

Information Note

The Airbnb Ireland case: The importance of business model in the platform economy

26th February 2020

Regarding the 19 December 2019 judgment of the European Court of Justice

On 19 December 2019, the ECJ delivered its judgment in the Airbnb Ireland case. The issues raised were very similar to those that the Court had had to resolve in the two previous cases on Uber - Uber Spain in 2017 and Uber France in 2018. However, the response of the ECJ in this case is completely opposite. The nuclear issue in all the cases before the ECJ concerned the qualification of the service provided by Airbnb and Uber respectively as operators of intermediary platforms in the real estate and transport sectors. The Court was asked whether Airbnb and Uber were to be regarded as mere providers of information society services or, on the contrary, as carrying on an activity in the relevant sector, in the field of transport or as a real estate agent. In essence, the judgment confirms that Airbnb is an 'information society service provider', that is to say, an operator of a platform enabling lessors and lessees to contact each other and conclude their transactions, but that it does not carry on the activity of real estate agent. However, in the two Uber judgments, the conclusion had been different. In these cases, the Court considered that the service provided by Uber is a 'service in the field of transport'.

The implications of this different classification are very important as it determines under what conditions the platform's activity can be carried out, what the applicable legal regime is and therefore, indirectly, what responsibility the platform operator assumes.

The most interesting and revealing aspect of the Court's opinion is precisely the argument used to conclude differently in the Airbnb case and in the Uber case. The reasons the Court finds for distinguishing the two business models give important signals to the market about the platform economy.

1. Why Airbnb and Uber are different models according to the Court

The ECJ analyses in detail the design, the operation and the characteristic functionalities that define the Airbnb model. It defines it as an intermediary service between lessors and lessees through an electronic platform. To this basic activity, Airbnb, as the platform operator, adds other value-added services which the Court summarizes in the following: an optional photography service, an optional template to define the content of the offers, a civil liability insurance and a guarantee for damages, an optional tool to estimate the price of the rent, a payment service (with escrow) and a reputational



evaluation system. The Court understands that these services provided by Airbnb to its users can be dissociated from the property transactions that ultimately take place between lessors and lessees.

In other words, the service provided by Airbnb consisting of organising rental offers, offering tools for searching, locating and comparing them, creating a reputational system (rating, ranking, evaluations) and facilitating transactions with the help of other value-added services (insurance, payment, guarantee) is not merely ancillary to the purely property business, but is relevant and of economic importance independently of the provision of accommodation. It is, in fact, an innovative model that competes with other real estate brokerage businesses but is not indispensable for the conclusion of rental transactions. Therefore, the Court does not consider Airbnb's activity to be an integral part of an overall service whose main element is an accommodation service. It is an activity which is part of the digital economy, which in regulatory terms means that it qualifies as an 'information society service' and not as a service proper to a real estate agent.

This conclusion is exactly the opposite of that reached by the Court in the two cases in which it analysed Uber's case. In analysing Uber's business model and the specific functionalities offered on the platform, the Court concludes, first, that Uber creates a market for urban transport services which otherwise could not exist or would not be viable and, second, that it exercises a decisive influence on the conditions under which the transport service is provided by drivers. In order to reach that conclusion, the Court considers, first, that without Uber's platform, private drivers would not be able to provide the transport service they seek. On the other hand, the analysis of Uber's model reveals that the operator fixes at least the maximum price of the service, receives the price from the customer before paying the drivers, sets conditions on the suitability, quality and performance of the drivers and vehicles and monitors compliance with them by applying even a policy of sanctions (suspension, exclusion). All this leads the Court to consider that Uber's service is part of a wider service whose main element is a transport service. Uber is therefore not a provider of information society services but the operator of a transport service platform.

2. What are the implications of this decision?

The decision has one obvious direct implication, as it answers the question expressly put to the Court, and another indirect implication, not explicit, but of great importance for platform economy.

First, if Airbnb's service is treated as an information society service, it enjoys the freedom of movement of services in the Community market. States may restrict this freedom or make it subject to conditions (licences, authorisations, sanctions, requirements) only for certain purposes (public order, consumer protection, public health) and under certain circumstances.

Secondly, by qualifying Airbnb's service as the management of an electronic intermediary platform and not as the exercise of the activity of real estate agent, it also affects Airbnb's responsibility as the platform operator. In principle, its responsibility relates to the services it offers itself (insurance, guarantees, searches, etc.), but not to the activity carried out on the platform by users or to the development of real estate transactions. It acts as an intermediary (provider of electronic intermediary services).

3. What we can do? The importance of the business model.

The most important conclusion of the judgment is that the business model matters. The design of the platform, the conditions of use, the services provided, the features of the system, the internal

policies of supervision, infringement and sanction, the systems of resolution of complaints and conflicts (ODR) and the systems of evaluation, rating or ranking will condition the exposure to risk of the platform. They will significantly influence and even, in certain cases, be decisive for many issues:

- The responsibility of the platform operator for the actions of users towards third parties or other users
- The regime applicable to the activity and possible regulatory requirements for its provision (licences, authorisations, legal status, penalty regime)
- Market definition in competition law cases
- Cases of discrimination and unfair competition: reservation of the right of admission, abuse of rights or exclusion agreements
- Abusive terms in the terms of use
- Validity of decisions taken internally in the conflict resolution system
- Reputational damage caused by evaluation, rating or ranking systems

Therefore, in all the phases of creation and operation of a platform, from the design of the model, the incorporation of new functionalities, the revision of the services, the modification of conditions, or the application of sanctions in accordance with the internal policy, to the resolution of conflicts in the internal system of dispute resolution, legal advice on the implications that these technological, business and operational decisions are key to evaluate the implications, mitigate the risks and control the responsibility. Andersen Tax & Legal has a team that is aware of the decisive importance of these elements of the business model in the legal and regulatory consequences of the activity and can offer this advice.

For more information please contact:

[Teresa Rodríguez de las Heras Ballell](mailto:teresa.rodriiguezdelasheras@AndersenTaxLegal.es)

teresa.rodriiguezdelasheras@AndersenTaxLegal.es

The above comments are for information purposes only and do not constitute professional opinions or legal advice, nor do they necessarily include the opinions of the authors. If you are interested in obtaining additional information or clarification of the content, please contact us by telephone on +34 917 813 300 or by e-mail at communications@andersentaxlegal.es.