ECJ 20 December 2017, case C-434/15 (Uber Spain), Employment status

Asociación Profesional Élite Taxi – v – Uber Systems Spain SL, Spanish case

Summary

The overall degree of control which the Uber platform exercises over the workforce does not suggest that it acts merely as an intermediary. The services Uber provides fall within the field of transport within the meaning of EU law and not under the freedom to provide services. It is therefore for the Member States to regulate the conditions under which such services are to be provided in conformity with the general rules of the TFEU.

Facts

Under Spanish law, taxi firms and transport intermediaries must obtain a special licence to perform car-hire services. Neither the Uber drivers operating in Barcelona, nor Uber Spain itself, possessed such a licence. On the grounds of violation of the law, the Asociación Profesional Élite Taxi ('Élite Taxi') sought a cease and desist order and demanded the prohibition of future similar behaviour on the basis of unfair competition. Uber argued that it does not provide transport or taxi services but is merely a digital intermediary facilitating the process of matching passengers wishing to make an urban journey with nearby drivers by means of a smartphone application.

Legal framework

The case lies along the line between services and transport. The former is harmonised at EU level and thus subject to EU law, whereas the latter remains within the competence of Member States, at least for the time being. Essentially, platforms operating under the freedom to provide services enjoy this freedom with no obstacles.

National proceedings

Élite Taxi is a professional organisation representing taxi drivers in the municipality of Barcelona. In 2014 it brought an action to the Commercial Court in Barcelona seeking an order against Uber Spain for failure to comply with the obligation to obtain prior authorisation and a licence to perform car-hire services. The Commercial Court confirmed that the necessary licences and authorisations had not been obtained by Uber Spain or its drivers. Uber Spain denied having infringing transport law and maintained that it was a company established and governed by Dutch law, Uber BV. Therefore, the applicant's claims should be brought against that company. According to Uber Spain, it was only responsible for advertising on behalf of Uber BV. The Court in Barcelona requested, however, a preliminary ruling concerning the legal classification of the service, on the basis that if Uber's activities were covered by the directive on services in the internal market or the directive on electronic commerce, it would not be in breach of competition law.

Questions put to the ECJ

Must Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123 and Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, 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, non-professional drivers using their own vehicle with persons who wish to make urban journeys, is to be classified as a 'service in the field of transport' within the meaning of Article 58(1) TFEU and, therefore, excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31, or whether, by contrast, the service is covered by Article 56 TFEU, Directive 2006/123 and Directive 2000/31?

ECJ's findings

At the outset, the ECJ noted that the intermediation service delivered by Uber was focused on the selection of non-professional drivers making use of their own vehicles who are provided with the Uber app. Following the AG's opinion, the ECJ ruled that the services Uber offers fall under the ambit of transport and are therefore subject to the national law of the Member States.

The ECJ essentially stated that Uber does something more than just provide the technical services in a form of an app, as the control that Uber exercises goes beyond intermediation. The ECJ found that Uber's intermediation service is separate from a transport service that physically moves passengers from one place to another. Each of the services could be linked in theory to different EU law provisions. Therefore, at first sight, the matching service meets the requirements for classification as an 'information society' service. Pure taxi services, on the other hand, are classified as services in the field of transport. But the ECJ notes that Uber's services are more than facilitation of demand by means of an app. Uber retains the right to influence the conditions

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under which drivers perform their activities. Not only does Uber set the maximum fare using an algorithm through the app, but it also charges passengers directly before paying drivers their part of the fare after deducing its commission. It also exercises a certain degree of control over the quality of vehicles and the drivers and their conduct, which might in some cases result in their exclusion from the platform. Overall, the ECJ found that Uber must be classified as providing a transport service, meaning that it did not fall with the scope of freedom to provide services but was subject to the rules relating to transport, pursuant to Article 58(1) TFEU. However, under current EU law, transport is regulated by individual Member States.

Ruling

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, non-professional 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.

Commentary

Bartłomiej Bednarowicz:[6]"The devil of Uber and the like, lies in the details'

Albeit this case mainly deals with classifying the services delivered by Uber, it also addresses an issue that is crucial in terms of employment – whether the drivers are Uber employees.

The ECJ was required to determine how Uber falls within the ambit of EU law. Transport is a shared competence, yet one that has not yet been exercised at EU level. In other words, main issue in the case was the legal classification of Uber's services but the ECJ also took a look at the functions that Uber executes. According to Uber, it simply matches supply with demand, but it seems to do more than that – supplying a service and organising how it works. It exercises indirect control over the quality of the services by virtue of its driver rating system and if a driver falls below the threshold, he or she might be excluded from the platform. In addition, the fare is set by Uber based on an algorithm that adjusts the price to the demand and also takes into account other variables such as weather conditions.

As the AG rightly pointed out in his opinion, "let us not be fooled by appearances". Uber really is an organiser and operator of urban transport services despite its innovative concept. Uber is not a mere intermediary between passengers and drivers because it organises and manages a sophisticated system for on-demand urban transport. It does not simply match supply with demand but also determines the activity of the drivers. For that reason, the service provided by the app is inseparable from the service provided by the drivers – and together they form a single service subject to transport law.

The ECJ highlighted the typical functions of an employer and found that Uber exercises these over its drivers. The ruling forms part of a current judicial trend in litigation about the degree of control exercised by platforms over a workforce. The ruling is in line with the recent UK case, in which Uber drivers were found to be workers.

In essence, this opens a door to demonstrating that Uber should be regarded as an employer, based on the control it has over the workforce. Without the app, drivers would not be able to perform their services for Uber and passengers would not benefit from the service, but by setting rules of conduct for the drivers, facilitating payments, generating paperwork and managing the driver rating system, it shows it is very much more than an app. The rating system in particular, raises the possibility of 'digital dismissal' with no recourse.

But this judgment does not mark the end of the Uber saga, as the ECJ has another case still pending, in which a French Court referred a question regarding the imposition of penalties on Uber for running an unlicensed taxi service (Case C-320/16 Uber France).

Interestingly, the tensions that the gig economy has placed on the labour markets at EU level have resulted in a recent initiative by the European Commission to replace Directive 91/533/EEC on written statements with a Directive on transparent and predictable working conditions. The EC argues in its Impact Assessment that up to 2-3 million workers will be entitled to the rights enshrined in the proposal. Indeed, the proposal seems to be confidently far-reaching. Nevertheless, one can expect it to be whittled down by the Council. Essentially, the proposal contains a new definition of 'worker', based on EU case law, intended to include all individu-

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als working for more than eight hours a month. The definition boils down to the concept of services performed for a certain period of time under the direction of another person in return for pay. The criterion of 'genuine and effective economic activity' has been intentionally left out in order to expand the potential scope of application and not to exclude marginal and ancillary activities, particularly digital platform work. Workers will be granted new rights in relation to: information on the essential aspects of their work, the length of probationary periods, seeking additional employment, knowing a reasonable period in advance when work will take place (especially in the case of zero-hours contracts or on-call work), receiving free mandatory training and receiving a written reply to any request to transfer to another more secure job. The proposal itself is a part of the European Pillar of Social Rights which should be implemented before Juncker's Commission term finishes in late-2019. Further discussions can be expected.

ECJ 20 December 2017, case C-158/16 (Vega González), Fixed-term work, Other forms of discrimination

Margarita Isabel Vega González – v – Consejería de Hacienda y Sector Público del Gobierno del Principado de Asturias, Spanish case

Summary

A fixed-term worker elected to a parliamentary role must be able to benefit from the same special leave granted to a permanent civil servant, to enable them to hold a public office.

Facts

On 15 April 2011, the Government of Asturias appointed Ms Vega González as an interim civil servant (on a fixed-term contract). In 2015, Ms Vega González was elected a Member of Parliament. In order to be able to attend to her parliamentary duties on a full time basis, Ms Vega González submitted a request for special service leave or – alternatively – personal leave. By a decision of 23 June 2015, the Spanish Directorate General for the Civil Service turned down Ms Vega González's request on the grounds that special service leave and personal leave can only be granted to 'established' civil servants (i.e. civil servants with indefinite term contracts). Ms Vega González lodged an internal appeal against this decision at the Ministry, which was dismissed as well. The Ministry explained that Ms Vega González's request would have been granted if she had had an indefinite term contract, and that the only way for Ms Vega González to carry out her political duties full time was to resign from her post as a civil servant. Ms Vega González lodged an appeal against this decision with the Juzgado de lo Contencioso-Administrativo n.1 de Oviedo (Spanish Administrative Court).

National proceedings

The Spanish Administrative Court found that the temporary nature of activities carried out by a civil servant who works on a fixed-term contract is not an objective reason justifying a difference in treatment that deprives the civil servant the right to return to his or her post at the end of the parliamentary term of office.

The Spanish Administrative Court was therefore uncertain as to whether the concept of 'working conditions' – as laid down in Clause 4 (1) of Framework Agreement on fixed-term work (Directive 1999/70/EC) – meant that employers were obliged to give fixed-term workers (in the present case a 'non-established civil servant') a status that would enable them to suspend their employment contract in order to fulfil a political mandate – in the same way as a permanent worker could. Second, the Spanish Administrative Court was uncertain whether the difference in treatment between non-established and established civil servants was compatible with the principle of non-discrimination established in Clause 4(1) of the Framework Agreement.

Questions put to the ECJ[7]

1. Must Clause 4(1) of the Framework Agreement be interpreted as meaning that the concept of 'employment conditions', referred to in that provision, includes the right for a worker who has been elected to a parliamentary role to benefit from special service leave, provided for by national legislation, under which the employment relationship is suspended such that the worker's job and his entitlement to promotion are guaranteed until the end of his parliamentary term of office?
2. Must Clause 4 of the Framework Agreement be interpreted as precluding national legislation, such as that at issue in the main proceedings, that absolutely excludes fixed-term workers from the right to be granted leave, so that they may hold political office, during which the employment relationship is suspended until the worker's reinstatement at the

7. As rephrased by the ECJ.

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