

# Uber and Airbnb: the decisions of the European Court of Justice on digital platforms (09.01.2020)

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(Original article in Italian on [lavoce.info](http://lavoce.info))

*The European Court of Justice had to make a decision about several lawsuits launched by national actors against digital platforms. Thus, the European judges identified two main requirements needed to classify digital platforms as information society services, filling the gap left by regulators.*

## New actors, new rules

The entry of digital platforms in many different markets gave rise to a series of challenges for public regulators: in fact, lots of traditional categories and incumbent players such as taxi drivers and hotel companies asked for the application of the existing regulatory framework to these new players, thus supporting a copy and paste approach which sometimes proved effective in counteracting the competitive threat coming from platforms. However, this approach is an obstacle to innovation and risks consolidating the market power of incumbent players, with potential consequences in terms of consumers' abuse and exploitation.

Under the pressure of local actors (Barcelona: taxi associations vs. Uber; Paris: hotels and real estate agencies vs. Airbnb), several national courts asked the European Court of Justice (ECJ) to decide whether digital platforms are entitled to freely establish and provide their services in the EU Member States. The analysis of the ECJ decisions in two different cases, Uber and Airbnb, can be useful to understand if at the European level the general interest is being correctly pursued with respect to the rise of platforms.

## The EU legal context

The European Union gives freedom of establishment to the so-called *information society services* (Directive 2006/123/EC and Directive 2000/31/EC): according to Article 3 of Directive 2000/31/CE, the EU member States are forbidden to limit such freedom by adopting national or local regulations. This should encourage the creation of a favourable atmosphere for investments and innovation.

Another central concept in the EU framework is the one of *electronic service*, whose definition is based on four elements: it must be provided for remuneration, at a distance, by means of electronic equipment for the processing and storage of data and at the individual request of a recipient. However, gaining the status of electronic service does not necessarily imply to be considered also an information society service, as shown by the ECJ decision concerning Uber. In fact, the Court stated that Uber provides an electronic service which cannot be classified as an information society service, since the main component of its service is represented by the field of transports which is subject to national and local legislations.

There are two main reasons behind this ECJ decision:

1. Uber creates a supply which would not exist without the platform. Therefore, it is an active market player rather than a pure intermediary. This is a contentious point I addressed [here](#).
2. Uber exerts a tight control over the conditions of service provision and the organization of work.

### **Which impacts on markets and platforms?**

After the ECJ decision on Uber, many observers thought that digital platforms were bound to be limited by restrictions on their activities. However, in its latest decision concerning Airbnb, which followed the lawsuit launched by French hotel companies and real estate agencies, the ECJ stated that the short term rentals platform is an information society service. This means that national and local legislators are forbidden to limit the freedom to provide its service.

The line of reasoning behind this decision is inspired by the scheme adopted in the case of the decision on Uber. According to the European judges, Airbnb does not create a brand new supply which would not exist without the platform. In fact, those who rent their apartment to tourists or other guests were able to operate in this market even before Airbnb, for example by drawing on agencies or personal networks and websites. Furthermore, Airbnb does not exert a tight control over market conditions (quantity, quality, price levels, entry and exit barriers), rather it simply connects the supply and demand of apartments. Finally, the Court stated that platforms are crucial to the construction of trust and information symmetry through the adoption of rating systems for the quality of services.

It is reasonable to think that the decision on Airbnb will create a favourable context for those platforms which satisfy the two conditions identified by the ECJ, as in the case of household chores platforms. Things get more complicated for food delivery platforms (Deliveroo, Just Eat), which control the labour process at least partially. However, these platforms do not exert control over meal preparation: in other words, restaurants exist independently from these platforms, which seem to lie in the middle between Uber and Airbnb.

While we are still lacking a coherent regulatory framework, it is interesting to examine which platforms satisfy the requirements identified by the ECJ. Another interesting issue is represented by the evolution of the debate on the tax regime to be applied to platforms, starting from the dispute between Airbnb and the Italian Revenue Agency over the 21% tax on rents and the communication of data, which will be settled – once more – by the European Court.

In the meantime, what are regulators and legislators doing?

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