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EU Case Law

Philipp Hacker*

UberPop, UberBlack, and the Regulation of Digital Platforms after the *Asociación Profesional Elite Taxi* Judgment of the CJEU

Judgment of the Court (Grand Chamber) 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15)

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On those grounds, the Court (Grand Chamber) hereby rules:

Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of Council of 20 July 1998, to which 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') refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, nonprofessional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport' within the meaning of Article 58(1) TFEU. Consequently, such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

Note: All URLs have been last accessed on 8 January 2018.

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The case concerning a smartphone transport application provided by Uber, decided by the Grand Chamber of the CJEU on 20 December 2017, has the potential to reshape the regulation of contracting in the digital economy. More precisely, it specifies the rules applicable to online platforms serving as intermediaries between parties demanding and offering services. The criteria the CJEU uses to reach its conclusion are likely to have repercussions far beyond the area of transportation applications.

This Case Note starts by presenting the facts of the case and the legal background of those EU law provisions potentially governing digital intermediaries. It then explores the criteria the Court uses to distinguish Uber from simple intermediation services, followed by a discussion and critique of these criteria. In the last two sections, it maps out the implications of the judgment for the platform economy, and suggests that a decisive impetus of the judgment should be a thorough review of regulations governing the provision of services in the EU.

I Facts and Legal Background

The factual and legal background of the judgment is as follows. According to the Court, Uber Systems Spain SL (Uber), a company related to the well-known technology company Uber Technologies Inc, provided, inter alia, a smartphone application connecting non-professional drivers in Spain with potential customers for rides in urban areas. As will be analyzed in detail in Section IV, Uber has implemented different business models. The one under scrutiny here, whose hallmark is the use of non-professional drivers, is the business model the company started out with, called UberPop. As Advocate General Szpunar remarked in his Opinion,[1] however, there is some doubt about whether Uber Systems Spain SL really ran the smartphone application or whether the service was not rather provided by Uber BV, a Dutch company managing Uber's European business, with the Spanish company merely providing marketing. This would imply that Uber BV, and not the Spanish company, should have been sued for the claim to succeed. If this was true, the questions asked by the referring court would not be relevant for the decision of the case at issue, and would therefore have been inadmissible under Article 267(2) TFEU. The CJEU, however, followed the Advocate General in leaving these factual questions for the referring court to resolve.

1 A.G. Szpunar, opinion of 11 May 2017 in case 434/15 *Asociación Profesional Elite Taxi* EU:C:2017:364, *para* 12, 17, 79.

What is beyond doubt is that customers wishing to make journeys were matched by the smartphone application with non-professional drivers who did not possess an administrative license or authorization for transportation of passengers; neither did Uber. Customers paid for the rides through the application directly to Uber, which passed on part of the fare to the drivers. In late 2014, the Barcelona Taxi Association 'Elite Taxi' brought an action before a Commercial Court in Barcelona seeking a cease-and-desist order against Uber for violation of the local regulation governing taxi transportation (for lack of a taxi licence) and the Spanish law on unfair competition. The referring Commercial Court essentially wanted to know how to classify Uber: as a taxi company or as a mere provider of an information society service.

This distinction is crucial to determine the law applicable to digital matchmaking platforms. If, on the one hand, they are classified as a company in the field of the services for which they act as an intermediary, they are subject to the full force of regulations governing regulated sectors, such as the taxi market. Furthermore, the freedom to provide services, enshrined in Article 56 TFEU and spelt out more concretely in the Services Directive 2006/123/EC, is inapplicable to services in the field of transport, according to Article 58(1) TFEU and Article 2(2)(d) of the Services Directive. This entails that the restrictive provisions on authorization schemes provided for in Article 9 of the Services Directive are equally inapplicable. If, on the other hand, intermediaries are classified as an information society service, they may avail themselves of a number of privileges for these services contained in EU law. The concept of an 'information society service', therefore, is a key concept of EU law for the regulation of the digital economy. More precisely, Article 1(2) of the Information Society Services Directive 98/34/EC defines an information society service as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'; this is reiterated identically in Article 1(1)(b) of the revised Information Society Services Directive (EU) 2015/1535. The definition is taken up by Article 2(a) of the E-Commerce Directive 2000/31/EC, which applies only to providers of information society services, Article 1(1). Article 3(2) of the E-Commerce Directive, in connection with Article 3(4), establishes a wide-ranging freedom to provide information society services in the internal market and subjects Member State restrictions to strict scrutiny. Moreover, Articles 12–15 of the E-Commerce Directive seek to shield information society service providers from liability for the content they store or transmit in a merely technical and neutral manner, for example if they act as 'mere conduits' (Article 12), 'caches' (Article 13) or 'hosts' (Article 14). Therefore, the entire regulatory framework depends on whether Uber, and other digital platforms, are classified as information society services or as services in the field of activities they intermediate.

II The Contents of the Judgment

The Grand Chamber of the Court started by noting that the intermediation service provided by Uber is in principle distinct from the transport service offered by Uber drivers. Given the electronic nature of the intermediation, the service provided by Uber, at least generally, fulfils the criteria of an information society service pursuant to Article 1(2) of the Information Society Services Directive. Traditional taxi services, by contrast, constitute services in the field of transport.

Had the Court stopped its analysis at this point, the regulation of the digital economy would likely have taken a different turn. Uber, and other digital platforms following a similar business model, would not have been subject to the substantive rules governing the activities they intermediate, such as licensing requirements. However, following the Advocate General,[2] the Grand Chamber in a second step argued that the services offered by Uber go beyond mere intermediation. The software tools provided and operated by Uber, and the influence Uber exercises over the organization of the transportation service, are deemed essential components of the transportation service, inextricably linked to the physical activity on the ground. In the most important passage of the judgment, the Court advances three main factual criteria that drive the conclusion that the service provided by Uber is, in addition to an intermediation, also a transportation service (*para* 39 of the judgment). First, the drivers are *selected* by Uber and have to file an application as a necessary prerequisite for providing their transportation service. Second, the travellers *would not use* the services of the non-professional drivers without the digital intermediation by Uber. Finally, the platform exercises 'decisive influence' over the provision of the transportation service itself. The Court again adopts this term, and its analysis, from the opinion of the Advocate General.[3] For example, Uber sets the maximum fare for the trip, which is shown to passengers up front and from which drivers do not actually deviate;[4] it receives the remuneration from the client and passes part of it on to the driver; and it controls, to a certain extent, the quality of the vehicles, the drivers and their conduct, reserving itself even the right to exclude drivers whose passenger ratings drop below a certain threshold.[5] To consolidate its analysis, the Court noted that according to settled case law,[6] the concept of 'services in the field of transport'

2 Szpunar, n 1 above, *para* 39 *et seq*.

3 Szpunar, n 1 above, *para* 35.

4 See also Szpunar, n 1 above, *para* 49 and 50.

5 Cf Szpunar, n 1 above, *para* 13.

6 CJEU, case 168/14 *Grupo Itevelesa and Others* EU:C:2015:685, *para* 46; see also CJEU, opinion 2/15 *Free Trade Agreement with Singapore* EU:C:2017:376, *para* 61.

includes any service 'inherently linked' to the physical transportation exercise itself.

The immediate legal consequence of Uber's decisive influence is that its business model of 'intermediation plus control' is seen as *one overall* service. In a second step, the Court then has to identify the main component of that service to determine the legal regime applicable to it. In the case of UberPop, the main component, according to the Court, is the transportation service. This bars the service from being qualified as an information society service. Therefore, Uber does not benefit from the privileges of the E-Commerce Directive as they require the provision of an information society service (Articles 1(1), 2(a) of the E-Commerce Directive). Moreover, the Services Directive does not apply to Uber since its Article 2(2)(d) explicitly excludes services in the field of transport. Similarly, according to Article 58(1) TFEU, Uber may not avail itself of the freedom to provide services enshrined in Article 56 TFEU, either, but is governed by the provisions on transport in Articles 90 *et seq*. TFEU. They establish a framework for an EU-wide common transport policy in Article 90 TFEU. Article 91(1) TFEU confers the competence for implementing the common transport policy to the European Parliament and the Council. However, they have not exercised their competence in this field yet. Therefore, the CJEU reasoned, Member States may validly regulate transportation applications such as Uber, just as they regulate taxi companies. The judgment hence creates a level playing field – between digital and traditional ride-hailing companies. It clarifies that both have to abide by the same rules if the digital company exercises a decisive influence on the transportation activity itself.

In sum, the judgment establishes a two-step test to determine the rules applicable to platforms offering composite services. First, if the platform exercises decisive influence over multiple service components and if they are inherently linked, they are considered one overall service. Second, the main component of this overall service determines the applicable rules. In the case of intermediation versus a substantive service, the main component will generally be seen in the substantive service.

III Discussion and Critique of the Judgment

While the second part of the test follows more orthodox jurisprudence,[7] three important questions arise with respect to the Court's reasoning and conclusions concerning the first part of the test, ie, the criteria that inherently link intermedia-

7 See below, last *para* of this Section.

tion to the transportation service. They have to be answered before we can map out the implications of the judgment beyond the UberPop case. First, are the three criteria offered by the Court convincing? Second, what happens if not all three of them are fulfilled? And third, why exactly does the fulfillment of the criteria bar the service from being qualified as an information society service?

Turning first to the merits of the three criteria used by the Court, we may note that they are partially distinct, and partially overlapping. First, there is the selection procedure of the drivers, ie, of those wishing to offer their services on the platform. The Court seems to highlight the fact that drivers do not only have to register, but have to present an application that goes beyond the mere formality of identifying the contracting party. While it is unclear from the judgment how exactly the selection process takes place, the Advocate General mentions the existence of quality screening procedures that accompany the scrutiny of the applications.[8] This already introduces the first element of control of the platform over the services provided. The *screening* procedure is therefore better understood as part of the third criterion that covers the control aspect. What remains from the first criterion is the mere registration (identification) of service providers, which is intrinsic to any kind of intermediation activity. The second criterion, the fact that travelers would not use the services of the non-professional drivers if the application did not connect them, is again inherent to any valuable intermediation tool. One must look at the opinion of the Advocate General to understand what may be meant by this criterion: the fact that the application itself *created* the supply by enabling agents to provide the service in question that, otherwise, would not have done so.[9] However, this is typical of any successful intermediation tool that makes a market grow and therefore inspires entry into the market. Therefore, the first two criteria (excepting the screening procedure) provide no convincing arguments for treating Uber different from any other intermediation platform, such as eBay, for example.

While the Court mentions the third criterion, the decisive influence over the transportation exercise itself, only as an additional factor, it must really be considered the core element of the Court's analysis. Indeed, there is mounting social science research pointing to the high degree of influence Uber exercises over the working conditions of its drivers.[10] There are essentially two reasons for accepting the Court's conclusion that 'intermediation plus control' is fundamen-

8 Szpunar, n 1 above, *para* 45 and 46.

9 Szpunar, n 1 above, *para* 43.

10 See, eg, R. Calo and A. Rosenblat, 'The Taking Economy: Uber, Information, and Power' (2017) 117 *Columbia Law Review* 1623; A. Rosenblat *et al*, 'Discriminating Tastes: Uber's Customer Ratings as Vehicles for Workplace Discrimination' (2017) 9 *Policy & Internet* 256.

tally different from mere intermediation. First, if the platform exercises decisive influence over the substantive service, the platform materially supplies the service and only uses the supply side actors (for example, Uber drivers) as *instruments*. In this case, the platform shapes, through contractual agreements and/or factual behavior, the economically and socially relevant parameters of the service, and is therefore primarily responsible for its success or failure. This not only implies that the platform will often be best positioned, as the central, organizing entity, to enforce quality standards imposed by substantive regulation in a cost-effective way; to the extent that the platform primarily causes, and monetarily receives, the profits from the substantive service provided, it should also bear the (legal) risks accompanying it. Second, if the platform controls parameters that are of direct relevance for competition with traditional providers of the substantive service, such as taxi companies, it makes sense to subject all competing parties to the same regulations. As the Advocate General highlighted in his opinion, Uber, for example, controls all the economically relevant parameters in UberPop.[11] The application of the same rules to traditional and digital companies determining the economic characteristics of substitutable products creates a level playing field and avoids undue advantage of platforms that offer comparable services in digital formats. The focus on control, understood as decisive influence, therefore prevents *regulatory arbitrage* bydigital companies, pretending to act only as intermediaries, but really substantially providing a service without being subject to the same rules as those that provide the service in more traditional formats.[12]

The preceding discussion already points to the answer to the second question. If the control element is largely lacking and the platform only registers suppliers of services and enables customers to connect with them (first two criteria), it should, arguably, still count as an information society service as these elements are intrinsic to any intermediation activity. As the Court has held in a judgment concerning eBay, the electronic facilitation of relations between sellers and buyers, for example, is a typical information society service.[13] This may be the case for hotel or flight booking platforms, for example. In his opinion, Advocate General Szpunar reaches a similar conclusion on the basis that, for hotel or flight booking platforms, the provision of the substantive service is (often) economically independent from the intermediation.[14] If, however, a thorough screening

11 Szpunar, n 1 above, *para* 51.

12 See, on regulatory arbitrage in general, V. Fleischer, 'Regulatory Arbitrage' (2010) 89 *Texas Law Review* 227 (2010); on regulatory arbitrage in the sharing economy Calo and Rosenblat, n 10 above.

13 CJEU, case 324/09 *L'Oréal and Others* EU:C:2011:474, *para* 109.

14 Szpunar, n 1 above, *para* 34.

procedure is conducted as part of the selection of suppliers, this introduces a control element that could, depending on the degree of vetting involved, be sufficient to qualify as decisive influence in the understanding of this Case Note.

This brings us to the third question: why exactly does the fulfillment of the three criteria result in the service offered by the platform not being an information society service anymore? The CJEU argues succinctly that intermediation, when accompanied by the three criteria, amounts to an overall service, whose main component is the substantive service provided, in Uber's case that being transportation. If the preceding analysis is correct, this is precisely the result of the control element. However, the Court then only apodictically states that this overall service 'must be qualified not as "an information society service"', but as a transportation service. There are two possible doctrinal explanations for the incompatibility of the control element with an information society service. First, one might argue that the legal consequences of qualifying a composite service simultaneously as a transportation and as an information society service are incompatible. This may be what A.G. Szpunar has in mind when he states that the classification of UberPop as an information society service 'would not permit the attainment of the objectives of liberalisation underpinning Directive 2000/31'.[15] This is due to the specific regulatory framework surrounding transportation: the freedom to provide services does not apply, neither through Article 56 TFEU nor through the Services Directive. However, as mentioned earlier, the hallmark of information society services is that their providers, pursuant to Article 3 of the E-Commerce Directive, benefit from substantial freedom to provide the services. This explanation would imply that the relevance of the judgment is limited to transportation applications (and perhaps other areas exempted from the scope of the Services Directive under its Article 2(2)) since other applications, even if they are deemed to be providing the substantial service their suppliers offer, may avail themselves of the freedom to provide services. However, the Court seems to base its conclusion not to qualify the platform service as an information society service on the unitary qualification of the overall service as a transportation service. This suggests a better doctrinal explanation that follows the reasoning of the Advocate General in his opinion:[16] the control element transforms the digital intermediation service into an overall service that, at least primarily, is not delivered electronically and at a distance, but physically and on the ground directly between the involved parties. Therefore, two decisive elements of an information society service (electronic provision; at a distance) are lacking; indeed, Article 1(2) of

15 Szpunar, n 1 above, *para* 65.

16 Szpunar, n 1 above, 29–35.

Directive 98/34/EC demands that information society services must be '*entirely* transmitted [...] by [...] electromagnetic means'.[17] This is precisely why Recital 18 of the E-Commerce Directive states that information society services do not cover the provision of services off-line.[18]

In this understanding, the control element makes a qualification of the platform as a provider of information society services impossible if the substantively provided service is not itself an information society service, but some activity carried out in the 'real economy'. According to Recital 18 and Article 2(h)(ii) of the E-Commerce Directive, not only offline services, but also the delivery of goods are excluded from information society services. Therefore, many of the substantive services intermediated by digital platforms will not qualify as information society services – be it the provision of accommodation (Airbnb), food preparation and delivery (Deliveroo), the conduct of air travel (Expedia), construction and repair (myhammer), or other works and services. If this reconstruction of the reasoning of the Court is accepted, the relevance of the judgment is not limited to transportation applications, but the criteria apply more broadly to any type of digital intermediation exercise.

The second part of the test – the qualification of the overall service according to its main component – is less novel and finds precedent in case law of the Court and the opinion of the Advocate General.[19] In another recent case, *Schottelius*, the Court held that the distinction between contracts of sale and contracts for work or services, for the purpose of determining the scope of application of Directive 1999/44/EC on the sale of consumer goods, also follows the principal obligation if both sale and work or service components are present in a contractual arrangement.[20] This follows a long-standing tradition in Member State contract law to qualify contracts exhibiting components of different contractual types according to the main component of the contract, if it can be reliably identified.[21] This method is not unchallenged,[22] but seems to be favored by the CJEU. Only where EU law itself distinguishes between different components of the contract, for example between the online *sale* and the *delivery* of these goods under Recital 18 and Article 2(h)(ii) of the E-Directive Commerce, does the Court split the contract up into parts governed by different legal regimes.[23] Rightly understood, a flexible regime is

17 Emphasis added; see also Szpunar, n 1 above, *para* 29.
18 See CJEU, case 108/09 *Ker-Optika* EU:C:2010:725, *para* 33.
19 Szpunar, n 1 above, *para* 35.
20 CJEU, case 247/16 *Schottelius* EU:C:2017:638, para 38 and 44.
21 Cf, eg, Emmerich, in Münchener Kommentar, BGB (7th ed, Munich: Beck, 2016) § 311 *para* 29.
22 *Id*.
23 CJEU, case 108/09 *Ker-Optika* EU:C:2010:725, *para* 24–31.

needed. One will even have to resort to the provisions governing ancillary aspects of a contractual arrangement if only these provisions contain adequate solutions for the problems of the specific case. For packages comprising intermediation and substantive services, however, it makes sense to generally resort to the rules governing substantive services as these services, and not the intermediation exercise, leave the strongest imprint on the main economic parameters of the exchange process.

IV Implications of the Judgment for the Platform Economy

The preceding discussion suggests that the judgment has wider implications for the platform economy. There are, of course, many different types of platforms that operate in the digital economy. Very broadly speaking, on the one hand, communication platforms, such as Facebook or other social media networks, seek to incentivize customers to share data and spend time on the platform. Their business model, based on multi-sided markets,[24] largely consists in selling, to third parties, user data or advertisements that are personalized with the help of the data collected from the platform's users. Their success is largely due to direct and indirect network effects (between one user category and across different sides of the market).[25] Search engines similarly provide their search services 'for free', ie, in exchange for personal data, while monetizing the data in the selling of advertisements and data. Uber, on the other hand, belongs to those platforms primarily intermediating services, works, or goods (while also collecting data, of course). Airbnb, Amazon, eBay, myhammer, Deliveroo and others are prominent examples of these intermediation platforms.

Concerning social media networks, the CJEU has already held that they constitute, at least in principle, information society services.[26] Entirely different questions are raised in competition law by the properties of multi-sided markets that have already been the subject of competition proceedings at the European

24 For the economics two-sided platforms, see J.-C. Rochet and J. Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1 *Journal of the European Economic Association* 990; M. Armstrong, 'Competition in Two-Sided Markets' (2006) 37 *The RAND Journal of Economic* 668.

25 Cf P. Belleflamme and M. Peitz, *Industrial Organization: Markets and Strategies* (2nd ed, Cambridge: Cambridge University Press, 2015) ch 20.

26 CJEU, case 360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* EU:C:2012:85, *para* 27.

level.[27] Both in the case of social media networks and search engines, the implications of the judgment are limited. In these cases, one may validly apply the two-step test, and will particularly have to look at the main component of the services offered to determine the applicable regulatory context. However, this is unlikely to result in novel insights: there is generally no offline activity inherently linked to the online service that could, if sufficiently controlled by the platform, transform its activities into an overall service outside of the scope of information society services. This may change if social media networks, in the future, start intermediating services and goods to a greater extent, too.[28]

Therefore, at the moment, intermediation platforms stand to be most affected by the present judgment. To determine the rules applicable to them, courts will arguably have to use the three criteria the CJEU mentions. Broadly speaking, if the application restricts itself to mere intermediation (ie, matchmaking), it will be considered an information society service and will be able to avail itself of the privileges and freedoms contained in the E-Commerce Directive, for example. If, however, the application also assumes decisive control over the substantive service the supply side provides, in other words, if the provision of that service is inherently linked to the use of the platform, the platform itself will become subject to the substantive rules governing the service it facilitates. This is the truly revolutionary potential of the judgment that stands to upset the business model of a number of intermediation platforms that seek to gain competitive advantages by evading substantive regulation while providing services equivalent to those traditional competitors offer (regulatory arbitrage).[29]

Within the scope of this Case Note, it is of course impossible to survey exhaustively the broad variety of platforms that exist on the market. Therefore, this section will restrict itself to map out the consequences of the judgment for (i) other types of transportation intermediation models and for (ii) selected other platforms such Airbnb.

27 See, eg, European Commission, decision in case AT.39740 of 27 June 2017 *Google Search (Shopping)*; see also S. Grundmann and Ph. Hacker, 'Digital Technology as a Challenge to European Contract Law' (2017) 13 *European Review of Contract Law* 255, 273 with further references.

28 See, eg, Facebook Marketplace, https://www.facebook.com/marketplace/learn-more.

29 See above n 12.

1 Implications for Transportation Platforms (Lyft, UberTaxi, UberBlack)

In the realm of transportation applications, there are three different business models that transport applications pursue, depending on the type of driver conducting the travel on the ground. Ride-sharing models (like UberPool, Lyft Line,[30] or Allygator[31]) may be implemented within each of the three types. At one end of the spectrum, the application connects customers to non-professional drivers without a transportation license (Lyft;[32] UberPop, often also UberX, UberXL, and UberSelect[33]). This business model has essentially been buried in the EU by the present judgment. UberTaxi stands at the opposite end of the spectrum by using regular taxis for transportation. Therefore, to the extent that these taxis comply with local taxi regulation, such applications should not encounter significant legal problems even if the platform was regarded as a transportation service provider for this service, too. However, it is also the least interesting case as it is not significantly different from any other taxi application. What is most interesting, therefore, is an intermediate business model in which rental car companies holding a license to transport persons conduct the transport on the ground. Examples for this business model are UberBlack and UberSUV, which only distinguish themselves by the types of car used.[34] This model is particularly intriguing not only because it sits analytically between UberPop and UberTaxi, but also because the Bundesgerichtshof (German Federal Private Law Supreme Court, BGH) has submitted a request for a preliminary ruling concerning the provision of an information society service by UberBlack in May 2017 that is still pending before the Court.[35] In this business model, Uber cooperates with rental

30 See https://www.lyft.com/line.

31 See https://www.allygatorshuttle.com/en/index.html.

32 See Lyft, 'Frequently Asked Questions', https://www.lyft.com/drive-with-lyft. So far, Lyft has not operated in the EU, see Darrell Etherington, 'Lyft's first market outside the U.S. will be Canada with a December launch in Toronto' *Tech Crunch* (13 November 2017), https://techcrunch.com/2017/11/13/lyfts-first-market-outside-the-u-s-will-be-canada-with-a-december-launch-in-toronto/.

33 DougH, 'What's the difference between UberX, XL, UberSelect, and Black Car?' RideSharingDriver (30 August 2016), https://www.ridesharingdriver.com/whats-the-difference-between-uberx-xl-uberplus-and-black-car/; see also n 34.

34 Furthermore, UberX, UberXL and UberSelect may, in some countries with restrictive legislation such as Germany, also use this business model, see Julana, 'uberX – Now available in Germany' *Uber Blog* (18 May 2015), https://www.uber.com/de/blog/dusseldorf/uberx-now-also-available-in-germany/.

35 Bundesgerichtshof (BGH), order of 18 May 2017 in case I ZR 3/16 *Uber Black* [sic] DE:BGH:2017:180517BIZR3.16.0.

car companies authorized to provide transportation services. In Germany, where the case originated, these rental car companies are subject to regulatory provisions similar to the ones covering taxis when they transport persons against remuneration. Given the criteria used by the Court in its present judgment, it is highly likely that it will find that UberBlack equally constitute a transportation, and not an information society service. As the BGH noted in its reference, Uber handles the payments, determines the advertising campaigns, and controls the conditions of the transportation service in the case of UberBlack, too.[36] Just like in the case of UberPop, the platform sets the maximum fare for UberBlack as well and therefore decisively influences the pricing of the service.[37] This seems to suggest that all of the three criteria mentioned by the Court, including the decisive control criterion, are fulfilled by UberBlack. This would imply that UberBlack needs to abide by the German regulation covering rental car companies that transport persons, which it arguably violated in one specific dimension (see below, Section V).

2 Implications for Other Types of Platforms (Amazon, Expedia, Airbnb)

For intermediation platforms outside of the transportation sector, the three criteria the Court established will be applicable, too (see above, at the end of Section III). However, platforms merely facilitating an online sale of goods constitute information society services irrespective of the degree of control they assume in the sales process since the facilitated activity, the conclusion of a contract of sale online (but not the delivery of the good, Article 2(h)(ii) of the E-Commerce Directive), is itself the epitome of an information society service.[38] The CJEU has implicitly affirmed from this for eBay;[39] the same should hold for Amazon. Therefore, the judgment will unfold its full meaning for intermediation platforms facilitating services or works, such as Expedia, myhammer, Airbnb, booking.com and others. Here, courts will have to ask whether the platform restricts itself to

36 BGH, n 35 above, *para* 36.

37 BGH, n 35 above. *para* 37.

38 Recital 18 of the E-Commerce Directive; CJEU, case 108/09 *Ker-Optika* EU:C:2010:725, *para* 24–25 and 29–30.

39 CJEU, case 324/09 *L'Oréal and Others* EU:C:2011:474, *para* 109–117 (noting that eBay may not qualify as a 'host' under art 14 of the E-Commerce Directive if it significantly influences the purchasing process, but not mentioning that it may not qualify as an information service provider in this case).

mere intermediation or implements an 'intermediation plus control' business model. Platforms that only register actors on the demand and supply side and facilitate matchmaking, such as many flight booking platforms, should count as providers of information society services. Even if they establish rating systems, as hotel reservation platforms often do, this should not count as 'decisive influence' over the provision of the accommodation service if it only facilitates reputation building and does not serve as a basis for sanctions against those scoring below a certain threshold.[40]

In the case of Airbnb, however, one may argue that the platform does follow an 'intermediation plus control' business model. Not only does Airbnb handle the payment for the accommodation via direct subsidiaries[41] and provide a guarantee to landlords for the reimbursement of damages,[42] but it also implements a screening procedure, including the right to exclude members falling below a rating threshold.[43] While the price is not influenced by Airbnb, the platform does reserve itself the right to stipulate rules for the presentation of the housing offer.[44] Importantly, it even runs a dispute resolution mechanism.[45] It may furthermore be of relevance that Airbnb, not necessarily but often, creates supply by connecting travellers with non-professional providers of accommodation that, but for the platform, would likely not have provided the service at all (as in the case of UberPop). Therefore, while controlling the substantive service less than Uber (particularly the price dimension), Airbnb still exercises significant control over the accommodation service, especially through the screening/exclusion procedure and the dispute resolution mechanism. Hence, while being a borderline case, it should arguably be considered not as a provider of an information society service, but of accommodation (and, in view of the expansion of the business model toward events: other) services. Following the criteria of the Uber case, Airbnb is therefore likely subject to local housing regulation, but also to anti-discrimination legislation applicable to landlords.[46] This could be important in

40 Cf also Szpunar, n 1 above, *para* 59.

41 https://www.airbnb.com/terms/payments_terms.

42 Grundmann and Hacker, n 27 above, 274.

43 § 2.3 *et seq* of the Airbnb Terms of Service, https://www.airbnb.com/terms.

44 § 7.1.4 of the Airbnb Terms of Service, https://www.airbnb.com/terms.

45 § 9.7 of the Airbnb Terms of Service, https://www.airbnb.com/terms.

46 Art 3(1)(h) of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJEC* 2000 L 180/22; art 3(1) of Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJEC* 2004 L 373/37.

view of empirical evidence of racial discrimination on Airbnb.[47] The same holds true, mutatis mutandis, for food delivery applications tracking and controlling their contributing restaurants and delivery personnel.

For digital intermediation platforms, the judgment therefore entails a non-trivial trade-off: the more they seek to control the quality of the substantial product they intermediate, the more they run the risk of becoming subject to substantial regulation. Companies will therefore have to weigh the expected increase of compliance costs that comes with tighter control over the product against the expected increase in profits flowing from better quality and organization.

V Time for a Regulatory Review

To the extent that the judgment subjects platforms that exercise decisive influence over the substantive service to the same rules as traditional providers of the service, the judgment is convincing. It holds the potential for fostering competition on the merits between similarly situated service providers. However, it also points to the pressing necessity of revising some of these rules and adapting them to the digital present. Outside of the transportation sector, Article 56 TFEU and the Services Directive will be applicable and regulation may therefore have to stand up to scrutiny under the freedom to provide services. Furthermore, Member State fundamental rights protecting the freedom to conduct business will be applicable, or Article 16 of the Charter of Fundamental Rights of the European Union, depending on the facts of the case (cf Article 51(1) of the Charter).

One obvious case for reform is the requirement, in many local taxi regulations, that drivers learn by heart thousands of street names and their location; in the age of ubiquitous and reliable GPS navigation, this is clearly a waste of time and resources. The order of reference by the BGH in the matter of UberBlack is another case in point. If UberBlack is considered a transportation service, it must comply with German transportation regulation. Unlike the case of UberPop, Uber in this case operates with a company that holds an authorization for transporting persons. However, the way the service is organized violates a specific provision

47 B. Edelman, M. Luca and D. Svirsky, 'Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment' (2017) 9 *American Economic Journal: Applied Economics* 1; D. Wang, S. Xi and J. Gilheany, 'The Model Minority? Not on Airbnb.com: A Hedonic Pricing Model to Quantify Racial Bias against Asian Americans' (2015) *Technology Science*, https://techscience.org/a/2015090104/. It should be noted that these studies establish discrimination by hosts and guests, not by Airbnb in the performance of its own platform services.

of German transportation regulation (the so-called return rule). According to § 49(4)(3) of the Law on the Transportation of Persons (Personenbeförderungsgesetz), rental cars that transport persons have to return immediately to their seat of business, unless they have received a new transportation request from the seat of business before arriving at the seat of business. This return duty differentiates rental car companies transporting persons from taxis. In the case of UberBlack, however, customers request the vehicle via the app, and the request is routed to an Uber server in the Netherlands. That server *directly* contacts the closest vehicle and simultaneously sends a transportation notice to the seat of business of the rental car company.[48] This, however, violates the return rule since the request is not first sent to the seat of business and then communicated to the vehicle driver.

The justification for the existence of this provision, however, is more than dubious. The BGH reasons that the provision is necessary and appropriate to protect taxi companies from competition by rental car companies. According to the German court, rental car companies suffer from two decisive disadvantages vis-à-vis taxi companies that make the protection of the taxi market a legitimate aim.[49] First, taxis are subjected to regulated prices; second, they are under an obligation to contract with passengers irrespective of the location of the passenger. Upon closer scrutiny, however, it is unclear whether consumers would be really worse off with respect to these two parameters if taxis were partially, or even completely, replaced by UberBlack-type rental car companies. If competition is significant, and pricing transparent, there should be no need to regulate transportation prices in the first place. Now, there are reports about price hikes by Uber in times of high demand or when users are about to run out of battery (surge pricing).[50] To combat this problem, however, it seems sufficient to introduce price caps for rental car personal transport, instead of ruling out an entire service type via an inefficient communication obligation. Concerning the absence of anobligation to contract with passengers, the BGH notes that this obligation benefits customers in less frequented and more inaccessible areas. However, it is far from clear whether increased competitive pressure from digital ride-hailing companies would worsen or improve access to transportation for non-central areas. As the author has repeatedly experienced himself, even taxis under an obligation to

48 BGH, n 35 above, *para* 20.

49 BGH, n 35 above, *para* 43.

50 J. Cascarelli, 'The Uber Hangover: That Bar Tab Might Not Be the Only Thing You'll Regret in the Morning' *The New Yorker* (27 December 2013), http://nymag.com/daily/intelligencer/2013/12/uber-surge-pricing-model.html; see also Ph. Hacker, 'Personal data, exploitative contracts, and algorithmic fairness: autonomous vehicles meet the internet of things' (2017) 7 *International Data Privacy* 266, 272–273; Szpunar, n 1 above, *para* 15.

contract do not reliably respond to transportation requests from more forlorn parts of Berlin, for example. Moreover, as a matter of policy priority, it might be advisable to invest in public transportation rather than aiming to guarantee maximum coverage of private transportation.

It must therefore be welcomed that the BGH explicitly raised the question of the justification of the German return rule in the light of Article 16 of the Services Directive.[51] Similarly, the 'disruptive' practices of other online platforms should be taken as an indication that, sometimes, regulation might be outdated or at least in need of substantial review. Needless to say, to the extent that, eg, housing, anti-discrimination or foodstuff regulation pursue legitimate aims in appropriate ways, they will be justified and should be applied, within and beyond the digital economy. In this sense, as this Case Note has shown, the criteria of the Uber case may well harbinger an era of new regulatory oversight over so far 'unregulated' platform services – but perhaps also of a critical review of some of the substantive regulatory provisions themselves.

51 The BGH only raised the question, however, for the case that UberBlack is not qualified as a transportation service (BGH, n 35 above, *para* 40). If this was the case, the provision would have to be justified vis-à-vis art 12 of the German Constitution; the German Constitutional Court (Bundesverfassungsgericht) has affirmed the constitutionality of this rule in 1989: BVerfGE 81, 70, *Neue Juristische Wochenschrift* 1990, 1349.