ECLI:EU:C:2017:981

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

20 December 2017 (*)

(Reference for a preliminary ruling — Article 56 TFEU — Article 58(1) TFEU — Services in the field of transport — Directive 2006/123/EC — Services in the internal market — Directive 2000/31/EC — Directive 98/34/EC — Information society services — Intermediation service 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 — Requirement for authorisation)

In Case C-434/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona, Spain), made by decision of 16 July 2015, received at the Court on 7 August 2015, in the proceedings

Asociación Profesional Élite Taxi

v

Uber Systems Spain SL,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, D. Šváby (Rapporteur), C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 November 2016,

after considering the observations submitted on behalf of:

– Asociación Profesional Elite Taxi, by M. Balagué Farré and D. Salmerón Porras, abogados, and J.A. López-Jurado González, procurador,

– Uber Systems Spain SL, by B. Le Bret and D. Calciu, avocats, R. Allendesalazar Corcho, J.J. Montero Pascual, C. Fernández Vicién and I. Moreno-Tapia Rivas, abogados,

– the Spanish Government, by M.A. Sampol Pucurull and A. Rubio González, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– Ireland, by E. Creedon, L. Williams and A. Joyce, acting as Agents, and A. Carroll, Barrister,

– the Greek Government, by M. Michelogiannaki, acting as Agent,

– the French Government, by D. Colas, G. de Bergues and R. Coesme, acting as Agents,

– the Netherlands Government, by H. Stergiou and M. Bulterman, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the European Commission, by É. Gippini Fournier, F. Wilman, J. Hottiaux and H. Tserepa-Lacombe, acting as Agents,

– the EFTA Surveillance Authority, by C. Zatschler, Ø. Bø and C. Perrin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 TFEU, Article 1 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 (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) (‘Directive 98/34’), Article 3 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’) (OJ 2000 L 178, p. 1), and Articles 2 and 9 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2 The request has been made in proceedings between Asociación Profesional Elite Taxi (‘Elite Taxi’), a professional taxi drivers’ association in Barcelona (Spain), and Uber Systems Spain SL, a company related to Uber Technologies Inc., concerning the provision by the latter, by means of a smartphone application, of the paid service consisting of connecting non-professional drivers using their own vehicle with persons who wish to make urban journeys, without holding any administrative licence or authorisation.

Legal context

EU law

Directive 98/34

3 Article 1(2) of Directive 98/34 provides:

‘For the purposes of this Directive, the following meanings shall apply:

...

(2) “service”, any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– “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 services” means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

...’

4 In accordance with Articles 10 and 11 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), Directive 98/34 was repealed on 7 October 2015. Nevertheless, Directive 98/34 remains applicable *ratione temporis* to the dispute in the main proceedings.

Directive 2000/31

5 Article 2(a) of Directive 2000/31 provides that, for the purposes of the directive, ‘information society services’ means services within the meaning of Article 1(2) of Directive 98/34.

6 Article 3(2) and (4) of Directive 2000/31 states:

‘2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

...

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

– public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

– the protection of public health,

– public security, including the safeguarding of national security and defence,

– the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

– asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

– notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.'

Directive 2006/123

7 According to recital 21 of Directive 2006/123, 'transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive'.

8 Article 2(2)(d) of Directive 2006/123 provides that the directive does not apply to services in the field of transport, including port services, falling within the scope of Title V of Part Three of the EC Treaty, which is now Title VI of Part Three of the FEU Treaty.

9 Under Article 9(1) of Directive 2006/123, which falls under Chapter III thereof, headed 'Freedom of establishment for providers':

'Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.'

10 Under Chapter IV of the directive, headed 'Free movement of services', Article 16 lays down the procedures enabling service providers to provide services in a Member State other than that in which they are established.

Spanish law

11 In the metropolitan area of Barcelona, taxi services are governed by Ley 19/2003 del Taxi (Law No 19/2003 on taxi services) of 4 July 2003 (DOGC No 3926 of 16 July 2003 and BOE No 189 of 8 August 2003) and by Reglamento Metropolitano del Taxi (Regulation on taxi services in the metropolitan area of Barcelona) of 22 July 2004 adopted by the Consell Metropolitá of the Entitat Metropolitana de Transport de Barcelona (Governing Board of the Transport management body for the metropolitan area of Barcelona, Spain).

12 Under Article 4 of that law:

'1. The provision of urban taxi services is subject to the prior grant of a licence entitling the licence holder for each vehicle intended to carry out that activity.

2. Licences for the provision of urban taxi services are issued by the town halls or the competent local authorities in the territory where the activity shall be carried out.

3. The provision of interurban taxi services is subject to the prior grant of the corresponding authorisation issued by the ministry of transport of the regional government.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 On 29 October 2014, Elite Taxi brought an action before the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona, Spain) seeking a declaration from that court that the activities of Uber Systems Spain infringe the legislation in force and amount to misleading practices and acts of unfair competition within the meaning of Ley 3/1991 de Competencia Desleal (Law No 3/1991 on unfair competition) of 10 January 1991. Elite Taxi also claims that Uber Systems Spain should be ordered to cease its unfair conduct consisting of supporting other companies in the group by providing on-demand booking services by means of mobile devices and the internet. Lastly, it claims that the court should prohibit Uber Systems Spain from engaging in such activity in the future.

14 The Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) noted at the outset that although Uber Systems Spain carries out its activity in Spain, that activity is linked to an international platform, thus justifying the assessment at EU level of the actions of that company. It also observed that neither Uber Systems Spain nor the non-professional drivers of the vehicles concerned have the licences and authorisations required under the Regulation on taxi services in the metropolitan area of Barcelona of 22 July 2004.

15 In order to determine whether the practices of Uber Systems Spain and related companies (together, 'Uber') can be classified as unfair practices that infringe the Spanish rules on

competition, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) considers it necessary to ascertain whether or not Uber requires prior administrative authorisation. To that end, the court considers that it should be determined whether the services provided by that company are to be regarded as transport services, information society services or a combination of both. According to the court, whether or not prior administrative authorisation may be required depends on the classification adopted. In particular, the referring court takes the view that if the service at issue were covered by Directive 2006/123 or Directive 98/34, Uber's practices could not be regarded as unfair practices.

16 To that end, the referring court states that Uber contacts or connects with non-professional drivers to whom it provides a number of software tools — an interface — which enables them, in turn, to connect with persons who wish to make urban journeys and who gain access to the service through the eponymous software application. According to the court, Uber's activity is for profit.

17 The referring court also states that the request for a preliminary ruling in no way concerns those factual elements but solely the legal classification of the service at issue.

18 Consequently, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Inasmuch as Article 2(2)(d) of [Directive 2006/123] excludes transport activities from the scope of that directive, must the activity carried out for profit by [Uber Systems Spain], consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources — in the words of [Uber Systems Spain], "smartphone and technological platform" interface and software application — which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service, as defined by Article 1(2) of [Directive 98/34]?

(2) Within the identification of the legal nature of that activity, can it be considered to be … in part an information society service, and, if so, ought the electronic intermediary service to benefit from the principle of freedom to provide services as guaranteed in [EU] legislation — Article 56 TFEU and Directives [2006/123] and … [2000/31]?

(3) If the service provided by [Uber Systems Spain] were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, is Article 15 of Law [No 3/1991] on unfair competition [of 10 January 1991] — concerning the infringement of rules governing competitive activity — contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorisation schemes, when the reference to national laws or to legal provisions is made without taking into account the fact that the scheme for obtaining licences, authorisations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment?

(4) If it is confirmed that Directive [2000/31] is applicable to the service provided by [Uber Systems Spain], are restrictions in one Member State regarding the freedom to provide the electronic intermediary service from another Member State, in the form of making the service subject to an authorisation or a licence, or in the form of an injunction prohibiting provision of the electronic intermediary service based on the application of the national legislation on unfair competition, valid measures that constitute derogations from Article 3(2) of Directive [2000/31] in accordance with Article 3(4) thereof?'

The jurisdiction of the Court

19 Elite Taxi claims that the legal classification of the service provided by Uber does not fall within the Court's jurisdiction because that classification requires a decision on issues of fact. In those circumstances, according to Elite Taxi, the Court has no jurisdiction to answer the questions referred.

20 In that regard, it should be recalled that the referring court has clearly stated, as is apparent from paragraph 17 above, that its questions concern solely the legal classification of the service at issue and not a finding or assessment of the facts of the dispute in the main proceedings. The classification under EU law of facts established by that court involves, however, the interpretation of EU law for which, in the context of the procedure laid down in Article 267 TFEU, the Court of Justice has jurisdiction (see, to that effect, judgment of 3 December 2015, *Banif Plus Bank*, C-312/14, EU:C:2015:794, paragraphs 51 and 52).

21 The Court therefore has jurisdiction to reply to the questions referred.

Consideration of the questions referred

Admissibility

22 The Spanish, Greek, Netherlands, Polish and Finnish Governments, the European Commission and the EFTA Surveillance Authority note that the order for reference is insufficiently precise as regards both the applicable national legislation and the nature of the activities at issue in the main proceedings.

23 In that regard, it should be recalled that the Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 25).

24 On that last point, the need to provide an interpretation of EU law which will be of use to the referring court requires that court, according to Article 94(a) and (b) of the Rules of Procedure of the Court, to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based (see judgment of 10 May 2017, *de Lobkowicz*, C-690/15, EU:C:2017:355, paragraph 28).

25 Furthermore, according to the settled case-law of the Court, the information provided in orders for reference not only enables the Court to give useful answers but also serves to ensure that the governments of the Member States and other interested persons are given an opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under Article 23, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, but excluding any case file that may be sent to the Court by the national court (judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 26 and the case-law cited).

26 In the present case, it must be noted that the order for reference, while brief in its reference to the relevant national provisions, nevertheless serves to identify those that may apply to the

provision of the service at issue in the main proceedings, from which it would follow that a licence or prior administrative authorisation is required for that purpose.

27 Similarly, the referring court's description of the service provided by Uber, the content of which is set out in paragraph 16 above, is sufficiently precise.

28 Lastly, in accordance with Article 94(c) of the Rules of Procedure, the referring court sets out precisely the reasons for its uncertainty as to the interpretation of EU law.

29 Consequently, it must be held that the order for reference contains the factual and legal material necessary to enable the Court to give a useful answer to the referring court and to enable interested persons usefully to take a position on the questions referred to the Court, in accordance with the case-law referred to in paragraph 25 above.

30 The Polish Government also expresses its doubts as to whether Article 56 TFEU, inter alia, is applicable to the present case, on the ground that the matter in the main proceedings is allegedly a purely internal matter.

31 However, it is apparent from the order for reference, in particular the information referred to in paragraph 14 above and the other documents in the file before the Court, that the service at issue in the main proceedings is provided through a company that operates from another Member State, namely the Kingdom of the Netherlands.

32 In those circumstances, the request for a preliminary ruling must be held to be admissible.

Substance

33 By its first and second questions, which should be considered together, the referring court asks, in essence, whether 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, 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, 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, on the contrary, the service is covered by Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

34 In that regard, it should be noted that an intermediation service consisting of connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey is, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle. It should be added that each of those services, taken separately, can be linked to different directives or provisions of the FEU Treaty on the freedom to provide services, as contemplated by the referring court.

35 Accordingly, an intermediation 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 non-professional driver who will carry out the transportation using his or her own vehicle, meets, in principle, the criteria for classification as an 'information society service' within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31. That intermediation service, according to the definition laid down in Article 1(2) of Directive 98/34, is 'a

service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

36 By contrast, non-public urban transport services, such as a taxi services, must be classified as 'services in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123, read in the light of recital 21 thereof (see, to that effect, judgment of 1 October 2015, *Trijber and Harmsen*, C-340/14 and C-341/14, EU:C:2015:641, paragraph 49).

37 It is appropriate to observe, however, that a service such as that in the main proceedings is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey.

38 In a situation such as that with which the referring court is concerned, where passengers are transported by non-professional drivers using their own vehicle, the provider of that intermediation service simultaneously offers urban transport services, which it renders accessible, in particular, through software tools such as the application at issue in the main proceedings and whose general operation it organises for the benefit of persons who wish to accept that offer in order to make an urban journey.

39 In that regard, it follows from the information before the Court that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.

40 That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as 'an information society service' within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as 'a service in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123.

41 That classification is indeed confirmed by the case-law of the Court, according to which the concept of 'services in the field of transport' includes not only transport services in themselves but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport (see, to that effect, judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraphs 45 and 46, and Opinion 2/15 *(Free Trade Agreement with Singapore)* of 16 May 2017, EU:C:2017:376, paragraph 61).

42 Consequently, Directive 2000/13 does not apply to an intermediation service such as that at issue in the main proceedings.

43 Such service, in so far as it is classified as 'a service in the field of transport', does not come under Directive 2006/123 either, since this type of service is expressly excluded from the scope of the directive pursuant to Article 2(2)(d) thereof.

44 Moreover, since the intermediation service at issue in the main proceedings is to be classified as ‘a service in the field of transport’, it is covered not by Article 56 TFEU on the freedom to provide services in general but by Article 58(1) TFEU, a specific provision according to which ‘freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport’ (see, to that effect, judgment of 22 December 2010, *Yellow Cab Verkehrsbetrieb*, C-338/09, EU:C:2010:814, paragraph 29 and the case-law cited).

45 Accordingly, application of the principle governing freedom to provide services must be achieved, according to the FEU Treaty, by implementing the common transport policy (judgment of 22 December 2010, Y*ellow Cab Verkehrsbetrieb*, C-338/09, EU:C:2010:814, paragraph 30 and the case-law cited).

46 However, it should be noted that non-public urban transport services and services that are inherently linked to those services, such as the intermediation service at issue in the main proceedings, has not given rise to the adoption by the European Parliament and the Council of the European Union of common rules or other measures based on Article 91(1) TFEU.

47 It follows that, as EU law currently stands, it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty.

48 Accordingly, the answer to the first and second questions is that 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, 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.

49 In the light of the answer given to the first and second questions, it is not necessary to provide an answer to the third and fourth questions, which were referred on the assumption that Directive 2006/123 or Directive 2000/31 applied.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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, 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.

[Signatures]

* Language of the case: Spanish.