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Coty decision upholds ban on distributors selling on third party platforms

Paul Stone, Partner at Charles Russell Speechlys, dissects the decision as to whether it is permissible under competition law for a supplier of luxury goods to prohibit its authorised distributors from selling on third party online platforms.



ECJ rules Uber is a transport service

The European Court of Justice (‘ECJ’) issued its decision in *Asociación Profesional Elite Taxi v. Uber Spain SL (C-434/15)* on 20 December 2017, finding that Uber’s taxi-hailing peer-to-peer intermediation service “must be regarded as forming an integral part of an overall service whose main element is a transport service” and thus is “a service in the field of transport” under EU law, rather than an ‘information society service’ (‘ISS’); consequently Uber will now be subject to national transport regulations in each EU Member State in which it operates. Uber had contested in the case that its service should be regarded as an ISS rather than a transport service, as its app provides a means of intermediation between its users and drivers rather than the transportation service itself.

Under the judgment, the platform shall not be classified as a service in a specific field of transport unless the platform exercises decisive influence over the conditions of the service, exceeding the role of an intermediary of a service provided by the users. In addition, the criteria exhibited in the ruling could be applied to any ISS, which will be free of the application of national regulations (accommodation, employment, etc.) only in cases where the said platform does not exercise decisive influence over the conditions under which that service is provided by the users.”

The judgment, which Uber cannot appeal against, was made following the referral of questions to the ECJ by the Juzgado Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) in a case which began in 2014, when the Asociación Profesional Elite Taxi (a professional taxi drivers association in Barcelona) brought an action against Uber over Uber’s lack of licences and authorisations that would be required under the Spanish Law No 19/2003 on taxi services and the Regulation on taxi services in the metropolitan area of Barcelona. Had Uber’s service been deemed an ISS by the ECJ, the two national laws would not have been applicable to Uber. The ruling that Uber’s service is a transport service in fact determines “that, consequently, the Directive on electronic commerce does not apply to that service [Uber], which is also excluded from the scope of the Directive on services in the internal market. For the same reason, the service in question is covered not by the freedom to provide services in general but by the

common transport policy,” states the ECJ’s press release.

“The integral nature of the role as intermediary and the extent of control which they exercise over the service being delivered will be a fascinating balancing act to watch play out in this space,” comments Mark Blunden, Partner at Boyes Turner. “Will technology enabled businesses reduce the extent of control exerted over service providers in the gig economy, in a play to remain a lightly regulated ISS and at the same time seek to avoid having service providers classed as ‘workers?’ Or will more ISS classified businesses conclude that is too much of a gamble, judge instead that service quality and certainty are more important, and choose to follow Uber into conventionally regulated sectors?”

Since the ruling, commentators have stated concern that the ECJ’s ruling may impact those ISS that operate similar models to Uber. “In my opinion, the Court’s decision has a negative impact on the collaborative economy, as it considers that the intermediation service set up by Uber through an app is a mere accessory to a wider global service,” comments Benoit Van Asbroeck, Partner at Bird & Bird. “This ruling could imply that each intermediation service should be subject to the (EU or national) rules that are specific to the final services provided to the consumer, such as for instance the rules applicable to hospitality apps such as Deliveroo and Airbnb.”

Uber commented in a public statement made on 20 December 2017 that the ruling will not affect its services in most EU Member States where it already operates in compliance with national transport regulation, but also noted that “it is appropriate to regulate services such as Uber and so we will continue the dialogue with cities across Europe.”