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Why Uber is an information society service

Case Note to CJEU 20 December 2017 C-434/15 (*Asociación profesional Élite Taxi*)

I. Introduction

The e-commerce Directive¹ has the aim to create a legal framework that ensures the free movement of information society services between Member States.² Key concept in this directive is the concept ‘information society service’.

At first glance, it is not completely clear what constitutes an information society service. Probably, the drafters attempted to keep this concept broad and without reference to any specific applications, so that it would not be outdated by the fast developments in information technology.

The concept aims to cover a wide range of services related to internet access, hosting services and electronic contracting. Recital 18 of the e-commerce Directive offers some guidance, stating that information society services span a wide range of economic activities which take place on-line, such as the on-line sale of goods and the online provision of information.

One would think that, if anything, the online ride booking-application offered by Uber classifies as an information society service. This application enables drivers to offer transport services and enables passengers to book a ride with these drivers. However, in a recent judgement the Court of Justice of the European Union (CJEU) decided that the application that enables non-professional drivers to connect and contract with passengers is not an information society service.³ The CJEU considers the booking-application to be an integral part of an overall service whose main component is a transport service as meant in the Services Directive⁴ and therefore must not be classified as an information society service.⁵

As a consequence, the booking-application does not fall within the scope of the e-commerce Directive, which contains inter alia the principle of freedom to provide information society services.⁶ As transport services are also explicitly excluded from the application of the Services Directive, and the principles of freedom of establishment and freedom to provide services laid down in that directive, the Member States retain their national authority to regulate the activities of Uber.

In this article I will argue that the decision of the CJEU to exclude the booking application from the scope of the e-commerce Directive is incorrect and unnecessary. Possibly, this decision was prompted by the desire to ensure that Member States can apply and enforce national rules relating to transport services. Yet, classification of Uber as an information society service would not have precluded this.

To demonstrate this, I will first set out (in part 2) the definition and aim of the concept of information society service. The e-commerce Directive provides (amongst others things) two basic principles for information society services: the home state control-principle and the principle of freedom to provide information society services.⁷ The scope and in particular the limitations of these principles are discussed in part 3. The practical implications of the limited scope of the principles are illustrated by the decision of the CJEU in *Ker Optika*⁸ (set out in part 4). This sets the stage for the discussion of the Courts’ decision in *Asociación Profesional Élite Taxi v Uber Systems Spain* in parts 5 and 6. I will argue (in

parts 7 to 9) that it was neither necessary nor desirable to exclude the Uber booking-application from the scope of the e-commerce Directive. Part 10 contains an outlook on the consequences of the CJEU-decision for the classification of electronic platforms in general as information society services. Part 11 summarizes my conclusions.

II. Scope and purpose of the concept information society service

The e-commerce Directive does not define the concept information society service, but refers to the definition of article 1 (2) of Directive 98/34 laying down a procedure for the provision of information in the field of technical standards.⁹ A consolidated version of Directive 98/34 was published in 2015 (Directive (EU) 2015/1535) which is a restatement including all changes made to Directive 98/34 after it was issued.¹⁰

According to article 1(1) of Directive (EU) 2015/1535 an information society service is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. The elements of this definition are further defined in the same provision. ‘At a distance’ means that the service is provided without the parties being simultaneously present. ‘By electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means. ‘At the individual request of a recipient of a service’ means that the service is provided through the transmission of data on individual request.¹¹

The remuneration that is required is to be interpreted broadly. It is not necessary that the recipient of the service pays for the online service. The definition also includes online services that are not remunerated, but constitute an economic activity, such as online information, commercial communications, search tools, access and retrieval of data.¹² The CJEU

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Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1 (Directive on electronic commerce).

2 Recital 8 Directive (EC) 2000/31.

3 Case C-434/15, *Asociación profesional Élite Taxi v Uber Systems Spain* [2017] ECLI:EU:C:2017:981.

4 Directive (EC) 2006/123 on Services in the Internal Market [2006] OJ L 376/36.

5 Case C-434/15, *Asociación Profesional Élite Taxi v Uber Systems Spain* para 40.

6 Article 3(2) of Directive (EC) 2000/31.

7 Articles 3(1) and (2) of Directive (EC) 2000/31.

8 Case C-108/09, *Ker-Optika* [2010] ECLI:EU:C:2010:725.

9 Directive (EC) 98/34 laying down a procedure for the provision of Information Society Services [1998] OJ L 204/37, as amended by Directive (EC) 98/48 [1998] OJ L 217/18.

10 Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society Services (codification) [2015] OJ L 241/1.

11 On these elements in relation to online auctions see: Christine Riefa, *Consumer Protection and Online Auction Platforms* (Ashgate 2015) 58-61.

confirmed in *Sotiris Papasavvas* that it covers the provision of online services where income is generated by advertisements posted on the website.¹³

Annex I of Directive (EU) 2015/1535 contains an indicative list of services that are not considered to be information society services. This annex lists inter alia the consultation of an electronic catalogue in a shop, electronic games in a video arcade, automatic ticket dispensing machines, toll booths, television and radio broadcasting and televised teletext.

The definition aims to include a wide range of activities related to internet within the scope of the e-commerce Directive. According to recital 18 of this Directive, it covers online economic activities such as the selling of goods, offering online information and search engines as well as services consisting of the transmission of information via communication networks, access providers and hosting providers. In *L'Oréal v eBay* the CJEU stated that an internet service consisting in facilitating relations between sellers and buyers of goods is, in principle, a service for the purposes of Directive 2000/31.¹⁴ Activities such as the delivery of goods and the provision of services off-line are explicitly not covered.¹⁵

If a service falls within the scope of the e-commerce Directive, the provider of that service must comply with the general transparency requirements of article 5-7 of the e-commerce Directive and the rules relating to electronic contracting of articles 9-11. For intermediary service providers¹⁶ articles 12-15 of the e-commerce Directive relating to the liability for information transmitted or stored by the service provider are relevant.

Besides these substantive rules concerning the provision of the service, the e-commerce Directive contains several general principles. First, there is the *home state control* principle, which entails that the Member States 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 questions which fall within the coordinated field.¹⁷ Secondly, Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State, which is referred to as the *principle of freedom to provide information society services*.¹⁸ And thirdly, Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorization or any other requirement having equivalent effect, referred to as the *principle excluding prior authorization*.¹⁹

If these principles were applied unconditionally, providers of information society services would enjoy far-reaching freedom without having to worry about interference from various Member States and about various authorization schemes. However, a closer look reveals that the scope of these principles is limited.

III. The limited freedom to provide information society services

The scope of the home state control principle and the freedom to provide information society services is limited in several ways. The Annex to the e-commerce Directive (titled: derogations from article 3) lists eight topics that are excluded from the home state control and principle of freedom to provide information society services. Amongst other things this list includes copyright, emission of electronic money, the freedom of the parties to choose the law applicable to their

contract and contractual obligations concerning consumer contracts.

Article 3(4) of the e-commerce Directive allows Member States to derogate from the freedom to provide information society services if certain conditions are met. For example, derogations are allowed if this is necessary for reasons of public policy, the protection of public health, public security and the protection of consumers.²⁰

The most important limitation arises from the extent of the coordinated field. The home state control principle and the principle of freedom to provide information society services only apply to issues that fall within this field. This means the scope of the coordinated field in essence determines the impact of these principles.

The coordinated field concerns requirements laid down in Member States' legal systems applicable to information society service providers²¹ or information society services, regardless of whether they are of a general nature or specifically designed for them.²² The coordinated field includes requirements in respect of the taking up of the activity of an information society service such as requirements concerning qualifications, authorization or notification and requirements relating to the pursuit of the activity such as requirements concerning the behavior of the service provider, the quality or content of the service.²³ The definition of the coordinated field is quite vague, as with the concept of information society service, the extent of this concept is not clear at first sight.

However, it is explicitly stipulated that the coordinated field does not cover requirements such as requirements applicable to goods as such, requirements to the delivery of goods and requirements applicable to services not provided by electronic means.²⁴ This limited extent is underlined by recital 21 of the e-commerce Directive stating that the coordinated field only covers requirements relating to online activities such as online information, online advertising, online shopping, online contracting and does not concern Member States' legal requirements relating to goods such as safety standards, labeling obligations, liability for goods, or Member States' requirements relating to the delivery or the transport of goods.

The principle excluding prior authorization is limited by article 4(2) of the e-commerce Directive stating that this principle is without prejudice to authorization schemes which are not specifically and exclusively targeted at information society services.

12 Recital 18 of Directive (EC) 2000/31.

13 Case C-291/13, *Sotiris Papasavvas* [2014] ECLI:EU:C:2014:2209.

14 Case C-324/09, *L'Oréal v eBay* [2011] ECLI:EU:C:2011:474, para. 109.

15 Recital 18 of Directive (EC) 2000/31.

16 If the service provider provides access to a network or transmits or stores information that is provided by others.

17 Article 3(1) of Directive (EC) 2000/31.

18 Article 3(2) of Directive (EC) 2000/31.

19 Article 4(1) of Directive (EC) 2000/31.

20 Derogations should be proportionate and taken only after the home state of the service provider has failed to take (adequate) measures and the Commission must be notified.

21 Any natural or legal person providing an information society service, article 2 sub b Directive (EC) 2000/31.

22 Article 2 sub h Directive (EC) 2000/31.

23 Article 2 sub h under i Directive (EC) 2000/31.

24 Article 2 sub h under ii Directive (EC) 2000/31.

IV. Ker-Optika

The scope of the coordinated field establishes a division between offline and online activities. Online activities are covered by the home state principle and the freedom to provide information society services and offline activities are not. This online-offline divide is confirmed by the CJEU-decision in *Ker-Optika*.²⁵ The case concerns the online selling of contact lenses by Ker-Optika. The Hungarian governmental authority prohibited this, because Hungarian health regulations prescribed that contact lenses could only be sold in a shop which specializes in the sale of medical devices or by home delivery for final consumption and cannot, as Ker-Optika did, be sold via internet.

Ker-Optika, relying on the national implementation of the e-commerce Directive in Hungary, argued that the online sale of contact lenses cannot be restricted. The Hungarian authority in turn referred to recital 18 of the directive claiming that the selling of contact lenses requires a medical examination and therefore cannot be an information society service. The last sentence of this recital reads: ‘activities which by their nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts and medical advice requiring the physical examination of a patient are not information society services’.

The CJEU ruled that national provisions that prohibit online selling of contact lenses fall within the scope of the coordinated field.²⁶ The CJEU also observed that the coordinated field does not cover requirements applicable to the supply of goods which are sold online, thereby confirming the online-offline divide made by the e-commerce Directive.²⁷ This means online selling of contact lenses cannot be prohibited, but national requirements pertaining to the lenses themselves or the delivery of the lenses are allowed, at least as far as the e-commerce Directive is concerned.²⁸

Subsequently, the CJEU examined if the selling or supply of contact lenses may be subject to the requirement that the customer first obtains medical advice. By doing this, the CJEU meant to determine if the activities of Ker-Optika fall within the last sentence of recital 18 of the e-commerce Directive: activities which by their very nature cannot be carried out at a distance or by electronic means (such as medical advice requiring a physical examination) are not information society services. The CJEU states that if medical advice requiring a physical examination of a customer is inseparable from the selling of contact lenses, the fact that such advice is required means that such selling does not, ultimately fall within the scope of the e-commerce Directive.

In my view the last sentence of recital 18 emphasizes that some activities cannot be information society services, but this does not necessarily mean that an online activity intrinsically related to those offline activities cannot be an information society service. What is more, the e-commerce Directive seems to operate from the assumption that an offline-online divide should be made, even where offline and online activities are inseparable. For example, without online selling there cannot be an obligation for an offline delivery. Online selling explicitly falls within the scope of the e-commerce Directive, but the offline delivery does not.

In any event, the CJEU finds that an ophthalmological examination is not inseparable from the selling of contact lenses, because lenses can be sold based on a prescription made prior to the sale. The unfortunate presumption made by the CJEU in relation to recital 18 (that services that are inseparable

from activities that are inherently offline cannot be information society services) does not have any consequences for the outcome of the case.

V. Asociación Profesional Élite Taxi v Uber Systems Spain

The case *Asociación Profesional Élite Taxi* concerns the use of the booking application provided by Uber where non-professional drivers (using their own car) can offer transport services to persons looking for transport (UberPop). A taxi company from Barcelona (Elite Taxi) started legal proceedings against Uber seeking a prohibition of these activities of Uber in Barcelona, because neither Uber nor the drivers had the licenses and authorization required under the local regulation on taxi services. The questions of the referring court concern the classification of the service in order to determine the applicability of the e-commerce Directive, the Services Directive and the principle on freedom to provide services under primary EU law.

The CJEU first observes that in principle the service consisting of connecting a driver to a person who wishes to make a journey is a separate service from the service consisting of the transport (the physical act of moving persons) and that each of those services can be linked to different directives or provisions of the TFEU treaty.²⁹ Second, according to the CJEU the intermediary service that enables the transfer by means of a smartphone application of information concerning the booking of a transport service between the passenger and the driver meets, in principle, the criteria for classification as an information society service.³⁰ And third, non-public urban transport service, such as taxi services, must be classified as a service in the field of transport, as meant by article 2(2) of the Services Directive.³¹

However, the CJEU then states that because the intermediary service forms an integral part of an overall service whose main component is a transport service, the booking application must not be classified as an information society service, but as a service in the field of transport.³²

The classification of the services of Uber as transportation services means they are covered by article 58(1) of the TFEU on the freedom to provide services in the field of transport and shall be governed by the provisions of the Title relating to transport and not article 56 TFEU on the freedom to provide services in general. As there is no EU law relating to the provision of non-public urban transport and services that are inherently linked to that, it is for the Member States to regulate the conditions under which intermediation services such as the Uber booking-app can operate.

25 Case C-108/09, *Ker-Optika* [2010] ECLI:EU:C:2010:725.

26 Para 28 *Ker-Optika*.

27 Paras 29-31 *Ker-Optika*.

28 The CJEU also assessed the Hungarian regulations under primary EU law in relation to the freedom of movement of goods and ruled that national legislation which authorizes the selling of contact lenses only in shops which specialize in medical devices is a restriction to the free movement of goods which is not allowed, see paras 41-78 *Ker-Optika*. For an analysis of the case in relation to eHealth Services see: Erik Vollebregt, ‘Consequences of the EU *Ker-Optika* case for e-commerce in Physical Medical Devices and Apps for eHealth Services’ [2012] 02 EJNI 34-39.

29 Para 34 *Asociación Profesional Élite Taxi v Uber Systems Spain*.

30 Para 35 *Asociación Profesional Élite Taxi v Uber Systems Spain*.

31 Para 36 *Asociación Profesional Élite Taxi v Uber Systems Spain*.

32 Para 40 *Asociación Profesional Élite Taxi v Uber Systems Spain*. The CJEU repeated this decision in case C-320/16, *Uber France SAS* [2018] ECLI:EU:C:2018:221.

VI. An active intermediary

The terms of Uber state that the services of Uber consist of providing a platform that allows users to connect with independent external providers of transportation or logistical services. The terms stress (with the use of capital letters) that Uber should not be considered as a provider of transportation services.³³ Nevertheless, the CJEU finds that Uber in fact does more than providing an intermediary service of connecting drivers and passengers.³⁴ The conclusion of the CJEU that Uber offers urban transport services is based on several observations concerning the characteristics of the service provision of Uber.³⁵

The Court notes that without Uber, the non-professional drivers would not be led to provide transport services and potential passengers would not be able to use the services of these drivers. Supply and demand of these particular services are created by Uber. More important is the fact that Uber exerts decisive influence over the conditions under which the transport services are provided. Uber determines the maximum fare, receives the payment from the passengers which is partly transferred to the driver and partly kept as payment for the use of the booking-application, and Uber exerts a certain control over the quality of the vehicles, the drivers and the conduct of the drivers, which can result in exclusion of the driver from the app.³⁶

In cases in the United States and the UK the control of Uber over the drivers has been a factor to classify Uber as an employer of the drivers rather than an intermediary between independent drivers and their passengers.³⁷ This matter, however, is not expressly addressed by the CJEU.³⁸

The active role with regard to the content and the performance of the contracts concluded via the app is what tips the scale. If Uber was neutral, that is to say if Uber did no more than list drivers allowing passengers to choose and contact the driver of their choice and allow drivers to state the price and conditions of their services, then the app would truly be 'just' an intermediary service provider connecting drivers and passengers.

VII. The legal classification of composite services

The urban transport services are intrinsically linked with the booking-app. According to the Court the application must be regarded as forming an integral part of an overall service whose main component is a transport service and therefore must not be classified as an information society service.³⁹ The judgement does not elaborate on why the classification of the activities of Uber as a transport service entails that the booking-app cannot be classified as an information society service.

The ruling is in line with the Opinion of AG Szpunar, whose argumentation is more extensive.⁴⁰ The AG argued that only online activities with self-standing economic value can be classified as information society services. According to the AG if services comprise electronic and non-electronic elements, the online activities can only be regarded as entirely transmitted by electronic means, when the supply of the service which is not made by electronic means is economically independent of the online service.⁴¹ To justify this the AG refers to the objective of the e-commerce Directive which is to liberalize the information society services.

The main argument of the AG seems to be that online services intrinsically related to offline services fall outside the scope of the e-commerce Directive, because the liberalization of such online activities would be useless if the supply of that

online service could not be freely made due to regulations affecting the related offline services.⁴²

Indeed regulation of offline activities related to online activities effectively limits the freedom to provide the online service. Although I agree with the AG that liberalization of online activities has little effect if offline activities related to the online service can still be restricted by Member State law, this is the consequence of the online-offline divide expressly made by the e-commerce Directive and illustrated by the CJEU ruling in *Ker-Optika*. This does not mean that such services fall outside the scope of the directive altogether.

It seems to me that the division that can be made between the booking-app and the performance of the transportation is comparable to the division that is made between online selling of goods and the subsequent delivery of those goods. According to recital 18 of the e-commerce Directive online selling of goods explicitly falls within the scope of the e-commerce Directive, while the delivery of the goods falls outside the scope. The AG finds this is different from the service provision of Uber. In his view the essential components of the transaction are the offer and its acceptance. Offer and acceptance and often payment are performed by electronic means and fall within the definition of information society services. The AG considers the subsequent delivery of the goods simply the performance of a contractual obligation, so that the rules applying to the delivery should not affect the provision of the main service, which is online contracting.⁴³

33 Article 2 of the terms of Uber <www.uber.com/nl/legal/terms/nl/> accessed 01 March 2018.

34 Para 37 *Asociación Profesional Élite Taxi v Uber Systems Spain*. See also the Opinion of AG Szpunar, par 44: Uber does more than match supply and demand. It creates supply and lays down rules concerning the essential characteristics of the supply and organizes how it works.

35 German courts decided in a similar manner: Hamburgisches OVG, Beschluss vom 24 September 2014, Az. 3 Bs 175/14, and VG Berlin, Beschluss vom 26 September 2014, Az. 11 L 353.14.

36 Para 39 *Asociación Profesional Élite Taxi v Uber Systems Spain*. A description of the functioning of Uber can be found in many publications, see for example: Marie J. Sorensen, 'Private Law perspectives on Platform Services. Uber – a business model in search of a new contractual legal frame?' [2016] 01 EuCML 15-19.

37 *Aslam v Uber BV* [2017] I.R.L.R. 4 (28 October 2016), *O'Connor et al. v Uber Technologies Inc et al.* No. C-13-3826 EMC, United States District Court, N. D. California (11 March 2015).

38 Marie J. Sorensen, 'Private Law perspectives on Platform Services. Uber – a business model in search of a new contractual legal frame?' [2016] 01 EuCML 15-19, argues that if Uber qualifies as an employer of its drivers, the passengers enter into a contact with Uber as a transportation service provider.

39 Par. 40 *Asociación Profesional Élite Taxi v Uber Systems Spain*. The Court finds that this classification is confirmed by the broad interpretation of the concept 'services in the field of transport', including any service linked to any physical act of moving persons or goods from one place to another by means of transport, see case C-168/14, *Grupo Itevelesa* [2015] ECLI:EU:C:2015:685.

40 Opinion AG Szpunar of 11 May 2017, case C-434/15, *Asociación Profesional Élite Taxi* [2017] ECLI:EU:C:2017:364.

41 Paras 32-33 Opinion AG Szpunar *Asociación Profesional Élite Taxi*. The AG repeats this point of view in his Opinion of 4 July 2017 in case C-320/16, *Uber France SAS* [2017] ECLI:EU:C:2017:511, this case concerns a related matter, namely the question if a French provision affecting the service provision of Uber is a technical regulation in the meaning of Directive (EC) 98/34.

42 Paras 31-32 Opinion AG Szpunar *Asociación Profesional Élite Taxi*. AG notes at 65 that the fact that the related offline activities can be regulated and prohibited undermines the entire rationale behind the freedom to provide information society services as organized by the directive based on the supervision of the legality of the providers operations by the Member State where he is established and the recognition of that supervision by other Member States.

43 Par 36 Opinion AG Szpunar *Asociación Profesional Élite Taxi*. With regard to the classification of the selling of goods to consumers as services see case C-31/16, *Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam* [2018] ECLI:EU:C:2018:44. The Court

I certainly see differences between the delivery of goods and the provision of transport services; however both constitute, essentially, the performance of a contractual obligation. When the contract is concluded electronically this should fall within the scope of the e-commerce Directive. The information society service that is provided consists of the possibility to contract online. When a trader (such as a seller or a transportation service provider) engages in online selling or advertising, this trader gets a second qualification: the seller or service provider also becomes an information society service provider.⁴⁴

VIII. Uber as both a transport service provider and an information society service provider

In my opinion, any trade-related online activity, even if it is merely incidental secondary or preparatory in nature and even if it is not economically independent from the offline performance, is an information society service.⁴⁵ This is assuming that the main element of this concept is that the online activity should represent an economic activity and that the fact that this activity is secondary or preparatory is of no relevance.

An online booking application (independent or not) always adds economic value, as the possibility to order or book online has economic value for any company wanting to sell goods or provide services. This approach is supported by recital 18 of the e-commerce Directive which mentions services giving rise to on-line contracting as an example of what constitutes an information society service.⁴⁶ The classification of Uber as a transport service provider should not preclude the classification of the online booking application as an information society service, because the fact that both the online service and the offline service are inseparable is not relevant for this classification.

The online booking application of Uber meets all the criteria of the definition of information society service and therefore should be classified as such.⁴⁷ This would mean that the provision of the online booking application falls within the scope of the freedom to provide information society services, but the provision of the transport services can still be restricted.⁴⁸ In the final remarks of his Opinion in *Asociación Profesional Élite Taxi AG Szpunar* also observes that if the Court were to decide that the booking application classifies as an information society service, this would not preclude requirements relating to the activity of transport, since the service of drivers falls outside the scope of Directive 2000/31.⁴⁹

The offline regulation of course affects the freedom of the online service, even to the extent that the freedom to provide the information society service is rendered useless due to the license requirements for urban transport, but the application of the e-commerce Directive would not be completely obsolete. The directive contains several transparency requirements, including the obligation to provide easy, direct en permanent access to information on name, address, contact details and on the location where the service provider is registered. The directive also contains rules related to the treatment of online contracts and lists requirements regarding the online ordering procedure.⁵⁰ If Uber (and their drivers) were to obtain the relevant licenses for urban transport, and were classified as both a transport service and an information society service, Uber would have to comply with these obligations.

When applying the substantive rules of the e-commerce Directive to online platforms, the obligations relating to online contracting apply in first instance to the contracts concluded for the use of the platform. Generally the users of platforms (both providers and customers) will have to create an account in order to be able to use the platform (the platform-agreement). Subsequently contracts are concluded with other users via the platform (in the case of Uber: online transportation agreements). As Uber is seen as the provider of the transportation services, the obligations relating to online contracting of Uber concern both the platform agreement and the online transportation agreements.

Strictly speaking a neutral platform operator would not have the obligation to fulfill the information requirements relating to the contracts concluded between the users via the platform; however in my opinion such neutral intermediary platforms should have an obligation to ensure their platform allows the users that offer goods or services to comply with their information duties.

Furthermore, the information society service provider can under certain conditions rely on the rules concerning the exemption from liability of intermediary service providers.⁵¹

From the perspective of consumer protection the exclusion of the booking-app from the e-commerce Directive is undesirable. This exclusion entails that the transparency requirements and the rules relating to online contracting are not applicable at all, even if the relevant licenses were obtained. As transport services are also excluded from the scope of applicability of the Services Directive, the transparency requirements of this directive equally do not apply.⁵²

There is still a substantial amount of consumer protection in place regarding the services provided by Uber. For any contractual relation between a professional party and a consumer the Directive on unfair contract terms applies⁵³ as well as the Directive on unfair commercial practices⁵⁴ and some rules

decided that retail trade in goods falls within the concept of 'service' within the meaning of Directive (EG) 2006/123.

44 Wendehorst refers to this as the dual role of online shop operators: seller with respect to the goods; service provider with respect to the service of offering the goods online or: service provider with regard to the service that is offered and information society service by offering these services online. See Christiane Wendehorst, 'Platform Intermediary Services and Duties under the E-commerce Directive and the Consumer Rights Directive' [2016] 01 EuCML par 2 a. The author argues that it is beyond doubt that the operating of an online intermediary platform as such qualifies as an information society service.

45 As opposed to the point of departure in par 37 of the Opinion AG Szpunar *Asociación Profesional Élite Taxi*.

46 The view is supported by Christiane Wendehorst, 'Platform intermediary Services and Duties under the E-commerce Directive and the Consumer Rights Directive' [2016] 01 EuCML par 3 a; Anne de Vries-Stotijn, 'De status van Uber – Wie betaalt er aan het eind van de rit?' [2016] 03 TvC 101-102; Christine Riefa, *Consumer Protection and Online Auction Platforms* (Ashgate 2015) 58-61.

47 See also: Anne de Vries-Stotijn, 'Ontwikkelingen in het EU-recht; Uber een vervoersaanbieder?' [2017] 04 TvC 176.

48 Offering transport via UberPOP without a permit is prohibited in the Netherlands, both the UberPOP drivers and Uber (because it shared in the profits of these activities) were held to be in violation of the Dutch law on transport of persons (Wet personenvervoer 2000), see CBB, 8 December 2014, NL:CBB:2014:450. A series of national legal reports on Uber is published by EuCML 2015, issues 1-4.

49 Par 88 Opinion AG Szpunar *Asociación Profesional Élite Taxi*.

50 Articles 5-7 and article 9-11 of Directive (EC) 2000/31.

51 Articles 12-15 of Directive (EC) 2000/31.

52 Passenger transport services are also partly excluded from the scope of the Consumer Rights Directive, article 3(3) sub k Directive (EU) 2011/83.

53 Council Directive (EEC) 93/13 on unfair terms in consumer contracts [1993] OJ L 95/29.

54 Directive (EC) 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

of the Consumer Rights Directive.⁵⁵ Passenger transport services are excluded from the applicability of the Consumer Rights Directive, but articles 8(2), 19 and 22 of the Consumer Rights Directive still apply.⁵⁶ Nevertheless the exclusion of Uber and possibly in the wake of the CJEU-decision more active service platforms⁵⁷ from the e-commerce Directive means a diminishment in consumer protection as well as an unnecessary fragmentation of the legal framework regarding e-commerce.

IX. Concurrent applicability of the e-commerce and the Services Directive

The reasoning of both the CJEU and the AG in *Asociación Profesional Élite Taxi* reflects the reasoning adopted in primary EU law in relation to activities that fall within two fundamental freedoms. If a national measure affects both the free movement of goods and the freedom to provide services, it will be examined in relation to only one of these fundamental freedoms, if it appears that one of them is entirely secondary in relation to the other and may be considered together with it.⁵⁸

This approach does not fit the situation in the case of Uber, where the activities of the trader fall within the scope of two directives. If classification of the facts results in the conclusion that more than one directive applies, it should first be examined if these directives contain rules specifying the relation with the other applicable secondary instrument.

Article 3(1) of the Services Directive states that if the provisions of the Services Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions.⁵⁹ Following this provision it must first be established if the rules of the e-commerce Directive and the Services Directive conflict. If there is no conflict, there is no impediment to apply both instruments simultaneously.

When considering the provisions of the Services Directive and the e-commerce Directive, it appears to me that there is no conflict. As far as the information requirements are concerned, service providers can comply with both the transparency requirements of the e-commerce Directive⁶⁰ and the information requirements of the Services Directive simultaneously.⁶¹ Several of these information items even overlap and neither instrument comprises maximum or total harmonization with regard to the information duties.⁶² In the case of Uber, the information requirements of the Services Directive do not apply, as transport services are excluded from the scope of the directive, so there is no potential conflict in relation to information requirements at all.

More important, classification of the booking-app as an information society service does not affect the Member States' authority to regulate related transportation services, because transportation falls outside the scope of the coordinated field and therefore outside the scope of the freedom to provide information society services and is also excluded from the principle of freedom to provide services of the Services Directive.⁶³

As regards the freedom to provide the booking-app, this is effectively set aside by the exclusion of the transport services from the freedom to provide services in article 2(2) sub d of the Services Directive. This, however, is a result of the limited scope of the coordinated field, which inevitably means that

the freedom to provide information society services will find its limits in case online services are intrinsically related to offline activities which are regulated on a Member State level.

X. Consequences for other platforms

Looking beyond the consequences of *Asociación Profesional Élite Taxi* for Uber, this ruling potentially has far reaching consequences for the applicability of the e-commerce Directive. The judgement essentially limits the scope of the e-commerce Directive to independent or neutral platforms, that is to say platforms that have no relation or interference with the users that offer their goods or services via the platform, nor with the contracts concluded via the platform or the provision of the offline services.⁶⁴

It could mean, for example, that if a hotel decides to add an online booking feature to its website, this online booking feature would be a component of the main or overall service of providing rooms and therefore fall outside the scope of the e-commerce Directive. And if an online platform where cleaners can offer their cleaning services screens and selects the cleaners and sets certain conditions for the performance of the cleaning service, this active role can lead to an exclusion of the platform from the applicability of the directive.

At first sight this may seem to be to the detriment of the active platform, because this entails that it cannot rely on the principles relating to the freedom to provide information society services, but the platform in the end also profits as it does not need to comply with the transparency requirements and the rules related to online contracting.

As a result of the ruling, to determine if an online application constitutes an information society service it has to be determined if this service is not an integral part of an offline activity that is considered the main component. Positively worded, it must be examined if it has an independent economic value.. How this test is to be performed is not specified

55 Directive (EU) 2011/83 on consumer rights [2011] OJ L 304/64.

56 Article 3(3) sub k of Directive (EU) 2011/83. The articles that are applicable contain several key-information requirements, the prohibition to charge fees to the use of means of payment that exceed the cost born by the traders and the obligation to obtain the consumer's express consent for any extra payments.

57 Platforms involved with the content of the contract and the performance of the offline services.

58 Case C-20/03, *Burmanjer* [2005] ECLI:EU:C:2005:307, paras 34-35, with reference to case C-71/02, *Karner* [2004] ECLI:EU:C:2004:181; case C-390/99, *Canal Satélite Digital* [2002] ECLI:EU:C:2002:34; case C-275/92, *Schindler* [1994] ECLI:EU:C:1994:119.

59 Article 3 of Directive (EG) 2006/123 lists several examples of Community acts that prevail over the Services Directive, the e-commerce directive is not listed, but the list is non-exhaustive and the e-commerce Directive can be seen as a directive governing specific aspects of a service activity, namely information society services. In nr. 92 of his Opinion to *Asociación Profesional Élite Taxi* AG Szpunar observes that Directive (EC) 2000/31 is a *lex specialis* in relation to Directive (EG) 2006/123, so that it would take precedence, albeit in keeping with the adage *lex posterior generali non derogate legi priori speciali*.

60 See in particular articles 5-7 and articles 10-11 of Directive (EC) 2000/31 and article 22 of Directive (EG) 2006/123.

61 Article 22 of Directive (EG) 2006/123.

62 See in particular article 22 (5) Directive (EG) 2006/123, article 5(2) Directive (EC) 2000/31 and 10(1) Directive (EC) 2000/31 stating that the information requirements apply in addition to other information requirements established by Community law.

63 The license requirements would also fall outside the scope of the principle excluding prior authorization of the e-commerce Directive, because this principle is limited by article 4(2) stating that this is without prejudice to authorization schemes which are not specifically and exclusively targeted at information society services.

64 Par 34 Opinion AG Szpunar *Asociación Profesional Élite Taxi* mentions as examples of this platforms for the purchase of flights or hotel bookings where the platform remains economically independent and the trader pursues the platform activity separately.

by the Court. The factors that the CJEU states in *Asociación Profesional Élite Taxi* relate to the question if Uber offers transport services, but do not specifically relate to the question whether or not the app has an independent economic value. Apparently, if the platform becomes involved with the services offered via the platform in such a manner that it can be considered the provider of these services, this automatically entails that the online activity loses its independent economic value.⁶⁵

With this ruling, the CJEU has complicated the application of the e-commerce Directive as the scope of protection is now dependent on the assessment of the involvement of the platform with the offline services offered via the platform.⁶⁶

XI. Conclusion

The influence of Uber over the contracts concluded via the booking-app and over the subsequent provision of the transport services justifies that Uber is classified as a transport service provider as meant in the Services Directive. In my opinion this should not automatically entail that the online application cannot be classified as an information society service, as the CJEU did in *Asociación Profesional Élite Taxi*.

Possibly, the CJEU decided this in order to ensure that Uber is excluded from the freedom to provide information society services so that Member States remain free to regulate the urban transport services. However, with a view to the scope of the coordinated field (which limits the freedom to provide information society services to the online activities) the exclusion of Uber from the applicability of the e-commerce Directive is unnecessary. If the online booking-app of Uber would be classified as an information society service, Member States could still regulate transport services.⁶⁷

From the perspective of consumer protection the exclusion is undesirable, because it excludes active intermediary platforms from the application of the transparency requirements and the requirements relating to online contracting of the e-commerce Directive.

Adding to this, the ruling (further) complicates the already cryptic concept of information society service and establishes a fragmentation in the applicability of the legal framework of the e-commerce Directive. ■

⁶⁵ The division between active and independent (or neutral) intermediaries is a division that is relevant, but in my view only for the determination of the scope of articles 12-14 (liability of intermediary service providers). If the platform becomes involved with the content or has some form of control over the information on the platform, the platform cannot rely on the exemptions of liability provided for by the e-commerce Directive, see case C-324/09, *L'Oréal v eBay* [2011], nr. 113.

⁶⁶ For a broader perspective on the legal challenges raised by the platform economy see Evelyne Terryn, 'The Sharing economy in Belgium – a case for regulation?' [2016] 01 EuCML 45. Busch et al. propose that a European Platform Directive is drafted specifying the scope of the existing Directives and stipulating specific rules for platforms, see Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Fryderyk Zoll, 'The Rise of the Platform Economy; A new Challenge for EU Consumer Law?' [2016] 01 EuCML par. III.2.

⁶⁷ Uber B.V. is situated in the Netherlands, therefore, this Member State should supervise if the online booking application complies with the rules of the e-commerce directive with regard to the information requirements and the design of the booking procedure.