

## FEATURES FROM OUR GLOBAL MEMBERS

## EUROPE

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# The 'decisive influence' test: the ECJ judgment on Uber

**F**ew companies have attracted as much worldwide attention as Uber. This is the case because Uber operates in a number of countries around the world and its business directly affects the taxi sector, which provides urban transport services and which is subject to heavy administrative regulation.

In most jurisdictions, taxi drivers have expressed their bitter opposition to Uber, claiming that it is providing transport services without the necessary administrative authorisations. In other cases, drivers who provided transport services through the Uber app have requested that the courts declare that their relationship with Uber was equivalent to an employment contract, in view of the fact that Uber controlled their remuneration and the conditions for providing the service.

Regardless of whether one is for or against Uber, it is undoubtedly true that Uber has used technology to revolutionise non-collective urban transport. This technology-driven change has also affected other areas of our daily life, such as the way we communicate, socialise or travel, which now mainly revolves around using the internet.

From a legal perspective, this technological change poses important questions. Specifically, it is important to determine whether companies which provide services through the internet should be subject to the administrative regulations which affect the activity of their offline competitors. From the specific perspective of European Union Law, the recent ruling of the European Court of Justice (ECJ or the 'Court') on the activity of Uber may shed some light on this issue.

The ECJ Judgment, dated 20 December 2017 (C-434/15 – *Asociación Profesional Élite Taxi v Uber Systems Spain SL*), established that the activity of UberPop in Spain constituted a 'service in the field of transport services' (the 'ECJ Uber Judgment' or the 'Judgment').

The ECJ Uber Judgment arose following a Spanish lawsuit filed by a professional

association of taxi drivers for unfair competition. According to the claimant, the UberPop service (a service no longer provided by Uber) was performed by non-professional drivers in their own vehicles and without administrative authorisation. In the opinion of the claimant, Uber was providing urban transport services without authorisation, which allegedly was tantamount to unfair competition. However, according to the defendant, Uber simply matched demand with supply. As such, Uber alleged that it carried out an intermediation activity, which was an information society service and not a transport service.

The ECJ Uber Judgment deserves some attention because of the impact that this ruling may have on future cases relating to digital platform businesses. The Judgment formulates the 'decisive influence test' which the ECJ used to analyse the characteristics of the activity performed by Uber, in order to determine whether such activity should be classified as an information society service or a transport service.

Please note that, according to EU regulations, information society services should be provided freely from any EU member state, without being subject to prior administrative authorisation. Therefore, if Uber was classified as an information society service, it would be allowed to operate without being subject to the specific administrative regulations of the transport sector.

As a starting point, the ECJ stated that an intermediation service that enables a driver to locate and connect with a potential passenger using a smartphone application is not, in principle, a transport service and must be classified as an information society service, according to the wording of Article 2, letter (a) of Directive 2000/31/EC.

However, the ECJ further considered that Uber does not just provide an intermediation service for passengers and drivers but actually provides a 'composite service' where Uber

exercises a 'decisive influence' on the activity of the drivers, to the extent that Uber actually organises and supplies a non-collective urban transport service.

According to the Advocate General, a 'composite service' is partly provided by electronic means and partly offline (the underlying activity). In order to conclude whether a 'composite service' is an information society service or not, one has to determine (i) whether the service provided offline is financially independent of the service provided online or (ii) whether the two services form part of an inseparable whole because the provider exercises a decisive influence over the conditions under which the offline service is provided.

In the Uber case, the ECJ carried out the aforementioned analysis and concluded that UberPop consisted of two services, an online service and an offline service, where the offline service (non-collective urban transport) was financially dependent on the service provided online (connecting drivers with passengers through an online application) due to the decisive influence that Uber exerted on the way the offline service was provided. Such decisive influence was observed in view of facts such as the control that Uber exerted over drivers including their recruitment and performance, the way Uber set fares and the control that Uber exerted over the technical requirements that vehicles had to meet.

Thus, the Court concluded that the intermediation activity carried out through the online application was inextricably linked to the offline activity consisting of a non-collective urban transport service (or taxi service). Therefore, Uber was the provider of an intermediation service and, simultaneously, offered and organised the general operation of urban transport services for the benefit of people who wished to make an urban journey. This led the ECJ to conclude that Uber could not solely be considered an electronic platform but that, in fact, it also performed a 'classic transport service'. This classification as an urban transport service means that Uber's activity could be subject to administrative authorisation depending on the specific regulations of the different EU member states.

In terms of the future consequences of these conclusions, the Court's reasoning may generate uncertainty regarding the impact this case will have, if any, on other digital platform businesses.

There is an ECJ precedent in a very similar case where an information society service clashed with national legislation. In Case C-108/09, *Ker-Optika*, the ECJ, by judgment of 2 December 2010, ruled that the sale of contact lenses over the internet qualified as an information society service and, therefore, the Hungarian regulation which established that the marketing of contact lenses could only be carried out in establishments specialising in medical instruments was contrary to Directive 2000/31/CE.

The ECJ's reasoning and conclusions in the *Ker-Optika* case differ greatly from those in the ECJ Uber Judgment. It would have been useful for the ECJ to have justified the need to reach a different conclusion in the Uber case than in the *Ker-Optika* case. We believe the ECJ has missed a great opportunity to explain these different decisions on the application of Directive 2000/31/CE. One could argue that the difference could be partially attributed to the fact that Uber is a sensitive business that requires special attention.

In light of the foregoing, it is reasonable to consider what the ECJ Uber Judgment will mean for companies that operate online apps which are similar to Uber in other sectors. Following the reasoning in the Uber case, some may argue that these companies exert a 'decisive influence' over the offline service and, thus, do not qualify as e-commerce services and could be subject to the specific administrative regulations of the different EU member states.

In any case, and until further notice from the ECJ, in terms of Directive 2000/31/CE, we may have to apply the 'decisive influence' test. Thus, we may be required to analyse the extent to which the activity of the platform is inextricably linked to the underlying service (be it accommodation, catering or urban transport) and the degree of control and influence the platform exercises over the underlying or offline service.