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Ban on car hire with driver services' use of smartphones in Brussels: highlights from the Court of Appeal judgment

On 19 February 2021, the "Direction Transport de Personnes" of the Brussels Capital Region issued a circular (*circulaire/omzendbrief*) concerning the operating conditions of car hire with driver services in the Brussels-Capital Region. With this circular, the Brussels Capital Region reminded operators of such services of their legal obligations laid down in the Ordonnance of 27 April 1995, as well as the operating conditions contained in the 29 March 2007 Decree of the Brussels-Capital Region Government. More specifically, the Brussels Capital Region stressed that a written contract must be concluded prior to the service being rendered. The regional Government also noticed that the use of a radio communication transmitter or receiver (smartphone, walkie-talkie, etc.) for the purpose of receiving orders is prohibited under the aforementioned legislation.

This circular was issued following a judgment by the Brussels Court of Appeal, pronounced on 15 January 2021, in a case opposing the Belgian Taxi Federation to a global car hire with driver services company. The key elements of this judgment are further analysed below.

Reasoning of Brussels Court of Appeal in its 15 January 2021 judgment

The Brussels Court of Appeal started by explaining the differences between taxis and car hire with driver services. A major element distinguishes these two services: their availability to the public. A taxi vehicle is made available to the public either at a dedicated parking location, on public roads, or at any other

location outside public traffic. Whereas a vehicle operated by car hire with driver services must be ordered in advance. It is this fundamental difference that explains the operating conditions imposed on car hire with driver services.

Regarding the use of radio communication transmitters or receivers, the Court of Appeal noted that the prohibition for vehicles, operated by car hire with driver services, to be equipped with radio communication transmitters or receivers (e.g. smartphones) was included in the Ordonnance of 27 April 1995. The legislator considered that the use of such devices was not justified for this type of service, since (unlike taxis) vehicles in operation for car hire with driver services are not supposed to be driven on public roads in search for clients, and are not connected to a platform allowing receipt of orders to be completed instantaneously. Therefore, the Court of Appeal considers the Ordonnance to be violated as soon as these vehicles are equipped with a radio communication transmitter or receiver. The Court further highlighted that this constitutes a violation of the principles governing the operating conditions for car hire with driver services, and that criminal sanctions may be imposed.

The Court of Appeal then analysed whether written contracts were effectively concluded prior to the car hire with driver services being provided. The Court noted the existence of a "Platform Rider Association", which has the key role of contracting rental agreements with companies that have already entered into a service agreement with the global car hire with driver services company. In view of these elements, the Court of Appeal considered that contracts concluded by companies with the Platform Rider Association are, in fact, artificial by nature and have no other purpose than to avoid certain operating conditions that govern their activities, and which are mandatory or of public order. The Court therefore considered that there was fraud and that contracts concluded between the companies and the Platform Rider Association must therefore be considered as non-existent, in application of the rule "*fraus omnia corrumpit*".

By equipping vehicles with smartphones and by circulating with them without prior written rental contracts (since rental contracts were previously considered by the Court of Appeal as non-existent), the Court of Appeal considered that companies using the global car hire with driver services brand's standard service and operating in the Brussels-Capital Region were not compliant with the legal conditions laid down in the Ordonnance of 27 April 1995, nor with conditions contained in the Government of the Brussels-Capital Region's Decree of 29 March 2007.

The global car hire with driver services company nevertheless argued that its standard service was legitimate, since it was an information society service within the meaning of Directive (EU) 2015/1535 of the European Parliament and of 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, and as such not governed by Brussels legislation concerning taxis and car hire with driver services. The Court of Appeal referred to decisions pronounced on 20 December 2017 (C-434/15) and on 10 April 2018 (C-320/16) by the Court of Justice of the European Union (CJEU). The CJEU had twice rejected the qualification of the global car hire with driver services brand's trip-sharing offering as an information society service. The Court of Appeal noted that although the standard service is different from the trip-sharing service, the CJEU's analysis in these previous decisions remained relevant and transposable in the present case. Consequently, the Court of Appeal rejected the qualification of an information society service, and considered that the standard service must be qualified as a service in the field of transport within the meaning of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

The global car hire with driver services company further argued that Brussels legislation concerning taxis and car hire with driver services restricted its freedom of establishment and freedom to provide services, in violation of Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU). The company also argued that its freedom of enterprise would be compromised if legislation concerning taxis and car hire with driver services were to be considered as applicable to its operations, as this legislation is not adapted and foreseen to capture and frame the characteristics of the company's activity in question. In view of these elements, the Court of Appeal recognised that the Brussels legislation might – through the operating conditions they impose on car hire with driver services – hinder and make it less attractive for operators to pursue their activities. The Brussels Court of Appeal therefore decided to ask the following questions to the Belgian Constitutional Court :

> "*1. Is the Brussels legislation concerning taxis and car hire with driver services compatible with the freedom of enterprise, since it is currently not possible for Brussels companies operating car hire with driver services to:*
> - *receive orders for rides via a smartphone application such as the company's standard service;*
> - *park or drive on public roads in search of clients, without having concluded a prior written contract with the user?*
>
> *2. Are the Walloon and Brussels legislations concerning car hire with driver services likely to hinder the freedom of enterprise and create discrimination between Brussels and Walloon drivers, since it is currently not possible for Walloon companies operating car hire with driver services to park or drive on public roads in search of clients that are starting from the Brussels-Capital Region?*"

While awaiting the Constitutional Court's ruling on these two questions, the Court of Appeal declared that the appeal was receivable, but reserved its decision for the rest of the case.

The Constitutional Court's judgment on these questions – which normally takes about 6 months to process – is therefore eagerly awaited. An update will be issued as soon as the Constitutional Court responds to these questions.

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