

CASE UBER – TRANSPORTATION SERVICE OR A SERVICE OF INFORMATION SOCIETY? BATTLE ON THE FUTURE OF THE PLATFORM ECONOMY

On August 7 2015 a request for a preliminary ruling in the matter of law which should be applied to the services provided by UBER SYSTEMS SPAIN, S.L. has been lodged to the Court of Justice of the EU by the Association of Taxi drivers in Barcelona.¹ UBER, an online application serving as an intermediary between a customer and private drivers and enabling their mutual communication, has been a breakthrough on the international transportation services market.² However, being an innovative technology, it has caused a series of various legal problems around the world which corroborate the growing need for legislation in the area of triangular transactions³ and generally Online Platforms. As such, it is a primary example of a phenomenon which Clayton Christensen, Professor at Harvard business school has called a “Disruptive Innovation”.⁴

The aforementioned request concerns the ambiguity in Uber’s economical model, which carries features of transport services as well as e-services, which I shall specify further. This ambiguity arises crucial questions from a legal perspective, as the application of the Directive 2000/31/EC on electronic commerce⁵ or the falling of Uber’s services under the scope of transport services, excluded from the scope of the Directive 2006/123/EC on services in the internal market⁶, lays down vital legal consequences. Namely if the services provided by UBER would fall under the scope of the Directive as a service of the so-called Information Society⁷, the question of the allowance of the imposing of various authorization schemes within their strict boundaries enclosed in Article 9 of the Directive 2006/123/EC in context of the general rule of the freedom of establishment arises. In the scarce limits of this paper, I will analyze the model in which Uber is operating, summarize the consequences connected with it being considered as a transport service or as a service of Information Society. Finally, I will try to assign the discussed model to the corresponding branch, thus making it subject to the European or National law.

Uber – a brave and an innovative idea originating from San Francisco was founded in 2009.⁸ Since then it has become widespread across the world causing

¹Case C-434/15

²<http://www.nber.org/papers/w22627.pdf>

³The notion of triangular transactions in the context of Platform Economy is discussed in - Busch: “*The Rise of the Platform Economy: A New Challenge for EU Consumer Law?*” EuCML 2016, No 1
See also – Research group on the Law of Digital Services: “*On the Law of Digital Services: Discussion Draft of a Directive on Online Intermediary Platforms*” EuCML 2016, Heft 4

⁴<http://www.claytonchristensen.com/key-concepts/>

⁵<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:HTML>

⁶<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0123&from=EN>

⁷Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC

⁸[https://en.wikipedia.org/wiki/Uber_\(company\)#History](https://en.wikipedia.org/wiki/Uber_(company)#History)

as much interest and enthusiasm as critique and protests. The main idea behind it consists of enabling the user, to get in touch with a private driver and order a ride in a given direction by using a vast arrange of apps specifying the service reaching from a simple ride to even serving as a courier or delivering food. The official legal terms precisely state “The Services comprise mobile applications and related services (each, an "Application"), which enable users to arrange and schedule transportation, logistics and/or delivery services and/or to purchase certain goods, including with third-party providers of such services and goods under agreement with Uber or certain of Uber's affiliates ("Third Party Providers")”.¹ Throughout the text of Uber's legal terms, one can clearly see the omnipresent provisions stating its position merely as an intermediate service providing means for customers to organize their ride with "third party providers". This is especially visible in the following passage from the legal terms, formulated originally in capital letters: “YOU ACKNOWLEDGE THAT UBER DOES NOT PROVIDE TRANSPORTATION, LOGISTICS, DELIVERY OR VENDOR SERVICES OR FUNCTION AS A TRANSPORTATION PROVIDER OR CARRIER AND THAT ALL SUCH TRANSPORTATION, LOGISTICS, DELIVERY AND VENDOR SERVICES ARE PROVIDED BY INDEPENDENT THIRD PARTY CONTRACTORS WHO ARE NOT EMPLOYED BY UBER OR ANY OF ITS AFFILIATES”.² Furthermore, when it comes to payment, Uber treats itself as a “disclosed payment collection agent for the Third Party Provider (as Principal)” and states, that the payment should be considered as if made directly to the "third person provider". The fee in itself, however, is calculated according to many different circumstances such as the intensity of the traffic in a given moment or the availability of the drivers and is imposed by the application. The accounting is performed solely by Uber, it is Uber that reserves the right to grant discounts and to revise charges. It is stated, that the imposed charges are meant to fully compensate the Third Party Provider and the only additional fee constitutes the payment for using the application.³ Uber also limits its liability stating that it does not guarantee any specific quality or even safety of the service⁴ It is clear that Uber sees itself purely as a facilitator of a consumer to consumer (or rather a “prosumer”, as Prof. Dr. Christoph Bush suggests, stating that the supplier is often in a stronger position than a typical consumer)⁵ relation while trying to exclude its own liability as far as possible. This model would situate Uber as the supplier of an Information Society service as defined by Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC that is: [...] service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. This would allow Uber to fall under the very broad notion of the freedom of establishment protected by European doctrine⁶ and shelter it from the accusations of violating the National unfair competition provisions raised worldwide by transporting services and Taxi companies.

As a respond to these objections more and more countries are beginning to question the form in which Uber is operating and from the growing number of

¹<https://www.uber.com/legal/terms/us/> point 2

² *ibidem*

³<https://www.uber.com/legal/terms/gb/> point 4

⁴<https://www.uber.com/legal/terms/gb/> point 5

⁵ *Busch: The Rise of the Platform Economy: A New Challenge for EU Consumer Law? EuCML 2016, II, IV d, V, No. 1*

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0123&from=EN>

judgments across the world one can make off a tendency to establish some authentication schemes and provisions typical to those of Transport Services. Among a growing number of countries which decided to completely ban Uber, thus recognizing it as a transport service allowing them to regulate its activity, Belgium is an interesting exception. After a long struggle and series of trials Belgian legislator has decided to allow Uber's services, recognizing the difference between paid transport and transport whereby the compensation merely covered the costs."¹

Another interesting example is the ruling of the Court for the Northern District of California in the case "O'Connor vs Uber Technologies"² The Court had to examine if the "third party suppliers", as stated in the legal terms & conditions should nonetheless be treated as employees. In order to do that the Court applies the so-called Borello employment test and states as a result, that despite being able to see meaningful flaws and the non-conformity of the test to the new models of triangular contractual relationships, it shall, for now, assume the test as effective and thus states, that plaintiffs (all presumably qualifying for the category of "third party suppliers") shall be treated as employees. The Court also brings up a discussion in which it is recalled that before the first claims happened, Uber used to refer to itself as "On-Demand Car Service" and that its relation with the supplier very much resembles that of an employer towards an employee.

Also in Poland, it is visible that more and more lawsuits filed by Taxi companies against Uber drivers who do not have a viable Taxi license required by the Polish transportation law³ are being recognized. In the widely discussed first fully recognized claim, Polish Regional Court for Cracow – Śródmieście charged Uber drivers with a fee for not complying with the requirements of Polish transportation law. The Court pointed, that for being able to qualify the service as a charged transportation service, the fact that the driver doesn't receive his money directly doesn't change anything, as it only allows the driver to form a claim against the party which was obliged to pay him, in this case Uber.⁴

Those cases give a strong reasoning as to why Uber should, despite its explicit denial, should be primarily considered as a supplier of transportation services, and as such, as subject to the Member State's corresponding transportation laws and the limitations. It is, however, important to accept the specific form of Uber's economic model and undertake steps towards the recognition of the model of "sharing economy platforms" in National, as well as European regulations. The discussed cases show that methods and definitions now present in the corresponding legal systems fail to fully depict the new contractual relations of the "sharing economy platforms". An important step towards this idea is the study made by a Research group on the Law of Digital Services at the University of Osnabrück in Germany and their Discussion Draft of a Directive on Online Intermediary Platform⁵ suggesting innovative solutions which can serve as an

¹<http://www.elsampe.be/nl/ubers-european-breakthrough>,

For a thorough analysis of the Belgian discussion concerning the case of Uber see - Terryn: "The sharing economy in Belgium – a case for regulation?" EuCML 2016, No. 1

²<http://uberlawsuit.com/OrderDenying.pdf>

³ All the requirements needed in order to be granted a license according to Polish law are stated here - <http://www.kurstaxi.pl/index.php/licencja-taxi-opis-procedury-akty-prawne>

⁴ <http://krakow.wyborcza.pl/krakow/1,44425,21181430,pierwszy-kierowca-ubera-ukarany-w-pelnym-procesie-przelomowy.html>

⁵ "on the Law of Digital Services: Discussion Draft of a Directive on Online Intermediary Platforms", EuCML 2016, No. 4

inspiration for the European legislator in acknowledging new contractual models arising in today's societies.

Returning to the legal question mentioned at the beginning of this paper a questioned remains to be answered as to how should the Court of Justice of the EU qualify the services provided by Uber? Does it comply with the goals and definitions set out by the Directive 98/34/EC as amended by Directive 98/48/EC concerning the Information Society services and thus flourish on its wide freedom of establishment of services? The service provided by Uber is undoubtedly accessible via a specific application and, to a great extent, digitalized. As such it does generally fit into the definition set by the Directive. It is, however, to be stated that the broadly stated freedom of Information Society didn't take into account such a diversely constructed model as that of Uber's. It does rather show the importance of the accessibility of information in today's society. It concerns services dealing with the storage of data and sharing them with users. In spite of Uber seeing itself merely as such a medium, collecting information, calculating routes and finding the most beneficiary one, the far control and scope of interference with the main bilateral contract, realized through the calculation of fees and an "employer-employee like" relationship towards its suppliers causes it to fall out of the scope of the Information Society Service. The main focus set on granting the equivalent of a transport service to the customer and the growing acknowledgment of the said relation as such an equivalent by National courts qualifies the economic model under the definition of a transport service excluded from the scope of the Directive 2006/123/EC¹. Thus I do think that the outcome of the discussed case should situate Uber as such a transportation service, with the aforementioned provision, that *de lege ferenda* a set of rules governing the specific position of the Platform in the contractual relation should be established.

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IMPLEMENTACJA DYREKTYW TIMESHARINGOWYCH PRZEZ POLSKĘ

Instytucja timesharingu powstała w latach 60-tych XX w. w Europie Zachodniej, skąd po kilku latach została przeniesiona do Stanów Zjednoczonych Ameryki Północnej, gdzie wykształcił się jej obecny model jurydyczny. Do krajów Europy Zachodniej timesharing powrócił jako oferta turystyczna oferowania z wykorzystaniem agresywnych technik sprzedaży. [8, 342; 11, 21-25]

Czym zatem jest timesharing. Odpowiedź na to pytanie nie jest prosta. Time oznacza czas, a sharing dzielenie, podział. Proponowano tłumaczyć timesharing jako prawo podzielone w czasie, prawo dzielone czasem bądź, zapewne najwłaściwiej, prawo dzielone z kimś w czasie. Tłumaczenia te niedokładnie oddają znaczenie tego pojęcia. Wydaje się, że jego ścisły przekład jest niemożliwy. Za słowem timesharing kryje się forma okresowego, cyklicznego korzystania z rzeczy lub praw. Zazwyczaj pod tym pojęciem rozumiemy szczególny sposób korzystania z dóbr, głównie z nieruchomości wykorzystywanych turystycznie,

¹Directive 2006/123/EC, recitals 17 and 21