COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Accommodating the freedom of online platforms to provide services through the incidental direct effect back door: *Airbnb Ireland*

Case C-390/18, *X, YA, Airbnb Ireland UC, Hôtelière Turenne SAS, Association pour un hébergement et un tourisme professionnels (AHTOP), Valhotel,* Judgment of the Court (Grand Chamber) of 19 December 2019, EU:C:2019:1112

1. Introduction

Ordering a meal, hailing a ride or booking temporary accommodation increasingly take place through online platforms such as Deliveroo, Uber or Airbnb.[1] The activities and EU presence of those online platforms have continued to grow significantly over the past ten years.[2] Despite that growth, the legal status of platforms under EU law remains unclear. Although it cannot be denied that most online platforms provide economic activities for remuneration and can thus be considered service providers under Article 57 TFEU,[3] their exact legal classification remains more open to interpretation. Are they simply intermediating between a provider of goods and services and a (potential) client, or are they alternatively offering more global or integrated services in disparate fields such as transportation or accommodation?

The *Airbnb Ireland* Grand Chamber judgment offered a welcome and necessary opportunity to shed more light on that question. The ECJ confirmed that Airbnb's online intermediation activities fall within the scope of information society services covered by the e-commerce Directive 2000/31. As such, the Court distinguished the Airbnb case from its earlier cases involving Uber, where it ruled that the Uber platform offered a service in the field of transport.[4] By distinguishing the two cases, the ECJ confirmed that the elements taken into account in the *Uber* cases remain relevant as parts of

1. For a general overview of the platform economy and the law, see Cordier, "L'économie de plateforme: description d'un phénomène d'intermédiation" in Kéfer and Clesse (Eds.), *Enjeux et défis juridiques de l'économie de plateforme* (Anthemis, 2019), pp. 8–33.

2. The European Commission confirms this in its Communication, "Online platforms and the digital single market – Opportunities and challenges for Europe", COM(2016)288 final, at pp. 2–3.

3. The Court retains a wide definition of the notion of service. See Case C-281/06, *Jundt*, EU:C:2007:816, paras. 29–32.

4. Case C-434/15, *Asociacion Profesional Elite Taxi*, EU:C:2017:981; Case C-320/16, *Uber France*, EU:C:2018:221. See also Hatzopoulos, "After *Uber Spain*: The EU's approach on

a tailor-made case-by-case factual analysis determining the nature of the services offered by an online platform and their classification under EU internal market law. At the same time, in distinguishing Airbnb's service offering from Uber's, the annotated judgment also makes clear that the majority of online platforms would be considered to provide information society services, thus benefiting from Directive 2000/31's country-of-origin principle and freedom to provide services provisions.

Despite clarifying the scope of its previous case law, the judgment also leaves unanswered a most fundamental question relating to the scope of the freedom to provide services covered by Directive 2000/31. The ECJ seems to provide hints – without offering a clear and final answer – that ancillary online services offered by those platforms could be subject to the same regulatory requirements as the principal information society service. Of themselves, those services would be subject to specific provisions of EU law governing authorizations and other conditions attached to providing them in the platform's home Member State and, to a lesser extent, within the host States. The judgment highlights that the interplay between those more specific rules and Directive 2000/31 may require future fine-tuning in order to ensure that platforms can continue safely to offer those ancillary online services and in order to avoid the platforms refraining from continuing to offer such services themselves.

In addition to confirming and clarifying the legal nature of platform services, the ECJ had the opportunity to rule on the effects of non-notification of host State rules under Directive 2000/31. Relying on its *CIA Security* case law on Member States' technical regulations,[5] the ECJ ruled that non-notification of restrictive substantive rules applicable to information society service providers in the host State also constitutes a breach of an essential procedural requirement. That breach results in the non-application of the non-notified rules to information society service providers offering their services in the host State concerned. The effects of that non-application also extend to private legal relationships. As a result, ongoing liability actions introduced against Airbnb for not respecting non-notified French rules will have to be ended prematurely, as those rules cannot be invoked against Airbnb. In doing so, the ECJ confirmed the "incidental horizontal direct effect" of Article 3(4) of Directive 2000/31. More generally, *Airbnb Ireland* implicitly extends the incidental horizontal direct effect of the Directive beyond the

the sharing economy in need of review?", 44 EL Rev. (2019), 89–99; Finck, "Distinguishing internet platforms from transport services: *Elite Taxi* v. *Uber Spain*", 55 CML Rev. (2018), 1619–1640.

5. Case C-194/94, *CIA Security International,* EU:C:1996:172, para 54 and Case C-443/98, *Unilever Italia*, EU:C:2000:496, paras. 49–51; see also more recently, Case C-613/14, *James Elliott Construction*, EU:C:2016:821, para 64.

traditional scope of draft technical regulations in relation to which that doctrine arose, raising fresh questions that will need to be answered in the near future.

Although the annotated judgment only concerned the application to Airbnb of French regulations governing real estate agents, the judgment can clearly be seen as an important test case for online platforms providing services across the EU internal market. Online platforms offering information society services can rely safely on the judgment to force host Member States to give them access to their markets and to invoke the non-application to them of rules not notified under Directive 2000/31. By contrast, Member States have to be more vigilant, as rules adopted long before online platforms became active may be considered to have an impact on platforms' principal and ancillary online services offering, and must be notified under Article 3(4)(b) of Directive 2000/31 as a result. Only after notification will host State regulations be applicable to those platforms. It can thus be expected that Member States will critically have to go over their existing services regulations, and will have to notify a whole series of existing rules to the Commission under that provision. It can also be expected that the Commission will have to pay more explicit attention to those questions in the development of its proposed Digital Services Act and the revision of Directive 2000/31 that is expected to form part of it.[6] In that respect, it is important to understand that the annotated judgment only addresses platforms exclusively or principally offering information society services. The EU law legal status of platforms also offering additional offline services, such as Deliveroo (online meal ordering and subsequent courier transport[7]) remains open for interpretation and have not been addressed in this particular judgment.

2. Factual and legal background

The Airbnb Group is made up of a number of companies owned by Airbnb Inc., established in the United States. The main activity of the Group is to put professionals or private individuals with accommodation to rent (hosts) in contact with people looking for such accommodation (guests), in return for the payment of a commission fee. The underlying purpose of that service is to enable those parties to conclude accommodation rental agreements.[8] Upon

6. The elaboration of such an Act has been contemplated in the Von der Leyen Commission's political guidelines, available at <ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf > (all websites last visited 29 May 2020).

7. See <www.deliveroo.com>.

8. See also the terms and conditions of Airbnb, available at <www.airbnb.com/terms#eu>.

registration on the Airbnb electronic platform, prospective hosts and guests conclude a contract with Airbnb for the use of its platform and for the payments made via that platform. Hosts pay a fee in order to have their property listed on the Airbnb application, and guests pay a fee whenever they rent a property through the application.[9] For its European activities, the group set up Airbnb Ireland UC, a company established under Irish law and located in Dublin, operating the Airbnb electronic platform in Europe. In addition, a United Kingdom-based corporation, Airbnb Payments UK Ltd, provides online payment services as part of the contact services across the European Union. On top of that, Airbnb has established companies under the laws of the different Member States, which are responsible for the promotion and advertising of the platform to local audiences.[10]

Although online intermediation between hosts and guests is a key feature of the Airbnb service package, the group also provides additional services. Those include a rating system for both hosts and guests, an optional photography service, optional civil liability insurance, and guarantees against damages. In addition, it offers an optional tool for estimating the rental price to be charged in light of the market averages on the platform. Airbnb also offers arrangements facilitating the payment of the underlying accommodation services. When a host accepts a guest, the latter will transfer the rental price to Airbnb Payments, which will hold the money until 24 hours after check-in, when the money is transferred to the host. In that way, Airbnb has put in place a safeguard mechanism to ensure a guest has paid nothing until they have seen the accommodation and offering a guarantee that the host will be paid. In return for the whole package of online services, Airbnb adds 6 to 12 percent of the rent charged and determined by the host as service charges.[11]

Airbnb Ireland's platform and ancillary services also cover accommodation – and hosts – established in France. In that Member State, however, a 1970 Act (the Hoguet Law)[12] determines the conditions for the exercise of activities relating to certain transactions concerning real estate. According to that Act, any natural or legal person lending assistance on a regular basis to the search for, leasing, or sub-leasing of buildings must hold a professional licence issued by the President of the Regional Chamber of

9. See in that regard <www.airbnb.com/help/article/1857/what-is-the-airbnb-service-fee>.

10. Judgment, para 18.

11. Ibid., para 19.

12. Loi n° 70-9 du 2 janvier 1970 réglementant les conditions d'exercice des activités relatives à certaines opérations portant sur les immeubles et les fonds de commerce, Journal Officiel de la République française 4 Jan. 1970, p. 142. The Act has been modified; the most recent consolidated version can be consulted at <www.legifrance.gouv.fr>.

Commerce and Industry and respect specific accounting rules.[13] Not holding a professional licence or non-compliance with those obligations is punishable by 6 months' to 2 years' imprisonment and criminal fines.[14] Airbnb Ireland does not hold a licence. As a result, the French Association for professional tourism and accommodation (AHTOP) filed a criminal complaint and joined it as a civil party against Airbnb Ireland for failing to comply with existing professional regulations.[15] The main question that arose in the ensuing criminal investigation was whether the combination of different services offered by Airbnb resulted in Airbnb becoming an online real estate agent rather than a simple information society service provider in accordance with Directive 2000/31.[16]

Information society services consist of bringing together buyers and sellers via an online e-commerce platform or marketplace so that they can conclude a contract regarding the sales, storage, and delivery of goods and services.[17] Article 2(a) of Directive 2000/31 refers to an information society service as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". At a distance means "that the service is provided without the parties being simultaneously present"; by electronic means implies 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", and at the individual request means that the data transmission takes place on request only.[18] In order to be considered an information society service, the activity offered for remuneration should be provided entirely by electronic means, involving no exchanges of or access to material content.[19]

13. Judgment, para 14.
14. Ibid., paras. 16–17.
15. Ibid., para 22.
16. 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), O.J. 2000, L 178/1.
17. Case C-324/09, *L'Oréal SA*, EU:C:2011:474, para 109 and Case C-108/09, *Ker-Optika bt* v. *ÀNTSZ Dél-dunántúli Regionális Intézete*, EU:C:2010:725, para 28.
18. Art. 2(a) Directive 2000/31 refers to Art. 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC; the 1998 Directive was repealed and replaced by Directive 2015/1535 of the European Parliament and the Council of 9 Sept. 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, O.J. 2015, L 241/1. Art. 1(b) of that Directive now contains the definition of an information society service; the definition has not changed compared to the previous Directive.
19. See also Annex I to Directive 2015/1535.

In practice, information society services are more often than not coupled or mixed with an offering of other services that may result in the delivery of material content. That is also the case for Airbnb, which offers a range of optional services in addition to enabling contact between host and guests. Previous ECJ case law had already identified two different scenarios involving mixed or coupled services, of which information society services were part. The circumstances underlying Airbnb Ireland are closest to, yet also somewhat different from, the second scenario.

In the first scenario, the provision of information society services was followed by a service consisting in the physical delivery of goods. Article 2(h)(ii), first and second indents of e-commerce Directive 2000/31 in that regard explicitly excludes regulatory requirements relating to goods and to the delivery of goods from the legal regime of the Directive. As a result, the delivery of goods had to be considered a service that has economic value different from the information society service of online ordering. In *Ker-Optika,* the ECJ therefore found that in that scenario, the information society and other services need to be clearly distinguished.[20] As a result, the information society service was governed by Directive 2000/31, whereas the other services were considered as separate services governed by separate provisions of EU law. Activities of platforms acting both as a retailer and shipper or transporter of goods would fall in this category. As a result, the services offered by Deliveroo could also be considered to fall within this category. Deliveroo allows ordering meals online that are prepared by restaurants registered on their platform. Following the preparation of the meal, Deliveroo sends a courier to the restaurant to transport the meal to the person having placed the order. Although the courier is officially an independent professional, Deliveroo determines the essential conditions under which the courier transports the meal.[21] The actual online ordering of the meal and the subsequent transportation of that meal can be distinguished clearly and can exist independently of each other, despite Deliveroo offering them as a single package. Although the ECJ has not ruled explicitly on the legal status of the services offered by Deliveroo, its reasoning in *Ker-Optika* would appear to consider those services as separate and governed by equally separate provisions of EU or, in the absence thereof, national law as far as both the information society and subsequent transportation services are concerned.

In the second scenario, information society services are offered in conjunction with other offline services not involving the delivery of goods.

20. Case C-108/09, *Ker-Optika,* paras. 37–38.

21. On the problems associated with the independent status of Deliveroo couriers, see Aloisi, "'A worker is a worker is a worker': Collective bargaining and platform work, the case of Deliveroo couriers", 5 *International Labor Rights Case Law* (2019), 23–40.

For those additional services, Article 2(h)(ii), third indent of e-commerce Directive 2000/31 also confirms that rules regarding services not provided by electronic means in any case fall outside the scope of that Directive. In principle, as in the previous scenario, separate services – online and offline – would be governed by separate provisions of EU law. Online services would be captured by Directive 2000/31, whereas offline services would be governed by the 2005 professional qualifications Directive,[22] the 2006 Services Directive,[23] specific Directives in the field of other services,[24] or EU primary law in the absence of EU secondary legislation.[25] However, the ECJ held that when information society services are considered to be a part of a composite offline service, they will no longer be considered as separately existing services under EU law.[26] The Court recognized that scenario in the *Uber* judgments of 2017 (*Elite Taxi*) and 2018 (*Uber France*). One of the Uber applications (UberPOP) enabled non-professional drivers to be contacted by persons looking for a ride. Those drivers use their own vehicles, yet charge rates in accordance with Uber's pricing algorithm, which imposed a maximum price for any given ride.[27] At first sight, Uber would allow drivers and users to be put in contact at their individual requests and without them being present simultaneously, making use of the Internet to transmit the data related to both users' making contact. Uber would thus also meet all requirements to classify its activities as information society services. According to *Elite Taxi* and *Uber France*, however, Uber's intermediation activities were not offered in such a way that they could be separated from the underlying offering of an urban transport service. Not only was that service rendered accessible through software tools provided by Uber, the latter was

22. Directive 2005/36/EC of the European Parliament and of the Council of 7 Sept. 2005 on the recognition of professional qualifications, O.J. 2005, L 255/22; this Directive only applies when a service provider effectively moves to the territory of another Member State to provide occasional or temporary services, which is not the case when a platform offers online services, as was confirmed in Case C-342/14, *X-Steuerberatungsgesellschaft* v. *Finanzamt Hannover-Nord*, EU:C:2015:827, para 35.

23. Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on services in the internal market, O.J. 2006, L 376/36. This instrument differs from Directive 2000/31 both in scope and in justifications that can be offered. Within the framework of online platform uses, see Joined Cases C-724 & 727/18, *Cali Apartments* (C-724/18), HX (C-727/18) v. *Procureur général près la cour d'appel de Paris*, pending, involving the attempts of the City of Paris to restrict owners from renting their apartments without authorization.

24. E.g. Directive 2015/2366 of the European Parliament and of the Council of 25 Nov. 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) 1093/2010, and repealing Directive 2007/64/EC, O.J. 2015, L 337/35.

25. As confirmed in Case C-434/15, *Elite Taxi*, paras. 44–46.

26. Case C-108/09, *Ker-Optika,* paras. 33–34.

27. Case C-434/15, *Elite Taxi*, para 16. See also Finck, op. cit. *supra* note 4, 1621.

also responsible for the general operation of the particular urban transport.[28] The ECJ held that online intermediation through the UberPOP application formed an integral part of the underlying transportation service, which would never have taken place without the application and vice versa.[29] The offline transportation service would not and could not be offered in the same way without the preliminary online intermediation made possible thanks to UberPOP.

The *Airbnb Ireland* case presents a situation somewhat similar to the abovementioned second scenario. Airbnb principally offers online intermediation between property owners (hosts) hoping to provide an accommodation service to potential guests. However, such intermediation is not and has never been the only way for hosts and guests to get in contact and to conclude a subsequent rental agreement. Other accommodation websites or real estate agents have also offered that service, albeit often on a smaller scale. As a result, Airbnb's intermediation service at first sight is not a necessary preliminary step in order for the underlying accommodation services to be offered. The same goes for Airbnb's optional photography service, which allows hosts to have their accommodation photographed by a professional contacted through the Airbnb platform. Although Airbnb determines the prices of the photography service, hosts can perfectly contact a photographer themselves to have accommodation photos taken. The platform is therefore not necessary to obtain the subsequent offline photography service, in contrast with the UberPOP application at stake in *Elite Taxi* and *Uber France*. Questions have therefore been asked whether those circumstances are sufficient to arrive at a different conclusion from the one the ECJ reached in those cases.

In addition to its main intermediation and optional photography service, Airbnb also offers a variety of other optional online services (payment services, optional insurance, and peer review). All those additional services are offered by electronic means and complement Airbnb's main service offering. The referring court implicitly appears to ask whether the cumulative offering of those additional online services would change the legal status of Airbnb's main service under EU law. That question is distinct from the one asked in the *Uber* cases. In those cases, the online intermediation service was part of an overall service, the key component of which was not provided online. By contrast, in the case at hand, the additional payment, insurance, and rating services were all offered online and transmitted by electronic means, without automatically or exclusively being information society services.

28. Case C-434/15, *Elite Taxi*, para 38; Case C-320/16, *Uber France*, para 21.
29. Case C-434/15, *Elite Taxi*, para 40; Case C-320/16, *Uber France*, para 22.

Against that background, the ECJ had to address two questions. First, it had to determine to what extent Airbnb Ireland offered information society services and whether the offering of additional online services would alter that conclusion. In addition, the ECJ also had to determine whether France could enforce its law on real estate agents to the Airbnb Group's activities and, if so, under what circumstances.[30] The enforceability of that French law essentially depended on whether it had to be notified in advance to the Commission. Within the framework of information society services, so-called technical regulations have to be notified to and approved by the Commission in order to be able to create effects between private individuals. In that regard, Directive 2015/1535 requires draft technical regulations to be notified to the Commission.[31] Technical regulations cover *inter alia* rules imposing requirements of a general nature relating to the taking-up and pursuit of information society service activities. As a result, any rule whose specific aim and object is to regulate such services in an explicit and targeted manner must be notified under that Directive and will be suspended prior to Commission approval.[32] Failing to notify the rule results in the non-application of those technical regulations, even in private legal relationships.[33] From that case law, it follows that rules merely imposing a prior authorization on service providers are not of themselves technical regulations within the meaning of that Directive. As those rules only affect the pursuit of information society services in an implicit or incidental manner, they do not need to be notified.[34] The Hoguet law seems to fall outside the technical regulations category. However, Article 3(4)(b) of Directive 2000/31 also imposes such a notification requirement; that provision also requires host States to notify the Commission of any rules which do not necessarily qualify as technical regulations and that derogate from the freedom to provide cross-border information society services. In contrast with the Directive 2015/1535 procedure, notifications under Article 3(4)(b) of Directive 2000/31 do not suspend the application of those rules in anticipation of a Commission decision as to their compatibility with EU law.[35] The Hoguet law had not been notified under that provision. The ECJ was therefore asked to determine whether non-notification of the Hoguet law could result in its non-enforceability in private law proceedings.

30. Judgment, para 27.

31. Art. 5 of Directive 2015/1535 cited *supra* note 18.

32. Art. 1(f) juncto 1(e)(i) Directive 2015/1535. See e.g. by way of example, Case C-336/14, *Ince*, EU:C:2016:72, para 84.

33. Case C-194/94, *CIA Security International,* para 54.

34. See Case C-267/03, *Lindberg*, EU:C:2005:246, para 87; Case C-255/16, *Falbert and Others*, EU:C:2017:983, para 16; and Opinion in Case C-390/18, *Airbnb Ireland*, EU:C:2019:336, para 141, footnote 64.

35. Judgment, para 93.

3. Opinion of the Advocate General

Advocate General Szpunar had no difficulty in establishing that the basic intermediation service offered by Airbnb fell within the definition of information society services. Airbnb offers a remunerated activity, without host and guest being present at its premises, at their request and without providing material content.[36] As Airbnb does not own the properties listed on its website, it is not responsible for handing over the use of that property to the guest concerned. As such, Airbnb meets all conditions of an information society service.[37] The key open question, however, was whether the additional services were to be considered as part of one integrated service, together with the intermediation offered and, if so, whether that service as a result would have to be qualified as a service in the field of accommodation.

In his Opinion, the Advocate General confirmed that "[t]he fact that that service provider also offers other services having a material content does not prevent the service provided by electronic means from being classified as an information society service, provided that the latter service does not form an inseparable whole with those services".[38] To determine whether that was the case, he considered it useful to revisit the test the ECJ had developed in *Elite Taxi*. The Advocate General held that the Court acknowledged two testing elements in that regard: the creation of a new supply and the exercise of decisive influence over the underlying non-electronic transaction. He subsequently recognized that the ECJ did not clarify fully either the scope of or the relationship between those criteria.[39] Before applying them to Airbnb's practices, it was therefore necessary to address those issues.

According to the Advocate General, the ECJ did not consider the presence of a new supply alone as sufficient to exclude online platforms from the scope of the information society service definition. As platforms generally are responsible for enabling the provision of new supply or new services that did not exist previously, that would mean that all those platforms contributing to the emergence of new services would no longer offer information society services once they contribute to creating new services for which no previous supply (and perhaps demand) existed.[40] That could not have been the Court's

36. Opinion, paras. 36–40. For a comment on that Opinion, see Busch, "The sharing economy at the CJEU: Does Airbnb pass the '*Uber* test'? Some observations on the pending Case C-390/18 – *Airbnb Ireland*", (2019) *Journal of European Consumer and Markets Law*, 172–174; and also Menegus, "*Uber* test revised? Remarks on Opinion of AG in Case *Airbnb Ireland*", 4 *European Papers* (2019), 603–614.

37. Opinion, para 41.

38. Ibid., para 85.

39. Ibid., paras. 51–52 and 60.

40. Ibid., para 63.

intention. The key criterion to take into account is rather whether the platform exercises a decisive influence over the offering of a non-electronic service as well.[41] That would be the case only if the platform acts as a power that regulates the economically significant aspects of the underlying service offered, or the structuring of the market on which that service is offered.[42]

Applied to Airbnb Ireland, the Advocate General concluded that it exercises no decisive control over all the economically significant aspects of the short-term accommodation service, as Uber did in relation to the transport service.[43] More particularly, Airbnb does not control the location and standards of the accommodations prior to them being listed on its platform, does not itself set the price beyond offering some tools to calculate it better, and does not impose specific conditions determining the letting and cancellation conditions.[44] Although Airbnb can suspend or remove hosts and guests from its platform, the power of administrative control it exercises does not concern the hosts' and guests' conduct – as was the case with Uber drivers – and is only limited to verifying compliance with standards defined or chosen by the users themselves.[45] In addition, the fact that Airbnb offers payment facilities is an element typical of most information society services, such as hotel or ticket reservation platforms. The presence of such facilities alone does not allow one to say that a platform exercises decisive influence over the underlying accommodation transaction.[46] As a result, the various services do not in themselves determine or structure the principal underlying service, which is the conclusion of an accommodation contract between host and guest.[47] The intermediation service offered through the Airbnb Ireland platform was therefore to be considered as an "information society service" falling within the scope of Directive 2000/31.

Since Airbnb offers an information society service, the Advocate General subsequently had to address the French court's second question as to whether the Hoguet law could be considered applicable to Airbnb Ireland's platform activities. Following a discussion as to the admissibility of that question, the Advocate General rephrased the question as asking whether under the free movement regime put in place by Directive 2000/31, national rules such as the Hoguet law can be invoked against information society service providers established in other Member States, as is the case with Airbnb.[48]

41. Ibid., para 67.
42. Ibid., para 72.
43. Ibid., para 78.
44. Ibid., paras. 73–74.
45. Ibid., para 75.
46. Ibid., para 77.
47. Ibid., para 81.
48. Ibid., para 96.

The Advocate General confirmed that France had not notified its Hoguet law to the Commission or Ireland. According to Article 3(4)(b) of Directive 2000/31, Member States are in principle prohibited from restricting the free movement of information society service providers legally established in another Member State, unless the Member State of establishment and the Commission are notified of the intended adoption of restrictive ad hoc measures.[49] Following that notification, the measures may be implemented, but the Commission will examine their compatibility with EU law. If found incompatible, it will ask the Member State urgently to put an end to them. The Advocate General submits that, given those features and in line with the ECJ's previous case law,[50] a failure to notify the Commission would entail the non-enforceability of that measure against the provider of information society services. A similar sanction had been recognized by the ECJ in the context of non-notification of technical regulations and could be transposed to regulations concerning information society services as well.[51]

4. Judgment of the Court

The ECJ essentially agreed with the Advocate General that the services offered by Airbnb Ireland are information society services[52] and that the failure to notify a national rule regulating those services entails its non-enforceability against an information society service provider established in another Member State.[53]

With regard to the legal status of Airbnb Ireland's services, the ECJ confirmed that the Airbnb platform offers a service as defined in Article 57

49. According to the A.G., only substantive ad hoc measures would be permitted under Art. 3(4) Directive 2000/31. See Opinion, para 135. In para 136, he doubts whether the Hoguet law would meet the proportionality test required under that same provision of the Directive.

50. The A.G. particularly refers to A.G. Jacobs' Opinion in Case 380/87, *Enichem Base and Others*, EU:C:1989:135, para 14, the judgment in that Case in para 20 (EU:C:1989:318), Case C-443/98, *Unilever Italia*, para 43, and Case C-122/17, *Smith*, EU:C:2018:631, paras. 52–53. In contrast with the ECJ, the A.G. did not refer explicitly to Case C-194/94, *CIA Security International,* to which the Court referred abundantly. The A.G. only refers to his Opinion in Case C-320/16, *Uber France*, where a reference to that case had been added.

51. Ibid., paras. 150–151.

52. The ECJ only answered the questions from that perspective, despite the Commission and AHTOP having argued that Directive 2005/36 on the recognition of professional qualifications (O.J. 2005, L 255/22) and Directive 2007/64 on payment services in the internal market (O.J. 2007, L 319/1) had to be interpreted too. Since those instruments were not mentioned in the reference for a preliminary ruling, the Court did not consider them here; see para 38. The 2007 payment services had in the meantime been replaced by Directive 2015/2366.

53. Judgment, para 98.

TFEU,[54] meeting all four conditions of the information society service definition.[55] In this case, the ECJ held that the platform essentially provides and makes available a list of available accommodations. That "compiling of offers using a harmonized format, coupled with tools for searching for, locating and comparing those offers, constitutes a service which cannot be regarded as merely ancillary to an overall service coming under a different legal classification, namely provision of an accommodation service".[56]

To substantiate that conclusion, the ECJ verified whether Airbnb's intermediation service is separate from or forms an integral part of an overall service the main component of which is the provision of accommodation to guests.[57] The Court offers three specific reasons as to why Airbnb's online intermediation service is separate from such subsequent service. First, the intermediation service is not only intended to provide an immediate accommodation service, but also to offer a tool to facilitate more generally the conclusion of contracts concerning future accommodation rental transactions.[58] Second, the platform service is "in no way indispensable to the provision of accommodation services", as it competes with real estate agents and classified real estate advertisers.[59] Offering an innovative way of bringing hosts and guests in contact with each other, the platform is one way among many to contribute to the provision of a future accommodation service. Third, it was confirmed that Airbnb does not set or cap the amount of rents charged.[60] That element fundamentally differentiates Airbnb's services from Uber's, which not only determines prices but also selects the drivers and cars that could offer their services through UberPOP.[61] As Airbnb does nothing like that, the ECJ confirmed that Airbnb did not exercise decisive influence over the underlying accommodation service.[62]

54. Ibid., para 40.
55. Ibid., para 49.
56. Ibid., para 54.
57. Ibid., para 50.
58. In para 53 of the judgment, the English version incorrectly states that intermediation cannot be separated from the property transaction itself. That is an incorrect translation, as the ECJ stated that intermediation in this context can be separated. In the French version, the ECJ confirms that "un tel service d'intermédiation présente un caractère dissociable de l'opération immobilière proprement dite". The German translation confirms that "[e]in solcher Vermittlungsdienst ist vom eigentlichen Immobiliengeschäft trennbar", as do the Dutch ("staat immers los van") and Spanish ("es disociable") translations.
59. Ibid., para 55.
60. Ibid., para 56.
61. Case C-434/15, *Elite Taxi*, para 39.
62. Judgment, para 68.

In addition, the ECJ also addressed the legal status of the optional services offered by Airbnb.[63] The ECJ in that regard held that the optional photography, payment, and damage guarantee services perform an ancillary supply function and do not modify the specific characteristics of the main information society service.[64] As a result, it would be paradoxical if added-value ancillary services, which allow a platform to distinguish itself from competitors, could, in the absence of additional elements, result in a modification of the nature and legal classification of the platform's principal activity.[65]

In response to the second question asked, the ECJ determined what the impact of its answer to the first question would be on the enforceability of the Hoguet law against Airbnb Ireland. To do so, it rephrased the French court's question into one asking whether the free movement provision covered by Directive 2000/31 tolerates a Member State other than the State of establishment adopting rules restricting the provision of the information society service on its territory.[66] The ECJ recalled that Article 3(4)(a) of Directive 2000/31 allows a host Member State to limit the freedom to provide information society services, subject to the measures being necessary in the interests of public policy, public health, public security, or the protection of consumers, responding to an actual service undermining those objectives, and proportionate to the realization of that objective.[67] On top of those substantive conditions, the restrictive measures must be notified to the Commission and the Member State of establishment.[68] Since no notification had been made, the ECJ focused exclusively on the consequences of that omission without further interpreting the substantive conditions in Article 3(4)(a).[69] According to the ECJ, the notification obligation laid down in Article 3(4)(b) is "sufficiently clear, precise and unconditional to confer on it direct effect and, it may be invoked by individuals before the national courts".[70] Notification is necessary in order for "the Commission [to] avoid the adoption or at least the maintenance of obstacles to trade contrary to the TFEU, in particular by proposing amendments to be made to the national measures concerned".[71] Given its importance, failure to notify the measure to the Commission

63. Ibid., para 58.
64. Ibid., paras. 59–63.
65. Ibid., para 64.
66. Ibid., para 78.
67. Ibid., para 84.
68. Ibid., para 86.
69. For a more substantive analysis, see Opinion, paras. 123–137 and Busch, op. cit. *supra* note 36, 174.
70. Judgment, para 90.
71. Ibid., para 92.

amounts to the breach of an essential procedural requirement. The ECJ then drew an analogy with the failure of a Member State to give prior notification to the Commission of technical rules. In line with *CIA Security International*, such non-notified rules are unenforceable against individuals.[72] Extending that reasoning to Airbnb, the platform can also rely on that failure to notify to avoid the Hoguet law being invoked against it by individuals in private law disputes.[73] The judgment thus explicitly also shields Airbnb from private damages actions envisaged against the background of the ongoing criminal investigation.

5. Comment

Online platforms allow new service providers to enter into competition directly with incumbent market operators and grant consumers more choices in obtaining services. It is no surprise, therefore, that in the wake of the European Commission's Digital Single Market Strategy,[74] the 2016 Commission Communication on online platforms confirmed that online platforms are to benefit fully from the EU "single market freedoms".[75] However, it is well known that in the context of those "single market freedoms", Member States retain a significant degree of regulatory autonomy when determining the conditions under which online platforms can operate on their territories.[76] Those conditions differ depending on the legal instrument that guarantees the service provider access to a Member State's market. The annotated judgment focused exclusively on the scope and application of the e-commerce Directive 2000/31 in this context.

The judgment sheds light on the room for Member States' regulatory autonomy under that Directive from two perspectives. First, the judgment allows a better grasp of the scope and features of the Court's legal framework determining the nature of a service provided by an online platform. The judgment confirms that the *Uber* testing criteria were, above all, indicators the courts have to take into consideration on a case-by-case basis. At the same

72. Ibid., para 96, referring to Case C-194/94, *CIA Security International,* para 54.

73. Ibid., para 97; the ECJ referred to Case C-613/14, *James Elliott Construction*, para 64 to affirm that point.

74. See Commission Communication, "A Digital Single Market Strategy for Europe", COM(2015)192 final, pp. 11–12. See for background as well, Adamski, "Lost on the digital platform. Europe's legal travails with the digital single market", 55 CML Rev. (2018), 719–752.

75. Commission Communication cited *supra* note 2, p. 5.

76. On the fragmentation resulting from this, see Delimatsis, "From *Sacchi* to *Uber*: 60 years of services liberalization, ten years of the Services Directive in the EU", 37 YEL (2018), 188–250.

time, however, the judgment unfortunately leaves open a fundamental question regarding the legal status of services ancillary to the information society services offered by online platforms. The ECJ seems to hint at the possibility that those ancillary services could benefit from the same legal treatment as the principal information society service in either the home or the host Member State, but does not take an explicit position on that point. Second, the judgment remarkably and without much consideration extends its familiar "incidental direct effect" of directives case law beyond the scope of technical regulations, raising new questions and creating more opportunities for litigation in that context.

5.1. *The EU law nature of platform services: Some answers and fresh questions*

In the annotated judgment, the ECJ arrived at the conclusion that the online intermediation offered by Airbnb was sufficiently independent from the underlying accommodation service in order for it to remain a self-standing information society service governed by Directive 2000/31. In justifying that conclusion, the Court confirmed the relevance of its testing indicators relied on in *Elite Taxi* and *Uber France* (the *Uber* cases) in order to assess whether a service is an information society service. Those indicators are not as such set in stone, but need to be applied in the context of a factual case-by-case assessment of the services offered by a platform (5.1.1.). At the same time, however, the Court implicitly also raised new questions as to the EU law status of services that are ancillary to the provision of information society services (5.1.2.).

5.1.1. *Information society services: The Uber test confirmed and clarified*

As in *Elite Taxi,*[77] the ECJ's reasoning in *Airbnb Ireland* starts from the idea that most platforms are providers of such information society services. To establish conclusively that this is the case, it needs to be determined whether the information society service forms an integral part of an underlying or subsequent service. The legal test relied on in that context consists of determining the economically independent nature of both services. To the extent that this is the case, the two services could be separated. By contrast, when no such economic independence can be found, the service will be considered one integrated service of which the electronic or information society component forms a part.[78] When completing that assessment, the

77. Case C-434/15, *Elite Taxi*, para 35.
78. Opinion of A.G. Szpunar in Case C-434/15, *Elite Taxi*, EU:C:2017:364, para 33.

focus rests on "the nature of the links between those services".[79] The ECJ has relied on an open-ended series of indicators to make that assessment.

Similar to the *Uber* cases, the ECJ principally took into consideration two main indicators to assess the nature of the links between Airbnb's service offering and the subsequent accommodation services. First, the Court ruled that the service provided by Airbnb was in no way indispensable to the provision of subsequent accommodation services. In other words, Airbnb did not create a new demand, but offered a new way for demand and supply to meet. Airbnb's offering thus differed from Uber's through its UberPOP application, which created a new offering of services that would not have been accessible without the application. In the field of accommodation, both guests and hosts "have a number of other, sometimes long-standing, channels at their disposal, such as estate agents, classified advertisements, whether in paper or electronic format, or even property lettings websites".[80] The mere fact of being in direct competition with those service providers with an innovative service based on the particular features of commercial activity in the information society, does not result in the conclusion that Airbnb's activity is indispensable to the provision of an accommodation service.[81] In line with the Advocate General's Opinion,[82] the ECJ confirms that this indicator alone cannot determine whether online and offline services are separate or integrated. However, it does remain an important element in the assessment of the nature of the link between the online and offline services. Second, the Court held that Airbnb did not have a decisive influence over the general operation of the subsequent accommodation service. According to the Court, that was the case "particularly since Airbnb Ireland does not determine, directly or indirectly, the rental price charged … still less does it select the hosts or the accommodation put up for rent on its platform".[83] The application of the indicators led to a different conclusion compared to Uber, justifying the ECJ's classification of Airbnb's service offering as an information society service falling within Directive 2000/31.

It follows from the foregoing that the indicators relied on to classify Uber services have proven to remain relevant in the context of Airbnb as well. The Court implicitly makes clear that those criteria are simply indicators of a case-by-case economic independence test.[84] In the annotated judgment, the ECJ also took into account the overall objective of Airbnb's service offering as an additional indicator establishing the nature of the links between online

79. Judgment, para 52.
80. Ibid., paras. 54–55.
81. Ibid., para 55.
82. Opinion, para 65.
83. Judgment, para 68.
84. See also already Finck, op. cit. *supra* note 4, 1631.

and offline services.[85] It cannot be excluded therefore that in future cases, different indicators will be relied on to establish the nature of the link between those services. It goes without saying, however, that in the context of the platform economy, the new market/indispensability and decisive influence criteria will continue to remain relevant in that assessment, as both Uber and Airbnb services have been assessed against their background.

5.1.2. *The puzzling EU law status of ancillary online services*

The Airbnb Ireland judgment confirmed once more that whenever an information society service is ancillary to and forming an integral part of an underlying offline service, the principal offline service eventually determines the instrument of EU or national law applicable to the service as a whole (*accessorium sequitur principale*).[86] That reasoning was developed and confirmed in the context of mixed online-offline services. It can be questioned whether it also remains valid whenever a principal online service is accompanied by ancillary online services only, and no material content is provided in addition to those online services. That question is not purely hypothetical, as Airbnb offered ancillary online payment, insurance, and rating services in addition to its main online intermediation service.

The legal status of those ancillary online services under EU law is not completely clear yet. In the particular context of Airbnb, the ECJ only confirmed that those services "do not substantially modify the specific characteristics of [the principal information society] service".[87] They are merely "ancillary in nature, given that, for the hosts, they do not constitute an end in themselves, but rather a means of benefiting from the intermediation service provided by *Airbnb Ireland* or of offering accommodation services in the best conditions".[88] Somewhat remarkably, when confirming their ancillary nature and in an attempt to distinguish them from the principal online intermediation service, the ECJ referred to its existing VAT case law on the relationship between principal and ancillary services and their treatment as a single supply for tax purposes.[89] In the ECJ's interpretation of VAT

85. Judgment, para 53.
86. Judgment, para 65; see also Case C-434/15, *Elite Taxi*, para 38.
87. Judgment, para 64.
88. Ibid., para 58.
89. Ibid. The Court refers to the following cases in that regard: Case C-425/06, *Part Service*, EU:C:2008:108, para 52; Case C-432/15, *Baštová*, EU:C:2016:855, para 71; Case C-71/18, *KPC Herning*, EU:C:2019:660, para 38. According to that case law, "a supply must be regarded as ancillary to a principal supply if it does not constitute, for customers, an end in itself but a means of better enjoying the principal service supplied".

Directive 2006/112,[90] ancillary services forming part of a single supply share the tax treatment of the principal service, as they do not have independent economic value in themselves.[91] Because of their subordinate role in an economic transaction, ancillary services would in that case be subject to the same legal treatment in terms of taxation as the principal service.

By referring to that case law, the ECJ could be understood also implicitly to draw an analogy with that case law and consider that ancillary online services would receive the same legal treatment as the main information society service. A closer analysis reveals that the legal framework in place would not *prima facie* exclude that interpretation. The harmonized field of Directive 2000/31 covers not only rules regulating access to Member States' markets, but also requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider.[92] Those requirements could be interpreted as covering the offering of ancillary online services as well. Article 2(h)(ii) of that Directive only excludes rules relating to goods, the delivery of goods, and to services not provided by electronic means from its scope of application. The latter category could be said to cover only services containing material content requiring offline activities.[93] Ancillary online services, even when not technically speaking information society services, would not as such be excluded *prima facie* from the field harmonized by that Directive.

That tentative conclusion is further reinforced by a comparison with Directive 2019/770 on the supply of digital content, which explicitly states that where a single contract between the same trader and the same consumer includes in a bundle elements of supply of digital content or a digital service and elements of the provision of other services or goods, it shall only apply to the elements of the contract concerning the digital content or digital service.[94]

90. Council Directive 2006/112/EC of 28 Nov. 2006 on the common system of value added tax, O.J. 2006, L 347/1.

91. See Joined Cases C-308/96 & C-94/97, *Commissioners of Customs and Excise* v. *Madgett and Baldwin,* EU:C:1998:496*,* paras. 24–25 and Case C-349/96, *Card Protection Plan*, EU:C:1999:93, paras. 30–31. Case C-278/18, *Sequeira Mesquita*, EU:C:2019:160, para 30, confirmed that a supply must be regarded as a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. See also Henkow, "Defining the tax object in composite supplies in European VAT in European VAT", 2 *World Journal of VAT/GST Law* (2013), 182–202.

92. Art. 2(h)(i) Directive 2000/31; see also Busch, op. cit. *supra* note 36, 174.

93. At least implicitly; see Case, C-108/09, *Ker Optika*, paras. 33 and 38.

94. Art. 3(6) of Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, O.J. 2019, L 137/1.

Directive 2000/31 contains no such explicit exception to the *accessorium sequitur principale* idea. As a result, and contrary to Directive 2019/770, Directive 2000/31 could be interpreted still to allow those ancillary services to be considered integral parts of the principal information society service. Other EU secondary legislation instruments related to the Digital Single Market could be interpreted even more to support that conclusion. Platform-to-business Regulation 2019/1150 covers not only online intermediation services, but also ancillary services. The Regulation defines ancillary services as services offered to the consumer prior to the completion of a transaction initiated on the online intermediation services, in addition to and complementary to the primary good or service offered by the business user through the online intermediation services.[95] The transparency requirements that apply to online intermediation services also extend to the ancillary services offered.[96] In the same way, Directive 2019/789 on the exercise of copyright applicable to online transmissions of broadcasting organizations, refers to the online retransmission of broadcasts as ancillary services. Those ancillary services are subject to copyright rules in the country of origin of the broadcast.[97] In those instruments, ancillary services are subject to the same obligations imposed by EU law in relation to principal intermediation and broadcasting services. By way of analogy, it could be argued that the same rights and obligations applicable to information society services could be extended to those providers when they offer ancillary services. Against that background, the ECJ's apparently innocent reference to the VAT cases could be understood to hint at the extended application of the information society service legal regime to ancillary online services.

In theory, that would mean that Directive 2000/31 would govern the authorization and provision of ancillary online services as well. That theoretical argument should nevertheless not be exaggerated, as Directive 2000/31 itself also excludes rules relating to other potential online services from its coordinated field. Member States' application of taxation-related, data protection, competition law and private international law provisions to providers of information society services fall outside the Directive's coordinated field. Information society services performed in the spheres of online gambling, attorney-client representation and notary public services are

95. Art. 2(11) of Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, O.J. 2019, L 186/57.

96. Art. 6 of Regulation 2019/1150.

97. Art. 3 of Directive 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, O.J. 2019, L 130/82.

also excluded.[98] Rules thus excluded from the Directive that govern ancillary online services in those fields would equally not be subject to the Directive's (notification) obligations. In addition, the Directive leaves untouched home and host Member States' intellectual property rights, rights related to the emission of electronic money, contract laws, and rules regarding the permissibility of unsolicited commercial communications by electronic mail. More importantly even, the Directive's freedom of establishment and freedom to provide services do not replace harmonized EU law governing direct and life insurance and investment services. Those services remain governed by the internal market clauses present in more specific Directives.[99]

To the extent that a particular online service is not excluded from the scope of Directive 2000/31, ancillary services could also be covered by its provisions. In that context, it should be recalled that Article 3 of Directive 2000/31 establishes a principle of home State control, and States are precluded from making taking up an information society services activity subject to a prior authorization procedure.[100] More particularly, each Member State shall ensure that the information society services provided by a service provider established on its territory, comply with the national provisions applicable in the Member State in question which fall within the Directive's coordinated field. The Directive itself imposes particular transparency obligations, yet also guarantees an exemption from liability for the mere hosting or displaying of offensive or illegal content.[101] To the extent that ancillary online services are considered to be an integral part of the main information society service, those transparency obligations and liability exemptions would also extend to those ancillary services. Home Member States would have to make sure their regulatory frameworks enable such an extended application of the Directive's provisions to be guaranteed. Per Article 3(2), host Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State, unless for reasons permitted by and following the procedures of Article 3(4) of the Directive.[102] Host Member States would have to rely on the procedures in place within this Directive to take measures limiting the provision of those ancillary services on

98. Art. 1(5) Directive 2000/31.

99. Annex to Art. 3(3) Directive 2000/31.

100. Art. 4 Directive 2000/31. See also Waelde, "Article 3, ECD: Internal market clause" in Edwards (Ed.), *The New Legal Framework for E-commerce in Europe* (Hart, 2005), pp. 3–30.

101. See Arts. 5–14 Directive 2000/31. On the scope of those obligations and the liability exemption, see Lodder, "Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market" in Lodder and Murray (Eds.), *EU Regulation of E-commerce: A Commentary* (Elgar, 2016), pp. 15–58.

102. As confirmed in Joined Cases C-509/09 & C-161/10, *eDate Advertising*, EU:C:2011:685, para 67.

their territories. That means that host States may only take necessary and proportionate measures justified by public policy, public security, public health or consumer protection objectives and that every measure taken needs to be notified to the Commission. As the ECJ confirmed in the annotated judgment, not notifying those measures will result in their non-application to the provider of information society services. To the extent that the Directive's regime extends to ancillary online services, any host State rules in place aimed at prohibiting, curtailing or otherwise regulating those ancillary services, would have to be justified and notified in the same way as rules directly targeting information society services.

The abovementioned analysis may prove salient in relation to the regulation of online payment services also offered by online platforms. By contrast with insurance and guarantee services, Directive 2000/31 does not exclude such payment services from its scope. However, Recital 55 of Directive 2015/2366 on payment services confirms that its provisions are to apply in conjunction with Directive 2000/31.[103] That simultaneous application is likely to raise questions regarding the regulation of online payment services put in place by platforms in their home States. Article 5 of Directive 2015/2366 imposes a prior authorization scheme for payment services, which Directive 2000/31 would prohibit. It remains to be seen how that potential difference would be resolved. It could be argued that the payment services Directive is a *lex specialis*, which would apply over the *lex generalis* (Directive 2000/31). The ECJ has not had the chance to confirm this so far. In addition, questions remain as to the power of host States to regulate ancillary online payment services. Article 30 of Directive 2015/2366 allows host States to intervene in that regard. It could be argued that those regulations will have an impact on the way in which the principal information society service is offered. If, as the annotated judgment may indicate, those regulations have to comply with the legal regime of that principal service, it cannot be excluded that host Member States would also have to notify those rules under Article 3(4)(b) of Directive 2000/31, and to ensure those rules comply with the substantive criteria outlined in Article 3(4)(a) of the same Directive. If that were the case, the judgment would impose on host Member States the duty to verify and, if necessary, adapt their rules so as to ensure compliance with Directive 2000/31 in the context of ancillary online services as well.

Given the lack of clarity as to the rules having to be notified, it is most regrettable that the Court was not more explicit as to whether it really had in mind those additional obligations for Member States under Directive 2000/31 in relation to ancillary online services. The ECJ may have the occasion to

103. That position is also confirmed by Tapia Hermida, "The second payment services Directive", 35 *Banco de España -Financial Stability Review* (2017), 59, at 62.

clarify its position in the very near future. In a pending case, the Italian Council of State essentially asked whether Italian authorities may require Airbnb to collect information and transmit it for tax purposes to the Italian tax authorities without notifying such information to the Commission under Directive 2000/31.[104] In addition, the envisaged update and upgrade of Directive 2000/31 as part of the Commission's Digital Services Act, presents a welcome and necessary occasion to address more clearly the status of ancillary online services at legislative level as well. The ECJ's reference to VAT case law at the very least makes clear that the question of the legal status of ancillary online services under EU law remains open for discussion and may require a better answer in the short term.

5.2. *An implicit extension of the incidental direct effect of directives?*

The ECJ also had the opportunity to clarify the consequences of not complying with the notification obligation in Article 3(4) of Directive 2000/31. The referring court essentially asked whether the French Hoguet law was enforceable against Airbnb under EU law. The question consisted of two sub-questions. First, the French court implicitly wanted to know whether the Hoguet law was incompatible with Directive 2000/31, a question the ECJ can answer only indirectly by interpreting the provisions of that Directive.[105] Second, if that turns out to be the case, could that incompatibility result in the non-application, as a matter of EU law, of that law in both the State-Airbnb relationship (the ongoing criminal investigation) and horizontal legal relationships (the Airbnb–private tourism association (ATHOP) action for damages)? The key issue was that the national law was potentially incompatible with the provisions of a directive, and directives lack horizontal direct effect.[106]

According to consistent case law, directives do not produce direct effect between private parties, even when their provisions are sufficiently clear and precise.[107] Those provisions have direct effect only in relationships between a

104. See pending Case C-723/19, *AIRBNB Ireland UC, Airbnb Payments UK Ltd* v. *Agenzia delle Entrate,* a preliminary reference from the Consiglio di Stato (Italy).

105. See e.g. Case C-443/06, *Hollman*, EU:C:2007:600, para 18.

106. It is submitted that the ECJ would not have touched on the horizontal direct effect problem had the preliminary reference been phrased as a question of interpretation of Directive 2000/31. For an example of where the Court avoided the direct effect question in that context, see Case C-129/94, *Ruiz Bernaldez*, EU:C:1996:143. See also Squintani and Lindeboom, "The normative impact of invoking directives: Casting light on direct effect and the elusive distinction between obligations and mere adverse repercussions", 38 YEL (2019), 40.

107. See among others, Case 152/84, *Marshall*, EU:C:1986:84, para 48; Case C-91/92, *Faccini Dori*, EU:C:1994:292, paras. 20–24; Case C-194/92, *El Corte Ingles,* EU:C:1996:88, para 15; Joined Cases C-397-403/01, *Pfeiffer and Others*, EU:C:2004:584, para 108; Case

private individual and all emanations of the State.[108] Even when a Directive is transposed incorrectly, national courts cannot be forced to disapply provisions of national law that are incompatible with the directive if they apply in horizontal (contractual) relationships between private persons.[109] The only alternative remedy available in that context is the requirement to interpret, as far as possible, national legislation in conformity with the directive. The ECJ has ruled that this does not go so far as to require a *contra legem* interpretation from the national court.[110] Applied to the case at hand, it would be possible that, as the Advocate General found, the Hoguet law might not be proportionate and justified in accordance with the Article 3(4)(a) derogation of Directive 2000/31, and therefore be incompatible with the Directive.[111] If that were the case, the French State authorities could not rely on their incompatible national law against Airbnb, which could invoke the provisions of the Directive against those authorities. However, Airbnb would likely not be able to rely on the same provisions to avoid the application of such rules in a liability case introduced against it by AHTOP. In such a scenario, the national court could not be required to disapply incompatible provisions of national law without extending the horizontal direct effect of an incorrectly transposed directive and asking a national court to interpret national rules *contra legem*.[112]

An orthodox application of the ECJ's directives case law would thus have resulted in this rather incoherent outcome, where the French law would not be enforceable in criminal proceedings conducted by the State but would be in private damages actions. It is unsurprising, therefore, that the ECJ decided not to develop the above reasoning. Instead, it looked for an alternative way to answer the question referred. That alternative was found in refocusing the analysis on Article 3(4)(b) of Directive 2000/31. That provision requires the

C-282/10, *Dominguez,* EU:C:2012:33, para 37; Case C-176/12, *Association de médiation sociale*, EU:C:2014:2, para 36; Case C-122/17, *Smith*, paras. 42–43.

108. See Case 152/84, *Marshall*, para 49; Case C-188/89, *Foster and Others*, EU:C:1990:313, para 17; and Case C-343/98, *Collino and Chiappero*, EU:C:2000:441, para 22; Case C-157/02, *Rieser Internationale Transporte,* EU:C:2004:76, para 24; Case C-356/06, *Farrell*, EU:C:2007:229, para 40; Case C-282/10, *Dominguez,* para 39. State authorities can even do so against other State authorities, see Case C-425/12, *Portgas*, EU:C:2013:829, para 38; Albors-Llorens, "The direct effect of EU directives: Fresh controversy or a storm in a teacup?" 39 EL Rev. (2014), 850–862.

109. Case C-122/17, *Smith*, para 55.

110. Case 14/83, *Von Colson and Kamann*, EU:C:1984:153, para 26; Case C-106/89, *Marleasing*, EU:C:1990:395, para 8; Case C-91/92, *Faccini Dori*, para 26; Case C-403/01, *Pfeiffer and Others*, para 113; Case C-282/10, *Dominguez,* para 25; see also Betlem, "The doctrine of consistent interpretation – Managing legal uncertainty", 22 *Oxford Journal of Legal Studies* (2003), 397–418.

111. Opinion, paras. 129–135.

112. Case C-282/10, *Dominguez,* paras. 40–43; Case C-122/17, *Smith*, para 55.

host State to notify the home State and the Commission of any restrictive rule under Article 3(2) it seeks to apply against an information society service provider not established on its territory. The notification procedure seeks to put in place a mechanism of preventive control, allowing the Commission to rule as fast as possible on the compatibility of the envisaged rule with EU law.[113] Given the importance of such a preventive control procedure, the ECJ deemed that non-compliance with it results in a breach of an essential procedural requirement. As a result, non-notified national rules are unenforceable against providers of services making use of their freedom to provide services, both by State authorities and private persons.[114] As the ECJ had stated earlier in *CIA Security*, failure to comply with an essential procedural requirement thus incidentally grants direct effect,[115] even in horizontal legal relationships.[116] Contrary to Directive 2015/1535 notifications, Article 3(4)(b) notifications have no suspensive effect and allow national rules to remain in place and be applied before the Commission has expressed an opinion as to their compatibility with EU law. The Court did not consider this to be problematic, as in *Enichem Base* it had confirmed implicitly that rules "laying down any procedure for Community monitoring thereof or making implementation of the planned rules conditional upon agreement by the Commission or its failure to object" could produce such incidental effects.[117] The notification procedure outlined in Article 3(4)(b) of Directive 2000/31 was considered such a procedure, justifying the analogous application of the *CIA Security* incidental direct effect in this context as well.

From the point of view of obtaining a desirable outcome in the particular context of the *Airbnb* judgment, the ECJ's incidental effect reasoning is perfectly understandable. The Court would have wanted both State authorities and private actors to be prevented from taking legal action against Airbnb for failure to comply with the Hoguet law, because of the apparent incompatibility of the latter with EU law. The lack of horizontal direct effect of directives understandably made the ECJ turn to its incidental direct effect case law to obtain a satisfactory outcome in the case at hand.

113. As had been contemplated by A.G. Jacobs in his Opinion in Case C-443/98, *Unilever Italia*, EU:C:2000:57, paras. 69 and 79–80.

114. Judgment, paras. 96–97.

115. See among many others on the incidental horizontal effect of Directives, Arnull, "Editorial: The incidental effect of directives", 24 EL Rev. (1999), 1; Hilson and Downes, "Making sense of rights: Community rights in EC Law", 24 EL Rev. (1999), 121, at 125; and Dougan, "The 'disguised' vertical direct effect of directives?", 59 CLJ (2000), 586; and Squintani and Lindeboom, op. cit. *supra* note 106, 9–10.

116. Case C-194/94, *CIA Security International*, para 54, as confirmed more recently in Case C-613/14, *James Elliott Construction*, para 64.

117. Judgment, para 94; see also Case 380/87, *Enichem Base,* para 20.

However, in order to do so, the ECJ needed to abandon a key background assumption, which had limited the scope of incidental direct effect of procedural notification directives following *CIA Security*. Seeking to justify the recognition of such incidental effect, the ECJ had held in *Unilever Italia* that the notification procedure at stake did not create subjective rights or obligations and did not determine directly the substantive content of the legal rule on the basis of which the national court would have to decide the case before it.[118] The Court confirmed that reasoning as key to justify the non-extension of incidental direct effect in later cases as well.[119] By contrast, in the annotated judgment, no such reference was made any more. One could thus be inclined to think that this background assumption has been abandoned, and that any failure to notify a rule in a preventive control procedure suffices to trigger the incidental direct effect of the Directive provisions containing that obligation, provided that they are sufficiently clear and precise to have direct effect.[120] A closer analysis of Directive 2000/31 allows confirmation of that point. Within the Directive, the Article 3(4)(b) notification procedure is embedded firmly within a regulatory instrument that seeks to create rights for and impose obligations on individuals.[121] In addition, Directive 2000/31 does determine the substantive content of the legal rule at stake in the case. Article 3(4)(a) explicitly determines that host State rules need to meet certain substantive law requirements in order to be justified restrictions on the freedom to provide services. That provision has a direct impact on the substantive content of the rules in place and applies cumulatively with the notification obligation. A rule may only remain in place when it meets those substantive conditions and has been notified and approved by the Commission. By not referring to the background assumption that had circumscribed the incidental direct effect of a directive's procedural provisions in *Unilever Italia*, the ECJ at least implicitly opens up a wider scope for the incidental direct effect of a directive's notification obligations. Future case law will have to clarify whether, and to what extent, this is indeed the case. At the very least, the unreserved application of incidental direct effect for a directive harmonizing both substantive and procedural law provisions is a new step in the development of that EU law doctrine.

Proponents of more extended horizontal direct effect of directives are likely to welcome this judgment as a more generous – though still limited and problematic – way to extend the horizontal effects of directives. At the same

118. Case C-443/98, *Unilever Italia*, para 51.

119. Case C-122/17, *Smith*, para 53, which also refers to Case C-194/94, *CIA Security International*, para 48, although the ECJ did not formally make that point there.

120. E.g. Art. 15(7) of Services Directive 2006/123.

121. Art. 3(2) Directive 2000/31 grants the subjective right of free movement; exemptions from liability in Arts. 12–14 also grant subjective rights in that context.

time, private individuals and Member States will face an increasingly complex legal reality. From the point of view of private individuals, introducing a damages action against an economic actor for failing to apply certain national rules will be conditional upon the rules having been notified or not. If those rules turn out not to have been notified, they cannot be applied before a national court and the intended legal action will be inadmissible or unfounded. Instead of lodging a damages claim against a private operator, they will have to try to hold the State liable in accordance with the ECJ's *Francovich* case law.[122] From a State's point of view, failure to notify could result more easily in restrictive national rules compatible with EU law being disapplied and States potentially being held liable for not having complied with procedural obligations. In the wake of the annotated judgment, States should most certainly be increasingly vigilant in order to comply with the variety of notification obligations accompanying preventive control mechanisms set up by EU secondary legislation. The solution of incidental direct effect therefore imposes new obligations and is likely to result in new clarification questions to be answered by the ECJ in the future.

6. Conclusion

Airbnb Ireland offered the ECJ a welcome opportunity to fine-tune its case law on the classification of services offered by online platforms. Unlike Uber when offering its UberPOP application, Airbnb offers information society services covered by e-commerce Directive 2000/31. National rules that restrict the freedom to provide such information society services have to be notified to the Member State of establishment and the Commission in accordance with Article 3(4)(b) of the Directive. Failure to do so, results in those rules being non-applicable to online platforms providing information society services. That non-applicability extends to both ongoing criminal investigations and private damages actions.

Although the judgment may have cleared the way for Airbnb to stay active within France, it raises two new questions from a legal point of view. First, the ECJ appears to suggest that ancillary services to an information society service would also be subject to the requirements imposed by Directive 2000/31, but it does not give a clear statement. Second, the judgment confirms the Court's incidental direct effect of directives doctrine, potentially extending it to new situations and encouraging Member States to be more

122. See Joined Cases C-6 & 9/90, *Francovich*, EU:C:1991:428; see also, Lock, "Is private enforcement of EU law through State liability a myth? An assessment 20 years after *Francovich*", 49 CML Rev. (2012), 1675–1702.

vigilant in respecting notification obligations under EU law. Beyond the narrow confines of the platform economy, the judgment may very well open up new academic and judicial debates on the continued relevance of the lack of horizontal direct effect of directives. The innovative nature of the platform economy could therefore also become a fresh opportunity to reconsider established principles and doctrines of EU law.

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