensured by that directive.

19. Pursuant to Article 3(1) of Directive 2000/31, each Member State is to ensure that the information society services provided by a service provider established in its territory comply with the national provisions applicable in the Member State in question that fall within the coordinated field. According to Article 3(2) of that directive, on the other hand, Member States other than that in whose territory a service provider is established may not, in principle, for reasons falling within the coordinated field, restrict the free movement of such services. It is therefore the information society services that benefit from the freedom to provide services referred to in the first question.

20. In that regard, the referring court merely states that Directive 2000/31 precludes the application of restrictive national rules such as the Hoguet law in e-commerce matters and that it is thus necessary to determine whether AIRBNB Ireland's activities fall within the scope of that directive.

21. On that point, the parties put forward diametrically opposite positions and submit considerations relating to the question whether and, if so, subject to what reservations, AIRBNB Ireland's activities are comparable to those of Uber, which was the subject of the judgments in *Asociación Profesional Elite Taxi*[9] and *Uber France*.[10]

22. In essence, AIRBNB Ireland, the Czech and Luxembourg Governments and the Commission are of the view that a service such as that provided by AIRBNB Ireland — in that it allows service providers and potential customers to be connected — satisfies the criteria set out in the definition of 'information society service' within the meaning of Directive 2000/31.

23. AHTOP and the French and Spanish Governments, on the other hand, are of the view that, in accordance with the reasoning followed by the Court in the judgment in *Asociación Profesional Elite Taxi*,[11] an intermediation service, such as that provided by AIRBNB Ireland, in conjunction with the other services offered by AIRBNB Ireland, constitutes a global service the main element of which is a service connected with real property.

9 Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

10 Judgment of 10 April 2018 (C-320/16, EU:C:2018:221).

11 Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

24. In order to answer the first question, I shall first of all make a few general observations about AIRBNB Ireland's activities and the operation of its electronic platform (points 25 to 33 of this Opinion). Next, I shall answer the question whether, having regard to those observations, AIRBNB Ireland's activities fall within the concept of 'information society services'. In doing so, I shall mention the legislative conditions under which a service may be considered to fall within the concept of 'information society service' and I shall illustrate the specific problems raised by electronic platforms as regards their classification in the light of Directive 2000/31 (points 35 of 44 of this Opinion). After detailing the solution developed in the case-law in order to overcome such problems (points 45 to 53 of this Opinion), I shall consider whether and, if so, on what conditions, that solution can be transposed to the circumstances of the main proceedings (points 55 to 78 of this Opinion). Last, on the basis of those considerations, I shall analyse the impact of other services offered by AIRBNB Ireland on the classification of its intermediation service (points 80 to 85 of this Opinion).

1. AIRBNB Ireland's activities

25. As is apparent from the facts of the main proceedings and the explanations provided by certain parties, and from the Terms of Service for European Union users of the platform concerned,[12] AIRBNB Ireland administers an electronic platform that enables hosts with accommodation to rent to be connected with persons seeking that type of accommodation.

26. AIRBNB Ireland centralises listings on its platform, so that a search for accommodation to rent may be carried out according to several criteria, independently of the location of the potential guest. The results of a search carried out, in particular, on the basis of the destination and period of stay are displayed in the form of a list of accommodations together with photographs and general information, including prices. The user of the platform may then obtain more detailed information about each accommodation and, on the basis of that information, make his choice.

27. It is the host's responsibility to set the tariffs, the calendar of availability and the reservation criteria and also to draw up house rules, which any guests must accept. In addition, a host must select one of the options predefined by AIRBNB Ireland as regards the conditions of cancellation of the rental of his accommodation.

28. The services provided by AIRBNB Ireland are not confined to the provision of a platform that enables hosts and guests to be connected.

29. First of all, AIRBNB Ireland has put in place a system whereby hosts and guests may leave an assessment of each other, by means of a rating of between zero and five stars. The ratings, together with any comments, are available on the platform to hosts and guests.

30. Next, in certain cases, in particular where a host receives mediocre ratings or negative comments or cancels confirmed reservations, AIRBNB Ireland may temporarily suspend the listing, cancel a reservation or even prohibit access to the site.

31. Last, AIRBNB Ireland also offers the host (i) a framework defining the terms of his offer; (ii) a photography service; (iii) civil liability insurance; (iv) a guarantee for damage of up to EUR 800 000; and (v) a tool for estimating the price of his rental by reference to average market prices taken from the platform.

12 See https://www.airbnb.co.uk/terms#eusec7.

32. Within the AIRBNB group, AIRBNB Payments UK Ltd, a company governed by the laws of England and Wales and established in London, provides online payment services to users of AIRBNB Ireland's electronic platform and administers the group's payment activities within the European Union. Thus, when the host accepts a guest, the guest makes payment to AIRBNB Payments UK, the amount of which corresponds to the rental price plus 6 to 12% for the charges and the service provided by AIRBNB Ireland. AIRBNB Payments UK retains the funds on behalf of the host, then, 24 hours after the guest has entered the premises, transfers them to the host by bank transfer, thus providing the guest with a guarantee that the property exists and the host with a guarantee of payment.

33. Thus, French internet users enter into a contract with AIRBNB Ireland for the use of the site (placing of a listing, reservations), on the one hand, and with AIRBNB Payments UK for payments made through that site, on the other hand.

34. That being said, it is appropriate to return to the question whether the service provided by AIRBNB Ireland may be regarded as an information society service.

2. AIRBNB Ireland's activities by reference to the definition in Directive 2000/31

35. An information society service is defined by Directive 2015/1535 as a service provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

36. In that regard, it is true that, prima facie and taken separately, the service allowing users of an electronic platform to be connected corresponds to the definition of an information society service. That, moreover, is the conclusion reached by the Court in the judgment in *L'Oréal and Others*.[13] It follows from that judgment that the operation of an online marketplace, that is to say, an internet service consisting in facilitating relations between sellers and buyers of goods, may, in principle, constitute an 'information society service' within the meaning of Directive 2000/31.

37. However, as I observed in my Opinion in *Asociación Profesional Elite Taxi*,[14] concerning electronic platforms, while the test as to whether a service is for remuneration and is provided upon individual request does not appear to be problematic, the same cannot be said of the test as to whether a service is provided at a distance by electronic means. In fact, the line between the component of the services that is provided by electronic means and that which is not so provided is sometimes blurred.

38. More specifically, as regards the question whether the service provided by AIRBNB Ireland is normally for remuneration, it is apparent from the order for reference that the amount of the rent paid by the guest includes the charges and remuneration for the service provided by AIRBNB Ireland. It must therefore be stated that there are two categories of recipients as regards the services provided by AIRBNB Ireland: hosts and guests, those categories not being distinct. However, as is apparent from the judgment in *Papasavvas*,[15] the remuneration for a service provided by a service provider in the context of his economic activity is not necessarily paid by the persons who benefit from that service. A fortiori, as regards services consisting in connecting their recipients, who are divided into two categories, it is sufficient that one of those categories pays the remuneration to the provider of an information society service.

13 Judgment of 12 July 2011 (C-324/09, EU:C:2011:474, paragraph 109).

14 C-434/15, EU:C:2017:364, point 27.

15 Judgment of 11 September 2014 (C-291/13, EU:C:2014:2209, paragraphs 28 and 29).

39. As regards the condition relating to the provision of a service at the individual request of its recipient, it should be noted that, in the judgment in *Google France and Google*,[16] the Court held that a paid referencing service, used in the context of an internet search engine, whereby an economic operator may make an advertising link to its site appear to users of that search engine, satisfies the condition relating to the individual request of that economic operator. As regards AIRBNB Ireland's services, a host must approach the platform managed by that company in order for his accommodation to appear on that platform. Furthermore, it is with the assistance of AIRBNB Ireland's platform that a guest must carry out a search in order to be able to rent accommodation published on that platform.

40. Conversely, the answer to the question whether the service provided by AIRBNB Ireland satisfies the third and fourth conditions, set out in point 35 of the present Opinion, that is to say, whether that service is provided at a distance and by electronic means, depends largely, as the discussion between the parties illustrates, on the viewpoint adopted when the extent of the service in question is determined.

41. To illustrate my point, AIRBNB Ireland does not physically meet the recipients of its services: neither the hosts nor the guests. As is apparent from the preliminary observations concerning AIRBNB Ireland's activities, the host is not required to approach AIRBNB Ireland in person in order to publish his accommodation on the platform. Furthermore, a user of the platform managed by AIRBNB Ireland may rent an accommodation at a distance, without having to be physically in contact with that service provider. However, it is clear that the connection of users of the platform managed by AIRBNB Ireland results in the use of an accommodation, which may be regarded as a non-electronic component of the service provided by that company.

42. In those circumstances, can the service provided by AIRBNB Ireland be considered to be a service provided at a distance, in the sense that, as required by Article 1(1)(b)(i) of Directive 2015/1535, that service is provided without the parties being simultaneously present?

43. Likewise, can the service consisting in the connection of hosts and guests and having as its result the use of an accommodation be considered to be *entirely* provided by the use of electronic equipment, as required by Article 1(1)(b)(ii) of Directive 2015/1535, and to have no relation to the services referred to in the indicative list set out in Annex I to that directive, that is to say, to services having material content even though they are provided via electronic means?

44. In order to answer those two questions, I shall turn to the case-law of the Court, which has already been requested to rule on the classification of mixed services, that is to say, of services consisting of an element provided by electronic means and another that is not provided by electronic means.[17]

3. The mixed services in the light of Directive 2000/31

45. In the judgment in *Ker-Optika*,[18] the Court considered whether the fact that the sale or supply of contact lenses might be subject to the requirement that the patient first obtain medical advice, involving a physical examination of the patient, is capable of preventing the sale of lenses via the internet from being classified as an 'information society service' within the meaning of Directive 2000/31. In that regard, the Court held that such obtaining of medical advice is not inseparable from the selling of contact lenses, on the ground that it can be carried out independently of the act of sale.

16 Judgment of 23 March 2010 (C-236/08 to C-238/08, EU:C:2010:159, paragraphs 23 and 110).

17 See my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364, point 33).

18 Judgment of 2 December 2010 (C-108/09, EU:C:2010:725, paragraphs 32 to 38).

46. I infer from that finding that services that are not inseparably linked with the service provided by electronic means, in the sense that the former may be provided independently of the latter, are not capable of affecting the nature of that service. The service provided by electronic means does not lose its economic interest and continues to be independent of the services having material content.

47. On the other hand, the classification of a service provided by electronic means requires a detailed examination where that service forms an inseparable whole with a service having material content. [19]

48. In that vein, the Court held, in the judgment in *Asociación Profesional Elite Taxi*, [20] that an intermediation service consisting in connecting a non-professional driver using his own vehicle with a person who wishes to make an urban journey may, taken separately and a priori, be classified as an 'information society service'. [21] However, having taken into account all the characteristics of Uber's activities, the Court held that its intermediation service must be considered to be inseparably linked with a transport service and thus excluded from the scope of Directive 2000/31.

49. In that regard, the Court stated, first of all, that a service such as that provided by Uber was more than an intermediation service consisting in connecting, by means of a smartphone application, a non-professional driver using his own vehicle with a person wishing to make an urban journey. The provider of 'that intermediation service *simultaneously offers urban transport services*, which it renders accessible, in particular, through software tools … and whose *general operation it organises* for the benefit of persons who wish to accept that offer in order to make an urban journey.' [22]

50. The Court then provided clarification permitting an assessment of whether those two criteria were satisfied.

51. More specifically, the Court stated that, without the application provided by Uber, (i) the drivers would not be led to provide transport services and (ii) persons wishing to make an urban journey would not use the services provided by those drivers. [23] To my mind, that clarification refers to the criterion relating to the fact that Uber *offers services* having material content.

52. Furthermore, the Court stated that Uber exercised decisive influence over the conditions under which that service was provided by the drivers by determining, by means of its application, at least the maximum fare for the journey and by exercising a certain control over the quality of the vehicles and their drivers. [24] To my mind, that clarification was intended to determine that Uber *organised the general operation* of the services that were not provided by electronic means.

53. Thus, in the judgments in *Asociación Profesional Elite Taxi* [25] and *Uber France*, [26] the Court established two criteria to be applied in order to determine whether a service provided by electronic means that, taken separately, prima facie meets the definition of an 'information society service' is separable from other services having material content, namely the criteria relating to the fact that the service provider *offers services having a material content* and to the fact that the *service provider exercises decisive influence on the conditions under which such services are provided*.

54. It must therefore be determined whether those two criteria are satisfied in the circumstances of the main proceedings.

19 See my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364, point 35).

20 Judgment of 20 December 2017 (C-434/15, EU:C:2017:981, paragraph 34).

21 See judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 35).

22 See judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 38). (Emphasis added).

23 See judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 39).

24 See judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 39).

25 Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

26 Judgment of 10 April 2018 (C-320/16, EU:C:2018:221).

4. The criterion relating to the offer of services

(a) Application in the present case

55. Has AIRBNB Ireland, in the context of its activities, created an offer within the meaning of the judgments in *Asociación Profesional Elite Taxi*[27] and *Uber France*?[28]

56. In my view, that question must be answered in the negative, for the following reasons.

57. Uber's offer, which was a new phenomenon, at least in the case of the UberPop service, was based on non-professional drivers, and it was for that reason that the Court considered that, without the application provided by Uber, that on-demand transport service, provided by non-professional drivers, could not be provided. A non-professional driver could, admittedly, have himself attempted to provide an on-demand transport service; however, without Uber's application, that driver would have been unable to guarantee a match between his offer and demand.

58. Unlike Uber's platform, AIRBNB Ireland's platform is open to professional hosts and non-professional hosts. The short-term accommodation market, whether professional or not, existed long before the activity of AIRBNB Ireland's service began. As the Luxembourg Government observes, professional and non-professional hosts can offer their assets via more traditional channels. Nor is it unusual for a host to create a website devoted solely to his accommodation that can be found with the help of search engines.

59. Thus, the accommodation services are not inseparably linked to the service provided by AIRBNB Ireland by electronic means, in the sense that they can be provided independently of that service. Those services retain their economic interest and remain independent of AIRBNB Ireland's electronic service.

60. Since the criterion relating to the creation of an offer of services within the meaning of the judgment in *Asociación Profesional Elite Taxi*[29] is not satisfied in the present case, the question arises as to the relationship between that criterion and the criterion relating to the exercise of control over the provision of those services. That question did not arise with respect to Uber's activity, since those two criteria were satisfied in that case.[30]

(b) The relationship between the creation of an offer of services and the exercise of control over those services

61. New technologies such as the internet make it possible to meet, on a hitherto unknown scale, any demand with an appropriate supply. Likewise, each offer is capable of finding a demand. That is possible, in particular, because of the innovations introduced by economic operators wishing to increase their competitiveness. Those innovations thus intensify economic trade and play an important role in the development of a market without frontiers. They may also lead to the creation of a supply — or even of a demand — that did not previously exist.

27 Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

28 Judgment of 10 April 2018 (C-320/16, EU:C:2018:221).

29 See judgment of 20 December 2017 (C-434/15, EU:C:2017:981, paragraph 38).

30 See also my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364, point 43). In that regard, see also Van Cleynenbreuel, P., 'Le droit de l'Union européenne ne se prête-t-il pas (encore) à l'ubérisation des services?', *Revue de la Faculté de droit de l'Université de Liège*, No 1, 2018, p. 114.

62. That is all in keeping with the logic of the internal market, which, as the EU legislature points out in recital 3 of Directive 98/48, enables providers of such services to develop their cross-border activities and consumers to have new forms of access to goods and services.

63. In those circumstances, it would be contrary to the logic of the internal market and to the liberalisation of information society services, which is the objective of Directive 2000/31,[31] if, solely because of the creation of a new supply, the innovations of economic operators that enable consumers to have new forms of access to goods or services led to those economic operators being excluded from the scope of Directive 2000/31.

64. However, an innovation that leads to the provision of services having material content by or under the control of an economic operator cannot ensure the applicability of Directive 2000/31 because, on the basis of providing an information society service, that economic operator would compete with other market players who do not benefit from that liberalisation.

65. For those reasons, the criterion relating to the creation of a supply of services constitutes only, to my mind, an indication that a service provided by electronic means forms an inseparable whole with a service having material content. It is not sufficient that a service provider creates a new supply of services that are not provided by electronic means in the sense that I have just explained in points 49 to 51 of this Opinion: the creation of those services must be followed by the maintenance, under the control of that provider, of the conditions under which they are provided.

66. In that regard, it should be noted that a provider of services provided by electronic means may organise his activity in such a way as to allow him to exercise control over the provision of the services having material content, even if those services form part of the pre-existing supply. Must it then be considered, in those circumstances, that that supplier provides an information society service and thus benefits from the liberalisation aimed at by Directive 2000/31? For the reasons I have just stated in point 64 of this Opinion, that question must, in my view, be answered in the negative.

67. It follows from the foregoing that the criterion relating to the creation of a supply of services that are not provided by electronic means is not decisive as regards the question whether those services form an inseparable whole with a service provided by electronic means. It is the decisive influence exercised by the service provider over the conditions of the supply of the services having material content that is capable of rendering those services inseparable from the service that that provider provides by electronic means.

68. For those reasons, and following the Court's reasoning concerning Uber's activity, it is now necessary to determine whether AIRBNB Ireland exercises control over the conditions governing the provision of the short-term accommodation services.

31 See my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364, point 31).

5. The control exercised over the conditions of the provision of the services

69. As a reminder, in the judgments in *Asociación Profesional Elite Taxi*[32] and *Uber France*,[33] the Court considered that Uber exercised decisive influence over the conditions under which transport was provided, in particular by determining the maximum fare, by collecting that price from the customer before paying part of it to the non-professional driver of the vehicle and by exercising a certain control over the quality of the vehicles and their drivers and over the drivers' conduct, which could, in some circumstances, result in their exclusion.[34] A reading of those judgments clearly shows that that list is indicative in nature.

70. For that reason, I consider it appropriate to point out that, in my Opinions in those cases, I had drawn the Court's attention to the fact that Uber exercised control over other relevant aspects of an urban transport service, namely over the minimum safety conditions, by means of prior requirements concerning drivers and vehicles, and over the accessibility of the transport supply, by encouraging drivers to work when and where demand was high.[35]

71. Those circumstances, taken as a whole, had led me to conclude that Uber exercised control over the economically significant aspects of the transport service offered through its platform. As regards on-demand urban transport services, the price, the immediate availability of the means of transport, ensured by the size of the supply, the minimum quality acceptable for the passengers of those means of transport, and the safety of those passengers, constitute the most significant factors for the recipients of those services. Conversely, in the present case I do not consider that AIRBNB Ireland exercises control over all the economically significant aspects of the short-term accommodation service, such as the location and standards of the accommodations, which are of major significance in the case of such a service. On the other hand, the price does not seem to play as significant a role in the context of accommodation services as in the context of on-demand urban transport services. In any event, as my analysis reveals, AIRBNB Ireland does not control the price of the accommodation services.

72. Admittedly, it is true that, as the Spanish Government, in particular, observed at the hearing, AIRBNB Ireland's electronic service has an impact on the short-term accommodation market and, in reality, on the accommodation market in general. That said, AIRBNB Ireland does not seem to act as either a power that regulates the economic aspects of that market or as a provider exercising decisive control over the conditions under which the accommodation services are provided. All the social and economic implications of the operation of its platform are the result of the actions of the users of that platform and of the logic of supply and demand.

73. In that regard, I consider that, while AIRBNB Ireland provides optional assistance in determining the price, it does not set that price, which is determined by a host. In addition, unlike the situation in *Uber*,[36] hosts using AIRBNB Ireland's platform are not discouraged from setting the price themselves, the only factor that might discourage them from doing so being the logic of supply and demand.

74. Next, as regards the procedures for the provision of the accommodation services, it should be noted that it is the hosts that determine the letting conditions. Admittedly, AIRBNB Ireland pre-defines the options of the conditions for cancellation. However, it is always the host who deliberately chooses one of the options proposed and, accordingly, the final decision on the cancellation conditions is a matter for the host.

32 Judgment of 20 December 2017 (C-434/15, EU:C:2017:981).

33 Judgment of 10 April 2018 (C-320/16, EU:C:2018:221).

34 See judgments of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981, paragraph 39), and of 10 April 2018, *Uber France* (C-320/16, EU:C:2018:221, paragraph 21).

35 See my Opinions in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364, point 51) and in *Uber France* (C-320/16, EU:C:2017:511, points 15, 16 and 20).

36 See my Opinion in Asociación *Profesional Elite Taxi* (C-434/15, EU:C:2017:364, point 50).

75. In addition, it appears that, on the basis of the information available from the ratings and from users' comments, AIRBNB Ireland may, in certain cases, temporarily suspend a listing, cancel a reservation, or indeed prohibit access to its platform. In that regard, the administrator of an electronic platform may confer on itself a power of administrative control, in particular in order to ensure that the conditions of the contracts that it enters into with the users of that platform are observed. In addition, those contractual conditions may impose obligations on users so that the operating standards of an electronic platform are observed. As regards the classification of the information society services, the question arises, however, of the intensity of that power, which is reflected in the influence over the provision of the services provided by the users of that platform.

76. It should be noted, in that regard, that Uber exercised control over the quality of the vehicles and their drivers and also over the drivers' conduct by reference to the standards that Uber itself had determined. On the other hand, as is apparent from points 27 and 29 of this Opinion, the control exercised by AIRBNB Ireland concerns users' compliance with standards defined or, at the very least, chosen by those users. In any event, as regards Uber's activity, the exercise of the power of administrative control was only one of the factors that led to the assertion that that provider exercised decisive influence over the conditions under which the transport services were provided.

77. Last, as regards the fact, raised by AHTOP, that, like Uber, AIRBNB Ireland collects the amount corresponding to the rental price and subsequently transfers it to the host, it should again be noted that, in the case of Uber's activity, the fact that the service provider collected the price was one of the factors taken into account for the purpose of deciding that its service did not come within the concept of 'information society service'. It should be noted that that element of the service provided by AIRBNB Ireland, supplied by AIRBNB Payments UK, is typical of the great majority of information society services, including for platforms that allow a hotel to be reserved or airline tickets to be purchased.[37] The mere fact that a service provided by electronic means includes facilities for payment for the services that are not provided by electronic means does not permit the conclusion that all of those services are inseparable.

78. For all of the foregoing reasons, I consider that it cannot be concluded that AIRBNB Ireland's electronic service satisfies the criterion relating to the exercise of control over the services having material content, namely the short-term accommodation services.

79. It is now appropriate to examine a final point, namely AHTOP's argument that, as AIRBNB Ireland offers other services to its users, the classification of information society service cannot be applied in the present case.

6. The other services offered by AIRBNB Ireland

80. It appears that AIRBNB Ireland also offers other services, namely a photography service, civil liability insurance and a guarantee for damage.

81. It should be borne in mind that, in the judgment in *Ker-Optika*,[38] the Court concluded that services that are not inseparably linked to the service provided by electronic means, in the sense that the former may be provided independently of the latter, are not capable of affecting the nature of that service. The service provided by electronic means does not lose its economic interest and remains independent of the services having material content.

37 See my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364, point 34).

38 Judgment of 2 December 2010 (C-108/09, EU:C:2010:725).

82. If that conclusion is transposed to the present case, it should be noted that the other services offered by AIRBNB Ireland are optional and, accordingly, are ancillary in nature by comparison with the service provided by electronic means. Those services are therefore separable from the service provided by electronic means. In fact, a host may, in advance and by his own means, obtain photographs, insurance or guarantees from third parties.

83. Admittedly, those other services offered by AIRBNB Ireland are provided by AIRBNB Ireland itself, while the Court's analysis in the judgment in *Ker-Optika* [39] concerned not the advice given and checks carried out by the seller of contact lenses, but those given and carried out by ophthalmologists.

84. However, I doubt that the answer given by the Court in that judgment would have been different if such services had been provided by the provider of the service provided by electronic means. It seems logical to me that, in order to make their offer more competitive, providers should extend the range of services that they provide, in particular by offering services that are not provided by electronic means. Provided that such services are separable from the information society service, the former services do not alter the nature of the latter service. If an interpretation *a contrario* were applied, that could lead providers of the information society services to limit the attractiveness of their offer or to outsource, even in an artificial manner, the services having a material content.

85. To summarise, the fact that the provider of an information society service offers the recipients of that service other services having a material content does not prevent that service from being classified as an 'information society service', provided that those other services are not inseparable from the service provided by electronic means, in the sense that the latter service does not lose its economic interest and remains independent of the services having a material content.

7. Conclusions relating to the first question

86. Following the analysis that I have just carried out, I consider that the services having a material content, which are not inseparably linked to the service provided by electronic means, are not capable of affecting the nature of that service. The service provided by electronic means does not lose its economic interest and remains independent of the services having a material content.

87. The two criteria laid down in that regard by the Court in its case-law, namely the criterion relating to the creation of a supply of services and the criterion relating to the exercise of control over the conditions under which those services are provided, make it possible to answer the question whether a service provided by electronic means that, taken separately, prima facie meets the definition of 'information society service', is or is not separable from other services having a material content.

88. However, the criterion relating to the creation of a supply is merely an indication of whether a service provided by electronic means forms an inseparable whole with a service having a material content. It is not sufficient that a provider has created a new supply of services that are not provided by electronic means in the sense explained above. The creation of such a supply should be followed by the maintenance of control, by that provider, over the conditions under which those services are provided.

89. In the light of those considerations, I therefore propose that the answer to the first question should be that Article 2(a) of Directive 2000/31, read in conjunction with Article 1(1)(b) of Directive 2015/1535, must be interpreted as meaning that a service consisting in connecting, via an electronic platform, potential guests with hosts offering short-term accommodation, in a situation where the provider of that service does not exercise control over the essential procedures of the provision of

39 Judgment of 2 December 2010 (C-108/09, EU:C:2010:725).

those services, constitutes an information society service within the meaning of those provisions. The fact that that service provider also offers other services having a material content does not prevent the service provided by electronic means from being classified as an information society service, provided that the latter service does not form an inseparable whole with those services.

90. It should be noted that the conditions of renting the accommodations, that is to say, of the services provided by the hosts, do not come within the scope of Directive 2000/31 and must be assessed in the light of other provisions of EU law. [40]

91. Since the first question calls for an affirmative answer and, consequently, the service provided by AIRBNB Ireland must be considered to be an 'information society service' within the meaning of Directive 2000/31, it is necessary to answer the second question.

B. The second question

92. By its second question, which it submits in case the answer to the first question should be in the affirmative, the referring court seeks, in essence, to ascertain whether the requirements laid down by the Hoguet law can be applied to AIRBNB Ireland as a provider of information society services.

1. Admissibility

93. The French Government maintains, primarily, that the Court manifestly lacks jurisdiction to answer this question. According to that Government, the second question entails determining whether AIRBNB Ireland falls within the scope *ratione materiae* of the Hoguet law, which is a matter of interpretation of national law and, accordingly, within the exclusive jurisdiction of the referring court.

94. In the alternative, the French Government submits that the second question would still be manifestly inadmissible in that it does not satisfy the requirements laid down in Article 94 of the Rules of Procedure of the Court of Justice, since it does specify whether AIRBNB Ireland falls within the scope *ratione materiae* of the Hoguet law. [41]

95. I do not share the reservations expressed by the French Government as regards the admissibility of the second question.

96. In that context, it should be noted that, within the framework of its alternative argument, the French Government acknowledges that it could be considered that the referring court implicitly indicates that AIRBNB Ireland falls within the scope of the Hoguet law. In fact, the second question relates not to whether that *law* is *applicable* to AIRBNB Ireland but to whether *restrictive rules* of the Hoguet law are *opposable* to that undertaking.

40 See, by analogy, judgment of 2 December 2010, *Ker-Optika* (C-108/09, EU:C:2010:725, paragraph 41).

41 In the further alternative, the French Government claims in its written observations that criminal proceedings initiated following the lodgement of a complaint together with an application to join in the proceedings as civil party must be regarded as a dispute between individuals. Directive 2003/31 therefore cannot be relied on in the dispute at issue in the main proceedings and, consequently, the second question is hypothetical in nature. At the hearing, however, the French Government seemed to withdraw its argument relating to the hypothetical nature of the second question. In any event, there is nothing to indicate that the dispute before the referring court is a dispute between two individuals. Furthermore, it is apparent from the explicit legal framework of the order for reference that criminal proceedings initiated following the lodgement of a complaint together with an application to join the proceedings as civil party might result in the imposition of criminal penalties.

97. Furthermore, a request for a preliminary ruling benefits from a presumption of relevance and it is therefore only in rare and extreme cases that the Court will refuse to answer such a request, in particular if it is obvious that EU law cannot be applied to the circumstances of the dispute in the main proceedings,[42] which is not the case here. In fact, I understand the second question to mean that the referring court is wondering whether a Member State other than that in whose territory a provider of an information society service is established (the Member State of origin) may, by means of rules such as those laid down in the Hoguet law, actually impose certain requirements on that service provider. As the discussion between the parties illustrates, that question may be covered by several instruments of EU law.

98. Without prejudice to the foregoing considerations, it should be noted that at the hearing the French Government stated that the requirements laid down in the Hoguet law did not apply to service providers such as AIRBNB Ireland.

99. In any event, it is for the national court to determine the precise scope of the national law. It is therefore appropriate to answer the second question, while leaving it to the referring court to address the question of the scope of the Hoguet law.

2. Substance

(a) The applicability of Directive 2005/36/EC

100. AHTOP claims that the enforceability of the Hoguet law against AIRBNB Ireland should be assessed in the light of Directive 2005/36/EC,[43] which authorises the Member States to apply professional and ethical standards, and standards concerning liability, to certain professions.

101. On the other hand, AIRBNB Ireland contends, in the first place, that Directive 2000/31 contains no exclusion implying that the provisions of Directive 2005/36 would prevail over those of the former directive.

102. In the second place, AIRBNB Ireland submits that it follows from Article 5(2) of Directive 2005/36 and from the judgment in *X-Steuerberatungsgesellschaft*[44] that that directive does not apply to the situation in the present case on the ground that AIRBNB Ireland does not move to French territory in order to pursue its profession.

103. It should be noted, first of all, that, according to Article 5(2) of Directive 2005/36, the principle of the free provision of services, in so far as it concerns the restrictions relating to professional qualifications, is to apply only where the service provider moves to the territory of the host Member State to pursue, on a temporary and occasional basis, his profession. There is nothing to indicate that AIRBNB Ireland is in such a situation. It therefore does not benefit from the principle of free provision of services guaranteed by Article 5 of Directive 2005/36.

42 See, in particular, judgment of 7 July 2011, *Agafiței and Others* (C-310/10, EU:C:2011:467, paragraph 28).

43 Directive of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005, L 255, p. 22).

44 Judgment of 17 December 2015 (C-342/14, EU:C:2015:827, paragraph 35).

104. In the judgment in *X-Steuerberatungsgesellschaft*,[45] on which AIRBNB Ireland relies, the Court held that in such a situation the service provider was also unable to rely on the principle of the freedom to provide services guaranteed by Directive 2006/123/EC[46] and that, accordingly, it was necessary to appraise the conditions of access to a profession by reference to the FEU Treaty.[47]

105. In the present case, the question thus arises of the relationship between, on the one hand, Directive 2000/31 and the principle of the free movement of information society services and, on the other hand, the Member States' power to regulate the conditions of access to a profession.

106. It has been suggested in the literature that the conditions of access to a profession cannot be applied to a provider who offers services with the assistance of the internet.[48] In fact, the coordinated field encompasses, in particular, the requirements relating to access to the activity of an information society service, such as those concerning qualifications, authorisation or notification, even if those requirements are general in nature.[49] Furthermore, unlike Directive 2006/123,[50] Directive 2000/31 contains no exclusion providing that the free movement of information society services does not affect requirements relating to access to a regulated profession.

107. Consequently, at least as regards the requirements relating to access to a regulated profession, a service provider who provides an information society service in a Member State of origin may rely on the free movement of services guaranteed by Directive 2000/31.[51] As that question is covered by Directive 2000/31, there is no need to assess it in the light of primary law.[52]

(b) The applicability of Directive 2007/64/EC

108. The Commission submits that the services provided by AIRBNB Payments UK are potentially subject to Directive 2007/64/EC.[53]

109. Since the second question is put in case the Court should answer the first question in the affirmative, which means that AIRBNB Ireland benefits from the principle of freedom to provide information society services guaranteed by Directive 2000/31, I shall confine my analysis of the second question to that directive.

110. In addition, as the request for a preliminary ruling does not mention Directive 2007/64 and as AIRBNB Payments UK is not a party to the main proceedings, I do not consider it appropriate, in the absence of clarification from the referring court and observations from the parties other than the Commission, to address the questions that might arise under that directive. In fact, the Court does not have sufficient information to analyse them of its own motion.

45 Judgment of 17 December 2015 (C-342/14, EU:C:2015:827).

46 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).

47 According to Article 17(6) of Directive 2006/123, the principle of freedom to provide services laid down in Article 16 of that directive is not to apply to matters covered by Title II of Directive 2005/36 or to requirements in the Member State where the service is provided which reserve an activity to a particular profession. See judgment of 17 December 2015, *X-Steuerberatungsgesellschaft* (C-342/14, EU:C:2015:827, paragraph 35).

48 See, in particular, Hatzopoulos, V., *The Collaborative Economy and EU Law*, Hart Publishing, Oxford-Portland, 2018, p. 41.

49 See Article 2(h) of Directive 2000/31. See also Lodder, A.R., & Murray, A.D. (Eds.), *EU Regulation of E-Commerce: A Commentary*, Edward Elgar Publishing, Cheltenham-Northampton, 2017, p. 29.

50 See footnote 47.

51 See, to that effect, User guide — Directive 2005/36/EC — Everything you need to know about the recognition of professional qualifications, https://ec.europa.eu, p. 15.

52 See, to that effect, judgment of 23 February 2016, *Commission* v *Hungary* (C-179/14, EU:C:2016:108, paragraph 118). See also my Opinion in joined cases *X and Visser* (C-360/15 and C-31/16, EU:C:2017:397, point 152).

53 Directive of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007, L 319, p. 1).

(c) The free movement of information society services and its scope

111. It should be noted at the outset that, according to Article 3(1) of Directive 2000/31, each Member State is to ensure that the information society services provided by a service provider established in its territory comply with the national provisions applicable in the Member State in question that fall within the coordinated field, as defined in Article 2(h) of that directive. Conversely, with the exception of the cases referred to in Article 3(4) of Directive 2000/31, Article 3(2) of that directive prohibits other Member States, for reasons falling within the coordinated field, from restricting the free movement of information society services.

112. Information society services benefit from the free movement guaranteed by Directive 2000/31 only as regards the fields that fall within the scope of that directive. Article 1(5) of Directive 2000/31 sets out the fields and questions to which that directive is not to apply, but the present case concerns none of them. [54]

113. Nor, according to Article 3(3) of Directive 2000/31, are information society services to benefit from free movement as regards the fields referred to in the annex to that directive. The requirements laid down in the Hoguet law do not fall within one of those fields. [55]

114. The requirements relating to information society services, which fall within the coordinated field, may issue from the Member State of origin or — within the limits imposed by Directive 2000/31, in Article 3(4) — from other Member States.

115. The present case is concerned with the latter situation, in which the legislation of a Member State other than the Member State of origin is liable to restrict the information society services and, accordingly, falls prima facie within the scope of Article 3(2) of Directive 2000/31. [56]

116. The coordinated field, as defined in Article 2(h) of Directive 2000/31, read in the light of recital 21 of that directive, encompasses the requirements relating to access to the activity of an information society service and the exercise of such an activity, whether they are general in nature or whether they were specifically conceived for those services or their providers. [57] The requirements laid down by the Hoguet law therefore seem to fall within the coordinated field.

117. In order for a requirement laid down by a Member State other than that in which the provider of the information society services is established to be enforceable against that provider and lead to the restriction of the free movement of those services, that requirement must be a measure that satisfies the *substantive* and *procedural conditions* laid down in Article 3(4)(a) and (b), respectively, of Directive 2000/31.

54 It follows from Article 1(5) of Directive 2000/31 that that directive is not to apply to the field of taxation, questions relating to the processing of personal data and those relating to agreements or practices governed by cartel law or to certain activities of information society services, set out in Article 1(5)(d) of that directive.

55 See the Annex to Directive 2000/31. On the functioning of Article 3(3) of that directive, see judgment of 29 November 2017, *VCAST* (C-265/16, EU:C:2017:913, paragraphs 24 and 25). See also my Opinion in *VCAST* (C-265/16, EU:C:2017:649, point 19).

56 See, *a contrario*, judgment of 11 September 2014, *Papasavvas* (C-291/13, EU:C:2014:2209, paragraph 35).

57 Conversely, requirements not coming within the coordinated area that are also not harmonised at EU level must be assessed where necessary in the light of primary law. See, to that effect, judgment of 14 February 2008, *Dynamic Medien* (C-244/06, EU:C:2008:85, paragraph 23). See also Lodder, A.R., 'Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market', in Lodder, A.R., & Murray, A.D. (Eds.), *EU Regulation of E-Commerce: A Commentary*, Edward Elgar Publishing, Cheltenham-Northampton, 2017, p. 31.

(d) The measures derogating from Directive 2000/31

118. It should be noted at the outset that the Hoguet law, adopted in 1970, predates Directive 2000/31. It is thus obvious that the requirements laid down in that law were not formulated *ab initio* as measures provided for in Article 3(4) of that directive. Furthermore, Directive 2000/31 does not contain a clause authorising Member States to maintain earlier measures that might restrict the free movement of information society services.

119. Nonetheless, I cannot exclude outright the possibility that a measure that predates Directive 200/31 or was adopted on the basis of legislation that predates it, provided that it satisfies the conditions laid down in Article 3(4) of that directive, might restrict the free movement of information society services.

120. Furthermore, the wording of Article 3(4)(b) of Directive 2000/31 shows that a Member State may derogate from Article 3(2) of that directive by two types of measures: those subject to the procedural conditions laid down in Article 3(4)(b) of that directive and those not subject to those conditions, that is to say, at least in certain cases, measures adopted in judicial proceedings. [58]

121. It should be noted that, in the circumstances of the present case, whether AIRBNB Ireland will be found to be criminally liable at the end of the main proceedings depends on the answer to the preliminary question whether that service provider was obliged to satisfy the requirements laid down in the provisions of the Hoguet law. That, to my mind, is the reason why the referring court wonders whether the rules on the exercise of the profession of real estate agent can be enforced against that service provider.

122. Having made that clear, I shall now proceed to analyse the conditions laid down in Article 3(4)(a) and (b) of Directive 2000/31.

(e) Substantive conditions

123. First of all, it follows from Article 3(4)(a)(i) of Directive 2000/31 that derogations from the free movement of information society services are permitted, in particular, when they are *necessary* for reasons relating to public policy, the protection of public health, public security or the protection of consumers. The requirements laid down by the Hoguet law seem to be aimed at the protection of consumers.

124. Next, in the words of Article 3(4)(a)(ii) of Directive 2000/31, those derogations may be applied when an information society service affected by a measure taken by a Member State other than the State of origin *prejudices* that objective or presents *a serious and grave risk of prejudice* to it.

125. Last, according to Article 3(4)(a)(iii) of Directive 2000/31, such derogations are to be *proportionate*.

126. There is nothing in the order for reference on the basis of which it might be determined whether legislation such as that at issue in the main proceedings satisfies those requirements.

58 See also recital 25 of Directive 2000/31, which states that national courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in that directive. In addition, according to recital 26 of Directive 2000/31, Member States, in conformity with conditions established in that directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission.

127. That being so, it is for a Member State that seeks, for reasons falling within the coordinated field, to restrict the free movement of information society services to show that the substantive conditions laid down in Article 3(4)(a) of Directive 2000/31 are fulfilled.

128. In fact, in the absence of clarification concerning the need to adopt the measure at issue and the possibility that AIRBNB Ireland's service prejudices one of the objectives specified in Article 3(4)(a)(i), of Directive 2000/31, the second question cannot be understood otherwise than as seeking to ascertain whether a Member State other than the Member State of origin may be allowed to impose, on its own initiative and without examining the substantive conditions, the requirements relating to the practice of the profession of real estate agent on providers of a category of information society services.

129. I think that Directive 2000/31 precludes a Member State from being able to restrict, in such circumstances and in such a way, the free movement of information society services from another Member State.

130. In the first place, Article 3(1) of Directive 2000/31 imposes on the Member States of origin the obligation to ensure that the information society services provided by a service provider established in their territories comply with the national provisions applicable in those Member States that fall within the coordinated field.[59] In contrast with that general obligation, in order not to 'dilute' the principle laid down in Article 3(1) of Directive 2000/31, Article 3(4) of that directive might be understood as authorising Member States other than the Member State of origin to derogate from the free movement of services only in an indirect manner.

131. In the second place, Article 3 of Directive 2000/31 must be interpreted in such a way as to guarantee the free movement of information society services between the Member States.[60] If Member States other than the Member State of origin were also competent to apply on their own initiative, to all providers of a category of information society services, measures of a general and abstract nature, the principle of the free movement of such services would be significantly weakened. In fact, Article 3(2) of Directive 2000/31 guarantees a provider of information society services a certain degree of legal certainty: subject to the derogations authorised under Article 3(4) of Directive 2000/31, that service provider cannot be subject to stricter requirements than those laid down in the material law in force in the Member State in which it is established.

132. In the third place, the measures adopted on the basis of Article 3(4) of Directive 2000/31 do not concern the information society services or their providers, but a *given* service.

133. In the fourth place, in order to determine whether *an information society service* prejudices a given objective or presents a serious and grave risk of prejudice to that objective, it is appropriate, in my view, in every instance, to examine the circumstances of the case.

134. Last, in the fifth place, the foregoing considerations are supported by the procedural conditions to be fulfilled by a Member State that seeks to restrict the free movement of the services, and to which I shall return later.[61] It should be noted that, according to Article 3(4)(b) of Directive 2000/31, a Member State that envisages adopting measures to derogate from Article 3(2) of that directive must first notify the Commission of its intention to do so and ask the Member State of origin to take

59 See judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraph 61). See also D'Acunto, S., 'La directive 98/48 prévoyant un mécanisme de transparence règlementaire pour les information society services: un premier bilan après douze mois de fonctionnement', *Revue du droit de l'Union européenne*, No 3, 2000, p. 628.

60 See judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraph 64).

61 See points 138 to 150 of this Opinion.

measures with regard to the information society services. That Member State may, in the absence of an appropriate response from the Member State of origin, adopt the measures envisaged. Those procedural conditions clearly confirm that the measures referred to in Article 3(4) of Directive 2000/31 can be adopted only on an ad hoc basis.

135. For those reasons, I consider that a Member State other than the Member State of origin can derogate from the free movement of information society services only by measures taken on a 'case-by-case' basis. [62]

136. In addition, I consider that the requirements laid down by the Hoguet law may raise doubts as to their proportionality. I infer from the discussion between the parties at the hearing that it is not certain that, on the basis of the Hoguet law, AIRBNB Ireland might become the holder of a professional licence. However, on the basis of the information supplied by the referring court in its request, the Court is unable to rule on that point.

137. In any event, it is for the referring court to determine whether, having regard to all of the factors brought to its attention, the measures at issue are necessary in order to ensure the protection of consumers and do not go beyond what is required to attain the objective pursued.

(f) Procedural conditions

138. As a reminder, it follows from Article 3(4)(b) of Directive 2000/31 that a Member State that proposes to adopt measures that restrict the free movement of information society services from another Member State must first notify the Commission of its intention and ask the Member State of origin to take measures in respect of information society services.

139. There is no indication that the French Republic asked Ireland to take measures in respect of information society services.

140. Nor is it apparent that the condition relating to notification of the Commission was fulfilled, whether during or after the period of the transposition of Directive 2000/31.

141. It follows from the Court's settled case-law that failure to notify technical regulations, as provided for in Directive 2015/1535, means that those technical regulations are inapplicable and cannot therefore be enforced against individuals. [63] Is the legal consequence the same in the case of failure to notify the Commission as provided for in Article 3(4) of Directive 2000/31? [64]

62 See Communication from the Commission to the Council, the European Parliament and the European Central Bank — Application to financial services of Article 3(4) to (6) of the electronic commerce directive (COM/2003/0259 final, points 1 and 2.1.2); Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee — First Report from the Commission on the application of Directive [2000/31] of 21 November 2003 (COM(2003) 702 final, point 4.1). See also Crabit, E., 'La directive sur le commerce électronique. Le projet "Méditerranée"', *Revue du Droit de l'Union Européenne*, No 4, 2000, pp. 762 and 792; Gkoutzinis, A., *Internet Banking and the Law in Europe: Regulation, Financial Integration and Electronic Commerce*, Cambridge University Press, Cambridge-New York, 2006, p. 283.

63 See, recently, judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraphs 52 and 53). See also my Opinion in *Uber France* (C-320/16, EU:C:2017:511, point 37).

64 It should be noted that, if the requirements laid down by the Hoguet law were considered to be measures within the meaning of Article 3(4) of Directive 2000/31, the question of the connection between the obligation to notify laid down in Directive 2000/31 and that laid down in Directive 2015/1535 would not arise. In order to be classified as a 'technical regulation', subject to the obligation to notify under the latter directive, a requirement laid down by national law must have the specific aim and object of regulating information society services in an explicit and targeted manner (see my Opinion in *Uber France*, C-320/16, EU:C:2017:511, points 24 to 33). That is not the position in the present case, however. Nor, as is apparent from the Court's case-law, do national provisions that make the exercise of a business activity subject to prior authorisation constitute technical regulations (see judgment of 20 December 2017, *Falbert and Others* (C-255/16, EU:C:2017:983, paragraph 16). In essence, the Hoguet law makes the exercise of the activity of real estate agent subject to obtaining a professional licence.

142. It should be observed in that context that, in his Opinion in *Enichem Base and Others*,[65] Advocate General Jacobs drew a distinction between, on the one hand, obligations to inform the Commission that were accompanied by specific provisions enabling the Commission and the various Member States to make comments on the notified drafts and requiring Member States in certain circumstances to postpone the adoption of those drafts for certain periods and, on the other hand, obligations to notify the Commission that are not circumscribed by such procedures. Advocate General Jacobs then stated that, in the absence of any prescribed procedure for suspension of introduction of the measure concerned, or for Community control, it could not be maintained that a failure to inform the Commission had the effect of rendering the measures unlawful.[66]

143. In its judgment, the Court held that, in the absence of any procedure for Community monitoring of draft rules and where the implementation of the planned rules was not made conditional upon agreement by the Commission or its failure to object, a rule requiring the Member States to inform the Commission of such draft rules and such rules does not give individuals any right that they may enforce before national courts on the ground that the rules were adopted without having been previously communicated to the Commission.[67]

144. Likewise, in subsequent case-law relating to failure to notify measures as provided for in the directives that preceded Directive 2015/1535, the Court noted that legal instruments entailing the sanction of inapplicability owing to that failure provide a procedure of Union control of draft regulations and make the date of their entry into force subject to the Commission's agreement or lack of opposition.[68]

145. It is in the light of those considerations in the case-law that the effects of the failure to notify as provided for in Directive 2000/31 must be determined.

146. It is true that Article 3(4) of Directive 2000/31 does not authorise the Commission to annul or cancel the effects of a national measure. On the other hand, according to Article 3(6) of that directive the Commission may ask the Member State concerned to refrain from taking the proposed measures or urgently to put an end to the measures in question. In addition, the Commission may bring infringement proceedings against the Member State where it has not complied with its obligation to refrain from adopting or to put an end to a measure.[69]

147. Furthermore, in urgent cases, Article 3(5) of Directive 2000/31 authorises Member States to adopt measures restricting the free movement of information society services. In urgent cases, the measures are to be notified in the shortest possible time to the Commission. I infer that, prima facie, a measure may produce its effects without it being subject, before the date of its entry into force, to the Commission's agreement or lack of opposition.

148. Neither does Directive 2015/1535 empower the Commission to annul or suspend the entry into force of national regulations. Conversely, that directive requires that Member States comply with the Commission's instructions.

149. Furthermore, under Directive 2015/1535, a Member State may also have recourse to the urgent procedure where it considers it necessary to prepare technical regulations in a very short time.

65 380/87, not published, EU:C:1989:135.

66 See Opinion of Advocate General Jacobs in *Enichem Base and Others* (380/87, not published, EU:C:1989:135, point 14).

67 See judgment of 13 July 1989, *Enichem Base and Others* (380/87, EU:C:1989:318, paragraphs 20 and 24).

68 See judgment of 26 September 2000, *Unilever* (C-443/98, EU:C:2000:496, paragraph 43).

69 See Crabit, E., 'La directive sur le commerce électronique. Le projet "Méditerranée"', *Revue du droit de l'Union européenne*, No 4, 2000, p. 791, and Kightlinger, M.F., 'A Solution to the Yahoo! Problem? The EC E-Commerce Directive as a Model for International Cooperation on Internet Choice of Law', *Michigan Journal of International Law*, vol. 24, No 3, 2003, p. 737.

150. For those reasons, having regard to the analogy between the control procedure concerning technical regulations provided for in Directive 2015/1535 and that concerning measures that restrict the free movement of information society services, I consider that, under Directive 2000/31, failure to notify entails the sanction of non-enforceability of a measure against the provider of those services.

151. In the light of those considerations, I propose that the answer to the second question should be that Article 3(4) of Directive 2000/31 must be interpreted as meaning that a Member State other than that in whose territory a provider of an information society service is established cannot, for reasons falling within the coordinated field, restrict the free movement of those services by relying, as against a provider of information society services, on its own initiative and without an examination of the substantive conditions being necessary, on requirements such as those relating to the practice of the profession of real estate agent, laid down in the Hoguet law.

VI. Conclusions

152. In the light of all of the foregoing considerations, I propose that the Court answer the questions for a preliminary ruling submitted by the investigating judge of the Tribunal de grande instance de Paris (Regional Court, Paris) (France) 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(b) 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, must be interpreted as meaning that a service consisting in connecting, via an electronic platform, potential guests with hosts offering short-term accommodation, in a situation where the provider of that service does not exercise control over the essential procedures of the provision of those services, constitutes an information society service within the meaning of those provisions.

(2) Article 3(4) of Directive 2000/31 must be interpreted as meaning that a Member State other than that in whose territory a provider of an information society service is established cannot, for reasons falling within the coordinated field, restrict the free movement of those services by relying, as against a provider of information society services, on its own initiative and without an examination of the substantive conditions being necessary, on requirements such as those relating to the practice of the profession of real estate agent, laid down in Law No 70-9 of 2 January 1970 regulating the conditions of the exercise of activities relating to certain transactions concerning real property and business assets.