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THE UBER CASE: A RIDE FOR THE FUTURE OF THE EUROPEAN SINGLE MARKET

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Introduction

The purpose of this work is to offer a general overview of the issues and challenges presented by the rapid development of collaborative and sharing platforms in the context of the European Single Market, by focusing, specifically, on the issues that have emerged from the lengthy legal battle that has characterized the activity of Uber, since the debut of its first European services in 2011. The conclusions of the work take shape in the aftermath of the highly anticipated decision of the European Court of Justice (C-434/15 *Asociación Profesional Elite Taxi*) to categorize one of Uber's most controversial services, UberPOP, as a 'service in the field of transport', thus denying to the Californian company the ample protections, and significant freedoms, granted by the European framework to established service providers and 'information society services', and subordinating the operational reality of the service to the fragmented cosmos of national transport regulations.

The decision of the Court, described by many commentators as a grave setback for the future perspectives of the American company in the Old Continent, is only the latest in a long series of incidents that have seen Uber protagonist of litigations and scandals, in Europe and abroad, and which have resulted in an unprecedented polarization of the public opinion, split between defenders of the old economy and advocates of the digital revolution. The former accusing Uber of profiting from unfair competitive advantages, obtained over taxis and traditional transport operators by circumventing the applicable laws and by undermining the fundamental tenets of the labour market. The latter welcoming the convenience, reliability, and inexpensiveness of its services, hoping that the development of Uber in the transport market would finally bring a breath of fresh air in a sector of the economy which has long been unable to meet consumer demands and foster technological progress, while promoting the development of alternative business models. Such contrast of views is, often, the result of a misrepresentation of the ways in which the company operates in the different markets as well as a lack of general transparency concerning the way its many services affect the relationship between platform, users and partner drivers.

Hence, in order to achieve a meaningful comprehension of the Uber phenomenon and put it in the perspective of the European framework, it is necessary to take a step back to analyse the circumstances that brought the once small Californian start-up, aspiring to revolutionize the concept of urban transport, to become a technological behemoth worth billions of dollars, constantly at the centre of the global attention. In this regard, particular attention is to be dedicated to the different dynamics and characteristics behind the famous UberPOP, the intermediation service allowing

private unprofessional drivers to provide services of urban transport, and UberBLACK, the premium intermediation service that, by relying on licensed PHV drivers, threaten to compromise the delicate regulatory balance existing between taxis and private-hire-vehicles in many European countries.

The paper is divided in three parts. Chapter 1 offers, first of all, a general overview of the history and fundamental features of the Uber phenomenon, since the foundation of the company in 2009, up to the latest incidents that brought to the referrals before the European Court of Justice. It also analyses the variety of services offered by the American company as well as the way Uber has organized its corporate structure to take advantage of the European Single Market. Finally, the chapter describes the common features that characterize the transport sector across the Union, where the complex stratification of national and local rules, and the comparatively minor influence of European harmonization, has led to severe regulatory fragmentation and allowed traditional incumbent operators to hold positions of quasi-monopolistic privilege.

Chapter 2 tackles the main question raised by the development of the Uber platform, introducing the issues concerning the qualification of the service, and reflecting on the ambiguities that characterize the contractual and economic relationship that binds together the immateriality of the intermediation function provided by the platform and the physicality of the transportation services offered by its allegedly independent drivers; a feature which is common to many other players in the world of the collaborative economy and which leads us to identify a new category of two-sided digital platforms. The chapter goes on to provide a general overview of the norms on the freedom of establishment and the free movement of services, as well as the rules that specifically govern the field of transport. Particular attention is dedicated to the category of ‘information society services’, specially introduced by the European legislators to address the peculiar issues and characteristics of the digital economy, detailing the way such services are to be regulated across the Union as well as the restrictions that Member States can lawfully adopt towards service providers. This is a key passage of this work, as qualifying Uber and similar internet-based platforms as ‘information society services’ allows them to seamlessly operate across the European market without stumbling into many of the national provisions that often protect local economic operators from the competition of foreign undertakings. However, as emerges from the thorough analysis of Uber’s actual *modus operandi*, such qualification must be declined whenever the participation of the platform to the provision of the underlying services reaches such levels of influence and control as to blur the economic and functional distinction that must exist between intermediary and providers, both in physical and online marketplaces. This is certainly the case with UberPOP, as confirmed by the decision of the ECJ, in which the intervention of the platform is decisive, not only for the purpose of setting the tariffs and the general conditions for the provision of the service, but also plays an essential role in the creation and organization of a

market for passenger transport which would not be otherwise accessible by users and drivers; the same cannot be said, with equal certainty, in the case of UberBLACK, in which the presence of independent professional drivers, holders of specific PHV licence, bring the position of the platform closer to the brokerage and procurement function that cooperatives and dispatch centres have been performing for years in favour of taxi and PHV drivers. By classifying Uber as a service in the field of transport, it follows that Member States have greater discretion to regulate the activity of the platform, provided that the common transport policy envisaged in the Treaty on the Functioning of the European Union, as well as the fundamental principles on the freedom of establishment and the freedom of enterprise, are complied with. After having examined the implications of the judgment in *Asociación Profesional Elite Taxi*, the chapter ends by briefly discussing the possible outcome of the other preliminary rulings still pending before the ECJ, as well as reflecting on potential path available for Uber to continue to operate, lawfully, in the European Union.

Chapter 3, building on the conclusions reached on the configuration of Uber as a service in the field of transport, addresses the issues pertaining unfair competition in business-to-business relations between Uber and the other transport operators. Having noted the lack of formal harmonization in the area of unfair competition at the European level, the chapter uses the Italian experience towards UberPOP and UberBLACK, in both legislation and jurisdiction, as a reference for the potential fate of the service in Europe; the conclusion being that, whenever the activity of unscheduled public transport is reserved to specific figures like taxis and PHVs, subjected to an administrative licence regime, the particular functioning of the platform has the potential of infringing the rules on unfair competition, and it is thereby punishable by national courts, also by means of a precautionary suspension of the service. The chapter also provides a wider reflection on the role of collaborative platforms, of which Uber represents the most notable example, in the context of a systemic transformation of the European economy, and with specific regard to the competitive threats related to the use of automatic pricing algorithms. In addition, it offers a general overview of the possible regulatory strategies, adoptable by the EU and its Member States, to valorise the efficiencies afforded by these new technologies, ensuring a level playing field between new competitors and old operators, and addressing the systemic issues and externalities determined by the expansion of an economic model increasingly centred around the role of internet platforms. Finally, the chapter ends with a quick look to the risks that the development of Uber and its peers poses for the stability of the labour market, by looking at the emerging caselaw, from Europe and the United States, on the legal qualification of the contractual and economic relationships binding workers and platforms together.

Introduzione

Lo scopo di questo lavoro è fornire una panoramica generale delle problematiche e delle sfide dettate dal rapido sviluppo delle piattaforme collaborative e di condivisione nell'ambito del Mercato Unico dell'Unione Europea, focalizzando l'attenzione sulle numerose questioni emerse nel corso della lunga battaglia legale che ha contraddistinto l'attività di Uber, fin dal debutto nel 2011 dei suoi primi servizi in territorio europeo. Le conclusioni del lavoro prendono forma all'indomani dell'attesa decisione della Corte di Giustizia Europea (C-434/15 *Asociación Profesional Elite Taxi*) che qualifica UberPOP, il più controverso tra i servizi della società americana, come un 'servizio nel settore dei trasporti', così negando ad Uber le ampie protezioni, e significative libertà, altrimenti garantite dall'ordinamento europeo ai fornitori di 'servizi della società dell'informazione', e subordinando, di fatto, la concreta operabilità del servizio alle frammentate normative nazionali in tema di trasporto. La decisione della Corte, descritta da molti commentatori come una grave battuta d'arresto per le prospettive di sviluppo di Uber nel Vecchio Continente, è solo l'ultimo di una lunga serie di eventi che hanno visto la società americana protagonista di numerosi procedimenti giudiziari e scandali, in Europa e all'estero, e che hanno determinato una polarizzazione senza precedenti dell'opinione pubblica, divisa tra difensori della vecchia economia e sostenitori della rivoluzione digitale. Gli uni accusano Uber di approfittare di vantaggi competitivi indebiti, ottenuti ai danni di tassisti e operatori tradizionali del trasporto persone, aggirando le normative di settore e minando le fondamentali tutele del mercato del lavoro. Gli altri accolgono, invece, con favore la praticità, l'affidabilità e l'economicità dei suoi servizi, auspicando che lo sviluppo di Uber nel mercato dei trasporti urbani possa finalmente smuovere un settore dell'economia a lungo incapace di soddisfare adeguatamente la domanda dei consumatori e, nel contempo, sostenere il progresso tecnologico e la diffusione di modelli alternativi di impresa. Tale contrapposizione di opinioni è, sovente, il risultato di un fraintendimento delle modalità in cui la società americana opera nei diversi mercati, conseguenza di una complessiva mancanza di trasparenza circa il modo in cui i suoi numerosi servizi influenzano il rapporto tra piattaforma digitale, utenti e *partner drivers*.

Rimanendo nella prospettiva dell'ordinamento europeo, per giungere ad una comprensione adeguata del fenomeno Uber, è allora necessario compiere un passo indietro e analizzare le circostanze che hanno portato una piccola start-up californiana, con l'ambizione di rivoluzionare il concetto di trasporto urbano, a diventare un gigante tecnologico da miliardi di dollari, costantemente al centro dell'attenzione globale. Particolare attenzione viene dedicata, nel corso della trattazione, alle diverse

dinamiche e caratteristiche che contraddistinguono UberPOP, il servizio di intermediazione che permette ad autisti non professionali di fornire servizi di trasporto urbano, ed UberBLACK, il servizio di intermediazione premium che, appoggiandosi a professionisti dotati di licenza NCC, minaccia di compromettere il delicato equilibrio normativo tra servizio di taxi e servizi di ‘noleggio con conducente’ esistente in molti paesi dell’Unione Europea.

La trattazione è divisa in tre parti. Il Capitolo 1 fornisce, innanzitutto, una panoramica generale della storia e delle caratteristiche fondamentali del fenomeno Uber, dalla costituzione della società nel 2009, sino alle ultime vicende che hanno portato ai rinvii pregiudiziali di fronte alla Corte di Giustizia Europea. Analizza, inoltre, la grande varietà di servizi offerti dalla società americana ed il modo in cui Uber ha organizzato la propria struttura aziendale per sfruttare al meglio il funzionamento del Mercato Unico Europeo. Descrive, infine, gli elementi comuni che caratterizzano il settore del trasporto pubblico non di linea nei diversi paesi dell’Unione, alla luce della complessa stratificazione di regole nazionali e locali che, unite all’influenza relativamente limitata dell’armonizzazione europea, ha portato ad una situazione di forte frammentazione normativa, permettendo agli operatori tradizionali di mantenere posizioni di privilegio quasi monopolistico.

Il Capitolo 2 affronta le principali questioni sollevate dallo sviluppo della piattaforma Uber, introducendo le problematiche riguardanti la qualificazione del servizio e riflettendo sulle ambiguità del rapporto economico e contrattuale che lega la immaterialità della funzione di intermediazione fornita dalla piattaforma e la fisicità del servizio di trasporto offerto, in maniera formalmente indipendente, dai *partner drivers*; caratteristica che risulta comune a molti dei soggetti che operano nel mondo dell’economia collaborativa e che permette l’identificazione di una nuova categoria di piattaforme digitali strutturate secondo un modello di *two-sided market* (cd. mercato a due versanti). Il capitolo offre una rassegna delle norme europee riguardanti la libertà di stabilimento e la libera circolazione dei servizi, nonché delle regole che disciplinano in modo specifico il settore dei trasporti. Particolare attenzione viene dedicata alla definizione della categoria dei ‘servizi della società dell’informazione’, introdotta dal legislatore europeo per affrontare i peculiari problemi e caratteristiche dell’economia digitale, fornendo dettagliate indicazioni circa il modo in cui questi servizi possono essere disciplinati dagli Stati Membri, e circa il tipo di restrizioni che possono essere legittimamente adottate nei confronti dei fornitori di servizi. Si tratta di un passaggio fondamentale del presente lavoro, poiché qualificare Uber, e le altre piattaforme simili, come ‘servizi della società dell’informazione’, permette loro di operare agevolmente in tutto il mercato europeo, svincolandosi dalla moltitudine di regole nazionali di settore che spesso proteggono gli operatori economici locali dalla concorrenza delle imprese straniere. Tuttavia, come emerge dalla analisi del concreto *modus operandi* di Uber, una simile qualificazione deve essere esclusa ogniquale volta la partecipazione della

piattaforma alla fornitura del servizio sottostante raggiunge livelli di influenza e controllo tali da eliminare la separazione, economica e funzionale, che deve normalmente esistere tra intermediari e fornitori di servizi, nei mercati sia fisici che online. Tale situazione ricorre senz'altro nel caso di UberPOP, come valutato anche dalla CGUE, in cui l'intervento della piattaforma è decisivo, non solo ai fini della fissazione delle tariffe e delle condizioni generali di erogazione del servizio, ma svolge un ruolo essenziale nella creazione e organizzazione di un mercato per il trasporto passeggeri cui utenti e guidatori non avrebbero altrimenti accesso; lo stesso non può invece dirsi, con altrettanta certezza, nel caso di UberBLACK, in cui la presenza di guidatori professionisti indipendenti, e titolari di apposita licenza, avvicina maggiormente la posizione della piattaforma a quella funzione di intermediazione e procacciamento dei clienti che cooperative e centrali operative già svolgono da anni a favore di tassisti e operatori di noleggio con conducente. Dalla qualificazione di Uber come servizio di trasporto consegue che la regolamentazione dei relativi servizi è rimessa alla discrezionalità dei singoli Stati Membri, compatibilmente con la politica comune dei trasporti prevista dal Trattato sul Funzionamento della UE, e a condizione che i principi fondamentali sulla libertà di stabilimento e di impresa siano rispettati. Esaminate le implicazioni derivanti dal giudizio del caso *Asociación Profesional Elite Taxi*, il capitolo si conclude considerando brevemente la questione relativa al possibile esito dei rinvii pregiudiziali ancora pendenti di fronte alla Corte Europea, e riflettendo sulle strade potenzialmente percorribili da Uber per continuare ad operare legittimamente nell'Unione Europea.

Il Capitolo 3, partendo dalle conclusioni raggiunte circa la configurazione di Uber come 'servizio nel settore dei trasporti', approfondisce la questione relativa alle fattispecie di concorrenza sleale nelle relazioni b2b tra Uber e gli altri operatori del settore trasporto. Preso atto dell'assenza di un'armonizzazione formale in materia di concorrenza sleale a livello europeo, il capitolo utilizza come riferimento l'esperienza italiana, normativa e giurisdizionale, nell'approccio ai problemi posti da UberPOP e UberBLACK, giungendo alla conclusione che, ogniqualvolta l'attività di trasporto pubblico non di linea sia riservata a figure come taxi e NCC, e soggetta ad un regime di licenze amministrative, le particolari modalità di funzionamento della piattaforma possono integrare una ipotesi di concorrenza sleale, opportunamente sanzionabile dal giudice nazionale, anche attraverso la sospensione cautelare del servizio. Il capitolo fornisce, inoltre, una più ampia riflessione sul ruolo delle piattaforme collaborative, delle quali Uber rappresenta l'esponente maggiormente noto, nel contesto di una trasformazione sistemica dell'economia europea, e con particolare riguardo alle minacce competitive legate all'impiego di algoritmi di fissazione automatica dei prezzi, nonché alle possibili strategie regolatorie, adottabili dalla UE e dagli Stati Membri, per valorizzare le efficienze offerte da queste nuove tecnologie, garantire condizioni concorrenziali paritarie tra nuovi concorrenti

e vecchi operatori, ed affrontare le problematiche di sistema e le esternalità determinate dall'espansione di un modello economico crescentemente incentrato sul ruolo delle piattaforme online. Il capitolo presenta, infine, una breve panoramica dei rischi posti dalla proliferazione di Uber, e dei suoi simili, per la stabilità del mercato del lavoro, volgendo lo sguardo alla più recente giurisprudenza, europea e statunitense, circa la qualificazione legale ed economica del peculiare rapporto contrattuale che lega lavoratori e *partner drivers* alle rispettive piattaforme.

Chapter 1

1.1 The rise of Uber

Few companies, in recent years, have managed to excite such a fervent and intense debate as Uber have. Founded in 2009 as UberCab with an initial capital of just \$200,000¹, the service originally only allowed users in the San Francisco area to hail black luxury cars and share the cost of the ride among a number of passengers². Few years later, Uber is the most valuable start-up in the world³, operating in over 633 cities across 5 continents and diversified in a wide range of services, spacing from food delivery to autonomous driving research.

Yet the path to global domination was not untroubled. Uber expansion into new markets has often been wrapped in controversy and met by widespread protests, excited political debate and decided judicial action, while the company's corporate strategies and executives' behaviours have always been subject to severe scrutiny by the press and the public opinion. As a result, Uber faces today one the most difficult time of its existence, having to deal with the scandalous resignation of its CEO, and original founder, Travis Kalanick⁴ and having to defend itself from multiple allegations of unfair competition, price-transparency violations and even intellectual propriety theft, from law enforcement agencies all over the world⁵.

As the main purpose of this dissertation is to define the nature of one of Uber's most disputed service (UberX/Pop) in the context of EU law, special consideration needs to be given to the history of the company in the continent. Uber set foot in Europe for the first time in 2011, expanding its operations internationally in Paris and London; by the end of 2015, at least one of its services was available in

¹ SINAN, M. (2011) On heels of new funding and global expansion, car service Uber launches in D.C. today. *Venturebeat*. [Online] 15th December 2011. Available from: <https://venturebeat.com/2011/12/15/uber>. [Accessed: 12th October 2017].

² SHONTELL, A. (2014) All Hail the Uber Man! How Sharp-Elbowed Salesman Travis Kalanick Became Silicon Valley's Newest Star. *Business insider*. [Online] 11th January 2014. Available from: <http://www.businessinsider.com/uber-travis-kalanick-bio-2014-1?IR=T>. [Accessed: 12th October 2017].

³ HARTMANS, A. (2017) The \$10 billion club: Meet the 8 most valuable startups in the US. *Business Insider*. [Online] 2nd January 2017. Available from: <http://www.businessinsider.com/most-valuable-us-startups-2016-12?IR=T/#2-airbnb-7>. [Accessed: 12th October 2017].

⁴ WONG, J.C. (2017) Uber CEO Travis Kalanick resigns following months of chaos. *The Guardian*. [Online] 21st June 2017. Available from: <https://www.theguardian.com/technology/2017/jun/20/uber-ceo-travis-kalanick-resigns>. [Accessed: 12th October 2017].

⁵ NEWCOMER, E. (2017) Uber Pushed the Limits of the Law. Now Comes the Reckoning. *Bloomberg*. [Online] 11th October. Available from: <https://www.bloomberg.com/news/features/2017-10-11/uber-pushed-the-limits-of-the-law-now-comes-the-reckoning>. [Accessed: 12th October 2017].

nearly 50 other cities within the Union⁶. Reactions of national authorities and competing businesses, especially in those countries where taxi services and private hire vehicles are heavily regulated, have been swift and resolute. In Germany, administrative and commercial courts in Berlin, Hamburg and Frankfurt repeatedly found Uber in violation of the “Passenger Transportation Act” and the “Unfair Competition Act” and proceeded to ban its service in the country⁷. In Spain, the regional government of Catalonia resorted to sanction the company for the unauthorized offering of transportation services, while the commercial court of Madrid ordered the precautionary suspension of Uber’s activities⁸. In Italy, despite calls for loosening regulatory restrictions by the national competition authority and the administrative high court, the tribunals of Milan and Rome ordered Uber to discontinue some of its more prominent services in the country⁹. In France, where Uber’s arrival had given rise to violent strikes throughout the country, ad-hoc legislation was passed to regulate and severely limit its operations, while two of the company’s managers were even arrested with the accusation of running an illegal taxi company¹⁰.

Despite these difficulties, Uber popularity among users has been steadily growing over the years, with supporters of the service emerging even from the rows of national and European institutions¹¹. For instance, the decision by the London transport authority, consisting in the revocation of Uber’s licence to operate in the city¹², and motivated by the company’s lack of corporate responsibility in relation to a series of security and transparency issues, was followed by a public petition signed by more than 800,000 people asking for the TfL to reconsider the matter.

While at the national level, the uncoordinated actions of governments and courts have, sometimes hastily, attempted to solve problems which regulations weren’t clearly ready for, at the European level, debate on the matter has lagged behind. It was only in 2016 that the Commission issued a communication to the other European institutions, detailing the issues pertaining the so-called collaborative-or-sharing economy and setting the outlines of a common agenda for Member States to

⁶ WEIJMAN, F. (2015) Uber – A Pan-European Regulatory Challenge. *Journal of European Consumer and Market Law*. [Online] Kluwer Law Online. Issue 1-2. p.59. Available at <http://www.kluwerlawonline.com>. [Accessed: 2nd October 2017].

⁷ Id. p.60-62

⁸ Id. p.62-63

⁹ DE FRANCESCHI, A. (2016) The adequacy of Italian Law for the platform economy. *Journal of European Consumer and Market Law*. [Online] Kluwer Law Online. Issue 1. pp. 56–61. Available at <http://www.kluwerlawonline.com>. [Accessed: 2nd October 2017].

¹⁰ SOMMER, J.K. (2015) Uber – A Pan-European Regulatory Challenge. *Journal of European Consumer and Market Law*. [Online] Kluwer Law Online. Issue 3. pp. 112–118. Available at <http://www.kluwerlawonline.com>. [Accessed: 2nd October 2017].

¹¹ In 2014, Neelie Kroes, former commissioner for the EU Digital Agenda, declared through her personal Twitter account to be “absolutely outraged” by the decision of a Belgian tribunal to ban Uber in the country.

¹² TRANSPORT FOR LONDON. (2017) Licensing decision on Uber London Limited. [Online] Available from: <https://tfl.gov.uk/info-for/media/press-releases/2017/september/licensing-decision-on-uber-london-limited>. [Accessed: 12th October 2017].

follow¹³.

It is clear, at this point, that what originally started as a small Californian start-up has managed to transform into a global phenomenon, posing a series of complex legal, political and economic questions, which are potentially capable not only of disrupting the market for public and private transportation by fuelling the ever-present debate on the liberalization of the sector, but also paving the way for a new wave of technological services that aspire to supplant traditional operators.

The European Court of Justice may, in fact, play a critical role in this context. Questioned on several different occasions to rule on the definition of Uber under EU law and on the legality of the restrictions imposed upon it by national authorities¹⁴, the Court's decisions have the potential to either open the Single Market to the untamed diffusion of services like Uber, Lyft and Airbnb or legitimate the defensive approach undertaken by many European governments.

The merit of these questions will be thoroughly discussed in the following chapters; the rest of this chapter, instead, will be dedicated to the analysis of Uber's corporate structure and business strategy and to the state of the taxi industry in Europe, to better understand the events and the issues that have brought the American company before the ECJ.

1.2 Uber's product portfolio

Uber is an electronic platform which allows, using a smartphone equipped with the Uber application, to order a variety of urban transport services in the cities where the company has a presence and where those specific services are implemented. Thanks to Uber organizational capability and to the flexibility of its algorithm-based technologies, the number, characteristics and denominations of the services offered through the platform are constantly changing and can differ significantly from one city to the other, depending on the market demands and, most of all, the regulatory limitations imposed by local authorities.

Recurring element in all these services is that Uber places itself as a mere intermediary, providing the instruments to connect demand with offer, without needing to own or directly employ any vehicle or driver. The App recognises the location of the user and finds available nearby 'partner-drivers'; when a driver accepts the trip through the dedicated Driver application, the App notifies the user and displays the driver's profile and an estimated fare to the destination indicated; once the trip is

¹³ European Commission Communication COM(2016)356 of 2 June 2016. A European agenda for the collaborative economy.

¹⁴ (C-434/15) Request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain); (C-320/16) Request for a preliminary ruling from the Tribunal de grande instance de Lille (Regional Court, Lille, France); (C-526/15) Request for a preliminary ruling from the Rechtbank van Koophandel Brussel (Belgium); (C-371/17) Request for a preliminary ruling from the Bundesgerichtshof (Germany).

completed, the fare is automatically charged to the payment method indicated by the user when signing up to the App; Uber retains a percentage of the fare paid by the customer as a fee for its intermediation service; finally, a built-in rating function enables users and drivers to rate each other performance, and allows Uber to exclude from the platform those with average scores falling below a given threshold¹⁵.

As of 2017, Uber's offer is structured into two main price tiers, economy (UberX and variants) and premium (UberBLACK and variants), in addition to a number of smaller services¹⁶, ranging from food and package delivery (UberEATS and UberRUSH) to boats and helicopters rental (UberBOAT and UberCHOPPER), from freight transportation (UberFREIGHT) to dedicated transport for seniors and people with disabilities (UberASSIST).

UberBLACK is the original ride option offered by the platform since its inception. It uses premium black cars and professional drivers, providing a service comparable to private hire vehicles already available and regulated in many countries. The control exercised by the platform is particularly high. Uber determines both the fares applicable to customers and the characteristics of the cars eligible for the service (model, year, number of passengers, interior and exterior colour), and requires the driver and owner of the car to have a commercial insurance and hold regular commercial licensing and registration and additional permits, depending on local regulations. In addition, the number of active Black cars in a specific market area is limited by the platform in order to maintain demand and prices high.

UberX, also known in many European cities as UberPOP, is the most used and most controversial ride option available today. Launch in 2012, the service allows any non-professional driver with a valid driving license and access to a car in good conditions to drive for Uber, provided that a basic background check on driving records and criminal history is passed. There is no limitation on the number of active drivers nor a predetermined working schedule; drivers can get in their cars and work, whenever they like and wherever they want. Fares are not fixed, but they are determined by a complex of algorithms, taking into account many different factors: number of passengers, duration and length of the journey, road congestion, and local fluctuations in passengers' demand. This mechanism, also known as 'surge pricing algorithm'¹⁷, enables Uber to economically incentivise its partner-drivers to get on the road in times and places of higher demand, thus indirectly controlling the distribution of Uber-enabled cars within the city. Still, fares are significantly cheaper than UberBLACK's and,

¹⁵ Court of Justice of the European Union. Press release No 50/17 (11 May 2017) on Advocate General's Opinion in Case C-434/15, *Asociación Profesional Élite Taxi v Uber System Spain, S.L.*

¹⁶ For a complete and updated overview of the services offered by Uber in each city, see <https://www.uber.com/it/cities>.

¹⁷ Uber's pricing system will be the object of greater analysis in Chapter 3.

overall, the service results to be more convenient than regular taxis¹⁸, giving users the possibility to know in advance the identity and rating of the driver, the time of pick-up and arrival at destination, the route he will follow, and have an estimate of the final price based on the characteristics of the journey, one-off discounts and other promotions.

The legality of UberPOP has always been questioned by incumbents and governments alike. The principle accusation being that such a service enables inexperience and unreliable non-professional drivers to compete directly with existing, and highly regulated, transport services, and that the stark differences in running costs and technical requirements give Uber's drivers and unfair competitive advantage. In fact, as shown by data, regular taxis and ridersourcing services like Uber tend to serve a similar market demand¹⁹, with the latter generally prevailing in terms of lower prices and shorter waiting times; it follows that Uber's growth in a market can determine a consistent and swift decline in taxi's market-share and number of trips per day²⁰.

Two additional services complement Uber's offer in a limited number of markets. The first one is UberPOOL, the cheapest ride option available on the platform. The service works similarly to other carpooling applications by matching riders who are traveling in the same direction and are willing to share the same UberX car for a reduced fare. An algorithm takes care of selecting the closest driver and determining the optimal pick-up and drop-off points for the two passengers; then it calculates the fare, applying the reduced tariff associated with the selection of the service, and splits the bill between the passengers based on the length of their respective journeys. The service is performed by the same drivers who qualify for UberX with no additional conditions required by the platform.

The second service is called UberTAXI. It is basically an e-hailing service, which enables users to summon and pay for regular taxis using the Uber smartphone application; it was introduced by the American company in an attempt to appease discontented taxi drivers. As taxis are generally regulated by governments, the technical requirements imposed on drivers, including the possession of an administrative license and of a commercial insurance, as well as the pricing system applicable to clients, are those already set by local transport authorities for the rest of the industry. In exchange for the brokerage service performed, Uber charges a 5% commission on the driver and an additional booking fee on the user. As these services mimic the functioning of other well-established platforms,

¹⁸ For a comparative analysis of Uber's and Taxi's prices across 21 US cities see SILVERSTEIN, S. (2014) These Animated Charts Tell You Everything About Uber Prices In 21 Cities. *Business insider*. [Online] 16th October 2014. Available from: <http://www.businessinsider.com/uber-vs-taxi-pricing-by-city-2014-10?IR=T>. [Accessed: 15th October 2017].

¹⁹ SHAHEEN, S. and CHAN, N. (2014) App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco. *University of California Transportation Center (UCTC)*. [Online] Available from: <http://tsrc.berkeley.edu/node/797>. [Accessed: 16th October 2017].

²⁰ DOGTIEV, A. (2017) Uber Revenue and Usage Statistics 2017. *BusinessofApps*. [Online] 26th September 2017. Available from: <http://www.businessofapps.com/data/uber-statistics>. [Accessed: 16th October 2017].

already present in many European markets (e.g. BlaBlaCar, Lyft Line, Taxify, Mytaxi, ect.), no specific issue has so far affected their operation in the EU.

1.3 Uber's corporate structure

Like many other multinational tech companies, another key element of Uber's activity is its articulated corporate structure. The platform is originally developed and operated by Uber Technologies Inc., a privately held Delaware company having its principal place of business in San Francisco. Yet operations outside the US, including those performed in the European Union, are managed by one of its many subsidiaries²¹, Uber B.V., a private limited liability company incorporated under the laws of the Netherlands. Uber B.V. is, in turn, the parent company of a number of smaller firms incorporated in several nations where its services are available, like Uber London Ltd, Uber France SAS, Uber System Spain LS and Uber Italy S.r.l., whose only activity is supposed to be the performance of local advertising and the provision of technical assistance to the drivers during the registration process to the platform and, depending on the city's regulations, assist in the obtaining of the administrative licenses necessary for the service to operate (e.g. the PHV licence in London). However, the role played by these particular subsidiaries in the functioning of Uber's plethora of services remains the object of much legal attention and judicial discussion²².

Furthermore, the analysis of the platform operations is rendered even more complicated by the fact that, while passengers enter in a contractual relationship with Uber B.V. which grants them a limited use license for the Uber smartphone application in exchange for the payment of the related fares, the drivers working for the platform enter a different service agreement with a different company called Rasier Operations B.V. (another one of Uber's subsidiaries, also located in the Netherlands) which licenses them the use of the driver application and distributes the fares collected by Uber B.V.²³.

Leaving aside the fiscal aspects that clearly inspired such a convoluted structure, and whose analysis would entail digressing way beyond the purpose of this dissertation, significant issues arise even at

²¹ For a detailed analysis of Uber's corporate structure and its implications in terms of taxation, see O'KEEFE, B. and JONES, M. (2015) How Uber plays the tax shell game. *Fortune*. [Online] 22nd October 2015. Available from: <http://fortune.com/2015/10/22/uber-tax-shell>. [Accessed: 15th October 2017].

²² As we will see going further in this dissertation, the London Employment Tribunal ruled in 2015 that Uber London Ltd played a central role in the provision of the service in the city and, because of the close working relationship it established with the drivers of the platform, was to be considered their actual employer.

²³ Documentation concerning the driver service agreement is not publicly available on Uber website, and can only be accessed during the registration process to the platform. A copy of the 2015 agreement is available at <https://s3.amazonaws.com/uber-regulatory-documents/country/canada/RASIER+OPERATIONS+BV+Agreement+-+Canada+December+29+2015.pdf>. [Accessed: 2nd November 2017]. Extensive extracts of the service of the T&C agreement can also be found in the judgment of the London Employment Tribunal on the qualification of Uber's partner drivers; see case 2202551/2015 & Others, *Aslam, Farrar and Others v. Uber*, judgment of 28th October 2016.

the jurisdictional level when dealing with Uber's conducts. The very first consequence is the increased difficulties in identifying and summoning the right defendants, causing greater complexity in the trail and, in some instances, even leading to the dismissal of the action²⁴. Moreover, the existence of separate contractual and business relationships for the two main components of the service (the request of rides by the users on one hand and the provision of available drivers on the other) allows Uber to create a legal barrier, separating its disputed intermediation activity from the even more controversial relationship with its drivers. Yet, the most significant result of this kind of corporate organization is the way it allows the Uber platform to seamlessly operate and grow across the European Single Market.

First of all, having placed its registered office and central administration in a Member State such as the Netherlands, Uber benefited from the right of secondary establishment granted by Article 49 and 54 TFEU; thus the company was able to pursue its economic activity throughout the EU by setting-up agencies, branches and subsidiaries in the territory of the other Member States, while enjoying the fiscal and regulatory advantages offered by Dutch company law, even if the company actually conducted no business of any kind in the Netherlands²⁵, which was precisely the case when Uber first came to Europe in 2011 (see § 1.1).

Secondly, being in fact a national of a Member State to the purpose of the TFEU, Uber could also take advantage of the fundamental freedoms offered by the European Union; specifically, the freedom to provide services across the Union under the conditions granted by Article 56 TFEU. As a result, the platform could launch and experiment with its commercial activities in new European markets, even on a temporary basis, without having to establish there a permanent organization. This is particularly useful to test the reaction of consumers and regulators, with very limited costs for the company, especially in those countries where the existence of heavily regulated markets created uncertainties on Uber's ability to remain operative in the long term. Furthermore, as we will see in § 1.5, the company, when brought before national courts to defend the legality of its conducts or faced with their restrictions by national authorities, has repeatedly invoked the protections provided by the European legislation concerning services and electronic commerce in the Internal Market.

²⁴ In 2015, the Tribunale di Milano, ruling on an application for the precautionary suspension of UberPOP, had to delay to the main proceeding the decision concerning the relationship among five of Uber's subsidiary, all standing as defendants in the trial, because considered too complicated. [See *Ordinanza Tribunale di Milano RG No 16612/2015*]. Also in 2015, the Court of Queen's Bench of Alberta had to dismiss the application for a statutory interlocutory injunction against Uber because the plaintiff had wrongfully brought before the court its Canadian subsidiary instead of Uber B.V. and Rasier B.V. [See *Edmonton (City) v Uber Canada Inc*, 2015 ABQB 214 (CanLII)].

²⁵ As long as the company is constituted under the law of a Member State and has its registered office there, it will be established in the first Member State within the meaning of the Treaty; even if the company conducted no business or trade of any kind in that Member State, but solely through the various forms of secondary establishment. This principle was first established by the ECJ in the famous *Segers* case (C-79/85) and later confirmed in *Centros* (C-212/97).

In the end, it is worth noting that the applicability of these norms fundamentally depends on the qualification given to Uber's activities. The analysis of these questions will be one of the focus of this dissertation and will be thoroughly discusses in Chapter 2.

1.4 The state of passenger transport in the EU

Before diving into the analysis of the main legal issues, it is necessary to understand the structure and regulation of the sector for unscheduled passenger transport in the EU.

While the matter of transport is framed by Article 4 TFEU within the shared competence of Union and Member States, control over the functioning of the local taxi industry is largely left to the competence of individual Member States, which regulate the sector both at national and regional level. As a result, local transport systems are highly fragmented and legal frameworks differ wildly not only from one state to the other but among cities themselves. Yet, the rise of sharing platforms and new competing services in the sector for public and private transport, has invested and perturbed all Member States in very similar ways, posing new challenges of transnational nature and prompting the attention of the European Commission on the matter²⁶.

Despite the differences in organization and legislation, several common features can be identified across the EU. Since taxis are mostly deemed to provide a service of public interest, local governments have often resulted to tightly regulate their operations, imposing significant barriers to entry and separating them from other types of passenger transport like hire cars and, more recently, ridesharing services. This is particularly evident in terms of market allocation, where taxi services generally enjoy the advantages of legal monopolies over the street hailing and ranking segment of the market, being the only operators allowed to accept rides on the road, whereas the other players are left to compete in the already crowded pre-booked segment of the market against aggressive prices and new hailing technologies.

In all Member States, the exercise of the taxi activity is subject to the issuing of a license, an administrative authorization granting drivers the right to circulate on public roads and dedicated bus lanes, to access restricted areas like congestion charge zones and city centres, and to park and wait for passengers in designated areas of the city like taxi stands, stations and airports. Licenses are assigned by local authorities through a variety of administrative procedures whose purpose is to

²⁶ For a comprehensive analysis of the European taxi, hire car with driver and ridesharing markets across the EU, see European Commission, (2016). *Study on passenger transport by taxi, hire car with driver and ridesharing in the EU*. Brussels. Available from: <https://ec.europa.eu/transport/sites/transport/files/2016-09-26-pax-transport-taxi-hirecar-w-driver-ridesharing-final-report.pdf>. [Accessed 22nd October 2017].

determine and respond to the transportation needs of the community through the imposition on drivers and taxi companies of stringent quantitative restrictions and demanding qualitative requirements.

Licenses are, in many cities, limited in number and issued for free on a personal basis with a limited validity, requiring drivers to renew them periodically or else maintain regular compliance with current regulations. While in most of the Member States licenses cannot be transferred, and issuing authorities hold the power to revoke them, in countries such as Italy, France, Spain and the United Kingdom, licenses are transferable for monetary consideration, with prices in secondary markets often spiking to thousands or hundreds of Euros²⁷. Furthermore, licenses are usually only valid in a determined geographical area, often requiring additional permits to service ports and airports.

Taxi operators are structured either as sole entrepreneurs, operating individually or united in a cooperative, or as employees of taxi companies. In the former case, which represents the overwhelming majority across the EU, in addition to the general rules on self-employed persons, a series of requirements of professional competence, medical fitness, financial standing and technical organization are applied, with drivers required in several countries to be affiliated to a dispatch centre or to provide minimum level of service during certain hours of the day. In the latter case, instead, special legislation has been introduced to protect the employees of taxi companies, setting rules on minimum wage as well as strict requirements concerning working hours.

Dispatch centres operates as mere intermediaries between taxi drivers and potential passengers, allowing drivers to increase turnover in the pre-arranged market. They cannot give orders and cannot force a driver to accept rides, but they generally play an important role in the market by setting additional qualitative standards for drivers to comply with, and by fostering competition through the development of new hailing technologies such as smartphone and web application.

Technical requirements concerning the vehicle are also regulated at the national level, including the adoption of specific symbols and liveries to allow users to recognize officially licensed taxis. The specifications of taximeters, which in many countries is a device usable exclusively by taxis²⁸, are determined in conformity with Directive 2004/22/EC on measuring instruments.

Fares are also the object of thorough regulation, as local authorities in all Member States set maximum and minimum fares with very limited space left for price competition among drivers and dispatch

²⁷ Quantitative regulation has been widely used in the taxi industry. It effectively reduces the threat of competition to the incumbents. This may create a scarcity value, which may be “cropped” if the licences are traded. See ECMT (2007), *ECMT Round Tables: No. 133 (De)Regulation of the Taxi Industry*, OECD Publishing, Paris, p.121. Available from: <http://dx.doi.org/10.1787/9789282101155-en>.

²⁸ Uber itself was brought before court with the accusation that its app was being used as a taximeter, which in London is a privilege afforded only to black-cab drivers in return for the extensive training they undergo to get licensed by the TfL. On this matter, see TOPHAM, G. and HELLIER, D. and GANI, A. (2015) Uber wins high court case over taxi app. *The Guardian*. [Online] 16TH October 2015. Available from: <https://www.theguardian.com/technology/2015/oct/16/uber-wins-high-court-case-taxi-app-tfl>. [Accessed: 24th October 2017].

centres. In a limited number of countries, including Germany and Austria, fares are entirely fixed. Interestingly, in the United Kingdom, a peculiar fare system allows riders to share the same taxi to reach different destinations by paying separate and reduced fares.

Finally, it is for national laws to identify the special obligation of public law imposed on taxi operators as well as the rules of private law applicable to the contractual relation binding drivers and passengers together. The former is a typical common carrier obligation of non-discriminatory service, similar throughout the EU, requiring taxi operators to offer, among other things, 24/7 radio dispatch capability with reasonable and non-discriminatory fares and services, minimum level of response time, and appropriate financial responsibility standards and insurances. The latter differs significantly across Member States, being either the result of special legislation or the application of civil codes provisions on transport contracts and contractual obligations. In many countries, taxi operators are part of an integrated urban mobility and often entrusted, and subsidised by local governments, with the exercise of paratransit services, such as door-to-door transport for elders and people with reduced mobility.

As mentioned earlier, most Member States follow a two-tier system, which revolves around a regulatory distinction between hire cars with drivers (PHV, VTC, NCC, etc.) and regular taxis.

The activity of hire car with driver is also subject to an administrative authorization to perform the service, but general requirements are lower than taxi licences, while the number of active drivers is not subject to a numeric cap. Hire cars are characterized by the absence of a taximeter, being able to negotiate the tariff directly with the customer, and are usually required to comply with technical regulations intended to discern them from regular taxi operators. For this same reason, hire cars with driver are forbidden to pick-up new passengers on the street, as all legislations across the EU have similarly imposed on them the obligations to perform the service based exclusively on prior reservations in exchange for a pre-arranged fixed fare, and to return to the place of business or deposit after each service (the so-called ‘return to the garage rule’).

As with taxis, hire car drivers can either operate as self-employed professionals or be employee of larger companies. Crucial in this sector is the role played by private intermediaries matching the offer of hire car operators with the demand for passenger transport. UberBLACK, the premium-tire service offered by the American company, generally falls within this category of intermediaries. While the activity is in principle accepted by local authorities and often regulated (some Member States even require them to be registered as dispatch centres or obtain a specific authorization), issues may arise in respect of the modalities in which the service is performed; specifically, when the violation of the ‘return to the garage rule’, in combination with telematic booking systems such as smartphone

applications, allows hire cars with driver to unlawfully and directly compete with regular taxis in the street hailing sector.

Since the establishment of the European Union, twelve out of twenty-eight Member States have proceeded to liberalize the taxi sector by removing quantitative restrictions to the issuing of licenses²⁹. In these countries, the number of taxis has increased by a considerable amount, forcing in some cases the competent authorities to impose a moratorium to avoid the oversaturation of the market (e.g. Ireland). In a few of them, additional indirect barriers and qualitative requirements have had the overall effect of limiting the number of active taxis (e.g. Sweden, the Netherlands and Hungary). Although quantitative restrictions are generally considered by the economic literature as a “welfare-reducing regulatory intervention”, the positive effects of the liberalization of the taxi sector have been modest if not outright contradictory, often leading to an overall decrease in operating efficiency and drivers’ income, while causing an increase in cities congestion and, paradoxically, in ride prices as well³⁰.

In those countries where taxis are subject to quantitative restrictions and high entry costs, many operators have instead opted to move to the less regulated hire car sector. This is particularly evident in countries like France, Italy and the United Kingdom, where the number of ‘hire car with driver’ authorizations has grown exponentially in less than five years since the introduction of the first intermediary platforms³¹.

Finally, many European cities have become accustomed, in recent times, to the concept of ride-and-car sharing. Ridesharing (or carpooling) allows users travelling to a predetermined destination, by private or hire car, to simply share the cost of the journey with people going in the same direction; such service is considered and permitted by many Member States’ legislations without subjecting it to any prior authorization, as long as the transport activity is performed, on an occasional basis, for free or merely to cover the running costs of the vehicle. Carsharing, on the other hand, can be described as a “sequential short-term car access”³², where end users can rent and drive, for short periods of time, cars owned by municipalities or partnered private companies; it is a service favoured by local governments and, by now, represent a significant part of their vision for an integrated mobility landscape.

²⁹ European Commission, (2016). *Study on passenger transport by taxi, hire car with driver and ridesharing in the EU*. Brussels. Available from: <https://ec.europa.eu/transport/sites/transport/files/2016-09-26-pax-transport-taxi-hirecar-w-driver-ridesharing-final-report.pdf>. [Accessed 22nd October 2017]. p.68-69.

³⁰ For an economic analysis of the reasons why the taxi industry fails to reflect the perfect competition model described by micro-economic theories and thus tends to react to liberalization attempts in an unanticipated and unsatisfactory manner, see DEMPSEY, P.S. (1996) Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure. *Transportation Law Journal*. Volume 24:73. p.73-120.

³¹ See note 29. p. 70-77.

³² LE VINE, S. and ZOLFAGHARI, A. and POLAK, J. (2014) Carsharing: Evolution, Challenges and Opportunities. *Centre for Transport Studies, Imperial College London*. p.4.

These phenomena, which are traditionally considered part of the so-called sharing economy revolution, need not to be confused with the activity performed by services such as UberX/POP which, by connecting passengers with private non-professional drivers, allow them to systematically transport passengers for compensation without any license. Such a service represents, in almost all Member States³³, a hybrid category that falls outside the boundaries of the law and has, so far, been the object of much litigation and has been made illegal in many cities across the EU.

1.5 Preliminary rulings C-434/15, C-526/15, C-320/16 and C-371/17

As we have seen in the previous paragraphs, the launch of Uber in new countries has frequently been followed by the prompt reaction of incumbent operators, particularly taxi associations, which have not hesitated to bring the American company before national courts, asking for injunctions or outright prohibitions of several of its services. However, only few of these trials have so far managed to climb their way through the Member States' judicial systems and reached the bench of Europe highest court: the European Court of Justice.

To this day, only four requests for a preliminary ruling have been deferred to the ECJ. One of these, lodged in October 2015 by the Brussel Tribunal of Commerce in a case involving Uber Belgium and one of Brussels' main taxi companies³⁴, was declared manifestly inadmissible and dismissed by the Court for procedural reasons³⁵: specifically, the lack of sufficient information on the factual and legislative context provided by the referring court. The case concerned whether a local regulation on taxis and hire car services could be interpreted as to encompass, within the definition of 'taxi services', the activity of individual unlicensed carriers accepting rides through the UberPOP application. The court of first instance in Brussel had found UberPOP activities to be contrary to the fair commercial practices established by local legislation, ordered the cessation of the service and imposed 10,000 euros fine on its drivers for any further violation. The court of appeal, questioning the compatibility of such judgment with the fundamental principles of the European Single Market on proportionality and the freedom to provide services, had decided to defer the question to the ECJ for a preliminary ruling. Yet, following the dismissal of the request, the decision of the court has been confirmed and UberPOP remains, to this day, illegal in Belgium.

³³ Poland, Estonia and Lithuania are among the few countries that tolerate these applications and intends to fully legitimize them by passing specific legislation and subjecting them to VAT taxation (see the Opinion of the 1st June 2015 of the Polish Minister of Finance, No 221850.654195.427483).

³⁴ Case C-526/15 - Request for a preliminary ruling from the Rechtbank van Koophandel Brussel (Belgium) lodged on 5 October 2015— Uber Belgium BVBA v Taxi Radio Bruxellois NV, Other parties: Uber NV and Others.

³⁵ C-526/15 - Order of the Court (Eighth Chamber) of 27 October 2016— Uber Belgium BVBA v Taxi Radio Bruxellois NV.

As for the other rulings, only one of them has recently arrived at a final judgment, while the others are expected to be decided in the course of 2018. Nevertheless, these cases deserve to be jointly analysed in greater detail, as they all revolve around the same fundamental legal issues and represent a crucial passage for the development of the Uber platform across the EU.

The first case to be brought to the attention of the ECJ dates back to the 7th August 2015, when the Third Commercial Court of Barcelona lodged the request for a preliminary ruling concerning the interpretation of several norms from the TFEU and the Service Directive³⁶. The case is a good example of the typical legal issues that arise in court when dealing with electronic platforms such as Uber and it shows many of the company's usual defensive strategies.

In October 2014, the 'Asociación Profesional Élite Taxi', a professional organisation representing taxi drivers in the metropolitan area of Barcelona, started an action before the 'Juzgado de lo Mercantil No 3 de Barcelona' asking the court to make an order against 'Uber Systems Spain SL' to declare its activities, performed through the UberPOP service, as acts of unfair competition and to order their immediate cessation. In fact, according to the applicant, neither Uber nor the owners-drivers of the vehicles concerned had the licences and authorizations required by the national rules on transport (Ley 16/1987 de Ordenación de los Transportes Terrestres) and the local regulations on taxi services (Reglamento Metropolitano del Taxi) to perform passenger transport in the city of Barcelona. As the Uber application allows non-professional private drivers to transport passengers using their own vehicles, the applicant claimed that the technological instruments provided by the platform gave these drivers an unfair competitive advantage over licenced taxi operators and constituted a violation of the rules governing competitive activities and misleading practices within the meaning of Articles 4, 5 and 15 of the Ley 3/1991 de Competencia Desleal. Uber Spain, on the other hand, objected the lack of passive legitimacy and denied having committed any infringement of the Spanish legislation; it claimed to be performing only advertising duties and support activities on behalf of Uber BV, the Dutch company which is responsible for the functioning of the Uber application in the territory of the European Union (see § 1.3). Furthermore, Uber claimed that it does not provide a transport service within the meaning of the European and Spanish legislation, but that it acts as a mere intermediary, providing its users access to an "intelligent telephone and technological platform" interface and software application which enable them to connect with one another. Deeming itself as an electronic service, it claimed to be entitled to the protections granted by Article 56 TFEU on the freedom to provide services and by Directives 2006/123/EC and 2000/31/EC on information society services in the Internal Market.

³⁶ Case C-434/15 - Request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain) lodged on 7 August 2015 — Asociación Profesional Élite Taxi v Uber Systems Spain, S.L.

The applicability of the aforementioned EU norms is the object of the questions referred by the Spanish court to the ECJ; specifically: should the activity carried out by Uber be considered as a transport service, to be regulated within the scope of the shared competence of the European Union and the Member States, or should it be considered as an electronic intermediary or information society service, as such covered by the guarantees of the European Single Market? If the latter were to be the correct classification, are national norms on unfair competition, enabling courts to forbid the performance of its services, contrary to the provisions of the Service Directive on proportionality, freedom of establishment and authorization schemes? And finally, are the restrictions on the freedom to provide services imposed by one Member State, such as authorization requirements or cessation orders, lawful measures in accordance with the Directive on electronic commerce?

As noted by Advocate General Szpunar in his opinion on the case³⁷, the ruling presents the Court with a highly politicised issue, as Uber's methods of operating generates multiple questions concerning not only competition law, but also consumer protection and employment law. The way the ECJ decided to answer these questions could certainly have a significant impact on Uber's ambitions of expansion in the EU, as well as set an important precedent for the legal qualification of similar internet-based services in the years to come. Final judgment of the case was eventually delivered on the 20th December 2017; its content is thoroughly discussed in Chapter 2.

The second case to be brought before the ECJ comes from the Regional Court of Lille in France which, invested of a criminal proceeding against Uber's French subsidiary Uber France SAS, has lodged the request for a preliminary ruling on the 6th June 2016³⁸.

In this instance, Uber is accused of having organised, from June 2014 onwards, an illegal system (UberPOP) for putting customers in touch with persons who, despite being neither road transport undertakings entitled to provide occasional services nor licensed taxi drivers, carry passengers by road for consideration, in violation of Article L. 3124-13 of the French Transport Code. Uber France defends itself by claiming that the aforementioned provisions of the Transport Code constitute a technical regulation on Information Society services within the meaning of Directive 98/34/EC; the directive requires Member States, before adopting any new draft rule setting general requirements on the taking-up and pursuit of service activities, to notify the Commission of their intentions; having the French government failed to do so, the Article in question would not be enforceable against Uber. Thus, the French Court refers to the ECJ the question whether the requirements set by Article L. 3124-13 represents new technical regulation on services subject to mandatory notification to the

³⁷ Advocate General's Opinion in Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, delivered on the 11th May 2017, Court of Justice of the European Union, Luxembourg.

³⁸ Case C-320/16 - Request for a preliminary ruling from the Tribunal de grande instance de Lille (Regional Court, Lille) (France) lodged on 6 June 2016 — Criminal proceedings against Uber France SAS.

Commission or, instead, whether it merely constitutes transport regulation, excluded by Article 2 of the Service Directive from the application of said obligation.

Here again, arises the issue of the legal classification of the UberPOP service: does a provision targeting the modalities in which the platform operates constitute a restriction to the company's freedom to provide its service in the EU or, on the contrary, is just another norm aimed at regulating the proper functioning of a Member State's transport sector? Here again, the judgment of the ECJ will help define the boundaries of the Member States' discretion in regulating new economic models that seek to subvert existing markets through the implementation of new technologies and organizational models. Advocate General Szpunar, delivering its opinion on this case as well³⁹, notices that the questions posed by the case raise the same fundamental issues already dealt with in *Asociación Profesional Élite Taxi*, and are likely to be resolved by the Court in the same manner.

Lastly, it was the turn of the German Federal Court to ask the ECJ, in June 2017, for clarification concerning the legal qualification attributable to one of Uber's less disputed activity, UberBLACK⁴⁰. This is the first time that Europe highest Court is specifically asked to rule on UberBLACK as the service, despite attracting the attention and suspect of incumbent operators, has generally managed to fly safely beneath the radars of national courts. In fact, as we have seen in § 1.2, UberBLACK operates as an intermediary between passengers and professional hire car drivers who, unlike those working for UberPOP, normally hold a licence or authorization in compliance with local regulations. Issues may arise when hire cars with driver operate in violation of sector-specific operational requirements such as the 'return to the garage rule', by accepting new customers straight on the road without previously returning to their depot, and do so, by using advanced hailing instruments like the Uber application. Such a conduct could well be sanctioned as an act of unfair competition, as it tends to blur the legal and economic line established in many European countries to separate hire cars from taxis⁴¹.

Similarly, in the case at hand, the Berlin District Court ruled, in April 2014, that UberBLACK had violated German competition law by assigning rides to drivers and rental car companies right from its Dutch headquarter (Uber BV), and not from a specifically licensed company located in Germany, as required under German transport law. In addition, the Court found that Uber drivers generally remained in the city centre after completing a ride, waiting for new clients, and unlawfully competing

³⁹ Advocate General's Opinion in Case C-320/16 Uber France SAS, delivered on the 4th July 2017, Court of Justice of the European Union, Luxembourg.

⁴⁰ Case C-371/17 - Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 19 June 2017—Uber BV v Richard Leipold.

⁴¹ Such was the view of the Tribunale di Roma when, in April 2017, forbade UberBLACK to operate in the country [see *Ordinanza Tribunale di Roma RG No 76465/2016*]. The decision was later overturned by the same Court following the decision of the Italian Parliament to suspend the application of several norms on private hire vehicles in the context of an overall revision of the framework regulating the sector [see e *Ordinanza Tribunale di Roma RG No 25857/2017*].

with taxi operators. It also argued that Uber was not in fact a simple intermediary, but a complex company directly involved in the financial management, organization and marketing of the transport service offered by its partner drivers; and thus, responsible for their commercial conducts⁴².

Landed on the bench of the Federal Court, the case was then referred to the ECJ to clarify whether such reconstruction was in line with the Union legislation. The German judge particularly demands whether a company that, not only provide carriers and passengers with a smartphone application that enables them to remotely connect and contract rides, but also determines the prices and the condition of carriage, processes the payments, and advertises the service under a common brand, should be regarded as an undertaking in the field of transport within the meaning of Article 58 TFEU or just as an intermediary service covered by Directive 2006/123/EC. If the latter option were to be found true, the Court continues, “may an injunction prohibiting the service to safeguard public policy, specifically with the objective of maintaining the competitiveness and proper functioning of taxi services, be justified under the principles established by Article 16 of the Service Directive?”.

The referral raises two important questions. The first one, concerning the qualification of UberBLACK, may in fact induce the American company to restructure its European corporate organization, moving the responsibility for the exercise of its services onto the respective national subsidiaries, and limiting the role played by Uber BV to higher administrative and fiscal functions. The second one, relating to the admissibility of certain restrictive measures adopted by the Member States against services like Uber’s, will certainly contribute, together with the previous rulings, to better define the extent to which the defence of the *status quo*, of legal monopolies and incumbent undertakings, may legitimize a compression of the freedom to do business and provide innovative services across the European Union.

⁴² The findings of the Court resulted in an interim injunction against UberBLACK [see Richard Leipold v Uber BV, Landgericht Berlin 9.2.2015 Case 101 O 125/14, juris]; the decision was subsequently confirmed [see Landgericht Berlin 9.2.2015 Case 101 O 125/14, juris]. Since then UberBLACK is banned from operating in Berlin.

Chapter 2

2.1 Defining Uber: a regulatory problem

Before diving into the main question concerning the legal qualification of Uber's services in the context of EU law, it is necessary to take into consideration the intricate set of provisions that are relevant to the case at hand. As we have seen in Chapter 1, Uber's *modus operandi* is the result of the combination of a complex corporate structure with advanced information management technologies. Specifically, Uber operates as a composite service. A significant part of it is provided remotely by electronic means: a smartphone application collects the requests for urban transport made by the users of the platform, and then matches this demand with available nearby drivers. The other part of the service relies, instead, on the physical work of Uber's partner drivers, who offer a seat on their car in exchange for a remuneration determined by the application itself. The qualification of the driver and the features of the vehicle vary depending on the service tier selected by the users (UberBLACK, UberPOP, etc.). Hence, because of the characteristics of such a condition and the immateriality of most of its platform, the American company is able to provide differentiated services and grow throughout the territory of the European Union, while remaining comfortably settled in its Amsterdam headquarters, whereas its local subsidiaries are relegated to mere ancillary roles⁴³.

One of the main questions concerning the legality of Uber stems from the unclear correlation that ties the two parts of the service together. According to national and local governments and, especially, incumbent taxi and private-hire operators, the intermediation component of the service and the provision of the actual rides constitute an integrated and inseparable transportation business. According to Uber, instead, the two components are economically and functionally independent, with the Uber digital platform playing the sole role of intermediating between the demand of passengers and the offer of willing self-employed drivers. The solution of this problem is of particular significance, as it radically changes the provisions applicable to the case on the matter of service circulation in the EU. Article 58 TFEU, in fact, prescribes that the free movement of services in the field of transport shall be governed by the specific provisions of Title VI of the Treaty on the

⁴³ Although the operational role of Uber's European subsidiaries is still the object of some doubts, to the purpose of this analysis, I will assume that it is the company Uber BV, located in the Netherlands, that operates the Uber application in the European Union. Such a reconstruction has been confirmed by several national courts dealing with the Uber case (Landgericht Berlin 9.2.2015 Case 101 O 125/14) and, more recently, has also been suggested by Advocate General Szpunar in his opinions on the cases C-434/15 and C-320/16.

Functioning of the European Union, relating to the common transport policy, thus excluding the field from the application of many of the general provisions on free movement contained in Title II of the same Treaty and subsequent implementing directives. As we shall see continuing our analysis, accepting the reconstruction advanced by Uber, allows the American company, and the other IT start-ups operating in a similar manner, to benefit from the established *acquis communautaire* on services and establishment, while enjoying an unparalleled freedom to move across the Single Market, escaping many of the burdens otherwise imposable by national legislations.

2.1.1 Uber and the collaborative economy

The issues raised by the definition of Uber's activities need to be analysed in the context of the general economic and social phenomenon that falls under the term of collaborative economy. Considered by many economists as the fundamental element of the "fourth industrial revolution"⁴⁴, sharing platforms aim to facilitate the circulation of goods and services between peers, by connecting private and professional individuals through the implementation of sophisticated internet-based communication networks, blurring the line between users and providers, and bypassing traditional intermediaries and economic operators. Despite being originally conceived as non-profit efforts, intended to shift the attention from ownership to accessibility in the pursuit of a fairer and more sustainable market, collaborative platforms have rapidly developed into a profitable business model and many of its pioneers have transformed into lucrative multi-national corporations; a trend that has been supported in its development by the acceleration of technological evolution, the increase in urbanization and people concentration, by the crisis of the traditional economic and financial model, and, most of all, by the ongoing process of "servitization" of the western economies⁴⁵. Uber is, in fact, only the most prominent player among a growing number of undertakings which, by pushing the Schumpeterian concept of "disruptive innovation" to its limits, seek to subvert the established dynamics of a variety of market sectors: not only urban transportation (Lyft, Blablacar, Scooterino), but also logistics (Deliveroo, Foodora, Just Eat), accommodation (Airbnb, HomeExchange, Couchsurfing), finance (Indiegogo, Kickstarter, Lendingclub), professional assistance (Lawyers on Demand, Medicast, Taskrabbt), and so on.

Overall, there is still significant ambiguity concerning the characteristics and features of the sharing economic model, as reflected by the regulatory fragmentation that affects the matter at the European

⁴⁴ SCHWAB, K. (ed.) (2016) *The Fourth Industrial Revolution*. World Economic Forum.

⁴⁵ The concept of servitization describes a process in which added value is created by the combination of different products and services under the unified brand of a new advanced service. See HOJNIK, J. (2016) The servitization of industry: EU law implications and challenges. *Common Market Law Review* 53: 1575–1624.

level, where the general attitude held by the Commission can be regarded as a “wait-and-see” approach⁴⁶. Nevertheless, a few common distinctive elements can be identified: the presence of service providers sharing their resources, assets, time or skill, on an occasional basis or even in a professional capacity; the activity of intermediaries, that manage the digital platforms necessary to coordinate peer-to-peer transactions without needing to own any of the assets involved; and the availability of peer-users willing to access these resources in exchange for some kind of remuneration⁴⁷. Because of the amplitude of the concept of remuneration accepted by the ECJ (more on this in the following paragraphs), any activity provided in this manner will essentially qualify as a service within the meaning of the TFEU, and service providers, as well as sharing platforms, will be able to claim market access under the Service Directive, provided that they comply with the Treaty requirements on establishment.

In the case of Uber, however, the basic concept of resource sharing has evolved beyond the function of simple intermediation. In fact, while traditional sharing platforms operate as mere marketplaces, where users interested in sharing their resources can meet and negotiate their transactions, Uber has the ability to affect and influence, to a variable degree, the way services are provided onto its platform, by setting technical requirements, determining prices and selecting the people who are entitled to use it. Such level of involvement in the provision of the service makes the Uber case somehow unique when compared to the rest of the sector and renders the application of national and European rules even more problematic.

It is only natural at this point that, in order to answer any of these questions in a meaningful way, it is necessary to turn our attention to the specific pieces of EU legislation on which sharing platforms may rely to defend the legality of their operations. Besides the Treaty provisions concerning free movement and the fundamental principles of the internal market, an essential role is occupied by the Service Directive⁴⁸ and the Directive on electronic commerce⁴⁹. The former, adopted in 2006 after a lengthy political discussion and a troubled legislative process⁵⁰, is aimed at removing barriers

⁴⁶ In spite of advancing new legislation, the Commission has been elaborating on the adaptability of the current regulatory framework on services and e-commerce, as testified by the work done within the EU Agenda for the Collaborative Economy.

⁴⁷ As established in COM(2015) 634 final and COM(2015) 635 final for the draft directive on the digital economy, a remuneration exists where “a price is to be paid or the consumer actively provides counter-performances other than money in the form of personal data or other data”. In addition, in *Papasavvas* (C-291/13), the ECJ rules that Article 2 of the e-commerce directive must be interpreted to include in the concept of ‘information society services’ the provision of online information services for which the service provider is remunerated, not by the recipient, but by income generated by advertisements posted on a website.

The definition is provided in Article 1 of Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society Services.

⁴⁸ Directive 2006/123/EC on services in the Internal Market. O.J. 2006, L 376/36.

⁴⁹ Directive 2000/31/EC on certain aspects of information society services, in particular electronic commerce, in the Internal Market. O.J. 2000, L 178/1.

⁵⁰ DE WITTE, B. (2007) Setting the scene: How did Services get to Bolkestein and Why? *EUI Working Papers*. 20/2007.

between Member States for both providers and recipients; it transposes into legal provisions the massive case law of the ECJ on the matter of services and sets procedures allowing greater administrative simplification and cooperation among Member States. The latter constitutes *lex specialis* to the Service Directive, as its provisions are intended to better define and encourage the development of information society services in the context of the internal market. Finally, further reference will be made to the Commission's agenda on the collaborative economy⁵¹ as a useful, albeit non-binding, guidance on the interpretation of the law on this matter.

2.2 The right of Establishment

The first issue that comes into consideration when dealing with trans-national economic activities is the legal establishment of the subjects providing the services. At the European level, the right of establishment of natural and legal persons is regulated, first and foremost, by 'Article 49 et seq.' of the Treaty on the Functioning of the European Union. The Treaty provides a general prohibition on Member States to restrict the freedom of European nationals to establish themselves in the territory of a Member State other than the one of origin (the so-called right of primary establishment), as well as a further prohibition against the limitation of the freedom of European nationals, established in the territory of any Member States, to set-up agencies, branches or subsidiaries in any other Member State (the so-called right of secondary establishment).

While the provisions of Article 49 are essentially intended to grant natural persons, having the European citizenship, the right to take up and pursue activities as self-employed persons and to set up and manage undertakings in any Member State under the same conditions laid down by law for its own nationals, Article 54 extends the applicability of these rules to companies and firms, provided that they are formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the territory of the European Union. It is opportune to iterate the fact that, consistent with the case law of the ECJ, as long as the company is lawfully constituted under national civil or commercial law, and holds a connecting factor with one of the Member States, it will be considered to be established therein, even if it doesn't conduct any business or trade of any kind, but solely operates through the various forms of secondary establishment allowed under EU law⁵².

⁵¹ See *supra* note 13.

⁵² In *Centros* (C-212/97), the ECJ expressed the principle under which the deliberate choice by an undertaking to establish in a Member State with favourable legislative requirements concerning incorporation, with the sole purpose of enjoying the right of secondary establishment in another Member State with stricter regulations, constitutes an exercise of the rights inherent in the concept of freedom of establishment. Such interpretation does not, however, prevent the authorities of the

As to the content of the right of establishment, a significant contribution to the development of its fundamental concepts has come from the decades of case law of the European Court of Justice. Recognized as directly effective since 1974⁵³, Article 49 allows individuals and companies, who intend to pursue an economic activity for an indefinite period of time in the territory of one or more Member States⁵⁴, to establish in it a permanent place of business; this entails, in the words of the Court, participating in, and profiting from, the economic life of that specific Member State on a stable and continuous basis⁵⁵. This requirement may be fulfilled where a company is constituted for a given period or where it rents the building or installation through which it pursues its activity; it may also be fulfilled where a Member State grants authorization for a limited duration or only in relation to particular services⁵⁶. In addition, an establishment does not necessarily need to take the form of a subsidiary, branch or agency, but may simply consist of an office managed by a provider's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking. The ECJ further clarified that the temporal element of the activity performed by the company or individual, need to be scrutinized, not only in the light of the duration of the provision of the relative service, but also by taking into consideration its characteristics of regularity, periodicity and continuity, as not even the setting-up of a physical business infrastructure is sufficient, in itself, to conclusively prove the existence of an establishment within the meaning of the Treaty⁵⁷.

Freedom of establishment is predicated upon the principle of equal treatment, which entails the prohibition not only of any discrimination on grounds of nationality but also of any indirect discrimination based on other grounds, equally capable of producing the same result⁵⁸. Core objective of these provisions is the requirement for Member States to regulate, in an equal manner, the treatment of both their nationals and non-nationals. As such, restrictions that are manifestly discriminatory on ground of nationality are *prima facie* forbidden under Article 49, unless otherwise justified. Moreover, the case law of the ECJ has gradually expanded the scope of application of these norms, coming to cover, under the general prohibition of the Treaty, any national rule which is liable to hinder or make less attractive the exercise of its fundamental freedoms, including the right of establishment⁵⁹. In the view of the Court, in order to be acceptable under EU law, such restrictive

Member State concerned from adopting the appropriate measure for preventing or penalising fraud, either in relation to the company itself or in relation to its members. For further case law on the matter, see *supra* note 25.

⁵³ Case C-2/74 *Jean Reyners v Belgian State* [1974].

⁵⁴ Case C-221/89 *R v Secretary of State for Transport, ex p Factortame* [1991] and Case C-107/83 *Ordre des Avocats v Klopp* [1984].

⁵⁵ Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995].

⁵⁶ Recital 37 to the Service Directive.

⁵⁷ Advocate General's Opinion in Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, delivered on the 4th July 2017, Court of Justice of the European Union, Luxembourg.

⁵⁸ Recital 65 to the Service Directive.

⁵⁹ See *supra* note 54.

measures must fulfil four conditions: a) they must be applied in a non-discriminatory manner; b) they must be justified by imperative requirements of general interest; c) they must be suitable and proportionate for securing the attainment of the objective which they pursue; d) they must not go beyond what is necessary in order to achieve their objective. As to the concept of restrictions, the “obstacle approach” undertaken by the Court broadly covers all measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-community trade⁶⁰.

Yet the right of establishment is not without limitations. First of all, Article 51 TFEU excludes from the application of these provisions any activity which is connected, even occasionally, with the exercise of official authority⁶¹. This includes any activity which is connected with the use of official power, implying the power of enjoying prerogatives and privileges outside the general law as well as the power of coercion over citizens. Moreover, Article 52 TFEU introduces several additional exceptions of general application in the field of public policy, security, and health. These derogations, which allow Member States to establish special treatments for foreign nationals by means of law, regulation or administrative action, cannot in any way exclude entire sectors of the economy from the application of the principles on the freedom of establishment⁶², and are subject in their application to the general principles of non-discrimination and proportionality, as articulated over the years by the ECJ. It is also worth highlighting that the derogations provided by Article 52 are the only ones on which Member States may rely in order to justify restrictions of the freedom of establishment that are, deliberately or directly, discriminatory in nature⁶³; on the other hand, in the case of non-discriminatory restrictions, Member States may invoke a wider range of public-interest exemptions, including mandatory or imperative requirements as well as objective justifications.

On a similar note, the Service Directive, whose Chapter III is entirely dedicated to the establishment of service providers, regulates the adoption of authorization schemes intended to make access to the market and consequent establishment of companies and individuals subject to preventive requirements and controls. Specifically, Articles 9 and 10 provide that the authorization schemes implemented by Member States shall not be, directly or indirectly, discriminatory against the provider of the service, and that they shall be justified by overriding reasons of public interest as well as proportionate to the objective pursued by the law. In addition, they shall be based on objective criteria,

⁶⁰ C-400/08 *Commission v Spain* [2011].

⁶¹ In *Reyners*, the Court ruled that it is possible to exclude a whole profession on the basis of Article 51 ‘only in cases where such activity is linked with that profession in such a way that freedom of establishment would result in imposing on the Member State concerned the obligation to allow the exercise by non-nationals of functions appertaining to official authority’. See *supra* note 53

⁶² Case C-496/01 *Commission v France* [2004].

⁶³ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007].

precluding the competent authorities from exercising their power of assessment in an arbitrary manner, and shall not duplicate requirements and controls, either equivalent or comparable, to which the provider is already subject in another Member State. On the scope of application of these requirements we will return when dealing with the regulation of services in the European Union. For the time being, it is sufficient to note that, while the drive towards an integrated European market certainly entails taking down trade barriers and the convergence of national standards, Member States are not left without the power to protect the fundamental right of their citizens and secure the operation of essential social schemes.

2.3 The European market for services

Services represent a fundamental part of the European economy. They account for over 70% of GDP and employment in most Member States⁶⁴, have been the driving force out of the financial crisis of the last decade, and comprise the greatest variety of economic activities⁶⁵. As a result, both legislation and case law on the matter of services have undergone a dramatic expansion, with previous sector-specific regulations leaving the way to more integrated harmonization efforts (most notably the adoption of the Service Directive), and with the ECJ having to deal with an increasing number of service-related cases⁶⁶. Even more significant has been the transformation triggered by the rapid penetration of ICTs, allowing traditional non-storable and non-tradable services to be exchanged at a distance, opening new markets and creating new development opportunities.

The greater complexity of the world of services vis-à-vis the more traditional category of goods is reflected by the lack of a universally accepted definition of the phenomenon, both in the economic and juridical academia; hence, the empirical or descriptive approach employed by the GATS⁶⁷ and the TFEU when it comes to the identification and regulation of services. According to Article 57

⁶⁴ Recital 4 to the Service Directive.

⁶⁵ The Statistical Classification of Economic Activity in the European Community (NACE), established in 2006 by the Regulation CE n. 1893/2006, identifies 21 different categories of services. These include among others: agriculture, trade, transportation, finance, education, health, utilities, information and communication.

⁶⁶ In the period from January 2006 and May 2012, the Court had issued almost as many judgments relating to services as it had done since the foundation of the EEC in 1958. See HATZOPOULOS, V. (2013) *The Court's approach to services (2006-2012): from case law to case load?*. 50 CML Review: 459-502.

⁶⁷ The 'General Agreement on Trade in Services' (GATS) is part of the establishing Treaty of the World Trade Organization. It contains a complex normative content which only binds signatory members to the extent of each own commitments. Nonetheless, it offers a precise classification of the world of services based on their mode of supply: 1) 'cross-border trade' when provider and recipient interact at a distance while the service cross the borders thanks to telecommunication technologies; 2) 'consumption abroad' where the service recipient move to the state of the provider; 3) 'commercial presence' where a service provider get commercially established in another state; 4) 'presence of natural persons' where the service is provisionally provided by a foreign natural person on the territory of the service recipient. These modes ECJ broadly correspond to the service categories elaborated by the ECJ at the European level, except for Mode 3 which generally fall in the different legal category of 'establishment'.

TFEU, only those services which are normally provided for remuneration fall under the rules of the Treaty, in so far as they are not governed by the provision relating the free of movement of goods, capital and persons. The Treaty also provides a non-exhaustive list of included services (activities of industrial and commercial character, craftsmen and professions) and clarifies that, without prejudice to the provisions relating to the right of establishment, the person providing a service may temporarily pursue his activity in another Member State, under the same conditions imposed by that State on its own nationals.

We have already mentioned how the case law of the ECJ has progressively expanded the definition of remuneration by moving beyond the traditional concept of an economic consideration agreed upon between provider and recipient⁶⁸, and by arriving to include even triangular situations where third parties pay for the recipient of the service⁶⁹. Today, the concept of remuneration includes even situations where the correlation between service and remuneration is merely indirect⁷⁰. Consequently, the only service activities to be clearly excluded from the application of the Treaty are those inherently lacking any economic character, because they are either a part of the State's social policy engagements or are covered by general taxation, like public hospitals and schools.

As to the apparent residuality of the category of services vis-à-vis those of capital, goods and establishment, as hinted at by the formulation of Article 57, the approach of the ECJ to the application of these rules seems to prove quite the contrary. In fact, the Court has frequently relied on the concept of services to expand the scope of the Treaty on capitals⁷¹, or to refine the application of its legal criteria on goods⁷². Yet, it is in the field of establishment that the influence of the rules on services has been more pronounced, with the case law of the ECJ gradually expanding their ambit of application to situations which, under a traditional interpretation of the Treaty, would simply qualify as establishment. In fact, since *Schnitzer*⁷³, the Court has manifested a tendency to apply the rules on services wherever the activity in question would economically qualify as a service, thereby setting aside many of the criteria relating to duration, repetitiveness and periodicity introduced back in *Gebhard*⁷⁴. On occasions, the Court has also applied the rules on services and establishment simultaneously, when Member States' measures had the effect of hampering both the temporary and the permanent pursuit of an economic activity at the same time. An interesting case, in this regard, is

⁶⁸ Case C-263/86 *Belgian State v René Humbel and Marie-Thérèse Edel* [1988].

⁶⁹ Case C-352/85 *Bond van Adverteerders and others v The Netherlands State* [1988].

⁷⁰ Case C-51/96 *Deliège* [2000] and Case C-157/99 *Geraets-Smiths and Peerbooms v Stichting* [2001].

⁷¹ In joined cases C-286/82 & C-26/83 *Luisi and Carbone v Ministero del Tesoro*, the Court ruled that the freedom to receive services in other Member States also entails the right to carry the necessary funds.

⁷² The distinction between services and goods no longer relies on the material/immaterial nature (C-155/73) or the identification of a core aspect (C-275/92) of the activities concerned, but refers to the actual economic rationale behind the activity itself (C-36/02 and C-6/01).

⁷³ Case C-215/01 *Bruno Schnitzer* [2003] and case C-171/02 *Commission v Portugal, Private Security Firms* [2004].

⁷⁴ See *supra* note 55.

the one found in *Gambelli*, where an English firm had setup a subsidiary in Italy with the purpose of promoting sport gambling and, at the same time, offered cross-border gambling services to its Italian customers over the internet. Here the ECJ held that national legislation prohibiting, by means of criminal penalties, the pursuit of such activities without a license or authorization, constituted a potentially unlawful restriction of the freedom of establishment as well as the freedom to provide services⁷⁵. The only situations where the Court has excluded the application of the service provisions and concentrated on the rules of establishment, are the one where several elements were cumulatively met⁷⁶: not only the prolonged and indeterminate establishment of the service provider in the host State, but also the presence of the provider's intention to settle therein and actively engage with local customers. Ultimately, the centrality of services was conclusively affirmed in *Fidium Finanz*, with the ECJ ruling that Article 57 is not intended to establish any order of priority between fundamental freedoms, but rather to make sure that all economic activities falls within the scope of application of the Treaty⁷⁷. Such an economic approach to the interpretation of the law has the merit of bringing the legal category of services in the EU closer to the one established by the GATS, and reflects more faithfully the economic reality of the modern world.

2.3.1 The free movement of services

The principle of free movement of services gives European nationals the possibility to provide a service in another Member State without being established therein. Specifically, Article 56 TFEU contains a general prohibition against any restrictions to the freedom of European natural and legal persons to provide services within the Union, provided that the persons in question are already established in the EU. As mentioned before, when dealing with a company, this requirement entails being formed in accordance with the law of a Member State and having its registered office, central administration or principal place of business within the territory of the Union.

While the freedom of establishment involves the actual pursuit of an economic activity, through a fixed establishment, and for an indefinite period of time, the freedom to provide services has traditionally revolved around the fact that the activities concerned are carried out in a temporary or provisional manner. The idea behind this distinction being to give service providers the ability to

⁷⁵ Case C-243/01 *Gambelli and Others* [2003]. Specifically, the ECJ ruled that Italian law governing invitations to tender for betting licenses made practically impossible for companies from other Member States to enter the market and constituted a *prima facie* restriction on their freedom of establishment; in the same manner, the imposition of criminal penalties against providers offering their services over the internet constituted a restriction on the freedom to provide services.

⁷⁶ See *supra* note 66 HATZOPOULOS, V. (2013).

⁷⁷ Case C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] and in case C-602/10 *SC Volksbank Romania SA* [2012].

choose between the two freedoms and two respective forms of business, depending on their strategy for growth in each Member State⁷⁸. Yet, the evolving case law of the ECJ and the proliferation of internet-based services have gradually eroded the line separating the two concepts. As stated by the Court in *Chamier-Glisczinski*⁷⁹, ‘no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services’ within the meaning of Article 56. A trend further confirmed by the introduction, in the Service Directive, of an entire chapter dedicated to the establishment of service providers, as well as several rules concerning the provision of services by both established undertakings and by undertakings acting occasionally in the territory of another Member State.

The provisions on services, whose direct effect was recognized shortly after the *Reyners* ruling on establishment⁸⁰, have risen over the years a number of issues concerning their interpretation. Most notably, the ECJ was called to rule on the conditions under which the provision of a service qualifies as an economic activity, and whether an activity deemed illegal in one Member State could constitute a service within the meaning of Article 56 and 57. On the former question, the conclusion of the court was that the service must be commercial in nature and has to be provided for remuneration, regardless of the non-profit scope of the enterprise or the public nature of the service involved⁸¹. On the latter question, the court ruled that the circumstance that a certain remunerated activity is allowed in at least one Member State is sufficient, in itself, to qualify it as a service under EU law; yet, national authorities retain a certain margin of discretion to regulate, and even prohibit, the provision of such service within their territory, on the condition that the regulation is objectively motivated by reasons of public policy and carried out in a consistent, proportionate and non-discriminatory manner⁸². Another corollary of the principle of free movement of services is the inherent right for the recipients of services, including persons receiving medical treatments and those travelling for education or business purposes, to move to another Member State in order to receive their services there, without being limited by national restrictions⁸³.

Similarly to the other fundamental freedoms of the EU, the norms on services do not apply to wholly internal situations in which the significant element of the activity are concentrated within the territory

⁷⁸ Recital 5 to the Service Directive.

⁷⁹ Case C-208/07 *Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse* [2009].

⁸⁰ As established in C-33/74 *Van Binsbergen* [1974], provisions of binding EU law, which are sufficiently clear, precise and unconditional, confer rights directly on individuals and can be invoked and relied upon before national courts.

⁸¹ Case C-70/95 *Sodemare* [1997]. On the relation between public services and the provisions on the free movement of services, see also DAVIES, G. (2002) *Welfare as a Service*. 29 LIEI 27.

⁸² Case C-36/02 *Omega* [2004] and case C-275/92 *Schindler* [1994].

⁸³ Cases C-286/82 and C-26/83 *Luisi and Carbone v Ministero del Tesoro* [1984].

of a single Member State⁸⁴. Nonetheless, exceptions to the need of an inter-state element have increasingly emerged over the years in certain sector of the economy where the impact of harmonization, either through Directives or secondary regulations, has been greater (e.g. public procurement, data protection, telecommunication services) and ‘aimed, not only at the elimination of nationality-based discriminations, but also at the creation of a level playing field for all European companies to compete, unfettered by national regulatory regimes’⁸⁵.

While the Treaty was necessary to build the foundations of the Internal Market, the provisions of the Service Directive were crucial in regulating the circulation of services across the Union and eliminating, at least theoretically, the remaining national barriers that prevented a competitive service market from taking off. In this regard, it is worth considering that the final text of the Directive accomplished only partially the initial intention of the Commission to create a true single market, with plans for a general adoption of the ‘country-of-origin principle’ being quickly discarded in favour of less radical forms of ‘cross-sector harmonization’ as extrapolated by the case law of the ECJ⁸⁶. Moreover, despite the harsh criticism of excessive deregulation that followed the adoption of the Directive, significant parts of the European economy remain, to this day, outside the scope of its provisions. Not only the Directive is only applicable to the extent that the activities in question are already open to competition, saving from liberalization many services of general economic interest and the relevant legal monopolies⁸⁷, neither does affect the application of national laws on labour nor the exercise of the other fundamental rights of the European Union⁸⁸.

Long is the list, contained in Article 2, of the excluded activities: financial services, healthcare and social services, gambling, taxation, non-economic services of general interest and, most importantly to the purpose of this paper, the body of services falling within the field of transport. This last provision, which echoes the wording of Article 58 TFEU, is meant to cover all forms of transport by air, water, rail, and land, including road and urban transport and, most notably, taxi services. Yet, these exclusions are not absolute, as Member States retain the option to apply some of the general

⁸⁴ For an example of a purely internal situation in the field of broadcasting services see Case C-52/79 *Debauve and others* [1980] in comparison to case C-352/85 *Bond van Adverteerders* [1988] where the inter-state element was identified in the fact the television broadcast originated in a different Member State.

⁸⁵ HATZOPOULOS, V. (2006) *The Case Law of the ECJ Concerning the Free Provision of Services: 2000-2005*. 43 CML Review: 923. P. 24. And case C-243/89, *Commission v. Denmark (Storbaelt)* [1993].

⁸⁶ Based on the ‘country-of-origin principle’, the service provision would not have been regulated by the laws of the host country, but instead by those of the home country where the service provider was established, regardless of the economic sectors concerned. Instead, the Directive was amended to comply with the milder ‘principle of mutual recognition’, under which the host state, when regulating a service, only has to take into account the law and regulations to which the service provider is already subject in its home state, in order to avoid the imposition of double burdens. On the evolution of the principle within the Service Directive, see *supra* note 50.

⁸⁷ Recital 8 to the Service Directive.

⁸⁸ Article 1 of the Service Directive.

principles and arrangements of the Service Directive to some or all the excluded services⁸⁹. Furthermore, national regulations relating to the excluded services must always comply with the general rules of the Treaty anyway, with particular attention to those concerning the freedom of establishment.

The key norms of the Service Directive are found in Chapter IV on free movement. Article 16 provides that Member States shall respect the right of any providers (either a natural person who is a national of a Member State or a legal person formed in accordance with his law) to provide services in a Member State other than that in which they are established, and shall ensure that a service activity is freely accessible and exercisable within their territory, without subjecting it to compliance with any discriminatory, unnecessary, or disproportionate requirement. At the same time, Article 19 prohibits Member States from imposing requirement restricting the freedom of recipients to benefit from services supplied by providers established in another Member State. As recalled by the ECJ in one of its first judgment following the adoption of the Directive⁹⁰, both provisions stem directly from the principles of Article 56 TFEU and share with the Treaty the body of derogations and exceptions that are allowed under EU law.

2.3.2 Justifying restrictions on the free movement of services

The biggest contribution of the ECJ to the elaboration of the free movement doctrine has been in the definition of what constitute an unlawful restriction under Article 56 TFEU. Restrictions to the free movement of services are, in fact, identified and evaluated by the European Court of Justice in the course of litigation proceedings, either in the context of preliminary rulings initiated by private parties before national courts (Article 267 TFEU) or as a result of infringements procedures brought forward by the Commission directly against Member States (Article 258 TFEU). In addition to the typically reactive or ex-post nature of these remedies, the introduction of preventive notification procedures like the ones provided in the field of technical standard and information society services (Directive 98/34/EC as amended by Directive 2015/1535) as well as those adopted by Article 15 of the Service Directive⁹¹, has allowed the Commission the power to intervene in a proactive manner, while lightening the ever-increasing load of the ECJ on the matter of services.

⁸⁹ Commission's Handbook on the implementation of the Service Directive. P. 10.

⁹⁰ Case C-458/08 *Commission v Portugal (construction)* [2010], para. 88-9.

⁹¹ Article 15 requires Member States to examine their legal system to ascertain whether a number non-discriminatory requirements are imposed on service providers and, eventually, adapt their laws to render them compatible with the conditions of the Directive. In addition, Member States shall notify the Commission of any new laws, regulations or administrative provisions which set such requirements. Within 3 months, the Commission shall examine their compatibility with EU law and, in case, issue a decision requesting the Member State to refrain from their application or to abolish them altogether.

The identification of a restriction is also relevant in terms of competence. Since Member States' laws and regulations are required to comply with the European principles on free movement, any restriction which is capable of hindering the proper functioning of the market may raise an issue of European relevance, drawing the attention of the EU institutions and shifting the competence to regulate the issue from the state to the Union's institutions⁹². It follows that an excessively broad definition of restriction would either exacerbate the extent of the EU regulatory intervention or determine an overwhelming wave of new litigation before the Court.

Referring to the decades of case law in the field of services, restrictive measures can be generally distinguished between measures affecting '*access to*' and those affecting the '*exercise of*' service activities⁹³. The former ones are measures that forbid or render more difficult the taking up and offering of a service activity in the market of another Member State; they include the absolute prohibition of certain services, the imposition of nationality/residence requirements or other establishment rules, any restrictions on the corporate structure or personal capacity of the service provider, and other measures granting special rights to established providers or requiring other authorizations or permits. The latter ones encompass those measures that may affect the carrying out of a service in another market, such as rules on professional freedom, advertising, and access to financial services, and those discriminating providers or recipients of non-domestic services.

In terms of the nature of the restriction, these measures can be further classified in: a) measures that discriminate formally and directly by introducing distinctions among providers on the basis of nationality; b) measures that discriminate formally but indirectly by introducing distinctions based on other criteria; c) measures that are not formally discriminatory, but have the equivalent effect of favouring national service providers; d) non-discriminatory measures that have the effect of imposing double burdens on foreign service providers; e) measures that have none of the previous effects, but have the ability to affect the access or exercise of a service activity. While the former four are all in principle illegal, unless otherwise justified, the latter category of measures can be the object of the Court's intervention only when a substantial effect on the market can be proven by the party invoking a violation of the rules of the Treaty⁹⁴.

Of course, not every restriction to the free movement principles is immediately struck down by the ECJ, as the Court generally follows a two-prong test to assess the aims and the compatibility of

⁹² SNELL, J. (2003) Who's Got the Power? Free Movement and Allocation of Competences in EC Law. *Year Book of European Law*. Volume 22, issue 1, pages 323-51.

⁹³ HATZOPOULOS, V. (2012) *Regulating Services in the European Union*. Oxford: Oxford University Press. P. 97-178.

⁹⁴ The 'market access test' was established by AG F.G. Jacobs in its opinion on the case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA* [1995] ECR I-179, para 39-41: 'There is one guiding principle which seems to provide an appropriate test: that principle is that all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market.'

national measures with the Union's objectives. The test, whose foundations were originally set in the *Van Binsbergen* case, examines whether the restrictions are adopted in pursuit of a legitimate public interest compatible with EU law; then it proceeds to establish whether the specific measure is objectively justified, equally applicable to persons established within the state, compatible with the fundamental rights accepted by the Treaty and, most of all, whether the measure is proportionate in its application to service providers.

Proportionality is also a general principle of EU law, common to all legal orders, and essential to the definition of the scope of application of the free movement rules. It comprises two main criteria⁹⁵: 'suitability' and 'necessity' of the measure in question. The former consists of an objective means-to-an-end analysis to determine whether the measure is capable of achieving its proposed objective; the latter weights the results determined by the application of the measure against other alternative means of protection available to national authorities, taking also into consideration the nature of the activities involved and the consequences of a failure by the service provider. Occasionally, the Court has broadened the scope of the test to examine the so-called 'proportionality *stricto sensu*'; in this case, even if the measure is deemed to be the most suitable and necessary to the realization of the objective pursued, it can still be rejected because of the adverse consequences it would produce on public and private third-party interests⁹⁶. Moreover, an additional criterion has emerged from the case law of the last few years, concerning the 'consistency' and 'coherence' of the measure in question. Specifically, starting from *Gambelli*⁹⁷, this approach has enabled the Court to operate with greater flexibility and discretion, to ascertain whether the measure represents a standalone rule, or whether it is part of a coherent legal system, and to evaluate how the specific measure relates to the rest of the policies pursued by the Member State in a certain sector of the economy. A judiciary instrument which has proved useful, not only to neutralize national threats to the free movement framework, but also to remedy the consequences of poor quality legislation.

As for Treaty-based justifications, Article 62 TFEU makes specifically applicable to the general field of services the exceptions contained in Article 51 and 52 for the right of establishment and pertaining, respectively, to the activities connected with the exercise of official authority and the special treatments afforded to foreign nationals on grounds of public policy, public security or public health. Although the Court's interpretation of these justifications has traditionally been quite restrictive and their

⁹⁵ The structure of the proportionality test derives from the *Gebhard* judgment, where the ECJ established that restrictive measures 'must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it'.

⁹⁶ Examples of the application of this extended proportionality test can be found in C-76/90 *Säger* [1991], C-165/98 *Mazzoleni* [2001], C-341/05 *Laval* [2007] and C-438/05 *Viking* [2007].

⁹⁷ In *Gambelli*, the Court ruled against Italy for restricting the provision of gambling services by foreign providers, as the country was pursuing, at the same time, an expansive policy on gambling. See *supra* note 75.

application in the field of services has been numerically limited⁹⁸, they still hold a significant position in the logic of the Treaty as they remain the only justifications adoptable vis-à-vis discriminatory measures⁹⁹.

Legislative and, especially, judge-made justifications are also an essential part of the free movement framework. Best known as ORPIs or ‘Overriding reasons of public interest’, they represent a vast and continuously expanding category of exceptions. The concept was first introduced by the ECJ in *Van Binsbergen*, where the Court held that certain requirements imposed upon service providers could be compatible with the Treaty if justified by the general interest. The idea was further articulated in *Cassis de Dijon*¹⁰⁰ and formally sanctioned in the drafting of Article 4(8) of the Service Directive, where ORPIs were recognized as reasons stemming directly from the case law of the Court of Justice. They cover a variety of field, including among others: public policy, security and health; protection of consumers and service recipients; fairness of trade transactions; social solidarity and morality; protection of the environment and historic heritage; and the preservation of the financial equilibrium of social security systems. Following the same logic, the Directive establishes, in Article 16(1)(3), that Member States may impose requirements on the provision of a service activity, provided that such restrictive measures are non-discriminatory, necessary and proportional to the attainment of the objectives of public policy, public security, public health and environmental protection, as envisioned by the Treaty. Furthermore, Article 17 allows the adoption of additional derogations from the norms on the free movement of services in specific fields, which are either already covered by directives and regulations or are otherwise critical to the interests of Member States (e.g. postal services, water, gas and electricity distribution). Finally, Article 18 foresees, in the case of exceptional circumstances, the adoption by the host Member State of case-by-case derogations relating to the safety of certain services, provided that the field lacks any form of EU harmonization and that the specific mutual assistance procedure (laid down in Article 35 of the Directive) is preventively complied with. Overall, no harmonization of the ORPIs was undertaken by the Service Directive, whose impact on the regulation of services has been greatly reduced by the abandonment of the country-of-origin principle. Hence, as confirmed in *Commission v Italy*¹⁰¹, Member States retain to this day the competence to regulate ORPIs by introducing more restrictive requirements, especially in the field of consumer

⁹⁸ See *supra* note 93.

⁹⁹ See *supra* note 63.

¹⁰⁰ Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979].

¹⁰¹ Case C-110/05 *Commission v Italy* [2009]. It ruled that ‘In the absence of fully harmonising provisions at Community level, it is for the Member States to decide upon the level at which they wish to ensure road safety in their territory’.

protection or in other sectors where only minimum or no harmonization at all has been implemented¹⁰².

A particularly debated issue concerns the possibility of Member States to pursue economic aims using the ORPI justification. In fact, the ECJ has always insisted that ORPIs, like the exceptions provided by the Treaty, cannot be used to exclude an entire economic activity from the application of the rules on goods, services and the Internal Market. Furthermore, the Court has held for many years that purely economic considerations may not qualify as ORPIs and cannot serve to justify the adoption of restrictive measures by Member States. Such a position is necessary for the proper functioning of the Union: it is clear that ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’ as envisioned by Article 26 TFEU, as it stimulates competition among market players from different countries, is destined to create both losers and winners¹⁰³. If Member States were able to rely on economic grounds as justifications for restricting free movement and protect local economies and incumbent operators, it would frustrate any effort made towards the Single Market and defeat the objective of the Treaty.

Nonetheless, a number of judgments of the Court seem to suggest that, in certain cases¹⁰⁴, economic aims can be used to justify the adoption of restrictive measures. The attitude of the Court in this regard has been quite variegated. In some cases, in order to avoid striking down such measures, it opted for a narrow interpretation of the concept of restriction¹⁰⁵, or simply decided to ignore or deny the economic nature of the objectives pursued¹⁰⁶, preventing the issue of justification altogether; in others, the Court preferred to consider the economic nature of certain restrictive measures in conjunction with other public interest considerations, developing the idea that the achievement of economic objectives (e.g. the maintenance of the financial balance and treatment capacity of the healthcare system) could be deemed necessary for the attainment of higher social aims (e.g. the protection of public health)¹⁰⁷. The latter represents an interesting take on the matter of justifications, as the recognition of intermediate economic aims is coherent with the position of the Treaty regarding the operation of services of general economic interest in the field of competition law. Specifically, it falls in line with the provisions of Article 106 TFEU, which allows Member States to limit the

¹⁰² See GSCHWANDTNER, S. (2009) National Private Rules as Restrictions to Market Freedoms. EUI Law Working Paper No. 22/2009. Available from http://cadmus.eui.eu/bitstream/handle/1814/13114/LAW_2009_22.pdf. [Accessed: 27th November 2017].

¹⁰³ SNELL, J. (2005) Economic aims as justification for restrictions on free movement. *Rule of Reason: Rethinking Another Classic of EC Legal Doctrine*. Europa Law Publishing. 35-56

¹⁰⁴ For a thorough analysis of the legal strategies employed by the ECJ on the matter of economic justifications, see *Id.*

¹⁰⁵ Case C-238/82 *Duphar BV and others v The Netherlands State* [1984].

¹⁰⁶ Case C-99/78 *Weingut Gustav Decker KG v Hauptzollamt Landau* [1979] and case C-158/96 *Kohll v Union des caisses de maladie* [1998].

¹⁰⁷ See *supra* note 70.

application of the rules on the Internal Market and competition if necessary to the proper performance of such services by selected undertakings.

Overall, the general impression is that the ECJ may occasionally grant the label of ORPI to measures of structural or macroeconomic nature (like the coherence of a tax system or the balance of a social security scheme) while restrictions pursuing more conjectural or microeconomic objectives (like the protection of localized interests and former monopolies) are destined to be struck down by the intervention of the Court.

2.3.3 Information society services

The regulatory framework concerning the establishment and provision of services by European undertakings is complemented by the rules concerning ‘Information Society Services’. In fact, while the Treaty and the subsequent Service Directive were intended to frame the needs and set the foundations of a nascent economy based on the cross-border circulation of mostly physical services, the advent, at the end of the 90s, of internet-based companies posed new regulatory challenges and rendered traditional definitions either obsolete or in dire need of revision. In the words of J. Catchpole, the ‘Internet, by its very nature, has shown itself as a respecter of neither geographic nor jurisdictional boundaries and has challenged the law in ways that could not have been envisaged before’¹⁰⁸.

The European Union has responded to the issue by establishing the category of ‘Information Society Services’ and by adopting legislation targeting specific aspects of this new phenomenon: Directive 98/34/EC in the field of technical standards and regulations, Regulation (EU) 2016/679 on the movement and processing of personal data and, above all, Directive 2000/31/EC on electronic commerce, whose purpose is to encourage the development of commerce within the information society, by removing legal uncertainties concerning the extent to which Member States can control services originating from another Member State, and by ensuring them access and free movement across the Single Market.

As for the concept of information society services, Article 2 of the E-commerce Directive recalls the definition already contained in Directive 98/34/EC (as amended by Directive 2015/1535), where such services are defined as a new type of undertaking, whose activity is characterized by the ability to provide a variety of services at a distance, through an electronic platform and for a given remuneration. This means that the contract is concluded, and the service performed, without the parties ever needing to be simultaneously present in the same place, while the relevant data is entirely

¹⁰⁸ CATCHPOLE, J. (2001) The Regulation of Electronic Commerce: A comparative Analysis of the Issues Surrounding the Principle of Establishment. *International Journal of Law and Information Technology*. Vol. 9 No. 1.

transmitted (by wire, radio, optical or other electromagnetic means), processed and stored at the individual request of the recipient party. As for the requirement of remuneration, we have already established how the case law of the ECJ has significantly expanded the legal meaning of the term; the Directive confirms this trend by including in the field of information society services, not only the ones giving rise to on-line contracting but, as long as they represent an economic activity, also those services which are not directly remunerated by the recipients, such as the offering of on-line information or commercial communications and the provision of online tools for search, access and retrieval of data¹⁰⁹.

The first issue that arises in the field of information society services concerns the determination of the place of establishment of service providers. In fact, many of the traditional elements used by the law to assess where an undertaking pursues its economic activity in a permanent manner (fixed premises, presence of staff, intermediaries able to undertake business transactions, etc.) are hardly suitable for e-commerce and internet enterprises. Here, providers and recipients conclude contracts and exchange services through the immaterial interface of a website, while the hardware resources necessary to the functioning of such systems are generally spread across a number of servers. The servers, in turn, may well be located in countries where the enterprise has no other presence or, more often, they may be operated by a different enterprise than the one providing the service itself. Overall, such a phenomenon has the effect of blurring the lines between the concept of stable establishment of a business and the one of temporary provision of services, as the defining elements of the economic activity are often littered across time and space.

In this context, the E-commerce Directive makes the effort to clarify that, within the territory of the European Union, the place of establishment of a company providing services via an internet website, or other similar applications, is not the place where the technology supporting the website is located or the place at which the service is accessible, but the place where, in conformity with the case law of the ECJ, the relevant economic activity is actually pursued¹¹⁰. In cases where the provider maintains several places of establishment, the Directive states the importance of determining from which place of establishment the service concerned is specifically provided; if this is not possible or results overly difficult to determine, then the place of establishment is located, relying on a residual parameter, where the provider of the service maintains the centre of his activities. The Directive further imposes on service providers a variety of information requirements. Among other norms concerning the protection of consumers, service providers are required to render accessible, to the recipients of the service and the competent national authorities, detailed information concerning the

¹⁰⁹ Recital 18 to the E-Commerce Directive.

¹¹⁰ Recital 19 to the E-commerce Directive.

locations where the provider is established, and whether the activity performed is subject to an authorization scheme or is part of a regulated profession or registered in a trade register, anywhere in the EU.

As far as the principle of free movement of services is concerned, in the relatively limited field of information society services, the European lawmakers have succeeded in adopting a more ambitious approach compared to the Service Directive. The E-commerce Directive in fact, willing to ensure the unrestricted circulation of information society services within the Union, is designed to deal with economic models that systematically transcend the notion of national borders and escape the application of traditional connecting factors. As such, not only does the Directive ensure that the taking up and pursuit of such services may not be made subject to prior authorization or any other requirement of equivalent effect (Article 4), but it also prohibits Member States from restricting the freedom of established undertakings to provide information society services in another Member State, for reasons falling within the coordinated field¹¹¹ (Article 3(2)). Moreover, in the attempt of resolving the uncertainties as to which Member State have the jurisdiction to control and regulate the activity of service providers, the Directive relies on a diluted version of the country-of-origin principle, thereby establishing that the law applicable to providers is the one of the Member State where they are established. Hence, Article 3(1) imposes upon the latter an obligation to monitor the compliance of the service with the relevant European and national provisions as well as the observance by the provider of the multiple information requirements established by the Directive itself.

Yet, the other countries are not powerless in respect of information society services, as Member States may take measures to derogate from the above provisions in respect of a given service, provided that any imposed restriction is necessary and proportionate to the attainment of the objectives pursued by the country in the field of public policy, public health, public security, and consumers protection (Article 3(4)). The adoption of said measures is however subject to a specific procedure: without prejudice to court proceedings, including preliminary proceedings and criminal investigations, Member States are required to ask, preventively and unsuccessfully, to the country where the provider is established to take measures against the service; they are also required to notify the Commission of their intentions to act on the matter. It is then for the Commission to evaluate the compatibility of the measures in question with Community law and, eventually, ask the Member State to refrain or put an end to the actions already undertaken.

¹¹¹ The coordinated field is the body of requirements laid down in Member States legal systems which is applicable to Information Society Services and their providers. It may cover the taking up and pursuit of the relevant activities, but it does not concern any requirements relating the quality and delivery of goods nor services which are not provided by electronic means.

Finally, the E-Commerce Directive contains several provisions aimed at clarifying the liability regime applicable to intermediary service providers. Specifically, Articles 12 to 15 provide that information society platforms shall not be liable for the mere transmission, caching (automatic, intermediate and temporary storage) and hosting of information provided by the recipient of the service, as long as the platform does not select or modify the information, nor has actual knowledge of illegal activities or information, nor is aware of facts or circumstances from which the illegality of said activities is apparent; upon obtaining knowledge or awareness of the illegality of the information or activities performed through its services, the platform is required to act expeditiously to remove or to disable access to the information. In addition, Member States are forbidden from imposing on providers a general obligation to monitor the information they transmit or store nor to seek facts or circumstances indicating illegal activity. These provisions, which are intended to remove disparities among national legislations that may impair the development of cross-border information society services, ‘cover only cases where the activity of the provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored’. Such an activity implies that the information service provider has neither knowledge nor control over the information transmitted or stored, but plays a merely automatic and passive role vis-à-vis service recipients. Accordingly, ‘a service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities’ covered by the liability exemptions established by the Directive¹¹².

Overall, it is pretty clear that the E-commerce Directive represents the ideal market opener for all sorts of electronic services, including the growing number of collaborative platforms that populate many sectors of the European economy. In fact, the functioning of such platforms often requires the involvement of several systems across a number of countries and the relevant service is generally provided for remuneration, at a distance, by electronic means and at the individual request of its recipients. However, application of these rules should only be possible when the activity performed by the platform consists merely of an electronic service, namely the intermediation between two or more private parties (owners of the assets involved) as well as the provision of other ancillary services. On the other hand, when the platforms are also somehow involved in the actual provision of the underlying service (house renting, passenger transport, etc.), then the applicability of the E-commerce Directive should certainly be the object of further questioning, since any activity which by its very nature cannot be carried out at a distance and by electronic means does not qualify as an

¹¹² Recitals 40 to 46 in the preamble to Directive 2000/31. On the liability of service provider see Joined Cases C-236/08 to C-238/08 *Google France and Google* [2010].

information society service¹¹³. As a result, sector-specific regulations, including service licensing and business authorizations, may become relevant for collaborative platforms as well.

A useful clarification in this respect is contained in the Commission's Agenda for the Collaborative Economy, according to which the relation between collaborative platforms and underlying services is to be assessed on a case-by-case basis. Specifically, attention has to be paid to the level of control or influence that the platforms concretely exert over the providers of such services (setting prices and key contractual terms, owning any of the assets involved, incurring the costs or assuming the risks of the provision of the underlying service) as well as to the contractual or employment relationship binding the two subjects together. Should the collaborative platform be found to exercise decisive influence over the provision of both the electronic service and the underlying services then, according to the Commission, the platform should be considered as a traditional service provider in addition to an information society service¹¹⁴.

2.4 Is Uber an information society service?

The time is ripe to deal with one of the fundamental question raised by the case of Uber: does the activity operated by the American company in the European Union constitute an information society service and how does it have to be regulated?

At first glance, Uber certainly meets all the requirements established by Directive 98/34/EC when defining information society services. Firstly, Uber's products are provided at a distance, since none of the parties involved in the transaction (the users, the drivers, and Uber itself) need to be physically and simultaneously present for the service to function. Secondly, they are provided by electronic means, since both the drivers' and the users' smartphones, which are indispensable to conclude the contracts, communicate with the servers of the platform through the internet. Thirdly, Uber's services are provided at the individual request of their recipients, since the data transmission necessary for the system to work is initiated only the moment the user decides to open the smartphone application and hail a ride. Lastly, the service is provided for a remuneration, represented by the fee that Uber deducts from the driver compensation, which is in turn payed by the user through the application at the end of each ride.

In addition to these characteristics, Uber does not own the vehicles used to transport the passengers nor does it employ the people that drive them. It is, first and foremost, a software company whose

¹¹³ Recital 18 to the E-commerce Directive.

¹¹⁴ European Commission Communication COM(2016)356 of 2 June 2016. A European agenda for the collaborative economy. Pag. 6.

principal expenditures are directed towards the development of technological infrastructures and advanced algorithms as well as the promotion and expansion of its network of services around the world. From this standpoint, it is neither a taxi or taxi-like service, since it does not directly create value by transporting people, nor is it a ride sharing platform *stricto sensu*¹¹⁵, since the destination is selected by the passenger in exchange for a compensation that far exceeds the mere reimbursement of the trip expenses. Rather, Uber can be defined as an online ‘market making system’, a two-sided platform with the purpose of establishing a virtual place where the offer of independent drivers and the demand of willing riders can meet in the most efficient way. Both parties are Uber’s customers and are linked to each other by an indirect network effect¹¹⁶. Analogous to other famous intermediation platforms, like Airbnb, Expedia and Booking.com, Uber also provides its customers with a series of ancillary services, features aimed at assisting users in the fruition of the platform and facilitating the accomplishment of the relevant operations. The most significant of which are the implementation of a digital payment system that ensures the completion of cash-less transactions, as well as the provision of a rating system intended to reduce information asymmetries between riders and drivers and promote the maintenance of quality among its customers.

As an information society service, Uber would be entitled to the significant protections afforded by the E-commerce Directive in terms of freedom of establishment and freedom to provide services¹¹⁷. Hence, it would be able to take up, pursue and provide its activity in all Member States, without incurring in unnecessary or disproportionate restrictions, double burdens, authorization schemes or any other measure of equivalent effect. And it would be able to do so while maintaining its permanent establishment in its Netherland headquarter, subject to the limited controls and significant corporate and fiscal benefits provided by the Dutch legislation, and enjoying the freedom afforded by the recognition regime established by the country-of-origin principle. As a result, any national measure imposing a restriction upon the service or allowing national courts to undertake such measures would need to satisfy the precise requirements set by Article 3. Specifically, it would need to be necessary on ground of public policy (meaning the prevention, investigation, detection and prosecution of criminal offences), public health, public security, or justified for the protection of consumers. It would also need to be proportionate to the objectives pursued by the measure, and only adopted after the fulfilment of the appropriate cooperation procedure. It is worth reiterating that the objective of

¹¹⁵ Ride sharing is a mode of transport where the driver determines the journey and the destination, while the passenger simply decides to share the costs of the travel through a sort of reimbursement. It is not a lucrative activity.

¹¹⁶ In economic theory, a network effect is the positive effect that every additional user of a good or service has on the value of that product to others. In the case of Uber, more users are attracted to the platform because of the high number of partner drivers, and vice versa.

¹¹⁷ As for the applicability of the Service Directive, Article 3(1) provide for the disapplication of the Directive whenever it conflicts with another Community act governing specific aspects of access or exercise of a service activity in a specific sector. The E-Commerce Directive certainly fits this criterion.

maintaining the competitiveness and proper functioning of the taxi sector (a possibility suggested by the German Federal Court in its request for a preliminary ruling on UberBLACK), given its intrinsic economic nature, would hardly qualify as legitimate aim of public policy or an overriding reason of general interest. Moreover, pursuant to Article 4, any national law requiring prior authorization to take up and pursue the activity of information society service provided could be successfully challenged before the ECJ by the American company.

However, this is the point where a first line need to be drawn, within both the transport sector and the Uber platform itself. In fact, while traditional dispatch centres, as well as services like UberBLACK (see § 1.2), deal with professional drivers who are licensed by local authorities to exercise an activity in the field of transport and who use the brokerage service to simply increase their job opportunities, a service like UberPOP gives unlicensed persons, wishing to pursue and to profit from an activity of urban transport, on a regular and systematic basis, the possibility to access an organized market that simply did not exist before; an activity which is deemed illegal in the majority of the European countries, which reserved it by law to specially authorized carries like taxis and PHVs, and which would not be independently and efficiently pursuable without the existence of the Uber platform. Expressed in economic terms, UberPOP does not simply match supply with demand: it creates the supply itself.

In addition, Uber has the capacity to influence, in a determinant manner, the way the underlying service is carried out by its partner drivers. First of all, all the key contractual aspects pertaining the economic relation between Uber and its drivers, as well as Uber and its passengers, are unilaterally determined by the platform and are made binding on both subjects by means of the terms and conditions for the use of the smartphone application. These include extensive requirements concerning the qualification of the driver, the characteristics of the vehicle, the maintenance of minimum insurance levels, and the modalities in which the transportation service shall be provided, as well as detailed regulation concerning the conduct of the drivers and even the possibility of adopting disciplinary measures against misbehaving drivers.

Secondly, Uber fundamentally set the prices of the service provided. Although, as specified by the drivers' service agreement¹¹⁸, drivers are entitled to negotiate a lower fare than the pre-arranged one calculated by Uber's algorithms, the reality is that drivers are hardly encouraged to do so. Not only the service fee (withheld by Uber) is calculated on the amount of the pre-arranged fare, regardless of the amount specifically negotiated by the driver, but the platform retains the right to reduce or even cancel the payment of the fare, whenever the route he selected for the ride results exceedingly inefficient. Then, there is the matter of fare calculation altogether. We have already mentioned in §

¹¹⁸ See *supra* note 23. Specifically, Paragraph 4 'Financial Terms' of the Service Agreement.

1.2 how the adoption of a proprietary ‘surge pricing algorithm’ enables Uber to economically incentivise its partner-drivers to get on the road in times and places of higher demand. Surge pricing is yet another means of indirect control, similar in its effect to traditional fleet management mechanisms, capable of coordinating the behaviour of thousands of drivers towards the attainment of greater operational efficiency, while, at the same time, manipulating price levels to take advantage of the constant fluctuations of market demand. Competition concerns notwithstanding, this is a mechanism having very little in common with the promotional strategies that many internet platforms traditionally implement to stimulate transactions on their services, since the increase in the cost of the rides is entirely and automatically transferred from Uber onto the final passengers, without any concrete possibility for the drivers to circumvent the determination of the system. Thus, Uber not only operates as a market maker, but acts as price setter as well.

For these reasons it becomes very difficult, despite some residual similarities, to compare a service like Uber to other internet intermediation platforms. These platforms, in fact, give users the possibility to confront the commercial offer of functionally independent undertakings (hotels, bed and breakfasts, airlines, etc.), which are free to determine the conditions and prices under which their services are provided, and compete in their respective markets by developing distinctive characteristics. On the other hand, Uber’s drivers offer a highly standardized product and are selected by the user mainly based on physical proximity rather than personal preferences. Drivers may be forbidden from displaying corporate signs or wearing a uniform¹¹⁹, but are consistently perceived by the users of the platform as an integrated whole with the rest of Uber’s services.

Another element separating Uber from the rest of the information society services is represented by the level of control exercised by the platform vis-à-vis its partner drivers, a combination of the severe rating system and the operating conditions imposed upon them. In fact, while it is true that drivers have no contractual obligation to accept new requests for urban transport (which are automatically prompted on their smartphones whenever they are logged in the driver application) and are free to engage in any other business activity (even work for Uber’s competitors), the service agreement specifically highlights how the repeated failure to accept rides may create a negative experience for the user of the application and damage the image of the service. Combined with the fact that Uber retains the right to deactivate or restrict access and use of the Driver App in the event of harmful or damaging conducts of its drivers, as discretionally determined and evaluated by the company itself, it is easy to see how drivers who rely on Uber for most of their revenue would be compelled to maintain, not only a high standard of quality, but also high levels of service. Moreover, Uber’s participation to the provision of the actual transport activity has proven to extend way beyond the

¹¹⁹ See *supra* note 23. Specifically, paragraph 2.4 of the Driver’s Service Agreement.

concept of ancillary services. Not only Uber may supply drivers with the device (a smartphone) and connection (a wireless data plan) necessary for the functioning of the service, but also facilitates contacts between aspiring drivers and vehicle businesses, such as rental, leasing and finance providers¹²⁰. It also offers them legal and financial assistance for the fines or prosecutions they may have run into during the provision of an Uber ride. Yet, even more revealing of Uber's involvement in the provision of the underlying service is the adoption, uncovered by several investigations during the years, of a number of controversial software instruments and borderline business practices, specifically intended to sabotage the physical operation of rival services and avoid the control of its drivers by local law enforcement authorities¹²¹.

Therefore, from the evidence gathered thus far, it seems reasonable to conclude that, within UberPOP, the American company does not operate as a mere intermediary, but rather as a 'genuine organiser and operator of urban transport services in the cities where it has its presence'¹²². While the technological solutions employed by the platform to increase the efficiency of urban transport are certainly innovative and partly responsible for the company's success in the global market, that market remains essentially focused around the business of moving people from one point to the other. In this context, the connection service provided by the platform is neither self-standing nor economically prevalent.

There is no need, at this stage, to deal with the controversy surrounding the working status of Uber's partner drivers, as the qualification of the legal relationship existing between them falls down to matters of national law and does not fundamentally alter the questions hereby discussed, since Uber may well rely on independent contractors for the provision of its transport service, without needing to establish with them a traditional employment relationship.

¹²⁰ Uber Marketplace, available in a limited number of countries, acts as an intermediary between drivers and a variety of local business specialized in the provision of vehicles designed for ride sharing.

¹²¹ From 2014 to 2016, Uber allegedly used the 'Hell' program to spy on its main competitor (Lyft) and build up detailed profiles of individual Lyft drivers to determine which drivers were working double shifts for both companies; it then attempted to deprive its competitor of available workers, by artificially ensuring that double-shifting drivers were given more Uber rides than normal (see www.theguardian.com/technology/2017/apr/13/uber-allegedly-used-secret-program-to-cripple-rival-lyft). In addition, at the beginning of 2017, Uber admitted the adoption of the 'Greyball' system, a software program designed to deceive local authorities and avoid sting operations against its drivers, in markets where its low-cost ride-hailing service was resisted by law enforcement or had been banned. It operated by profiling "suspect" persons (city officials, police agents, law enforcement agents), preventing them from hailing a ride, and scrambling the actual position of Uber drivers. The system is no longer active. (see www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html).

¹²² Such is also the view expressed by A.G. Szpunar in its opinion on *Asociación Profesional Elite Taxi*.

2.4.1 Uber as a composite service

Having established that the physical transportation of passengers is to be considered an integral component of the provision of the Uber service, for which the company itself is responsible, it remains to be seen whether the connection service provided by electronic means can be legally separated from the former and regulated within the terms of the E-commerce Directive.

We have already stipulated that the norms on information society services apply only to platforms whose activity is limited to the provision of electronic services. At the same time, there is no question that the business of moving a person from point A to point B for remuneration constitutes a service in the field of transport, an activity which, by its very nature, cannot be provided by electronic means and which is excluded, by reference to Article 58 of the TFEU and Article 2(d) of the Service Directive, from the application of most of the norms concerning the freedom of establishment and the free movement of services. On the other hand, the connection service provided by the Uber platform may, if considered on its own, fall within the category of information society service and benefit from the relevant provisions. Such an approach raises the question whether, under the conditions of a ‘severability test’, the E-commerce Directive could be applied limited to the part of the service that actually qualify as an information society service, while the residual physical component would be subject to different rules, either those pertaining the provision of services in the EU or other relevant sector-specific regulations. Given the breadth of the issue, the relevance of the question is not limited to the case of Uber, but may well extend to the multitude of composite services that operate through the internet, with particular ramifications within the general world of the sharing economy.

The main issue is represented by the definition of the conditions under which composite services can be separately regulated. Deriving from the case law of the ECJ¹²³, two alternative criteria can be identified: a) whether the two elements composing the service are economically independent of one another; or b) whether the overall service is substantially or predominantly provided by electronic means, with the physical component representing the mere performance of a residual contractual obligation. The factual assessment of these elements will generally need to be carried out by the Court on a case-by-case basis.

¹²³ One of the first cases where the ECJ recognized the possibility of a ‘severability test’ in the field of electronic commerce was *Ker-Optika* (C-108/09), concerning the administrative prohibition of the sale of contact lenses through the internet. The prohibition was based on the premise that the selling of contact lenses requires the medical advice and physical examination of the patient, an activity expressly excluded from the application of the E-commerce Directive. The Court ruled that the norms concerning the selling of goods online needs to be separated from the conditions for the provision of medical services; the former falls within the coordinated field of the E-commerce Directive, while the latter must be assessed under primary law (in this case, Article 34 TFEU concerning quantitative restrictions between Member States).

As for Uber, the evidence gathered thus far point out how, at least as far as the service UberPOP is concerned, the provision of the connection service and the transportation of paying passenger to a designated destination constitute an integrated whole, a single supply of transport where the two components give each other equal economic meaning. Such a reasoning conclusively implicates that UberPOP is a service in the field of transport and excludes it from the application of the E-commerce Directive as well as the Service Directive. Besides, even if the two components were to be deemed separable, qualifying the former component as an information society service would not produce any practical result for Uber, since Member States would still be able to freely regulate and restrict the provision of the underlying transportation service, effectively rendering Uber's business impossible to pursue. This scenario is further confirmed by the case law of the ECJ on the liability of information service providers and online marketplace. In its famous eBay case¹²⁴, concerning the injunction by a national court towards the operator of an e-commerce platform to take measure against the violation, by third-party sellers, of the rights conferred by registered trademarks, the Court ruled that a service provider cannot rely on the liability exemptions of the E-Commerce Directive when, instead of confining itself to providing its intermediation service in an automatic and merely technical manner, it plays an active role in the selection and organisation of the information transmitted or stored, so as to give the provider knowledge or awareness of the perpetration of illegal activities through its platform. In a similar situation, continues the Court, national courts need to be able 'to order the operator of an online marketplace to take measures which contribute, not only to bringing to an end infringement of those rights by users of that marketplace, but also preventing further infringements of that kind', in an effective, proportional and dissuasive manner. In the case of UberPOP, the manifest illegality of the systematic provision of paid transportation services by unlicensed private citizens would easily justifies the right of national courts to act against the platform as well, in order to attain the definitive cessation of said activities. As for UberBLACK, instead, the successful application of the 'severability test' cannot be ruled out *a priori*. In fact, the drivers working with UberBLACK generally hold the authorization or license necessary to exercise the activity of 'private hire vehicle' in their respective cities. Hence, even without the intervention of Uber, they would still be able to legitimately pursue their typical business as independent professional or, otherwise, by joining traditional dispatch centres to benefit from their brokerage activity. If this approach were to be confirmed by the Court, then Uber's connection service, provided in the context of PHV transport, would fall under the guarantees established by EU law: the taking up and pursuit of the service would not be subjectable to authorizations or prior requirements nor would Member States be able to restrict its provision across the Union for reasons falling within the coordinated field. Member States could

¹²⁴ Case C-324/09 *L'Oréal v eBay* [2011], para. 106-144.

still take measures to derogate from the above freedoms, pursuant to Article 3(4) of the E-commerce Directive, when necessitated by reasons of public policy, health and security, as well as reasons of consumer protections. However, it remains to be seen whether national measures could integrate the stringent requirements of necessity and proportionality envisioned by the Directive.

2.4.2 Regulating services in the field of transport

At this point, given the conclusions we have reached on the qualification of at least one of Uber's services, it is necessary, in order to complete our survey of the relevant norms applicable to the case, to turn our attention to the body of European and national rules that covers the category of services in the field of transport. Transport has been one of the fundamental concerns of the European project since the draft of the Treaty of Rome in 1957, which even dedicated an entire title to establish a few fundamental principles on the matter. This approach has been repeatedly confirmed over the years by the effort of the Commission¹²⁵, and has retained its place in the current formulation of the Treaty of Lisbon, with greater involvement of the European Parliament in the operation of the legislative process.

First of all, Article 4(2)(g) TFEU places transport in the area of shared competence between the Union and Member States. This entails that, based on the concept of legislative pre-emption, Member States can exercise their competence on the matter only to the extent that the Union has not exercised, or decided to cease to exercise, its competence in the relevant area. Moreover, in application of the principles of subsidiarity and proportionality embodied in Article 5 TEU, the Union can act in the area of shared competence only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at the central or regional or local level; nor can the content and form of the Union action exceed what is necessary to achieve the objectives of the Treaties. The result of these provision has been that, in the field of transport, the effort of the Union concentrated on issues of transnational nature, like the setting up of common infrastructures and transport corridors and the harmonization of technical and administrative standards among Member States, while issues of purely national relevance were left in the hands of national governments.

¹²⁵ While in the years immediately following the adoption of the Treaty of Rome the Union hesitated in interfering with the regulation of an economic sector which was largely in the hand of public-owned enterprises, in 1985 the ECJ ruled, in a case brought before the Court by the European Parliament (C-13/83), that the Council had failed to act accordingly to ensure freedom to provide services in the sphere of international transport. It followed a series of ambitious projects by the European institutions to build and develop a common, efficient and technologically advanced, common transport market, as envisioned by the following White Papers on the completion of the internal market (COM(85)310) and the future development of the common transport policy (COM(1992)0494) and COM(2001)0370 and COM(2011)0144).

As for the principle of free movement in the field of transport, the main provisions are contained, as we have already mentioned in the previous paragraphs, in Article 58 TFEU and, especially, in Title VI of the Treaty. Here, Article 90 sets the objective of a common transport policy to guide the Union towards the establishment of a common transport market. To this purpose, Article 91 vests the European Parliament and the Council with the power to lay down the common rules applicable to intra-European transport, as well as the measures necessary to improve transport safety, and the conditions under which non-resident carriers may operate transport services within a Member State. Article 92 reiterates the validity of the principle of non-discrimination in the area of transport, forbidding Member States from imposing less favourable conditions on carriers of other Member States vis-à-vis national carriers whereas, at the same time, Article 93 allows the provision of State aids to transport undertakings, insofar as they are needed for the coordination of the sector or as a form of reimbursement for the discharge, by specifically appointed private undertakings, of public service obligations. Interestingly enough, the Treaty does not provide an explicit definition of what constitutes a service in the field of transport, preferring instead to rely on the specific definitions found in secondary legislation adopted pursuant to Title VI TFEU.

While in the field of air, rail and maritime transport the impact of EU legislation has been particularly strong, given the ability of these industries to affect the direct exercise of the Union's fundamental freedoms, in the area of land transport, and particularly that of local passenger transport, the effort of the Union has been comparatively mild. The reasons for this different attitude towards local mobility are to be found in the extreme fragmentation, as well as the intricate interweaving of public services and private interests, that characterize the sector within Member States themselves, as well as the significant barrier represented by the subsidiarity principle. This is particularly true in the case of taxis and similar services for passenger transport which, despite sharing many traits throughout Europe, are subject to different regulations from one city to the other.

It was only in 2009 that the European Parliament called for the development, at European level, of an integrated global approach to urban mobility to serve as a common frame of reference for European, national and local players. The Commission responded with its action plan on urban mobility (COM(2009)0490), highlighting that, although the responsibility for urban mobility lies primarily with local, regional and national authorities, it would be desirable for every decision to be adopted within a common framework for sustainable mobility, promoting EU-funded initiatives, strengthening information exchange and passenger rights, facilitating integration and interoperability between different transport networks and different European markets, and exploring new forms of mobility (car-sharing, carpooling, bike-sharing, and other alternative means of transport) as well as developing intelligent and connected transport systems (traffic management, ticketing and payment,

travel information, use of the Galileo Global Navigation Satellite System). Still, no explicit mention of services like Uber is present in the Commission's vision for the future of urban mobility, nor has this programmatic effort gave birth to any concrete action yet. In this context, in 2016, the Commission sponsored the realization of a detailed study on the state of passenger transport in the EU, with the clear intent to understand the characteristics and needs of the market and test the ground for stronger regulatory harmonization¹²⁶.

Similarly to many other field of EU law, the European Court of Justice played a critical role in the development of the transport sector, setting principles that supplemented the ordinary legislative instruments, and allowed the relatively stable provisions of the Treaty to adapt to the radical transformation undergone by the world of transport¹²⁷. As far as land and urban transport is concerned, a landmark judgment is represented by the *Yellow Cab* case¹²⁸. Called to rule on the compatibility with EU law of an authorization scheme preventing a German company to operate a bus service in Austria, the ECJ clarified that when a transport service is provided within the limited territory of a city or municipality, it constitutes a form of urban or suburban transport, and is thus excluded from the regulations concerning international transport and, by extension, from the relevant norms on the free movement of services. Instead, national legislation is to be assessed in the light of the provisions of the TFEU concerning the freedom of establishment which, unlike those on services, are applicable directly to the field of transport and not on the basis of Title VI of the Treaty. In this regard, the Court pointed out that the requirement of a seat or another establishment in the territory of the host Member State cannot constitute, as such, a barrier to, or restriction on, the freedom of establishment, since that obligation does not impose any actual restriction on the possibility of foreign economic operators to establish themselves in other Member States or create agencies or other forms of secondary establishment in that territory. Nor does Article 49 TFEU precludes national legislation providing for an establishment requirement which apply only after the authorisation has been granted, and before the applicant commences operation of that service. Instead, it will be necessary to examine whether the detailed rules surrounding such requirements, as a prerequisite for obtaining the authorisation to operate a transport service, constitute a practical barrier to the actual exercise of the right of establishment, and whether those barriers may be objectively justified pursuant to EU law. Considering this last matter, the ECJ noted that, notwithstanding the absence of discrimination on grounds of nationality, while such measures may serve an objective of general interest, such as the

¹²⁶ The content of the report was discussed in § 1.4.

¹²⁷ For a comprehensive survey of the evolution of the EU policy on transport, with particular attention to the areas of air, rail and maritime transport, see COLANGELO, M. and ZENO-ZENCOVICH, V. (2016) *Introduction to European Union Transport Law*. Second Edition. Rome: RomaTrE-PRESS.

¹²⁸ Case C-338/09, *Yellow Cab Verkehrsbetriebs GmbH v. Landeshauptmann von Wien*, [2010] E.C.R. I-13927.

promotion of tourism and road safety, or the protection of the environment, other purely economic objectives like ensuring the profitability of a competing service, or simply preventing the arrival of new services from compromising the existence of already authorized ones, would not constitute overriding reasons of general interest and could not be used as a legitimate justification for an establishment restriction.

This approach was later confirmed in *Grupo Itevelesa*¹²⁹. In his opinion on the case, A.G. Wahl stressed how the purpose of the rules relating to the common transport policy is to implement and complement those on freedom to provide services by means of a common action. Accordingly, when an economic activity falls to be characterised as a service in the field of transport under Article 58 TFEU and Article 2(2)(d) of the Service Directive, the conclusion to be drawn, unless otherwise provided by specific norms, is that EU law does not ensure the freedom to provide services to that particular activity. Again, nothing prevents the application to the case of the provisions concerning the freedom of establishment.

Overall, while classifying the activity of an undertaking such Uber as a service in the field of transport does subtract it from some of the key protections of European Single Market, expressed by the Service Directive and the E-commerce Directive, it does not imply that national authorities are entirely free to regulate the service as they see fit, since any further restriction will still need to be scrutinized with regard to the other economic guarantees offered by the Union. Besides, nothing prevents Member States to adopt a lighter regulatory regime, specifically adapted to intermediation and transportation platforms, and generally more favourable to services like Uber; nor does it preclude the possibility of future harmonization effort to be carried out at the European level. Still, these are just speculations and the result of quite unpredictable political choices. For the near future, the destiny of Uber rests firmly in the hand of the individual Member States.

2.4.3 The judgment in *Asociación Profesional Élite Taxi*: the end of Uber?

The reconstructions provided in the previous paragraphs, for many years at centre of a harsh debate among academics¹³⁰, economists and politicians alike, has eventually been confirmed by the

¹²⁹ Case C-168/14, *Grupo Itevelesa et al. v. OCA Inspeccion Tecnica de Vehiculos SA, Generalidad de Cataluna*, [2015].

¹³⁰ For an example of two radically different doctrinal approach to the Uber case, see GERADIN, D. (2016) Online Intermediation Platforms and Free Trade Principles – Some Reflections on the Uber Preliminary Ruling Case. *SSRN*. [Online] Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759379 [Accessed: 6th December 2017], where it is argued in favour of Uber's qualification as an information society service, and HATZOPOULOS, V. and ROMA, S. (2017) Caring for sharing? The collaborative economy under EU Law. *Common Market Law Review*, Volume 54, p. 81-128. [Online] Available from: <https://www.kluwerlawonline.com> [Accessed: 30th October 2017], where Uber is held to be entirely a service in the field of transport.

European Court of Justice at the end of December 2017, with its conclusive judgment in *Asociación Profesional Élite Taxi*¹³¹. The case, which had been brought to the attention of the Court by the referral, in 2015, of the Commercial Court of Barcelona, revolved around the fundamental question of whether the service, provided by UberPOP in the city of Barcelona, was to be regarded as a service in the field of transport, or as an information society service, or as a combination of both.

In a concise albeit sharp reasoning, the ECJ acknowledged the opinion expressed few months earlier by Advocate General Szpunar and denied UberPOP the qualification of information society service. First of all, the Court recognizes the composite nature of the UberPOP service: ‘an intermediation service consisting of connecting a nonprofessional driver using his or her own vehicle with a person who wishes to make an urban journey is, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle [...] and each of those services, taken separately, can be linked to different directives or provisions of the FEU Treaty on the freedom to provide services’¹³². The former having a theoretical resemblance with the criteria established for information society services; the latter falling clearly in the general field of transport.

Yet, as the Court observes, the evidences acquired on the characteristics and the operating modes of the platform, shows incontrovertibly that such a service is more than a simple intermediation system, but offers simultaneously a service of urban transportation. A fact which is not diminished by the use of software tools and smartphone applications, but is rather reinforced by the knowledge that, without the technological systems employed by Uber, ‘non-professional drivers using their own vehicle would not be led to provide transport services, nor the persons wishing to make an urban journey would use the services provided by such drivers’¹³³. Moreover, the fact the Uber is able to exercise decisive influence over the conditions under which the underlying transportation service is provided, including the unilateral determination, collection and distribution of the fares paid by the users, as well as the control of several qualitative and quantitative aspects of the drivers’ performance, is further proof that the intermediation service ‘must be regarded as forming an integral part of an overall service, whose main component is a transport service’¹³⁴. Recalling the judgment of *Grupo Itevelesa*, the Court further notes that ‘the concept of services in the field of transport includes not only transport services in themselves but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport’¹³⁵.

¹³¹ Case C-434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain, SL* [20th December 2017].

¹³² Id. Para. 34.

¹³³ Id. Para. 39.

¹³⁴ Id. Para. 40.

¹³⁵ Id. Para 41.

Accordingly, UberPOP cannot be regarded as a mere intermediary between drivers and passengers, nor can it be classified as an information society service within the meaning of Directive 2000/31/EC. Instead, as it represents a comprehensive system for the organisation and management of urban transport, UberPOP must be classified as a ‘service in the field of transport’ within the meaning of Article 58 TFEU and Article 2(2)(d) of Directive 2006/123/EC. As such, the service cannot benefit from the general principles on free movement established by Article 56 TFEU, but rather it is subject to the rules and principles adopted pursuant to Article 58 and 91 TFEU, concerning the implementation of the common transport policy and the conditions under which non-resident carriers can operate transport services within another Member State. In this regard, the Court highlights the lack of common EU rules in the area of local and suburban transport, concluding that, in the absence of positive action on the part of the Union, ‘it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty’¹³⁶. This entails that, as of today, the legality and operation of the service fundamentally depends on national, regional and local regulations, and that Member States are free to impose on Uber typical requirements like the possession of a license or the issue of an authorization, provided that the fundamental provisions on the freedom of establishment are respected.

The decision of the Court also deals with the second question raised by the Spanish judges, concerning the possibility of applying the provisions of the E-Commerce Directive limited to the part of the UberPOP service that fit the criteria of information society service. As we have previously noted, such approach is based on the application of a ‘severability test’ to assess the level of economic and functional dependency of one part to the other. Yet, given the reconstruction of the Court, and given the fact that the two components of the UberPOP service represent equally important and economically interdependent aspects of the same transportation business, a similar possibility must be excluded a priori.

The decision in *Asociación Profesional Élite Taxi* is expected to have decisive effects on the other preliminary ruling raised with regard to *Uber France* (C-320/16), and still pending before the ECJ. As seen in §1.5, the case revolved around the question of whether national measures prohibiting and punishing with criminal penalties the intermediation of illegal transport activities, and targeting specifically the organization of intermediation services like UberPOP, constituted technical regulations to the purpose of Directive 98/34/EC, and were thus subject to the established notification

¹³⁶ Id. Para. 47.

procedure¹³⁷. As it stands, Directive 98/34/EC is applicable only with regard to information society services, since the intended purpose of the rule is to avoid fragmentation in the definition of technical standards across the European digital market. Having denied UberPOP the qualification of information society service, there is no doubt that the ECJ will rule accordingly in this case as well. Besides, the issue presented by the *Uber France* case was already rather secondary, as it can be solved regardless of the legal qualification attributed to Uber's services. In fact, there is little doubt that the unprofessional unlicensed drivers operating through the platform pursue a transportation activity subject to, and potentially in violation of, the relevant national laws on the organization of transportation services. Extrapolating from A.G. Szpunar's opinion on the case, 'the notification obligation (established by Directive 98/34/EC) applies only to technical regulations having the specific aim and object of regulating, in an explicit and targeted manner, the taking-up and exercise of information society services'¹³⁸, whereas national rules affecting the provision of the service only in an incidental manner, such as the French measures in question, do not constitute a technical regulation, as they are aimed at ensuring the effectiveness of the national framework relating to the general field of transport. Besides, as noted by the Advocate General, if every national provision prohibiting the intermediation in illegal activities had to be regarded as technical regulation for the sole reason that such activities may take place by electronic means, the reach of the notification procedure would extend to an enormous number of internal rules, without really contributing to the intended purpose of the Directive¹³⁹.

The decision of the ECJ certainly represents a significant blow to Uber's business model and to the prospects of development of the UberPOP service across Europe, and it is a clear setback for all those that hoped in the intervention of the Court of Justice to dismantle the position of privilege and protection that traditional transport operators have been enjoying for the past decades. It also openly contradicts the recommendation, contained in the Commission's 'Study on passenger transport in the EU'¹⁴⁰, to make a distinction between the providers of the underlying service and the intermediaries managing the platforms, and will have broader significance for how technology companies offering traditional peer-to-peer services are to be regulated in the EU.

However, the conclusions of the Court are in line with the economic reality of the UberPOP service and are fundamentally coherent with the current European framework concerning the provision of

¹³⁷ Article 8 of Directive 98/34/EC requires Member States to communicate the Commission any draft technical regulation concerning the taking-up and pursuit of an information society service, and to clarify the grounds which make the enactment of such regulation necessary. The purpose of the norm is to avoid the adoption by Member States of measures incompatible with the internal market.

¹³⁸ Advocate General's Opinion in Case C-320/16 *Uber France SAS* [2017]. Para. 24.

¹³⁹ *Id.* Para 36.

¹⁴⁰ Final Report, p.23. See *supra* note 26.

services and the regulation of transport. As such, the judgment in *Asociación Profesional Élite Taxi* has to be endorsed.

The outcomes of the above rulings are expected to give Member States greater confidence and discretion in the regulation of these new transportation services, and will allow national courts to conclusively address the accusations of unfair competition raised against the platform. Yet, it does not necessarily mark the end of the Uber phenomenon. In order to maintain a presence in the European transportation market, the company will certainly have to adapt its business model to comply with tighter regulatory requirements and attempt to establish a more productive and peaceful relationship with authorities and incumbents alike. It also means that UberBLACK, the company's premium-tier service which relies on licensed PHV drivers to provide transportation services in many cities, will have to play a greater role in the future of the platform. As noted in §1.5, UberBLACK has recently been the object of another preliminary ruling request by the German Federal Court (C-371/17), which raises again the question about the legal qualification to be attributed, under EU law, to the intermediation activity provided by the American company, and the possible submission of the platform, together with its partner drivers, to the rules pertaining the provision of 'chauffeur-driven hire vehicles' services in the German territory.

As it stands, the outcome of this judgment may not be obvious at all. In fact, while it is true that UberBLACK shares with its cheaper sibling many of the characteristics that connote the Uber platform as a whole (such as the algorithmic determination of prices, the electronic processing of payments, and the reliance on peer-to-peer rating system to ensure the maintenance of certain level of quality in the provision of the underlying service), the drivers operating under its banner are, to all intents and purposes, licensed professionals authorized by local authorities to provide PHV services. It also worth noting that their relationship with the platform is essentially free of any exclusivity clause, meaning that, regardless of Uber, they are perfectly capable of pursuing their economic activity in a lawful and independent manner. Nevertheless, even if the ECJ were to lean towards the opposite reconstruction and extend the status of 'service in the field of transport' to UberBLACK as well, the consequences for the platform would be comparatively minor. In fact, as demonstrated by the example of London (where the platform operated for many years using a PHV license), the service can successfully operate in compliance with local regulations. Doubts may remain regarding the compatibility of Uber's intermediation mechanism with the established framework, like the violation by its partner drivers of the 'return to the garage' rule or the many provisions intended to separate the business of PHVs from that of traditional taxis. In this case, if UberBLACK were to be recognized as a service in the field of transport, it would certainly be impossible for the American company to

defend its position by relying on the European provisions on the free movement of services. The judgment of the ECJ on the matter is not expected before the end of 2018.

Finally, being denied the status of information society service, Uber could attempt to challenge the legality of national taxi regulations by invoking community rules on competition against the Member States themselves. To this purpose, the American company could rely on the combined provisions of Article 102 TFEU on abuse of dominant position and Article 106 (1) TFEU, which contains a general prohibition against the enactment and maintenance by Member States of measures conferring exclusive or special rights to public or private undertakings when contrary to the Treaties (particularly to the rules on competition and the functioning of the Single Market). As suggested in *Ambulanz Glöckner*¹⁴¹, special or exclusive rights are rights granted by a Member State to one or a limited number of undertakings that affect the ability of other potentially competing undertakings to exercise an economic activity in the same geographical area under equivalent conditions. In the field of urban transport, Uber could argue that the limitations and special rights represented by the taxi and PHV license system constitute a legal monopoly that prevents new operators from entering the market. Besides, the ECJ has clarified that the mere fact that an economic entity enjoys a special position conferred upon it by the state, while also occupying a dominant position in the relevant market, is not sufficient in itself to establish a violation of Article 106. For this to apply, it is instead necessary to identify a causal link between a Member State's legislative or administrative intervention and the anti-competitive behaviour of the accused undertaking¹⁴². For instance, as held in *Höfner v Macrotron*¹⁴³, a Member State's violation of Article 106 could be affirmed whenever the measures adopted by the state put the privileged undertaking in a position in which it could not avoid infringing Article 102 of the Treaty, particularly because of its manifest inability to satisfy market demand, while preventing potential competitors from entering the market, with potential negative effects on trade between Member States.

In the case of taxis, Uber could well allege that national frameworks on private urban transport have essentially created a situation of systematic unfulfillment of consumers' demand and prevented the technical development of the sector as well as competition on prices; and that, while taxi services are essentially local in nature, the introduction of international online platforms would contribute to give a cross-border dimension to the activities involved, rendering the issue relevant at the European level.

¹⁴¹ Opinion of Advocate General Jacobs on case C-457/99 *Ambulanz Glöckner* [2001], para. 89.

¹⁴² Case C-67/96 *Albany International BV v SBT* [1999].

¹⁴³ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991]. The case concerned the concession of a legal monopoly to a public undertaking in the market for employment procurement; the ECJ found an infringement of Article 106, where Germany had created a situation where the FEO was manifestly not in a position to satisfy demand for recruitment services. This approach was further expanded upon in a series of subsequent judgments: cases C-260/89 *ERT v Dimotiki* [1991], C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli* [1991], and C-18/88 *RTT v GB-Inno-BM* [1991].

However, such a line of argument, despite having some merit, would reasonably encounter significant hurdles. First and foremost, Article 106 (2) TFEU itself contains a notable exception to the above rule vis-à-vis certain undertakings, namely those entrusted with the operation of services of general economic interest, whenever the application of the Treaty rules on competition obstructs the performance of the particular task assigned to them. As defined by the Commission, ‘services of general economic interest are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention’¹⁴⁴. These include universal postal services, social schemes and medical services, and can well comprehend transport networks and those transportation services that would not be economically viable if performed at market conditions. If taxi services were to be qualified as such, then it would be fundamentally impossible for Uber to challenge the structure of the transport market by way of EU law. Interestingly, the *Corbeau* judgment seemed to suggest the possibility to challenge, even in areas of general economic interest, the breadth and proportionality of the exclusive or special rights attributed to certain undertakings, when such privileges extend to ancillary activities which are not instrumental to the performance of the main services¹⁴⁵. Yet, it is worth noting that the ECJ has since adopted a more cautious and restrictive approach to the matter, and that the previously mentioned Article 93 TFEU, concerning state aids in the field of transport, may already provide Member States with a viable justification for the special treatment afforded to the taxi market.

Overall, the decision in *Asociación Profesional Élite Taxi* certainly has the potential to affect the way the American company is perceived as well as the way it presents itself in the European market, and could well trigger more and more Member States to act and lock down the platform. In this sense, the future months will play a decisive role for the future of the Uber platform in Europe, with new judgments expected to further rule on the legality of UberPOP, UberBLACK and the rest of its services. In the meantime, the company will have to continue to fight its way through the great number of disputes still open around the world. Some of them, specifically those concerning the relation of the platform with competition and labour law, as well as the possible regulatory approaches adoptable by Member States to integrate its services in the urban landscape, will be discussed in the next Chapter.

¹⁴⁴ European Commission. *Services of general economic interest (public services)*. [Online] Available from: http://ec.europa.eu/competition/state_aid/overview/public_services_en.html [Accessed: 3re January 2018].

¹⁴⁵ Case C-320/91 *Corbeau* [1993]. The case concerned criminal proceedings brought against a Belgian businessman, accused of violating the national monopoly for postal services. Here, the ECJ held that the breadth of the monopoly given to the Belgian Post Office was unjustifiably greater than would have necessary to fulfil its service obligations of general economic interest, and it was thus partially unlawful.

Chapter 3

3.1 The regulation of unfair competition

Denying Uber the qualification of information society service and falling back within the conventional concept of service in the field of transport has the main effect of shifting the focus of the legal battle on the legality of its services from the European level to national legislations. Specifically, it exposes the American company to the varying cosmos of local transport regulations, and it enables established operators, such as taxis and private hire vehicles, to challenge Uber's polarizing business practices under the norms on unfair competition and business-to-business relations.

The concept of unfair competition encompasses a variety of commercial practices that undertakings may employ vis-à-vis other competing businesses as well as the general pool of consumers. It is a body of the law fundamentally separated from the field of antitrust, as the two diverge not only in terms of the economic conducts they aspire to sanction, but also in terms of the general objectives that their respective provisions intend to pursue. While the goal of competition law is to ensure the development of free and effective competition in a market void of collusive agreements, abusive monopolies and distortive public interventions, the rules on unfair competition guarantee that the commercial confrontation among rival businesses, and their relationship with consumers, takes place in a correct and loyal manner, by adhering to shared and honest practices, and by competing on a level playing field. The unfair competition framework is composed of two distinct areas. On one side there are the provisions relating to unfair business-to-consumer (b2c) commercial practices, harmonized at the European level by Directive 2005/29/EC¹⁴⁶; on the other, there are the norms concerning the unfair business-to-business (b2b) behaviours; a subject which, except for a few provisions on misleading and comparative advertising contained in Directive 2006/114/EC, has largely remained in the hands of national legislations. Yet, the lack of formal harmonization on b2b

¹⁴⁶ Article 2(d) of the UCPD Directive defines 'business-to-consumer commercial practices' as any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers. Article 5 proceeds to prohibit any unfair commercial practice which is contrary to the requirements of professional diligence (the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity) and materially distorts or is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

unfair competition has not been cause of significant fragmentation, since most Member States had already adopted similar regulatory patterns well before the foundation of the European Union, and had implemented, with varying degrees of autonomy, common instruments to counteract the unfair exercise of certain business practices. In fact, the rules on unfair competition are closely related to other instruments of industrial propriety protection traditionally enshrined in national civil law, and find their common origin in Article 10-bis of the Paris Union Convention, as amended in The Hague back in 1925. Under the provisions of the treaty, its 177 contracting countries¹⁴⁷ are bound to assure effective protection against ‘any act contrary to honest practices in industrial or commercial matters’. The treaty dedicates particular attention to a number of practices, including: (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; and (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

Germany was the first European country to adopt legislation implementing the treaty, and was shortly followed by most of today's Member States, which transposed the fundamental objectives of its provisions (the protection of industrial property and goodwill) and expanded upon it, gearing the law towards the protection of general economic interests. In the end, competition rules on b2b practices were introduced in the legal framework of all Member States, either in the form of special legislation (Germany, Denmark, Sweden, Finland, Spain, Greece, Poland, Slovenia, Belgium, Estonia, Latvia, Lithuania, Hungary, Luxembourg) or as part of their civil and commercial codes (Italy, France, the Netherlands, Portugal). The only countries lacking such rules are the UK, Ireland, Cyprus and Malta, as common law has traditionally focused on the protection of consumers, leaving businesses to the thinner protections of economic tort law¹⁴⁸.

As to the relation between unfair competition and antitrust law, the possibility of prohibiting certain competitive behaviours, deemed contrary to honest business practices by national legislations, may occasionally be at odds with the objectives of free and effective competition pursued by the TFEU. In order to avoid such a conflict, Article 3 of Regulation 1/2003 on the implementation of Articles 101 and 102 TFEU, provides Member States with a necessary exception, allowing them to adopt and apply on their territory ‘stricter national laws which prohibit or sanction unilateral conduct engaged

¹⁴⁷ Full list of signing members available at: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2.

¹⁴⁸ WADLOW, C. (2007) The Case for Reclaiming European Unfair Competition Law from Europe's Consumer Lawyers. In WEATHERILL S. & BERNITZ U. (eds.) *The Regulation of Unfair Commercial Practices under EC Directive 2005/29—New Rules and New Techniques* Vol. 4. Oxford.

in by undertakings [...] and to pursue an objective different from that pursued by the Treaty', thus including the protection of industrial propriety and consumers' general interests through the adoption of unfair competition rules.

So far, no further harmonization effort has been attempted nor has been perceived as necessary in the specific field of b2b practices, as there is little evidence that the marginal disparities existing among national legislations may result in significant obstacles to the development of the internal market¹⁴⁹. Moreover, b2c legislation already cover a wide spectrum of situations where existing EU rules can be invoked between undertakings with regard to conducts deployed vis-à-vis consumers; by using them to counteract the wrongful actions of competitors, businesses can already benefit from the guarantees of the UCPD directive as means of indirect protection against unfair competition.

Arrived at this point, in order to continue our analysis of the Uber phenomenon and understand the way the different rules on transport, competition and the internal market practically come together, it becomes necessary to delve deeper into the law of individual Member States. We will do it by taking into consideration the example of the Italian legislation which, not only has one of the most tightly regulated transport sector in Europe, but it is also one of the few countries whose judiciary has had the change to rule, with interesting results, on the legality of both UberPOP and UberBLACK. As we will see, Italy can rely on consolidated doctrine as well as detailed regulations, which stem directly from the provisions of the Paris Convention, thus providing a good example of the general approach adopted by most European countries in the field of unfair competition.

3.1.1 The Italian case: transport and unfair competition

Italy is an excellent example of the kind of regulatory opposition and market foreclosure that Uber has been encountering since its debut in the territory of the European Union. Here, hire and public transport represents a highly regulated sector of the national economy, whereas the political pressure exerted by taxi unions on local authorities has consistently been able to prevent the adoption of meaningful reforms. Italy follows a two-tier system, distinguishing between regular taxis and hire cars with drivers. The two services, framed under the common label of 'non-scheduled public transport service' ('autoservizi pubblici non di linea'), are regulated by overlapping norms, at the national, regional and municipal level, and are subject to strong barriers to entry, stringent quantitative and qualitative requirements and regulated tariffs.

¹⁴⁹ STUYCK, J. (2011) Briefing Paper on Addressing unfair commercial practices in business-to-business relations in the internal market. Directorate General for Internal Policies.

The general framework is provided by Law 21/1992 on the transport of persons through non-scheduled public transport service ('Legge Quadro per il trasporto di persone mediante autoservizi pubblici non di linea'), which defines taxis and private hire vehicles (also known as NCC) as services providing for the individual or collective transport of persons, carried out at the individual request of the passenger, on itineraries and according to timetables that are determined on a case-by-case basis in a non-continuous and non-periodic manner (Article 1). In the view of the Italian lawmakers, such services perform a transport function which is both complementary and integrative to the proper functioning of the other public transport lines (land, rail, sea, air) and, as a result, the restrictions to access the market, and the elaborate regulatory framework that characterized their operations, have always been justified on ground of public necessity as well as public order.

Article 2 and 3 of Law 21/1992 draw a clear distinction between taxis and NCCs, setting precise measures intended to prevent any risk of confusion or competition among the different operators. Specifically, taxis are aimed at an undifferentiated mass of users and are subject to a typical common carrier obligation. They are allowed to remain stationed on public soil, while tariffs and service characteristics are decided by administrative determination. On the other hand, NCCs are aimed at specific users who issue, at the depot of the carrier, request for a predetermined transportation service. They can only be stationed at their respective depots or garages, but, unlike taxis, they can refuse the provision of a certain service and can negotiate the applicable tariff directly with the passengers. In addition, they operate according to the 'return to the garage' rule, where NCC vehicles are required to start from and, return to, their central deposit after each service.

Further regulation is passed at the local level, pursuant to the principle of vertical subsidiarity. First, the Regions set the criteria under which local authorities are to regulate the exercise of urban transport services. Then, it is for the individual Municipalities to determine, by means of administrative regulation, the main elements of the respective services: the number and types of vehicles to be assigned to taxis and NCCs, the modalities in which the services are to be carried out by licensed and authorized carriers, the criteria for the determination of taxi tariffs and the implementation of approved taximeters, as well as the prerequisites and conditions for the granting of the licenses and authorizations, respectively necessary for the exercise of taxi and NCC services. Registered drivers are also required to hold a certificate of professional qualification and undergo extensive examination of their abilities and geographical knowledge; whereas NCC operators are required to own or, at least, have at their disposal a physical depot to station their vehicles. Licences and authorizations are issued on a personal basis through a public procurement procedure, and can only be transferred, at the request

of their holders, under the peremptory circumstances required by the law¹⁵⁰. The Italian Traffic Code ('Codice della Strada') also establishes a clear distinction between the private use of a vehicle for one's own interest, and the remunerated transportation of third parties to a destination selected by persons other than the holder of the vehicle registration certificate. Hence, under Article 86 of the Italian Traffic Code, the use of a private vehicle to exercise the activity of taxi or NCC transport, without the required license or authorization, is punished with an administrative penalty, the confiscation of the vehicle and the suspension of the driving license.

It is also worth noting that the Italian legislation on the matter of urban transport has been, for some time, the object of passionate debate and some rather contradictory policy intervention. In fact, after a timid liberalization attempt brought forward by the national government in 2006 (d.l. 223/2006 'Bersani-Visco'), only two years later, a different government introduced new norms intended to double down on the regulatory limitations and administrative sanctions that prevent NCC from interfering with the business of regular taxi (d.l. 207/2008). The application of these provisions, which were immediately criticized by the national competition authority (AGCM) for their lack of market foresight and disregard for the needs of mobility in urban areas¹⁵¹, was later suspended in 2009¹⁵², leaving to this day a regulatory gap in the field of non-scheduled public transport. A gap that has given the chance to the growing number of NCC operators, as well as new aggressive players like Uber, to enter the market and thrive, by adopting business practices that blur the line between taxis and other urban transport services.

As regard the discipline of unfair competition, Italy has dedicated, since 1942, an entire section of its Civil Code to the repression of wrongful business-to-business practices. In particular, Italian law allows national courts to inhibit the continuation of acts of unfair competition by business owners and to provide for economic compensation in the event of damages suffered by competing undertakings. In addition, it entrusts professional associations, as well as the other entities representing the interests of entire professional categories, with the power to stand in court and promote the necessary legal actions on behalf of their members.

Similar to the Paris Convention, Article 2598 of the Italian Civil Code sanctions as acts of unfair competition the utilization of distinctive signs (trademarks and tradenames legitimately used by other businesses) or of any other means capable of creating confusion with the products and services of a

¹⁵⁰ While the law makes no reference to the possibility of transferring licenses for economic consideration, the sale of licenses has become a widespread practice throughout the country, especially in the taxi sector, with prices often spiking to hundreds of thousands of Euro. The phenomenon is further inflated by the protracted pressure of incumbent operators against the opening of the market to new entrants.

¹⁵¹ Disciplina dell'attività di noleggio con conducente (Disegno di legge di conversione in legge, con modificazioni, del Decreto-legge 30 dicembre 2008, n. 207), AS501 del 19 febbraio 2009.

¹⁵² D.L. 10 febbraio 2009 n. 5. 'Misure urgenti a sostegno dei settori industriali in crisi'.

competitor, as well as the dissemination of news to discredit or take advantage of the merits of the products and services of a competitor. Yet, more relevant to the purpose of our analysis, is the last residual provision contained in the article, which establishes a general prohibition against the use, in a direct or indirect manner, of any other means not compliant with the principles of professional fairness and correctness, as such capable of inflicting damage to the business of a competitor. This is the norm most often invoked by Uber's detractors to stop the diffusion of its services, as it gives courts the flexibility necessary to determine whether new and particular competitive behaviours, different from the ones already typified by the law, are actually contrary to the concept of honest practices and professional diligence as accepted in industrial and commercial matters. In the case of Uber, the fundamental question remains whether the characteristics of its platform, capable coordinating the actions of thousands of licensed and unlicensed drivers, allow the performance of transport services which are equivalent to those reserved by the law to taxis and PHVs, and that, by disregarding local regulations, enjoy substantial, and potentially unfair, competitive advantages over the other operators, damaging their business and undermining the role of public transport.

3.1.2 The Italian case law on UberPOP

The general context of the Italian transport market meant that it was inevitable for Uber's services to be met by swift judicial initiatives in the cities where it decided to operate, namely Rome and Milan. The first case to come up was in 2015¹⁵³, when twelve professional associations, representing the interests of taxi drivers in the area of Milan, filed a precautionary action against Uber, asking the local tribunal to inhibit the use of the UberPOP service and block access to its website and smartphone application throughout the country. The accusation being that the service offered through Uber by unlicensed unprofessional drivers resulted identical, in practice, to the public transportation service provided by regular taxis and that, by not having to abide by the rules and requisites established for the sector by Law 21/1992, their activity qualified as an act of unfair competition within the meaning of Article 2598 Civil Code. The case is contemporary to the preliminary ruling in *Asociación Profesional Élite Taxi* we dealt with in the first half of this dissertation, and the questions posed before the court are similarly connected with the qualification of Uber and the application of national competition rules. Yet, the Italian tribunal managed to independently develop compelling solutions to the problem, without calling for the intervention of the ECJ, and by anticipating the arguments of Advocate General Szpunar by almost two years. The case also provides an interesting overview of

¹⁵³ Ordinanza Tribunale di Milano – Sezione Specializzata in materia di impresa - RG No 16612/2015; then confirmed in Ordinanza Tribunale di Milano – Sezione Specializzata in materia di impresa - RG No35445/2015 + 36491/2015.

the attitude of Uber's defendants towards judicial proceedings, and the arguments typically employed by the company to justify its services and dispute the lawfulness of national restrictive measures.

The first element to be assessed when dealing with hypothesis of unfair competition under Article 2598 c.c. is the existence of an actual, or even potential, competitive relationship between two undertakings¹⁵⁴. Such is the case when the two undertakings share the same clientele and offer identical or similar products and services to the same relevant market. In this regard, Uber presented its usual defence by claiming that the UberPOP service is not a transport service, but an electronic application aimed at facilitating the diffusion of alternative forms of shared private transport among its users. According to the American company, UberPOP is a closed and private community where interaction is only possible for the persons having installed and registered the necessary smartphone application, thus distinguishing the service availability from typically open and public nature of taxi services. In addition, Uber claimed that its partner drivers willingly share their journey with the users of the platform, receiving in exchange a mere reimbursement of the costs of the travel and vehicles expenses, thus configuring UberPOP as a mere car-sharing service.

Of course, as we have already elaborated on in the previous chapter, this reconstruction of Uber's activity is mostly inaccurate and has to be refused, and a similar conclusion also emerges from the judgment of the Italian court. In its view, the intermediation service provided by the platform is substantially comparable to the one already carried out by radio taxis and dispatch centres, not sufficing the necessity of a simple registration to the Uber application to make it a private community or limit its potential clientele. Consequently, UberPOP is not a private community but a service provided to an undifferentiated mass of consumers, using cars circulating freely on public roads; just like taxis. Secondly, UberPOP is not a simple electronic platform but represents the essential coordinating element that allows unprofessional drivers to earn an income by picking up random passengers on the road. The level of control and overall participation exerted by Uber on the provision of the underlying transport service, is the result of an integrated organizational structure that has been designed, from the beginning, to encourage and profit from the exercise on an illegal transport activity. In this context, the remuneration paid by the users of the platform is no less than a true transport tariff, while the way in which the destination is selected, and the journey is performed, resembles in no way the functioning of popular car-sharing services.

According to the court, there is no doubt that UberPOP constitutes a service in the field of transport, to the point of deeming applicable to Uber itself the body of civil rules pertaining the responsibility

¹⁵⁴ To the purpose of the application of the rules on unfair competition the concept of undertakings encompasses a variety of legal subjects: individual entrepreneurs, private and public companies, territorial public entities, and concessionaires of public services. Unlike the TFEU rules on competition, self-employed professionals are excluded from the application of the law.

of carriers in the context of transport contracts. The court also recalls the fact that under EU law, namely Article 58 and 91 TFEU, the provision of services in the field of transport is not subject to the general provision on the free movement of services nor does the activity of taxi and NCC fall within the scope of the provisions adopted on the basis of Title VI of the Treaty¹⁵⁵. These circumstances are confirmed, at the national level, by the laws responsible for the implementation of the Service Directive (D.Lgs. 59/10 and L. 148/11), which expressly excludes taxis and NCCs from their scope of application. In the view of the court there is no need to defer the question to the European Court of Justice as there is no uncertainty regarding the way such services are to be regulated at the national level; nor does the Italian law set discriminatory limitations to the freedom of establishment, as the rules on the issuing of licenses apply indistinctively to all European citizens. Hence, based on the relevant legal framework (L. 21/1992 and ‘Codice della Strada’), an activity consisting in the transportation of passengers for remuneration, and in the interest of persons other than the owner of the car, represents a service in direct competition with licensed taxi. In the same way, the provision of such a service without the necessary administrative authorization constitutes a clear violation of Italian law.

The second essential element for the application of Article 2598 c.c. is the identification of a commercial conduct which is potentially capable of inflicting damages and affect the business of competing undertakings. In this regard, the Italian judges note that, while the violation of norms of public law is not in itself an act of unfair competition, such a conduct is sufficient to infringe the principles of professional fairness whenever it is the cause of the diminution of a competitor’s profitability or else, whenever it has determined a competitive advantage that would have been impossible if the norms had been respected.

In the case of UberPOP, the failure to comply with regulations on transport allows the American company to make significant cost savings and to substantially reduce its organizational and supervisory activities. When compared to the costs and restrictions to which taxi operators are subjected, such as the purchase of a vehicle uniquely dedicated to the provision of the service, the installation of homologated taximeters, the stipulation of dedicated insurance contracts, the affiliation to professional organizations and dispatch centres, and the respect of unilaterally determined tariffs and timetables, it is clear that Uber and its drivers are able to benefit from an undisputed competitive advantage. Lower overall costs result in lower average prices¹⁵⁶, which in turn determined an alteration in the urban taxi market, the diversion of traditional customers and, ultimately, a case of

¹⁵⁵ Joined Cases C-419/12 and C-420/12 *Crono Service and Anitrav v Roma Capitale and Regione Lazio* [2014], para.42.

¹⁵⁶ While the average cost of a UberPOP ride can be significantly lower than the equivalent journey made by taxi, the adoption of Uber’s surge pricing mechanism can lead to increases between 150 to 500 percent.

unfair competition. Thus the court ruled for the inhibition of UberPOP; a measure which is still in force to this day.

3.1.3 The Italian case law on UberBLACK

The second action to be brought against Uber dates back to the beginning of 2017¹⁵⁷, when eleven associations, representing taxis and NCCs in the territory of Rome, asked for the nation-wide inhibition and obscuring of the UberBLACK service. Similarly to the previous instance, the plaintiffs claimed the illegality, abusiveness and unfairness of the modalities in which the Uber application enables its drivers to compete with rival NCCs and, especially, regulated taxi operators. The fundamental difference, in this case, is in the eminent feature that UberBLACK operates as an advanced reservation system between authorized NCC drivers and registered users. Overall, the service works just like UberPOP: the driver is selected based on geographical proximity, the fare is unilaterally calculated by the application by applying the surge pricing algorithm, and the platform exercises decisive influence over the conducts of its partner drivers and most relevant aspects of the journey. And yet, unlike UberPOP, the fact that the drivers are actually professionals, specifically authorized by local municipalities to operate as a non-scheduled public transport service within the meaning of Law 21/1992, marks the fundamental difference between a transport activity which is unquestionably illegal and a service which instead can operate, at least in principle, within the boundaries of the law. This is a fact that the Italian court does not fail to highlight in its judgment. However, the problem with UberBLACK lies in the fact that, given the characteristics of the electronic platform, the NCC drivers working for it are able to stay stationed on public soil and accept new rides while circulating on the road, violating the ‘return to the garage’ rule and tapping into the undifferentiated mass of users that would otherwise belong to the taxi market. Such conduct, in the view of the court, constitutes a clear violation of the stringent operational requirements imposed upon NCCs by the law, and can certainly result in an act of unfair competition vis-à-vis taxis and other NCC operators. This position of undue competitive advantage is further aggravated by the fact that unlike taxis, which are bound by administratively predetermined tariffs, Uber can modulate its offer depending on the varying needs of the market, providing affordable prices in the moments of lower demand and charging greater profits in time of surging requests. In addition, compared to regular NCCs, UberBLACK’s drivers enjoy greater freedom to move further from their deposit and seek customers in municipalities other than the one which had originally granted them their authorizations.

¹⁵⁷ Ordinanza Tribunale di Roma – Sezione Specializzata in materia di impresa - RG No 76465/2016; and Ordinanza Tribunale di Roma – Sezione Specializzata in materia di impresa - RG No 25857/2017.

Hence, the judges of the Tribunal of Rome confirmed the reconstruction made by their colleagues of the Tribunal of Milan less than two years before. Namely, that Uber does not represent a mere intermediary between drivers and passengers, but the manager of an integrated transport system, where all these elements play an equally fundamental role. As a result, by operating in disregard of the regulatory framework provided for NCC services, the American company participates in the provision of a service of non-scheduled public transport in ways that are contrary to the law. For these reasons, the court initially ruled to inhibit the provision of the service in the Italian territory.

However, when called to rule on the appeal proposed by Uber against the adoption of the precautionary measure, the court decided to subvert its original judgment. Reasoning from the fact that the general law concerning non-scheduled public transport had been the object of consistent modifications in 2008, targeting specifically some of the operational requirements of NCCs¹⁵⁸, and that the applicability of said modifications had then been repeatedly suspended by the national government with the intention of a complete overhaul and remodulation of the whole sector (lastly in 2016¹⁵⁹), the court concluded that the regulatory gap purposely left by the government meant that the exercise of NCC services was to be considered free from the specific requirements involved in the suspended reform. As a result, the conducts originally objected against UberBLACK and its drivers are no longer contrary to the law on non-scheduled public transport, nor can they be invoked as a key element of an alleged act of unfair competition. Thus, the court ruled to revoke the ban on UberBLACK, with the result that the service remains, to this day, operational in the Italian territory. Finally, a shared albeit secondary element that emerges from both proceedings is the sheer number of defendant parties called before the judge; not only the rather well-known Uber BV and RASIER Operations BV, but also more obscure entities like Uber International BV, Uber International Holding BV and Uber Italy S.r.l. A fact which is indicative of the way Uber corporate structure trickles down, from the abstract world of tax planning, to the reality of law enforcement. On the one hand, Uber pleads the lack of passive legitimization and lack of involvement of the latter three subsidiaries in the provision of its services. On the other hand, the Italian judges note that, while the participation of Uber's subsidiaries to the illegal activity cannot be excluded in principle¹⁶⁰, the complexity of the question regarding the economic interrelationships existing within the group makes it unsuitable to be dealt with in the context of a precautionary procedure. In the meantime, the judges of both courts, noting the existence of a shared economic interest of the various Uber companies to the success and

¹⁵⁸ Specifically those pertaining the obligatory ownership of a dedicated garage, the conditions under which reservations and services are to be provided at the garage, the prohibition to station on public soil, the keeping of specific accounting records.

¹⁵⁹ D.l. 30 dicembre 2016 n. 244, proroguing the suspension of the modification until the 31st December 2017.

¹⁶⁰ Particularly Uber Italy S.r.l. which from the documents of the court appears to be actively engaged in the promotion and development of the platform on the national territory.

profitability of their services, resolved to apply the relevant sanctions jointly and severally to all the defendants, while deferring the rest of the matter to the further examination of the judgment of merit. Overall, it seems that, given the state of European, national and local legislations on the matter of urban transport, Uber's attempted revolution of the sector is destined to remain, at least for now, unfulfilled. It is also clear that the pains of the American company could be instantly resolved by a fundamental change in the general approach of the law towards the subject. Yet the likelihood of such a radical reform hinges on the determination, at the political level, to subvert the consolidated dynamics of the market and erase the artificial differentiations introduced by the law between taxis, private hire vehicles and other forms of private transport. A change which, as far as Italy is concerned, has been repeatedly called for by the national authorities for competition (AGCM) and the regulation of transport (ART)¹⁶¹. A change which is assured to cause further controversy along the way.

3.2 The collaborative economy: a competition law perspective

These first years of Uber in Europe have been characterized by the strenuous attempt of national regulators to systematically place the platform within the boundaries of the existent legal frameworks on services and transport. However, as the company settle in the market and adapt to comply with the relevant regulations, and consumers get accustomed to its presence and services, the scrutiny of European and national authorities will eventually shift to the critical field of competition law as enshrined in Articles 101 and 102 TFEU. This is an area where the Commission has long struggled in bringing famous technological behemoths under the scrutiny of the law; Microsoft, Google, Facebook, Apple, are just few notable examples of the challenges posed by the attempt to adapt century old definitions to economic realities in constant transformation. A task that is assured to be even more complicated in the evolving context of the collaborative economy, where the applicability of the current competition rules has comparatively been the of object of little discussion and, especially on the part of the Commission, very little action.

A first fundamental issue when dealing with the conducts of individual collaborative platforms lies in the choice of the legal instruments used to define the relevant markets and the particular economic relationships that bind together different market players. Incumbent market operators are certainly the first subjects to be affected by the development of sharing platforms, as they traditionally sell or lease the variety of products and services that the new platforms aspire to share with the rest of the

¹⁶¹ 'Atto di segnalazione al Governo e al Parlamento sull'autotrasporto di persone non di linea: taxi, noleggio con conducente e servizi tecnologici per la mobilità' (21 May 2015); and 'Segnalazione dell'Autorità Garante della Concorrenza e del Mercato in merito alla riforma del settore della mobilità non di linea' S2782 (10 March 2017).

community. Reduction in goods under-utilisation and decrease in the transaction costs associated with their circulation in the market are the elements at the centre of this new economic disruption which promises to reduce transaction costs and overall prices as well as reducing the aggregated demand for traditional supplies¹⁶². Since this is the kind of competitive revolution that antitrust law, with its focus on consumer welfare, seeks to incentivize and protect, incumbent operators, especially those originally holding positions of dominance within their relevant market, are prevented from engaging in exclusionary practices at the expense of the new entrants, and have to fall back, to defend their business, to the localized protections offered by the rules on unfair competition.

The other subjects to be examined under competition law are the players actively engaged in the functioning of sharing platforms: on one side, there are the individuals, both professionals and private citizens, supplying the underlying product or service to the users of the platform; on the other side, there are the technological structures providing the means to intermediate between supply and demand, and finalize transactions. For competition rules to apply, the subjects engaged in the alleged anticompetitive activities need to qualify as an undertaking with the meaning of EU law. As we know, this a broad definition which encompass every entity engaged in an economic activity (the offering of goods and services on a given market¹⁶³), regardless of its legal form and the way in which it is financed¹⁶⁴. Even the fact that the provider is a single individual, working part-time, does not preclude its qualification as an undertaking¹⁶⁵, as it suffices that the activity performed can, at least in principle, be carried out in order to make profits¹⁶⁶. Hence, collaborative platforms and affiliated service providers would generally constitute separate undertakings, each operating in a different market against different competitors; the former competing only with the handful of other intermediation services, and the latter having to deal with traditional brick-and-mortar commercial activities and service providers. However, the considerations we have conducted in the course of this paper, as well as the evidence emerging from the case law of the ECJ, suggest that, under certain circumstances, the control exerted by platforms on the underlying services can be so intense as to erase the apparent distinction between broker and provider, resulting in the creation integrated business which operates in the context of a unified two-sided market¹⁶⁷. This is certainly the case with Uber and its partner drivers.

¹⁶² ZERVAS, G and PROSERPIO, D (2015) The rise of the sharing economy: estimating the impact of Airbnb on the hotel industry. [Online] Available from: <http://people.bu.edu/zg/publications/airbnb.pdf>. [Accessed: 20th December 2017].

¹⁶³ Case C-218/00 *Cisal v INAIL* [2002].

¹⁶⁴ Case C-41/90 *Hofner and Elser v Macrotron GmbH* [1991].

¹⁶⁵ Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014], para.27.

¹⁶⁶ Case C- 67/96 *Albany* [1999].

¹⁶⁷ In economic theory, a two-sided market is an economic platform having two distinguishable groups of users, which can interact through a common interface, providing each other with some form of network benefit. In this type of

The identification of a single relevant market has direct implications on the way competition rules are applied as well as the way liability for competitive infringements is allocated¹⁶⁸. Let us start by considering the applicability of Article 101 TFEU, prohibiting ‘all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member State, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market’. Article 101 does not apply to behaviours and arrangements between dependent undertakings, which are either part of the same group or constitute a single economic entity¹⁶⁹. This requirement entails a case-by-case evaluation of the economic interrelations existing between the undertakings; namely whether one of them is able to control key aspects, or exercise decisive influence, over the economic activities of the others. What is interesting in the case of collaborative platforms is that the application of Article 101 can be further excluded in situations of so-called ‘false self-employment’, where a formally independent service provider is confined in such a position of subjection and vulnerability towards another undertaking (in this case the intermediation platform), that it is not able to determine independently his own conduct on the market, but ends up operating as a mere auxiliary within the principal’s undertaking¹⁷⁰. The main question for courts and competition authorities, here, is to assess whether providers enjoy more independence and flexibility than employees who perform the same activity in an equivalent role¹⁷¹. A question which is particularly relevant in the case of Uber, as the recognition of an employment or quasi-employment status for its partner drivers, albeit opposed by Uber itself, would fundamentally save the platform from any future allegation of concerted practices.

Another relevant exception is provided by Article 101(3) which saves from the axe of competition law those agreements and practices that, despite having a potential anticompetitive effect, contribute to the general improvement of production and technology, while allowing consumers a fair share of the resulting benefit. There is no doubt that collaborative platforms can produce great advantages for both general consumers and individual service providers, by opening markets that would otherwise be foreclosed and by bringing down the costs and asymmetries associated with this kind of transactions in traditional markets. Thus, where a competitive restraint is indispensable or advantageous to the functioning of the platform, EU law may provide ways to legitimate such

markets, the members of each group require different functionality from the platform and generally have a preference regarding the number of users active on the other side of the market, with the result that variations in the number of users and the level of prices on one side may have positive or negative network effects on the other. Because of network effects, successful platforms generally enjoy increasing returns to scale.

¹⁶⁸ LOUGHER, G. and KALMANOWICZ, K. (2016) EU Competition Law in the Sharing Economy. *JECLAP Vol. 7 No. 2*. P. 87-102

¹⁶⁹ Cases C-73/95 *Viho* [1996] and C-97/08 *Akzo Nobel NV* [2009].

¹⁷⁰ See *supra* note 158, *FNV* case, para. 31.

¹⁷¹ *Ibid*, para. 37.

coordination¹⁷². Here, the two-sided nature of the collaborative market is again relevant in the evaluation of the potential effects of the undertakings' conducts, as positive effects generated on one side of the market, may well determine disproportionate disadvantages on the other.

The concept of a two-sided market also bears significant consequences in the application of Article 102 TFEU on abuse of dominant position. Dominance is a threshold concept: only those undertakings which enjoy such a position of economic strength as to be able to act independently of competitors, customers and consumers, are burdened by the law with the special responsibility to not impair the genuine and undistorted functioning of competition¹⁷³. Establishing dominance is a two-stage process. First, it is necessary to determinate the boundaries of the relevant market; then, it is necessary to evaluate whether the concerned undertaking holds a sufficiently strong economic position in that market. This is done by reference to the relevant products as well as the geographic and temporal dimension of the market, and by taking into consideration elements like demand substitution¹⁷⁴, market shares¹⁷⁵, and external competitive constraints by rivals and consumers. However, in the case of collaborative platforms, these elements need to be analyse by taking into consideration the peculiar dynamics of technology markets, where network effects and economies of scale and scope play a significant role in consolidating the position of first movers, and where the capacity to collect large amount of data enables platforms to tailor the underlying products to the specific needs of their users. Given the possible interferences and competitive constraints that the intermediation market and underlying service market can exercise on each another, market share values alone become less meaningful than in the assessment of traditional markets, forcing authorities to look for different econometric models, better suited to evaluate the interdependencies between the two sides¹⁷⁶. Moreover, empirical evidence seems to demonstrate the volatility of any market power generated in the sharing economy, as platforms need to constantly innovate their underlying technologies to maintain momentum and keep growing and avoid being exceeded by new competitors, while practically non-existent switching costs and multi-homing abilities (the possibility of users and

¹⁷² DUNNE, N. (2017) Competition Law (and Its Limits) in the Sharing Economy. Forthcoming, Nestor Davidson, Michèle Finck and John Infranca (eds.), Cambridge Handbook on Law and Regulation of the Sharing Economy (Cambridge University Press 2018). Available at SSRN: <https://ssrn.com/abstract=3058697> [Accessed: 20th December 2017].

¹⁷³ Case C-27/76 *United Brands* [1978].

¹⁷⁴ Demand substitution identifies the range of products that consumers perceive as interchangeable. This is assessed through the SSNIP test, which considers the effect of non-transitory price variations on consumer behaviour.

¹⁷⁵ According to the '*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*' (OJ C45/7, 24.2.2009), a share of 50% or more determines a rebuttable presumption of dominance, while shares below 40% are not likely to sustain dominance. As established by the ECJ in *Microsoft (C-201/04)*, a condition of super-dominance may exist where an undertaking hold a share of more than 90%.

¹⁷⁶ FILISTRUCCHI, L. and KLEIN, TJ. and MICHIENSEN, T. (2012) Assessing Unilateral Effects in a Two-Sided Market: An Application to the Dutch Daily Newspaper Market. 8:2 *Journal of Competition Law and Economics*. P. 297–329.

providers to participate in more than one platform at the same time) contribute to further diminish the capacity of the platforms to consolidate and exercise market power¹⁷⁷, to the point of raising doubts on the practical likelihood of dominance in the collaborative market¹⁷⁸. On a different but related note, the absence of any commonality of interests and any means of direct coordination among the different service providers, seems to exclude the possibility of collective dominance¹⁷⁹.

3.2.1 The issues of pricing algorithms

A new emerging issue in the field of competition law, and which plays a determinant role in the functioning and development of internet-based platform like Uber, is the adoption of automated algorithms to assist users in the completion of transactions and automatically determine key aspects of the relevant contracts; most notably, prices.

Competition law, particularly the provisions concerning collusive agreements, has traditionally targeted human behaviours. Concurrence of wills, meeting of the minds, practical intention, deliberate cooperation, are all concepts born in a time where competing undertakings needed to meet, discuss and decide the kind of collusive practices they intended to undertake. But today, the colourful image of the handful of corporate managers discussing price-fixing strategies in a smoke-filled room, has to leave the way to new immaterial intelligent systems, capable of processing billions of data and unilaterally determine complex commercial strategies in just a few seconds.

Following the definition provided by Wilson and Keil¹⁸⁰, ‘an algorithm is an unambiguous, precise, list of simple operations applied mechanically and systematically to a set of tokens or objects, where the initial state of the tokens is the input and the final state is the output’. Put it simply, an algorithm is a recipe for doing something: given a certain input (price levels, number of competitors, aggregated supply and demand, etc.), the system can autonomously determine a corresponding output (a modification of price, a variation in stocks, and so on). With the evolution of computer science, artificial intelligence and machine learning, algorithms have been developed to automatically perform repetitive tasks involving complex calculations and data processing that would otherwise be too difficult or too long for human beings to execute. The ability of algorithms to solve complex problems, make predictions and take decisions in a quick and efficient way has led an increasing number of

¹⁷⁷ RUSSO, F. and STASI, M.L. (2016) Defining the relevant market in the sharing economy. *Internet Policy Review*. Volume 5 Issue 2.

¹⁷⁸ Federal Trade Commission (FTC), *The “Sharing Economy”. Issues Facing Platforms, Participants & Regulators*. An FTC Staff Report. November 2016. p. 21-23.

¹⁷⁹ HATZOPOULOS, V. and ROMA, S. (2017) Caring for sharing? The collaborative economy under EI Law. *Common Market Law Review*, Volume 54, p. 121.

¹⁸⁰ WILSON, R. and KEIL, F. (1999) *The MIT Encyclopedia of the Cognitive Sciences*. The MIT Press Cambridge, Massachusetts. pag.11.

companies, not only in the tech industry and online market, but also in the field of finance, healthcare and transport, to employ algorithms to improve business decisions and automatize processes for competitive differentiation; a phenomenon which is known as ‘algorithmic business’¹⁸¹. As companies use algorithms to become more efficient, competing firms feel the pressure to digitalise their operations and develop similar mechanism themselves. While the increase reliance on algorithms to take business decisions represents a revolutionary opportunity to foster market efficiencies and create value from the relentless flow of data produced in our societies, these tools lend themselves quite effectively as facilitating factors for collusive behaviours, providing companies with sophisticated and often undetectable ways to coordinate their operations and exchange critical commercial information.

The concept of collusion traditionally refers to any form of agreement or coordination among competing firms, adopted with the specific intent of raising prices above the level that would have otherwise been possible in a perfectly competitive environment. In order for a collusive strategy to work, the participating undertakings need to setup a structure to regulate their relations, agree on a common policy, monitor each other’s adherence to it, and enforce the agreement by punishing deviating and misbehaving firms.

From an economic standpoint, collusion can be either explicit or tacit. While explicit collusion requires direct interaction among the participating firms in the form of agreements, decisions or concerted practices, and it is generally forbidden under competition law, tacit collusion is often the result of the particular structure of the market (e.g. information transparency in oligopolistic markets), and gives rise to forms of conscious parallel behaviours between independent firms. Given the lack of any form of intentional coordination, these practices are mostly left untouched by competition authorities. What is interesting about ‘algorithmic collusion’ is that, by favouring the automatic and immaterial exchange of information between competitors, it allows undertakings to replace the exteriority of explicit collusion with a mechanism of tacit coordination.

A cartel may setup ‘monitor algorithms’ to collect and process information from competitors and punish eventual deviations; it may rely on a ‘parallel algorithm’ to automatize price adjustments to the continuous fluctuations of supply and demand or to follow the pricing decisions of the cartel leader; it may employ ‘signalling algorithms’ to disclose and spread internal information to announce its intention to collude with other competitors; it may even adopt self-learning algorithms capable of autonomously achieving monopolistic results without the firms having to programme it to do so¹⁸².

¹⁸¹ EZRACHI, A. and STUCKE, M. (2016), *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, *Harvard University Press*. United States.

¹⁸² A computer algorithm may be capable of observing the characteristics of the market, learning the competitors’ behaviours, and determining the best conduct to maximize the profits of its company. This is a field which is destined to

Overall, the use of anti-competitive algorithms may make firms' behaviours interdependent without the need for explicit interaction; it may render collusion easier to accomplish and cheaper to maintain, as the elimination of those elements typically associated with human intervention (irrationality and error) may succeed in governing collusive structures more efficiently than men¹⁸³.

In the case of collaborative platforms, a particular form of collusion, made possible by the adoption of dynamic pricing algorithms, is the so-called 'Hub and Spoke' mechanism or conspiracy. In a 'Hub and Spoke' cartel, participating firms do not communicate directly to coordinate their business behaviours, but rely on a vertically positioned third party (e.g. a market research organization or the companies' suppliers and retailers), to organize the cartel and take care of the diffusion of the necessary market information. In this way it is possible for upstream or downstream firms (also known as 'the spokes') to realize the effects of a horizontal coordination through the implementation individual vertical agreements with a common subject (also known as 'the hub'). Although the intermediary of the 'hub and spoke' conspiracy does not operate in the cartelised market, antitrust liability may still cover its conduct¹⁸⁴. In the new world of computer economics, this third party may be represented by a single algorithm, programmed by a common intermediation platform, and used by the underlying firms to detect variations in market prices or changes in market aggregated dynamics, and collude with each other to reap supra-competitive profits.

Proving a 'hub and spoke' conspiracy may result particularly difficult, as it generally requires evidence of the intent or awareness of the participating firms of entering into a horizontal agreement. Without the horizontal element, an alleged hub-and-spoke cartel is merely a set of vertical relationships or restraints that result in parallel conducts. In addition, depending on whether the conducts of the colluding firms constitute an object or effect restriction, further evidence may result necessary to establish an actual violation of antitrust law. Furthermore, the lack of transparency in the way algorithms are programmed, given the fact that they generally represent valuable trade secrets for the companies that employ them, makes algorithms difficult to access and hard to understand¹⁸⁵. Even if companies were to publicly release or share their secrets with regulators and courts, the

grow and become increasingly more relevant as the technologies behind machine learnings further progresses. It also poses interesting questions in terms of antitrust liability as pricing decisions consistently happen without the involvement of human beings.

On this topic, see VESTAGER, M. (2017), 'Algorithms and Competition', Speech at the Bundeskartellamt 18th Conference on Competition, Berlin. [Online] Available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en.

¹⁸³ MEHRA, S. K. (2015), Antitrust and the Robo-Seller: Competition in the Time of Algorithms. *Minnesota Law Review*. Vol. 100. Available from: http://www.minnesotalawreview.org/wp-content/uploads/2016/04/Mehra_ONLINEPDF1.pdf

¹⁸⁴ ORBACH, B. (2016) Hub-and-Spoke Conspiracies. *Arizona Legal Studies*. Discussion Paper No. 16-11.

¹⁸⁵ PASQUALE, F. (2015) *The Black Box Society. The Secret Algorithms That Control Money and Information*. Harvard University Press; and MALGIERI, G. (2016) Trade Secret v Personal Data: A Possible Solution for Balancing Rights. *International Data Privacy Law*. Volume 6 Issue 2. Oxford University Press.

complexity of their codes (not to mention black box algorithms making inherently autonomous decisions) would still make extremely hard to discern the human anticompetitive intention behind their programming and practical effects on the market.

Given these facts, the fundamental question remains whether, under EU competition law, sharing platform may be held accountable for facilitating collusion among individual undertakings; and, in cases where a collusive initiative is taken by the platforms, whether individual service providers may be held responsible for horizontal coordination. Recent judgments by the ECJ seems to pave the way for such approach. In *Treuhand*, the Court deemed contrary to Article 101 the activity of a consultancy company which, by collecting, processing and sharing commercial data among a number of competing undertakings, played an essential role in facilitating the commission of horizontal infringements and concerted practices among its clients¹⁸⁶. In *Eturas*¹⁸⁷, where an internet booking platform had informed by email the travel agencies selling their products on its website of a platform-wide policy to reduce maximum retail discounts, the ECJ held both subjects liable for collusion. In the reasoning of the Court, the mere receipt of the message could in fact demonstrate horizontal concertation where the agencies were aware of its contents and could be regarded as having tacitly assented. Although the parties had not expressly entered into a horizontal contract with each other, but merely into an individual vertical agreement with the platform, they were found responsible of remaining inert, and tacitly accepting, the unilateral initiative of the platform to cap the applicable discount rates, thus allowing for a generalized and coordinated increase in prices.

Yet, within the sharing economy, such logic needs to be applied with great caution, as the relevant imbalance of power that often characterizes the relation between providers and platforms generally translates into vertical contracts having the form of contracts of adhesion, with little ability on the part of the providers to influence the relative terms.

3.2.2 Uber's pricing system: a threat to competition?

As already noted in the previous chapters, Uber's pricing algorithms play a fundamental role in the functioning of the platform. By adhering to the drivers' T&C, the drivers appoint Uber as their limited payment collection agent for the sole purpose of accepting the fare; in this way Uber receives the payments made through the users' smartphone applications and then proceeds, after having subtracted the fee associated with the use of the platform, to distribute the revenue to each driver.

¹⁸⁶ Case C-194/14 P *AC-Treuhand AG* [2015]. The test established by the Court is actually quite strict, as it requires the facilitator to directly influence the negotiation and implementation of the agreement between the parties as well as having clear knowledge of the facts and anticompetitive objectives pursued by the competing undertakings.

¹⁸⁷ Case C-74/14 *Eturas UAB* [2016].

Uber fares are calculated in the same manner across all services: a base fare (arbitrarily decided by Uber and specific to each service-tier) is added to the additional amounts calculated based on the kilometric distance travelled, the duration of the journey, and eventual tolls and fees incurred by the driver during the service; the resulting sum is then multiplied by a coefficient determined by the ‘surge pricing algorithm’, an automatic system that monitors real-time variations in the number of riders requesting transport and drivers offering their service. The algorithm divides every city where Uber is active into sectors, and each sector is assigned a specific value that reflect the trend in supply and demand. When the system detects a significant imbalance between riders’ requests and drivers’ availability, it assigns a specific ‘surge’ multiplier to every ride initiated in that area; a fact which is instantly communicated through the smartphone application to every driver operating in the city.

The main purpose of this mechanism is to compensate for a structural weakness inherent in the organizational scheme of the Uber platform, resulting from the peculiar contractual relationship binding it with its partner drivers. In fact, drivers offering their services on the platform are neither bound by predetermined working schedules nor subject to an exclusivity agreement towards Uber. The result is that they are essentially free to decide the amount, place and time of their working activity as well as whether to dedicate their energies working for other competing ridesharing services or even pursue a different economic activity altogether. In this context, the ‘surge pricing’ algorithm represents a strong monetary incentive for drivers to stay longer on the platform and, most of all, to operate in those areas of the city and those days of the year where the demand for transportation services is higher. Overall, the system produces two beneficial effects¹⁸⁸: it increases the number of active drivers, rewarding their commitment with higher earnings, and allocates those drivers to the users that value them the most and are thus willing to pay a premium to receive the service. Uber also benefits from the mechanism, as it increases the capillarity and reliability of the service, consolidating its positive image among consumers, while at the same time earning it higher fees from the activity of the drivers.

We have already discussed the fact that, although drivers are entitled to negotiate lower fares with their customers, the operational reality of the platform as well as the practical and informational difficulties of determining the costs of a ride on a case-by-case basis, render this provision fundamentally inoperable. As a result, Uber’s pricing system works in such a way that every driver working on the platform accepts the underlying dynamics behind the determination of price levels and follows passively the tariffs unilaterally determined by its algorithms. These facts raise the interesting question whether such a pricing mechanism, developed by a platform that formally poses

¹⁸⁸ HALL, J. and KENDRICK, C. and NOSKO, C. (2015) The Effects of Uber’s Surge Pricing: A Case Study. [Online] Available from: http://economicsforlife.ca/wp-content/uploads/2015/10/effects_of_ubers_surge_pricing.pdf.

itself as an intermediary between independent contractors, represents a threat to the effective functioning of competition in the market for urban transport¹⁸⁹.

In one of his many eccentric statements, Travis Kalanick, founder and former CEO of Uber, speaking of Uber's pricing system, declared the following: "We are not setting the price. The market is setting the price. We have algorithms to determine what that market is"¹⁹⁰. Some commentators have raised the doubt that the Uber ecosystem represents a form of "algorithmic monopoly". That the market described by its algorithms is not the open market for urban transport where Uber competes with alternative forms of transport, but an artificial closed market where Uber has absolute control on all relevant factors, putting it in a position of extreme information asymmetry towards consumers¹⁹¹. In this context, the pricing algorithm may mimic a perceived competitive price rather than true market prices, whereas the growing number of users, as well as the gradual displacement of traditional operators, may provide opportunities for exploitation and coordinated price increases¹⁹².

These allegations have already brought, in the United States, to a first antitrust class action lawsuit against the company¹⁹³, for the alleged orchestration and facilitation of an illegal price-fixing conspiracy by means of its computer-based algorithm, in violation of Section 1 of the federal Sherman Antitrust Act¹⁹⁴. Although the case is still at a preliminary stage, it offers a first insight into the alleged unlawfulness of Uber's conducts. The main charge is that Uber's local managers, while disclaiming to be running a transportation company, conspired with Uber drivers to use the pricing algorithm to fix the prices charged to Uber riders, thereby restricting price competition to the detriment of the users of the platform. To support the accusation, the plaintiff presented additional evidence of a series of meeting among drivers, organized by Uber itself, in which information concerning upcoming events and related increase of demand was discussed, as well as the fact that after repeated complaints by the drivers, Uber had decided to raise prices for the service. Uber objected that there was no horizontal agreement between the drivers who, when signing up to the platform, entered only into a vertical agreement with the company, remaining free to operate independently of one another.

The court, accepting the claim made by the plaintiff and allowing the motion to continue the judgment, held that a horizontal conspiracy, realized through the Uber platform, was plausible, as it

¹⁸⁹ ANDERSON, M. and HUFFMAN, M. (2017) The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something in Between? *Robert H. McKinney School of Law. Legal Studies Research Paper*. No. 2017 – 8.

¹⁹⁰ PRILUCK, J. (2015) When Bots Collude. *The New Yorker*. [Online] 25th April. Available from: <https://www.newyorker.com/business/currency/when-bots-collude>. [Accessed: 22nd December 2017].

¹⁹¹ STOLLER, M. (2014) How Uber Creates an Algorithmic Monopoly to Extract Rents. [Online] 11th April. Available from: <http://www.nakedcapitalism.com/2014/04/mattstoller-how-uber-creates-an-algorithmic-monopoly.html>. [Accessed 21st December 2017].

¹⁹² See *supra* note 181, Ezrachi, A. and Stucke, M. (2016). p14.

¹⁹³ *Spencer Meyer v Travis Kalanick*, 15 Civ 9796; 2016 US. Dist. Lexis 43944.

¹⁹⁴ 15 U.S. Code § 1, 'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal'.

guaranteed that no driver would undercut their prices. It also held that a vertical conspiracy was sufficiently supported by the facts. In addition, taking into consideration the established case law on previous hub-and-spoke cartels¹⁹⁵, the court observed that the practical reality of Uber's pricing model could well stabilise the cartel and allow for the realisation of the common motive of obtaining supra-competitive prices, while the positive and procompetitive effects alleged by Uber, consisting in the opening of the market to the entry of an increasing number of drivers, would not be sufficient to prevent the finding of a horizontal conspiracy.

The solution of the case will depend on the way the American court will decide to qualify the relationship between Uber and its driver to the purpose of the Sherman Act and under federal law; a matter of US antitrust law which is obviously outside the scope of this dissertation. Instead, what we need to ask ourselves is whether a similar case could present itself, and in what form, in the European Union, especially after the recent judgement of the ECJ on the nature of one of the company's most famous service: UberPOP.

It has been established that Article 101 TFEU is theoretically capable of covering collusive infringements by collaborative platforms, including the more sophisticated hub-and-spoke cartels, and that characterizing service providers as separate undertakings is essential for the application of competition law to their relationship with the platforms. In fact, while the American courts have so far operated on the premise that Uber represents a mere intermediary and that the people driving for it are independent contractors, the decision of the ECJ in *Asociación Profesional Élite Taxi* is set to change the perception of the platform in the EU. One of the main implication of considering Uber as an integrated service in the field of transport, responsible for both components of the service, is that its partner drivers can hardly be qualified as independent undertakings. Can an unlicensed driver, equipped with just a car, exert a single competitive force on the market for urban transport, when Uber is the one controlling all the relevant economic aspects of the underlying service? Probably not. As noted by Odudu and Bailey¹⁹⁶, "the concept of an economic entity is best understood as the minimum combination of natural and legal persons able to exert a single competitive force on the market [...] The impossibility of competition is the criterion used to determine which separate legal entities are to be treated as a single economic entity". Following this view, Uber and its drivers would constitute, under EU law, a single economic entity and, as such, the agreements standing between them would not be subjectable to the scrutiny of competition law. It does not mean, however, that their relationship would necessarily need to be regarded as an employment one, as the company may

¹⁹⁵ *United States of America v Apple Inc., et al.*, 12 Civ. 2862 (DLC) and *Laumann et al v National Hockey League et al.*, U.S. District Court, Southern District of New York, No. 1201817.

¹⁹⁶ ODUDU O. and BAILEY, D. (2014) *The Single Economic Entity Doctrine In Eu Competition Law*. Kluwer Law International. *Common Market Law Review* 51: 1721–1758.

very well rely on subcontractors for the provision of its services. The only thing that matter for the purpose of competition law is that one entity is able to determine or influence, in a decisive manner, the policy and behaviour of the other party on the market.

The above reasoning may certainly hold true for UberPOP, in which the activity of the drivers could not be economically possible without the rest of the platform. Can the same be said in regard to UberBLACK? Here, the drivers are proper undertakings, licensed as PHV operators and formally capable of exercising an autonomous transport activity without Uber. In addition, unlike taxis which are bound by administratively predetermined tariffs, PHVs are generally able to compete among themselves by setting or negotiating different prices directly with their customers. Hence, by turning to Uber, these firms knowingly accept to delegate to the platform the power to determine prices and influence their operations across the territory, thereby determining a generalized alignment in PHV prices offered to consumers. Isn't this the kind of horizontal coordination through vertical agreements that the hub-and-spoke model is all about? The answer to this question will depend on how the ECJ decides to qualify the provision of the UberBLACK service. If it were to be deemed as a service in the field of transport, like UberPOP provided under the decisive control of the platform, then it would be impossible to identify a competitive relationship among the drivers. If, instead, the intermediation function of the platform could be separated from the provision of the underlying transportation services, then the above argument may successfully be invoked to assess a violation of Article 101. As for potential infringements under Article 102 TFEU, it is important to remember that unilateral behaviours by an undertaking constitute a problem only when combined with a situation of economic dominance in the relevant market. We have already noted the difficulty of assessing the stable attainment by collaborative platforms of a position of dominance, especially in those cases where the relevant market involves not only the intermediation component of the service but also, as with Uber, the provision of the underlying physical service. However, strong network effects combined with the accumulation of substantial quantity of personal data may enable companies like Uber to retain sufficient competitive advantage to consolidate a position of leader in the market for hired transport. Yet, even in this case, the most prominent example of deliberate price-gouging by Uber (the 'surge pricing algorithm') is unlikely to qualify as an exploitative pricing practices, as it ideally reflects a concept of market clearing and affects only a small portion of the journeys provided through the platform¹⁹⁷. As for the possibility of exclusionary abuses, predatory pricing may be used to foreclose the market to competitors on both side of the market (intermediation and transport). Uber, may in fact

¹⁹⁷ As recently articulated by the ECJ, excessive pricing practices must be 'significant and persistent' and not merely 'temporary or episodic'. See C-177/16 *Autotiesību un komunikēšanās konsultāciju aģentūra - Latvijas Autoru apvienība* EU:C:2017:689. Para. 56-61. Surge pricing, on the other hand, affects only a small number of ride and for short period of time. For a detailed insight of the way the algorithm works, drafted using Uber's internal data, see *supra* note 188.

be able to charge consumers unduly low prices while paying drivers more than they earn, by relying on its significant capital reserves or by cross-subsidizing from its other profitable businesses (urban logistics, freight transport, etc.)¹⁹⁸.

In conclusion, what emerges from this brief overview on the matter of competition is that it is still too early to make a definitive call. The legal challenges presented by the new organizational paradigm behind collaborative platforms demand deeper understanding of the functioning of the market and of the platforms' algorithmic systems, as well as a delicate effort of interpretation and adaptation of many concepts and definition of the past. A task that will require certain sensibility and great caution, as the risk of over-intervention and false positives could ultimately damage the development of a sector which is assured to play a fundamental role in the economy of the future. Furthermore, it would be a mistake to expect to address the many issues posed by the development of the collaborative economy through the means of competition law. As it stands, competition law is a powerful tool, but its scope of application is fundamentally limited to the protection of consumer welfare. Under such limited perspective, the cost reductions and the allocative efficiencies allowed by sharing platforms mostly represent highly beneficial factors. The losses of established providers displaced by new innovative entrants, together with the broader concerns regarding the compatibility and fairness of such economic models with the structure of our society, are not issues that can be successfully challenged under the rules of competition. As noted by Commission Vestager, 'not every case of unfairness is a matter for competition law'¹⁹⁹. It will be for other regulatory frameworks to intervene and solve the economic and social questions posed by the sharing economy.

3.3 Towards the future of urban transport

One should not make the mistake of thinking that, by reducing the issues of Uber to the localized realities of national transport regulations, the path is suddenly clear towards an effective and universal understanding of the sharing economy. Although Uber's many characteristics contributes to distinguish its services from the activity of other renowned internet-based platforms, making it a

¹⁹⁸ HUET, E. (2014) Uber's Newest Tactic: Pay Drivers More than They Earn. *Forbes*. 2nd July. [Online] Available from: <https://www.forbes.com/sites/ellenhuet/2014/07/02/ubers-newest-tactic-pay-drivers-more-than-they-earn/#2ccc92fd1011> [Accessed: 1st December 2017]; and HUET, E. (2015) Uber's Clever, Hidden Move: How Its Latest Fare Cuts Can Actually Lock in Its Drivers. *Forbes*. 9th January. [Online] Available from: <https://www.forbes.com/sites/ellenhuet/2015/01/09/ubers-clever-hidden-move-how-fare-cuts-actually-lock-in-its-drivers/#28cc85e14f1a> [Accessed: 23rd December 2017].

A list of the most prominent investments made into Uber since its foundation is available from: www.crunchbase.com/organization/uber/funding_rounds/funding_rounds_list. [Accessed: 23rd December 2017].

¹⁹⁹ Speech of Commissioner Vestager, *Setting priorities in antitrust*. GCLC, Brussels, 1 February 2016. [Online] Available from: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/setting-priorities-antitrust_en.

somewhat unique agent in the new landscape of the collaborative economy, the events of the last years have proved the need for European governments to rethink their approach towards economic and technological disruption and reshape their regulatory and enforcement instruments to tackle the challenges emerging from the clash of consumers' expectations, incumbents' prerogatives and entrants' innovations. The unprecedented turmoil caused by the arrival of the Californian company in Europe has particularly exposed the criticalities of an important sector of the economy such as urban transport and have reignited the unresolved debate on the scope and opportunity of public intervention in the provision of services of general economic interest.

Lawmakers, initially caught by surprise by the advent of these new players, are currently engaged in a strenuous attempt to understand the complexity of the phenomenon and determine who and how should regulate the functioning of collaborative platforms. The first issue arises from the absence of clear and shared legal definitions, capable of capturing the eminent diversity of these platforms. 'Sharing' or 'gig' or 'mesh' economy, 'collaborative consumption', 'Uberization of everything', are all terms used almost interchangeably to designate the infinite ways in which the development of technology has allowed physical goods or services to circulate among peers. And yet, despite the apparent convenience of a unified and coherent representation of the new industry, sharing economy businesses typically maintain certain characteristics that reflects the distinctive functioning of their underlying markets. Just like taxis and hotels have each their own regulatory frameworks, so different collaborative platforms do require differentiated regulatory responses. Even when limiting the spectrum to a single platform like Uber, the number and features of the different subservices offered through the same technological interface, have the potential of influencing radically different markets, rendering a one-fit-all solution fundamentally unsuitable.

At the European level, a first attempt towards synthesis was made by the Commission, by providing a single definition for the platform phenomenon (which defined platforms as 'undertakings operating in two (or multi)-sided markets, which uses the internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups')²⁰⁰, only to be contradicted by the position of the European Parliament, noting the impossibility of a single categorization and highlighting the necessity to fall back to sector-specific legislation, according to their characteristics, classifications and principles²⁰¹. The lack of initiative has so far left the matter in hands of national governments. Some of them, eager to repel the offensive of the platform

²⁰⁰ EU Survey. European Commission. *Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy*.

[Online] Available from: <https://ec.europa.eu/eusurvey/pdf/survey/31103?lang=EN&unique=b91d8ce8-a2a0-4b29-a92c-3689dce5f71c>. [Accessed: 29th December 2017].

²⁰¹ European Parliament resolution of 15 June 2017 (P8_TA(2017)0271) on a European Agenda for the collaborative economy (2017/2003(INI)).

economy, adopted protectionist laws, targeting specifically the business models of these new realities and rendering their existence extremely difficult or even impossible. A notable example is the *Loi Thevenoud* adopted in France to undercut the development of Uber²⁰². Other Member States, instead, willing to support their position in the digital market, decided to legitimize collaborative platforms and integrate them within a general legal framework. Such is the example of the UK, where Uber was allowed to operate by complying with local PHV regulations and licenses; or Estonia, where a dedicated regime was created to accommodate the efficiency of transportation platform within the guarantees of existing public services. Others, again, have preferred to remain inert, delegating to the judiciary the daunting task of assessing the legality of these new services under existing regulations. The overall risk of such a disjointed approach is that a patchwork of 28 different regulations and legislations may ultimately hinder the development of pan-European sharing economy services, misunderstanding the dynamics of the phenomenon and adopting, or adapting, ill-suited or dated legal frameworks, stifling innovation and further aggravating the gap between Europe and the United States.

Today, governments are called to take brave and forward-looking decisions. In fact, despite the resistance of incumbents and local authorities, the sharing economy is here to stay²⁰³, and is reaching a size where regulatory intervention will be needed. Car-sharing and accommodation alone accounted for over 20 billion euro of the European economy in 2015²⁰⁴. Banning them is not a long-term solution; not only because the market demand towards sharing economy services is insatiable, with consumers increasingly relying on these instruments to satisfy their needs, even in the face of their alleged illegality, but also because collaborative platforms are finding growing support even at the highest levels of government, including competition authorities. Thus, sharing services need to be daylighted, rendered transparent and formalized in such a way as to guarantee public authorities access to the amount of data and information that platforms are able to harness from their users. Labour law, consumer protection, taxation, public safety are all issues that need to be addressed in the context of a general regulation of these new realities.

Acting today also means being prepared for the next big revolution of the service market and, especially, of the urban transport sector. Uber and the rest of the Silicon Valley are already pouring billions of Dollars into the development of artificial intelligence and self-driving vehicles and, pretty

²⁰² LOI n° 2014-1104 du 1er octobre 2014 relative aux taxis et aux voitures de transport avec chauffeur. Available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029527162&categorieLien=id>.

²⁰³ MILLER, S. (2016) First Principles for Regulating the Sharing Economy. 53 Harvard Law Journal on Legislation 147. [Online] Available at: <https://ssrn.com/abstract=2568016>. [Accessed: 26th December 2017].

²⁰⁴ MUNKOE, M. (2017) Regulating the European Sharing Economy: State of Play and Challenges. Intereconomics. Volume 52, No. 1. pp. 38-44. [Online] Available from: <https://archive.intereconomics.eu/year/2017/1/regulating-the-european-sharing-economy-state-of-play-and-challenges/>. [Accessed: 27th December 2017].

soon, they will be able to bring to the market technological solutions which are assured to displace, at least economically, incumbents and traditional frameworks alike. This kind of revolutions will require public authorities, at the local, national and European level, to cooperate with platforms, to encourage them to operate in harmony with the goals of social policy and redistribution, and even to involve them in the actual provision of public utility services²⁰⁵.

3.3.1 Regulating the platform economy

The sharing economy, by reimagining the nature of commercial transactions, requires a regulatory response that transcends established codes, written for traditional industries. It is a difficult task, as it is an area of the economy which is still evolving fast, in different and unpredictable sectors, with the risk of regulations lagging behind. Policy makers are faced with the dilemma of the specificity of their intervention; detailed rules will inevitably become obsolete sooner, failing in protecting the public interest or even damaging the development of the platforms; shallow ones, instead, may still fail to properly address public concerns as well as fail to provide enough legal certainty to encourage the competitive development of the sharing economy.

When it comes to regulating economic behaviours the first option which typically comes to mind is ‘top-down’ or ‘command-and-control’ regulation. In the European Union, this kind of approach is generally associated with harmonized secondary legislation adopted under the ordinary legislative procedure and state-centred legislation, unified, hierarchical and applicable in a homogenous way to all players²⁰⁶. Applied to the platform economy, a similar approach would certainly accomplish the Commission’s vision of creating greater uniformity across the Union²⁰⁷, and would prevent uncertainties and fragmentation from hindering market access and limiting investment opportunities²⁰⁸. However, given the significant asymmetries that plague the collection of reliable information on the functioning and impact of collaborative platforms, the legislating effort could well result in the adoption of harmful principles incompatible with the development of these new sectors as well as unenforceable or burdensome rules, while having the only effect of adding more platform-specific regulation to already complex regulatory frameworks. Moreover, law-making is often an

²⁰⁵ RAUCH, D. and SCHLEICHER, D. (2015) Like Uber, But for Local Governmental Policy: The Future of Local Regulation of the Sharing Economy. George Mason Law & Economics Research Paper No. 15-01. [Online] Available from: <https://ssrn.com/abstract=2549919> [Accessed: 2nd December 2017].

²⁰⁶ SCOTT, J. and TRUBEK, D. (2002) Mind the Gap: Law and New Approaches to Governance in the European Union. *European Law Journal*, Volume 8, No. 1.

²⁰⁷ European Commission, ‘Communication on Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe’ COM (2016) 288 final.

²⁰⁸ Commission Staff Working Document, ‘A Single Market Strategy for Europe: Analysis and Evidence’, SWD (2015) 202 final 6.

opaque process, having little room for the involvement of different stakeholders, and prone to perorate the interests of lobbying groups and entrenched incumbents²⁰⁹. Supranational secondary legislation is also ill-equipped to deal with highly diversified and fragmented local situations. In fact, while the platforms' internal functioning is generally identical everywhere regardless of the location of their users, their external effects on local economies diverge significantly to the point of necessitating different policies for different cities or even for different areas of the same city.

The presence of strategic uncertainty and regulatory interdependence legitimate the adoption of new governance methods²¹⁰, better suited to resolve complex and rapidly changing issues such as collaborative platforms. The first option is represented by self-regulation²¹¹, either mandated by public authorities or adopted voluntarily. Most platforms are already self-regulating entities, as they autonomously define the terms and conditions of their online intermediary function as well as the standards for the provision of the underlying services and the offline behaviour of their users and suppliers. Uber's Community Guidelines is a great example of these tendency towards internal enforcement²¹². The company provides its users and drivers with a series of behavioural guidelines (e.g. mutual respect and common courtesy, zero-tolerance policy towards discrimination of any kind) as well as several principles intended to address safety issues and generate trust towards the platform (e.g. the controversial 'no sex' rule forbidding users and drivers from arranging any subsequent date; or the general prohibition against carrying firearms even in those countries where it is *per se* legal). As noted before, Uber's enforcement procedures heavily rely on user-generated feedbacks, and proceed to sanction grave misconducts by delisting the responsible driver or rider.

Self-regulation is, unsurprisingly, widely supported by industry insiders and platforms operators, because of its capacity to deal with complex situations and bypass the issue of information asymmetry, as most information on the functioning of the platforms is at their direct and exclusive disposal. According to many supporters of the collaborative economy, the innovative business models and technological system employed by internet platforms can already provide business solutions to market failure²¹³. However, a system of pure self-regulation is hardly desirable. Not only it would lack transparency, but also would not account for the interests of other stakeholders, as platforms lack the general overview necessary to implement wider social objectives. It would also risk increasing

²⁰⁹ STIGLER, G. (1971) The Theory of Economic Regulation. *Bell Journal of Economics and Management*. Vol. 2 Issue 1.

²¹⁰ DE BURCA, G. (2010) New Governance and Experimentalism: An Introduction. *Wisconsin Law Review*. Issue 2.

²¹¹ In the EU, self-regulation is defined as 'the possibility for economic operators [...] to adopt amongst themselves and for themselves common guidelines' such as codes of practice and sectorial agreements. See, *Interinstitutional Agreement On Better Law-Making* (2003) OJ C 321, para. 22.

²¹² Uber Community Guidelines. [Online] Available from: <https://www.uber.com/it/legal/community-guidelines/us-en/>. [Accessed: 29th December 2017].

²¹³ STALLIBRASS, D. and FINGLETON, J. (2016) Regulation, Innovation and Growth: Why Peer-to-Peer Businesses Should be Supported. *Journal of European Competition Law & Practice*, Volume 7, Issue 6. p.414–419.

platforms' power even further, putting them in the position to regulate the underlying market and prevent the entry of new disruptors²¹⁴. Moreover, platforms like Uber have already showed a tendency to put aside internal policies, and hide misconducts of their users, in order to protect their own image before the public opinion²¹⁵. And finally, internal rating mechanisms, despite their promise of rendering traditional regulatory guarantees superfluous, raises more than a few doubts concerning their correct functioning in the context of sharing relationships between users and providers (more on this later).

If the effects of self-regulation are deemed undesirable, then governments may rely on alternative forms of co-regulation to achieve wider framework goals through the involvement of all the market players and the interested stakeholders²¹⁶. Co-regulation represents a hybrid approach, where the regulatory regime is the result of the interaction between general legislation and self-regulatory bodies²¹⁷, a collaboration that has the merit of delegating complex aspects such as technical enforcement and data collection to the market parties best equipped to do so, while enabling authorities to pursue general social objectives. It is not a form of deregulation, as public authorities are involved at all stages of the process. It is also particularly suited to deal with evolving and paradigm-changing phenomena, as the standards set through co-regulation are subject to constant evaluation and review. Co-regulation would also allow for 'the reconciliation of stark centralizing and decentralizing forces that characterize the platform economy'²¹⁸, as EU level standards would leave ample freedom to national and subnational actors to determine precise rules in collaboration with platforms themselves, better capturing the needs of local realities and attributing greater democratic legitimacy to the whole legislative process. Co-regulation examples in the field of sharing platforms are already present at the national level, especially in the accommodation sector, where Airbnb has even established a 'Community Compact' setting guiding principles to develop partnership with cities on a case-by-case basis²¹⁹.

A final argument in favour of a more sophisticated form of co-regulation stems from the possibility of public regulators to conclude agreements with platforms enabling them access to the enormous

²¹⁴ LYNKEY, O. (2017) Regulating "Platform Power". LSE Law, Society and Economy Working Papers 1/2017.

²¹⁵ BACH, N. (2017) London Police Say Uber Has Failed to Report Sexual Assaults by Drivers. Fortune. [Online] 14th August. Available from: fortune.com/2017/08/14/uber-allegedly-failed-to-report-sex-attacks. [Accessed: 29th December 2017].

²¹⁶ In the EU, co-regulation is defined as 'a mechanism whereby a legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognized in the field' such as economic operators, social partners, non-governmental organizations, and associations. See *Interinstitutional Agreement On Better Law-Making* (2003) OJ C 321, para. 18.

²¹⁷ MARSDEN, C. (2011) Internet Co-Regulation. *Cambridge University Press*. Pag. 46.

²¹⁸ FINCK, M. (2017) Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy. LSE Law, Society and Economy Working Papers 15/2017. Pag. 20.

²¹⁹ Airbnb Community Compact. [Online] Available from: <https://www.airbnb.com/community-compact>. [Accessed: 30th December 2017].

flow of data generated by their activities, and indispensable to control their compliance with the established standards, fundamentally solving the issue of information asymmetry. A similar approach would also be in line with the recommendations adopted in 2016 by the Commission concerning the development of the collaborative economy²²⁰.

Focusing on the transport sector, one should ask whether a similar approach is compatible with the peculiarities that characterize the regulation of services in the field of urban transport. As we have seen in Chapter 2, Title VI TFEU does confer on the European Union the power to pursue a common transport policy. Specifically, it allows the European Parliament and Council to lay down common rules for international transport and measures to improve transport safety, as well as to determine the conditions for the operation of non-resident carriers within a Member State and any other appropriate provisions. However, subsidiarity has always represented an almost insurmountable obstacle for the adoption of harmonization initiatives in the field of urban transport. The locality of the issue, combined with the express exclusion of transport from the scope of application of the Service Directive, made sure that the regulation of taxis and PHVs remained firmly in the hands of national and local authorities. And yet today, software platforms like Uber provide a chance for vertical harmonization as never before. Many issues like safety, commercial and algorithmic transparency, consumers protection and data access have the same impact across the European market, and may benefit from the univocal approach of Community directives. Moreover, because of its technical expertise, the European Commission would be the natural interlocutor and point of reference for multinational platforms willing to debut their services in Europe. This would not affect the freedom of national and local regulators to determine the modalities and the specific conditions under which platforms are to be integrated into their existing transport systems.

A final element of friction may arise from the special position traditionally occupied by ‘non-scheduled public transport’ operators in many Member States. Called to serve purposes of general interest, taxis and PHVs have often been regulated in coordination with public transport providers in the context of administratively-controlled markets, in such a way that the typical dynamics of supply and demand could not interfere with the fulfilment of their service obligations. However, this mentality of opposition against the mechanism of competition, which has been typical of many civil law countries in continental Europe, is slowly making way to some strong instances of deregulation, pushing towards the opening of the market to new operators and pressuring authorities into recognizing a new category of ‘non-scheduled private transport’²²¹. Still, faced with the contradictory

²²⁰ European Commission COM (2016) 356. A European agenda for the collaborative economy.

²²¹ MOSTACCI, E. and SOMMA, A. (2016) *Il caso Uber. La sharing economy nel confronto tra Common law e Civil law*. Collana di Diritto dell’Economia. Egea.

indications of the economic literature on the matter²²², the degree of liberalization that will be necessary to allow transportation platforms to operate alongside traditional operators, largely remains a decision of political nature.

3.3.2 The Uber model: between efficiencies and externalities

According to Christensen's theory of disruptive innovation²²³, the dominance of an incumbent market participant can be upended by new entrants by offering a product that is: cheaper, more reliable, more convenient, and simpler to use than the product of the incumbent, while still meeting the basic demands of the customer. While it is true that part of Uber's success stems from its capacity to elude existing regulations by adopting border-line configurations and creating new markets where the only rules are the one set by the platform itself, the interweaving of traditional economic activities and internet-based technologies has translated into significant efficiencies that would have otherwise been impossible to achieve.

Firstly, software-based transportation platforms allow for a significant reduction in transaction costs. By placing the entire transaction (search, pricing and payment, evaluation) onto a communication system available through mass produced smartphones, users can exchange more information at lower costs, removing from the process slow and costly elements such as dispatch centres and specialized equipment (taximeters, credit card readers, radiotaxi). The use of GPS systems further enables users to receive continuous updates on the position of the vehicles, reducing the uncertainties typically associated with hailing and waiting for taxis.

Secondly, platforms like Uber allow for more effective resource allocation and utilisation of both labour and capital assets. Computer-based matching systems, combined with GPS localization services, enables platforms to distribute rides in a more efficient way, reducing commuting times and costs for the drivers, while increasing availability and reliability to customers. Data from the US has shown that driver redundancies among Uber drivers are much lower than regular taxi²²⁴, as the mechanism of 'surge pricing' cause Uber drivers to reactively adjust their working hours following real-time variations in local demand. Such systems result in greater average utilization of the vehicles, with direct positive consequences in terms of price to consumers and street congestion.

²²² MOORE, A. and BALAKER, T. (2006) Do Economists Reach a Conclusion on Taxi Deregulation? *Econ Journal Watch*.

Volume 3 Number 1. p.109-132.

²²³ CHRISTENSEN, C. (1997) The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail. *Harvard Business School Press*. p.221-2.

²²⁴ CRAMER, J. And KRUEGER, A. (2016) Disruptive Change in the Taxi Business: The Case of Uber. NBER Working Paper No. 22083. [Online] Available from: <https://econpapers.repec.org/paper/nbrnberwo/22083.htm>. [Accessed: 30th December 2017].

Advanced software also permits to offer consumers new services that would have otherwise been impossible. A great example is UberPOOL, which enables two users travelling in a similar direction to share the same vehicle, by plotting the most efficient route to pick them up and minimizing waiting times as well as overall costs; or even more interestingly, the use of Uber's proposed 'perpetual ride' algorithm enables drivers to continuously pick up and drop off a series of passengers along the same route, by adjusting the driver's path as soon as there is a seat available in the car and requests for new rides arrive, without the need to determine a specific starting or ending point of the overall journey²²⁵. Platforms determine information efficiencies not only by making better allocation decisions, but also by discouraging unwanted or opportunistic behaviours and mitigate the risks concerning the execution of economic transaction with strangers. In this sense, a critical function is performed by internal rating systems, which collect and process a variety of information regarding service providers as well as customers, helping both parties to easily assess their respective performance and avoid counterparties with dubious records. A feat which would be extremely difficult, and much less effective, by relying on the bureaucratic reporting mechanism of traditional transport services. Platforms like Uber also help in building the necessary trust for the sharing economy to function, by securing the execution of payments and by providing minimum guarantees concerning the provision of the underlying services. The mandatory use of electronic payments is also an added element of transparency and financial traceability, which has long been resisted by incumbent operators. Another efficiency made specifically possible by the adoption of pricing algorithms is the already mentioned change of prices in response of real-time variations of supply and demand. While the practice of 'surge pricing' has woken more than a few complaints among users, and may even raise doubts on its compliance with competition law, such mechanism allows to substitute the rigidity of predetermined timetables with the flexibility of a system which stimulate a more conscientious use of transport, by determining a more efficient distribution of vehicles and by convincing passengers to defer low-value trips or rely on alternative means of public transport²²⁶. Finally, many of these efficiencies are not exclusive to software platforms, but can be easily implemented by incumbent operators as well. Fleet owners can improve dispatch centres and monitor their vehicles by employing GPS technology and smartphone-based reservation systems; and they can do so by either developing their own systems or by relying on third-party software services²²⁷.

²²⁵ BUHR, S. (2015) Lyft Line Gets Into Perpetual Ride Territory With Triple Match Service. TechCrunch. [Online] 29th July. Available from: <https://techcrunch.com/2015/07/29/lyft-line-gets-into-perpetual-ride-territory-with-new-triple-match-service>. [Accessed: 30th December 2017].

²²⁶ SUROWIECKI, J. (2014) In Praise of Efficient Price Gouging. MIT Technology Review. [Online] 19th August. Available at: <https://www.technologyreview.com/s/529961/in-praise-of-efficient-price-gouging>. [Accessed: 30th December 2017].

²²⁷ 'Hailo' and 'Mytaxi' are just two of the many third-party services which can be used by regular taxi drivers to broaden their market and retain customers who would otherwise turn to Uber and similar services.

As for dynamic pricing, many legislations forbid a similar approach, at least in the street-hailing sector (taxis), and instead recur to impose on transport operators fixed or predetermined tariffs. This is due to the peculiar characteristics of the urban transport market, where users generally don't have the time or the information necessary to compare prices among competitors and make conscious contractual decisions. It is also a regulatory response to the risk of opportunistic behaviours on the part of the drivers, which may take advantage of their position to exact higher prices. While the necessity and actuality of this kind of protections in the face of modern technological instruments may be debatable, the idea that transport opportunities could be limited, in times of higher need, only to the people that are willing or able to pay them the most, seems hardly compatible with the vision of a democratic and inclusive transport system or the fulfilment of a service obligation. On the other hand, some forms of dynamic pricing could still be possible in the relatively less regulated pre-arranged segment of the market.

Of course, the existence of such efficiencies should not place software platforms above the law, nor should it preclude regulatory intervention from correcting possible market failures and allowing the larger collectivity to benefit from the new opportunities offered by these systems. First of all, transportation platforms like Uber generate relevant externalities; that is circumstances in which companies impact third parties or the public as a whole. One of the risks associated with the use of these services is the presence of unsafe drivers and unsafe vehicles. While Uber perform certain background checks on its drivers and set minimum qualitative standards for their cars, the reports of the last few years indicate that the system is far from being foolproof²²⁸. In addition, where services like UberPOP allow the provision of transportation services without any licenses or commercial insurance, it exposes the public to the risks of amateur and untrained drivers. This is a classic externality since the costs for better training and higher insurance levels are entirely incurred by the platforms or the drivers themselves, while the positive benefits of these precautions affect only the public.

Another issue concerns the so-called 'insurance gap'. Transportation platforms like Uber and Lyft already provide some forms of insurance covering both passengers and drivers. However, the coverage of these insurances is typically limited to the period in which the ride is performed (including the period in which the driver is *en route* to pick up its passenger, and the period in which the passenger is on board), leaving the considerable time during which the driver roams the city

²²⁸ CHUANG, T. (2017) Uber fined \$8.9 million by Colorado for allowing drivers with felony convictions, other driver's license issues. *The Denver Post*. [Online] 20th November. Available at: <https://www.denverpost.com/2017/11/20/uber-colorado-fine/>. [Accessed: 3rd January 2018].

waiting for a new ride to the insufficient coverage of the driver's own personal insurance²²⁹. Insurance gaps produce two major externalities: harmed third parties may be unable to recover their losses, since non-commercial insurances could deny coverage, disputing on the commercial nature of the activity performed by the driver; in addition, the exponential increase of damage claims filed on the drivers' personal insurances may cause a generalized increase in insurance premiums for all other drivers, since premiums are calculated from average statistical data of the same area²³⁰.

Secondly, information asymmetry remains a significant problem in the functioning of transportation platforms. Consumers as well as service providers may lack the information necessary to correctly assess the risks associated with the use of the platform, or they may ignore the importance of certain features in guaranteeing the safety of the ride. Transportation platforms heavily rely on *ex-post* rating and reputational systems to assure the quality of their services. Yet, such mechanism may not always work correctly. For example, awareness on the part of the users of the harsh consequences associated with low ratings for Uber drivers, results in their hesitance to provide negative ratings²³¹. Fear of retaliation may also play a significant role in diminishing the efficacy of rating systems. 'Truthful negative information is a public good, available to all, but with no direct benefit to a contributor'²³². Furthermore, rating systems cover effectively only those aspects of the service of which users are aware or care about. In this case, regulatory schemes, setting minimum service requirements and standards, may serve consumers better than rating systems, in which the lack of the relevant information, as well as cognitive bias²³³, may cause them to not recognize potential problems.

Lastly, a significant issue pertaining the diffusion platforms like Uber is the necessity of public authorities to guarantee the provision of 'universal services' to all their citizens. In the transportation sector, universal service obligations typically imply ensuring that a service is always available for all origins and to any destinations within a region, as well as serving disfavoured groups, minorities, and people with disabilities. Such obligations generally entail operating outside of a market perspective

²²⁹ New rides are prompted on the driver's smartphone, who has only 15 seconds to accept it by tapping on the screen. This means that in the time between rides, drivers are frequently forced to check their phones for new rides or for the existence of surge pricing locations, thus reducing their attention to the road. See RICHTEL, M. (2014) Distracted Driving and the Risks of Ride-Hailing Services Like Uber. The New York Times. [Online] 21st December. Available from: <https://bits.blogs.nytimes.com/2014/12/21/distracted-driving-and-the-risks-of-ride-hailing-services-like-uber/>. [Accessed: 30th December 2017].

²³⁰ On the issue of TNC coverage, see Letter from Dave Jones, California Insurance Commissioner, to Michael R. Peevey, President, California Public Utility Commission (Apr. 7, 2014) http://sfcdca.org/CPUC/4.7.14_LettertoCPUCfromCDI.pdf.

²³¹ BERCOVICI, J. (2014) Uber's Ratings Terrorize Drivers And Trick Riders. Why Not Fix Them?. Forbes. [Online] 14th August. Available from: <https://www.forbes.com/sites/jeffbercovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people/#3cabe788ebca>. [Accessed: 26th December 2017].

²³² EDELMAN, B. and GERADIN, D. (2016) Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like AirBnB and Uber. *Stanford Technology Journal* 293.

²³³ Even if the user has potentially access to the relevant information, he may take irrational decision by misunderstanding them or by relying on irrelevant information or by focusing on a minor element of a problem.

and generate costs that need to be absorbed by the collectivity. Regulatory intervention may result necessary to require software platforms to provide a proportional share of the universal service or, otherwise, to designate a universal service provider and compensate him, through special taxes or general taxation, for the costs incurred in the provision of the service. Without such intervention software platforms would continue to operate in a situation of regulatory asymmetry, facing lower costs than traditional transport competitors, and enjoying an unfair competitive advantage vis-à-vis licensed taxis and PHVs.

For all the above reasons, regulatory intervention becomes necessary to enable platforms to operate legally and deliver their key efficiencies to the market while, at the same time, adequately protecting the rights of consumers and third parties²³⁴. The new digital business models hold the potential to significantly increase productivity. Good regulation is the only way to unlock such potential.

3.3.3 The examples of California, Estonia, Finland, and Portugal

The fundamental question concerning the regulation of collaborative transportation platforms is whether such services should be subjected to a dedicated framework, accounting for their specificity, and providing minimum rules necessary to address market failures without neglecting their efficiencies, or otherwise, whether they should be integrated with taxis and PHVs within a single regulatory framework. The latter approach certainly provides greater regulatory clarity, but it may be difficult to reconcile such profoundly different business models. Finding a minimum common denominator between the old and the new service providers would also entail some significant simplification of the rules currently binding the activity of taxis and PHVs. The adoption of a separate regime, on the other hand, would probably be resisted by incumbent operators seeking to compete with platforms on a level playing field, if not attempting to have them banned altogether by maintaining the normative status quo. Regardless of the approach chosen, public authorities may take advantage of this regulatory effort to evaluate whether measures such as capping of the number of licenses or controlling fares or the detailed rules separating taxis from PHVs (all measures that have resulted in the shortage in the supply of urban transport services) are still necessary or convenient for the correct functioning of the transport sector. Most importantly, regulators need to intervene to assure that competition among the different players is played on the market and not on the rules.

Before turning our attention to the European Union, it is worth analysing the regulatory choices taken by the State of California on the matter of transportation platforms. Being the birthplace of many of the great technological innovations of the last two decades, it is not surprising that California was, in

²³⁴ See *supra* note 232, EDELMAN, B. and GERADIN, D. (2016). P. 22.

2013, one of the first countries to integrate platforms in its overall vision for the future of transport. It did so by creating the category of Transportation Network Company (TNC)²³⁵, specifically designed to legitimate and regulate private transport services like UberPOP. The new framework comprises 28 new rules, including a compulsory license scheme for TNC platforms to operate, criminal background checks and training programs for drivers, a zero-tolerance policy on drugs and alcohol, an annual 19-point car inspection, and compulsory commercial liability insurance, covering both the execution of rides and the periods between one ride and the other. Similar TNC regulations were quickly adopted, with few interesting variations, by many other States and municipalities in the USA; the city of Chicago, for example, decided to distinguish TNC drivers depending on the number of working hours, providing a lighter regulatory regime for those working less than 20 hours in a week²³⁶.

In Europe, the first country to take positive action in favour of transportation platform was Estonia. In 2015, Estonia amended its Public Transport Act (PTA) establishing a series of minimum requirements pertaining the newly introduced category of ‘occasional service’ providers, defined as ‘the carriage by road, except for regular services and taxi services, of groups of passengers constituted on the initiative of the customer or the carrier’²³⁷. The reform provides, among other measures: a mandatory license scheme for all operators, the obligation for driver to register as commercial or non-commercial entity, the verification of the absence of criminal convictions, the compulsory appointment of a transport manager to overlook the activity. The initiative was followed by further amendments seeking to liberalize the entry and operation of new transportation services, distinguishing between public transport providers (taxi and PHV), information service providers (Uber), and occasional transportation providers (other forms of ride-sharing)²³⁸. The amended act focuses on transparency and safety; it imposes upon platforms the obligation to inform users on the identity and profile of the drivers, on the details of the journey, and to disclose the method of calculation of the applicable fare. No quantitative restrictions on the number of licenses is established. At the same time, it reduces the regulatory requirements for traditional taxis, facilitating the obtaining of new licenses, expanding the permitted service area, and putting taxis and private-hire vehicles on

²³⁵ In its ‘Decision Adopting Rules And Regulations To Protect Public Safety While Allowing New Entrants To The Transportation Industry’ the California Public Utilities Commission (Cpuc) defines a TNC as an organization whether a corporation, partnership, sole proprietor, or other form, operating in California that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles. The primary distinction between a TNC and other TCP (Transportation Charter Permit) is that a TNC connects riders to drivers who drive their personal vehicle, not a limousine purchased primarily for a commercial purpose. To that end, a TNC is not permitted to itself own vehicles used in its operation or own fleets of vehicles. Available from: <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K112/77112285.PDF>.

²³⁶ Chicago Municipal Code, chapter 9-115.

²³⁷ A translated version of the PTA is available at https://www.riigiteataja.ee/en/compare_original?id=505022016010.

²³⁸ Ühistranspordiseaduse, liiklusseaduse ja riigilõivuseaduse muutmise seadus 188 SE.

a similar footing. Interestingly, Estonia decided to eliminate any requirement for vocational training for drivers, delegating the matter to self-regulation of their respective companies. It also established a partnership with Uber to monitor drivers' income and automatically report it to the competent tax authority. The action of the Estonian government is part of a greater effort to transform the country into fertile soil for the development of the digital economy²³⁹. Unsurprisingly, the country can already count on its own version of Uber, the transportation star-up Taxify.

In 2016 Finland followed suit by embarking in a thorough liberalization of the transport sector²⁴⁰. Seeking to create a single, light-touch and harmonized, regulatory framework for both traditional taxis and new transportation platforms, Finland amended its Act on Transport Services (ATS) to eliminate any license capping, thus allowing anyone meeting the necessary requirements to enter the taxi market²⁴¹. It also abandoned any form of tariff regulation, leaving their determination to the free action of the market. To counterbalance the significant freedoms attributed to market operators and to guarantee greater transparency, Finland established a series of information obligations, requiring platforms to allow open access to the data gathered during the service, and to provide riders with detailed information concerning the conditions of the journey, the calculation of fares, and the characteristics of the driver. It also mandated platforms operators to establish a reporting mechanism to facilitate government scrutiny over the activity of their drivers. Like Estonia and California, the training of the drivers, as well as the enforcement of minimum standards dictated by the law, is entrusted to the platforms themselves. The amended act, expected to come into force in 2018, will allow services like UberPOP to operate legally in the country²⁴².

Lastly, at the begin of 2017, Portugal joined the group of countries willing to legalize and regulate the activity of transportation platforms. The proposed measures, which are still being discussed before the Parliament, provide a legal framework specifically designed for intermediation platforms and their partner drivers, defined as 'TVDE' operators ('transporte em veículo descaracterizado a partir de plataforma eletrónica')²⁴³. Interestingly, the Portuguese proposal goes so far as to deny platforms like Uber the nature of services in the field of transport, framing them instead within the concept of

²³⁹ Estonia is trying to convert the EU to its digital creed. *The Economist*. [Online] 6th July 2017. Available from: <https://www.economist.com/news/europe/21724831-country-e-residency-wonders-why-others-are-more-sceptical-estonia-trying-convert>. [Accessed: 28th December 2017].

²⁴⁰ VON WILLEBRAND, M. (2017) Opening and Digitalizing the Finnish Logistics Market – Transport Code. Expert Guides. [Online] 27th February. Available from: <https://www.expertguides.com/articles/opening-and-digitalizing-the-finnish-logistics-markettransport-code/arxvffzq>. [Accessed: 31st December 2017].

²⁴¹ Hallituksen esitys liikennekaareksi ja eräiksi siihen liittyviksi laeiksi, HE 161/2016, available at https://www.eduskunta.fi/FI/vaski/Kasittelytiedot/Valtiopaivaasia/Sivut/HE_161+2016.aspx.

²⁴² HERN, A. (2017) Uber presses pause on primary taxi service in Finland until 2018. *The Guardian*. 6th July. [Online] Available from: <https://www.theguardian.com/technology/2017/jul/06/uber-pop-primary-unlicensed-taxi-service-regulation-helsinki-finland-until-2018>. [Accessed: 31st December 2017].

²⁴³ Proposta de Lei 50/XIII. Cria o regime jurídico do transporte em veículo a partir de plataforma eletrónica. Available at <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=40897>.

information society services. As such, their activity is deemed fundamentally distinct from that of traditional taxis and PHVs, having no public service obligation, and being precluded from circulating on dedicated preferential lanes and taking passengers in the street hailing segment. However, after the judgment of the ECJ in *Asociación Profesional Élite Taxi*, it remains to be seen whether Portugal will change its approach towards Uber, reverting to more conventional forms of transport regulation. Still, the proposal contains a few distinctive measures: it establishes a registration procedure for drivers willing to operate as TVDE operators, including the issue of a specific license with no quantitative restriction, the participation to road training courses, as well as minimum technical requirements for the vehicles. TVDE operators are also made subject to the obligations arising from safety, labour, health and social security legislation. Intermediation platforms, on the other hand, are required to notify the competent transport authorities of their intention to operate in Portugal, and are subject to detailed information obligations towards both the authorities and their customers. Yet, the Portuguese proposal does nothing to modernize the regulatory framework for traditional taxi operators, failing to create the competitive level playing field that would be necessary to allow both transportation services to co-exist peacefully on the market.

Overall, these reforms represent a first step towards an urban transport market where taxis, PHVs and transportation platforms can compete in a more fair and effective way. Lightening quantitative restrictions and relying on new cooperation mechanisms to enforce qualitative requirements, may certainly prove an interesting way to meet the everchanging needs of the market, without sacrificing the rights of the European citizens.

3.3.4 Working for Uber at the time of the collaborative economy

Labour is just another sector of the law where the disruptive action of collaborative platforms has exasperated old issues and challenged accepted definitions. The main issue, here, concerns the legal qualification of the relationship that exists between the platforms and the subjects providing the underlying services. Namely, whether their contractual relationship can be conceived as a traditional employment relationship, as such entitled to the many protections and guarantees offered by national labour laws and subjected to the liability regime expressed by the principle of *respondeat superior*, or whether the underlying service providers are merely independent contractors, offering their skills through an agent in the form of a software interface.

Although the matter requires a thorough consideration of the factual elements pertaining the contractual and economic relationship between platforms and providers, with results varying wildly depending on national labour legislations (an effort well outside the scope of this dissertation), it is

still worth providing readers with a general overview of the problem, and of its potential to influence the discussion on competition and regulatory intervention. It is also worth noting that, as far as Europe is concerned, given the overall novelty of the sharing economy, the debate on the matter of work is still at an early stage, as most of the legal disputes are still concentrated around the collocation of these new players within the traditional economy.

When looking at the general phenomenon of the sharing economy, it is easy to notice that intermediation platforms put great effort in separating their contractual relationships with service providers from the traditional forms of employment envisioned by the law. The use of alternative denominations like *tasker*, *turker*, *rabbit*, *partner* or, at best, *driver*, represents a systematic attempt on their part to relegate these new working relationships into a ‘parallel dimension in which labour protection and employment regulation are assumed not to apply by default’²⁴⁴. Such a paradigm change has been made possible by the peculiar organizational scheme and technological systems adopted by sharing platforms, as well as a general transformation of the service economy. First of all, the implementation of peer rating systems, with their focus on maintaining strict quality levels, has put service providers in a condition of constant pressure, rendering *de facto* superfluous the exercise of classical employer powers, outsourcing the control function of the employer to the community, and freeing the platforms from the related costs. Secondly, collaborative platforms and especially ridesharing services *à la* Uber revolve around low-skilled and repetitive tasks, to be performed following the precise standards determined by the platforms or the indications coming from a smartphone application. In this context, the financial crisis of the last decade has certainly contributed to increase the number of people willing to work in an unconventional or flexible manner, allowing platforms to ditch traditional working schedule in favour of advanced on-demand mechanism like Uber’s notorious ‘surge pricing algorithm’. From this point of view, the development of collaborative platforms reflects a broader tendency of the labour market to move towards growing forms of precarious work.

One diffuse concern is that ‘sharing economy companies like Uber shift risk from corporations to workers, weaken labour protections, and drive down wages’²⁴⁵. In the USA, associations of Uber drivers have already emerged, protesting the overall precariousness, low pay, and long hours of their working activity²⁴⁶. The issue has also a particular numerical significance, as data shows that, as early

²⁴⁴ DE STEFANO, V. (2015) The Rise of the ‘Just-in-Time Workforce’: On-Demand Work, Crowd Work and Labour Protection in the ‘Gig-Economy’. Bocconi Legal Studies Research Paper No. 2682602.

²⁴⁵ ASHER-SHAPIO, A. (2014) Against Sharing. JacobinMag. 19th September. [Online] Available from: <https://www.jacobinmag.com/2014/09/against-sharing/>. [Accessed: 26th December 2017].

²⁴⁶ JAMIESON, D. (2016) Will Uber’s New ‘Drivers Association’ Have Any Real Power? Huffington Post. 26th April. [Online] Available from: https://www.huffingtonpost.com/entry/uber-drivers-association_us_571e79a9e4b0b49df6a8a2b4 [Accessed: 31st December 2017].

as 2015, out of a total of 600,000 collaborative workers in the USA, more than 400,000 worked for the Uber platform²⁴⁷. In a future where collaborative platforms are expected to conquer important slices of the market, the conditions of workers represents a relevant social issue, as underlying service providers generally find themselves in a position of contractual weakness towards their platforms, that has few equals in traditional industries. They bear greater costs and greater risks than comparable workers, lacking many of the guarantees that are now taken for granted: paid leaves for holidays and sickness, health insurance, trade union action and collective protections. Even more daunting is how the stability of their working activity hinges on their capacity to maintain a numerical rating above the threshold arbitrarily determined by the platform. As a result, many providers in the USA are increasingly turning to class action lawsuits, in the attempt to resolve issues with their platforms and to have recognized their right to minimum wages and overtimes²⁴⁸.

The difficulty of defining the legal nature of platform workers was also colourfully captured by California's Northern Circuit Court, in *Cotter v. Lyft*, in which the judge compared the effort of placing these new relationships within the traditional figure of independent contractors and employees to the act of trying to put a square peg inside two round holes. In terms of regulatory intervention, some commentators have argued on the possibility of establishing a third category of workers, distinct from both employee and independent contractors, similarly to how TNCs are regulated in some states. Others have instead stressed the necessity to elaborate a more functional concept of employer, with platforms, workers, and users each shouldering their appropriate share of employer responsibilities²⁴⁹.

From a European perspective, it is worth highlighting that the legal qualification of Uber's drivers is not just a matter of national law. As noted in § 3.2, clarifying the economic nature of their relationship with the platform is essential to assess the applicability of competition law. Moreover, EU law already provides detailed rules on labour, including working time (Directive 2003/88/EC), information on individual working conditions (Directive 91/533/EC), anti-discrimination for non-standard forms of employment (Directives 97/81/EC, 1990/70/EC, 2008/104/EC), and protection in case of insolvency of employers (Directive 2008/94/EC), just to name a few. For this purpose, the European Commission, in its agenda for the collaborative economy, provide a few indications on the qualification of employment relationships. It specifically focuses on the existence of three essential

²⁴⁷ In Europe, because of the late development of the collaborative economy, the numbers are significantly lower, with only 65,000 out of 100,000 people working for Uber in 2015. See DE GROEN, W. and MASELLI, I. (2016) The Impact of the Collaborative Economy on the Labour Market. *CEPS Special Report No. 138*. [Online] Available from: <https://www.ceps.eu/publications/impact-collaborative-economy-labour-market>. [Accessed: 31st December 2017].

²⁴⁸ *O'Connor v. Uber Techs*, 2015 WL 1069092; *Cotter v. Lyft*, 60 F. Supp. 3d 1067.

²⁴⁹ PRASSL, J. and RISAK, M. (2016) Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdfork. *Oxford Legal Studies Research Paper No. 8/2016*.

criteria: whether the service provider operate under the direction of the collaborative platform which unilaterally determines the choice of the activity, the remuneration and the working conditions; whether the service provider pursue an activity of economic value that is effective and genuine, and not merely accessory or purely marginal to the activity of the platform; and whether the remuneration received by the service provider largely outweigh the mere compensation of the costs incurred.

In the world of the collaborative economy, transportation services like Uber are the most likely to qualify as employers. As noted throughout this dissertation, Uber exercises an uncommon level of control over all the relevant aspects of the activity of its partner drivers. Not only by unilaterally determining their remuneration, but also by forcing their conducts to conform to the stringent requirements of Uber's terms and conditions. These are some of the elements that brought, for the first time, a European court (the London Employment Tribunal) to recognize to a small number of drivers the quality of employees of the Uber platform²⁵⁰. In the view of the Court, Uber constitutes a transportation business, in which the drivers are the essential component delivering its services and earning its profits. It also ruled that the terms on which Uber rely to regulate its relationship with drivers do not correspond with the reality of its economic organisation, and that such working relationship comprise, not only the period in which the driver is performing a ride, but also the resting periods in which the drivers is waiting for new rides with his smartphone application switched on. Interestingly, the Court held that the entity responsible for the employment relationship is not Uber BV (the Dutch holding company licensed to operate the Uber App in Europe), but the local subsidiary Uber London Ltd, as the holder of the PHV licenses, necessary to operate in the UK, and the main point of contact between the Uber platform and its London-based drivers.

Overall, the issue of employment will keep regulators busy for the next few years. As the competitive advantage of Uber & Co. relies, in no small part, on their ability to provide structured services without needing to formalize costly employment relationships with their providers, the unfavourable decision

²⁵⁰ Case 2202551/2015 & Others, *Aslam, Farrar and Others v. Uber*, judgment of 28th October 2016, paragraph 92. The Court specifically based its judgment on the fact that: << 1) The contradiction in the Rider Terms between the fact that ULL purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings. 2) The fact that Uber interviews and recruits drivers. 3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it. 4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements. 5) The fact that Uber sets the (default) route and the driver departs from it at his peril. 6) The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory.) 7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties. (8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure. 9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected. 10) The guaranteed earnings schemes (albeit now discontinued). 11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them. 12) The fact that Uber handles complaints by passengers, including complaints about the driver. 13) The fact that Uber reserves the power to amend the drivers' terms unilaterally>>.

by courts and governments around the world to recognize the existence of such relationships might affect the profitability of their business model far more than the simple subsumption of the Uber platform as a service in the field of transport. From this perspective, Uber's eagerness to develop self-driving infrastructures does not come as a surprise. In fact, while the deployment of such systems would conclusively imply the direct involvement of Uber in the transportation business, it could well be the only way to save the company from the incredible expense of employing, all of a sudden, millions of drivers around the world.

Conclusion

Uber is an interesting company for a variety of reasons. Born out of the streets of the Silicon Valley with a radical vision to transform the urban landscape, it is the embodiment of that same spirit of disruptive revolution that has allowed the other giants of the tech sector to transform the way people access information and communicate with each other. However, revolutionizing the functioning of the urban transport market has proved to be a feat of no small proportions. In Europe, taxis and private-hire-vehicles have always occupied a privileged position in the legal systems of each Member State, charged with the provision of services of public utility and regulated in coordination with the other systems of public transport. The locality of the issue, combined with the express exclusion of transport from the scope of application of Article 56 TFEU and the Service Directive, as well as the failure of the EU to adopt common transport policies pursuant to Article 90 TFEU, made sure that the regulation of taxis and PHVs remained firmly in the hands of national and local authorities, pulverising the rules on private transport in as many pieces as the number of cities where such services are provided.

As such, it is no wonder that when Uber decided to debut its services in the territory of the European Union, it attempted to do so by configuring its activity as an ‘information society service’, and by adopting an economic structure which was designed to separate intermediation services provided by the platform from the work of its partner drivers, and ascribe the provision of the former to a single corporate entity, subject to the convenient framework of Dutch law and the considerable freedoms granted by the E-Commerce Directive to ‘information society services’. It would have also allowed the American company to challenge before the ECJ the legality of the many restrictive measures that national courts and law-makers were assured to impose on its activities. Instead, the judgement in *Asociación Profesional Élite Taxi* fundamentally denies Uber this kind of protection, qualifying UberPOP as a ‘service in the field of transport’ and recognizing the competence of Member States to regulate the service as they see fit.

Member States, in turn, can either maintain the current regulations, causing Uber to be successfully challenged by incumbent operators on ground of unfair competition, or embrace the change, and decide to regulate the activity of the platform in the context of a thorough remodulation of the urban transport sector. The former approach exposes regulators to the risk of underestimating the fact that collaborative platforms are not a transitory phenomenon, but represent the wider demand of the market to move towards forms of more modern and efficient utilization of the available resources.

The latter approach is equally daunting, as it forces authorities to confront with the many regulatory challenges posed by the characteristics of two-sided collaborative markets. Fair and effective competition, consumer protection, labour, and taxation, are all aspects that require the attention of sensible policy-making. And given the economic dimension that these phenomena are expected to reach in the next few years, regulatory intervention appears inevitable as well as necessary. As the development of self-driving fleet and the diffusion of ‘algorithmic businesses’ furthers the capacity of technological platforms to create close and self-regulating markets, European and national law-makers face an existential choice to channel the efficiencies and opportunities afforded by the platform model and put them at the service of the community of citizens. The advisable approach being, to establish a model of polycentric regulatory cooperation, deferring the establishment of few common principles to the means of European harmonization, and leaving local regulators the discretion to determine the details for the integration of platforms within their own service frameworks.

As for the future of Uber, there is no doubt that 2017 has been one its worst year in an already troubled existence²⁵¹. Yet, when looking at all the scandals and lawsuits that have befallen the development of the American company, one cannot avoid noticing that, in the end, Uber’s biggest enemies might not be national governments and European courts, but rather the company’s own corporate culture²⁵². The example of Uber in London is emblematic. Originally licensed as a PHV operator, Uber was able, for several years, to provide its services in a lawful, relatively peaceful and profitable manner, competing alongside black cabs and other transport operators without needing to dissimulate the reality of its transport services behind the curtain of an intermediation activity. But when the TfL declined to renew Uber’s license, it did so by raising a question of corporate responsibility and respect for the underlying rules on corporate correctness and transparency; a matter that has little to do with its qualification as a provider of transport or as an internet intermediary. As it turns out, the inherent dishonesty of many of its old and present practices, the alienation of drivers and consumers towards more ethical rivals, and the many doubts concerning the long-term sustainability of its business model²⁵³, may ultimately prove much more dangerous for the perspective of Uber’s transport revolution than the rulings of the European Court of Justice.

²⁵¹ HAWKINS, A. (2017) The Verge 2017 tech report card: Uber. The Verge. [Online] 29th December. Available from: <https://www.theverge.com/2017/12/29/16820474/2017-tech-recap-uber-scandal-waymo-lawsuits-travis-kalanick> [Accessed: 1st January 2018].

²⁵² BERSHIDSKY, L. (2017) Commentary: Uber’s problem: a culture of dishonesty. *Chicago Tribune*. [Online] 29th November. Available from: <http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-uber-dishonest-culture-hacked-khosrowshahi-20171129-story.html> [Accessed: 1st January 2018].

²⁵³ HORAN, H. (2017) Will the Growth of Uber Increase Economic Welfare? 44 *Transport Law Journal*, 33-105. [Online] Available from: <https://ssrn.com/abstract=2933177> [Accessed: 1st January 2018].

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