

Written Observations of the Respondent

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.	<i>Id est</i> , that is
e.g.	<i>Exempli gratia</i> , for example
etc.	<i>Et cetera</i> , 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 Inglés*
5. Case C-194/94 *CIA Security*
6. Case C-168/95 *Arcaro*
7. Case C-102/02 *Beuttenmüller*
8. Case C-144/04 *Mangold*
9. Case C-338/04 *Placanica*
10. Case C-110/05 *Commision v. Italy*
11. Case C-338/09 *Yellow Cab*
12. Cases C-297/10 and C-298/10 *Hennigs*
13. Case C-617/10 *Åkerberg Fransson*
14. Case C-168/14 *Grupo Itelevesa*
15. Opinion of Advocate General Szpunar in C-434/15 *Elite Taxi*
16. Case C-434/15 *Elite Taxi*
17. Case C-320/16 *Uber*
18. Case C-41/17 *Isabel González Castro*
19. Case C-390/18 *Airbnb Ireland*
20. Case C-692/19 *Yodel*
21. Opinion of Advocate General Szpunar in C-62/19 *Star Taxi*
22. Case C-62/19 *Star Taxi*
23. Case C-501/18 *BT*
24. Case C-624/19 *K v Tesco*

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 RESPONDENT TO THE REFERRED QUESTIONS

Question 1

Suggested answer: Art. 3 of Directive 2000/31, Art. 16 of the Directive 2006/123 and Art. 56 TFEU 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 States to obtain a licence.

- 1) The Respondent hereby states that the legislation is precluded based on the fact that (i) SmartDrive is an ISS provider, therefore the provisions related to free movement of services apply, thus, (ii) Danubia cannot require licences as a requirement in a coordinated field under the Directive 2000/31 and (iii) in any case, the licensing requirement disproportionately limits rights protected by Directive 2006/123 and Art. 56 TFEU.
- 2) Turning to the first argument, SmartDrive as an ISS provider satisfies the following conditions: (a) a service is provided for remuneration, (b) at a distance, (c) by electronic means and (d) at the individual request of recipient of services.¹ Based on the settled case-law, another condition must be met where (e) an intermediation service cannot form an integral part of transport service.²
- 3) Firstly, SmartDrive satisfies condition that service is provided for remuneration, since persons wishing to make a drive are using the SmartDrive's app for free and it is the drivers that pay service fees³ as also concluded in the case *Star Taxi*.⁴
- 4) Secondly, SmartDrive satisfies the condition that the service is provided at a distance, since it is provided without the parties being simultaneously present at the same time, through the SmartDrive's app.⁵
- 5) Thirdly, SmartDrive satisfies the condition that the service is provided electronically, since the drivers and persons wishing to make a journey are put in touch via the SmartDrive's app,⁶ without the intermediation service provider being present.⁷
- 6) Fourthly, SmartDrive satisfies the condition that the service is provided at the individual request of recipient of service, since the taxi drivers make a request by connecting to the app, indicating that they are available. On the other hand, passengers wishing to make a journey make an individual request by ordering a taxi.⁸
- 7) Fifthly, SmartDrive cannot form an integral part of an overall transport service, therefore it remains an ISS provider. Regarding the integral part of an overall service, it must be assessed whether (i) the drivers would not have been providing transport services and passengers would not have booked those drivers, and (ii) the company exercised decisive influence over the conditions under which such services were provided by the drivers.⁹
- 8) Unlike in the case *Uber*, SmartDrive is used by authorised taxi drivers¹⁰ who may sign up for any other smartphone application.¹¹ SmartDrive's app is merely one of multiple ways of acquiring customers, not one which the drivers are obliged to use. Therefore, the authorised drivers are not dependent on the app. The important component to determine is also the exercise of a decisive influence over the conditions for the performance of the transport services.¹² SmartDrive enters into contracts with drivers as independent service providers, *i.e.*, drivers are recipients of service.¹³ Moreover, SmartDrive does not select the taxi driver, nor determine the fares, as the drivers may grant discounts at any time, therefore they can modify

¹ Art. 1(1)(b) of the Directive 2015/1535, p. 155.

² *Star Taxi*, Case C-62/19, § 49, str. 554.

³ Facts of Case, § 4, p. 5.

⁴ *Star Taxi*, Case C-62/19, § 45, p. 553.

⁵ *Star Taxi*, Case C-62/19, § 46, p. 554.

⁶ Fact of the Case, § 2, p. 5.

⁷ *Star Taxi*, Case C-62/19, § 46, p. 554.

⁸ *Star Taxi*, Case C-62/19, § 47, p. 554.

⁹ *Uber*, Case C-320/16, § 21, p. 412.

¹⁰ Facts of Case, § 7, p. 6.

¹¹ Facts of Case, § 6, p. 5.

¹² *Elite Taxi*, Case C-434/15, § 39, p. 390.

¹³ Facts of Case, § 6, p. 5.

the fare for the journey. The discounts are also shown in the list of available drivers,¹⁴ therefore the drivers determine the price since the beginning through discounts. Even the fact that SmartDrive collects payments from passengers¹⁵ does not justify exercise of control.¹⁶ Rather, it should be considered as a tool for securing transactions between drivers and passengers. These two services are not inherently linked, consequently service provided by SmartDrive does not form an integral part of overall transport service.

- 9) **Based on the abovementioned, the Respondent states that SmartDrive is an ISS provider. Accordingly, the freedom to provide services under Art. 56 TFEU, which prohibits the performance of service to be subjected to prior authorization applies.**
- 10) Following from the first argument, Moselia recognizes SmartDrive as provider of services under the Directives 2000/31 and 2006/123.¹⁷ Regarding Art. 3(2) of the Directive 2000/31, Danubia shall not, for reasons falling within the coordinated field, restrict the freedom to provide ISS from another Member State. The coordinated field shall be understood as any requirements laid down in Danubia, applicable to ISS provider or ISS, regardless of whether they are general nature or specifically designed for ISS.¹⁸ The coordinated field concerns requirements with which the service provider has to comply in respect of the taking up of the activity of an ISS.¹⁹ In particular, Danubia adopted authorisation scheme under which the transport services may be performed only by holders of a licence,²⁰ which is difficult to obtain. Although the authorisation scheme in Danubia is of a general nature, it nevertheless does not exclude the application of Art. 3(2) of the Directive 2000/31. Such authorisation scheme may not restrict the freedom to provide ISS from another Member State, pursuant to Art. 3(2) of the Directive 2000/31.
- 11) Moreover, the Directive 2000/31 sets several exceptions from that prohibition, such as public policy, the protection of public health, public security, the protection of consumers, the measures are taken against a certain ISS provider that prejudice these objectives and must be proportionate.²¹ The authorisation scheme in Danubia cannot be justified by any of the abovementioned objectives, as the number of taxi drivers should be regulated by the market, not by Danubia. Therefore, taking into account the principle of free movement of ISS between Member States established in Art. 3 of the Directive 2000/31,²² Danubia is obliged to recognize SmartDrive as an ISS provider. Otherwise, the principle of legal certainty and free movement of ISS could be violated.
- 12) Under Art. 3(4)(b) of the Directive 2000/31, Danubia shall notify measures related to the restrictions on freedom to provide ISS. The failure to fulfil this obligation by Danubia²³ constitutes unenforceability of national provisions.²⁴ It means that non-notified measures as those at issue are precluded by Art. 3(4) of the Directive 2000/31.
- 13) Turning to the third argument, in case Art. 3(4)(b) of the Directive 2000/31 cannot be applied, restrictions on intermediary services, as are those at issue, still fall within the scope of the Directive 2006/123. There is no reason to exclude those services under Art. 2(2)(d) of the Directive 2006/123,²⁵ as SmartDrive is not an integral part of the transport service, as argued above.²⁶ Therefore, Art. 16 of the Directive 2006/123 still mandates Danubia to ensure free access to and exercise of a service within its territory, unless the exceptions set therein are met. Requirements restricting the free movement of services shall respect principles: (a) non-discrimination, (b) necessity, and (c) proportionality. Furthermore, as stated in Art. 16(2) of the Directive 2006/123, Member States may not restrict the freedom to provide service by imposing, *inter alia*, an obligation on the provider to obtain an authorisation from their competent authority. In relation to market management system, the Respondent considers this reason as purely economic reason.

¹⁴ Facts of Case, § 3, p. 5.

¹⁵ Facts of Case, § 4, p. 5.

¹⁶ *Airbnb Ireland*, Case C-390/18, § 62, p. 496.

¹⁷ Facts of Case, § 1, p. 5.

¹⁸ Art. 2(h) of the Directive 2000/31, p. 98.

¹⁹ Art. 2(h)(i) of the Directive 2000/31, p. 98.

²⁰ Facts of Case, § 10, p. 6.

²¹ Art. 3(4)(a) of the Directive 2000/31, pp. 98-99.

²² *Star Taxi*, Opinion of AG Szpunar in Case C-62/19, § 58, p. 520.

²³ Facts of Case, § 10, p. 6.

²⁴ *Airbnb Ireland*, Case C-390/18, § 96, p. 501.

²⁵ *Star Taxi*, Opinion of AG Szpunar in Case C-62/19, § 89, p. 524.

²⁶ *Grupo Itelevesa*, Case C-168/14, § 46, p. 352.

- 14) Consequently, the limitation of licences to a number corresponding to the estimated demand for taxi services, as a purely economic reason, cannot constitute an overriding reason in the public interest.²⁷ Therefore, the regulation at issue imposes unjustified burdens and costs on providers of the service. Even if the Applicant considers such requirements as the means to protect the consumers, it fails the proportionality test, as there are less restrictive means than limiting the number of licensed drivers to avoid an overflow of service providers. Setting limits on number of authorised drivers may have the opposite effect, as the quality of services may diminish and the fares for journey may increase, as the result of an artificial regulation of situation on the market. Therefore, the restriction on free movement of services as introduced by Danubia²⁸ cannot be in interest of consumers.
- 15) **Accordingly, Art. 3 of Directive 2000/31, Art. 16 of the Directive 2006/123 and Art. 56 TFEU preclude the Danubian PTR 2002.**

Question 2

Suggested answer: Octavia Linta may 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 Respondent hereby presents why relying on mutual recognition of her PPT license is possible and bases its suggested answer on principles concerning the fundamental freedoms of the internal market, an area without internal frontiers based on Art. 26(2) TFEU. For these reasons, three arguments will be submitted (i) the mutual recognition in Art. 53 TFEU shall be applied, (ii) the Respondent's freedom of establishment is applicable even in the transport sector and (iii) the restrictions imposed on the Respondent are prohibited in the context of settled case-law.
- 17) Turning to the first argument, the Respondent, as an independent service provider using a platform to offer services, enjoys the free movement of services under Art. 56 TFEU *et seq.* It should be noted that these provisions of the Treaty explicitly prohibit restrictions imposed on this freedom by the Member States. Restrictions which could be imposed must be in accordance with Art. 51 and Art. 52 TFEU.
- 18) Most importantly, the permissible restrictions must be appropriate, necessary and proportionate to the objective the Member State intends to achieve.²⁹ Not recognizing diplomas, licenses and certificates which were awarded by other Member States poses a restriction on the fundamental freedom,³⁰ which must be assessed in the light of appropriateness, necessity and proportionality.³¹
- 19) Turning to the second argument, if the CJEU shall be of the opinion that the Respondent provides services in the field of transport and the provisions on services won't be applicable,³² the case must be assessed in light of the freedom of establishment, which is directly applicable to transport sector.³³ This is based on the fact that the Respondent found out about the higher rates in Danubia and most of the Respondent's activity occurred there from August onwards,³⁴ with the intent to establish within Danubian territory and perform drives there permanently. Thereafter, the Respondent will be established in more than one Member State, in accordance with provisions on the freedom of establishment, namely Art. 49 TFEU.
- 20) The Respondent points out Art. 53(1) TFEU, regarding the principle of mutual recognition in the freedom of establishment. Principally, the mutual recognition of Respondent's PPT license should be granted based on this provision, which allows the possibility of pursuing a profession in a Member State other than that in which the individuals acquired their qualifications. Moreover, the CJEU stated that a general system of recognition of diplomas is intended to facilitate the pursuit by EU citizens of all professional activities, which in the host Member State are dependent upon the completion of a particular education and training.³⁵
- 21) Considering settled case-law, the CJEU affirmed that mutual recognition does not imply that diplomas awarded by other Member States certify an education and training similar or comparable to that required in

²⁷ *Yellow Cab*, Case C-338/09, § 51, p. 313.

²⁸ Facts of Case, §§ 11-12, p. 6.

²⁹ *Commission v. Italy*, Case C-110/05, § 59, p. 295.

³⁰ *Beuttenmüller*, Case C-102/02, § 36, p. 250.

³¹ *Grupo Itevevesa*, Case C-168/14, §§ 71-72, 76, p. 355.

³² Art. 58 TFEU, p. 46.

³³ *Yellow Cab*, Case C-338/09, § 33, p. 311.

³⁴ Facts of Case, § 21, p. 8.

³⁵ *Beuttenmüller*, Case C-102/02, § 36, p. 250.

the host Member State.³⁶ However, certain differences in the organisation or content of training acquired in another Member State are not sufficient to justify a refusal to recognise the professional qualification concerned.³⁷ If Danubia deemed Moselian PPT license and the Danubian RTO license substantial enough to question the Respondent's capacity to offer a person transport within Danubia, there were compensatory measures available under Art. 4 of the Directive 89/48 concerning mutual recognition, as cited in § 52 of case *Beuttenmüller*.³⁸

- 22) Turning to the third argument, under Danubian legislation, licenses are only granted after an existing license becomes available or a new license is issued.³⁹ The application process also includes an assessment of the driver's experience as a full-time taxi driver within Danubia, as a means of awarding priority to the applicants.⁴⁰ The application process is impossible to satisfy for taxi drivers from other Member States, as no one in Danubia may perform full-time taxi transport without the RTO license.⁴¹ This requirement for awarding priority has a dissuasive effect on taxi drivers from other Member States.⁴²
- 23) The CJEU affirmed that the requirement of an establishment or a seat before gaining an authorisation and commencing a service in the host Member State constitutes a barrier to the exercise of the aforementioned freedom.⁴³ The Respondent, to have a chance of gaining the RTO license, would need to move to Danubia⁴⁴ before becoming eligible for the license on an equal basis with Danubian residents. This is prohibited, even if the legislation does not require the establishment *expressis verbis*, but implies the need by affording preferential treatment to service providers already established within the Member State.⁴⁵ This, in the light of mentioned case-law, is a restriction on the fundamental freedom of establishment which is disproportionate.⁴⁶
- 24) Furthermore, even if Danubia controlled the market with the RTO licenses with an objective of consumer protection in mind,⁴⁷ it is necessary to point out that attainment of such objectives must be appropriate, necessary and proportionate, as argued above.⁴⁸ However, the Respondent still deems such a restriction purely economic one, which cannot constitute an overriding reason of public interest.⁴⁹ The Member State could have attained the objective by introducing transparent, reasonable and proportionate rules for individuals,⁵⁰ or compensatory measures to recognize the Moselian PPT license. However, no measures were adopted by Danubia. Due to absence of such measures, the existence of disproportionate restrictions leads the Respondent to depend solely on mutual recognition to ensure free movement under the TFEU.
- 25) Finally, regarding the Applicant's opinion in § 34 of Facts of Case, the Respondent disagrees with the remark that under the case *Commission v. Denmark*, Member States are not required to completely open national markets to non-resident hauliers within unharmonized area like international transport. The Respondent states that this does neither preclude nor limit the application of general principles of the EU law, nor the rule of mutual recognition as one of the essential rules regarding the fundamental freedoms of the internal market.
- 26) **Accordingly, an individual in the position of the Respondent may rely on the principle of mutual recognition of the PPT license under Art. 53(1) TFEU.**

Question 3 (a)

Suggested answer: Directive 2020/7563 is to be interpreted to the effect that Octavia Linta's contractual relationship with SmartDrive is one of employment in circumstances such as the ones described.

³⁶ *Beuttenmüller*, Case C-102/02, § 52, p. 254.

³⁷ *Beuttenmüller*, Case C-102/02, § 52, p. 254.

³⁸ *Beuttenmüller*, Case C-102/02, § 52, p. 254.

³⁹ Facts of Case, § 11, p. 6.

⁴⁰ Facts of Case, § 12, p. 6.

⁴¹ Facts of Case, § 10, p. 6.

⁴² *Yellow Cab*, Case C-338/09, § 37, p. 312.

⁴³ *Yellow Cab*, Case C-338/09, § 39, p. 312.

⁴⁴ Facts of Case, § 12, p. 6.

⁴⁵ Facts of Case, § 12, p. 6.

⁴⁶ *Yellow Cab*, Case C-338/09, § 41, p. 312.

⁴⁷ Facts of Case, § 15, p. 6.

⁴⁸ § 11 and 14 of Q1.

⁴⁹ *Yellow Cab*, Case C-338/09, § 51, p. 313.

⁵⁰ *Commission v. Italy*, Case C-110/05, § 67, p. 296.

- 27) The Respondent hereby states that the Directive 2020/7563 is to be interpreted to the effect that Respondent's contractual relationship with SmartDrive is one of employment in circumstances such as the ones described based on (i) contractual relationship fulfilling the criteria set in the Directive 2020/7563, and (ii) the Respondent relying on the Directive 2020/7563, notwithstanding that Member State in fact failed to transpose it.
- 28) Turning to the first argument, classification as an independent service provider under national law does not prevent person to be considered as a worker.⁵¹ The definition of platform worker was adopted in the Directive 2020/7563. The employment relationship under the Directive 2020/7563 is defined as a contractual relationship between digital labour platform that controls the performance of work and individual performing platform work. Therefore, despite the fact that the Respondent entered into contract as an independent service provider, she may be considered a worker under EU law.
- 29) 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.⁵² It follows from the wording of the Article that the conditions are alternative.
- 30) SmartDrive sets the price for a drive, but the driver may grant discount to passengers at any time,⁵³ which could be considered a control over the price. On the contrary, the Respondent is of the view that giving discounts is not a feasible option for drivers, as SmartDrive charges drivers with a fee resulting from the fare as calculated by the app (before discount is given).⁵⁴ Even though the drivers are theoretically given a discretion to modify the fare, any discount is to the detriment of the driver, hence it is unlikely that driver would exercise that discretion.⁵⁵
- 31) In relation to the argument that the passengers give tips to the drivers,⁵⁶ it is irrelevant for the assessment of the employment relationship at issue, as it is wholly in discretion of passengers what amount of tips they give to the drivers. Moreover, tips are not included in the overall price, from which the service fee is deducted.⁵⁷
- 32) Based on the abovementioned, the Respondent states that it is undeniable that neither discounts, nor tips can influence the fact that SmartDrive determines the price. The situation at issue differs from the Airbnb case, where platform at most provides the host an optional tool for estimating their rental price, based on the market averages taken from the platform, but leaving the responsibility for setting the price to the host.⁵⁸ Moreover, SmartDrive determines the level of remuneration which the drivers are paid by SmartDrive after the deduction of service fees. This needs to be distinguished from the control over the price for service as argued in Q1. The price for a drive is merely set by the driver, not SmartDrive, however, the salary paid to the driver is determined by SmartDrive, which set the level of service fee deducted from the fare. Therefore, it can be concluded that SmartDrive effectively determines the level of remuneration, even if not controlling pricing of the taxi service provided.
- 33) Secondly, SmartDrive sets several rules, e.g., sanctions for refusal of drives, or sanctions for the justified complaints regarding the appearance and behaviour of the driver or the quality of the car.⁵⁹ The Respondent is of the view that such restrictions constitute supervision of platform workers and verification of quality of the results of work as also stated by AG Szpunar in the case *Elite Taxi*.⁶⁰
- 34) The Respondent states that if any one out of three conditions set in Art. 5 of the Directive 2020/7563 is met, SmartDrive controls the performance of work. Thus, contractual relationship such as at issue shall be one of employment.

⁵¹ *Yodel*, Case C-692/19, § 30, p. 507.

⁵² Facts of Case, § 19, p. 7.

⁵³ Facts of Case, § 3, p. 5.

⁵⁴ Facts of Case, § 4, p. 5.

⁵⁵ *Elite Taxi*, Opinion of AG Szpunar in C-434/15, § 50, p. 365.

⁵⁶ Facts of Case, § 3, p. 5.

⁵⁷ Facts of Case, § 4, p. 5.

⁵⁸ *Airbnb Ireland*, Case C-390/18, § 56, p. 496.

⁵⁹ Facts of Case, § 5, p. 5.

⁶⁰ *Elite Taxi*, Opinion of AG Szpunar in C-434/15, § 48, p. 365.

- 35) Turning to the second argument, the expiration of the transposition period is relevant from the emergence of incidental horizontal effect. Two-year transposition period⁶¹ expired on 6 May 2022. The Respondent started performing person transport⁶² and committed the crime⁶³ after the transposition period expired.
- 36) Based on the relevant case-law, for the Directive 2020/7563 to have incidental horizontal effect, three conditions must be met. These being that the provisions are (i) unconditional, (ii) clear and (iii) precise.⁶⁴ In this regard, Arts. 1 and 5 of the Directive 2020/7563 are unconditional, sufficiently clear and precise, therefore the Respondent may rely upon these provisions.
- 37) In relation to argument that applicability of the Directive could impose obligations upon the employer,⁶⁵ the Respondent is of the view that the horizontal direct effect is not used. The Directive 2020/7563 does not create any new obligations or rights to individuals similarly to the CIA Security case, where the provisions at issue imposed an obligation to notify the technical regulation upon Member States. Therefore, the rights and obligations of private persons were not directly influenced⁶⁶ and merely some provisions of national law were rendered unenforceable.⁶⁷ After all, it is up to the national law whether any obligations arise from the reclassification of the contractual relationship, therefore even if any obligations are imposed on SmartDrive under the national law, it does not preclude the Directive 2020/7563 from being applied in terms of incidental horizontal effect.⁶⁸
- 38) In addition, the general principle of respect for human rights stemming from Art. 2 TEU should be taken into account. The human right of every worker to fair and just working conditions is enshrined in Art. 31 of the CFREU. Moreover, the person has the right to fair and equal treatment regarding working conditions and access to social protection as one of the principles provided in the European Pillar of Social Rights.⁶⁹ Thus, the use of the Directive 2020/7563 is justified by the general principle mentioned above,⁷⁰ mainly because Danubia did not transpose the Directive 2020/7563 in transposition period, and the state cannot take advantage of its own failure to transpose directives.⁷¹
- 39) **Accordingly, the Directive 2020/7563 is to be interpreted to the effect that Respondent's contractual relationship with SmartDrive is one of employment in circumstances such as the ones described.**

Question 3b

Suggested answer: Octavia Linta can rely on the Directive in those circumstances to shift criminal liability to another private party by virtue of Art. 219 of the Danubian Criminal Code.

- 40) The Respondent presents three arguments as to why it is possible to shift the criminal liability to another private party, since (i) Danubian penalties constitute a breach of the EU law, (ii) incidental horizontal effect enables shifting the criminal liability and (iii) the offence was committed due to SmartDrive's conduct. These arguments are built on the basis of previous affirmative answer to Q3a.
- 41) Turning to the first argument, the criminal penalties themselves, imposed on the Respondent, are precluded by Arts. 49 and 56 TFEU, as held by the CJEU in its case-law.⁷² Danubia failed to transpose the Directive 2020/7563 within the transposition period and failed to notify the regulation concerning RTO licenses pursuant to Directive 2000/31, as argued in Q1. This in itself constitutes a breach of the EU law concerning the internal market, in accordance with the arguments of the Respondent on the first two questions referred herein.
- 42) Moreover, the Respondent was not able to obtain a license under the Danubian law as a national from another Member State, since the conditions favoured nationals from Danubia, especially considering the requirement of establishment or experience as a full-time driver. This is explicitly forbidden in Art. 56 TFEU and the case *Placanica* in § 71. The fact that the Respondent had no way of obtaining the license,

⁶¹ Facts of Case, § 19, p. 7.

⁶² Facts of Case, § 20, p. 8.

⁶³ Facts of Case, § 22, p. 8.

⁶⁴ *Beuttenmüller*, Case C-102/02, § 54, p. 254.

⁶⁵ Facts of Case, § 33, p. 9.

⁶⁶ *CIA Security*, Case C-194/94, § 49, p. 227.

⁶⁷ *CIA Security*, Case C-194/94, § 54, p. 228.

⁶⁸ *CIA Security*, Case C-194/94, § 44-45, p. 227.

⁶⁹ Explanatory Memorandum, p. 169.

⁷⁰ *Mangold*, Case C-144/04, § 78, p. 271.

⁷¹ *El Corte Inglés*, Case C-192/94, § 16, p. 216.

⁷² *Placanica*, Case C-338/04, § 71, p. 285.

because the legislation of the Member State is in breach of the EU law, precludes criminal penalties such as those the Respondent faces.⁷³

- 43) Additionally, the CJEU affirmed in *Placanica* that although the criminal legislation is a matter of the Member States, the EU law sets limits to secure that the legislation respects the fundamental freedoms of the internal market.⁷⁴ Furthermore, a Member State may not apply a criminal penalty for failure to complete an administrative formality, such as obtaining the license, where the completion has been refused or rendered impossible by the Member State in infringement of the EU law.⁷⁵
- 44) The Respondent is of the opinion that the conduct of Danubia is unlawful and the criminal charges violated the EU law. Danubia rendered the licensing requirement impossible for nationals of other Member States, contrary to primary EU law and the CJEU's case-law, while subsequently imposing criminal penalties against those individuals.
- 45) Turning to the second argument, the EU law allows the possibility of employing the incidental horizontal effect against an individual in cases of directives not transposed on time. In relation to this possibility, the provisions of a directive must be unconditional, clear, and precise, according to § 36 of the case *Arcaro*. Considering the provisions within the Directive 2020/7563, the Respondent states that all are unconditional, clear and precise in their terms and invoke no doubt as to the effects. However, according to the case *Arcaro*, an individual may rely on a directive which has not been transposed, only if this directive does not create obligations for an individual.⁷⁶
- 46) In this case, the Directive 2020/7563 has not been transposed on time, its provisions are unconditional, clear and precise and the Directive itself does not create any obligations for an individual in the position of SmartDrive. It needs to be noted that the criminal liability itself would not constitute a new obligation based on the Directive. Therefore, the Respondent may invoke the incidental horizontal effect to transform the relationship and consequently shift the criminal liability to her employer.
- 47) Turning to the third argument, SmartDrive as an employer must organize the work of their employees in a way to ensure compliance with regulations and directives.⁷⁷ The Respondent's movement while working should have been regulated and the rides to, from and within Danubia could have been prevented by the employer banning rides outside the authorised territory of Moselia. However, SmartDrive failed to do so and, as an employer, should bear strict criminal liability in accordance with the Danubian constitutional principle in Art. 219 of the Danubian Criminal Code and relevant case-law.⁷⁸
- 48) Moreover, SmartDrive acting as an intermediary, as mentioned in Q1, has a duty to act, under certain circumstances, with a view to prevent or stop illegal activities and to ensure the smooth operation of SmartDrive's app in relation to cross-border services.⁷⁹ This can be done by disabling access to illegal information, in our case, request for a drive within unauthorised territory, and by implementing surveillance instruments now possible, especially for app-based providers.⁸⁰ This further points to the liability of SmartDrive, as the Respondent was acting only in the course of employment as an employee of SmartDrive, and SmartDrive never directed her not to enter Danubia.
- 49) **Accordingly, the Respondent can rely on the Art. 219 of the Danubian Criminal Code to shift criminal liability to another private party, namely SmartDrive as her employer.**

Question 4

Suggested answer: SmartDrive may not 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.

- 50) The Respondent develops two arguments as to why SmartDrive may not rely on the protection of commercial property and why the Directive 2020/7563 overrides contractual autonomy, since (i) the legislation is needed to protect workers, as explained in the Explanatory Memorandum, which is in

⁷³ *Placanica*, Case C-338/04, § 71, p. 285.

⁷⁴ *Placanica*, Case C-338/04, § 68, p. 284.

⁷⁵ *Placanica*, Case C-338/04, § 69, p. 284.

⁷⁶ *Arcaro*, Case C-168/95, § 36, pp. 235-236.

⁷⁷ *Hansen*, Case C-326/88, § 19, p. 210.

⁷⁸ *Hansen*, Case C-326/88, § 19, p. 210.

⁷⁹ Recital 40 of Directive 2000/31, p. 95.

⁸⁰ Recital 40 of Directive 2000/31, p. 95.

accordance with Art. 52(1) of the CFREU and (ii) the principles of subsidiarity and proportionality were upheld.

- 51) Turning to the first argument, as the employment obligation arises out of implementation of the EU law, the CFREU's application is therefore based on Art. 51(1) therein. The CFREU offers a standard of rights which must be maintained when implementing or applying the EU law, as a general principle.⁸¹
- 52) The case-law concerning the rights enshrined within the CFREU states that the right to property guaranteed in Art. 17 of the CFREU is not an absolute prerogative. On the contrary, its exercise may entail limitations, which must satisfy the conditions laid out in Art. 52(1).⁸² Under this provision, any limitations on the rights therein must be necessary, must connect to the objectives of general interest and must be subject to the principle of proportionality. It is necessary to point out that any possible interference with the right to property cannot touch upon the essential content of that right,⁸³ which was not affected in the present case. Considering the aim of the legislation and the reclassification of the employment relationship, the limitation is proportionate, necessary and meets the objectives of general interest.⁸⁴
- 53) The Respondent points out the aim of such legislation, as stated in the Explanatory Memorandum, which is to improve the working conditions and social rights of people working through platforms,⁸⁵ while respecting their health, safety and dignity.⁸⁶ These rights are also enshrined within the CFREU,⁸⁷ but the hardships placed upon them by avoiding the employment obligation put considerable strain on their essential content.⁸⁸ Without the protection offered by the Directive 2020/7563 and the subsequent reclassification, the rights of platform workers would be violated.
- 54) However, in no way do the limitations touch upon the essential content of the right to property of SmartDrive. Mainly, considering the fact that estimated five and a half million people working through digital labour platforms could be at risk of employment status misclassification, which results in inability to enjoy the rights and protections to which they are entitled as workers.⁸⁹ The Respondent considers this limitation on contractual autonomy and the right to property proportionate to the risks and losses it prevents and deems the conditions of proportionality and necessity under Art. 52(1) of the CFREU fulfilled.
- 55) Turning to the second argument, the Respondent states that the principles of subsidiarity and proportionality were upheld when adopting the Directive. Considering the content of the Directive 2020/7563, it is both subsidiary and proportionate.
- 56) As was mentioned above, the principle of proportionality is complied with. The public interest which needs to be protected by establishing an employment relationship for platform workers, along with the specific objectives of fairness and transparency,⁹⁰ are protected sufficiently. The Directive does not pose an excessive burden on the Member States or other legal persons.
- 57) Furthermore, to lessen the severity of the employment reclassification, it is considered a rebuttable presumption with a reversed burden of proof.⁹¹ This means that the employer is able to prove that certain drivers, or other service providers on various platform, are self-employed, and they retain factual autonomy within their activities, *i.e.*, their independence is not merely notional to disguise an employment relationship.⁹² This further lessens any burden the employment may pose on those who are truly self-employed and their contractual partners and offers a way to ease the policy for digital labour platforms which exert only a certain level of control over their workers and their performance.⁹³
- 58) In this case, however, SmartDrive did not offer any proof that the Respondent is independent within the platform and so the relationship is presumed to be one of employment. Furthermore, the Directive itself does not create any specific obligations for platforms concerning their employees. The legislation only created a uniform standard concerning personal scope, *i.e.*, who fits the description of an employee and

⁸¹ *Akerberg Fransson*, Case C-617/10, § 20, p. 337.

⁸² *BT*, Case C-501/18, § 107, p. 587.

⁸³ *BT*, Case C-501/18, § 109, pp. 587-588.

⁸⁴ *BT*, Case C-501/18, § 107, p. 587.

⁸⁵ Explanatory Memorandum, p. 170.

⁸⁶ Explanatory Memorandum, p. 169.

⁸⁷ Art. 1, 31, 34 and 35 of the CFREU, pp. 75, 81, 82.

⁸⁸ Explanatory Memorandum, p. 170.

⁸⁹ Explanatory Memorandum, p. 170.

⁹⁰ Explanatory Memorandum, p. 171.

⁹¹ Explanatory Memorandum, p. 171.

⁹² *Yodel*, Case-692/19, § 30, pp. 507-508. See also Explanatory Memorandum, pp. 171 and 176.

⁹³ Explanatory Memorandum, pp. 171 and 176.

derives rights therefrom. Additional matters regarding the status of the employees and their specific benefits in comparison to self-employed persons are left to the Member States, in the exercise of their competences.

- 59) Finally, considering subsidiarity, it is apparent that the enforcement of the rules and policy is more effective on the EU level than by national rules. The Directive 2020/7563, as an instrument of the EU legislation, is in accordance with the principle of subsidiarity, considering its scale and effects. The need for regulation of digital labour platforms also arises from the fact that they can easily move and operate between the Member States and various markets. This makes it harder to regulate them within the state territories, as national authorities are often not aware of which digital labour platforms are operating in their country.⁹⁴
- 60) **Accordingly, based on Art. 52(1) of the CFREU and settled case-law, SmartDrive may not rely on the protection of commercial property under the CFREU because the limitation respects the relevant conditions, as well as principles of proportionality and subsidiarity under Art. 5 TEU.**

Question 5

Suggested answer: Octavia Linta is entitled to claim compensation for breach of the principle of equal pay for equal work as set out in Art. 4 of the Directive 2006/54 and Art. 157(1) TFEU.

- 61) The Respondent hereby states that she is entitled to claim the compensation, since (i) she is protected by the principle of equal pay for equal work, (ii) she was subjected to indirect discrimination affecting her pay, (iii) without appropriate justification, therefore (iv) the burden of proof shifts to her employer to demonstrate she was not discriminated against.
- 62) Turning to the first argument, generally there are direct and indirect forms of discrimination. In this case, the Respondent suffered from the indirect type. A seemingly neutral provision, criterion or practice disadvantaged people of one sex in comparison to people of the other sex.⁹⁵ Indirect discrimination resulted from offering the same treatment to all drivers, who are in a different situation due to their sex.⁹⁶
- 63) Art. 4 of Directive 2006/54 and Art. 157(1) TFEU set out the principle of equal pay for equal work and prohibit any direct or indirect discrimination with regard to remuneration based on sex, whether for the same work, or work of equal value both in public and private sector as settled by the case-law.⁹⁷ To be protected, the jobs need not to be identical, but they must be substantially equal as to their nature.⁹⁸ All drivers within SmartDrive perform the same work, regardless of the time when the work is performed. They are required to have the same level of skill, training, responsibility or demands of the working conditions. As the nature of the work remains the same, therefore, so does the value.⁹⁹ Thus, the Respondent is protected by the principle of equal pay for equal work.
- 64) The Respondent suffered from a breach of this principle, as women are being unequally penalized by the rules SmartDrive set, solely for putting their safety first. Such treatment constitutes indirect discrimination, prohibited unless the difference in treatment is objectively justified.¹⁰⁰
- 65) Three main factors may be the cause of the decrease in the wage of female drivers, as laid out in Facts of Case. Firstly, female drivers are less picked and not in demand, as male drivers supposedly have more lucrative “sporty” cars. Secondly, female drivers are more likely to be picked by women, solo travellers or students and so do not receive tips as much. Thirdly, the penalisation for refusing drives more often decreases the income of women than men due to reluctance to drive certain groups of unruly customers.¹⁰¹
- 66) Less favourable treatment in this case arises from penalizing women due to putting their safety concerns first. By doing so, any driver is put at a risk of paying a higher service fee and eventually being barred. Female drivers, being more vulnerable at night-time in particular, naturally end up refusing more customers, hence female drivers are being treated less favourably. As stated in the Facts of Case,¹⁰² the women’s refusals were bigger in numbers, as generally they tend to be logically in a disadvantage to the male drivers.

⁹⁴ Explanatory Memorandum, p. 176.

⁹⁵ Art 2(1)(b) of Directive 2006/54, p. 109.

⁹⁶ *WA*, Case C-450/18, § 42, p. 481.

⁹⁷ *Defrenne*, Case C-43/75, § 1, p. 191.

⁹⁸ *K v Tesco*, Case C-624/19, § 28, p. 600.

⁹⁹ *K v Tesco*, Case C-624/19, §§ 27-30, p. 600.

¹⁰⁰ Art. 2(1) of Directive 2006/54, p. 109. See also *K v Tesco*, Case C-624/19, § 27, p. 600.

¹⁰¹ Facts of Case, § 5 and § 37, p. 5, 10.

¹⁰² Facts of Case, § 37 (iii), p. 10.

- 67) The Respondent would be punished for the refusals in any case, even if a driver protects herself from unruly customers, which the Respondent cannot do without losing money, and can even be barred if she does so.¹⁰³ The only reason for this harsh penalization is the absence of appropriate remuneration rules tailored to the needs of women drivers at night, which refuse them any way of protecting themselves, even when they fear for their safety. Thus, female drivers will work the same kilometres, same hours, but due to them being physically weaker and afraid of the night-time passengers, will forever earn less.
- 68) This discriminatory treatment could be solved by, for example, including an option to give reason for a refusal for all drivers and lessening the harsh sanction in case a refusal is made in justified cases of fear for personal safety. Inflexibility of rules concerning pay and factors behind their deductions turn neutral rule into one posing particular disadvantage for women drivers.¹⁰⁴
- 69) The burden of proof in cases alleging violation of non-discrimination is regulated by the EU law inversely and when victims establish facts in court, which can create presumption of discrimination, such presumption has to be rebutted by the employer.¹⁰⁵ The CJEU established that the burden of proof shifts and it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men.¹⁰⁶
- 70) The Respondent argues that the demonstrated wage differences and their causation to rules of SmartDrive created such presumption. Accordingly, burden of proof shifts to the employer, and it is up to SmartDrive to demonstrate to the national court that it has not subjected the Respondent to discrimination.¹⁰⁷ If the burden of proof remained on the Respondent, Art. 19 of the Directive 2006/54 would be violated. SmartDrive is responsible for demonstrating that there was no violation of the principle of equal treatment.
- 71) To rebut the presumption of discrimination, it needs to be proven that rules of SmartDrive in the matter of wages do not systematically work to the disadvantage of female employees. It will have to indicate how it has applied the criteria concerning remuneration and will thus be forced to make his system of pay transparent.¹⁰⁸
- 72) Moreover, as laid out in the CJEU decision-making, women should not be exposed to night work, especially during breastfeeding or pregnancy *etc.* That must be guaranteed by the possibility to shift to daytime work, if it is possible due to the nature of the work. This shifting of work schedules cannot be followed by a loss of income.¹⁰⁹ The rules of SmartDrive, however, make it impossible for such a choice to be taken without suffering a loss of income. SmartDrive did not state any reasons that could justify the penalisation for loss of income in cases of, *e.g.*, pregnancy.¹¹⁰
- 73) For the Respondent, as a taxi driver, change to daytime work is very much possible, as the Facts of Case do not indicate that the drivers are required to work at a specific time. Nevertheless, the income would be substantially reduced, in violation of the obligations set out in the preceding paragraph.
- 74) **Accordingly, the Respondent rightfully deserves compensation to recover lost earnings and compensation for breach of the equal pay provision in Art. 4 of the Directive 2006/54.**

¹⁰³ Facts of Case, § 5, p. 5.

¹⁰⁴ Art. 19 of Directive 2006/54, p. 114.

¹⁰⁵ Art. 19 of Directive 2006/54, p. 114.

¹⁰⁶ *Danfoss*, Case C-109/88, §16, p. 203.

¹⁰⁷ Art. 19 of Directive 2006/54, p. 114.

¹⁰⁸ *Danfoss*, Case C-109/88, § 15, p. 203.

¹⁰⁹ Cf. *mutatis mutandis Hennigs*, Cases C-297/10 and C-298/10, § 99, p. 330.

¹¹⁰ *Isabel González Castro*, Case C-41/17, § 10, p. 444.