CENTRAL AND EAST EUROPEAN MOOT COURT COMPETITION
Dubrovnik, CROATIA 2023

Written Observations of the Applicant

The Danubian Criminal Prosecution Office
supported by SmartDrive
(Applicant)

V

Octavia Linta
(Respondent)

Reference to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the TFEU

Comenius University in Bratislava
Faculty of Law

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LIST OF ABBREVIATIONS

§	Paragraph
AG	Advocate General
Applicant	The Danubian Criminal Prosecution Office
Respondent	Octavia Linta
CJEU	Court of Justice of the European Union
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
CFREU	Charter of Fundamental Rights of the European Union
PTR 2002	Personal Transport Regulation 2002
ISS	Information Society Service
p./pp.	Page/s
Q	Question
v	versus
i.e.	*Id est,* that is
e.g.	*Exempli gratia,* for example
etc.	*Et cetera,* and so on

LIST OF SOURCES

CJEU JURISPRUDENCE

1. Case C-43/75 *Defrenne*
2. Case C-109/88 *Danfoss*
3. Case C-326/88 *Hansen*
4. Case C-192/94 *El Corte Inglé*
5. Case C-102/02 *Beuttenmüller*
6. Case C-144/04 *Mangold*
7. Case C-110/05 *Commision v. Italy*
8. Case C-338/09 *Yellow Cab*
9. Cases C-297/10 and C-298/10 *Hennigs*
10. Case C-617/10 *Åkerberg Fransson*
11. Case C-168/14 *Grupo Itelevesa*
12. Case C-434/15 *Elite Taxi*
13. Case C-255/16 *Falbert*
14. Case C-320/16 *Uber*
15. Case C-541/16 *Commission v. Denmark*
16. Case C-41/17 *Isabele González Castro*
17. Case C-692/19 *Yodel*
18. Case C-62/19 *Star Taxi*
19. Case 624/19 *K v Tesco*
20. Case C-405/20 *EB*

LEGISLATION

1. Treaty on European Union.
2. Treaty on the Functioning of the European Union.
3. Charter of Fundamental Rights of the European Union.
4. 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 (hereinafter referred to as "**Directive 2000/31**").
5. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (hereinafter referred to as "**Directive 2006/54**").
6. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (hereinafter referred to as "**Directive 2006/123**").
7. Directive 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 (codification) (hereinafter referred to as "**Directive 2015/1535**").
8. Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work: Extracts and important explanatory notes for CEEMC moot teams (hereinafter referred to as "**Explanatory Memorandum**").

OBSERVATIONS OF THE APPLICANT TO THE REFERRED QUESTIONS

Question 1

Suggested answer: Art. 3 of the Directive 2000/31, Art. 16 of the Directive 2006/123 and Art. 58 TFEU do not 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.

1) The Applicant hereby states that the EU law do not preclude legislation such as the Danubian PTR 2002 based on arguments evolved below. The Applicant argues that (i) SmartDrive is a provider of a service in the field of transport, therefore (ii) Art. 3 of the Directive 2000/31, Art. 16 of the Directive 2006/123 and Art. 56 TFEU do not apply; (iii) PTR 2002 is not a technical regulation, thus Danubia was not obliged to notify such regulation in order to enforce it and (iv) the authorisation scheme is proportionate, non-discriminatory, and based on objective criteria that do not create unjustified obstacles.
2) Turning to the first argument concerning SmartDrive being a provider of a service in the field of transport, according to Art. 1(1)(b) of the Directive 2015/1535, the ISS is any service normally provided (a) for remuneration, (b) at a distance, (c) by electronic means and (d) at the individual request of a recipient of services. The Applicant does not contest that SmartDrive fulfils abovementioned criteria provided in Art. 1(1)(b) of the Directive 2015/1535.
3) However, according to present case law, to classify SmartDrive as an ISS, the intermediation service cannot form an integral part of an overall service whose main component is a service coming under another legal classification.[1] SmartDrive's app providing transport services such as at issue would be considered as the intermediation service forming integral part of an overall service in cases where: (i) service is provided to drivers by an app without which those drivers would not have been led to provide transport services, and the persons who wished to make an urban journey would not have used the services provided by those drivers, and (ii) company exercises decisive influence over the conditions under which services are provided.[2]
4) In the present case, SmartDrive sets price for the drive and collects the payments. This payment is subsequently transferred to the account of the driver after deduction of 20% service fee for use of a platform. Also, despite the fact that drivers are allowed to refuse the ride, they are penalized by an increased service fee for more than 10 refusals. The same applies if SmartDrive receives more than 5 justified complaints in a single month concerning the appearance and behaviour of the driver or the quality of the car.[3] SmartDrive also checks whether the cars are properly insured and well maintained.[4]
5) **Based on the abovementioned, a service is provided to drivers by SmartDrive's app without which those drivers would not have been led to provide transport services, and the persons who wished to make an urban journey would not have used the services provided by those drivers and SmartDrive exercises decisive influence over the conditions under which drivers are entitled to use the app, thus the Applicant states that SmartDrive is a provider of a service in the field of transport.**
6) Turning to the second argument, PTR 2002 may not be precluded by Art. 3 of the Directive 2000/31 regarding principle excluding prior authorisation and Art. 16 of the Directive 2006/123 regarding freedom to provide services.
7) Firstly, SmartDrive is considered as a provider of a service in the field of transport, however, for the purposes of Directive 2000/31, only the person providing ISS is considered a service provider,[5] hence this directive does not apply to SmartDrive as a provider in the field of transport.
8) Secondly, services in the field of transport regarding taxi services[6] are excluded from the scope of the Directive 2006/123.[7] According to settled case-law, such services also concern services inherently linked

[1] *Uber*, Case C-320/16, § 22, p. 412; *Star Taxi*, Case C-62/19, § 49, p. 554.
[2] *Uber*, Case C-320/16, § 21, p. 412.
[3] Facts of Case, § 5, p. 5.
[4] Facts of Case, § 7, p. 6.
[5] Art. 2(b) of the Directive 2000/31, p. 98.
[6] Recital 21 of the Directive 2006/123, p. 123.
[7] Art. 2(2)(d) of the Directive 2006/123, p. 135.

to the transport services[8] such as SmartDrive's app, as already argued above. As a result, Directive 2006/123 is inapplicable as well.

9) Moreover, intermediation services in the field of transport, such as at issue, are covered by Art. 58 TFEU. However, cross-border operation of such services is not harmonised by the EU law, therefore it is up to the Member States to regulate conditions under which intermediation services are to be provided in conformity with the general rules of the TFEU.[9]
10) Turning to the third argument, should SmartDrive be considered an ISS provider, contrary to arguments of the Applicant, the provisions making the exercise of a business activity subject to prior authorisation, such as PTR 2002, are not technical regulations within the meaning of the Directive 2015/1535.[10] Moreover, regarding the definition of technical regulation,[11] PTR 2002 is not exclusively aimed at ISS, but regulates both offline and online providers of transport services.[12] That means that PTR 2002 is not a technical regulation which needed to be notified, therefore Danubia is not obliged to notify such regulation and can still enforce it against individuals.[13] Thus, PTR 2002 cannot be rendered unenforceable by the EU law providing for notification of technical regulations.
11) Moreover, should provisions related to free movement of services be applicable, any regulation is still permissible if it is proportionate, non-discriminatory, and based on objective criteria that do not create unjustified obstacles.[14] The regulation in question does not impose requirements that go beyond what is necessary to achieve the stated objective and create unjustified obstacles to free movement, so it is not in a violation of the EU law.
12) The service being such a high-risk sphere, Danubia takes the protection of persons using the transport services with high sensitivity, making sure only skilled drivers provide the service.[15] Danubia has a public interest to ensure road safety by regulating the number of cars on the roads which also relates to protection of environment and reduction of emissions. Moreover, by regulating taxi drivers, Danubia ensures the quality and safety of services provided by taxi drivers. All these reasons are sufficient to conclude that the authorisation scheme is in public interest.
13) Furthermore, PTR 2002 does make it merely harder to receive a license, not impossible. As the Applicant stated, under the PTR 2002, licences are not only granted if and when an existing licence becomes available, but also when a new licence is issued by the authority.[16] The new licences were not issued since 2019,[17] however it is not clear from the Facts of Case whether it is caused by absence of applications rather than Danubia's reluctance to issue new licences. The Respondent did not even try to obtain such a licence and she immediately started to perform transport services in Danubia without such licence hoping that no one will figure it out. Moreover, the Respondent did not state why she was not able to obtain such licence, therefore it can be concluded that she was not at all interested in submitting the application form and was performing her services with the aim of making the quickest and highest financial profit possible.
14) According to case-law, Danubia may impose stricter rules to obtain licence than another Member State as degree of protection may vary from one Member State to another.[18] As a result, such rules may not be considered disproportionate just because they are stricter. Moreover, the national legislation applies to everyone without difference, hence neither foreign taxi driver, nor resident taxi drivers are preferred. The Respondent bears the same responsibility as others who breach Danubia laws. The Applicant takes the view that limitation of the number of licenses and criminal proceedings against a person violating the licensing requirements are not contrary to the EU law.
15) **Accordingly, the Applicant takes the view that in the present case Art. 3 of the Directive 2000/31, Art. 16 of the Directive 2006/123 and Art. 58 TFEU do not preclude PTR 2002.**

[8] *Elite Taxi,* Case C-434/15, § 41, p. 390.
[9] *Elite Taxi,* Case C-434/15, § 47, p. 391.
[10] *Star Taxi*, Case C-62/19, § 72, p. 522.
[11] Art. 1(1)(f) of the Directive 2015/1535, p. 156.
[12] *Star Taxi*, Case C-62/19, § 66, p. 521.
[13] *Falbert,* C-255/16, §§ 16-19, p. 397.
[14] *Star Taxi, Case* C-62/19, § 86, p. 559.
[15] Facts of Case, § 10, p. 6.
[16] Facts of Case, § 11, p. 6.
[17] Facts of Case, § 11, p. 6.
[18] *Commission v Italy,* Case C-110/05, § 65, p. 296.

Question 2

Suggested answer: Octavia Linta may not 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.

16) The Applicant hereby argues that (i) the situation at issue should be assessed in the light of the provisions of the TFEU governing transport and (ii) the mutual recognition principle cannot be applied to the situation at issue.
17) Turning to the first argument, the Respondent's freedom to provide services as an independent service provider in the field of person transport should not be governed by Art. 56 TFEU, but by Art. 58 TFEU, as was settled by case-law.[19] In relation to Art. 62 TFEU, the mutual recognition principle stated in Art. 53 TFEU does not cover services in the field of transport, whereas they are governed by Art. 90 TFEU *et seq*.
18) Pointing out Art. 91 TFEU, the EU is entitled to lay down legislation concerning situation at issue, nonetheless, legislation regarding the situation at hand is absent. Hence, it can be concluded there is no harmonisation at the EU level. In the absence of harmonisation, the Member States remain competent to define the conditions under which non-resident service providers may operate in the field of person transport with respect to basic freedoms guaranteed by the TFEU, as established by the case-law.[20]
19) Additionally, while adopting national legislation concerning framework that is not harmonised at the EU level, any restrictions of free movement must be (i) non-discriminatory, (ii) appropriate for securing the attainment of the objective pursued and (iii) not to go beyond what is necessary in order to attain it,[21] *ergo,* they must be proportionate. Justification of restrictions at issue are explained further above, in suggested answer to Q1.
20) In addition, concerning the EU legislation in the field of transport, the Member States are not obliged to completely open their national markets to non-residents, as settled by the case-law.[22] Consequently, the general principles of the EU law, including the principle of mutual recognition, can only find application in a limited manner. On that account, the Respondent cannot rely on the principle of mutual recognition.
21) Turning to the second argument, in case the CJEU shall be of the opinion that the mutual recognition principle should apply, it should be borne in mind that the mutual recognition principle only concerns the right to take up or to pursue a regulated profession in the same way as nationals of the host Member State.[23] Any applicant, regardless of his nationality, including citizens and residents of Danubia, is required to have prior authorisation in order to provide individual person transportation in Danubia.[24] If the Respondent intended to take up a regulated profession at issue, she should have firstly applied for granting a license and raise her arguments concerning mutual recognition in her application. The Facts of Case do not indicate that the Respondent applied for granting a license, or requested mutual recognition of her Moselian license, contrary to SmartDrive, even though its request was refused.[25]
22) Moreover, as held by the CJEU, it is for the national court to determine whether the evidence submitted by an applicant satisfies the conditions for pursuing a regulated profession in accordance with national provisions. Thus, it is not for the CJEU to determine that question by way of a preliminary ruling.[26] As mentioned above, the Respondent did not apply for granting a license or requested mutual recognition of her Moselian license, thus she had not provided Danubia with any evidence to be assessed. Therefore, it is not possible to determine whether the evidence submitted by the Respondent would have satisfied the conditions under the national legislation for granting the RTO license, nor the recognition of her Moselian license.
23) **Accordingly, an individual in the position of the Respondent may not rely on the principle of mutual recognition of her Moselian license in Danubia.**

[19] *Yellow Cab,* Case C-338/09, § 29, p. 311; *Grupo Itelevesa,* Case C-168/14, § 52, p. 352.
[20] *Grupo Itelevesa,* Case C-168/14, § 64, p. 354.
[21] *Commission v Italy,* Case C-110/05, § 59, p. 295.
[22] *Commission v. Denmark,* § 52, p. 423.
[23] *Beuttenmüller,* Case C-102/02, § 44, p. 252.
[24] Facts of Case, § 10, p. 6.
[25] Facts of Case, § 15, p. 6.
[26] *Beuttenmüller,* Case C-102/02, § 43, p. 252.

Question 3 (a)

Suggested answer: Directive 2020/7563 is to be interpreted to the effect that Octavia Linta's contractual relationship with SmartDrive is not one of employment in circumstances such as the ones described.

24) The Applicant hereby states that the Directive 2020/7563 is to be interpreted to the effect that the Respondent's contractual relationship with SmartDrive is not one of employment, as (i) the Directive 2020/7563 was not transposed at the time of the crime, hence the Directive 2020/7563 cannot be applied to horizontal relationship such as the one described and (ii) even if the Directive 2020/7563 is applicable, contractual relationship at issue does not fulfil criteria set therein to be reclassified.
25) Turning to the first argument, irrespective of whether the Respondent is considered an employee under the Directive 2020/7563, the directive was not transposed at the time of the crime. The Directive was adopted on 6 May 2020[27] with a two-year transposition period,[28] but it was not transposed by Danubia until 28 October 2022.[29] The contractual relationship commenced on 15 May 2022 when the Respondent started performing person transport in both Moselia and Danubia[30] and she was arrested on 16 October 2022.[31] Therefore, the Directive 2020/7563 had not been transposed at that time, within the transposition period.
26) Directives, which are not transposed within a two-year transposition period, may have only vertical direct effect, not horizontal direct effect.[32] In accordance with the principle of non-retroactivity and legal certainty, the Directive 2020/7563 should not be applied before its transposition into national law in situations, when certain new obligations may arise for private parties from the application of this Directive, which is prohibited according to case-law.[33] The reclassification of employment relationship and the resulting rights and obligations therefrom must be assessed, up to the said date, based on national and the EU law that preceded the implementation of this Directive.
27) Regarding the prohibited horizontal direct effect, the provisions of the Directive 2020/7563 may have a direct effect if they grant rights which the person may rely on against the state, not against private persons.[34] In fact, the Directive 2020/7563 does not grant any rights which the Respondent could exercise against the state. Moreover, the Respondent is not entitled to claim her rights arising from employment relationship against private persons, as it would create horizontal direct effect. The Applicant is of the opinion that the contractual relationship between SmartDrive and the Respondent cannot be considered an employment relationship in the absence of transposition.
28) Moreover, the reclassification of employment relationship does not reflect any general principle. Therefore, the Respondent cannot rely on effects of the general principle, which would have constituted horizontal direct effect, as provided in *Mangold* case.[35]
29) Turning to the second argument, to constitute employment relationship under the Directive 2020/7563, several criteria must be satisfied. In accordance with Arts. 4 and 5 thereof, the digital platform controls the performance of work with 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.[36]
30) Firstly, in the Respondent's case, despite the fact that SmartDrive sets the price for the drive,[37] the Respondent is entitled to grant discounts to passengers at any time.[38] Moreover, the passengers may give tips to the drivers, which form a significant part of drivers' income.[39] Based on these facts, SmartDrive does not solely determine the level of remuneration, as this remuneration can be modified by the drivers or the passengers. Even though SmartDrive exerts control over the platform, as the Applicant has already discussed in Q1, it does not control the remuneration itself.

[27] Facts of Case, § 17, p. 7.
[28] Facts of Case, § 19, pp. 7-8.
[29] Facts of Case, § 27, p. 9.
[30] Facts of Case, § 20, p. 8.
[31] Facts of Case, § 22, p. 8.
[32] *El Corte Inglé*, Case C-192/94, §§ 15-16, p. 216.
[33] *El Corte Inglé*, Case C-192/94, § 15, p. 216.
[34] *El Corte Inglé*, Case C-192/94, §§ 15-16, p. 216.
[35] *Mangold*, Case C-144/04, § 78, p. 271.
[36] Facts of Case, § 19, p. 7.
[37] Facts of Case, § 3, p. 5.
[38] Facts of Case, § 3, p. 5.
[39] Facts of Case, § 3, p. 5.

31) Secondly, according to the Facts of Case, SmartDrive does not set any binding rules, as the Respondent has a discretion to refuse the drives or to choose which drives to take. The limitation on number of refused tasks[40] does not constitute a specific binding rule, rather a restriction on the freedom to organise one's work, *e.g.,* to accept or refuse tasks. The drivers enjoy some form of freedom to choose the tasks they wish to perform, unlike the employees, who must perform the task once it is assigned to them by the employer, whether they like it or not.
32) Moreover, the Applicant is of the view that specific binding rules should be assessed on the extent that the rules are binding to all drivers, *e.g.*, dress-code, assigned routes, *etc*. As a business, SmartDrive has vital and reasonable interest in securing the prescribed standards *vis-à-vis* the customer. It is essential for SmartDrive to ensure that the drivers are available at any time and in all areas, to avoid that the service will not be provided because of the lack of drivers as a result of the driver's refusal to provide the service. Therefore, the provision of sufficient number of drivers providing service is essential to ensure the proper performance of that service.[41]
33) Thirdly, it is not sufficient to conclude that the mere fact that passengers may submit complaints[42] represents supervising the performance of work, or verifying the quality of the results of the work, and it does not allow for a detailed insight into worker's performance. Genuine self-employed persons are themselves responsible *vis-à-vis* their customers for how they perform their work and the quality of their outputs. Insufficient quality of a driver will be reflected in the choice of customers. The SmartDrive's app will still show even worse drivers, with few exceptions, it's only up to the customers whether they choose them or not.
34) Abovementioned definition should be interpreted in light of the *Yodel* case. The person is classified as a worker, where that person is not afforded discretion (a) to use subcontractors, (b) to accept or not accept the various tasks, (c) to provide his service to any third party, and (d) to fix his own working hours and to tailor his time to suit his personal convenience.[43]
35) In the Respondent's case, similarly to the *Yodel* case, the drivers concluded contracts as independent service providers,[44] the contracts were not exclusive,[45] the drivers could have refuse the drive at any time.[46] Unlike in the *Yodel* case, the drivers using SmartDrive's app are free to determine their working hours,[47] while the couriers for Yodel must provide service during the specific time slots.[48] While in the *Yodel* case, right to refuse tasks is an absolute right,[49] the drivers using SmartDrive's app are sanctioned for refusal of certain number of drives.[50] However, SmartDrive exercises only limited control over the choice of refused tasks, on the basis of a purely objective criterion.[51] Moreover, as already mentioned in § 32 above, securing sufficient number of drivers providing service is essential in order to ensure the proper performance of the service.[52] Therefore, the Applicant is of the view that such restriction does not constitute a relationship of subordination between SmartDrive and the Respondent. Based on the abovementioned, the Respondent fulfils all of the criteria mentioned in the *Yodel* case.[53]
36) **Accordingly, Directive 2020/7563 is to be interpreted to the effect that Respondent's contractual relationship with SmartDrive is not one of employment in circumstances such as the ones described.**

Question 3 (b)

Suggested answer: An individual in the position of Octavia Linta may not rely on the Directive 2020/7563 in her situation to shift criminal liability to another private party by virtue of Art. 219 of the Danubian Criminal Code.

[40] Facts of Case, § 5, p. 5.
[41] *Yodel*, Case C-692/19, § 42, p. 509.
[42] Facts of Case, § 5, p. 5.
[43] *Yodel*, Case C-692/19, § 45, p. 509.
[44] Facts of Case, § 6, p. 5.
[45] Facts of Case, § 6, p. 5.
[46] Facts of Case, § 5, p. 5.
[47] Facts of Case, § 36, p. 10.
[48] *Yodel*, Case C-692/19, § 42, p. 509.
[49] *Yodel*, Case C-692/19, § 40, p. 508.
[50] Facts of Case, § 5, p. 5.
[51] *Yodel*, Case C-692/19, § 39, p. 508.
[52] *Yodel*, Case C-692/19, § 42, p. 509.
[53] *Yodel*, Case C-692/19, § 45, p. 509.

37) The Applicant develops two arguments why the Respondent may not shift the criminal liability to another private party. This question presumes an affirmative answer to the Q3a, but the Applicant states, nevertheless, that such reclassification does not lead to shifting of the liability, as (i) the provisions of the Directive 2020/7563 were not transposed and as the CJEU affirmed in its case-law, directives do not have direct effect on which the Respondent could rely and (ii) the Respondent has not satisfied the conditions of employment required to invoke Art. 219 of the Danubian Criminal Code.
38) Turning to the first argument, directives addressed to the Member States have to be transposed into national law before any rights or obligations will arise between individuals. The Directive 2020/7563 was not implemented into national law within the transposition period, which means that the Directive was not implemented at the time of the Respondent's offence,[54] as explained above.
39) In case the Respondent would successfully invoke Directive 2020/7563 and transformed the legal relationship into one of an employment,[55] the resulting situation would ultimately lead to new obligations being imposed upon SmartDrive. These obligations would be primarily the shifting of a criminal liability to the employer, as well as the national employment obligations, along with liability for ensuring compliance of its drivers with any relevant regulations in all Member States.[56] However, the CJEU acknowledged this as prohibited in its case-law,[57] which leads to the conclusion that the reclassification of the relationship and consequent shifting of the criminal liability is impossible in the Respondent's case.
40) Turning to the second argument, as mentioned in the previous paragraphs, the arising obligations for SmartDrive make it impossible to transform the relationship to that of an employment which results in inapplicability of the Danubian Criminal Code.
41) Even if the relationship had been transformed, the Applicant argues the Art. 219 of the Danubian Criminal Code is inapplicable. The provision describes liability of employer for the offences committed '*...in Danubia by an employee acting in the course of employment...*'.[58] This attribute was not fulfilled at the time of the offence, as the Respondent travelled outside the zone where SmartDrive operated and performed taxi service alone, as an independent service provider.
42) Since the operating zone of SmartDrive is the territory of Moselia, while the application for a license in Danubia is pending, the drivers using SmartDrive should not have crossed to Danubia.[59] The app should not have been working in an unauthorised territory, had SmartDrive applied duties of care needed to prevent illegal activity from occurring.
43) Hence, while it is possible under the Danubian law to shift criminal liability to the employer, as the offences of the employee are only attributable to the employer,[60] this provision cannot affect the liability of the Respondent herself. The employment relationship was absent, as mentioned in previous paragraphs and settled in the Applicant's response to Q3a. No new obligations can still be created from a directive that was not transposed, even after transposition period expired. However, even if the employment relationship existed at the time of the offense, the fact that the Respondent performed service outside the zone where SmartDrive operated, constitutes activity performed outside the course of employment, which precludes applicability of the Art. 291 of the Danubian Criminal Code.
44) Even if the relationship between the Respondent and SmartDrive is transformed by the Directive 2020/7563, it does not follow *ipso facto* that any activity Respondent performs while driving a taxi constitutes an activity in the course of employment, for the purpose of shifting criminal liability.
45) The Respondent argues that the absence of duties of care of SmartDrive could result in the Respondent performing work outside the main operation zone and commit an offense under Danubian law. However, the Respondent acted as a self-employed service provider, acting alone and without any instruction from the employer as to what drives are permitted or prohibited. Nevertheless, the Respondent performed drives, in the absence of any instruction, despite SmartDrive's app not being authorised by the competent authority in Danubia, with the Respondent knowing she is not authorised personally. Thus, the shift of criminal liability to the employer is baseless and unlawful under the EU law.

[54] Facts of Case, § 27, p. 9.
[55] Facts of Case, § 19, p. 7.
[56] *Hansen,* Case C-326/88, § 19, p. 210.
[57] *El Corte Inglé,* Case C-192/94, § 15, p. 216.
[58] Facts of Case, § 14, p. 6.
[59] Facts of Case, § 8, p. 6.
[60] Facts of Case, § 14, p. 6.

46) **Accordingly, the Respondent may not rely on an unimplemented directive to shift criminal liability to an employer, in the absence of work conducted in the course of actual employment.**

Question 4

Suggested answer: SmartDrive may 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.

47) The Applicant develops three arguments: (i) SmartDrive's right to commercial property protected by the CFREU is violated, (ii) the principle of proportionality according to Art. 5(3) TEU is not satisfied and (iii) the chosen legal bases do not authorise adoption of the Directive 2020/7563. These prevent imposition of an employment obligation in a way the Directive presupposes.

48) Regarding the first argument, SmartDrive may rely on the protection of commercial property, based on Art. 17 of the CFREU, as the CFREU is applicable according to Art. 51 thereof and case-law of the CJEU.[61] The role of the CFREU is also supported by its legal value, which is the same as the Treaties.[62]

49) The right to property and its protection is guaranteed in Art. 17(1) of the CFREU. The Applicant considers the limitations upon this right incompatible with contractual autonomy[63] and a freedom to conduct a business under Art. 16 of the CFREU. Considering the SmartDrive's app as a part of the business's property and the considerable changes that would arise from different treatment of the drivers using it, the right to property is infringed upon, along with the right to conduct a business.

50) SmartDrive as an intermediary offers an app for the drivers to offer their services through. These parties have chosen their legal relationship in a way to benefit both, SmartDrive as a business model and the drivers as service providers. Imposition of an employment obligation under the Directive 2020/7563 is a disproportionate restriction to the protection of contractual autonomy. Not only the specific rights and obligations, but also the very way of conducting a business and managing the app would change for SmartDrive.

51) Considering Art. 52(1) of the CFREU, any limitations on the rights therein need to be necessary, must connect to objectives of general interest and must be subject to the principle of proportionality. In this context, the Applicant deems the conditions not satisfied, in violation of Art. 52(1) of the CFREU.

52) Regarding the second argument, the EU should adhere to the principles of subsidiarity and proportionality.[64] Out of these, the Directive 2020/7563 does not comply with the principle of proportionality, as explained herein and contrary to the Explanatory Memorandum.

53) The Applicant acknowledges the risks set out in the Explanatory Memorandum[65] and agrees that the principle of subsidiarity is upheld, and the enforcement of rules is more effective on the EU level. Nevertheless, it is necessary to point out Art. 153(2)(b) TFEU, as one of the legal bases for the Directive, in its relation to medium-sized and small undertakings. This provision states that directives must avoid imposing constraints, be it administrative, financial or legal, that would hold back the development of small and medium-sized undertakings.[66]

54) However, the precondition to avoid imposing constraints is not satisfied in context of the impact assessment. Should the reclassification take place, digital labour platforms would experience an increase of costs up to 4.5 billion EUR.[67] Many of the small and medium-sized undertakings would not be able to bear the increase, which could result in their operations shutting down, while other, bigger platforms would have to increase the costs of their services which would form a strain on consumers.[68] Moreover, this leads to the elimination of competition to the advantage of large companies. Another factor proving the reclassification as disproportionate is the negative impact on people working through platforms in the form of lower wages for those working above minimum wage.[69]

[61] *Åkerberg Fransson*, Case C-617/10, § 17, p. 337.
[62] Art. 6 TEU, p. 24.
[63] Facts of case, § 6, p. 5.
[64] Art. 5 TEU, pp. 23-24.
[65] Explanatory Memorandum, p. 176.
[66] See also Explanatory Memorandum, p. 175.
[67] Explanatory Memorandum, p. 179.
[68] Explanatory Memorandum, p. 179.
[69] Explanatory Memorandum, p. 179.

55) Turning to the third argument concerning the legal basis, the Directive 2020/7563 is based on Arts. 91 and 153 TFEU. The former concerns the common transport policy, while the latter regards support of the Member States in social policies. Art. 153(1)(b) TFEU as the legal basis for adoption of the Directive is debatable at best. The provision concerns improvement of the working conditions by means of directives, however the Applicant disagrees that a reclassification of the relationship would improve the conditions in which the self-employed service providers work. The formation of an employment relationship imposes rights and obligations on parties that chose not to have them in the first place.
56) According to the Explanatory Memorandum, the reclassification could help the workers increase their wages, however the sum is not enough to greatly improve their working conditions.[70] The Applicant is of the opinion, the accrued costs and obligations for the undertakings would further lead to a worse working situation for the service providers and the platforms as well.
57) It is unclear what other tangible benefits would the employees of SmartDrive attain by the reclassification. The possibility of shifting the liability does not improve the working conditions in any way and while considering the aforementioned problems, the employees could be laid off or the platforms would need to stop their operation due to the increased costs.
58) Notwithstanding the suggested answer to Q3a, the Applicant considers the improvement of working conditions an important policy. However, the obligations and conditions on working environment from the Directive should be imposed on employment relationships, not a contractual relationship between an intermediary and a self-employed person that voluntarily agreed upon such contract, specifically in order not to enter employment relationship. In this case, it would not be an improvement of working conditions, rather an extension of the scope to relationships other than employment, which would violate 153(1)(b) TFEU.
59) Moreover, the Directive 2020/7563 reclassifying all similar relationships to those of employment immediately upon transposition is not a *'minimum requirement for gradual implementation'* according to Art. 153(2)(b) TFEU. The Directive does not, in fact, provide any minimal requirement nor gradual implementation, as the reclassification is fixed and effective in its entirety upon fulfilment of certain criteria set therein, without intertemporal provisions or any introduction of obligations to be implemented gradually. Therefore, the Directive interfered with the relationships in a way that is not allowed by primary law.
60) **Accordingly, the Directive 2020/7563 was disproportionate and was adopted on an invalid legal basis. Thus, SmartDrive may rely on the protection of commercial property and the right to conduct a business to avoid an employment obligation.**

Question 5

Suggested answer: Octavia Linta is not entitled to claim compensation for breach of the principle of equal pay for equal work as set out in Art. 4 of Directive 2006/54 and Art. 157(1) TFEU.

61) The Applicant hereby argues that (i) the night drives are not of the same value as the day drives, therefore, the principle of equal pay for equal work is not applicable, (ii) the evidence submitted by the Respondent does not constitute facts that indicate indirect discrimination, (iii) in case the Court is of the opinion that principle of equal pay for equal work is applicable, SmartDrive's policy on remuneration is objectively justified, (iv) measures proposed by the Respondent are disproportional and that (v) the burden of proof had not been discharged.
62) Art. 157(1) TFEU and Art. 4 of the Directive 2006/54 prohibit both direct and indirect discrimination[71] as well as, set out the definition for both of these in Art. 2(1) therein.[72]
63) The direct discrimination is defined as '*where one person is treated less favourably on the grounds of sex than another is, has been or would be treated in a comparable situation'*.[73] SmartDrive's app does not distinguish male and female drivers, as SmartDrive's policy is binding on all drivers, regardless of their sex. Thus, the situation at issue cannot be regarded as direct discrimination.
64) The indirect discrimination is defined as '*where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving*

[70] Explanatory Memorandum, p. 178.
[71] Art. 4 of Directive 2006/54, p. 110.
[72] Art. 2(1) of Directive 2006/54, p. 109.
[73] Art. 2(1)(a) of Directive 2006/54, p. 109.

that aim are appropriate and necessary'.[74] The Applicant excludes the indirect discrimination in the following arguments.

65) Turning to the first argument, the terms "equal work" and "work of equal value", as set out in Art. 157(1) TFEU, are exclusively concerned with the nature of work actually performed, as settled by the case-law.[75] The Applicant argues that the work actually performed during the day is not of the same value as the one performed during the night, as the drivers performing work at night bear the risks connected with performing such work, *e.g.*, transporting rowdy passengers more often, performing more exhausting work at the expense of their sleep, hence having a negative impact on driver's health.

66) Therefore, as the nature of work is not the same and nor is the value, the remuneration for these drives is similarly not the same, but higher and the principle of equal pay for equal work is not applicable to the situation at issue.

67) Turning to the second argument, regarding the particular disadvantage, the Applicant argues the statistical evidence submitted by the Respondent does not constitute facts from which it may be presumed that there has been indirect discrimination. The statistical evidence shows a significant difference in the remuneration of the female drivers compared to the male ones. As the Facts of Case state, the difference may be attributed to three factors in particular.[76]

68) Relating to the first presented factor, some customers tend to pick male drivers with late model sporty cars. The Applicant is not familiar with any proportional way how SmartDrive may solve this issue without restricting the customer's right to choose their driver and not suffer a decrease of its profit at the same time.

69) Relating to the second presented factor, female drivers are often picked by female customers who do not tip as much. Alike, as regarding the first factor, the Applicant is not familiar with any proportional way how SmartDrive may solve this issue, as the granting of the tip is wholly up to the customer's discretion, not SmartDrive's.

70) Therefore, regarding the Applicant's arguments on the first and second presented factor, it can be concluded that the difference in remuneration is affected in significant manner by factors that cannot be attributed to SmartDrive's policy, as they result from the consumer's preferences and choices on vehicles selected and amount of tips given.

71) Relating to the third presented factor, female drivers end up being penalised more, as they are more reluctant to drive groups of rowdy male customers. The Applicant points out, it should be borne in mind that SmartDrive's policy is *per se* non-discriminatory. The additional remuneration for carrying out the night drives is the same for any driver, regardless of their sex, who is willing to perform the drive throughout the night-time, *ergo* willing to bear the additional risks same for all sexes connected with such.

72) Furthermore, all three of these factors are still only assumed[77] and the possibility of the difference in remuneration being caused by other factors, *e.g.*, the place of performance, cannot be excluded.

73) Turning to the third argument, in case the Court is of the opinion, that the work actually performed is of the same value and should be remunerated in the same way, the Applicant points out that the remuneration could be different, if the difference in remuneration itself is objectively justified, as stated in the case *K v Tesco*.[78]

74) Following the above mentioned, the Applicant considers SmartDrive's policy as proportional and objectively justified, as the night drives constitute additional risks and personal expenses, *e.g.*, transporting rowdy passengers more often, repression of their safety concerns and *sensu lato* their health. Hence, there is a natural necessity of motivating the drivers to carry out the night drives, as no rational driver would take the connected risks and expenses in case they would be remunerated in the same way as for the drives carried out throughout the day. Therefore, SmartDrive's policy is objectively justified, as settled by the case-law.[79]

75) Turning to the fourth argument, regarding the measures proposed by the Respondent,[80] the Applicant argues, as the factors responsible for the difference in remuneration are *de facto* unknown and still being only assumed, as stated in § 72 of the Applicant's suggested answer to Q5, such measures would not be

[74] Art. 2(1)(b) of Directive 2006/54, p. 109.
[75] *K v Tesco*, Case C-624/19, §§ 27-30, p. 600.
[76] Facts of Case, § 37, p. 10.
[77] Facts of Case, § 37, p. 10.
[78] *K v Tesco*, Case C-624/19, §§ 27-30, p. 600.
[79] Cf. mutatis mutandis *Danfoss*, Case C-109/88, § 2, p. 206.
[80] Facts of Case, § 40, p. 10.

able to guarantee the elimination of difference in remuneration and would with high probability lead to discrimination of the male drivers, thus, they would be disproportional.

76) Turning to the fifth argument, relating to burden of proof, as set out in case *Danfoss*, the submission of statistical evidence that may indicate indirect discrimination can reverse the burden of proof.[81] However, the situation it issue differs, as the evidence submitted by the Respondent is uncertain, obscure and vague, it cannot constitute nor indicate facts from which the indirect discrimination may be presumed. Therefore, contrary to the case *Danfoss*,[82] the burden of proof cannot be discharged.

77) **Accordingly, the Respondent is not 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**.

[81] *Danfoss*, Case C-109/88, §§ 15-16, p. 203.
[82] *Danfoss*, Case C-109/88, §§ 15-16, p. 203.