

# Track Changes

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## CJEU: WHY AIRBNB IS NOT UBER

### THE "COUNTRY OF ORIGIN" PRINCIPLE PURSUANT TO THE E-COMMERCE DIRECTIVE PRECLUDES THE APPLICATION OF FRENCH ACCESS RESTRICTIONS FOR REAL ESTATE AGENTS ON AIRBNB

In its recent ruling, the Court of Justice of the European Union (CJEU) ruled that the intermediation service offered by Airbnb Ireland is an "information society service" ([C-390/18](#)). As a win for the company, Airbnb therefore can avail itself of the so-called "country of origin" principle according to the E-Commerce Directive (Directive 2000/31/EC).

The decision stands in contrast with the 2017 ruling concerning Uber ([C-434/15](#)), in which the CJEU ruled that the intermediation service offered by Uber is not an "information society service" but instead a "transport service", which therefore leads to the application of Spanish national law.

The fact that the CJEU arrived at different legal conclusions regarding the two intermediation platforms is the result of the difference in the companies' abilities to influence the respective services provided.

### MERITS AND BUSINESS MODEL OF AIRBNB

The French Tourism Board (AHTOP) had filed a complaint against Airbnb alleging that Airbnb lacks an official license as real estate agent. Following the Uber decision, AHTOP argued that the service provided by Airbnb should be regarded as an integral part of an overall service, and that the main component of this service was the provision of accommodation. Therefore, according to AHTOP, it could not be considered an information society service.

The CJEU disagreed and assessed Airbnb's business model in the following manner: Airbnb offers an electronic platform intended to connect, for payment, potential guests with hosts offering short-term accommodation services. In addition, Airbnb offers further services such as format templates, a photo service, liability insurance and a tool for estimating the level of market rent, etc. Hosts and guests conclude a contract with Airbnb for the use of the electronic platform, whereas the accommodation contract is concluded directly between hosts and guests.

## JUDGEMENT OF CJEU

The CJEU confirmed that the service provided by Airbnb is an "information society service", i.e. a "service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".

In contrast to the Uber decision, the CJEU denied the existence of a service which was only provided as an integral part of an overall service. Therefore, according to the CJEU, the E-Commerce Directive could be invoked in the case of Airbnb. The reasons of the CJEU were the following:

- The intermediation service provided by Airbnb serves as a tool to facilitate the conclusion of future contracts by providing structured lists of accommodations available on the electronic platform. It is the creation of such a list that constitutes the essential feature of the electronic platform and which cannot be regarded as merely ancillary to an overall service which would fall under a different legal classification, namely the provision of an accommodation service.
- Airbnb's intermediation service is in no way indispensable to the provision of accommodation services. Both hosts and guests have other means of contact to enter into an accommodation contract (e.g. real estate agents, classified advertisements in print or electronic form or even property letting websites).
- Airbnb has no control over the rental price; the optional tool offered by Airbnb provides only an estimation of the rental price, while the responsibility for setting the rent is left with the host.
- The other services offered by Airbnb (e.g., the provision of a photo service, format templates) are ancillary in nature and are instead considered as a means of making the best use of the intermediation service.

The services provided by Airbnb Ireland are therefore not comparable to the intermediation service provided by Uber. In this respect, the CJEU stated that Uber exercised a decisive influence over the conditions under which transport services are provided (C-434/15; [C-320/16](#)). A similarly decisive influence of Airbnb Ireland on the conditions of the accommodation service was not found by the CJEU. Airbnb does not directly or indirectly determine the rental price charged, nor does it select the hosts or the accommodation offered on the Airbnb platform.

## PRACTICAL RELEVANCE OF THE QUALIFICATION AS AN "INFORMATION SOCIETY SERVICE"

Information society services are subject to the E-Commerce Directive.

The "country of origin" principle applies to providers of services established within the EEA. According to this principle, the taking up and pursuit of the service (e.g. the requirements concerning qualifications, authorization) is determined by the law of the Member State in which the service provider is established. From the point of view of the

service provider, this may lead to a decision to choose a location in Member States with less restrictive market rules.

Other Member States (different from the Member State of establishment) can only take limited restrictive measures. These must be necessary to protect specific legal interests (public policy, public security, health and consumer protection), must relate to a specific information society service and must be proportionate to the protection objectives. Overall, these measures amount to a high hurdle in practical terms. In addition, the European Commission and the State of establishment must be notified in advance regarding such measures. This, however, did not occur in the case at hand, which is why the French access restrictions for real estate agents could not be applied to Airbnb.

Service providers established outside the EEA, on the other hand, must accept that national law may apply to their services and thus, these services may be subject to a wide variety of national (access) restrictions.

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