

CPI's Europe Column Presents:

Market definition in a rapidly changing (digital) world: the case of ride-sharing

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June 2018

Introduction

The taxi and private hire vehicle sector has undergone rapid evolution in recent years. While ride-sharing "apps" such as Uber remain less than a decade old, they have had a transformational impact on traditional city transportation services in numerous countries.

Unlike traditional taxi services, ride-sharing apps do not themselves provide transportation services but act as "aggregators" or "intermediaries", using their technology to facilitate access to transportation services while matching rider demand with driver supply. Riders may interact with traditional taxi services and app-based intermediaries in different ways, e.g. riders may hail a taxi on the street, or telephone a taxi dispatch or use a relevant app. The distinction between traditional taxi services and app-based, intermediary services has become increasingly blurred due to traditional taxi services introducing booking apps alongside more traditional modes of dispatch (such as MyTaxi and Gett) and the capability in certain cities and countries for app-based intermediaries to match riders to traditional taxis as well as to private hire drivers.

This raises an interesting question from a competition law perspective: are app-based intermediaries in the same relevant product market as traditional taxi services and other private hire vehicles (or even public transport services)? And how should competition authorities deal with the rapidly changing competitive dynamics in this sector?

While the issue has been considered by several competition authorities in recent years (including in the UK, Spain and Russia) no consistent picture on market definition has emerged. In the UK, the CMA defined a relatively broad product market, including traditional taxis, private hire vehicles and app-based operators in *Sheffield City Taxis/Mercury Taxis*.² In Russia, the FAS appeared to take an intermediate approach in *Uber/Yandex.Taxi*, assessing the merger's effects on a market for "*the organisation of information interaction between taxi drivers and passengers*".³ Conversely, in Spain, in *MyTaxi/Hailo*,⁴ the CNMC defined a narrow product market involving only app-based intermediary services (thus excluding traditional taxi-hail operators from the relevant market). Nevertheless, a common thread running through these decisions has been the willingness of authorities to take account of the dynamic nature of these markets and of out-of-market constraints during the competitive assessment, and to scrutinise the extent to which players within the defined product market actually represented close competitive constraints.

This approach is a welcome development in a sector where competitive conditions are changing quickly and where it is expected that technological advances will continue apace with increasing convergence between public and private modes of transport. The benefit of this more flexible approach is that competition authorities will be able to take appropriate account of all constraints on the merging parties, whether within a defined product market or otherwise.

Sheffield City Taxis/Mercury Taxis (2015)

The CMA assessed the completed acquisition of Mercury Taxis by Sheffield City Taxis, both of which operated in Sheffield supplying private hire transport services to cash and account customers and

tender customers (i.e. large public bodies such as hospitals and local authorities, who tender their private hire transport needs). The transaction was cleared at Phase 1.

Market definition

The CMA defined a relevant product market for "*private hire and hackney [taxi] transport services to cash and account customers*", which included hailed taxi services⁵ as well as private hire transport services (where the parties overlapped). Despite somewhat mixed evidence of demand-side substitution by cash and account customers to hailed taxis, the CMA's conclusion was based on evidence of: (i) the similarity of the basic intended use of hailed taxis and private hire transport services; (ii) internal documents (and third party comments) supporting the view that private hire operators had regard to taxi tariffs when setting prices; and (iii) use of taxis by private hire operators to serve their end passengers, which suggested similar vehicle characteristics for a proportion of private hire operators' fleets. Whilst it did not expressly refer to app-based intermediaries in the market definition assessment, it treated Uber and Gett as private hire operators and close competitors of traditional private hire vehicle operators.

The CMA also defined a relevant product market for "*private hire and hackney [taxi] transport services to tender customers*", which was distinguished from the market for cash and account services due to evidence of: (i) differing fares for tender customers compared to cash and account customers; (ii) specific requirements of tender customers; and (ii) evidence that competitors for tender customers and cash and account customers differed.

Competitive assessment

Cash and account customers

Despite combined market shares of 50-60%, and an assessment that the merging parties were close competitors, the CMA concluded that competitive constraints existed from alternative providers including other mid-size private hire operators, taxis and app-based services such as Uber and Gett (which were recent entrants with a track record of taking market share from incumbent operators).

The CMA did note that the constraint exercised by taxis plying for hire on the street on the merging parties' private hire activities varied by customer type, with account customers and suburban customers less likely to consider on-street taxis a suitable alternative to private hire operators. The CMA differentiated Uber from the offering of the merging parties, based on service (as it could only be booked for immediate travel) and noted that Uber and Gett offered cheaper prices than the merging parties, but ultimately concluded that both Uber and Gett would be close competitors to the merging parties.⁶ The CMA's overall conclusion was that, while the various competitors in the market positioned themselves differently, they offered on a collective basis multiple alternatives to most cash and account customers of the Parties.

Tender customers

Conversely, the CMA concluded that the parties faced limited competition for tender customers from other private hire operators (due to their more limited scale, geographic coverage and/or different product offerings) or from other transport providers. While the CMA concluded that the merger raised a realistic prospect of a substantial lessening of competition for tender customers, it ultimately exercised its discretion not to refer the merger for an in-depth investigation due to the low revenues involved.

MyTaxi/Hailo (2016)

The CNMC assessed the proposed acquisition by Daimler (which owned MyTaxi) of a 60% share in Hailo. The parties overlapped as providers of taxi app intermediary services in Madrid and Barcelona. The transaction was cleared at Phase 1.

Market definition

The CNMC defined the relevant product market as app-based intermediary services only. This is a much narrower market definition than applied by either the CMA in *Sheffield Taxis/Mercury Taxis* or the FAS in *Uber/Yandex*. One possible reason for the CNMC's application of a narrow product market definition in this case may have been that market share was determinative of whether the transaction needed to be notified in Spain under the relevant jurisdictional thresholds.⁷

The CNMC narrowed the relevant product market as follows:

- It distinguished between **taxi hail operators** (i.e. hailing a taxi directly on the street) and **taxi intermediary services** (taxi services that can be hired via an app or via radio in the car), noting that for taxi hail operators there was a direct relationship between the passenger and driver (which was absent when an intermediary service was involved). Furthermore, it found that, from a driver perspective, using intermediaries to capture clients was complementary to hailed operations whereas, from a passenger perspective, intermediaries offered value added services (in terms of travel planning and time savings) compared to taxi hail operators.
- It concluded that **taxi app intermediaries** and **taxi radio/phone based intermediaries** were not in the same market, noting that taxi app intermediaries provided additional services compared to radio-based intermediaries (such as monitoring arrival in real time using a map, payment through the app and the ability to evaluate the driver) and that users of each type of intermediation service differed (with young people more likely to use app-based intermediaries). From a driver perspective, the CNMC again considered that taxi app intermediaries were complementary to, rather than substitutable for, radio-based intermediaries.
- It considered whether the market could be further segmented by car/driver type i.e. **intermediary services which used taxis as the transport mode** and **intermediary services which used private hire vehicles as the transport mode**. The CNMC ultimately left this issue

open but included all **app-based intermediary services** in its market share analysis. The CNMC considered that the functionalities⁸ of both types of apps were similar, although it noted some differences in the regulatory regimes applicable to taxis and private hire vehicles, which were relevant to pricing and the availability of vehicles.

Competitive assessment

Despite the narrow market definition applied, the CNMC concluded that no competition concerns were raised by the transaction. The authority reached this view notwithstanding a finding that the transaction involved a merger of closest competitors with very high market shares (particularly in Madrid where combined market shares were approximately 70%).

The CNMC justified its decision by pointing to a number of countervailing considerations which mitigated any competition concerns, such as the fact that:

- Intermediary app service providers were a recent development and had not had a significant impact on general taxi services, noting figures of between 2% and 5% of passengers;
- Any potential barriers arising as a result of the transaction would not restrict the expansion of existing radio-based intermediaries who benefited from a wide customer base, and app service providers, such as Cabify and Uber were potential competitors to the merging parties.
- The merging parties only accounted for 20-30% of drivers and there was no exclusivity obligation, so taxi drivers could opt to use alternative intermediaries to the parties; and
- Any increase/decrease in competition would have a limited impact on final clients due to taxi price regulation.

Therefore, notwithstanding the high market shares of the parties in the relevant market, the CNMC clearly took into account the competitive constraints from outside the market, together with the interplay of regulation, in order to reach an unconditional clearance decision. The authority also seems to have had regard to the relatively early stage of app-based intermediation, leaving scope for fast-paced sector development that could quickly change the competitive dynamic.

Decision of the Irish competition authority

The transaction was also notified to the Irish Competition and Consumer Protection Commission (the "CCPC") as the parties met the jurisdictional tests. However, due to the absence of a horizontal overlap between the parties' activities in Ireland⁹, the CCPC did not consider it necessary to define the precise relevant markets¹⁰.

Uber/Yandex (2017)

The FAS assessed the combination of the ride-sharing app businesses of Uber and Yandex. Taxi in Russia.

The parties overlapped in the provision of ride-sharing app services in numerous cities in Russia. The transaction was ultimately cleared conditionally after a Phase II review.

Market definition

While limited information is available about the FAS' reasoning, the FAS did conclude that app-based ride-sharing operators constituted just one part of a wider market for "*the organisation of information interaction between taxi drivers and passengers*". The FAS also noted that this market was at a stage of active growth, with app-based operators providing a new convenient method for customers to order a taxi. As such, it is evident that the FAS valued the innovation which had been brought to the market by app-based intermediary services.

The FAS was silent on the issue of whether the relevant market should also encompass traditional taxi hail services (in line with the CMA's decision in *Sheffield Taxi/Mercury Taxi*) but it is clear that the FAS' approach was broader than the "app-based intermediary services" approach applied by the CNMC in *MyTaxi/Hailo*. It appeared to consider that app-based methods were part of a wider market of dispatching taxis.

Competitive assessment

Despite its broad approach to market definition, the FAS also observed that digital technologies, including app-based operators, were playing an increasing role in the relevant market, with further growth expected. In light of this market trend, the FAS decided to attach some conditions to its clearance decision which were specifically aimed at the digital nature of the merging parties' business.

Clearance was made conditional on the parties (i) ensuring access for passengers to information about their journey and driver, including historical journey information; and (ii) ensuring the ability for drivers to partner with other app-based operators in the market.

Future developments and conclusion

Transport markets have evolved considerably in recent years, and this development does not show any signs of slowing down. One recent trend that can be observed is a blurring of the boundaries between public and private transport operators in response to customer demand for flexible and personalised transport options. By way of example, in the UK, bus and rail operator Arriva has launched a flexible and demand-responsive minibus service which takes multiple passengers all travelling in the same direction. Passengers use an app to select a pick-up and drop off-point and pay for their journey¹¹. The features of this service are somewhat similar to existing carpooling ride-sharing app-based services such as UberPool, which also match riders heading in the same direction so that they can share the ride and cost of their journey. Recent comments by Uber's CEO have also indicated an aim for Uber to evolve further beyond its initial ride-sharing focus to combine multiple modes of transport in its

application and to partner with public transport systems in cities¹². Therefore, further convergence between transport modes is anticipated in future.

So what does that mean for merger control and in particular for market definition in this sector? It is clear from the above cases that market definition is only part of the story and not necessarily determinative of the final outcome. Authorities have considered carefully in their competitive assessments the possibility of strong out-of-market constraints, dynamic competition, and the extent to which operators within the relevant market actually pose a competitive constraint. It is also evident that the innovation, price competition and value-added services that app-based intermediary services have introduced to the transportation sector have been welcomed by competition authorities. This indicates that competition authorities should be able to take account of rapidly changing competitive dynamics in future cases.

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- ¹ Kyriakos Fountoukakos and André Pretorius are partners in Herbert Smith Freehills. The authors advised Uber on the merger control aspects of the combination of its ridesharing business in Russia and neighbouring CIS countries with Yandex.Taxi. All views expressed are personal views of the authors.
- ² ME/6548-15; Completed acquisition by Sheffield City Taxis Limited of certain assets and business of Mercury Taxicab (Sheffield) Limited, Decision of 13 October 2015.
- ³ Uber/Yandex.Taxi, Decision of 24 November 2017.
- ⁴ C/0802/16:Daimler/Hailo/MyTaxi/Negocio Hailo.
- ⁵ Those plying for hire on the street and at ranks.
- ⁶ An interesting preliminary question which arose in this case was whether Uber should be included as part of the relevant counterfactual, as it had only started to operate in Sheffield four days after the merger had completed. The CMA concluded that Uber's entry into Sheffield was independent of the merger and that, in the absence of the merger, it was unrealistic that Uber would not have entered the Sheffield market. Therefore, it accepted as part of the relevant counterfactual that Uber was a recent and expanding entrant.
- ⁷ Article 8.1(a), Ley 15/2007, de 3 de julio, de Defensa de la Competencia.
- ⁸ The apps were free for the driver and passenger to download; pick-up took place in the location signalled by the passenger, with the capability to monitor arrival in real time using a map; payment could be made through the app and it was possible to evaluate the driver.
- ⁹ The jurisdictional thresholds were only met by MyTaxi due the revenue of MyTaxi's parent company Daimler from the sale of motor vehicles on a wholesale basis in Ireland, together with related financial services.
- ¹⁰ As the first merger notification in Ireland involving digital apps, this was perhaps an opportunity for the CCPC to provide useful guidance on the issue. That said, the CCPC's summary determination that the parties did not overlap in any "*taxi dispatch / ride hailing business or related activities*" in Ireland may indicate at least an implicit willingness to consider a market definition encompassing both app-based and non-app-based operators.
- ¹¹ <https://www.arrivaannualhighlights.co.uk/doing-great-things/convenience-and-comfort-hailed-in-a-click/> This service has been launched on a pilot basis and is expected to be expanded later this year.
- ¹² <https://www.uber.com/newsroom/citesevent/>.