UBER IN EUROPE: ARE THERE STILL JUDGES IN LUXEMBOURG?

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I. INTRODUCTION

Since its advent, Uber has been on the receiving end of criticism and fierce opposition from incumbent operators in the taxi industry. In some ways resembling the conventional antitrust struggle between incumbents and mavericks, traditional operators have been lobbying governments to impose bans and restrictions on Uber activity and have brought several lawsuits merging together many issues, ranging from questions pertaining to labor law to problems connected with unfair competition laws, consumer protection, or regulation.

In general, the common claim that Uber would unfairly compete with traditional operators is based on the consideration that it does not comply with the rules and requirements imposed on the taxi industry by regulation, which, with some degree of variations across countries, is typically very pervasive and may include licensing and performance requirements for the drivers and the taxi companies, financial responsibility standards, maximum number of operators, and even maximum rates on the basis of various methodologies.

In Europe, the numerous cases raised at the national level have led to diverging solutions, with courts and regulators operating in an uncertain and unknown field with regard to the proper legal qualification of Uber's services and the rules to apply. In the meantime, after lawsuits in many countries, Uber cannot operate, at least with regard to some services, with UberPop (whereby users connect to drivers that do not hold any professional taxi/chauffeur license) and UberBlack (where the app links consumers to private licensed professional drivers operating services with rental cars) being the most controversial. Due to the lack of clarity on the legal treatment to be applied to Uber, some national courts have asked for guidance from the European Court of Justice ("CJEU"), which issued its first preliminary ruling on the matter in December 2017.

II. THE *UBER SPAIN* RULING

The case originates from the request sent in August 2015 by the Juzgado de lo Mercantil No 3 (Commercial Court) regarding an action brought by a taxi trade association, asking the court to declare that Uber Spain's activity, operating in Barcelona, Madrid and Valencia in the form of UberPop would constitute an act of unfair competition and to order it to cease its conduct.[2] The core issue of the questions referred by the national court to the CJEU is whether Uber's activity falls within the scope of Directives 2006/123[3] and 2000/31[4] as well as the provisions of the Treaty on the Functioning of the European Union ("TFEU") on the freedom to provide services, i.e. whether the nature of Uber's activity amounts to "transport services" that should fall under the transport regulation or rather "information society services," and therefore be subject to a different set of rules.

The Court has based its assessment on the analysis of the services provided by Uber, distinguishing between the two main constituents of its activity, (1) the intermediation service which enables, through a smartphone application, the transfer of information concerning the booking of a transport service – provided for remuneration – between the passenger and the non-professional Uber driver; and (2) the separate transport service. Similar reasoning was applied by the Advocate General ("AG") Szupnar in his Opinion, where he defined the activity of Uber as a composite service, i.e. comprising electronic and non-electronic elements: according to the AG, as the former service is not the main one and is not economically independent of the latter, and considering that Uber imposes numerous terms and conditions in the contract covering both the taking up and the pursuit of the activity and the conduct of drivers when providing services, in addition to setting the final price, these elements would exclude Uber services from being classified as information society services within the meaning of the Directive 2000/31. Rather, Uber should be considered a "genuine organiser and operator of urban transport services," i.e. a traditional transport service.[5]

In reaching the same conclusion, the Court gives crucial relevance to the following main points, i.e. that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, that it is essential for both the drivers and the users (being "an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers"), and that Uber exercises decisive influence over the conditions under which the transport service is provided by the drivers and a certain control over the quality of the vehicles, the drivers and their conduct. According to the

2 CJEU, Judgment of December 20, 2017, *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, C-434/15, ECLI:EU:C:2017:981.

3 Directive 2006/123/EC of the European Parliament and of the Council of December 12, 2006 on services in the internal market, OJ 2006, L 376/36.

4 Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market, OJ 2000, L 178/1.

5 See the Opinion of the AG Szupnar delivered on May 11, 2017 (arguing, at paras. 57-60, that, even if some similarities exist, Uber cannot be assimilated to other intermediation platforms, such as booking platforms).

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Court, given the electronic nature of the intermediation, the service provided by Uber would generally fulfil the criteria of an information society service.[6] However, the elements mentioned above imply that the service carried out by Uber is more than that and must be regarded as forming an integral part of an overall service whose main component is a transport service, so that it must be classified as "a service in the field of transport," subject to the common transport policy.[7] However, the Court concludes that as currently non-public urban transport services and services that are inherently linked to those services, such as the intermediation service provided by Uber, have not given rise to the adoption of measures based on that policy, Member States have the task of regulating the conditions under which such services are to be provided in accordance with the general rules of the TFEU.[8]

The reasoning of the CJEU is in some ways in line with the criteria indicated by the Commission in its 2016 Communication on a European agenda for the collaborative economy, where it has identified some key elements to be met by collaborative platforms as indicative of the fact that they should be considered as providing, in addition to the information society services, the underlying service too (such as the transport service).[9] In the latter case, they could be subject to the relevant sector-specific regulation, including licensing requirements generally applied to service providers. Such criteria include the fact that the platform sets the final price to be paid by the user as well as other key contractual terms and that it owns the key assets used to provide the underlying service. Even though Uber does not properly belong to the category of collaborative platforms and no reference appears in the decision, it seems that the first two points also play a crucial role in the Court analysis in *Uber Spain*.[10]

This decision has, arguably, dissatisfied scholars who support the different approach and recall the necessity of giving primary importance to the main features of "matchmaker" platforms such as Uber, which create value by enabling interactions between distinct categories of users rather than by performing transport activities.[11] According to this view, the application of taxi regulations to Uber would eliminate most of the key efficiencies related to the platform itself, identified mainly as the ability to match demand and supply, and the dynamic pricing system.[12] From another perspective, other commentators have welcomed the *Uber Spain* judgment to the extent that it focuses on the decisive influence exercised by platforms over the underlying service as a substantive element preventing regulatory arbitrage by digital companies.[13]

The stance taken has then been reiterated by the Court in a recent judgment regarding Uber France and the application of a French law laying down criminal penalties for the organization of a system for putting customers in contact with persons carrying passengers by road for remuneration using vehicles with fewer than 10 seats without authorization.

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6 See paras. 35-39 of the Judgment.

7 This criterion is in line with the case-law of the Court (see Judgment of October 15, 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685).

8 See paras. 34 et seq. of the Judgment.

9 European Commission, Communication, *A European agenda for the collaborative economy*, COM(2016) 356 final, June 2, 2016.

10 See De Franceschi, "*Uber Spain* and the Identity Crisis of Online Platforms," 1 *EUCML* 1, 2 (2018).

11 See Geradin, "Online Intermediation Platforms and Free Trade Principles – Some Reflections on the Uber Preliminary Ruling Case," in Internet - Competition and Regulation of Online Platforms, in Ortiz (Ed.), *CPI* 2016 (affirming that UberPop would fit with the definition of information society service). See also Id., "For a Facts-Based Analysis of Uber's Activities in the EU: Addressing Some Misconceptions," *CPI Antitrust Chronicle* September 2017 (arguing that the qualification as "information society service" would be more appropriate and allow Member States to regulate these services to ensure public interest, while protecting Uber and other online intermediation platforms from regulatory requirements that would unduly interfere with their freedom to provide their services); and Id., "Should Uber be Allowed to Compete in Europe? And if so How?," *CPI* (2015).

12 Id., "For a Facts-Based Analysis of Uber's Activities in the EU," at 11 (arguing that, (1) Uber's platform solves problems related to the strict limitation on the number of licenses creating an imbalance between supply and demand at certain times of the day or in certain circumstances; and (2) Uber's dynamic pricing creates efficiency by increasing the price of rides (surge pricing) when demand exceeds supply, hence increasing the number of drivers while decreasing the number of riders, whereas the rigid regulation of taxi rates causes frequent imbalances between supply and demand).

13 See Hacker, "UberPop, UberBlack, and the Regulation of Digital Platforms after the Asociación Profesional Elite Taxi Judgment of the CJEU," 14(1) *European Review of Contract Law* 80 (2018) (referring to digital companies pretending to act only as intermediaries but substantially providing a service without being subject to the same rules as those that provide the service in traditional formats, and arguing that the CJEU judgment creates a level playing field between digital and traditional ride-hailing companies). In general, see Fleischer, "Regulatory Arbitrage," 89 *Texas L. Rev.* 227 (2010) (defining "regulatory arbitrage" as a perfectly legal planning technique used to avoid taxes, accounting rules, securities disclosure, and other regulatory costs, by exploiting the gap between the economic substance of a transaction and its legal or regulatory treatment). On regulatory arbitrage in the sharing economy, see Calo & Rosenblat, "The Taking Economy: Uber, Information, And Power," 117 *Columbia Law Review* 1623, 1645 (2017).

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It is worth mentioning that these judgments relate to the UberPop service, whereas the reference for a preliminary ruling on Uber Black is still pending.[14]

III. UBER AND ANTITRUST LAW

The now much-criticized Chicagoan antitrust scholars have always believed that competition is better off when markets are open to new entrants. Indeed, among the many positive changes that they can trigger, new entrants may also determine a technological leap in the development path of an industry – a forward jump that may be hugely beneficial not only for consumers, but also for the very same incumbent/legacy firms, because they may take the opportunity to evolve towards similar new technologies. The advent of Uber, as well as the choice by many taxi driver associations to develop their own platforms and mobile applications, has the merit of exemplifying and confirming this textbook conviction. In the U.S., where proper antitrust issues have also been the subject of judicial inquiry, the Court of Appeals for the Third Circuit has acknowledged this as recently as two months ago.[15]

Namely, in 2018, the Third Circuit rejected all claims by the appellant taxi association against a 2016 Pennsylvania state legislation authorizing operation of Transportation Network Companies ("TNCs") in Philadelphia. The Taxi Association alleged that Uber entered the market illegally, operated at a lower cost, and was close to achieving monopoly power, by failing to comply with the regulation and hiring drivers from traditional operators. However, not only has the Court found that the appellants failed to set forth a plausible claim, without alleging any evidence of the elements necessary to affirm an attempt to monopolize within the meaning of Section 2 of the Sherman Act, such as the harmful effects on competition, the specific intent to monopolize, and the dangerous probability of achieving monopoly power, but it has also affirmed clearly that "Uber's presence in the market created *more* competition for medallion taxicabs, not *less*, and thus Uber's so-called 'predation' – operating without medallions or certificates of public convenience – does not give rise to an antitrust injury."

In its conclusion, the Court recalled a previous case brought before the Seventh Circuit on the legitimacy of an ordinance of the city of Chicago applying specific rules to TNCs and challenged by taxi and livery companies,[16] reiterating that appellants have no right to exclude competitors from the taxicab market, even if those new entrants have failed to obtain medallions or certificates of public convenience. The quoted judgment appears particularly indicative, as Judge Posner argued that different rules applied to TNCs are justified by the fact that their services are different and not interchangeable with taxi services (such as "dogs and cats"), concluding that: "when new technologies, or new business methods, appear, a common result is the decline or even disappearance of the old. Were the old deemed to have a constitutional right to preclude the entry of the new into the markets of the old, economic progress might grind to a halt."[17]

In summary, the entrance of Uber in the market for transportation services does not – and should not – raise any antitrust concern.

Both the Uber experience and the *Uber Spain* ruling do have something to teach the antitrust community.

In the first place, the Uber experience exemplifies the *liquid* competition that may occur in the platform economy. Once a platform has proved to be successful, nothing prevents its owner from using it to offer the most diverse services. It has not taken much for Uber to diversify its service from the delivery "of people" to the delivery of food; and many believe that, by collecting data about transportation, Uber aims to become the world leader in logistics. Thus, future antitrust law should deepen its understanding of the competitive harm – if any – that conglomerate firms may bring about across relevant markets. In addition, it cannot be either myopic or slow: it needs to endorse a forward-looking attitude, at least in attempting to understand the rationale of these new businesses, and it must be rapid, at least when it finds it necessary to intervene in these markets that are very prone to fast changes and whose boundaries are blurring.[18]

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14 Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on June 19, 2017, *Uber BV v. Richard Leipold*, Case C-371/17.

15 *Philadelphia Taxi Association, Inc. v. Uber Technologies, Inc.*, 17-1871 (3rd Cir. 2018).

16 *Ill. Transp. Trade Ass'n v. City of Chicago*, 839 F.3d 594, 597 (7th Cir. 2016) (Posner, J.), cert. denied sub nom. *Ill. Transp. Trade Ass'n v. City of Chicago, Ill.*, 137 S. Ct. 1829 (2017).

17 Id., at 596-597.

18 See Kovacic, "Antitrust in high-tech industries: improving the federal antitrust joint venture," 19 *Geo. Mason L. Rev.* 1097, 1102 (2012) (observing that, "[t]he antitrust system pedals furiously on a bicycle to catch up with industry developments that speed ahead in a formula one car").

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Furthermore, it is true that Uber produces information efficiencies by allocating the optimal vehicle, by assessing the quality of drivers and consumers, and by creating a reputation mechanism. However, Uber is also in a position to use the data it collects from drivers and users to manipulate their behavior. As a rule, antitrust law does not enquire as to whether economic agents are well informed or aware of their choices, because cases of information asymmetries traditionally fall within the scope of consumer protection law, disclosure regulation, and unfair competition.[19] However, since information is a product, antitrust law could be used to prosecute firms which, by exploiting their unilateral or aggregated market power, produce and distribute little information of bad quality,[20] by representing false options and alternatives, for example. On the contrary, antitrust law should not be used to prosecute the case of a platform charging prices which equal consumers' willingness to pay or using profiling to better persuade its customers. These remain, at most, issues of consumer protection law.[21]

In the second place, although it discusses the characterization of Uber's economic activities, the ruling of the CJEU in *Uber Spain* offers interpretative hints in relation to the Uber pricing algorithm.

In recent years the Uber pricing algorithm has raised two main genuine antitrust concerns. First, as alleged in *Meyer v. Uber*,[22] the Uber pricing algorithm could accommodate a hub-and-spoke form of collusion[23] between the platform – the hub – and the drivers – the spokes.[24] Indeed, though the horizontal element of this conspiracy would be quite difficult to prove,[25] there is room to maintain that the platform and the drivers could agree to use the Uber pricing algorithm as a communication tool, with the ultimate goal of charging cartel prices. Second, it is true that – as maintained elsewhere[26] – no kind of collusion occurs when two or more drivers charge the same price suggested by the Uber pricing algorithm that mimics the functioning of the market. Yet, one could argue that Uber drivers are colluding because, by sharing the same pricing indexes, rules, and instructions,[27] they track one another's pricing more readily.[28]

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19 See, e.g. the Opinion of the AG Henrik Saugmandsgaard Øe, delivered on September 21, 2017, *F. Hoffmann-La Roche Ltd and Others v. AGCM*, C-79/16, EU:C:2017:714, paras. 156-157, which recites that, "the concerted communication of misleading allegations … is, by its very nature, harmful to the proper functioning of normal competition, so much so that an examination of its effects on competition is not necessary. … where an examination of the content of the allegations in question reveals that they are misleading, the concerted communication of those allegations impairs the quality of the information available on the market and, consequently, adversely affects the decision-making process of those who create the demand for the two products concerned."

20 See Patterson, *Antitrust law in the new economy: Google, Yelp, LIBOR, and the control of information* (Cambridge: Harvard University Press, 2017). In particular, the author analyzes the cases of the firms which, like Google, Yelp, Amazon and Standard & Poor's, provide people with the information that they use to make their consumption and investment decisions: "Although some consumers may continue to use multiple sources of information, many will not. Therefore, the products that Google or Amazon list with the lowest prices, or the products with the best reviews, are quite likely to be purchased more often than are other products. (…) As a result, shoppers may look only to that single source, making information providers like Google and Amazon critically important gatekeepers in their information markets" (at 33-38).

21 On consumer protection issues, see Calo & Rosenblat, supra note 13 (militating for a stronger intervention on the part of consumer protection law).

22 See *Meyer v. Kalanick*, 200 F. Supp. 3d 408, 408 (S.D.N.Y. 2016) also commented by Passaro, "How Meyer v. Kalanick Could Determine How Uber and the Sharing Economy Fit into Antitrust Law," 6 *Mich. Bus. & Entrepreneurial L. Rev.* 2 (2018).

23 See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) where, thanks to the multiple addressees of the letters bearing the multilateral invitations to collude made by the hub, a picture theatre, each of the "spokes," that is the movie distributors, knew that the proposed cartel was under consideration by their horizontal rivals. Furthermore, see Orbach, "Hub-and-Spoke Conspiracies," 15 *Antitrust Source* (2016), Arizona Legal Studies Discussion Paper No. 16-11, available at: https://ssrn.com/abstract=2765476, and Klein, "Antitrust Analysis of Hub-and-Spoke Conspiracies," (2017), available at: https://ssrn.com/abstract=2909341.

24 Stucke & Ezrachi, "How Pricing Bots Could Form Cartels and Make Things More Expensive," *Harvard Business Review* (2016), available at: https://hbr.org/2016/10/how-pricing-bots-could-form-cartels-and-make-things-more-expensive.

25 Indeed, to ascertain whether a form of hub-and-spoke collusion exists, enforcers must establish whether the "spokes" know about their respective practices, that is, about the horizontal dimension of the conspiracy. Otherwise, a court would characterize the case as an example of parallel vertical agreements, whose anticompetitive nature is much more difficult to prove – see, *Kotteakos v. United States*, 328 U.S. 750 (1946), where the Court did not find any evidence of the horizontal relationship among the "spokes."

26 Colangelo & Maggiolino, "Uber: A New Challenge For Regulation And Competition Law?," 1 *Market and Competition Law Review* 47 (2017).

27 See, e.g. CJEU, Judgment of March 19, 2015, *Dole Food and Dole Fresh Fruit Europe v. Commission*, ECLI:EU:C:2015:184; European Commission, Case AT.39861 – *Yen Interest Rate Derivatives*, February 4, 2015; *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 134-35 (1969); or *Va. Excelsior Mills, Inc. v. FTC*, 256 F.2d 538, 540 (4th Cir. 1958).

28 Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (New York, Aspen Publishers, 2006, 3rd ed.), § 2025(d).

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However, there is a further and more radical argument which displaces these two concerns. Consider, indeed, that these concerns hold true provided the Uber platform and the drivers are deemed to be independent undertakings within the meaning of EU competition law. In contrast, if they were all characterized as parts of the same single economic agent, there could be no form of collusive agreement among them.

Uber Spain does not tackle this issue directly. Yet the Court has observed that, "Uber exercises decisive influence over the conditions under which [the] service is provided by […] drivers. […] Uber determines at least the maximum fare by means of the eponymous application [… and …] it exercises a certain control over the quality of the vehicles, the drivers, and their conduct."[29]

Therefore, there is room to argue that in the market for transportation services, Uber drivers, subject to the decisive influence of the platform and to its daily instructions, do not pursue a commercial interest divergent from, or in conflict with, the strategic interest of Uber itself. Consequently, those drivers and the platform could be deemed to be parts of a single economic agent, that is, of an undertaking within the meaning of EU competition law. This holds even if Uber drivers were not deemed Uber employees, because the doctrine of the single economic agent provides for a number of natural or legal persons to make up a single undertaking[30] when there is one entity, such as the Uber platform, which exercises decisive and effective influence over other entities, such as the drivers.[31] Conclusively, then, since agreements are supposed to pull together interests that do not naturally converge, no form of collusion should be considered possible among the drivers themselves or between the drivers, on the one hand, and the platform, on the other, because they are already parts of the same undertaking representing one single center of economic interests.

IV. CONCLUDING REMARKS

The awaited decision of the CJEU in *Uber Spain* was expected to provide useful guidance not only with reference to Uber services, but also to be indicative of the treatment to be applied to platforms in general. Someone could complain about this ruling, by pointing out that the judgment is based on a legalistic question – that is, the exact legal classification of the services offered by Uber – and observing that, by qualifying Uber's activity as a transportation service, it runs the risk of stifling the new technology and business model introduced and developed by Uber, against the interests of both the market and consumers. However, the ruling addresses a substantive issue, providing criteria aimed at distinguishing between platforms offering mere intermediation services and those which are at the same time matchmakers and effective controllers of the supplied underlying service.

The main problems arise with regard to the effect of such a ruling, which in practice happens to be *de facto* a ban on Uber's activities (at least in the form of the most controversial service, UberPop).[32] Therefore legislators, who have proved to be not ready to address the regulatory challenges posed by disruptive technologies, should make a commitment to rethink the existing rules applied to incumbent operators and to establish proper measures to regulate the new business models introduced by platforms.

In other words, old regulations do not fit with new, disruptive technologies, which would be best served by a critical review of the existing framework for the entire industry. As a matter of fact, the CJEU in *Uber Spain* concludes that the issue should be thrown back to Member States, which may legitimately regulate companies such as Uber. Thus, one should not ask whether Uber should also be subject to the outdated rules currently applied to taxi operators but rather, one should ask whether, given the positive changes introduced by Uber, and given the current imbalance between established operators and new ones, a complete reform of the existing provisions for all private operators offering transport services should be introduced and how measures able to take into account the efficiencies derived from the platform economy could be designed.[33]

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29 See para. 39 of the Judgment.

30 See, e.g. Judgment of July 19, 2012, *Alliance One International and Standard Commercial Tobacco v. Commission/ Alliance One International and Others*, Joined Cases C-628/10 P and C-141/11 P, ECLI:EU:C:2012:479, para. 42 and the case-law cited.

31 See, *mutatis mutandis*, CJEU, Judgment of September 26, 2013, *The Dow Chemical Company v. Commission*, C-179/12 P, ECLI:EU:C:2013:605, para. 55 for the importance of formal and actual control by a parent company over its incorporated subsidiaries to hold all of them part of a single economic unit.

32 See Hacker, supra note 13 (arguing that the ride-sharing model has essentially been buried in the EU by *Uber Spain*).

33 Among the various proposals, see Edelman & Geradin, "Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber?," 19 *Stanford Technology Law Review* 293 (2016) (suggesting a new form of regulation retaining the efficiencies of Uber but also guaranteeing more safety and quality, a better distribution of information, and no discrimination).

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