OUTLINE JUDGMENT FOR CEEMC 2023 (DUBROVNIK)

This is a moot problem that would be guaranteed to tie up the Grand Chamber délibéré in untidy knots. Very deliberately, I am today breaking with CEEMC traditions. This 'judgment' is going to be very short. Also, now that I no longer work at the Court and no longer have nice référendaires to help me with the donkeywork of drafting it is going to be written in ESKC style ('Leo-style', for short), rather than CJEU judgment style. That may – I hope! – also make it more digestible.

Here in outline are some possible 'answers' to the various questions. Remember that the reference to the CJEU arises out of the criminal prosecution of Octavia. SmartDrive is having its own administrative problems with the Danubian authorities getting its app approved for use (see, e.g., the issue about use of credit cards only; or the question whether SmartDrive is an ISS or, as the Danubian authorities are maintaining, a provider of transport-based services using ISS technology). However, those commercial and administrative law problems for SmartDrive are not what the referring court has to deal with right now. We need to focus on Octavia.

Question 1

Octavia is a taxi driver. Yes, her work is heavily tied in with the SmartDrive app – but she is a taxi driver. As such, the services she is providing are clearly transport services. The relevant services here are the transborder services that she (a Moselian living in Moselia) provides in Danubia, on top of the other work that she performs 'internally' (i.e., within the borders of Moselia). In the jargon: Octavia is a frontier worker.

The evolution of Octavia's work and the increasing source of her income described in the facts point fairly clearly towards secondary establishment – more accurately, an attempt at secondary establishment – in Danubia.

The reason that Octavia can't work legally cross-border in Danubia is that she doesn't have the Registered Taxi Operators ('RTO') licence.

The licensing system for obtaining an RTO licence operates (fairly brutally) as an indirect residency clause protecting the Danubian market for Danubia's own taxi drivers. It discriminates against non-Danubian residents. Non-Danubian nationals are more likely to be non-Danubian residents than Danubian nationals. We are within the scope of EU law (clear trans-border element) and there is clear indirect discrimination on grounds of nationality contrary to Article 18 TFEU.

Question 2

Octavia's arguments based on mutual recognition of her Moselian Professional Person Transporter ('PPT') licence do not find the necessary support in the legislation or the Court's existing case law. Unaccountably, the EU legislator hasn't (yet) come up with a sectoral directive in the field of transport regulating the qualifications of taxi drivers. The general directives on recognition of qualifications (Directives 89/48 and Directive 92/51) do not assist, because Octavia's Moselian licence (the PPT licence) is not a 'higher education diploma awarded on completion of professional education and training of at least three years' duration'. Article 53 TFEU is an enabling provision that

the EU legislator can and does use as a legal base for secondary legislation; but it is of no help to Octavia. She loses on this point – but that doesn't matter if she wins (as she does) under question 1.

Question 3

(a) Independent service provider or employee?

The (fictional) Directive 2020/7563 (the 'Platform Workers Directive') is in force and past its date for transposition. It is meant (see the Explanatory Memorandum: the 'EM') to provide a 'comprehensive framework' for deciding whether a platform worker is an employee or an independent service provider. Octavia's work using the SmartDrive app falls within the definition of a 'digital labour platform' in Article 3. If any one of the three tests in Article 5 are satisfied, the legal presumption is the contractual relationship between Octavia and SmartDrive shall be 'legally presumed to be an employment relationship' (see Article 4). On the facts in the order for reference, at least one of the Article 3 tests is probably satisfied – maybe, all of them. (Note that, in real life, the CJEU ought to be leaving the details of the factual analysis to the national court.) As a matter of legal classification under EU law, Octavia was therefore working as an employee of SmartDrive when she was arrested on 16 October 2022; and she committed the offence with which she is charged ('unauthorised passenger transport') whilst acting 'in the course of her employment'.

That is enough (applying national law, in the shape of Article 219 of the Danubian Criminal Code) to bar a prosecution of Octavia. Put differently, as a matter of national law that reclassification under EU law of Octavia's activities shifts the focus of such prosecution (definitively) away from her.

Because Danubia has failed to implement the directive, however, the focus of prosecution cannot shift across onto SmartDrive. There is no horizontal direct effect between private parties (Octavia and SmartDrive) (so, for example, within national employment law, Octavia would have a hard time claiming employment law benefits). At the same time, EU law blocks the defaulting State (Danubia) from imposing a criminal sanction on someone on the basis of an unimplemented directive.

The Danubian authorities cannot therefore prosecute either Octavia or SmartDrive. If they consider that outcome to be unsatisfactory, the remedy lies in their own hands: to implement the Platform Workers Directive and to make any necessary consequential changes to national criminal law.

(b) Shifting criminal responsibility from Octavia to SmartDrive?

This question burrows deep into the issues of horizontal and vertical direct effect and what happens when a directive is past its 'sell by date' (i.e., it should already have been implemented), but the Member State has failed to do so.

I'm going to cheat just the way the CJEU does and say, 'in the light of the answer already given to question 3(a), there is no need to answer question 3(b)'.

Question 4

This question concerns the validity of the Platform Workers Directive. The Court was tempted to declare it inadmissible. However, unfortunately this argument was the basis upon which the national court gave SmartDrive permission to intervene in the criminal proceedings against Octavia.

The essential arguments are that the Directive violates the rights of platform service business (such as SmartDrive) to carry on their businesses (Article 16 of the Charter) and / or to exploit their property rights (Article 17 of the Charter), that the double legal base is flawed, and / or that the directive violates the principle of subsidiarity and / or proportionality.

a) Violation of Charter rights

This raises the (old) problem of competing rights: the rights of businesses (Articles 16, 17) and the rights of workers (e.g., Articles 15, 31). Neither set of rights is absolute. Article 52 explains that any limitations on a Charter right must 'be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

The EU legislator has chosen to strike that balance in a particular way. The choice is not obviously arbitrary, distorted, or unreasonable. The Court is not therefore going to interfere with the principle that legislation in this field is permissible. The outcome is not a manifest violation of ISS platforms' right to run a business or their right of ownership of commercial property.

b) Legal base

The Directive is a general cross-sectoral measure dealing with the need to improve working conditions (hence the use of Article 153(1)(b) TFEU). Insofar as there is a data processing aspect, reliance upon the additional base of Article 16(2) TFEU does not appear to be manifestly unreasonable. Very limited argument was presented to the Court addressing the choice of legal base. On the basis of what it has heard, the Court is not disposed to invalidate the directive for incorrect choice of legal base.

c) Subsidiarity

and

d) Proportionality

The Court has examined with great care the EM for the Directive (especially sections 2 and 3, pp 175 to 180 of the bundle). The Court notes the (predictable) disagreement between the two sides of industry as to whether the issue should be tackled at EU level (the trades unions' position) or should be addressed by action taken at national level (the position adopted by the employers' organisations that were consulted). It is clear that the Member States did consider whether action at EU level was consistent with the principle of subsidiarity; and that they decided that such action was justified. The Court is not going to second-guess that choice. Nor is it prepared to hold that the measures put in place by the directive – the fruit, as the legislative history shows, of extended discussions and negotiations – are manifestly disproportionate.

<u>Question 5</u>

The Court has already indicated that no factor has been disclosed that affects the validity of the Platform Workers Directive. It would be an affront to the coherence and consistency of EU law if a person fell to be reclassified as an employee in application of the Platform Workers Directive and yet

did not qualify as an employee for the purposes of the equal pay guarantee provided by EU primary law in Article 157 TFEU.

ISS applications reflect the business model of their creators (and occasionally also their unconscious biases). Should a particular business model and its application give rise to discrimination, direct or indirect, of a kind that is prohibited by EU law, it will be for the employer to make the necessary modifications to eliminate any discrimination for which he may be held responsible. The Court notes, however, that it is possible that – given the very nature of ISS platform work – circumstances may arise in which an employee suffers discrimination that is not causally attributable to the design and / or operation of the ISS platform as such. The Court here recalls that the operation of Article 157 TFEU depends on the relationship that exists between the employer, on the one hand, and the employee, on the other hand. For that reason, inequalities that lie beyond the employer's control and that cannot be remedied by action on his part also lie beyond the scope of Article 157 TFEU.

The statistical and other background material presented by the referring court in its order for reference is such as to raise a prima facie case of discrimination on grounds of sex; but is not sufficient to enable this Court to reach a settled conclusion as to whether that discrimination is properly to be characterised as direct or indirect. The Court here recalls its settled case law to the effect that whereas direct discrimination cannot be justified, the application of neutral criteria that give rise to indirect discrimination between comparable groups may be acceptable if there is objective justification for the use of those criteria and if they are in themselves proportionate.

The Court draws specific attention to the fact that the SmartDrive application apparently does not permit drivers who refuse a drive to advance any excuse or justification for their refusal. Thus, a woman taxi driver – or indeed a male taxi driver of colour, or a taxi driver who is disabled – might have excellent objective reasons for refusing a particular drive. The refusal will nevertheless count against them and, if they refuse more than 10 drives in a month, their service fee will be increased by one percentage point per drive refused.

It will be for the national court, as the sole judge of fact, to conduct a further and more detailed investigation into the differing receipts of male and female taxi drivers using the SmartDrive platform, and the reasons why those differences arise. In so doing, the national court is invited to apply the guidance given here in conjunction with that already available (notably Danfoss) and to bear in mind that once a prima facie case has been established, the burden of proof shifts to the employer.

Conclusion

Those are the answers that I put forward in the context of the present moot competition.

Of course, this is the (former) advocate general speaking. The Court may or may not follow me …

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