



# “UBER TEST” REVISED? REMARKS ON OPINION OF AG SZPUNAR IN CASE *AIRBNB IRELAND*

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**ABSTRACT:** In his opinion delivered on 30 April 2019 in case C-390/18, *Airbnb Ireland*, the AG Szpunar stated that Airbnb provides an information society service. He also proposed a revision of the “Uber test” established in the previous case-law of the CJEU. In this *Insight*, the opinion is summarized and critically commented, highlighting both the debatable points of the AG’s argumentation and the potential implications for national legislation.

**KEYWORDS:** Airbnb – collaborative economy – platform economy – information society service – Uber test – short-term rental regulations.

## I. INTRODUCTION

On 30 April 2019, the AG Szpunar issued his opinion in case C-390/18, *Airbnb Ireland*,<sup>1</sup> concluding that Airbnb – the world-famous home-sharing platform – provides an information society service and, consequently, falls within the scope 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 (better known as “E-Commerce Directive”).

The case is highly significant for the development of a regulatory framework for platforms of the collaborative (or sharing) economy. It is also in line with the Court of Justice jurisprudence on the platform economy, begun with the judgment *Asociación Profesional Elite Taxi* and *Uber France*.<sup>2</sup> However, in the opinion under scrutiny, the AG Szpunar appears to adopt a different approach from the previous cases. He proposes a

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<sup>1</sup> Opinion of AG Szpunar delivered on 30 April 2019, case C-390/18, *Airbnb Ireland*.

<sup>2</sup> Court of Justice: judgment of 20 December 2017, case C-434/15, *Asociación Profesional Élite Taxi* [GC], and Court of Justice, judgment of 10 April 2018, case C-320/16, *Uber France SAS*.

review of the criteria established for distinguishing between platforms providing only information society services and those providing “composite services”.<sup>3</sup>

This *Insight* briefly summarises the case’s background and facts, followed by an overview of the key points delivered by the Advocate General in his opinion. Some critical remarks regarding the new “Uber test” proposed by the AG Szpunar will lead the *Insight* to a conclusion. The potential implications both for the application of EU law to platforms other than Uber and for Member States’ legislative regimes on short-term rentals platforms will be discussed.

## II. BACKGROUND AND FACTS

Prior to analysing the Airbnb Ireland case, the so-called “Uber test”<sup>4</sup> will be described, as developed through the two cases *Asociación Profesional Élite Taxi* and *Uber France*.

In the aforementioned judgments, the Court held that Uber – a ride-hailing company which provides, amongst others, an app to connect non-professional drivers with passengers for rides in urban areas – must be regarded as a transport service provider, even though *prima facie* it seems to offer an information society service.

It is worth noting that, according to Art. 1, para. 1, let. b), of the 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 (codification),<sup>5</sup> 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. These elements are further clarified by the same provision as follows: “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. The element of remuneration – which is not defined by the provision – is to be

<sup>3</sup> It was also AG Szpunar who advised the CJEU in the previous cases *Asociación Profesional Élite Taxi* and *Uber France SAS*.

<sup>4</sup> The term was coined by C. BUSCH, *The Sharing Economy at the CJEU: Does Airbnb pass the ‘Uber test’?*, in *Journal of European Consumer and Market Law*, 2018, p. 172 *et seq.*

<sup>5</sup> See previously Art. 1, para. 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.

interpreted according to the CJEU case-law in a broad sense, including services with an economic value even if not directly remunerated by the users.<sup>6</sup>

Following the above description, the service provided by Uber apparently falls within the definition of information society service, since it meets, at least in principle, all the criteria mentioned. Uber essentially makes it possible to locate a non-professional driver, by means of a smartphone application (UberPop), and connect him/her with a potential passenger for the purpose of providing urban transport on demand. Such an intermediation service is provided *for remuneration* (part of the fare paid by the passenger goes to Uber), *at a distance* (since the two parties, Uber and the recipient of the service, are not simultaneously present), *by an electronic means* (the UberPop app), and *at the individual request of a recipient of services* (the ride is performed on demand of a single passenger or possibly a group small enough to fit into a hired vehicle).

Nonetheless, the Court found that Uber provides "more than an intermediation service". Largely following the opinion delivered in *Asociación Profesional Elite Taxi* by the AG Szpunar,<sup>7</sup> the Court stated that the service provided by Uber cannot be separated by the underlying urban transport service provided by non-professional drivers. The two services should be considered as forming an "inseparable whole" or a "composite service" (to recall the words of the AG), in which the online intermediation is just a part of an overall service whose main component is the urban transport service.

In order to establish that Uber service was not a mere intermediary and, consequently, not a provider of an information society service, the Advocate General identified two criteria, that may be defined as the "Uber test".<sup>8</sup>

The first criterion pointed out by the Advocate General and endorsed by the Court is the fact that Uber is a *market maker*.<sup>9</sup> Without the app developed and operated by Uber, (i) non-professional "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".<sup>10</sup> In other words, Uber does not simply match demand and supply but creates a new supply not existing before.

The second criterion set out by the Court is the *decisive influence* exercised by Uber over the main conditions of the underlying service. In this respect, the Court found in its judgment *Asociación Profesional Elite Taxi* that Uber "determines at least the maximum

<sup>6</sup> See M.Y. SCHAUB, *Why Uber is an information society service*, in *Journal of European Consumer and Market Law*, 2018, p. 109 *et seq.*, p. 110.

<sup>7</sup> There is such a close correspondence between the Opinion and the decision of the Court, that it has been argued that the two "may be read together and mutually clarify one another" (V. HATZOPOULOS, *After Uber Spain: The EU's Approach on the Sharing Economy in Need of Review?*, in *European Law Review*, 2019, p. 88 *et seq.*, p. 89).

<sup>8</sup> C. BUSCH, *The Sharing Economy at the CJEU*, cit., p. 172 *et seq.*

<sup>9</sup> *Ibid.*, p. 173.

<sup>10</sup> *Asociación Profesional Élite Taxi*, cit., para. 39.

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".<sup>11</sup>

As Uber (i) is a market maker, and (ii) exercises a decisive influence on the underlying urban transport service it cannot be classified as an information society service. This means that, *inter alia*, it cannot benefit from the freedom to provide cross-border information society services granted under Art. 3, para. 2, of Directive 2000/31.

In the present case, the AG Szpunar goes back to the fundamental question of whether the service offered by a sharing economy platform may be classified as an information society service as defined above.

The case originates from a complaint lodged before the *Tribunal de grande instance of Paris* (the Regional Court of Paris) by the *Association pour un hébergement et un tourisme professionnel (AHTOP)*, which claimed that Airbnb Ireland violates Arts 3 and 5 of the *Loi Hoguet*, a statute on real estate brokers which dates back to 1970. Under the former provision (Art. 3), real estate agents are required to possess a professional license, issued by the local Chamber of Commerce and Industry only to natural persons who meet a certain number of conditions. In particular, potential real estate brokers must *inter alia* prove their professional ability, a sufficient financial guarantee, and insurance against consequences of civil liability. Under the latter provision (Art. 5), real estate agents must keep special registers, records and detailed accounts of their activities.

Since the violation of the abovementioned provisions constitutes a criminal offence under the French Law, the Public Prosecutor's Office – responding to *AHTOP* complaint – decided to bring a criminal action against Airbnb Ireland, which was in fact not in possession of a professional licence and did not keep records of its activities in breach of *Loi Hoguet*. Conversely, Airbnb denied acting as a real estate agent and argued that the *Loi Hoguet* must be regarded as inapplicable on the ground that it is incompatible with Directive 2000/31/EC.

In those circumstances, the investigating judge of the *Tribunal de grande instance de Paris* decided to stay the criminal proceedings and to refer the following questions to the Court:

1) Do the services provided in France by Airbnb Ireland via its electronic platform, which is operated from Ireland, fall under the freedom of services guaranteed by Art. 3, para. 2, of Directive 2000/31/EC?

2) Can the restrictive provisions concerning the profession of the real estate brokers under Act No. 70-9 of 2 January 1970 (*Loi Hoguet*) be invoked against Airbnb Ireland?

<sup>11</sup> *Ibid.*, para. 39.

### III. AG OPINION’S KEY POINTS

On the basis of the relevant case-law of the CJEU – and in particular from the already mentioned “Uber cases” – the AG Szpunar first analyses whether the service provided by Airbnb can be considered as “inseparably linked” with the underlying short-term accommodation services or with the other additional services offered by the platform, namely a photography service, civil liability insurance, and a guarantee for damages.

In order to carry out this analysis, he recalls the abovementioned criteria laid down in *Asociación Profesional Elite Taxi* and *Uber France*: (i) creation of a new supply; (ii) decisive influence on the underlying service.

With respect to the first criterion, the Advocate General considers that Airbnb does not create a new offer of services: “The short-term accommodation market (...) *existed long before the activity of AIRBNB Ireland’s service began.* (...) professional and non-professional hosts can offer their assets via more traditional channels. Nor is it unusual for a host to create a website devoted solely to his accommodation that can be found with the help of search engines”.<sup>12</sup>

Having established that the first criterion is not met in the present case, the AG Szpunar further examines the relationship between the two criteria of the ‘Uber test’. The aim is to assess whether the second criterion alone may be sufficient to prove the existence of an inseparably close connection between Airbnb’s online services and the underlying short-term accommodation service.

In what constitutes one of the most interesting passages of his opinion in *Airbnb Ireland*, the Advocate General here tries to refine and correct the approach advocated in his opinions delivered in the two “Uber cases”. The AG Szpunar not only clarifies that the two criteria do not have cumulative nature, but he also “downgrades” the role played by the market maker criterion in the overall test. As a matter of fact, the AG Szpunar asserts that, *to his mind*, “the criterion relating to the creation of a supply of services constitutes *only (...) an indication* that a service provided by electronic means forms an inseparable whole with a service having material content”.<sup>13</sup>

The justification for this shift in perspective is based on the fact that excluding those innovations of economic operators that enable consumers to have new forms of access to goods or services from the scope of Directive 2000/31, *solely on the ground of the creation of a new supply*, would be contrary to the logic of the internal market and to the liberalisation of information society services pursued by the said Directive.

As a consequence, the AG Szpunar proposes to focus primarily on the second criterion: “*It is the decisive influence* exercised by the service provider over the conditions of the

<sup>12</sup> Opinion of AG Szpunar, *Airbnb Ireland*, para. 58 (emphasis added).

<sup>13</sup> *Ibid.*, para. 65 (emphasis added).

supply of the services having material content *that is capable of rendering those services inseparable from the service that that provider provides by electronic means*".<sup>14</sup>

In addition, the Advocate General briefly lists the elements that led the Court in its previous judgments to conclude that Uber exercised control over the economically significant aspects of the transport service offered through its platform. He highlights that those factors are "indicative in nature" in the view of assessing the nature of the service provided by the platform.

By means of this indicative list, the Advocate General carries out an examination of the main aspects of the Airbnb's service. He refers repeatedly to those of Uber and draws the attention more to the differences than to the similarities between the two platforms.

Uber sets the maximum fares for its rides and discourages drivers by setting lower fares, whereas Airbnb only provides optional assistance to its hosts in determining the price, without any conditioning except for the logic of supply and demand. Uber exercises control over the quality of the vehicles and their drivers and also over the drivers' conduct by reference to the standards that Uber itself had determined, whereas the control exercised by Airbnb Ireland concerns users' compliance with standards defined or, at the very least, chosen by those users. In Airbnb, it is always the host who decides about the letting conditions, eventually by choosing between the options proposed by the platform, whereas Uber defines all the most important conditions of the transport service. And even if the two platforms share a common feature – i.e. the fact that both provide facilities for payment for the services that are not provided by electronic means – this is considered not essential for determining the nature of the service, as it is "typical of the great majority of information society services".<sup>15</sup>

In summary, in AG Szpunar's view, Airbnb does not exercise such a decisive influence over the conditions of the underlying short-term accommodation services. The part of the opinion dedicated to the first preliminary question eventually closes with some concise considerations on the other services offered by Airbnb. These are found to be *optional* and *ancillary in nature* by comparison with the service provided by electronic means. Therefore, they are regarded as separable from the service provided by electronic means.<sup>16</sup>

Turning to the second question of the *Tribunal de grande instance of Paris* – by which the referring court basically seeks to ascertain whether the requirements laid down by the *Loi Hoguet* can be applied to Airbnb as a provider of information society services – the AG Szpunar begins with the scrutiny of some procedural aspects of the question, prior to considering the merits of the compatibility of the *Loi Hoguet* with a number of EU law provisions. The analysis is mainly focused on the national measures derogating from Directive 2000/31 and notably on substantial and procedural conditions with which the

<sup>14</sup> *Ibid.*, para. 67 (emphasis added).

<sup>15</sup> *Ibid.*, para. 77.

<sup>16</sup> *Ibid.*, paras 80-85.

Member States must comply in order to adopt such restrictive measures for the free movement of information society services from another Member State.

The potential consequences of the violation of the procedural conditions set out under Art. 3, para. 4, let. b), of the Directive 2000/31, constitutes the crucial point of this second part of the opinion. Indeed, the Directive does not provide any specific sanction for the failure to comply with that provision. In this respect, it may be recalled that the procedural conditions for a Member State which intends to adopt measures restricting the free movement of information society services are the following: first, to notify the Commission and the Member State of origin of its intention; and second, to ask the Member State of origin to take measures in respect of information society services.

Despite the absence of an *ad hoc* sanction for the infringement of those procedural obligations, the Advocate General states that by analogy with the control procedure concerning technical regulations provided for in Directive 2015/1535, the sanction should be the non-enforceability of a national measure against the provider of those services.<sup>17</sup>

#### IV. COMMENTS

The opinion delivered by the AG Szpunar in the present case marks a new approach to the regulation of platform economy, which nonetheless seems to be founded on some debatable assumptions and may lead to controversial outcomes if adopted by the Court of Justice.

The first questionable point in the Advocate General's opinion concerns the creation of a new supply by Airbnb. The AG Szpunar stated that Airbnb does not provide a new offer since the "short-term accommodation market (...) existed long before the activity of AIRBNB Ireland's service began".

This claim is not very convincing.

One can certainly argue that Airbnb seems only to provide a new mean to match supply and demand of short-term accommodations which previously were brought together through traditional (off-line) channels, such as travel agents, tourist offices, and even by word of mouth. However, it is hard to deny that Airbnb caused the explosive growth of a market which had been rather limited, bringing it to a level that was previously unimaginable.<sup>18</sup> From this perspective, the offer of Airbnb may be considered *new in size*.

Such an explosive growth of the short-term accommodation market is largely related to some innovative features introduced by Airbnb itself. In this regard, one may highlight the reduction of the transaction costs enabled by the platform (especially those arising from intermediation), which makes it possible for tourists to book residential accommodations usually at a price lower than the one requested by traditional operators.

<sup>17</sup> *Ibid.*, paras 138-151.

<sup>18</sup> P. VAN CLEYNENBREUGEL, *Le droit de l'Union européenne ne se prête-t-il pas (encore) à l'ubérisation des services?*, in *Revue de la Faculté de droit de l'Université de Liège*, 2018, p. 108 et seq., pp. 114-115.

Above all, it must be taken into account that without the reputational mechanism offered by Airbnb – and the resulting trust built between hosts and guests, and between them and the platform – few would have rented their own home to strangers and *vice versa* few would have stayed in a stranger's home.<sup>19</sup> This last aspect makes the offer of short-term accommodation created by Airbnb significantly different from the previous ones. From this perspective, the offer of Airbnb is *new in nature*.

On the contrary, in order to stress that there is little new in Airbnb's offer, the Advocate General observes that it is not unusual for a host to create a website for his own accommodation. However, this argument as well seems unpersuasive. Having a website devoted to a single accommodation is likely to be typical of professional hosts, while the core business (and distinctive feature) of Airbnb is represented by non-professionals who rent their own homes or rooms to tourists.

When analysing the "new supply criterion", it should also be considered that Airbnb is currently making it possible to book "not only homes but also hotels through its platform", while more traditional online intermediaries like Booking.com "are expanding their business into offering private holidays homes".<sup>20</sup> This increasingly complex background is not even mentioned in the Advocate General's opinion, although it seems to be relevant for the assessment on the nature of Airbnb's services.

Regardless of whether Airbnb is or not a market maker, the assessment of the Advocate General on this criterion seems to be based on a quite cursory analysis of the main features of Airbnb services that overlooks some aspects which could be fundamental for ascertaining whether the platform actually creates a new offer.

Despite this, the Advocate General decided to "downgrade" the market maker criterion to a mere indication of the existence of an inseparably close connection between Airbnb's online services and the underlying short-term accommodation service.

In this respect, it should be remarked that, already after the "Uber cases", some authors called into question the "market maker criterion". Some noted that creating a new offer not existing before is a common feature to most platforms of the collaborative economy. Others argued that this is "typical of any successful intermediation tool".<sup>21</sup> Still others simply retained doubts about the suitability of the same criterion to assess the existence of an inseparable link with the underlying service.<sup>22</sup>

<sup>19</sup> C. BUSCH, *Self-Regulation and Regulatory Intermediation in the Platform Economy*, in M. CANTERO GAMITO, H.-W. MICKLITZ (eds), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes*, Cheltenham: Edward Elgar, 2019 (forthcoming).

<sup>20</sup> C. BUSCH, *The Sharing Economy at the CJEU*, cit., p. 173.

<sup>21</sup> See P. HACKER, *UberPop, UberBlack, and the Regulation of Digital Platforms after the Asociación Profesional Elite Taxi judgment of the CJEU*, in *European Review of Contract Law*, 2018, pp. 80-96.

<sup>22</sup> C. BUSCH, *The Sharing Economy at the CJEU*, cit., p. 173; M. FINCK, *Distinguishing internet platforms from transport services: Elite Taxi v. Uber Spain*, in *Common Market Law Review*, 2018, p. 1631.



It is therefore comprehensible that the Advocate General suggested reconsidering the creation of a new supply as a mere indication instead of a criterion to be fulfilled, preferring to focus on the decisive influence criterion. Otherwise, most of the platforms in the collaborative economy would meet this criterion and consequently fall outside the scope of Directive 2000/31, “solely because of the creation of a new supply”.

This notwithstanding, the “revised Uber test”, when applied to Airbnb, could lead to results that partly contradict the purposes which justified the creation of the “Uber test” itself. As explained by the AG Szpunar in his opinion in *Asociación Profesional Elite Taxi*, the purposes of establishing the ‘Uber test’, in order to verify whether an information society service is or not a part of a composite service, were: (i) to avoid the liberalisation of a secondary aspect of a composite supply, which would cause a failure in attaining the objective of the Directive 2000/31; and (ii) to avoid legal uncertainties and diminished confidence in EU law.<sup>23</sup>

Both of those consequences are likely to occur if Airbnb, by mean of the application of the “revised Uber test”, is indeed found to be a provider of an information society service. With reference to the first potential consequence – an incomplete or apparent liberalisation – it should be recalled that, even if the information society service provided by a collaborative platform is found not to be inseparably linked with the underlying service, the latter would not benefit from the same freedom granted to the information society service. Indeed, the scope of the Directive 2000/31 does not cover requirements applicable to services not provided by electronic means (in the present case, the short-term accommodation service). As the AG Szpunar stated in his opinion in *Asociación Profesional Elite Taxi* referring to the judgment in *Ker-Optika* case,<sup>24</sup> “Member States are (...) free, subject to the limits which may be imposed by other provisions of EU law, to restrict providers’ freedom pursuant to rules concerning services not provided by electronic means”.<sup>25</sup>

To some extent, this is also the case of short-term accommodation services, which arguably fall within the scope of Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market but are still largely regulated by national, regional, and local legislation. Certainly, the degree of liberalisation in the short-term accommodation market is considerably wider than the one granted in the urban transport sector, which is excluded from the scope of the Directive 2006/123 according to Art. 2, para. 2, let. d), of the same Directive.<sup>26</sup> However, the

<sup>23</sup> See Opinion AG Szpunar, *Asociación Profesional Elite Taxi*, para. 31. The Court remained silent in this respect. For a comment on the purposes identified by the AG, see M.Y. SCHAUB, *Why Uber is an information society service*, cit., p. 112.

<sup>24</sup> Court of Justice, judgment of 2 December 2010, case, C-108/09, *Ker-Optika*, paras 29 and 30.

<sup>25</sup> Opinion AG Szpunar, *Asociación Profesional Elite Taxi*, cit., para. 30.

<sup>26</sup> The transport services are in fact excluded from the general regime on the freedom to provide services under Art. 58, para. 1, TFEU. See also M. FINCK, *Distinguishing internet platforms from transport services: Elite Taxi v. Uber Spain*, cit., pp. 1628 and 1636.

Member States still retain ample room for manoeuvre, also considered the many derogations provided by the Directive 2006/123.<sup>27</sup>

Consequently, it is reasonable to assume that, once the service provided by Airbnb is fully liberalised, this “incomplete – or simply apparent – liberalisation [may] create legal uncertainty, giving rise to grey areas and encouraging infringements of the law”, as stated by AG Szpunar with reference to Uber.<sup>28</sup> Besides, this already occurred in many European cities: for instance, a recent survey estimated that in Berlin about the 90 per cent of accommodations listed on Airbnb failed to indicate the registration number, which must be published in the advertising according to the local legislation.<sup>29</sup>

All in all, liberalising only the online services provided by Airbnb, while leaving to the Member States wide margins to regulate the short-term accommodation market, may be an obstacle to the objective of liberalisation pursued by the Directive 2000/31, as well as may generate legal uncertainties. These potential outcomes call into question the revision of the “Uber test” proposed in the present case.

Nonetheless, there could be further adverse consequences (especially for the certainty of law), which are pointed out in the following paragraph.

## V. IMPLICATIONS FOR NATIONAL LEGISLATION

If the solution adopted by the CJEU in the present case is the one proposed by the Advocate General, there will be a twofold effect on the existing national rules concerning Airbnb. First, they must meet the *substantive conditions* under Art. 3, para. 4, let. a), of the Directive 2000/31. Second and most notably, they must comply with *procedural conditions* under Art. 3, para. 4, let. b), namely the prior notification to the Commission and the Member State of origin, and the request to the latter to take appropriate measures.

Arguably, these conditions would not easily be met by the existing national legislations. This is not only the case of the *Loi Hoguet*, a statute laid down in the 1970s, which may be considered as a prehistoric relic, but also of a number of recent laws adopted by many Member States. As an example, one may recall various French statutes (*Loi ALUR*, *Loi pour une République numérique*, and, lastly, *Loi ELAN*),<sup>30</sup> which drew up a comprehensive discipline for short-term rentals establishing, *inter alia*, registration rules for

<sup>27</sup> See in this respect – with specific reference to the short-term accommodation sector– the Study on the Assessment of the Regulatory Aspects Affecting the Collaborative Economy in the Tourism Accommodation Sector in the 28 Member States' (580/PP/GRO/IMA/15/15111J), 4 May 2018, ec.europa.eu.

<sup>28</sup> Opinion AG Szpunar, *Asociación Profesional Elite Taxi*, cit., para. 66.

<sup>29</sup> See D. WURNIG, *Dem Großteil der Berliner Airbnb-Gastgeber drohen Strafen*, 3 December 2018, in *rbb24*, www.rbb24.de.

<sup>30</sup> For an analysis of the first two French statutes, see N. FOULQUIER, J. C. ROTOULLIÉ, *Numérique et tourisme: la réglementation française sur les locations meublées de tourisme*, in *Rivista Italiana di Diritto del Turismo*, 2018, pp. 32-44.

specific short-term rentals in certain cities and night limits. But similar regulations were also adopted in Germany, Spain, Portugal, and Italy.<sup>31</sup>

If those national laws were found to be inconsistent with the abovementioned conditions, they could be enforced only against the users of Airbnb (the hosts), but not against the platform itself. One can easily imagine the number of disputes that may arise before national courts in order to assess whether a certain provision of the mentioned laws can be applied to Airbnb; whether sanctions for the infringements of national provisions on night limits or registration may be applied both to the platform and to the host; or whether other platforms similar to Airbnb (e.g. Wimdu) can benefit from the same treatment.

Furthermore, it should be considered that the non-enforceability of the national provisions against Airbnb would impair the effectiveness of those provisions with regard to the users. Platforms are in fact increasingly crucial for the implementation of the regulation laid down at a national and local level against the users, given their “superior operational capacities, data pools, and direct access to platform users”.<sup>32</sup> It is no wonder that, in a joint letter addressed to the European Commission and Parliament, some of the major European cities have feared a reduced capacity to enforce their regulations, if the AG’s opinion were to be confirmed by the Court of Justice.<sup>33</sup>

Lastly, it should be noted that the procedural condition under Art. 3, para. 4, let. b), of the Directive 2000/31 – which imposes the duty to ask the Member State of origin to take appropriate measures concerning the information society service – appears to be nothing but a pointless and outdated procedural burden, at least in the short-term accommodation sector. The “strong territorial dimension of the issue” of home-sharing platforms – also highlighted by the Committee of Regions<sup>34</sup> – makes it almost impossible for the Member State of origin to appropriately regulate those platforms. For instance, how could Ireland adopt measures concerning Airbnb in order to set night limits, when these night limits may vary not only from one Member State to another, but even from one city to another? How could Ireland establish registration rules, when these vary significantly from one Region to another?

<sup>31</sup> It is impossible within the scope of this *Insight* to further examine the national provisions that directly or indirectly affect home-sharing platforms. For some brief overviews, see the *Country Reports* published in the *Journal of European Consumer and Market Law*: C. BUSCH, *Regulating Airbnb in Germany – status quo and future trends*; A.I. MARTÍNEZ NADAL, *Regulating Airbnb in Spain*; J.M. CARVALHO and P. POLICARPO, *Regulating Airbnb in Portugal*. For some indications regarding the Italian context, see G. MENEGUS, *Locazioni per finalità turistiche: il codice identificativo lombardo supera lo scrutinio di costituzionalità (nota a Corte cost., sent. 84/2019)*, in *Le Regioni*, 2019 (forthcoming).

<sup>32</sup> In this respect, see C. BUSCH, *Self-Regulation and Regulatory Intermediation in the Platform Economy*, cit.

<sup>33</sup> J. HENLEY, *Ten cities ask EU for help to fight Airbnb expansion*, in *TheGuardian.com*, 20 June 2019, [www.theguardian.com](http://www.theguardian.com).

<sup>34</sup> Opinion of the European Committee of the Regions – Collaborative economy and online platforms: a shared view of cities and regions (2017/C 185/04), 7 December 2016.

## VI. CONCLUSIONS

In brief, in the view of the Advocate General, Airbnb should be considered as a provider of an information society service. However, as it has been argued above, the “revised Uber test” proposed by the AG Szpunar and, more generally, the consequences deriving from its application to the Airbnb’s case are rather questionable. With a view to possible future regulations at the European level, a temporary compromise solution may be to maintain the “old Uber test” and consider Airbnb as a provider of short-term accommodation services. On the one hand, this would make it possible to correct the most evident restrictions of the freedom to provide services in the light of the Directive 2006/123. On the other hand, it would not undermine the existing national law and the possibility for the Member States to regulate platforms.

While awaiting the CJEU decision, one may draw two conclusions from the present case. Firstly, the cautious case-by-case approach devised by the Commission in its Agenda for a Collaborative Economy, and later endorsed by the Advocate General and the Court of Justice, has proved to be inadequate to provide a clear and stable legal framework for collaborative platforms. Secondly, the existing EU law for platforms of the collaborative economy is in need of a general reform to adjust outdated legal instruments – such as the E-Commerce Directive – to new business models enhanced by digital platforms.<sup>35</sup>

<sup>35</sup> See e.g. A. DE FRANCESCHI, *Uber Spain and the “Identity Crisis” of Online Platforms*, in *Journal of European Consumer and Market Law*, 2018, p. 4.