



2023 Moot Question

Reference for a preliminary ruling from the Central Court of Danubia in the matter of

**The Danubian Criminal Prosecution Office
supported by SmartDrive
v
Octavia Linta**

SmartDrive

1. SmartDrive is a company established and headquartered in the EU Member State of Moselia, where it is recognised as an information society service provider under Directives 2000/31 and 2006/123. SmartDrive provides a platform that supports drivers undertaking person transport.
2. The platform is based on a smartphone app, which provides passengers requesting transportation with a list of the first five available drivers, giving their first names, a picture of the driver and a picture of the car, with an indication of expected arrival time, amongst which the passenger may freely choose, as in case *C-62/19 Star Taxi*.
3. The app also sets the price for the drive, but drivers may grant a discount to passengers at any time, which will be indicated on the list of available drivers. Conversely, passengers may – and often do – give tips to drivers, which form a significant part of drivers' income.
4. The app collects payment for both fare and tips from the credit card registered on the app by the passenger, as in case *C-390/18 Airbnb Ireland*. The payment is forwarded to the bank account of the driver after deduction of a 20% service fee for use of the platform, which is calculated from the price before any discount is deducted or tips are added. In addition, drivers pay a 200 Euro service fee per month for registration on the platform.
5. Drivers may at any time refuse a drive, but if they refuse more than 10 drives in a single month, their service fee will be increased by 1% point per drive refused, and if refusals exceed 50 drives in a month they will be barred from the app for the coming calendar month. The same applies if more than 5 justified complaints are received in a single month concerning the appearance and behaviour of the driver or the quality of the car. In case of being barred more than 3 times in a single year, the driver will be excluded from the platform for the coming calendar year.
6. SmartDrive only enters into contracts with independent service providers, irrespective of whether such providers are physical or legal persons, while only the management,

accounting and IT staff have employment contracts. The contracts with drivers are not exclusive and drivers may sign up for any of the alternative apps that are common in Moselia.

7. Requirements for registration on the SmartDrive app include holding a certificate as a Professional Person Transporter in Moselia, referred to as the “PPT license” under the Transport Act 2020, or any equivalent certificate from their Member State of residence, unlike the unlicensed drivers situation in Case C-320/16 *Uber*. SmartDrive also checks that the car is properly insured and well maintained.
8. SmartDrive covers the entire territory of Moselia, and the company has applied for permission from the authorities of the neighbouring EU Member State of Danubia to expand services into that state. As part of preparing for the permission to operate in Danubia, SmartDrive has ensured that from a technical perspective, the app already works in both Moselia and Danubia.
9. However, the application is still pending, since SmartDrive faces problems with recognition as an information society service provider in Danubia, where it is instead regarded as a platform-based transport provider, based on the judgment of the CJEU in case C-434/15 *Elite Taxi*.

Danubia

10. Individual person transportation may be performed in Danubia only by holders of licences as a Registered Taxi Operators (RTO), as specified in the Personal Transport Regulation 2002 (PTR 2002). Due to a clerical error, that regulation has not been notified to the EU under Directive 98/34, as replaced by Directive 2015/1535, and subsequently the government found that a notification was no longer required, as established by Case C-255/16 *Falbert*.
11. Under the PTR 2002, licences are only granted if and when an existing licence becomes available, due to death or retirement, or when a new licence is issued by the authority, which has not happened since 2019. New licences are awarded subject to a needs test, which means that the competent authority limits the number of taxi licences to a number corresponding to the estimated demand for taxi services.
12. Section 43 of the regulation foresees that an applicant with at least two years of experience as a full-time taxi driver within Danubia will be given priority to a licence which becomes available, provided that driver was pursuing taxi driving as a main occupation. Section 44 of the Regulation furthermore stipulates that the applicant with the longest service as a full-time taxi driver within Danubia shall be awarded the available licence if several applicants fulfil the conditions in Section 43. If a licence cannot be awarded on the basis of seniority, the decision is subject to the licensing authority’s discretion.
13. Under Danubian law, breaches of the regulation are punished harshly, with imprisonment of up to 5 years, fines up to 20,000 Euro per commenced month the violation continues and confiscation of the vehicle.

14. Pursuant to Article 219 of the Danubian Criminal Code, criminal offences committed in Danubia by an employee acting in the course of employment are only attributable to the employer. This is based on a constitutional principle dating back to feudal times.
15. SmartDrive has requested mutual recognition of the Moselian PPT license as equivalent to the Danubian RTO license, but Danubia has refused this as the RTO license forms part of a market management system established in the interest of consumers, so as to avoid the Danubian market having an overflow of service providers.
16. Additionally, as part of consumer protection law, taxi transportation may be performed only against cash payment, so as to avoid the incremental accumulation of credit card debts.

Platform Directive

17. On 6 May 2020, the European Parliament and the Council adopted Directive 2020/7563 on improving working conditions for platform workers in the person transport sector. The preamble indicates that the Directive is based on the Treaty on the Functioning of the European Union, and in particular Articles 91 and 153 thereof.
18. The recitals of the Directive refer to a 2018 analytical report, adopted by the European Commission in 2020, concerning social security coordination and non-standard forms of employment and self-employment. Furthermore, the recitals state that since platform work has become prevalent in the person transport sector, regulation of the working conditions is required at the European level, as any lack of uniformity would have a negative impact on the internal market.
19. The Directive contains notably the following provisions:

Preamble: indicates that the Directive is based on the Treaty on the Functioning of the European Union, and in particular Articles 91 and 153 thereof.

Article 1 defines platform workers as persons performing platform work, irrespective of the contractual designation of the relationship between that individual and the digital labour platform by the parties involved.

Article 2 defines platform work as any work organised through a digital labour platform and performed in the Union by an individual on the basis of a contractual relationship between the digital labour platform and the individual, irrespective of whether a contractual relationship exists between the individual and the recipient of the service.

Article 3 defines a digital labour platform as any natural or legal person providing a commercial service which is provided at a distance through electronic means, at the request of a recipient of the service, which involves the organisation of work performed by individuals.

Article 4 provides that the contractual relationship between a digital labour platform that controls, within the meaning of Article 5, the performance of work and a person

performing platform work through that platform shall be legally presumed to be an employment relationship.

Article 5 provides that “controlling the performance of work” within the meaning of Article 4 shall be understood any one of the following: (a) effectively determining the level of remuneration; (b) requiring the person performing platform work to respect specific binding rules; (c) supervising the performance of work or verifying the quality of the results of the work.

Article 7 provides that the Directive shall not affect the Member States’ prerogative to apply or to introduce laws, regulations or administrative provisions which are more favourable to platform workers.

Article 9 provides that the Directive is addressed to the Member States, and that they must bring into force the laws, regulations, and administrative provisions necessary to comply with the Directive within two years from its adoption.

Octavia Linta

20. On 15 May 2022, Octavia Linta started performing person transport in both Moselia and Danubia, based on the SmartDrive app for which she had signed up after passing an exam and acquiring the PPT license in Moselia as an independent service provider. She is a Moselian native and resident in that country, in a small village close to the border of Danubia, across the river from the capital of Danubia, Weinstein.
21. While Octavia had no particular preference for which of the two countries she drove in, she soon found that fares in Danubia were often more lucrative, in particular airport transfers to and from Weinstein airport, as well as bringing revellers home in the evenings from the thriving nightclub and pub district of Weinstein. This involved both trips wholly within Danubia, and trips to or from Moselia. Whereas she initially had been driving much more within Moselia, from August onwards Octavia found herself crossing over to Danubia at least once a day, and in September more than half of her income came from trips starting or ending in Danubia, or both.
22. On 16 October 2022, the police of Danubia arrested Octavia Linta during a passenger transport on the way from downtown Weinstein to Weinstein airport (i.e. wholly within Danubia). They charged her with unauthorised passenger transport as she had not acquired a Danubian RTO license.

Octavia’s Defence

23. Octavia advanced three principal lines of argument in her defence.
24. She argued, firstly, that she was fully licensed under Moselian law, and that Danubia was obliged under EU law to recognise her license since she was performing cross-border services. Article 56 TFEU guarantees the freedom to provide services and is not affected

by the specific provisions governing transport in Articles 90-92 TFEU. In that regard, she made the point that it is for the national authorities to demonstrate that any restrictive measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it, as confirmed by case C-110/05 *Commission v Italy*.

25. Octavia argued, secondly, that measures limiting the number of taxi licences have the effect of limiting access to establishment as a taxi operator, and that grounds of an economic nature cannot constitute an overriding reason in the public interest justifying a restriction on a fundamental freedom, as held in Cases C-338/04 *Placanica* and C-338/09 *Yellow Cab*. In any event, the fine imposed under Danubian law violated the principle of proportionality, which applies also to criminal sanctions related to the exercise of the EU right of free movement, as established in Case C-326/88 *Hansen*.
26. Thirdly, Octavia argued that under Directive 2020/7563 she was not an independent driver, but an employee of SmartDrive, since she worked exclusively based on the SmartDrive app, and since the app determined the prices of all her services, as established in Case C-168/14 *Grupo Itelevesa*. In application of Article 219 of the Danubian Criminal Code, any offence committed by her in the course of employment must therefore be attributed to SmartDrive alone.
27. In Danubia, the Government had submitted a proposal for implementation of Directive 2020/7563 to the Parliament, but due to a constitutional crisis, it was not until 28 October 2022 that the implementation legislation was adopted and came into effect. When the criminal case at the Central Court of Danubia against Octavia Linta started on 10 November 2022, the prosecutor therefore argued that no reliance could be had on the Directive that had not been implemented at the time of the crime, as established by Case C-168/95 *Arcaro* and C-102/02 *Beuttenmüller*.
28. Octavia Linta counter-argued that under EU law, a private party may rely on the effects of a directive to the extent that late transposition means that the government has failed to perform administrative obligations, such as reclassifying the contractual relationship with SmartDrive, as established by Case C-194/94 *CIA Security*.
29. The Danubian prosecutor formally notified SmartDrive of the arguments raised by Octavia and informed it that it was considering proceedings against SmartDrive as the employer of Octavia Linta. On that basis, Smart Drive obtained permission to intervene in the proceedings on this specific point in support of the criminal case brought by the prosecutor.
30. SmartDrive and the prosecutor argued that the Directive was irrelevant since it concerned the social rights of drivers, and not the criminal law liability of employers. Additionally, they argued that Octavia Linta did not fulfil the criteria for an employee, as established by Case C-692/19 *Yodel*.
31. In any event, in the absence of transposition in Danubia, SmartDrive and the prosecutor argued that the Directive cannot give rise to horizontal direct effect against a private undertaking like SmartDrive, as established by Case C-192/94 *El Corte Inglés*.
32. Octavia Linta counterargued that the directive was the embodiment of basic principles of EU law, in the same manner as legislation on equal treatment of gender in employment

matters. Such principles must be upheld, as established by the Court of Justice in Case C-144/04 *Mangold*, irrespective of whether the legislation concerned has been implemented in a timely and correct manner.

33. Additionally, Smart Drive argued that the Directive violated the principles of subsidiarity and proportionality as it seeks to impose an employment obligation on private parties that had chosen to remain in a contractual relationship based on service provision. Thereby, the Directive violated the right of commercial property in the EU Charter (which can be relied upon in these circumstances: Case C-617/10 *Åkerberg Fransson*), as by analogy with Case C-501/18 *BT*.
34. Finally, the prosecution argued that since the Directive concerned the field of transportation, general principles EU law could only find application in a limited manner, as established in case C-541/16 *Commission v Denmark*, and for that reason Octavia Linta could not rely on any mutual recognition obligations in relation to her Danubian authorisation.

Octavia's Equal Pay Claim

35. Octavia's lawyers had in the meantime investigated some of the practices of SmartDrive further and had discovered on the basis of comparison data, which SmartDrive shared among its drivers to encourage competition and award a monthly prize to the drivers with the highest fare income and the greatest distance travelled, that female drivers had significantly lower incomes than male drivers.
36. In absolute income terms, no female driver featured in the top 25% of earners, which could not be explained by the fact that some female drivers chose to work shorter hours and avoided the lucrative evening drives. Even when dividing income by distance travelled, male drivers had on average 37% higher income per kilometre. In the light of this obvious discrepancy, it is not surprising that only 18% of SmartDrive drivers are female.
37. It seems that the difference may in particular be due to three factors: (i) customers on the most lucrative airport transfers or nightclub runs, as well as for long-distance transfers, tend to pick male drivers with late model sporty cars; (ii) female drivers are often picked by female customers travelling on their own, many of whom, even on the nightclub runs, are students or restaurant staff who do not tip very much; and (iii) female drivers end up being penalised more often for refusing drives, being sometimes more reluctant to drive groups of rowdy male customers.
38. Octavia introduced a collateral counterclaim, a procedural device permitted in Danubian criminal procedure, against SmartDrive to recover lost earnings and compensation for breach of the equal pay provision in Article 4 of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, which has been fully implemented in Danubia.
39. Additionally, she relied on Section 141 of the Danubian Constitution, which reflects Article 157(1) TFEU and provides: "In Danubia, the principle of equal pay for male and female workers for equal work or work of equal value is applied"; see also Case 43/75 *Defrenne*.

In that regard, she claimed that the discrimination was directly caused by the SmartDrive app, in the same manner as in Joined Cases C-297/10 and C-298/10 *Hennigs*.

40. Octavia in particular argued that, in order to ensure that work of equal value was remunerated in the same way, as notably required by Case C-624/19 *K v Tesco*, SmartDrive was required to ensure that female drivers received an equal share of the more lucrative drives, and tips of an equal value. In any event, SmartDrive should be precluded from organising its activities in such a way as to penalise female drivers for putting their safety concerns first, even if that means turning down drives more frequently.
41. SmartDrive counter-argued that the burden of proof for gender discrimination rested on Octavia Linta, as established by case 109/88 *Danfoss*, and that that burden had not been discharged.

Questions

42. The Central Court of Danubia found that there were doubts regarding the interpretation and application of EU law in the circumstances of the case pending before it and decided to refer the following questions to the Court of Justice of the European Union:
 1. **Does EU law preclude legislation such as the Danubian Personal Transport Regulation 2002, which limits the number of taxi licences and makes it practically impossible for companies and drivers based in other Member State to obtain a licence?**
 2. **May Octavia Linta rely on the mutual recognition in Danubia of her PPT license as an independent service provider in the field of person transport issued by the authorities of Moselia?**
 3. **(a) Is Directive 2020/7563 to be interpreted to the effect that Octavia Linta's contractual relationship with SmartDrive is one of employment in circumstances such as the ones described?**
(b) In the affirmative, may an individual in the position of Octavia Linta rely on that Directive in those circumstances to shift criminal liability to another private party by virtue of Article 219 of the Danubian Criminal Code?
 4. **May SmartDrive rely on the protection of commercial property, as well as the principles of subsidiarity and proportionality, to avoid an employment obligation being imposed on private parties that have chosen to remain in a contractual relationship based on service provision?**
 5. **Is Octavia Linta entitled to claim compensation for breach of the principle of equal pay for equal work as set out in Article 4 of Directive 2006/54 and Article 157(1) TFEU?**

During day 1 (Saturday), questions 1-3 will be mooted.

During day 2 (Sunday, other than the final), questions 4-5 will be mooted (but the judges may also choose to add another question[s] at their discretion. This will be confirmed on Saturday evening.

The judges will inform each of the finalist teams which questions will to be mooted in the final.