OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 4 July 2017 (1)

Case C-320/16

Uber France SAS

(Request for a preliminary ruling
from the tribunal de grande instance de Lille (Regional Court, Lille, France))

(Reference for a preliminary ruling — Technical regulation — Definition — Obligation to notify — Penalty — Unenforceable against individuals — System for putting customers in touch with non-professional drivers — UberPop application — Directive 2006/123/EC — Scope — Exclusion as a service in the field of transport)

Introduction

1. This is the second case in which the Court is called upon to consider legal issues regarding the way in which the local transport platform Uber works. (2) In the first case, in which I delivered my Opinion on 11 May 2017, (3) the central question was whether a service such as that provided by Uber should be classified as an information society service for the purposes of the relevant provisions of EU law. That question also arises in the present case. However, this case concerns a different issue, namely the question whether certain provisions of national law which apply to services such as those offered by Uber should have been notified as rules on services within the meaning of the provisions of EU law on technical notification. As I shall explain, that issue is partly independent of how Uber's activities are classified.

2. Accordingly, in the present Opinion I shall deal principally with the issue of notification, and I would refer to my earlier Opinion in so far as concerns the question of the classification of Uber's activities as an information society service.

Legal framework

EU law

3. Article 1(2), (5) and (11) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, (4) as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (5) ('Directive 98/34, as amended'), provides: (6)

‘For the purposes of this Directive, the following meanings shall apply:

…

2. “service”, any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

– “at a distance” means that the service is provided without the parties being simultaneously present,

– “by electronic means” means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

– “at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

…

5. “rule on services”, requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

…

For the purposes of this definition:

– a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner,

– a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner.

…

11. “technical regulation”, technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, *de jure* or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

…’

4. The first subparagraph of Article 8(1) of Directive 98/34, as amended, provides:

‘Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.’

French law

5. Article L. 3120-1 et seq. of the code des transports (Transport Code) governs the carriage of persons by road for consideration using vehicles with fewer than ten seats.

6. Article L. 3124-13 of the Transport Code provides:

‘The organisation of a system for putting customers in touch with persons carrying on the activities mentioned in Article L.3120-1 where such persons are neither road transport undertakings entitled to provide occasional services as mentioned in Chapter II of Title 1 of this Book, nor taxi drivers, two or three-wheeled motorised vehicles or private hire vehicles within the meaning of this title shall be punishable by a two-year term of imprisonment and a fine of EUR 300 000.

Legal persons who incur criminal liability for the offence laid down in this article shall, in addition to a fine in accordance with Article 131-38 of the Criminal Code, incur the penalties laid down in paragraphs 2 to 9 of Article 131-39 of the Criminal Code. The prohibition referred to in paragraph 2 of Article 131-39 of the Criminal Code shall extend to the activity in the exercise of which or at the time of the exercise of which the offence was committed. The penalties laid down in paragraphs 2 to 7 of Article 131-39 of the Criminal Code shall not exceed five years in duration.’

The facts, the procedure and the questions referred for a preliminary ruling

7. Uber France is a company established under French law and a subsidiary of Uber BV, a company governed by Netherlands law, which is itself a subsidiary of the company Uber Technologies Inc., whose principal place of business is in San Francisco (United States of America). Uber BV operates an electronic platform which enables users, with the aid of a smartphone equipped with the Uber application, to order urban transport services in the cities covered. The transport services offered on the Uber platform fall into various categories depending on the status of the driver and on the type of vehicle. The UberPop service is a service whereby non-professional private drivers transport passengers using their own vehicles. (7)

8. Uber France is a defendant before the tribunal correctionnel de Lille (Criminal Court, Lille, France) at the tribunal de grande instance, huitième chambre (Regional Court, Eighth Chamber, Lille) in a private prosecution and civil action brought by Mr Nabil Bensalem in relation to various matters, including the organisation, from 10 June 2014 onwards, of a system for putting customers in touch with persons carrying passengers by road for consideration using vehicles with fewer than ten seats in the circumstances set out in Article L. 3124-13 of the Transport Code.

9. In those proceedings, Uber France has submitted that Article L. 3124-13 of the Transport Code cannot be enforced against it because it is a technical regulation (a rule on services) that has not been notified, in breach of the first subparagraph of Article 8(1) of Directive 98/34, as amended. It is common ground, moreover, that Article L. 3124-13 has not been notified. What remains open to debate is whether it is a ‘technical regulation’.

10. In those circumstances, the tribunal de grande instance de Lille (Regional Court, Lille) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article L. 3124-13 of the Transport Code, inserted by Law No 2014-1104 of 1 October 2014 on taxis and private hire vehicles, constitute a new technical regulation that is not implicit and that relates

to one or more information society services, within the meaning of [Directive 98/34, as amended], such that, pursuant to Article 8 of that directive, it had to be notified in advance to the European Commission, or does it fall within the scope of [Directive 2006/123 (8)], Article 2[(2)](d) of which excludes transport?

(2) In the event that that question is answered in the affirmative, does a failure to satisfy the notification requirement laid down in Article 8 of [Directive 98/34, as amended] mean that Article L. 3124-13 of the Transport Code is unenforceable against individuals?'

11. The request for a preliminary ruling was received at the Court on 6 June 2016. Written observations have been lodged by Uber France, the Estonian, French, Netherlands, Polish and Finnish Governments, and the European Commission. The parties to the main proceedings, the Estonian, French and Netherlands Governments, the European Free Trade Association (EFTA) Surveillance Authority and the Commission were represented at the hearing on 24 April 2017.

Analysis

Preliminary observations

12. In formulating its questions, the referring court has apparently started from the premiss that the classification of a service as a service in the field of transport within the meaning of Directive 2006/123 precludes its classification as an information society service, thereby rendering inapplicable the obligation, under Directive 98/34, as amended, to notify the provisions relating to it. However, it is not certain that that automatically follows, inasmuch as Directive 98/34, as amended, contains no exclusion for transport of the kind that is laid down in Article 2(2)(d) of Directive 2006/123. (9) In my view, it is sufficient, without considering the question of the classification of Uber's activities under Directive 2006/123, to address the question of whether the provision of French law in question constitutes a technical regulation — and more specifically a rule on services, that being the only type of technical regulation of relevance in this case — that should have been notified in accordance with Article 8 of Directive 98/34, as amended.

13. Thus, by its first question, the referring court is essentially asking whether Article 1(5) of Directive 98/34, as amended, read in conjunction with Article 1(2) of that directive, must be interpreted as meaning that a provision of national law which prohibits and penalises the organisation of a system for putting customers in touch with persons engaging in the carriage of passengers in contravention of the rules which apply to such transport activities constitutes a rule on services within the meaning of Article 1(5) and subject, as such, to the notification obligation under Article 8 of the directive. The second question referred for a preliminary ruling concerns the possible consequences for the main proceedings of the failure to notify such a provision, should it be found to constitute a technical regulation.

14. These questions of course raise the issue of whether a service such as the UberPop service offered by Uber may be classified as an information society service. That is the issue which I addressed in my Opinion in *Asociación Profesional Elite Taxi*, (10) which I will merely summarise in this Opinion, while adding a further two points. Nevertheless, I think that the question of whether the provision of French law at issue in this case constitutes a technical regulation can be resolved irrespectively of the classification of the UberPop service, and I shall explain that position in the second part of my analysis. Finally, in the third part of my analysis, I shall address the question of the possible consequences of the failure to notify.

The classification of the Uber service

15. In my Opinion in *Asociación Profesional Elite Taxi*, I observed that the UberPop service provided by Uber was a single composite service comprising a supply whereby passengers and drivers were connected with one another by means of smartphone software and a supply of transport. I also noted that, where a composite service such as that is in issue, the component that is provided by electronic means may be regarded as an information society service, for the purposes of the application of the definition of such

services given in Article 1(2) of Directive 98/34, as amended, only if it is economically independent of the component that is not provided by electronic means or if it is the principal service within the composite service. Indeed, the application of the EU rules on information society services (which is to say both Directive 98/34, as amended, and Directive 2000/31 (11)) to services which are neither independent of services which do not fall within the scope of those rules nor predominant over such other services would be contrary to the wording of the provisions in question, would compromise the objective pursued by those provisions and would engender legal uncertainty, since it may be that the other services are regulated differently under various systems of national law, as is the case, especially, in specific fields such as transport. (12)

16. According to the information available on the way in which Uber functions, and subject to the findings of fact ultimately made by the national courts, in so far as the UberPop service is concerned, the connection service, which is performed by electronic means, is not independent of the transport service, because the former is inextricably linked with the latter and the two services are in fact supplied by the same company, Uber. That company, which indisputably provides the connection service, also exercises preponderant control over the transport service *stricto sensu*. Next, I also formed the view that the connection service was secondary to the transport service, the latter being the real economic *raison d'être* of the UberPop service considered as a whole. (13) I concluded from that that such a service could not be regarded as an information society service within the meaning of the definition of such services given in Article 1(2) of Directive 98/34, as amended. (14)

17. I maintain that position in the context of the present case and would refer to my Opinion in *Asociación Profesional Elite Taxi* for a more detailed explanation. I would merely add two points to the considerations set out in that Opinion.

18. First, Uber's situation must, in my view, be distinguished from that in the dispute which gave rise to the judgment in *Vanderborght*, which the Court of Justice handed down a few days before I delivered my Opinion in *Asociación Profesional Elite Taxi*. In that judgment, the Court held that advertising for a dental practice posted on an Internet website created by the practitioner in question fell within the definition of an 'information society service'. (15)

19. While that situation involved a service intended for users (other than the practitioner himself), the service in question consisted in the communication of information. It was directed, principally at least, not at people who were already patients of the practitioner in question, but at the general public, in the hope of attracting new patients. That sort of communication may or may not result in the subsequent provision of dental services (and, probably, in most cases it will not). Although the advertising was without question closely connected with the dental practice as such, it had, by contrast, no real connection with the actual dental care provided to individual patients.

20. The opposite is true of the connection service provided by the Uber platform, which is directed at people who are already Uber customers and which is intended to result in the actual provision of a transport service. Moreover, the connection is a necessary precursor to the transport service provided in the context of the Uber system.

21. Given those differences, I do not think that the guidance offered by the judgment in *Vanderborght* can be directly applied to the question of the classification of services such as UberPop as information society services.

22. Secondly, I would like to emphasise that the situation that arises in the context of the services provided by Uber is clearly different from the relationship between a franchisor and its franchisees under a franchise agreement. Admittedly, the franchisor may also exercise strict control over the activities of its franchisees, to the extent that customers will perceive the franchisees as branches of the franchisor rather than as independent undertakings. However, the role of the franchisor is limited to providing services (such as trade mark licences, know-how, the supply of equipment and the provision of advice) to the franchisees. It will have no relationship with the users of the final services, which will be provided solely

by the franchisees. The services of the franchisor are therefore independent of the final services, even if, in such a context, the franchisor determines the conditions under which those services are provided. Uber, on the other hand, is directly involved in the provision of the final service to users, and therefore must, by contrast with a franchisor, be regarded as the provider of that service.

The classification of the national provision at issue as a technical regulation

23. Even if the Court were to find that the UberPop service is an information society service, that would in no way affect the classification of the provision of French law in question as a technical regulation. Indeed, not every provision that concerns, in one way or another, information society services automatically falls within the category of technical regulations.

24. Indeed, among the various categories of technical regulations, Directive 98/34, as amended, distinguishes those which relate to services and clearly states that it deals only with information society services. According to the definition given in Article 1(5) of the directive, a rule on services is a requirement of a general nature relating to the taking-up and pursuit of service activities. In order to be classified as a technical regulation, it is also necessary that the specific aim and object of such a requirement should be to regulate such services in an explicit and targeted manner. By contrast, rules which affect such services only in an implicit or incidental manner are excluded.

25. Article L. 3124-13 of the Transport Code prohibits the organisation of systems for putting customers in touch with persons carrying on transport activities in breach of the rules which apply to those transport activities. That prohibition carries criminal penalties.

26. I can quite accept that, as Uber France submits in its observations, that prohibition is principally directed at systems for connecting the two parties by electronic means. Indeed, at present, such systems are technically and economically viable only if they operate with the aid of information technology, and thus by electronic means, within the meaning of Directive 98/34, as amended. Although systems for connecting parties by means of telecommunications still exist, organising them calls for significant technical resources (such as call centres and terminals in vehicles), which makes it unlikely that such a system would be organised with the participation of people who carry on transport activities outside of the legal framework.

27. I am therefore not persuaded by the French Government's argument that the provision at issue is not specifically aimed at information society services since that provision may affect other categories of intermediaries in the field of transport.

28. That said, it must be observed that the purpose of the provision is not to prohibit or to regulate in some other way the activity of putting customers in touch with providers of transport services in general. The purpose of the provision is solely to prohibit and to punish the activity of intermediary in the *illegal* exercise of transport activities. The activity of intermediary in legal transport services remains entirely outside the scope of the provision.

29. I therefore share the view expressed by the Polish Government in its written observations, that the provision affects information society services only in an incidental manner. Indeed, the purpose of the provision is not to regulate such services specifically, but to ensure the effectiveness of the rules relating to transport services, which are not covered by Directive 98/34, as amended.

30. Furthermore, the provisions of Article L. 3124-13 of the Transport Code, in so far as they prohibit the organisation of systems for putting customers in touch with persons providing transport services in breach of the applicable rules, must be assessed in context. If an activity is illegal, any complicity in the exercise of that activity may also be regarded as illegal under national law. That is particularly so when the complicity involves the organisation of a system and when its purpose is to make a profit. (16) Therefore, in reality, the regulatory contribution made by Article L. 3124-13 of the Transport Code lies principally in the establishment of criminal sanctions for participation in an activity which is already illegal under national legislation.

31. If every national provision that prohibited or punished intermediation in illegal activities had to be regarded as a technical regulation merely because the intermediation most likely takes place by electronic means, then a great number of internal rules in the Member States, written and unwritten, would have to be notified as technical regulations. That would lead to an unwarranted extension of the obligation to notify, (17) without that really contributing to the attainment of the objectives of the notification procedure, the purpose of which is to prevent the adoption by the Member States of measures that are incompatible with the internal market and to enable economic operators to make more of the advantages inherent in the internal market. (18) Instead of that, an excessive notification obligation, with the penalty of regulations that have not been notified being inapplicable, (19) would facilitate circumvention of the law and engender legal uncertainty, including in relationships between individuals.

32. If, as Uber France maintains in its observations, Article L. 3124-13 of the Transport Code may be perceived as being specifically directed at the way in which the Uber platform functions, then that is because, when it developed the UberPop service, Uber deliberately chose an economic model that is irreconcilable with the national regulations governing the transportation of passengers. (20) That model is based on the provision of services by non-professional drivers who, by definition, do not have the authorisations which are required under French law in order to carry on that transport activity. Nevertheless, that does not make the provision in question a rule governing the activities of intermediary in the field of transport in general.

33. For those reasons, I think that Article L. 3124-13 of the Transport Code affects only incidentally the service of connecting customers with persons providing transport services, inasmuch as the connection relates to the unlawful provision of such services. Article L. 3124-13 must therefore be excluded from the scope of Directive 98/34, as amended, in accordance with the second indent of the fifth subparagraph of Article 1(5) thereof.

34. That exclusion arises not from the fact that the provision at issue is a provision of criminal law, but from the fact that the provision does not prohibit and does not penalise an activity which is in the nature of an information society service in a general fashion, but only in so far as the activity amounts to an act of complicity in the exercise of another activity, one that is illegal and, moreover, one that falls outside the scope of Directive 98/34, as amended.

The possible consequences of the failure to notify the national provision at issue

35. By its second question referred for a preliminary ruling, the referring court asks, in essence, what inferences it should draw, in the main proceedings, from the failure to notify Article L. 3124-13 of the Transport Code.

36. Of course, if the Court agrees with my proposed answer to the first question referred, and holds that the provision in question is not a technical regulation within the meaning of Directive 98/34, as amended, and does not, therefore, fall within the scope of the notification obligation, the second question referred for a preliminary ruling will no longer be relevant. For the sake of completeness, however, I shall analyse it, because the answer to that question will give a fuller picture of the position.

37. The case-law of the Court on the consequences of a failure to notify a technical regulation is settled. In principle, such a failure constitutes a procedural defect in the adoption of the technical regulations concerned and renders those technical regulations inapplicable and therefore unenforceable against individuals. (21) Although the Court treats a failure to notify as a procedural defect, it applies the same sanction as that which applies in the case of substantive incompatibility of a provision of national law with a provision of EU law. (22)

38. Thus, an individual who wishes to escape the application of a rule may rely on the fact that it has not been notified, without there being any need to determine whether the rule is substantively contrary to the freedoms of the internal market. The resulting unenforceability may even benefit operators whose activities, while falling within the scope of the rule in question, do not amount to information society

services, in particular, because their role is not limited to services provided by electronic means. (23) I am thinking in particular of the situation at issue in the present case, that of Uber. As I explained in my Opinion in *Asociación Profesional Elite Taxi*, Uber's activity does not fall within the definition of an information society service, (24) even though action could be taken against it under Article L. 3124-13 of the Transport Code. Nevertheless, this is the inherent consequence of a procedural defect, which invalidates, with regard to all individuals, a rule which has not been notified.

39. The answer to the second question referred for a preliminary ruling should therefore be that, if Article L. 3124-13 were to be regarded as a rule on services within the meaning of Article 1(5) of Directive 98/34, as amended, it would be unenforceable against individuals in so far as it has not been notified in accordance with Article 8 of that directive.

40. Finally, in so far as concerns the notification obligation under Article 15(7) of Directive 2006/123, a matter which the Commission raised at the hearing, I would state that, in my view, (25) although Uber's activities are not to be regarded as an information society service because of their composite nature, they without question fall within the field of transport, which excludes them from the scope of that directive.

Conclusion

41. In light of all the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the tribunal de grande instance de Lille (Regional Court, Lille) as follows:

Article 1(5) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, read in conjunction with Article 1(2) thereof, must be interpreted as meaning that a provision of national law which prohibits and penalises the organisation of a system for putting customers in touch with persons engaging in the carriage of passengers in contravention of the rules which apply to such transport activities does not constitute a rule on services subject to the notification obligation under Article 8 of that directive.

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1 Original language: French.

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2 A third request for a preliminary ruling concerning this same subject was dismissed as inadmissible by order of 27 October 2016, *Uber Belgium* (C-526/15, not published, EU:C:2016:830).

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3 See my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

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4 OJ 1998 L 204, p. 37.

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5 OJ 1998 L 217, p. 18.

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6 In accordance with Article 11 of Directive (EU) 2015/1535 of the European Parliament and the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), Directive 98/34 was repealed on 7 October 2015. It nevertheless continues to apply, *ratione temporis*, to the facts in the main proceedings.

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7 For a more detailed description of the Uber platform, see points 12 to 15 of my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

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8 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

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9 A service *in the field of transport* is not necessarily a *transport* service *stricto sensu* (see the judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685).

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10 C-434/15, EU:C:2017:364.

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11 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

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12 See points 29 to 38 of my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

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13 See points 39 to 64 of my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

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14 See points 65 and 66 of my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).

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15 Judgment of 4 May 2017, *Vanderborght* (C-339/15, EU:C:2017:335, paragraph 39).

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16 I would recall that only services provided for consideration may be regarded as information society services within the meaning of Directive 98/34, as amended.

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17 The expansion of the notification obligation ('notification creep') has already been mentioned in point 62 of Advocate General Bobek's Opinion in *M. and S.* (C-303/15, EU:C:2016:531).

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18 See the judgment of 4 February 2016, *Ince* (C-336/14, EU:C:2016:72, paragraph 82).

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19 See above.

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20 It should be noted in this regard that Uber cannot rely on EU law in order to call into question the rules governing transport services in the strict sense because, in this field, positive action on the part of the Union legislature is necessary, in accordance with Articles 58 and 90 TFEU.

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21 See, in particular, the judgments of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172, paragraph 54) and, most recently, of 4 February 2016, *Ince* (C-336/14, EU:C:2016:72, paragraph 67).

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22 See the judgment of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172, paragraph 42).

23 See, in particular, points 29 to 38 of this Opinion.

24 See points 15 and 16 of this Opinion.

25 See points 67 to 70 of my Opinion in *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:364).