TECH LAW CLINICS

JUDGMENT

CLAIMANT	**AGAINST**
Mr. Kevin Alberola	**GelderFreeRide BV**
Falsusstrasse 9	Fictiefstraat 3
Kleve, Germany	Nijmegen, the Netherlands
[**CLAIMANT**]	**[RESPONDENT]**

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A. FACTUAL BACKGROUND

1. The present proceedings were initiated by Mr. Kevin Alberola, a German citizen residing in the German city of Kleve (hereinafter 'CLAIMANT' or 'Mr. Alberola') against GelderFreeRide BV, a Dutch company (hereinafter 'RESPONDENT' or 'GelderFreeRide'). According to the parties' initial submissions to the Court, the following facts must be considered as undisputed between the parties.

2. RESPONDENT has developed a new autonomous shuttle service, called GelderFreeRide. This service allows the residents of the region surrounding the city of Nijmegen to benefit of 5 trips per month on the route of their choice, free of charge. Users just need to register on RESPONDENT's website. The service is available both to residents in the Netherlands, and to those who live in the German cities of Emmerich and Kleve, close to the Dutch-German border. The shuttle picks clients up at the location they have indicated in a reservation request, which must be made at least 24 hours in advance.

3. GelderFreeRide is a service offered in partnership with IntelligentMove, which uses the latest generation of autonomous vehicles produced by Tyrex, combined with an artificial intelligence-based system to determine shuttle routes.

4. Since the shuttles have a limited capacity (7 people maximum), RESPONDENT cannot guarantee that a reservation request will be successful. In addition, the shuttle optimizes its route to avoid too many detours for users: it therefore has a certain ability to choose the passengers it takes.

5. Each shuttle collects a large amount of operating data, in particular data related to traffic difficulties on certain streets, and risks to the integrity of the shuttle and the safety of its passengers, as measured by the identification of tags, poor maintenance, and deterioration of street furniture.

6.

B. THE DISPUTE

7. CLAIMANT alleges that, for nine months, he has placed reservation requests with GelderFreeRide, but he has never been picked up by the shuttle. Not once did the service respond positively to him; whenever CLAIMANT tried to make a reservation, the system displayed the message 'too many requests'. CLAIMANT alleges that the real reason why the system responds negatively to him is that the area where CLAIMANT lives is reported as unsafe and poorly maintained, on the basis of the safety and maintenance data collected by the shuttle,

as well as the tags that the service users can attach to specific locations. This, according to CLAIMANT, would result in a discrimination on the basis of social origin.

8. CLAIMANT argues that RESPONDENT's conduct amounts to a violation of Article 21 of the Charter of Fundamental Rights of the European Union (hereinafter: CFR). More specifically, according to CLAIMANT, RESPONDENT would discriminate against him, and others in similar conditions, on the basis of his social background. In light of this, CLAIMANT argues that RESPONDENT has committed a tort (*onrechtmatige daad*) within the meaning of Article 6:162 of the Dutch Civil Code (BW).

9. CLAIMANT asks that the Court:

    a. order RESPONDENT to pay compensation to CLAIMANT, for the non-pecuniary damages that CLAIMANT has suffered as a result of the discrimination, in the sum of € 9.000 (i.e. € 1.000 for each of the months in which CLAIMANT has been prevented from using the service);

    b. order RESPONDENT to modify the algorithm of GelderFreeRide, to avoid any discrimination in the future.

10. In its initial submissions to the Court, RESPONDENT objects against CLAIMANT's request. First of all, RESPONDENT argues that, under Dutch law, a tort can only exist if the conduct is attributable to the alleged tortfeasor, and a link of causality exists between that conduct and the harm allegedly suffered by CLAIMANT. In this case, according to RESPONDENT, these requirements are not met, as the algorithm used by GelderFreeRide has been developed by IntelligentMove, and not by RESPONDENT itself. Furthermore, RESPONDENT alleges that the criterion indicated by CLAIMANT to substantiate its discrimination claim (i.e. his social origin) is not one of the criteria that the system takes into account, when deciding where a reservation request can be accepted.

11. RESPONDENT, furthermore, argues that Art. 21 CFR is not applicable in the case at hand, as it only applies in relationships between individuals and public authorities, but not in relations among privates. In the alternative, RESPONDENT argues that, even if Art. 21 CFR is applicable, the breach alleged by CLAIMANT is not "sufficiently serious", and cannot in any event trigger RESPONDENT's liability.

12. In addition, according to RESPONDENT, the remedies sought by CLAIMANT are not available under Dutch law. More specifically, RESPONDENT argues that art. 6:106 BW limits the possibility to obtain moral damages to certain specific situations, and CLAIMANT's case falls outside of the scope of the provision at hand.

13. As for CLAIMANT's request that GelderFreeRide's algorithm be modified, RESPONDENT argues that the remedy would be impossible to implement in practice. In addition, according to RESPONDENT, any attempt to improve the fairness of the algorithm would result in a loss of accuracy, ultimately making GelderFreeRide impossible to use for all users, including CLAIMANT himself.

14.

C. THE ISSUES IN DISPUTE

15. In light of the above, in Procedural Order no. 1, the Court invited the parties to address the following issues in their statements:

   I. Is the remedy of moral damages available under Dutch law, in the present circumstances?

   II. Is the remedy of modification of the algorithm available under Dutch law, in the present circumstances?

   III. Considering that at least one of the above remedies is in principle available,

      a. are the allegedly tortious facts attributable to RESPONDENT?

      b. is there a sufficient causal link between the damage allegedly suffered by CLAIMANT and RESPONDENT's conduct?

      c. Does RESPONDENT's behaviour amount to a violation of Art. 21 CFR?

On the basis of the submissions exchanged between the parties, the Court now reaches the following findings.

D. THE REMEDY OF COMPENSATION FOR MORAL DAMAGES IS NOT AVAILABLE IN THE CASE AT HAND

16. Before considering whether the requirements for the establishment of a tort are met under Dutch law, it is necessary to assess whether the remedies sought by CLAIMANT are, in the abstract, available. In this vein, it is first of all necessary to assess whether CLAIMANT could, in principle, be entitled to receive compensation for the moral damages he has allegedly suffered.

17. Article 6:106 of the Dutch Civil Code ensures the possibility of moral damages under three alternative circumstances. First, when there is the intention to cause physical or/and moral

damage to the injured party. Secondly, when the injured party is violated in her/his persona. This includes, physical injuries, harm of reputation and any other impairment. Lastly, the impairment of commemoration of a deceased person. The latter is not relevant for this case and shall not be discussed hereinafter.

18. The impairment of someone's persona shall in any case be deemed to have occurred if the injured party has suffered mental injury, as referred to in Section 6:106 subsection 1(b) of the Dutch Civil Code. Objective standards are required to establish this existence of mental injury. The invoking party will have to provide sufficient concrete evidence that the circumstances of the case give rise to such a mental injury. In order to be able to speak of a person being affected, it is not sufficient for CLAIMANT to have felt more or less psychological discomfort or feeling hurt. In order for a claim for personal injury to succeed, the starting point is that the existence of mental injury that has affected a person can be established in court, which will generally only be the case if there is a clinical mental matter at stake, which is recognized in psychiatry.[1]

19. The CLAIMANT has not provided any concrete details from which the existence of any mental injury as a mental illness recognized in psychiatry can be objectively established, or at least from which it can be deduced that psychological damage has occurred in connection with the circumstances of the case.

20. Alternatively, moral damages can be awarded if the nature and seriousness of the breach of the standards and the consequences thereof for the injured party may mean that his person is affected in some other way.[2] In principle, the person who invokes this will have to substantiate the impairment in his person with concrete data. The nature and seriousness of the breach of the standards may mean that the relevant adverse consequences for the injured party are so obvious that an impairment in the person can be assumed. An infringement of a fundamental right does not in itself constitute such an infringement.

21. CLAIMANT might possibly argue that even though Dutch private law does not allow moral damaged to be awarded based on violation of an anti-discrimination law, moral damages should still be awarded in this case, on the grounds of effectiveness of the CFR. Although the *Marleasing* principle requires national courts to interpret implementing legislation so as give effect to EU law, this does not extend to interpretations which would disregard the clear

[1] HR 22 February 2002, ECLI:NL:HR:2002:AD5356.
[2] HR 29 June 2012, NJ 2012/410 (*Blauw oog*).

Parliamentary intent to limit the right to compensation for distress - that was "fundamental" to the legislation.

22. According to the court, article 6:106 of the Dutch Civil Code is compatible with the principle of effectiveness of EU law. As stated above, there are three alternative circumstances in which moral damages can be awarded. Art 6:106 (b) is no 'exception' to the 'rule' that mental injury is required. In fact, the starting point for the right of moral damages is not that the injured party has suffered physical or mental injury. This particularly offers opportunities in cases where there is a serious breach of standards leading to serious consequences, without (demonstrable) injury or (substantial) pecuniary loss. Consequently, the infringement of a fundamental right can be addressed under (b) and thus art 6:106 offers the possibility to claim moral damages in case of discrimination. The conditions to be met are reasonable to safeguard those who truly suffered and not those who aim for financial gain.

23. The fact remains that CLAIMANT has not suffered sufficiently to successfully claim moral damages. This does not change with a broader interpretation of art 6:106(b). It might be that CLAIMANT has particular annoyance towards the system used by RESPONDENT. However, this does not naturally justify the right to moral damages. This, in and of itself, is sufficient for this court to dismiss the claim of compensation for moral damages.

E. IN PRINCIPLE, IT IS POSSIBLE FOR THIS COURT TO ORDER A MODIFICATION OF THE ALGORITHM

24. GelderfreeRide uses vehicles produced by Tyrex, combined with artificial intelligence based system provided by IntelligentMove. This service allows five trips per month free of charge, on route of choice. Users can register on the website, and put a reservation twenty-four hours prior to their trip. CLAIMANT has asked the Court to order the RESPONDENT to modify the algorithm of GelderFreeRide, to avoid any discrimination in the future.

25. The court realizes that the digital world has created new challenges for law. Algorithmic computing processes has served the new world, in which social functions are made more efficient, but also more impersonal. An algorithm is a process or set of rules to be followed in order to solve a problem (in this case, optimize the shuttle’s route to avoid detours for users). This means that the algorithm chooses the best possible route. It does so by a structured process, which proceeds in logical steps. In practice, this means that each shuttle collects a

large amount of operating data, in particular data related to traffic difficulties on certain streets, risks to the integrity of the shuttle, and the safety of its passengers.

26. The shuttle uses artificial intelligence (hereafter AI). This is something beyond algorithmic analytical processes. AI is a self-directed and a self-adaptive system machine, whereby an algorithm is used to optimize its responses through experiences as embodied in a large amount of data, with limited to no human interference. In other words, this means that AI involves self-learning which is capable of analysing situations that result in solutions which may not be even be foreseen or controlled by their programmers who write the algorithm in programming language. Given the way algorithm functions, it falls within the CLAIMANT's burden of proof to demonstrate that the RESPONDENT could exert some control over the algorithm's decision.

27. The court is well aware that there is no regulation in place nor any laws governing the decision-making process of algorithms. It is for this reason that it is important to see whether it is feasible for this particular case to change the algorithms. The decision-making process distinguishes between two notions: disparate treatment, and disparate impact. A decision-making process is influenced by disparate treatment when its decisions are (partly) based on sensitive information, and it has disparate impact when its outcomes disproportionately disadvantage (or benefit) people who carry these sensitive attribute values. While it is desirable to create decision making systems free of disparate treatment as well as disparate impact, this is however in practice a complicated matter, that cannot be easily fixed. One could avoid disparate treatment; however, it is necessary for algorithms to collect as much as possible data with the purpose of giving the best solution. Intentionally leaving certain data out can be detrimental to the effectiveness of the system. Ignoring disparate impact may lead in turn to reverse discrimination. It is also important to establish where the bias takes place, to be able to point out who is responsible, and where the modification must occur in order to avoid future discrimination. Bias can creep in, long before the data is collected. This can happen when the algorithm is created, and when the problem is framed. However, it is also possible that bias occurs not when the algorithm is developed, but when data is collected, either because the date one collects is unrepresentative, or it reflects existing prejudices.

28. GelderFreeRide's algorithm uses data provided by the shuttle itself, and by its service users. This means, in practice, that the variables are influenced by both the shuttle and the user. Service users can, through the so-called identification tags, attach to specific locations tags, such as ''dangerous'', ''poor maintenance'' etc. The court believes that these tags may amount

to discrimination. Unlike, the other data, these data are clearly provided by other people based on their very own judgement. It is important that these tags are based on objective information.

29. The data added by service users reflects subjective, personal opinions. These opinions can differ. A customer that uses the system often, will possibly judge certain circumstances differently from someone that uses the system only once. When a satisfied user never adds data to the system, its opinion will not be taken in consideration. The opinion of an unsatisfied user that often adds data to the system will have a great influence on the algorithm, when every feedback is generated with a value of '1'.

30. In light of the above considerations, nothing in Dutch law would prevent this Court from ordering GelderFreeRide to modify the algorithm, so as to give less value to the users input and more value to its own data. GelderFreeRide is responsible for the way it uses the outcome of the algorithm. The court acknowledges that changing the user input can result in a less attractive result for the company. However, there are other ways for the company to collect customer satisfaction feedback (for example, by opening a customer service point online or offline). The remedy sought by CLAIMANT, hence, is in principle available. However, the Court can only grant such a remedy, if the conditions for the establishment of a tort under Dutch law are met, in the case at hand. During the proceedings, the parties have expressed divergent opinions as to whether the requirements of attributability, causality and illegality are met. The Court, thus, will analyse each of these requirements in turn.

F. THE FACTS CAN BE ATTRIBUTED TO RESPONDENT

31. According to article 6:162 section 3 BW, a tortious act can be attributed to the tortfeasor if it results from his fault, or from a cause for which he is accountable by virtue of law or generally accepted principles. When there is a bias in the data, it is possible for the algorithm to give an outcome which was not intended by the developer. In theory, one could say that the algorithm is deficient. However according to Dutch law, risk liability is only possible for material objects. An algorithm is immaterial. For this reason, only the general duty of care could apply.

32. Under Dutch law, even though IntelligentMove developed the algorithm, attribution of the alleged tort to RESPONDENT is still possible. RESPONDENT ordered IntelligentMove to develop the algorithm, and RESPONDENT is the party that exploits the algorithm. Therefore, they carry the duty of care to ensure the algorithm does not discriminate on the basis of social origin.

33. The argument that social origin is not a specific criterion that the algorithm uses to determine its output does not hold up. The possible inputs from the shuttle or users on street quality, maintenance of roads or any other tags are indicative of social origin. It is not necessary for the algorithm to specifically use a metric called 'social origin' to amount to discrimination on the basis of social origin. Art. 21 CFR is a wide, open norm and the aforementioned metrics fall in its scope.

34. According to a testimony given by an expert witness, it is certainly possible for RESPONDENT to amend the algorithm in such a way that it disregards certain values or parameters. RESPONDENT could even split the algorithm and develop a second one, which checks if the outcomes of the first algorithm are discriminatory against anybody. If so, the second algorithm can make the first algorithm give a certain output in favour of those who normally do not get picked by the first algorithm. The expert witness concludes that it is certainly not impossible for RESPONDENT to alter or influence the algorithms. The court concludes that the alleged tort is attributable to RESPONDENT, based on fault-based liability. RESPONDENT does have the instruments to ensure that the algorithms does not give discriminatory outputs.

G. THERE IS A SUFFICIENT CAUSAL LINK BETWEEN RESPONDENT'S BEHAVIOUR AND THE CONSEQUENCES SUFFERED BY CLAIMANT

35. The question, here, is about whether there is a causality nexus between CLAIMANT's alleged damage and RESPONDENT's conduct. The conduct is constituted by RESPONDENT's failure to ensure the algorithm would not discriminate on the basis of social origin. CLAIMANT would not ever get picked up by the service for months. The causal chain starts with RESPONDENT neglecting their duty of care. As a result of this, the algorithm discriminates against CLAIMANT on the basis of social origin. This causes the alleged damages for CLAIMANT. In the Court's opinion, the system and idea of Dutch private law - specifically in liability law- requires that the algorithm needs to be considered close in the causal chain to the exploiter of the algorithm, just like liability for animals or constructions is regulated under Dutch law. This means the algorithm must be deemed to fall within the responsibility and risk of the party that exploits the algorithm.

36. The possible argument that the algorithm has its own "life", and that the algorithm cannot be altered, does not hold up. The fault-based liability makes GFR responsible for the algorithm's

outputs, even though it makes its own choices in a way. The causal link between the inability of the algorithm to pick up CLAIMANT and the alleged damages that arose from that inability is as direct as can be. If the algorithm would not decide to exclude CLAIMANT, the alleged damages would not have occurred.

H. RESPONDENT'S BEHAVIOUR DOES NOT AMOUNT TO A VIOLATION OF ART. 21 CFR

37. According to Article 2 of the Treaty on European Union, non-discrimination is a fundamental value of the EU. The condition to apply CFR is that the situation concerns the application of EU law (Article 51 CFR). The case at hand concerns a cross-border situation involving the free movement of services (Article 56 TFEU), which the Respondent provides in two Member States. Therefore, the CFR is applicable in the present case.

38. Direct effect of a Treaty provision exists if the provision is clear, precise and unconditional (Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1). A Treaty provision with direct effect can be invoked by an individual before a national Court, without the need to transpose the provision into national law. The CFR has the same value as the Treaties (Article 6(1) TEU).

39. Horizontal direct effect of a provision means that a provision can be invoked before a national Court by an individual against another individual.

40. When a provision has vertical effect, it is applicable between privates and the state, and when a provision has horizontal effect, it is applicable between privates. The relevance of this distinction is to determine if in a specific case a Claimant can call upon a certain provision. Some provisions are *de facto* only aimed at states, and some are aimed at states and privates.[3] A main question in the present case is whether article 21 CFR is also aimed at private parties. If so, then it has horizontal effect. A clear example of vertical effect is *Faccini Dori,* in which case the European Court of Justice (CJEU) rules that a private party cannot directly call upon a directive that has not been transposed on time against another private.[4] According to case law of the CJEU, provisions of directives have no horizontal but only vertical effect.[5]

[3] Note that according to case law the formal aim of a provision is irrelevant; CJEU 11 december 2007, case C-438/05, *Viking,* par. 58.
[4] CJEU 14 July 1994, case C-91/92, *Faccini Dori.*
[5] Eijsbouts et al. (ed.), *Europees Recht algemeen deel,* Goningen: Europa Law Publishing 2015, p. 306 – 307; CJEU 5 October 2004, case C-397/01 – C – 403/01, *Pfeiffer;* CJEU 24 January 2011, case C – 282/10, *Dominguez.*

41. 4 The provision of Article 21 (1) CFR is clear and precise. It stipulates that discrimination on a broad range of grounds is not allowed. The same provision, stipulating that 'any' discrimination is prohibited, is clearly unconditional. Therefore, the provision has direct effect and Claimant can rely on it.

42. It is apparent from the wording of Article 21 (1) CFR that the grounds of prohibition of discrimination are not exhaustive. In the case at hand, we can therefore consider discrimination by social origin or any similar grounds as applicable.

43. The question now is whether the provision has horizontal direct effect**.** In other words, can the provision be used against another individual, as is the case here. Article 51 CFR defines the scope of application of CFR. Article 51 stipulates that the CFR is addressed to Member States and EU institutions. However, Article 51 does not explicitly exclude application of the Charter in disputes between individuals (Joined Cases C-569/16 and C-570/16 ECLI:EU:C:2018:87 *Bauer* para 87). The CJEU rules that a private can successfully appeal to article 49 Treaty on the Functioning of the European Union (TFEU) against another private. CJEU 11 December 2007, case C-438/05, *Viking*.

44. In *Egenberger, Cresco,* and *Bauer* the CJEU states that the provisions of the CFR have direct horizontal effect. These parts of the cases are possibly *obiter dicta.*[6] Nevertheless, the judgements are relevant to answer the present question, because *obiter dicta* are not less important than the rest of a judgement. Contrarily, oftentimes Courts use *obiter dicta* to clarify or lay out a general doctrine.

45. Furthermore, in *Egenberger, Cresco,* and *Bauer* the CJEU rules about the direct horizontal effect of a CFR provision in combination with a directive.[7] However, this observation is irrelevant, because the Court also accepts the possibility of a CFR provision to have direct horizontal effect on its own in *Association de Médiation Sociale*.[8] Hence, individuals can also call upon a CFR provision itself, instead of such a provision in combination with a directive. In other words: a CFR provision can indirectly (i.e., combined with a directive) and directly

[6] Bassi, *MvV* 2019/7-8, p. 267.
[7] H. De Waele et al. (ed.), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment,* Deventer: Wolters Kluwer 2019, p. 284.
[8] L. Rossi, 'The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations', *Eu Law Analysis* 25 February 2019; CJEU 15 January 2014, case C – 176/12, *Association de Médiation Sociale,* par. 45 – 49.

(i.e., on its own or as such) have horizontal effect.[9] Moreover, in his opinion in *Bauer,* Advocate General Bot seems to be disconnecting the directive from the CFR provision to answer the question whether the CFR provision has direct horizontal effect.[10] According to his interpretation of *Association de Médiation Sociale,* the directive does not influence the effect of the CFR provision. Although that conclusion is extensive, it makes sense.

46. Lastly, if article 21 CFR is granted direct horizontal effect, everyone will be able to litigate against everyone based on that article. If so, it will be excessively easy to invoke the article, opening the way to compensation under national tort law. However, although the practical consequences of judgements have to be taken into account, they 'cannot go so far as to diminish the objective character of the law and compromise its application on the ground of the possible repercussions of a judicial decision.'[11] Moreover, in any given case, the rights and of Claimant and opponent must be weighed to come to a fair judgement. This is required by the last sentence of article 52 (1) CFR. Hence, the sole direct horizontal effect of article 21 CFR does not open the gate to unrestricted, unconditional and unlimited claims to the provision.

47. Article 21 CFR is applicable to disputes between individuals (C-414/16 *Egenberger ECLI:EU:C:2018:257* para 76; Joined Cases C-569/16 and C-570/16 ECLI:EU:C:2018:871 *Bauer* para 89; C-684/16 *Max Planck* ECLI:EU:C:2018:874 para 78). Article 21 is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law.[12] Therefore, Article 21 CFR can be applied in the present case, between Claimant and Respond as individuals.

48. After we have established that the Charter is applicable and that the Respondent is subject to obligations deriving directly from Article 21 of the Charter, we must turn to the question whether the Article 21 CFR has been breached in the present case.

49. First, the initial burden of proof lies on the Claimant, who has to establish *prima facie* discrimination. This can be done, for example, by providing statistical data but also by other means available to the Claimant. From the facts of the case, the Court can infer that the Claimant has requested the free service on multiple occasions, and that every time the response

[9] E. Frantziou, '(Most of) the Charter of fundamental Rights is horizontally applicable', *European Constitutional Law Review* 2019/15, p. 311 – 312.
[10] AG CJEU 29 May 2018, *Bauer,* par. 74.
[11] CJEU 15 December 1995, case C -415/93, *Bosman,* par. 77.
[12] CJEU 17 April 2018, case C-414/16, *Egenberger*, par. 76.

was "too many requests". From the facts of the case, we do not know whether there were too many requests to accept the Claimant or was that merely an excuse for not wanting to take Claimant.

50. EU law requires that the person who claims to be discriminated must first establish the facts from which it may be presumed that there has been discrimination (*C-381/99, Susanna Brunnhofer v. Bank der österreichischen Postsparkasse AG ECLI:EU:C:2001:358*, paras. 51-62). In the context of ECHR, it is equally true that the Claimant has the initial burden of providing facts (see eg ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007, para. 189). However, national rules on the burden of proof should not make the enforcement of EU rights excessively difficult (see eg C-497/13, Faber). Otherwise, the EU principle of effectiveness will be breached.

51. In the present case, Claimant is in a difficult position obtaining evidence regarding the algorithm because Claimant does not have access to it. As is clear in the present case, the system collects the following data to decide who is sorted in or out for the shuttle: street deterioration, traffic, safety, postal code, name, age, date, origin, destiny, and rate. However, it is not clear to what extend the system used these elements in the present case to sort the Claimant out.

52. According to EU law, it is for the national Court to determine whether the disclosure of evidence is required (C-104/10, *Patrick Kelly v. National University of Ireland).* The opinion of this Court is that upon the request of the Claimant, the Respondent must provide statistical and other data related to the algorithm so that the Claimant has a chance to make his case. The refusal to provide such information can be considered as one element in presuming the discrimination (C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH ECLI:EU:C:2012:217*, para 42).

53. After the Claimant has proven *prima facie* discrimination, the burden of proof shifts to the Respondent, who must prove that he did not commit discrimination (C-381/99, *Susanna Brunnhofer v. Bank der österreichischen Postsparkasse* AG ECLI:EU:C:2001:358, paras 51-62). This can be done either by proving that the victim is not in a similar situation to those to whom the service was offered; or that the difference in treatment is based on some objective factor, unconnected to the protected ground. If the defendant fails to rebut this presumption, they may still attempt to justify the differential treatment by conditions provided in Article 52(1) CFR.

54. The alleged victim in the present case, the Claimant is in a similar situation to other users of GelderFreeRide. Different situations can be treated differently. The situations do not have to be identical, as long as they are comparable in a specific way (CJEU 22 January 2019, case e C-193/17, *Cresco).* To be eligible for the free tours with GelderFreeRide, users must meet some criteria. They have to be a resident in the Netherlands or in Emmerich or Kleve, close to the Dutch – German border. Furthermore, they need to register. Claimant meets all these criteria, as do other users. Thus, Claimant is in the same situation as other users of GelderFreeRide.

55. Respondent may claim that the difference in treatment was objectively justified because it may not have been the responsibility of the Respondent that the area where the Claimant lives is reported as unsafe and poorly maintained. The data is fed by the users ('user tags') which tell the algorithm the relevant conditions. Therefore, other users may also contribute to Claimant not being picked up by the taxi service of Respondent. A way to prevent this would be to forbid providers of services and goods, such as Respondent, to base their algorithms on data of other users because such user data can in itself be discriminatory. The Respondent may also claim that it is not the responsibility of the Respondent to provide safety and decent public furniture, but the responsibility of relevant authorities.

56. However, simply alleging that a difference in treatment is objectively justified is not enough; Respondent must provide proof as well as satisfy the proportionality principle, since the burden of proof has shifted to the Respondent (C-83/14 CHEZ ECLI:EU:C:2015:480, paras 85-90, 166-117 – *this case is regarding a directive on non-discrimination, but the same logic applies*).

57. It is the obligation of the Respondent to provide evidence for claims that the area where Claimant lives is unsafe or poorly maintained roads if the Respondent wants to objectively justify the restriction of Claimant's fundamental right. In the present case, the Respondent has failed to provide evidence on this matter.

58. We have determined that Claimant is put in a different situation than other users and that this treatment is not objectively justified. Now, we turn to the third possible defence of the Respondent, that restrictions of Article 21 CFR can be justified by conditions in Article 52(1) CFR. Namely, any limitation on the exercise of the rights and freedoms recognised by the Charter must be, first, provided for by law and respect the essence of those rights and freedoms. In the present case we have an individual as the Respondent, not a State. Individuals cannot enact laws; therefore, this requirement cannot be considered. Otherwise, individuals as the

Respondent would be in a more difficult situation to justify their restrictions of fundamental rights of other than the States, which can enact laws to justify restrictions of fundamental rights. This shows the difficulties of putting into operation the horizontal direct effect, which was determined by the CJEU to exist in regard to Article 21 in eg *Egenberger* and *Bauer* cases.

59. The restriction of fundamental rights must satisfy the principle of proportionality. This means that the restriction of fundamental right must be necessary and must genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The condition of necessity is applicable, as it requires that the Respondent's action does not go beyond what is necessary.

60. However, regarding the second part of the proportionality principle, it must be said that private parties, such as the Respondent, cannot pursue legitimate aims in the general interest. Private parties cannot rely on legitimate aims in the general interests as justifications for infringements of EU law (T-30/89 - *Hilti v Commission ECLI:EU:T:1991:70,* para 118.). One cannot storm the local McDonalds and knock out milkshakes and French fries from other people and justify it by the pursuit of public health. It is not a prerogative of individual, but only of State (which is democratically controlled and represented, unlike an individual).

61. Therefore, the Respondent cannot be required to justify his action as being done in the public interest as it acts only it its own, private interest. Applying this requirement would make it impossible for individuals to justify their actions, and again, that would mean that States are in a better position than the individuals in this regard. This interpretation would be contrary to requirement of the CFR in Article 54 that nothing in the CFR can be interpreted as destroying the fundamental rights of individuals. Therefore, the requirement of having a public goal when restricting fundamental rights cannot be considered as well. This leaves Article 52(1) CFR with a proportionality and balancing test between the fundamental rights of the two sides in a horizontal relationship

62. In a vertical relationship Claimant is an individual and has fundamental rights, while the Respondent only has obligation to abide by fundamental rights of the Claimant. In a horizontal relationship, such as in this case, both sides have both fundamental rights and obligations, since they are equals. In the end, that leads to the conclusion that Article 52(1), when applied in a relationship between individuals, requires a balancing exercise, where we must determine which fundamental rights of both parties are at stake and then find the appropriate balance.

63. We must then determine what fundamental rights are at stake in the present case. The Claimant has invoked the right to not be discriminated against, contained in Article 21 CFR. On the side of Respondent, there are certain fundamental rights that require our consideration.

64. First of all, there is the Respondent's fundamental right of Article 16 CFR: the freedom to conduct business. This Article guarantees that individuals have a fundamental right to engage in an economic, profit-seeking activity and to make choices they see fit. This interpretation is in line with the Article 119(1) TFEU, which stipulates that the EU is an open market economy with free competition. These provisions would be meaningless if individuals would be precluded from making business decisions regarding prices, where they offer their services and the way in which the business operates. However, this business activity must be conducted in accordance with EU law and national laws and practices (Article 16 CFR).

65. Therefore, a balance must be struck between the Claimant's right not to be discriminated per Article 21 CFR and the Respondent's freedom to conduct a business as per Article 16 CFR. The need to consider the rights in a balance in regard to Article 21 CFR has been established by the jurisprudence of the CJEU (see C-414/16 *Egenberger ECLI:EU:C:2018:257* para 59, para 80).

66. Furthermore, Respondent's right to property is a fundamental right contained in the Articles 17 CFR 1, First Protocol, ECHR. The right to property also protects intellectual property (paragraph 2 of Article 17 CFR). Algorithms are intellectual property. Algorithms are therefore protected and forcing a change of the algorithm is a limitation of a fundamental right that needs to be justified. Therefore, the right to property of Article 17 CFR should also be considered in the balance.

67. Finally, Respondent's freedom of expression can be considered. CFR in Article 11 states that this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. An algorithm is a piece of information. Therefore, the content of the algorithm may be protected by the freedom of expression of Article 11 CFR. An example of this logic can be found in the US legal system. The Federal Bureau of Investigation (the FBI) required from Apple company to unlock iPhones that were taken from terrorists. Apple stated in its defence that requiring it to change its software so that it can be unlocked by FBI is requiring it to make a certain speech which goes against freedom of speech guaranteed by the US Constitution. That case ended before it was decided, as FBI found a way to unlock the phones without Apple. A similar argumentation may be true in the present case. To force a private party to change its algorithm is to limit the

party's freedom of expression, as guaranteed by Article 11 CFR. Therefore, the balancing exercise should consider this fundamental right on the side of Respondent as well. Otherwise, a risk appears that fundamental rights of individuals as respondents in cases concerning CFR could become meaningless.

68. Also, general principles of EU law should be considered. Namely, the principle of legal certainty, which requires that the law operates in such a way so that individuals know which rules they must adhere to. A related general principle of EU law, which is relevant for the present case, it the principle of legitimate expectations. These principles are relevant here because the decision of this Court must not create widespread uncertainty where individuals would not know whether their actions are in accordance with the law. Carelessly imposing horizontal direct effect would mean that any possible business decision of an individual or an undertaking might be illegal under article 21 CFR. If a small local pizzeria delivers only within two blocks, are those from the third block onward illegally discriminated? It would be a different issue if delivery was available only to certain people of the same area (eg if the pizzeria would offer services in West Nijmegen only to Dutch citizens). Similar is the issue of price discrimination. Let us suppose that Albert Heijn has higher prices in its store in the centre of Nijmegen than in the store in the suburbs, which is a common practice (stores outside of centre are ubiquitously bigger and cheaper). Is that discrimination against groups that predominately live in the city centre, such as homeless people, poets and students? Is it legal to give lower prices to middle- and high-income people living in the suburbs, which have cars to buy 100 kg of highly discounted detergent, while those living in the centre have to buy little bags of the same stuff costing a few times more per kg? Also, if non-discrimination must be abided by individuals, are consumers allowed to make choices regarding what they buy, at what prices and from whom? We must be able to distinguish those situations, otherwise we risk that the CFR becomes a great hindrance for fundamental rights of individuals, which goes against the very purpose of that instrument. Therefore, it is required to conduct the balancing test with great care for fundamental rights of both sides when it comes to horizontal disputes.

69. The Court also considers the prohibition of abuse of fundamental rights, contained in Article 54 CFR. This Article states that rights and freedoms in the Charter cannot be used for the purpose of destroying other rights contained in the Charter or limiting other rights to a greater extent than is provided by the Charter. The Court understands this provision as containing the general principle that prohibits use of rights for purpose of destroying other people's rights, but it goes beyond that: this provision, again, invokes the need for proportionality and balance

in adjudicating fundamental rights. In the case at hand, the Court must consider whether the Claimant's right is infringed to a degree that would justify diminishing Respondent's fundamental rights.

70. We should bear in mind that Claimant has not made any payment, nor was required to make a payment to receive the free five rides per month. Also, Claimant could have used another taxi service for the purpose of transport; therefore, the private service provider of Respondent did not put Claimant into any significant difficulties, at least none that the Claimant shared with the Court. This is on its own no justification for discrimination.

71. However, in the present case it is an indication that Claimant suffered no significant damage, whereas a prohibition to use the system or even an obligation to modify it would mean a significant restriction of Respondent's fundamental right to conduct business. This is also excessively costly. The Court also takes into consideration that the damage suffered is exactly the value of the transport costs that the Claimant paid because he was unavailable to use the free rides provided by Respondent. The fundamental rights of Claimant and Respondent should therefore be balanced with regards to how much they were infringed, and not merely in the abstract. It is not the same if discrimination prevents a person from education or merely from free taxi rides. The measure of infringement must be considered.

72. The restrictions of Respondent's fundamental rights to freedom of expression, free conduct of business and freedom of property would be greater than is the degree of restriction of the fundamental right to non-discrimination that the Claimant suffered in the case. Therefore, in the balance, Article 21 has not been infringed.

73. For this reason, the question whether a breach of Article 21 CFR must be 'sufficiently serious', in order for it to give rise to liability of a private party, is moot.

I. CONCLUSIONS

For the reasons stated above, all of CLAIMANT's claims are **dismissed**.

Nijmegen, 2 March 2020
The Judges