
Gig economy and the ECJ

HSI-meeting – 29 September 2017 – Amsterdam

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Agenda

1. Introduction Gig Economy (especially Uber)
2. Pending Cases at the ECJ
3. Uber drivers – self-employed or employees?
 - 3.1 National Case Law
 - 3.2 Classification of Uber drivers in the EU law
4. Further legal policy developments at EU level

1. Introduction Gig Economy

1.1 Gig economy – Much more than Crowdwork



1.2 Gig economy – A matter of EU law

- Gross revenue in the EU from collaborative platforms and providers was estimated by PwC Consulting to be EUR 28 billion in 2015 (COM(2016) 356 final, p. 2)
- Referring to the EC (see COM(2016) 356 final), questions arise on
 - Economic administration law
 - Protection of consumers/users
 - Labour Law (status of self-employed and workers)
 - Taxation
- Gig economy often raises issues with regard to the application of EU law, especially of labour law and social security law
- There has not been case law of the ECJ to subjects of the gig economy, yet; but several cases related to the Uber business model are pending



1.3 Uber business model

- Founded 2009 in San Francisco;
European Head office in Amsterdam („Uber International Holding B.V.“);
National subsidiaries
- Different services (about 16) e.g.
 - **UberBlack** (luxurious black limousines) connect passengers with rental cars with professional drivers
 - **UberPop** connects passengers with private drivers with their own cars
 - **UberTaxi** provides regular taxis (with regular fares)
- Providing via a smartphone app or a website



European Commission

2. Pending Cases at the ECJ

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2.1 *Asociación Profesional Elite Taxi* (C-434/15) (1)

Request for a preliminary ruling: Juzgado de lo Mercantil No 3 de Barcelona (**Spain**) lodged on 7/8/2015 – C-434/15 – ***Asociación Profesional Élite Taxi***

The facts:

- Spanish law: Public passenger transport and intermediary platforms need licences and administrative authorisations in order to pursue their activities (Article 99(1) Law 16/1987 on the organisation of land transport, local Regulation on taxi services in Barcelona)
- Argument of Elite Taxi (plaintiff): The activities of Uber Spain are acts of unfair competition
- Neither Uber Spain nor the owners or drivers of the vehicles have the licences and authorisations required under the Regulation on taxi services
- Argument of Uber Spain: No infringement of transport legislation committed -> regulation is not applicable (just an electronic platform)

2. Pending Cases at the ECJ

2.1 *Asociación Profesional Elite Taxi* (C-434/15) (2)

The question referred to the ECJ:

- Does Uber's activity fall within the scope of Directives 2006/123/EC (Service Directive) and 2000/31/EC (Directive on electronic commerce) as well as in the scope of the provisions of the FEU Treaty on the freedom to provide services?
- The problem: If the service of Uber has to be regarded as an information society service, Art. 3(2) of Directive 2000/31/EC could preclude the requirement to have authorisation in order to provide such a service
- The question behind: **What is Uber?** Is it a transport undertaking, a taxi business? Or is it solely an electronic platform enabling users to locate, book and pay for a transport service provided by someone else?

2. Pending Cases at the ECJ

2.1 *Asociación Profesional Elite Taxi* (C-434/15) (3)

11/5/2017: Opinion of advocate general Szpunar...

...**about the Uber business model:**

- When the provider exercises **decisive influence** over the conditions under which the latter service is provided: What is the main economic component of the supply?
- In numerous terms and conditions Uber “**lays down rules concerning the essential characteristics of the supply and organises how it works**” (no. 43), therefore it controls the economically significant aspects
- The supply whereby passengers and drivers are connected with one another is neither self-standing, nor the main supply. “Consequently, **it cannot be classified as an ‘information society service’**” (no. 65)
- Uber’s service in the field of transport is therefore excluded from the scope of Directive 2006/123/EC. Uber’s activity is covered by the exception to the freedom to provide services in Art. 58(1) TFEU and is governed by Art. 90 et seq. TFEU (no. 70)
- Therefore **Uber can thus be required to obtain the necessary licences and authorisations under national law**

2. Pending Cases at the ECJ

2.1 *Asociación Profesional Elite Taxi* (C-434/15) (4)

Opinion of advocate general Szpunar...

...**about the relationship between Uber and its drivers:**

- The **terms and conditions** cover the taking up and pursuit of the activity and even the conduct of drivers when providing services (no. 44)
- Most trips are carried out by drivers for whom Uber is their **only or main professional activity** (no. 47)
- The Uber-App contains a **ratings function**, enabling drivers to be rated by passengers. An average score falling below a given threshold **may result in exclusion from the platform** (no. 48)
- Uber **sets the price** of the service provided and pays a financial reward if the drivers accumulate a large number of trips (no. 47, 49)
- The fare is charged automatically by Uber who withholds between 20% and 25% and pays the remainder to the driver (no. 15, 50)

2. Pending Cases at the ECJ

2.1 *Asociación Profesional Elite Taxi* (C-434/15) (5)

Opinion of advocate general Szpunar (**obiter dictum**)...

...**about the classification of Uber-Drivers:**

- “**Indirect control** such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, 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.” (no. 52)
- But: “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.” (no. 54)

2. Pending Cases at the ECJ

2.2 *Uber France* (C-320/16) (1)

Request for a preliminary ruling: Tribunal de grande instance de Lille (**France**)
lodged on 6 June 2016 – C-320/16 – ***Uber France***

The facts:

- A French taxi driver argues that Uber offends against Art. L. 3120-1 of the French Transport Code and therefore has to be punished in the circumstances set out in Art. L. 3124-13

The question referred to the ECJ:

- Do certain provisions of national law which apply to services such as those offered by UberPop should have been notified as rules on services within the meaning of the provisions of EU law on technical notification?
- The legal question behind: Classification of Uber's activities as an information society service?

2. Pending Cases at the ECJ

2.2 *Uber France* (C-320/16) (2)

4/7/2017: **Opinion of advocate general Szpunar:**

- UberPop could not be regarded as an information society service within the meaning of Article 1(2) of Directive 98/34
- (Furthermore: Article L. 3124-13 of the Transport Code affects only incidentally the service of connecting customers with persons providing transport services, inasmuch as the connection relates to the unlawful provision of such services. Article L. 3124-13 must therefore be excluded from the scope of Directive 98/34 and does not constitute a rule on services subject to the notification obligation)

2. Pending Cases at the ECJ

2.3 *Uber* (C-371/17)

Request for a preliminary ruling: Bundesgerichtshof (**Germany**) lodged on 19/06/2017 – C-371/17 – **Uber**

The facts:

- German law: Car rental may only be carried out on the carrier's premises or in the entrepreneur's home (§ 49 (4) 2 passenger transport law- PBefG)
- A taxi entrepreneur claimed that it is anticompetitive that – by using the App Uber Black – those car rental drivers receive an order directly from the server of Uber, who are closest to the passenger

The question referred to the ECJ:

- Does Uber Black fall within the scope of Directive 2006/123 (and therefore the national prohibition has to be compatible with Art. 16 of the directive) or does it has to be characterized as a transport service?

3. Uber drivers – self-employed or employees?

3.1 National Case Law

- London Employment Tribunal

Judgement of the London Employment Tribunal, 28/10/2016 – 2202550/2015

- The case: Claim of two drivers for national minimum wage and paid annual leave against Uber
- London Employment Tribunal:
 - „It is not real to regard Uber as working ‚for‘ the drivers and the only sensible interpretation is that the relationship is the other way around. **Uber runs a transportation business.** The drivers provide the skilled labour through which the organisation delivers its services and earns its profits“ (no. 92)
 - „The Uber driver’s **working time** starts as soon as he is within his territory, has the App switched on and is ready and willing to accept trips and ends as soon as one or more of those conditions ceases to apply.“ (no. 122)
 - The relevant time for minimum wage is only the time when the driver is „working“ when he is carrying a passenger but not otherwise (no. 125)

The analysis bases on the following considerations (no. 95):

- (1) The contradiction in the Rider Terms between the fact that ULL purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings.
- (2) The fact that Uber interviews and recruits drivers.
- (3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it.
- (4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements.
- (5) The fact that Uber sets the (default) route and the driver departs from it at his peril.
- (6) The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory.)
- (7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties.
- (8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure.
- (9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected.
- (10) The guaranteed earnings schemes (albeit now discontinued).
- (11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them.⁴⁹
- (12) The fact that Uber handles complaints by passengers, including complaints about the driver.
- (13) The fact that Uber reserves the power to amend the drivers' terms unilaterally.

3.2 Classification of Uber drivers in EU law (1)

„The“ EU definition(s) of worker:

- The definition in Art. 45 FEU Treaty is used to determine who is to be considered as a worker when applying certain EU Directives in the social field (as Directives on working time, C-428/09 – Isère); on collective redundancies, C-229/14 – Balkaya); employment equality, C-432/14 – O)
- Other labour law Directives expressly refer to the Member States understanding of who is a worker (as long as these respect the effectiveness of EU law, C-393/10 – O’Brien)
- ECJ definition within the framework of the free movement of workers: “the essential feature of an employment relationship is that **for or a certain period of time** a person performs **services for and under the direction of another person** in return for which he receives **remuneration**” (66/85 – Lawrie-Blum, no. 17)

3.2 Classification of Uber drivers in EU law (2)

Three Criteria for an employment relationship between platform and service provider (COM(2016) 356 final, pages 12-13):

1. Existence of a subordination link

- Service provider must **act under the direction of the collaborative platform**, the latter determining the
 - choice of the activity,
 - remuneration and
 - working conditions
- Not necessary is an actual exercise of management or supervision on a continuous basis
- Just processing the payment deposited by a user and passes it on to the provider of the underlying service, does not imply that the collaborative platform is determining the remuneration

3.2 Classification of Uber drivers in EU law (3)

Three Criteria of the EC for an employment relationship between platform and service provider (COM(2016) 356 final, 12):

2. Nature of work

- The service provider must pursue an **activity of economic value that is effective and genuine**, excluding services on such a small scale as to be regarded as purely marginal and accessory
- Not providing purely marginal and accessory services through collaborative platforms

3. Presence of a remuneration

- Not fulfilled, when the provider does not receive any remuneration or receives merely a compensation of costs incurred for his activities

4. Further legal policy developments at EU level

4. Further legal policy developments at EU level

European Parliament resolution of 15/06/2017 on a **European Agenda for the collaborative economy** (2017/2003(INI)):

- New opportunities for unemployed people and those, who are otherwise not able to participate in the labour market (no. 37)
- “Ensure fair working conditions and adequate legal and social protection for all workers in the collaborative economy, regardless of their status” and safe worker’s rights, especially the right to organize, of collective bargaining and action (no. 39)
- “Ensuring the fundamental rights and adequate social security protection of the rising number of self-employed workers” (no. 41)
- The EC should examine how far the Directive on Temporary Agency Work (2008/104/EC1) is applicable to specific online platforms, because “many intermediating online platforms are structurally similar to temporary work agencies” (no. 46)

Thank you for your attention!