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# Global Competition Law. Uber: An (Un)solved Problem

## 1. Introduction

We were all accustomed to the traditional taxi services, but this sector was not showing signs of evolution and users have to accept the service as it is. Then, the situation changed when online-enabled car transportation service like Uber appeared. Uber provides a service, which connects drivers with passengers by using a mobile app. The consumers download the Uber app and can use it to find a driver which is located close by. It has benefits over taxis such as track the location of the car until it arrives and get an alarm when the car arrives. However, it's not only benefits... this brought some problems that we can't ignore. We propose to present these problems and try to answer them.

First of all, we have to understand Uber business model to see the legal nature of the services that Uber provides to their clients. So, we will see if we have a real transport service or otherwise services of the information society. Then, we will see if we have any problems or concerns with Uber that should involve antitrust authorities. And at last, we will analyze the polemic question "Uber vs. Taxis" and linked problems, such as if we have or not a taxi monopoly.

## 2. Uber Business Model

Uber makes their users' lives much more easier. However, there's no consensus about its characterization. But, we can say that "it evokes the phenomenon of the sharing economy because it fully exploits resources that would otherwise be underutilized. It provides transportation services without being subject to parts of the national regulations governing taxi services. It can be considered an 'information society service' because of its digital platform."<sup>[footnoteRef:1]</sup> However, we have to say that "sharing" is not the perfect description of the services on digital platforms like Uber.<sup>[footnoteRef:2]</sup> In fact, Uber matches drivers with those who need a taxi driver, which allows individuals to communicate and collaborate more effectively and efficiently.<sup>[footnoteRef:3]</sup> In fact, unlike online stores, Uber doesn't directly provide a service. But, the truth is that the users pay and drivers work for gain. Uber is not a web page or a mobile app hosting the transactions between drivers and consumers. What Uber does is provide an electronic payment system, ensuring that the price works dynamically, charge a fee for every exchange and ensures quality of service for both parties. "In other words, Uber falls somewhere along a spectrum between purely hosting platforms and direct service providers."<sup>[footnoteRef:4]</sup> [1: MARGHERITA COLANGELO and MARIATERESA MAGGIOLINO, Uber: a new challenge for regulation and competition law?, In: Market and competition law review, Vol. 1, n°2 (Oct. 2017), page 2.] [2: GIANA M. ECKKHARDT and FLEURA BARDHI, The Sharing Economy Isn't About Sharing at All, Harv. Bus. Rev. (Jan. 28, 2015), <https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all>.] [3: TALIA G. LOUCKS, Travelers Beware: Tort Liability in the Sharing Economy, 10 Wash. J.L. Tech. & Arts 10 (2015), pages 329 and 330.] [4: VANESSA KATZ, Regulating The Sharing Economy, 30 Berkeley Tech. L.J. 30 (2015), pages 1067, 1071-1072.]

Maybe this incorrect between Uber platform and sharing economy is like a scape to avoid the

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regulation for off-line services. It may be that the new technologies have actually deprived of meaning some of the rules set forth by the existing regulatory schemes and thus encouraged a change in the mindset of regulators.[footnoteRef:5] [5: NATHAN CORTEZ, Regulating Disruptive Innovation, Berkeley Tech. L.J. 29 (2014), page 175.]

## 2.1. Transport services or services of the information society?

When we are talking about Uber services, to know what rules should be applied, the main question is if are looking for a transport service or for a service of the information society.

If we evaluate Uber as information society, then it can benefit from Article 1 Number 2 of Directive 98/34/EC<sup>32</sup> which defines information society service as a normally provided service for remuneration at a given price, through electronic means, from a distance on an individual request of a recipient.[footnoteRef:6] [6: European Parliament: Directive 98/34/EC of the European Parliament and of the Council, available online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1998L0034:20070101:EN:PDF.>]

“Uber platform, through which it operates, meets all of the parts of this definition: the service is provided upon an individual request of a recipient (rider submits request through a platform, driver also notifies of his/her availability through the same platform); the services are provided for remuneration (rider pays the fair for a ride, from which driver receives 80% and the rest is deducted by Uber); the service is provided at a distance (driver and rider communicate through virtual platform); and the service is provided by electronic means (Uber application via internet).”[footnoteRef:7] Although Uber doesn’t have any car, there are some features that make it more than a “simple” information society. Actually, it’s not wrong to say that Uber drivers are not independent contractors but employees of the company, because it’s Uber who fixes the prices, so Uber drivers have no control on the price mechanisms. The payments are made through the app, so they can’t request more than what is stipulated. So, driver receives his payment through Uber and not the opposite. “This shift of control over the remunerations, as well as Uber’s complete control over the prices shows that Uber’s involvement in transportation providing processes goes beyond just facilitation of information exchange. Uber’s role should not be interpreted in a formalistic way, but looking at its overall policies.”[footnoteRef:8] [7: LAURA BARAINSKY, ESMA GUMBERIDZE and MOHAMMAD NURUL, Uber and Taxi Regulations: are Member States preserving a legal monopoly to the detriment of consumers?, page 14.] [8: LAURA BARAINSKY, ESMA GUMBERIDZE and MOHAMMAD NURUL, Uber and Taxi Regulations: are Member States preserving a legal monopoly to the detriment of consumers?, page 15.]

This totally shows us that Uber should not be considered just an information society but also a “cash distributor”. Uber should not be considered a truly information society, not should be seen as a truly intermediary and, because of this, we have to mention it as a service linked to transportation.

## 3. Uber Antitrust Law

“Uber exists and grows because, by matching users and drivers via its platform, it exploits the interdependencies that occur between these two different demands: the demands of transportation and the demand of driving. The antitrust analyses suggests that Uber platforms

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are a system of interoperable software combined in a complex architecture that is nevertheless flexible enough to embrace new components.”[footnoteRef:9] In other words, Uber can diversify its business like it did when created Uber eats. They can add associate other products and services to the platform, which produces different consequences. In a way, this means that the competition occurring in digital markets is dynamic because platforms can easily enter new markets by offering new and innovative functionalities.[footnoteRef:10] In other way, “the same capacity of developing new services may permit Uber to profit from preemptive strategies that produce exclusionary, though not necessarily anticompetitive, effects.”[footnoteRef:11] [9: MARGHERITA COLANGELO and MARIATERESA MAGGIOLINO, Uber: a new challenge for regulation and competition law?, In: Market and competition law review, Vol. 1, n°2 (Oct. 2017), page 10.] [10: JEFFREY EISENACH and THOMAS M. LEONARD, Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace. Boston: Kluwer Academic Publisher, 1998.] [11: MARGHERITA COLANGELO and MARIATERESA MAGGIOLINO, Uber: a new challenge for regulation and competition law?, In: Market and competition law review, Vol. 1, n°2 (Oct. 2017), page 10.]

Uber, by entering in transportation markets, with already established base of costumers, raise their rivals costs and force them to use less efficient and lower quality technologies that make their offer less valuable than the new offer.[footnoteRef:12] But, actually, the antitrust law can't say anything about the prices charged by Uber. In fact, the prices practiced by Uber, or in technical terms the 'dynamic price system', turns out to be a market where prices adjust almost instantaneously, according to supply and demand. This dynamic price change with different factores like: (a) company internal metrics; (b) competitors prices; (c) matching of supply and demand in real time; and (d) other elements that might affect the transportations. [12: STEVEN C. SALOP and DAVID T. SCHEFFMAN, Raising Rivals' Costs, The American Economic Review 73 (1983), page 267.]

A different issue, connected to prices, is whether the pricing system of Uber works as a “hub and spoke” tool, that is, as a central instrument – the “hub” – that coordinates the prices that drivers – the “spokes” – apply.[footnoteRef:13] This theory basically explores if the Uber's algorithm was manipulated to reduce competition between drivers, to fix their prices. But, if this algorithm work as Uber decelerate it works, that is reflecting how the market demand and supply change over time, no kind of collusion occurs and the case of two drivers charging the same price should be regarded as a coincidence and not as a behavior resulting from collision. [footnoteRef:14] [13: MAURICE E. STUCKE and ARIEL EZRACHI, Virtual Competition. Harvard: Harvard University Press, 2016, pages 50-55.] [14: MARGHERITA COLANGELO and MARIATERESA MAGGIOLINO, Uber: a new challenge for regulation and competition law?, In: Market and competition law review, Vol. 1, n°2 (Oct. 2017), page 11. ]

Uber offers certain services to its users, as we have already analyzed. And while it offers these services and people are adhering to them, it collects data from its users, which ends up withholding them. Thus, the more data you can collect, the better your ability to improve service and earn money. But does this fit into the antitrust law? Well, we have to say no. Because we are talking about market features that don't depend on business practices. And because that data collected is a byproduct of an activity, which aims to improve the service and consequently consumer comfort. And so, because of this, it can't be forbidden by antitrust law.

A final and big important question is directly related with competition authority itself. The antitrust law has no great concern with the question of whether or not consumers are well

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informed. We can not deny that in fact there were situations in which the antitrust authorities intervened against the counterfeits that appeared in the market, but we are talking about cases where the wrongdoing has already occurred. What should happen is prevention, education and empowerment by these authorities, because this falls within the scope of antitrust law. In fact, the information is a product and because it's a product, antitrust law can be used to prosecute firms that explore the market power damaging its proper operation by reducing the quantity and the quality of the information conveyed to consumers. [footnoteRef:15] So, if it were proved that Uber manipulates its systems, should be an intervention by the antitrust authorities, because we would be towards a dominant position. [15: MARK PATTERSON, Antitrust law in the new economy. Harvard: Harvard University Press, 2017, pages 33-38. ]

We can't deny that Uber changed the competitive dynamics in the transportation but we can't say that should be a concern by the competitive authorities, as we analyzed in this point.

## 4. Uber vs. Taxis

It was not a long time ago that Uber appeared, changing the transport industry. This made taxi drivers upset and created a lot of conflicts. We can't deny the benefits of Uber against taxis. Uber presented different options for different type of users and this made transport market reach another level.

One of the main reasons that led to the displeasure of taxi drivers was the different treatment between Uber and taxi drivers. Taxi drivers are subject to very strong regulations, being one of the most heavily regulated in the majority of countries all over the world, with varying degrees of difference in the forms of quantity regulation, quality regulation, market conduct regulation and price regulation.[footnoteRef:16] However, taxis fares always remain expensive while the service quality changes between drivers. The biggest concern is the control of entry by authorities setting the maximum number of taxi operators. The idea is that if the entry was not controlled, then we would have an excessive number of taxis. And an excessive number of taxis would create a competition out of control between them, what would be bad for the market itself, affecting the quality of the service. And would cause congestion and pollution, what would be terrible for everyone. [16: OECD, Taxi Services: Competition and Regulation, 2007, page 19.]

In most countries, regulation has failed to achieve expected results in this sector. First, because the control over the entrance led to a lack of service provision, especially at peak hours. Secondly because such tight control over prices and quality of service has meant that taxi companies did not improve their service. But, the results that come from the deregulation that has been tried in some countries are not unanimously shared by economic literature, even if the majority are in favor of it.[footnoteRef:17] [17: ADRIAN T. MOORE and TED BALAKER, Do Economists Reach a Conclusion on Taxi Deregulation?, Economic Journal Watch 3 (2006), page 109.]

When Uber appeared it got worse. Through technological advances Uber created a new way of operating in the transport market, questioning the taxi service, which led to a need to reform the rules. The use of internet mobile technology to match drivers with users has created unprecedented competition in the taxi industry.[footnoteRef:18] Taxi operators claimed that Uber competes unfairly with them for failing to comply with regulatory requirements. [18: JUDD CRAMER and ALAN B. KRUEGER, Disruptive Change in the Taxi Business: The Case of Uber,

## 4.1. Taxis Monopoly

First of all, we need to understand what is a monopoly, what “taxi” means and which services could compete in the same market.

We can defy monopoly as a dominant state of a particular business operator, which is either the only subject providing a particular service of its kind, or its share of the market of particular product/service is close to 100%.<sup>[footnoteRef:19]</sup> [19: LAURA BARAINSKY, ESMA GUMBERIDZE and MOHAMMAD NURUL, Uber and Taxi Regulations: are Member States preserving a legal monopoly to the detriment of consumers?, page 12.]

As we have already mentioned, the regulations imposed on taxi market normally involve a restriction on the number of taxis operating and competing with each other in a certain place, but not in a way that there is only one operator, which would mean that there was no competition. So, whenever authorities establish a certain number of taxi licenses for a particular location, there is always more than one to maintain competition. Those taxi companies that got a license, still have to compete with each other, despite the limited number of licenses. So, we can say that regulating taxi market itself doesn't automatically mean granting a monopoly.

Even so, we have to question whether there is a monopoly granted to taxis, allowed by governments through compulsory licenses by the means of imposing mandatory licensing, as a of picking up individual passengers by individual cars and transporting them for remuneration to their individually requested destination.<sup>[footnoteRef:20]</sup> So, by prohibiting new companies such as Uber from transporting individual passengers in individual cars to their destination, which are therefore the same as taxis but not covered by the licensing criteria established by the authorities, are authorities allowing a monopoly of taxis? This “monopoly” would be allowed to justified by social questions, safety, comfort and access for passengers during all day even in uninhabited areas. [20: LAURA BARAINSKY, ESMA GUMBERIDZE and MOHAMMAD NURUL, Uber and Taxi Regulations: are Member States preserving a legal monopoly to the detriment of consumers?, page 12.]

We can't use the term “monopoly” for this. This term is used to describe individual business, economic subjects, entities dominating a certain market with no or very few and weak competitors and not to describe a group of entities competing with each other.<sup>[footnoteRef:21]</sup> So, taxi companies competing between themselves as a group, can't be considered as a monopoly, even if they are protected by some sort of regulation, which means they don't have to face more and new competitors over time. [21: LAURA BARAINSKY, ESMA GUMBERIDZE and MOHAMMAD NURUL, Uber and Taxi Regulations: are Member States preserving a legal monopoly to the detriment of consumers?, page 13.]

We can not deny that these regulations limit competition to a certain level, but not at a monopoly level, unless they eventually form a cartel or merge, and start to operate a single identity.

## 4.2. Uber, Taxis and Antitrust Law

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Other relevant question that we have to explore: supposing that taxi regulations were applied to Uber, should antitrust law act against Uber because it doesn't comply with regulations of taxi services? Uber's services have increased the 'catalog' of available transport, with the benefit of lower prices than traditional taxis. Thus, we conclude that the existence of Uber and its economic activity is not anticompetitive within the meaning of antitrust law, because it does not harm the consumer. And this does not change even if Uber's business harms taxi drivers. This doesn't mean that antitrust authorities support those entities that act beyond the law. We can say that Uber and taxis should act on the same plan. This doesn't happen because authorities have limited powers. They can forbid anticompetitive agreements, mergers, and monopolistic practices, but they cannot force Uber to comply with taxi regulations through commitments or obligations, or exempt taxi drivers from those regulatory obligations to which Uber is not subject. Thus, we conclude this point saying that when the authorities can actually do something, they do, they act. However, there are issues there are not in their power.

### 4.3. Relevant Norms

“Under the “Services Directive”<sup>[footnoteRef:22]</sup>, Article 9 Number 1, which provides that Member States should not make access to a service activity or its exercise “subject to an authorization scheme unless the following conditions are satisfied: (a) the authorization scheme does not discriminate against the provider in question; (b) the need for an authorization scheme is justified by an overriding reason relating to the public interest; (c) the objective pursued cannot be attained by means of a less restrictive measure”. These 3 conditions are cumulatively mandatory for the state in order to be legally allowed to impose an authorization on service providers under EU law. Prohibiting Uber, and especially its individual partner drivers from picking up passengers, while other taxi services could perform such tasks under certain conditions, does constitute discrimination. Even though this restriction on provision of services could be justified by public need, however, there still are less restrictive options available. Rather than banning, the authorities should design appropriate regulations to accommodate new developments on the market. Therefore, Uber bans are illegal under the directive mentioned in this paragraph.”<sup>[footnoteRef:23]</sup> [22: European Parliament: Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, available online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0123&from=EN>. ] [23: LAURA BARAINSKY, ESMA GUMBERIDZE and MOHAMMAD NURUL, Uber and Taxi Regulations: are Member States preserving a legal monopoly to the detriment of consumers?, pages 15 and 16.]

According to the Article 49 of Treaty of the Functioning of the European Union (TFEU)<sup>[footnoteRef:24]</sup>, any citizen of EU member state is free and allowed without restrictions to set up and establish state branches or subsidiaries in any other member. Even though it is operating in another member state, instead of the citizenship of the person, should be applied the same laws and regulations as undertakings established by local citizens. Thereby, Uber branches that are established in one EU member state and are expanding to another, have the right to compete with other locally established in there. By this, we can say that when a court forbids new competitors from entering the market, because of taxi regulation preventions, is a violation of Article 49 of TFEU. [24: European Union: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), available online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=DE>.]

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According to the Article 102 of the TFEU<sup>[footnoteRef:25]</sup> abuse of dominant position on the market by an undertaking or a group of undertakings, which may directly or indirectly result in setting up unfair prices, hindering technological developments on the market, is prohibited. “Even though the situation of those taxi firms that have obtained licenses amount of which was artificially limited by the national or local authorities, does not amount to a monopoly, as their situation does not result from their internal agreements, but just from the decisions of the authorities and as they still compete among each other, however, it still might amount to dominance and its abuse, especially if the regulator has set a maximum charge rates. The artificial reduction of potential competitors on the taxi market results in unfairly high prices, as well as in limitation of production. These practices are violations of Article 102 of TFEU.”<sup>[footnoteRef:26]</sup> Nowadays, in Portugal, Uber is already regulated, but there are other places that don't have our scenario. In this countries, where Uber still operates with no regulations, while traditional taxi firms still have to comply with licensing requirements, we can say that we have a reversed abuse of dominance by Uber, because it competes with others on which it has benefits. But, the true is that Uber didn't took advantage from this increasing the prices. Anyway, by doing this, governments passively grant exclusive rights to Uber. So, the governments should equalize this situation to avoid violation of article 102 of the TFEU, because taxis and Uber are both transport services, as we have seen. [25: European Union: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), available online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=DE> ] [26: LAURA BARAINSKY, ESMA GUMBERIDZE and MOHAMMAD NURUL, Uber and Taxi Regulations: are Member States preserving a legal monopoly to the detriment of consumers?, page 17.]

## 5. Conclusion

In this paper we had the chance to analyse the impact that Uber caused in transport market and as a primary issue, the conflicts with taxi drivers. Uber created a new way of operating in the transport market, questioning the taxi service. But, before we analyzed Uber business model and we concluded that we are dealing with a a transport service and not with a service of the information society, because it ceases to be a true intermediary from the moment that establishes prices, which means drivers are not independent as genuine service providers. Then, we understood that Uber shouldn't be a concern by the competitive authorities. While Uber offers certain services and people add to them, it collects data from its users, which ends up withholding them. And the more data you can collect, the better your ability to improve service and earn money. We saw that this doesn't fit into antitrust law because this is market features that don't depend on business practices. This aims to improve service and consequently consumer comfort. And so, because of this, it can't be forbidden by antitrust law. Authorities should improve prevention, education and empowerment, because this falls within the scope of antitrust law.

We also analyzed that we don't have a taxi monopoly, because taxi companies competing between themselves as a group and the term monopoly “is used describe individual business, economic subjects, entities dominating a certain market with no or very few and weak competitors and not to describe a group of entities competing with each other.”

We conclude that the existence of Uber and its economic activity is not anticompetitive within the meaning of antitrust law, because it does not harm the consumer. And this wouldn't change

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even if Uber's business harms taxi drivers. We also conclude that Uber and taxis should act on the same plan and this doesn't happen because authorities have limited powers. They do what they can do!

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