Disruption and the Law in the Digital World: Some Thoughts on the CJEU Uber Spain Judgment

Bodiroga-Vukobrat, Nada; Martinović, Adrijana

Economics of Digital Transformation

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ECONOMICS OF DIGITAL TRANSFORMATION

Publisher
University of Rijeka, Faculty of Economics and Business

For the Publisher
Alen Host

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First Edition (2019)
300 copies

ISBN (hard copy) 978-953-7813-45-1

ISBN (on line-version) 978-953-7813-46-8

A CIP catalogue record for this book is available from the University of Rijeka Library under the number 140529069.

On the grounds of the decision issued by the University of Rijeka Publishing Committee Class: 602-09/19-01/08 Registration number: 2170-57-03-19-3, this book has been published as University of Rijeka Edition.

ECONOMICS OF DIGITAL TRANSFORMATION

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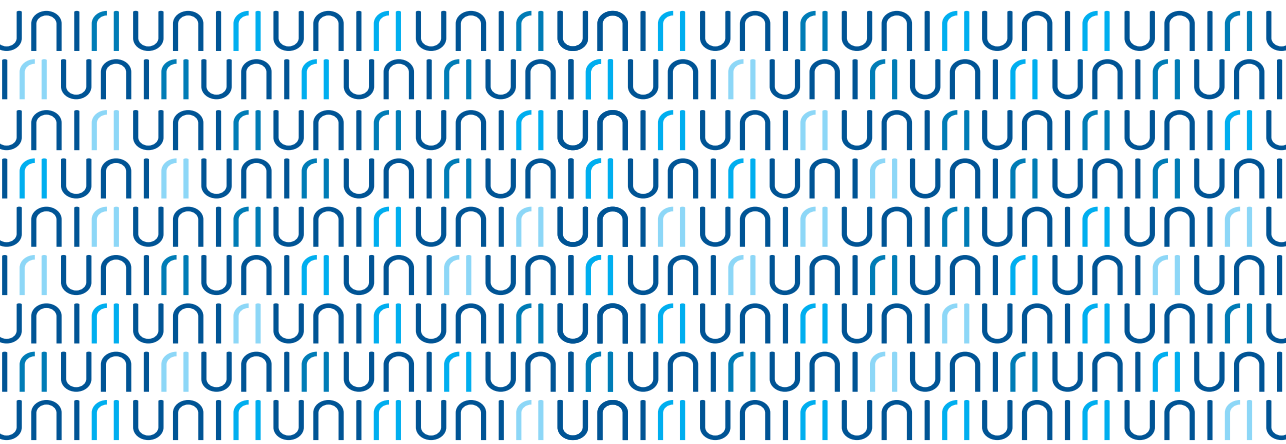
Research monograph – First Edition



EFRI

Rijeka, 2019

Faculty of Economics and Business

INTERNATIONAL SCIENTIFIC CONFERENCE „ECONOMICS OF DIGITAL TRANSFORMATION“

May 2- May 4, 2018 – Rijeka – Opatija – Republic of Croatia

Organizer:

University of Rijeka, Faculty of Economics and Business, Rijeka, Croatia

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FOREWORD

Dear authors, reviewers and readers,

It is our great pleasure to present first research monograph on the topic of Economics of digital transformation. The main goal of this research joint venture was to provide scientific proof of dramatic changes to contemporary and future economic reality caused by increasing digitalization processes. As far as we are informed, there are only few such publications which attempt to question impact of digital transformation on traditional economic systems and activities. Our contributors covered wide field of research within regulation economics, industry and European single market issues, entrepreneurship, local economic development, organization and innovation issues, digital marketing and monetary policy in the era of digital currencies.

The papers published in this monograph present best papers presented at the first conference of the Faculty of Economics and Bussiness of University of Rijeka organized on the topic of "Economics of digital transformation" from 2nd to 4th of May, 2018 in Opatija, Croatia (www.edt-conference.com). During the three days of the conference more than 50 researchers from European region contributed with their presentations. We are particularly proud on the results of our doctoral workshop where nine young researchers presented their research while five papers were published in the monograph. In this way we are building our future research capacities and expose young researchers to rigorous scientific challenge.

In addition, we also did our best to inform distinguished scientific indexing databases about our research contribution in order to enable wide dissemination of our research efforts and boost interest of both researchers and practitionares about this growing field of research. The best papers from the conference were selected for three distinguished scientific journals. These are Proceedings of Rijeka Faculty of Economics-Journal of Economics and Business, Public Sector Economics and Central European Public Administration Review. The information on papers published in these journals is given by the footnote of the topic of the paper.

Finnally, we would like to express our gratitude to our stellar keynote speakers Edward (Ned) Hill from John Glenn School of Urban Affairs, Ohio University, Iryna Lendl from Maxine Levine Goodman School of Urban Affairs, Cleveland State University and Eugenio Leanza, Head of Mandate Services of European Investmen Bank, as well as our panelists Cristian Popa, former Vice President of European Investment Bank and Boris Vujčić, Governer of the Croatian National Bank. We are immensely grateful to our contributors, reviewers, members of programme and organization board, partner universities and sponsors, as well as our students that received many complements from our guests for their knowledge, manners and hospitality.

Rijeka, December 2018

Editors

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INTRODUCTION

Digital transformation as a synonym for new technologies which enable innovation, new concepts and processes in all our traditional activities is not any more matter of our distant future or our presence. It is already part of our past. The rapid transformation processes which occurred particularly in the last decade, already transformed our life in such a radical way that we cannot imagine ourself withour use of modern technological gadgets or applications. While at the conferences and workshops we discuss about industry 4.0 and its significance for industry and quality of life, the concept of industry 5.0 is beginning with its practical implementation.

Therefore, in our research monograph, we deal with past, present and future. The most relevant contribution of our research is, by using our analytical skills, to provide some argumentation, elaborations and explanation on impact of all these processes on our well being. Thus, we try to cover wide field of economic issues and their interconnectedness, because in digital world, there are increasing and emerging relations that we have never anticipated and expected before. This makes our world more complex, and thus, makes our research endavours even more difficult.

In our monograph our researchers deal with regulation economics under new business models enabled by digitalization of industry and services, industrial developments under new circumstances, position of enterprises, changing role of local economic development under the new development paradigm of smart cities, organization issues in digital era, emergence of innovation economics, developments in digital marketing and new challenges for monetary policy under occurance of cryptocurrencies and blockchain technologies. Finnaly, we also include research papers of doctoral students which should drive our world to be even more digital in near future.

Threfore, we hope that this monograph will find not just researchers but also practitionares and provide both some questions and answers which will help them to confirm their beliefs, initiate new research and provide arguments for discussions. Of course, we will keep providing new food for thoughts. Until our new contribution next year, we wish you enjoyable reading.

PART 1

REGULATION ECONOMICS

CHAPTER 1

Disruption and the Law in the Digital World: Some Thoughts on the CJEU Uber Spain Judgment

Nada Bodiroga-Vukobrat[1], Adrijana Martinović[2]

ABSTRACT

Whether or not we can call Uber's business model as disruptive innovation (admittedly, according to the author of the disruptive innovation theory, we cannot), the fact remains that it has shaken the traditional models of passenger transport industries around the world. The law does not respond well, or, better said, it is not able to react fast enough to innovations. Technological and business inventions represent a threat to legal certainty. When an innovative business model, facilitated by the use of new technologies occurs, it is usually associated with a whole array of legal issues and conundrums. The law will try desperately to fit it into the existing moulds of legal regulation. The recent Uber Spain judgment (EU:C:987:2017) by the Court of Justice of the European Union (CJEU) provides a perfect illustration for this.

According to the CJEU, Uber is a transport company. This paper will analyse the arguments presented in the judgment to show how law is not able to deal with rapid technological and societal changes in today's digital world. The implications of this judgment are far reaching, not just for Uber's operations in the EU and world-wide, but also for other game changers in the digital economy.

Key words: EU law, transport services, information society services, single market for services, collaborative economy

JEL classification: K000, K200

1. Introduction

Ever since the adoption of the Digital Single Market strategy in 2015, the EU is devoted to maximizing the growth potential of the digital economy, while at the same time developing a 'fit for purpose' regulatory environment for online platforms and intermediaries (European Commission, 2015:11). Since then,

* *This research is supported in part by the Croatian Science Foundation under the project "Flexicurity and New Forms of Employment (Challenges regarding Modernization of Croatian Labour Law (UIP-2014-09-9377) and in part by the University of Rijeka project No. 13.08.1.2.03 "Social security and market competition".*

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a number of initiatives, studies and reports have attempted to identify key challenges for the development and operation of online platforms (European Commission 2016a; European Commission, 2016b; Gawer, 2016). They all point to the important growth potential of online platforms and other business models facilitated by new digital technologies and identify the current regulatory fragmentation as the key obstacle to their development and materialisation of their benefits. Online platforms in the digital economy are given the broadest possible meaning, from online advertising and market places to platforms for the collaborative economy (i.e. from eBay to Uber) (European Commission, 2016a:2). However, these are all soft policy instruments, and there is not a single proposal to date aiming to create common rules for the operation of such platforms, despite their obvious cross-border implications.

Meanwhile, these initiatives are at odds with the legal and judicial developments in the field, as evident from the recent judgment of the CJEU in case *Uber Spain*, and similar cases appearing before the CJEU.

2. Innovation, Uber and law in the digital world

Technological innovations and innovative business models lie at the foundations of the Digital Single Market. These innovations have certainly disrupted the traditional business patterns, even when not all of them can be labelled 'disruptive'. According to the disruption theory developed by Christensen in 1995, disruption is a process, whereby a smaller company ('entrant'), with fewer resources, successfully challenges established incumbent businesses (Christensen, 1997). Incumbents tend to overlook entrants, as they are concentrated on their trajectory towards the most profitable, high-end of the market. By focusing on segments overlooked by incumbents, entrants establish themselves and eventually move upmarket, overtaking incumbents' mainstream customers. Hence, disruption occurs precisely because entrant's innovation either went unnoticed or was considered unimportant by the incumbent business to deserve a(ny) reaction. Disruptive innovation differs from the so-called 'sustaining innovation': whereas the latter makes a good product better in the eyes of incumbent's existing customer, the first is initially considered inferior by most of incumbent's customers (Christensen et al., 2015).

Since it was created, disruption theory has gained a life of its own, mostly to the discontent of its author (Christensen et al., 2015). In the digital world, collaborative platform businesses are disrupting the disruption theory. Although Christensen claims that Uber's business model, or at least some of its versions, is not a disruptive innovation under the disruption theory (because it has not originated in the new or low-end market, but has straight away build a position in the mainstream market), others point to the need to 'update' the disruption theory (Moazed and Johnson, 2016; Cramer and Krueger, 2016; Sandstrom et al., 2014). Their main argument is that platform businesses are very different from the standard, 'linear' businesses on which the theory was built: whereas

linear businesses concentrate only on the demand-side, platforms create a network or a triangular relationship which includes both the demand and the supply-side (Moazed and Johnson, 2016; Hatzopoulos and Roma, 2017). The distinctiveness of a platform business model is an important parameter which should direct the search for disruptive competitors in the digital world (Moazed and Johnson, 2016). It would be hard to claim that Uber has sneaked into the market for passenger transport, for example, overlooked by incumbent businesses. Quite the opposite: almost everywhere it started its operations, it immediately caused fierce resistance from the traditional taxi industry.

There is no denying that Uber's business venture is innovative. The key innovation is not the application itself, but the fact that it has enabled reduction of the transaction costs (Rogers, 2015). Technological innovation facilitated organisational innovation and, coupled with aggressive expansion and corporate 'culture of misbehaviour', has changed the traditional business landscape (Jordan, 2017; Laurell and Sandström, 2016). But is it legal? Some claim that Uber's business model is predicated on lawbreaking and international illegality – and it is time to put an end to it (Edelman, 2017). Let us then, rephrase the question: is law capable of dealing with innovation, or is innovation doomed to be outlawed (at first)? There are no uniform, nor straightforward answers to these questions. If we concentrate on Uber, it all depends on the legal environment it is operating in and the type of service it offers. The underlying business model is the same, but there is no single Uber service, there are dozens, catered to specific needs of targeted groups (e.g. from standard UberPOP, UberX, Uber Black, over UberBOAT, UberLUX to Uber Freight, Uber Family or Uber English)[3] and depending on the quality of the driver, type of vehicle and geographical area. Possibilities seem endless: the new Uber Health service is even abandoning the 'old' smartphone app connection and turns to text messaging or phone calls to help patients who need rides to and from their doctors.[4] Uber Express Pool service is now competing with city buses.[5]

In the United States, Uber and similar companies have been classified and regulated as 'transportation network companies' ('TNCs'). In California, for example, which was one of the first federal states to adopt such regulations, TNC is defined as

> "[…] an organization […] that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle." (§5431.(c) of the California Public Utilities Code (PUC))

3 For a non-exhaustive overview of Uber's services see <https://ride.guru/content/resources/rideshares-worldwide#UBER>. In some cities, Uber was testing its self-driving vehicles (cars and trucks) on public roads (e.g. San Francisco, Phoenix, Toronto, Pittsburgh). However, the testing is currently paused after a fatal accident, see <https://www.theguardian.com/technology/2018/mar/19/uber-self-driving-car-kills-woman-arizona-tempe>; <https://www.cnbc.com/2018/03/19/uber-self-driving-car-fatality-halts-testing-in-all-cities-report-says.html>.

4 <http://money.cnn.com/2018/03/01/technology/uber-health/index.html>.

5 <https://www.theverge.com/2018/2/21/17020484/uber-express-pool-launch-cities>.

A ‘participating driver’ or ‘driver’ means any person who uses a vehicle (meeting prescribed requirements) in connection with a transportation network company’s online-enabled application or platform to connect with passengers. One of the requirements for a vehicle is that it is ‘not a taxicab’ (§5431.(b)(4) PUC). So clearly, there is a distinction between taxi services and transportation services offered through Uber and similar companies.

This is an example how regulatory framework was adapted to respond to the new business model. First there was innovation, but the law followed, and (arguably) delivered. In the EU, the situation is different. Innovative model arrived quickly from the United States, but the law largely disables innovation.

3. Uber’s business model in the EU legal environment

Not surprisingly, Uber’s business operations have been subject to numerous legal challenges throughout EU Member States, from outright bans to temporary injunctions. Several cases involving Uber have reached the CJEU by means of preliminary reference procedure: *Uber Spain* (C-434/15, EU:C:2017:981), *Uber France* (C-320/16, EU:C:2017:511), *Uber Belgium* (C-526/15, EU:C:2016:830), *Uber Black (Germany)* (C-371/17, EU:C:2016:830). *Uber Spain* case so far is the only one in which a judgment was rendered. The remaining cases are still pending (*Uber France* and *Uber Black (Germany)*), while *Uber Belgium* case was dismissed as manifestly inadmissible. They all basically test the limits of national taxi licensing requirements in view of the EU internal market freedoms. For a fuller understanding of the issues presented herein, these cases also merit a comparative evaluation.

Before analysing the case law of the CJEU, it is important to note that, despite lacking common EU rules on collaborative platforms, it is not *a priori* ruled out that collaborative platforms can in certain cases be considered as providers of the underlying service and subject to sector-specific regulations, including business authorisations and licensing requirements (European Commission, 2016b:6). The level of control or influence that the collaborative platform exerts over the provider of such services, in particular concerning the setting of price, contractual terms and ownership of key assets, is extremely significant for determining whether the platform should be considered as providing the underlying service (European Commission, 2016b:6). Hatzopoulos and Roma (2017:127) rightly criticise the newly introduced distinction between platforms ‘offering only e-services’ and platforms ‘offering (also) the underlying services’. The Commission’s reasoning is, in principle, followed by the CJEU. Arguably, the CJEU’s attitude is quite less ‘pro-sharing’.

The services which are under scrutiny of the CJEU are services offered in direct competition with the traditional taxi services. Viewed from the driver – provider side, what Uber actually provides or sells is more than a service that connects them with clients in need of a ride, it is a specific package or a business model (Adamski, 2018). However, existing national licencing requirements, virtually

unaltered or at least fundamentally unchallenged for decades, are not fit to accommodate this new business model, enabled and enhanced by the use of new technologies.

The main competitors to the traditional taxi industry are UberPOP, UberX and Uber Black services. UberPOP is a budget option, connecting non-professional drivers with passengers in need of a ride, whereas UberX and Uber Black services both include licensed professional drivers, and differ concerning the class of vehicles used. UberPOP has so far been either voluntarily suspended by Uber or banned by authorities in many cities around Europe, for failing to comply with the licensing regulations.[6]

3.1. Uber Belgium: A lucky escape

The first case to appear before the CJEU involving Uber was *Uber Belgium*. Luckily for CJEU, it did not have to take a stance on it: the case was dismissed by Order of 27 October 2016 as manifestly inadmissible, because of deficiencies in a preliminary reference made by the Belgian referring court. The CJEU found that the reference contained contradictory explanations, and that the question referred was hypothetical in nature, thus making it impossible for the CJEU to consider it. As can be discerned from the Order, the referring Dutch court was deciding in a matter of prohibitory injunction lodged by the Brussels taxi radio company against Uber Belgium, aiming to determine that Uber Belgium committed unfair commercial practices by connecting, through an app, unlicensed drivers with passengers in need of a ride, and requesting immediate termination of such practices.

The CJEU found that the concept of 'taxi service' in Belgian legislation, as explained by the referring court, is not defined by the quality of the driver and does not exclude private individuals. The authorisation in accordance with the Belgian legislation is based on the assumption that the service is provided for remuneration – but the preliminary reference is not based on that assumption. Without additional elements which would enable the court to conclude that the activity in question is effectively subject to authorisation, the question posed by the national court was deemed just hypothetical. The description of the service in the main procedure is contradictory and very brief. It is described as "ridesharing" – activity usually described as using the same vehicle by many persons on the same journey, with the goal of reducing road traffic and sharing transport costs. However, from the preliminary reference read in its entirety, the disputed service is described as having the form of journeys effectuated by

6 Most recently in Oslo, <http://fortune.com/2017/10/09/uber-uberpop-norway-oslo-pause-regulation/>; Helsinki, <https://www.theregister.co.uk/2017/07/07/uberpop_is_finnished_in_helsinki_until_2018/>; Zurich, <https://www.swissinfo.ch/eng/private-transport_uberpop-service-cancelled-in-zurich/43400534>; and even before that in Italy, <https://www.theguardian.com/technology/2015/may/26/uber-pop-italy-order-discontinue-unfair-competition-taxi>; France <http://uk.businessinsider.com/uber-suspends-uber-pop-in-france-2015-7>; Netherlands, <http://www.dutchnews.nl/news/archives/2015/11/uber-drops-uberpop-taxi-service-in-the-netherlands/ >.

driver and the destination is fixed by a passenger. The CJEU considered the question as too imprecise and declared the references as inadmissible. Arguably, the 'right' case to take the stand and decide on Uber's destiny in Europe was yet to come.

3.2. Uber Spain: an intermediation service is a service in the field of transport

Uber Spain case originated from the legal proceedings brought by a professional taxi drivers' association from Barcelona (Associatión Professional Elite Taxi, hereinafter: 'Elite Taxi') against Uber Systems Spain (hereinafter 'Uber Spain'), a company governed by Spanish law. The judgment never mentions the brand name of the disputed service, but only describes it as "the provision, by means of smartphone application, of the paid service consisting of connecting drivers using their own vehicle with persons who wish to make urban journeys, without holding any administrative licence or authorisation" (para. 2 of the judgment). This is basically UberPOP service, as rightly identified in the Advocate General Szpunar's opinion (para. 14 of the opinion). Elite Taxi claims that such activities amount to unfair practices in breach of the Spanish competition legislation and that they should be banned.

The referring Spanish court considered that the question whether prior authorisation is required was crucial for determining whether a breach of competition occurred. To correctly answer that question, the Spanish court needed the CJEU's help, given that it involved a question of interpretation of EU law. Neither national court, nor CJEU doubt that the provision of service was at stake. Some authors remain sceptical. Adamski (2018:347) claims that the freedom to provide services is irrelevant from the perspective of Uber's business model, because authorisation requirements represent a market entry impediment, which means that the rules on the freedom of establishment should apply. The referring Spanish court, however, was uncertain as to what *type* of service: a transport service, or an information society service, or a combination of both? The answer to that question draws important consequences for the outcome of the case.Free provision of services is one of the cornerstones of the internal market, meaning that any restriction is in principle prohibited (Article 56 of the Treaty on the Functioning of the European Union; hereinafter: TFEU). Further acts of secondary EU legislation may regulate specific issues in connection with specific services and their provision, especially concerning possible restrictions and derogations to that freedom. Such pieces of legislation, pertinent for this case, include the Services Directive 2006/123, Information Society Services Directive 98/34 (repealed by Directive 2015/1535, but applicable *ratione temporis* to this case), and E-commerce Directive 2000/31.

The Services Directive 2006/123 establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services, but it does not apply to 'services in the field of transport, […]' (Article 2(2)(d)). As explained

in Recital 21 of Directive 2006/123, transport services include 'urban transport, taxis and ambulances as well as port services'. The Information Society Services Directive 98/34 basically lays down the rules for notifying the Commission about any draft technical regulations or standards for products or services before they are adopted in national law, as such rules are liable to create unjustified barriers to trade between Member States and should be evaluated in advance. The objective of the E-commerce Directive 2000/31 is to liberalise the provision of information society services and approximate national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States (Article 1(2) of Directive 2000/31). For the definition of 'information society service' that Directive refers to Article 1(2) of Directive 98/34, as amended by Directive 98/48.

Prior authorisations, or similar licensing requirements, are by their very nature liable to constitute restrictions to the free provision of services. Consequently, the proper categorisation of the service in question does matter, as it may or may not lead to the applicability and/or justifiability of national licensing requirements. Transport services, however, fall under the EU's competences in the field of common transport policy (Article 58(1) TFEU; Articles 90 – 100 TFEU), which is governed by the completely different regulatory objectives and pathways than the internal market rules.

Both the internal market and common transport policy fall under the shared competence of the EU and Member States and rest on the principle of non-discrimination. Transport policy completes the internal market by creating transport networks and removing technical and administrative obstacles in the transport system, as well as eliminating distortion of competition or barriers to market access which can result from different national transport regulations. Given their specificity, transport services are explicitly singled out from other services (Article 58(1) TFEU) and governed under the rules adopted in the field of transport policy. Where such common rules do not exist, as is the case for non-public urban passenger transport (i.e. taxi transport), differing Member States regulations continue to apply.

In other words, where there are no common EU rules regulating the conditions under which certain transport services are to be provided, EU Member States are free to regulate them, in accordance with the general rules of EU law.

Supported by this regulatory framework, the CJEU delivered its Grand Chamber[7] judgment on 20 December 2017. The judgement in the *Uber Spain* case is remarkably short on substantive issues: only 15 relatively brief paragraphs on 2 pages of an 11-pages judgement (paras. 34 - 48). Its impact is probably more important in what it does not say, than in what it actually does.

7 The case is assigned to the Grand Chamber (composed of 15 judges), *inter alia,* if the difficulty or importance of the case or particular circumstances so require (Article 60(1) CJEU Rules of Procedure).

According to the Court,

> "[…] an intermediation service, such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport' within the meaning of Article 58(1) TFEU" (para. 48 and operative part of the judgment).

So, the Court is precise enough to name the disputed service 'an intermediation service', but nevertheless, a service which "has to be classified as a service in the field of transport". Can we attach any significance to this careful choice of words? As lawyers, we know that each term or word counts. And indeed, taken on its own, an intermediation service is a service, which could fall under the general scheme for the free provision of services under Article 56 TFEU and the Services Directive. However, an intermediation service which consists of connecting drivers with passengers, by means of a smartphone application meets the criteria for classification as information society service, as admitted by the CJEU in the *Uber Spain* judgment (para. 35).

An information society service, as defined in Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31, is deemed to be 'a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'. 'At a distance' means that the service is provided without the parties being simultaneously present; 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means; 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request (Article 1(2) of Directive 98/34, as amended by Directive 98/48).

Examples of 'information society services' include advertising of a dental practice via an online internet site (*Vanderborght*, C-339/15), 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 (such as newspaper portal) (*Papasavvas*, C-291/13), the operation of an online marketplace, such as eBay (*L'Oréal*, C-324/09), or online booking of flights and accommodation through independent service providers (*Uber Spain*, opinion of AG Szpunar, para. 34).

So why was Uber's service ultimately deemed as a service in the field of transport? In all of the above examples, the material or 'non-electronic' component of the service, e.g. delivery of purchased goods, represents merely a performance of a contractual obligation and is economically independent from the non-material or 'electronic' service (*Ker-Optika*, C-108/09; *Uber Spain*, opinion

of AG Szpunar, paras. 30-36). In contrast to that, in this case the service was provided at a distance, at individual request and by electronic means, but the Court held that it was *not a self-standing service*. It was deemed as "more than an intermediation service" by electronic means (para. 37 of the judgment). In its essence, it is an intermediation service, but it cannot be detached from the transport activity. The Court's reasoning is basically that the transport activity defines the intermediation service and represents its main component. It goes even further by stating that

> "[…] the provider of that intermediation service *simultaneously offers urban transport services,* which it *renders accessible*, in particular, through software tools such as the application at issue […]" (para. 38 of the judgment, emphasis added).

So, *offering* of a certain service is equalised to *making a certain service accessible* in any manner, and *offering* of urban transport unfolds simultaneously with the *provision* of an intermediation service. Should the activity of service *offering* be treated distinctly from the actual service *provision*? Clearly not (see *Alpine Investments*, C-384/93, para. 22), but that leaves us with conclusion that Uber is providing a transport service as if it was driving the car itself. Admittedly, this is not the case (the nature of Uber's relationship with the drivers is neither a subject-matter of this case, nor pertinent for its resolution).

There is not a word in the judgment about the nature of intermediation services, taken by themselves. What if we 'strip' the innovation part, facilitated by the technological progress, from the service? Could it then be regarded as a mere intermediation, whereby an intermediary or a broker connects the principal (the principal in that case being a driver) with the client, in exchange for a certain commission? Would it be relevant in that case, whether such service was provided electronically or through an online platform or a smartphone app or by any other means? The ensuing transaction between the principal and the client would be irrelevant for the relationship between the principal and the intermediary. But could the latter relationship escape being qualified as a transport service and potentially benefit from the general rules on the free provision of services?[8] We can only hypothesise, from the specific choice of wording in the judgment, that innovation has no bearing on the conclusion, whatsoever:

> "[…] the provider of that intermediation service simultaneously offers urban transport services, which it renders accessible, *in particular*, through software tools such as the application at issue […]" (para. 38 of the judgment, emphasis added).

Once again, in the eyes of the law, innovation is nothing but a 'glitch', a temporary anomaly in the system to be straightened out.

Surely, if a 'mere' intermediation, without the 'electronic' component was considered, the facts of the case would not have permitted any different conclusion:

8 There are no common rules on intermediation in general, but only in specific sectors, e.g. in the insurance sector (Directive (EU) 2016/97) or consumer credits (Directive 2008/48/EC).

an intermediary could never dictate the rules for the provision of service by the principal, as Uber does. But it is quite indicative that this possibility was never thoroughly investigated (and if necessary, dismissed) in the judgment or AG's opinion. While admitting that taken separately, those services can be linked to different directives or TFEU rules on freedom to provide services, the Court only provides an either-or situation: either information society services or transport services are involved. There is no denying that the service has a 'non-material' component – it brings the cross-border element to the case. In dismissing the intervening Polish Government's argument that the case is a purely internal matter over which the Court has no jurisdiction, the Court states

> "[…] the service at issue in the main proceedings is provided through a company that operates from another Member State, namely the Kingdom of the Netherlands." (para. 31 of the judgment)

So, the service is undoubtedly provided by electronic means, but nonetheless, it is 'more than an intermediation service' (para. 37 of the judgment). According to the Court, the activity of transport dictates the nature of the overall service. Indeed, it does, if viewed only from the passengers' standpoint. Passengers use the app to find reliable transport, and they care little about who is actually providing it. But what about the drivers who partner with Uber? The Court finds that there would be no drivers without Uber.

Two main arguments that support the Court's conclusion basically boil down to the following: (i) without Uber, there would be no transport service; and (ii) Uber has a decisive influence over the conditions under which the service is provided (para. 39 of the judgment). The first part of the first argument is probably the least convincing part of the judgment: the Court merely states, without any explanation, that without the application, the drivers would not offer transport services. For sure, these are non-professional drivers, as we know from the facts of the case. Did all of those non-professional drivers decided, out of the blue, to start driving when they discovered the application, or were they maybe somehow already involved in the transport business? What if there were professional drivers among them, trying out a new and more efficient method of connecting with the passengers? And how will this argument stand in the face of other services offered by Uber, which include professional drivers?[9] The second part of this argument is that persons who wish to make an urban journey would not use the services provided by those drivers. There is no further explanation here either, but it makes a bit more sense: without the application, there would simply be no connection between the passenger and that particular driver. In either case, both parts of the first argument seem too tenuous and unsubstantiated.[10]

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9 This will be further analysed in Uber Black (Germany) case here below.

10 How will this conclusion reflect on Airbnb and other similar online accommodation booking platforms, for example? It could also be claimed that many hosts would never offer their property for rent, nor would many guests book those properties, had it not been so easy to connect over the platform. Is Airbnb offering accommodation services?

The second argument, that Uber has a decisive influence over the conditions under which the service is provided, is plausible and offers a stronger footing to claim that this is 'more than an intermediation service'. A significant control is exercised in connection with setting of fares, type and appearance of vehicles used, the conduct of drivers. In addition, all payment transactions go through Uber, whereby Uber keeps a certain amount of commission, before wiring the driver his part. A mere intermediary could never determine the salient features of a service provision in such a way. More importantly, no matter how much Uber contests it, the decisive influence argument will also bear significant consequences for the nature of relationship between Uber and the drivers, i.e. whether they are truly independent contractors as Uber claims.

The conclusion is that Uber's intermediation service (which consists of connecting, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys) is an integral part of, and must be classified as, "service in the field of transport". The consequence is that, since there are currently no common EU rules on non-public urban transport services, Member States are free to regulate conditions under which such service is provided. This implies that even a complete ban would be possible, since such a service is excluded from the scope of existing EU law.

So basically, an application service is a transport service. In other words, forget about the potential of online platforms and benefits to the digital economy and society, by facilitating "efficiency gains" and increasing "consumer choice, [and] contributing to improved competitiveness of industry and enhancing consumer welfare" (European Commission, 2016a:3). Unlike advertising or connecting sellers and providers with potential customers in an online market place, when an application is connecting drivers with passengers, it is a transport service.

Given this argument, it would be irrelevant for the outcome of the case if the connecting service was between professional drivers and passengers. It is not the quality of the driver which determines the nature of the service, but the fact that it is inherently linked to the transport service.

This judgment cannot be criticised as to its outcome: it follows the law as it currently stands. But it is a typical example how law stifles innovation. Forget the revolutionary model of connecting drivers and passengers in real time: unlike the smartphone application, the law does not respond at the click of a button or the touch of a fingertip. We have to fit such situations into the existing regulatory moulds, even when they are clearly unfit to accommodate them. Especially when an issue is hotly debated, as Uber's operations throughout Europe are: it is much easier to keep a *status quo* in EU law and throw the ball back into the Member States' yard.

To state that the smartphone application connecting drivers with passengers 'has no self-standing economic value' (*Uber Spain*, opinion of AG Szpunar, para. 32) without the transport component is perhaps legally correct, in view

of the existing law. But then, it is also a fatal blow to innovative business models, where it is, or at least should be conceivable to become the world's leading non-public urban transport company, without actually owning any car. And what about the unfair competition argument, so forcefully brought forward by taxi drivers around Europe? If you take the non-professional drivers out of the equation, i.e. someone just looking to make some extra money on the side, and partner only with licensed professional drivers, that argument is void. Actually, most national taxi companies are by now catching up with the digital world and learning what it means to be competitive in the digital market: they have also started using smartphone applications with the same or similar algorithms as Uber to connect more effectively with passengers in need of a ride. And where is the innovation in that? The market is still as closed as it was.

3.3. Uber Black (Germany) and Uber France: Testing the reach of Uber Spain judgment

Out of two remaining pending cases involving Uber, perhaps the *Uber Black (Germany)* case will carry a bit more weight.

Uber Black (Germany) case originates in a law suit filed by a Berlin taxi driver against Uber BV, a company with a registered seat in the Netherlands. The taxi driver successfully sought an injunction order against Uber to cease the provision of a service which involves placing orders for chauffeur-driven rent vehicles, through a smartphone application, which connects that passenger to the nearest available vehicle. Passenger transport by chauffeur-driven rent vehicles in Germany is different from taxi services. By definition, transport with rent vehicles (*Mietwagen*) means passenger transport whose purpose, destination and course are determined by the hirer and which is different from the taxi transport (§ 49(4) *Personenbeförderungsgesetz* (Passenger Transport Act), hereinafter: *PbefG*). An important distinction is that taxi vehicles are usually made available at pre-authorised stops and that rides can be ordered directly by passengers from the taxi drivers. In contrast to that, rent vehicles can only take orders that have first been received at the company's headquarters and transmitted to the driver. This condition is not satisfied, for example, when the driver notifies the company's headquarters about a ride request he received while performing another trip, and following that notification, obtains the company's authorisation (BGH, I ZR 201/87). Even if the entrepreneur is a single driver – his headquarter is his home address. Rent vehicles may not bear taxi signs and attributes. Driver has to return to the company's headquarters after the ride, unless before or during the ride he telephonically receives another request from the headquarters (§ 49(4) *PbefG*). In view of the technological progress, the term 'telephonically' used in this provision is to be understood as transmitted to the driver also by e-mail, text message or by other means of mobile communication (BGH, I ZR 3/16, para. 20).

In the present case, Uber Black service enabled drivers of rent vehicles to receive ride requests directly over the server in the Netherlands, without involvement of another person at the company's headquarters.

The first-instance and appellate courts ruled this to be anti-competitive behaviour in breach of the German *PbefG*.

In the revision procedure, the German Bundesgerichtshof (BGH) submitted a request for preliminary ruling on 19 June 2017 (BGH, I ZR 3/16). There is no available information about the date of the hearing before the CJEU, however, the circumstances of the case and the questions referred can be discerned from the application (OJ C 318 from 25.09.2017) and the BGH's decision to refer the matter to the CJEU. The question concerns the interpretation of Article 58(1) TFEU and Article 2(2)(d) of Directive 2006/123 (the Services Directive), which both refer to the special position of transport services. More concretely, the BGH is concerned whether a company which makes available the smartphone application, through which users can order chauffeur-driven rent vehicles from undertakings licenced for passenger transport with rent vehicles, supplies the service in the field of transport itself. This concern arises out of the fact that the services of that company are closely connected to the transport service, because the company determines the rules on price, processing of payments, conditions of carriage, as well as advertises the vehicles under its own brand name designation and applies uniform promotional offers. So basically, the factual situation is similar to the *Uber Spain* case, but the important difference is that the services used here involve licenced professional drivers and rent vehicles. Taxi transport is in competition with the chauffer-driven rent vehicles transport, but subject to different set of rules under the German *PbefG*. The problem consists in the violation of the rule from the German *PbefG*, which requires that the mandate for chauffeur-driven rent vehicle has to first arrive at the headquarter of the undertaking licensed for passenger transport with rent vehicles, before a vehicle can be dispatched. This is the so-called '*Rückkehrgebot für Mietwagen*' - the 'return mandate' for rent vehicles (§ 49(4)(2) *PbefG*). BGH considers that the provision at issue represents a rule regulating the practice of a profession, justified in view of the protection of taxi service, which is bound by fixed tariffs and obligation to contract (*Kontrahierungszwang*). This condition is not satisfied when, as in the present case, the driver who is in the closest proximity to the passenger receives the order directly from the server located in the Netherlands, even though the undertaking's headquarters simultaneously receives an e-mail confirmation of the ride by the company responsible for the smartphone application.

For BGH, the transport companies offering chauffeur-driven rent vehicles are clearly liable for the breach of the return mandate under the *PbefG*, and thus for the breach of competition. In that sense, Uber is also liable for the breach of competition rules as their partner, regardless whether Uber itself falls under the *PbefG.* However, BGH is concerned that this requirement may be at odds with the EU rules on the free provision of services, which would not be applicable if

the intermediation service by Uber, in its existing form, represents a service in the field of transport. If Uber's service is not deemed as a service in the field of transport, the BGH wonders if that requirement is justified from the perspective of safeguarding of public policy, on the basis of objective of maintaining the competitiveness and proper functioning of taxi services.

Although there are factual differences in comparison to the *Uber Spain* case, especially concerning the type of service offered, it is highly unlikely that the outcome of this case will be any different. The 'no-service-without-transport' approach will likely be followed here. The CJEU will not have to reply or even consider the second question, posed in the event that it is concluded that Uber's services may not be deemed as services in the field of transportation. Therefore, this highly controversial issue is left to the Member States.

Uber France case, in which the opinion of Advocate General Szpunar was delivered on 4 July 2017, is very similar to the *Uber Spain* case. It also involves the UberPop service, i.e. connection of non-professional drivers with passengers through online application. However, the disputed question revolves around the fact whether the French national legislation prescribing the terms for performance of non-public urban passenger transport, i.e. taxi services, should have been notified to the Commission before it was adopted, in accordance with Directive 98/34 on information society services. Of course, this question will only be relevant if the service in question can be considered as an information society service within the meaning of that Directive. In line with the *Uber Spain* judgment, it clearly would not be the case.

4. Conclusion

In the United States, Uber started operating in 2010 (along with Lyft and similar companies), and the first municipal and state regulations were being adopted since 2014 (e.g. in California, Colorado, etc.). A legal solution was to regulate them as transportation network companies – TNCs. As a consequence, these companies are not taxi companies, and the regulatory accent is placed on the questions of insurance and liability of drivers and companies. By 2017, the majority of US federal states had a state-level regulation concerning TNCs.[11]

By contrast in Europe, Uber started its operations in late 2011.[12] In 2018, the only solution we have for its innovative business model is to basically call it a transport or taxi company. In this case, regulation has hindered innovation.

Would it be possible to apply a similar regulatory pattern in the EU? This would require a clear and unequivocal political will to admit that there is a need for common rules in this area. Such determination is obviously lacking, as it would imply a significant overhaul of national regulations on non-public urban passenger transport or taxi transport, an area which has traditionally been resilient to

11 See <https://policy.tti.tamu.edu/technology/tnc-legislation/>.

12 The first European Uber office was opened in Paris in December 2011.

change and Europeanisation. But it would also require from the Member States to admit that the platform or application enabled service connecting passengers with drivers (such as Uber's service) is not, by its nature, a transport service. By its nature, it still is, even under the current set of rules, an online intermediation service – whether we consider it detachable or non-detachable from its material component, the transport, is only the next step relevant for the decision how to regulate the provision of the service in question. But to completely deny its innovativeness is simply an untenable option.

The CJEU case law in Uber cases shows us that we are a long way from regulating online intermediation platforms "in a manner that truly serves competition, innovation and user choice" (Geradin, 2016). This paper should not be understood as a plea for market liberalisation. Quite the opposite, rules on competition, consumer protection, labour standards, liability, etc. are tremendously important in the regulation of online platforms.

As much as it can hinder, regulation can also enable innovation. So, it is not about liberalisation, but about recognising and adequately defining innovative business models, and creating a specific set of rules or adapting the existing ones to regulate their operation. The degree of control exercised by the platform over the provision of the underlying service is a starting point for determination of the service in question, but it is also the most elusive one, since it can shift and vary. The sensitivity or protected status of a certain field or industry, in view of its public importance, is an additional factor to take into account, but it should not serve as an excuse to refrain from any action. Regulatory fragmentation is recognised as one of the most important obstacles for the proper functioning of the digital single market. At this pace, by the time the EU decides whether and how to build the common regulatory approach, Uber and the likes may be long gone from the market, because they *are* breaking laws in many Member States.

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