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Airbnb to be regulated as an information, not an accommodation, provider
Criminal Proceedings against X, Airbnb Ireland intervening Case C-390/18
Court of Justice of the European Union
19 December 2019

In a case referred by the French courts, the Court of Justice of the European Union has held that Airbnb functions as a provider of information services, not accommodation. Therefore it does not fall within the scope of French laws regulating real property.

Background and decision

The essence of this case is the characterisation of the service provided by Airbnb as it links potential hosts and guests, as noted in an earlier comment on the Advocate General's opinion in these proceedings ((2019) 194 SPEL 80). Does it provide an "information society service" with the consequence that it is entitled to the wide benefits of free movement under the relevant EU Directive on electronic commerce (Dir. 2000/31/EC), free from local regulation? Or does it fall within the scope of French laws regulating transactions affecting real property and business assets?

The Court has followed the Advocate General in deciding in favour of the former view. What is provided is an "intermediation service" between providers and clients which is properly viewed as an information society service, not a rental service. It is "in no way indispensable to the provision of accommodation services, both from the point of view of the guests and the hosts who use it." Both have a number of other, sometimes long-standing, channels of communication at their disposal and the terms on which accommodation is provided are not determined by Airbnb. Therefore the French laws on property transactions do not apply.

Again following the Advocate General, the Court distinguished Airbnb's role from that of Uber (as considered in earlier cases before the Court: C-434/15 and C-320/16). Uber "exercised decisive influence over the conditions under which transport services were provided." It exercised a quite different level of control over the conditions of the physical service involved and therefore it was not providing merely an information service and was liable to further regulation.

Comment

The effect of the services provided by Airbnb has demonstrated the impact that can be had when digital services are used to "disrupt" the existing ways in which services are provided. The fundamentals of what is happening is nothing new – nineteenth century novels are full of families renting accommodation for short visits - but new technology has enabled the scale of this activity to be transformed. The large and very rapid growth of short-term letting facilitated by Airbnb has resulted in a number of problems, especially in visitor "hot spots" such as central Edinburgh.

Such situations pose a challenge when regulation is considered appropriate. Should the target of regulation be the activity directly creating the problems or the background innovations which have led to its transformation? As this case shows, measures that target the novel features of the background technology and communication may be problematic, so that the regulatory focus has to be placed on the physical activity.

This is what has been done in the Planning (Scotland) Act 2019, where planning authorities are authorised to designate "short-term let control areas", where use of a dwelling house for this

purpose amounts to a material change of use triggering the need for planning permission (s.17 of 2019 Act, adding s.26B to the Town and Country Planning (Scotland) Act 1997). Once this provision is brought into force it will be interesting to see how many authorities decide to invoke this power, how widely it is applied and whether the preference will be for refusing permissions or imposing conditions that seek to achieve a better balance between residents and visitors.

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