Uber and the challenges for antitrust law and regulation*

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Abstract

Uber is the most emblematic example of the service platforms that are challenging regulators and antitrust agencies all over the world. Should regulations adapt to the new services of the digital economy? Should competition law change its paradigm in relation to the sharing economy? Despite the growing expansion of these services, in most countries there is still no regulatory framework addressing these problems. This article firstly analyzes the peculiar business model adopted by Uber and the antitrust concerns that it could nourish. And, in so doing, the paper pays heed to the approach that antitrust authorities should have towards the complex rivalry between (regulated) incumbents and (unregulated) new entrants. Then, the paper considers the legal nature of the services provided by Uber, i.e. whether they should be considered as transport services or as services of the information society. Either ways, the chosen characterization will indeed affect the law applied to all digital platforms. The analysis, which adopts a comparative approach, focuses on the European context where national courts are in great turmoil and the CJEU has recently issued a preliminary ruling on the nature of Uber services.

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Sommario

1. Uber and the sharing economy

Ten years ago we welcomed the advent of digital platforms as the beginning of a new age: the era of a more sustainable economy and society, alternative to that of consumerism and individual ownership.[1] On those platforms, thousands and thousands of persons finally gained the opportunity to re-design their identities as consumers, owners, and workers. Instead of being the mere end points of massive production and distribution processes, platforms' users became collaborative *peers* benefitting from *joint* access to products and skills *put in common*. On those platforms, they could save time and money[2], by sharing, bartering, lending, renting, gifting, and swapping resources[3] that would otherwise be underutilized.[4] There, they could even make friends,[5] and become more active citizens.[6]

However, there is room to argue that "sharing" is not an accurate description of the services that run on digital platforms like Uber.[7] True, Uber matches workers and underemployed individuals with those in need of taxi services and, hence, enables individuals to communicate and collaborate more effectively and efficiently.[8] In addition, it is true that, differently from an online storefront, Uber does not provide any good or service directly. Yet, users pay money and drivers work for profit. Furthermore, Uber is not a passive web portal or mobile application hosting the many transactions occurring between consumers and drivers. Uber supplies the electronic payment system that users and drivers employ, guarantees that pricing works dynamically, organizes

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[1] Y. Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, in 114 *Yale L.J.* (2004): 273.

[2] R.A. Kaplan, *Regulation and the Sharing Economy*, in *N.Y. L.J.* (2014).

[3] R. Botsman - R. Rogers, *What's Mine Is Yours: The Rise Of Collaborative Consumption,* New York, 2010.

[4] M. Cohen - C. Zehngebot, *What's Old Becomes New: Regulating the Sharing Economy*, in 58 *Boston B.J.* (2014): 6; B. Cannon - H. Chung, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, in 31 *Santa Clara High Tech. L.J.* (2015): 23.

[5] Indeed, many sharing platforms enable users to create their own profiles and chat. This embedded social networking feature works also to fuel a reputation system made of review and rating tools – a reputation system that, in turn, serves to counterbalance the risks that users runs by contracting with strangers in lieu of larger well-established businesses.

[6] B. Morgan - D. Kuch, *Radical Transactionalism: Legal Consciousness, Diverse Economies, and the Sharing Economy*, in 42 *J.L. Soc'Y* (2015): 556, 557; J. Orsi, *Practicing Law In The Sharing Economy: Helping People Build Cooperatives, Social Enterprise, And Local Sustainable Economies.* Chicago: American Bar Association, 2012.

[7] G. M. Eckhardt - F. Bardhi, *The Sharing Economy Isn't About Sharing at All*, in *Harv. Bus. Rev.* (Jan. 28, 2015), accessed 15 July 2017, https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all ; E. Mostacci - A. Somma, *Il caso Uber: La Sharing economy nel confronto tra common law e civil law*, Milan, 2017.

[8] T. G. Loucks, *Travelers Beware: Tort Liability in the Sharing Economy*, 10 *Wash. J.L. Tech. & Arts* (2015): 329, 330.

the listings, charges a fee for each exchange, and issues minimum quality standards for drivers. In other words, Uber falls somewhere along a spectrum between purely hosting platforms and direct service providers.[9]
Against this backdrop, the paper intends to offer a legal characterization of Uber, by acknowledging that its technology has actually deprived of meaning some of the existing rules.[10]

2. Uber and the taxi industry

Rules governing transport services of passengers through platforms are the subject of debate in many jurisdictions, particularly in those where Uber has started (or tried to start) operating through one or more types of the activities provided by its business model. The two main (and controversial) services provided by Uber are UberPop (whereby, against the payment of a fee, users connect to drivers that do not hold any professional taxi/chauffeur licences) and UberBlack (where the app links consumers to private licensed professional drivers operating services with rental cars). It is well known that, despite the differences between the countries concerned, a general and strong reaction of taxi drivers against Uber (and similar platforms, such as Lyft) has occurred.
The taxi industry is one of the most heavily regulated in the majority of countries all over the world with some degree of variations, namely in the different forms of quantity regulation, quality regulation, market conduct regulation and price regulation,[11] which imply that typically the regulator or local authorities set the maximum number of operators that may provide taxi services, in addition to licensing and performance requirements for the drivers and the taxi companies (aimed at ensuring safety standards for both drivers and vehicles) and financial responsibility standards (such as compulsory insurance). Moreover, market conduct regulation can include requirements for taxis to pick up all passengers (the so-called "cab rank principle"),[12] and price regulation provides for the setting of maximum rates based on various methodologies.
In general, taxi services enjoy a higher protection than other transportation services because of their supplementary role in public passenger transportation at local level. Several justifications for such a pervasive role of public regulation are traditionally adduced. Among them, the main arguments include the idea that in the absence of control on entry there would be an excessive number of taxis, which would create congestion and pollution, on the one side, and a disastrous competition between them, on the other side, thereby affecting the quality of the service provided. Regulation is also

[9] V. Katz, *Regulating The Sharing Economy*, in 30 *Berkeley Tech. L.J.* (2015): 1067, 1071-1072.

[10] N. Cortez, *Regulating Disruptive Innovation*, in 29 *Berkeley Tech. L.J.* (2014): 175 and C. Koopman et al., *The sharing economy and consumer protection regulation: the case for policy change*, in 8 *J. Bus. Entrepreneurship & L.* (2015): 529, 544.

[11] OECD, *Taxi Services: Competition and Regulation*, 2007, at 19.

[12] Id., at 20 et seq. For a brief overview, see also D. Geradin, *Should Uber be Allowed to Compete in Europe? And if so How?,* in *CPI* (2015), at 4.

supposed to grant the fairness and reasonableness of the fares applied to passengers together with their safety.

In reality, in most countries practice demonstrates that regulation has failed in obtaining efficient results in this sector more than ever. In fact, control on entry has resulted to lead in many cases to undersupply of the service, being a typical complaint the lack of sufficient cars available during peak hours or in certain areas. Also control on prices and quality has not incentivized taxi companies to innovate or implement the quality of the service. More in general, empirical evidence demonstrates that taxi industry is highly subject to regulatory capture in several jurisdictions.[13] Nevertheless, the beneficial outcomes achieved by the experience of deregulation in some countries are not unanimously shared by economic literature, even if the majority concludes in favour of it.[14]

Uber has burnt into this industry as a disruptive element, showing how technological advances have created new ways to operate the service of carriage of persons and bringing the traditional taxi services into question, thereby reopening the debate on their inefficiencies and the need for a renovation of the rules governing the sector.[15] Actually, the use of Internet-based mobile technology to match passengers and drivers has created unprecedented competition in the taxi industry.[16] As a result, incumbent operators, which have benefitted from a substantial and lasting lack of competition in the market, have tried to stop the advent of Uber. Namely, not only they have been lobbying on governments to impose bans and restrictions on Uber's activities. In addition, they have been bringing several lawsuits merging together many issues, ranging from questions pertaining labor law to problems connected to unfair competition laws (claiming that Uber unfairly compete with traditional taxi operators as it does not meet the regulatory requirements applied to them). This has occurred in several Member States, resulting in many cases in a general ban on UberPop (e.g. in France, Italy and Germany) and in diverging views on UberBlack.[17]

The lawsuits and the general debate provoked by Uber have clearly shown the gaps of

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[13] OECD, *Taxi Services*, at 31 et seq.

[14] See the survey provided by A. T. Moore - T. Balaker, *Do Economists Reach a Conclusion on Taxi Deregulation?*, in 3 *Economic Journal Watch* (2006): 109.

[15] On the "disruption model" followed by Uber, see N.P. Terry, *Regulatory Disruption and Arbitrage in Healthcare Data Proceedings*, in 17 *Yale J. Health Pol'y, Law, & Ethics* (2017): 143, 156-158; M. Anderson - M. Huffman, *The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something in Between?,* in *Columbia Business Law Review* (forthcoming); Indiana University Robert H. McKinney School of Law Research Paper No. 2017-8, accessed 15 July 2017, https://ssrn.com/abstract=2954632. For a wide analysis of the effects of Uber on safety, privacy, discrimination, and labor standards, see B. Rogers, *The Social Costs of Uber*, in 82 *University of Chicago Law Review Online* (2015): 85, accessed 15 July 2017, at http://chicagounbound.uchicago.edu/uclrev_online/vol82/iss1/6.

[16] J. Cramer - A. B. Krueger, *Disruptive Change in the Taxi Business: The Case of Uber*, in 106 *American Economic Review* (2016): 177.

[17] With regard to UberBlack, in Germany administrative courts in Berlin and Hamburg have considered that Uber violates laws reserving taxis the right to wait at the roadside and pick up passengers and thus basically to blur the taxi and rental car services. In Italy UberBlack has been banned, and then readmitted by the Court of Rome in May 2017.

the existing laws, which appear to be definitely outdated and not suitable to be applied to the novelties put forward by technology. On this point, it is worth mentioning the stance taken by the Italian Constitutional Court, which, in the occasion of a judgment concerning a regional law limiting the carriage of passengers to taxis and NCC services (*noleggio con conducente*, i.e. hire cars with a driver),[18] has clarified that against the existing national legislation, dating back to the 90's, technological progress poses questions debated not only before courts but also in the political and regulatory contexts at both national and EU level: this would suggest the need for an updated and univocal regulatory framework to be met by the legislator. Also the Italian Competition Authority (ICA), intervening specifically in the *querelle* on Uber, has formally invited the legislator to intervene in order to modernize and make the actual legislation more flexible, by creating a level playing field aimed at avoiding practices that can seem unfair and opening the sector to competition with beneficial effects for final consumers.[19] On the other side of the Atlantic the crash with incumbent operators and the innovation process put forward by emerging new technologies have been emblematically described by Judge Posner in a case appealed before the Seventh Circuit on the legitimacy of an ordinance of Chicago City applying specific rules to Transportation Network Providers (TNPs) and challenged by taxi and livery companies.[20] In this occasion Judge Posner has stated: «when new technologies, or new business methods, appear, a common result is the decline or even disappearance of the old. Were the old deemed to have a constitutional right to preclude the entry of the new into the markets of the old, economic progress might grind to a halt.»[21]

Turning back to the European context, from the foregoing issues it appears that the first issue to solve is to determine which rules should be properly applied to Uber. In order to do that, the crucial question to answer primarily concerns the nature of the services provided by Uber itself. Yet, so far, national regulators and courts did not provide any uniform or final answer as to whether Uber offers "transport services" that should fall under the transport regulation, because equivalent to the taxi services, or rather "information society services", to be subject to a different set of rules. This uncertainty has led some national courts to refer to the European Court of Justice

[18] Italian Constitutional Court, 15 December 2016, No. 265. The Court declared such regional law as is illegitimate, as it comes under rules on the safeguard of competition, over which the State has exclusive competence.

[19] Autorità Garante della Concorrenza e del Mercato (Italia Competition Authority), 10 March 2017, S2782. The ICA has indicated three main points as crucial: firstly, it suggested equalising taxi services and other kinds of similar transport; secondly, it acknowledged that the advent of digital operators has completely modified market development and made obsolete the legislation in force; finally, the ICA recommended the enactment of some legislative tools to compensate the effects that the opening of the market has produced on the incumbent operators, forced to satisfy public service obligations.

[20] *Illinois Transportation Trade Association v. City of Chicago* (2016 WL 5859703).

[21] The ordinance at issue, governing TNPs since 2014, is more permissive than the others governing taxi and livery services. According to the judgment, the different rules applied to TNPs are justified by the fact that their services are different and not interchangeable with taxi service. For an analysis of this judgment, see A. Boitani - S. Colombo, *Taxi, Ncc, Uber: scontro finale o alba di coesistenza?*, in 1 *Mercato Concorrenza Regole* (2017): 61, 67 et seq.

(CJEU) for a preliminary ruling on the matter.[22] Among them, it is worth dwelling on the first request sent to the CJEU in August 2015 by the Juzgado de lo Mercantil No 3 (Commercial Court) regarding the rules to be applied to Uber Spain, operating in Barcelona, Madrid and Valencia without the licences and the authorisations required by the national laws for taxis.[23]

3. Uber before the CJEU: the Spanish case

The Spanish case arises from an action brought by a trade association (Elite Taxi), asking the court to declare that Uber Spain's activity in the form of UberPop constitutes an act of unfair competition and to order it to cease its conduct. The core issue of the questions referred by the national court is whether Uber's activity falls within the scope of Directives 2006/123 and 2000/31 as well as the provisions of the TFEU on the freedom to provide services.

It is worth analyzing firstly the Opinion released by the Advocate General (AG) Szpunar on the case, giving a crucial interpretation of the controversial questions at issue.[24] Given the definition of an "information society service" provided the Directive 98/34 (i.e. a service provided for remuneration, at a distance, by electronic means and at the individual request of a recipient) and the relevant EU regulatory framework, the reasoning of the AG develops on the following points, starting from the analysis of the main features of Uber's activity, i.e. that drivers on the Uber platform offer passengers a transport service to a destination selected by the passenger and receive the payment whose amount far exceeds the mere reimbursement of expenses incurred. This would in turn exclude that Uber is a ride-sharing platform as well as a mere intermediary who simply matches supply to demand. Above all, being the activity of Uber a composite service, i.e. comprising electronic and non-electronic elements, where the former is not the main one and is not economically independent of the latter, it cannot be classified as an information society service within the meaning of the Directive 2000/31. More specifically, the AG notes that Uber allows persons wishing to pursue the activity of urban passenger transport to connect to its application and carry out that activity subject to the terms and conditions imposed by Uber itself, which are binding on drivers by means of the contract for use of the application. The numerous terms and conditions included in the contract cover both the taking up and pursuit of the activity and the conduct of drivers when providing services. In addition, Uber sets the final price

[22] This is the case of the Tribunal de Grande Instance de Lille, which in March 2016 condemned Uber for unfair commercial practices. Again, Germany's Federal Court of Justice (*Bundesgerichtshof*) dealing with UberBlack referred the case the CJEU in May 2017.

[23] Case C-434/15, request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain) lodged on 7 August 2015 — *AsociaciónProfesional Élite Taxi v Uber Systems Spain*, OJ 2015, C 363/21. For a comment, see D. Geradin, *Online Intermediation Platforms and Free Trade Principles – Some Re lections on the Uber Preliminary Ruling Case*, April 2016, accessed July 15, 2017, https://ssrn.com/abstract=2759379.

[24] Opinion delivered on 11 May 2017.

of the service provided.[25] It follows, according to the AG, that Uber is a "genuine organiser and operator of urban transport services", i.e. a traditional transport service.[26] In a more recent preliminary ruling case, pending before the CJEU and concerning Uber France, the AG has confirmed this view.[27]

Such a qualification clashes with the view expressed by some scholars before the release of the conclusions of the AG, supporting the idea that Uber would have nothing to do with traditional transport services, such as those provided by taxi companies, but belongs to the category of "online market-making platform",[28] creating value by enabling interactions between distinct categories of users, and not by performing transport activities. In other words, according to this approach, Uber is a typical two/multi-sided platform, one of the main examples of what Evans and Schmalensee call as "matchmakers", connecting drivers and riders, which are linked by indirect network effects, as a large number of drivers benefits riders, and vice-versa.[29]

A very different approach is supported by AG Szpunar, which directly addresses the question of the comparison with other intermediation platforms, namely with those used to make hotel bookings or purchase flights.[30] Although he acknowledges that some similarities exist (e.g. as regards the mechanisms for booking or purchasing directly on the platform, the payment facilities, the ratings systems), he argues that in those cases hotels and airlines are undertakings which function completely independently of any intermediary platform. The AG points out that the crucial difference lies in the fact that hotels and airlines and not the booking platforms determine prices and conditions under which their services are provided. In reality, this assumption seems to collide with the stance taken by the Commission and several NCAs in the recent case law on online travel agencies (OTAs, e.g. Booking, Expedia, etc.), occurred in the UK, Germany, Italy, France and Sweden, where such intermediaries have been found

[25] See para. 50: «Although Uber's representatives stated at the hearing that drivers are, in principle, free to ask for a lower fare than that indicated by the application, this does not seem to me to be a genuinely feasible option for drivers. Although drivers are theoretically given such a discretion, the fee Uber charges is the amount resulting from the fare as calculated by the application. Since any reduction in the fare paid by the passenger is to the detriment of the driver, it is unlikely that drivers would exercise that discretion».

[26] Para. 61.

[27] Case C-320/16, *Uber France SAS,* Opinion of Advocate General Szupnar, delivered on 4 July 2017. This case concerns the question whether certain provisions of French law which apply to services such as those offered by Uber should have been notified as rules on services within the meaning of the provisions of EU law on technical notification.

[28] D. Geradin, *Online Intermediation Platforms,* cit., at 8-9 (affirming that UberPop would fit with the definition of information society service under Directive 98/34, as it meets all the elements required).

[29] D. S. Evans - R. Schmalensee, *Matchmakers,* Harvard, 2016. The terminology of two-sided and multi-sided markets derives from economic literature. The expression "two-sided markets" appears in the seminal work of J.-C. Rochet - J. Tirole, *Platform Competition in Two-Sided Markets*, 1 *J. Eur. Econ. Ass'n* (2003): 990]. The economic literature on this issue is huge. In general, the fundamental features of two-sided markets are: distinct groups of customers who rely on each other but also on the platform to intermediate transactions between them; indirect externalities across groups of users; and the non-neutrality of the price structure, meaning that the price structure of the platform affects the level of transactions.

[30] See paras. 59 et seq.

as imposing essential conditions of the pricing strategy of the principals through the widespread use of price parity clauses.[31] The AG considers this case law immaterial in the analysis of Uber;[32] nevertheless, as the control over conditions and prices is assumed by him to have a crucial relevance in the assessment of the difference between Uber and other platforms as intermediaries, it does not seem correct to not take into account the considerations mentioned above.

However, rather than the pricing issue, a more correct remark made by the AG regards the fact that, whereas Uber controls applicants' compliance with its own requirements, booking platforms do not exert any prior control on the hotels that have access to the platforms: simply, hotels operate in accordance with the State/local rules specific to their sector.[33] From this point of view, it is worth noting that Uber poses questions similar to those arising in respect of platforms such as Airbnb, as both are in tension with existing regulatory frameworks, which require licensing and other conditions (e.g. insurance, etc.).[34] This aspect turns to the main proceeding in the Spanish case at issue, being one of the referred questions whether the provisions of Directive 2000/31 prevent the imposition of penalties on Uber on account of unfair competition resulting from the activity of drivers providing transport services on that platform. The AG considers Uber responsible for its comprehensive system for on-demand transport and this would be true also in the case an interpretation different from that supported by Szpunar were to be accepted, i.e. that the connection supply were to be regarded as independent of the supply of transport in the strict sense, since these two supplies would ultimately be performed by Uber or on its behalf. In any case Uber, at least as far as the UberPop service is concerned, cannot benefit from the liberalization provided by Directive 2000/31, as it is organized in such a way that Uber cannot, as matters stand, comply with the requirements provided by the existing regulatory framework.[35]

Commenting the Opinion released by the AG, the main critical questions appear to be whether this approach properly considers the features of the platforms, among which Uber plays a unique role, and it is correct to consider the provision of a transport service as the main purpose of Uber's activity, so that this would necessarily lead to the conclusion that Uber must be equated to a transport service provider subject to the

[31] On this topic, see, *inter alia,* A. Ezrachi, *The Competitive Effects of Parity Clauses on Online Commerce*, in 11 *European Competition Journal* (2015): 488; P. Akman, *A competition law assessment of platform most-favored-customer clauses*, in 12 *Journal of Competition Law and Economics* (2016): 781; M. Colangelo, *Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking*, in 8 *Journal of European Competition Law & Practice* (2017): 3.

[32] See footnote 22 of the Opinion.

[33] The AG considers another difference between booking platforms and Uber at para. 60: «Lastly, such booking platforms give users a real choice between several providers whose offers differ on a number of important points from the users' perspective, such as flight and accommodation standards, flight times and hotel location. By contrast, with Uber, these aspects are standardized and determined by the platform, so that, as a general rule, the passenger will accept the service of the most quickly available driver».

[34] See B. G. Edelman - D. Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies like Airbnb and Uber?*, in 19 *Stan. Tech. L. Rev.* (2016): 293.

[35] Paras. 86-87.

traditional rules applied to transport. As a matter of fact, the CJEU has upheld this approach, stating that the service provided by Uber is more than an intermediation service consisting of connecting, by means of a smartphone application and for remuneration, a non professional driver using his own vehicle with a person who wishes to make an urban journey.[36] The Court notes that, as the provider of that intermediation service simultaneously offers urban transport services made accessible through software tools, the application provided by Uber is indispensable for both drivers and passengers. It also points out that Uber exercises decisive influence over the conditions under which the drivers provide their service. These elements lead the Court to the conclusion that the intermediation service carried out by Uber must be regarded as forming an integral part of an overall service whose main component is a transport service, so that it must be classified as "a service in the field of transport", subject to the common transport policy. However, as currently non-public urban transport services and services that are inherently linked to those services, such as the intermediation service provided by Uber, have not given rise to the adoption of measures based on that policy, the Court refers the Member States to regulate the conditions under which such services are to be provided in conformity with the general rules of the TFEU.[37]

4. Uber and Antitrust Law

When addressing the Uber case, one could wonder whether and how antitrust law could target Uber practices. Actually, first and foremost, the antitrust toolkit helps to better analyze and understand Uber's business.

For example, according to the antitrust jargon, Uber adopts a two-sided business model that exploits the indirect network effects that exist between drivers and users. In other words, and as said before by commenting the AG's opinion, Uber's platform flourishes not only because it enhances efficiency by reducing the under-utilization of cars and driving skills, but also because it enjoys a sort of self-reinforcing effect resulting from the twofold fact that a higher number of drivers attracts more users and vice-versa[38]. By knowing this, one should not overlook that Uber is not a mere provider of some pieces of technology, such as the platform and the connected mobile application. Uber exists and grows because, by matching users and drivers via its platform, it exploits the interdependencies that occur between these two different demands: the demands of transportation and the demand of driving. From the antitrust standpoint, however, the existence of network effects does not justify any intervention, because antitrust law takes markets as they are: it only acts against some business practices that arm the

[36] CJEU, judgment of 20 December 2017, Case C-434/15, *Asociación Profesional Élite Taxi v Uber Systems Spain SL*.

[37] See paras. 34 et seq. of the Judgment.

[38] D.S. Evans and M. Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, in 3 *Colum. Bus. L. Rev.* (2005): 667.

competitive process. Rather, the assessment of the magnitude of these effects serves to understand the extent to which platforms' market positions are contendable and, hence, it turns out to be useful in relation to market power inquiries. Indeed, because of indirect network effects, it is true that any potential entrant should have on board enough users before challenging the incumbent.[39]

In addition, the antitrust analysis suggests that Uber platforms is a *system of interoperable software* combined in a complex architecture that, nevertheless, is flexible enough to embrace new components. This means that Uber can easily diversify its business, by associating other products and services to the platform, as it actually did with Uber food. From an antitrust standpoint, this fact produces several consequences. On the one hand, it means that the competition occurring in digital markets is highly dynamic, not to say *fluid*, just because platforms can easily enter new markets by offering new and innovative functionalities.[40] On the other hand, the same capacity of developing new services may permit Uber to profit from pre-emptive strategies that produce exclusionary, though not necessarily anticompetitive, effects. Indeed, who enters new markets by offering novel functionalities to an already-established base of customers raises its rivals' costs, that is, forces rivals to use less efficient and lower-quality technologies that make their offer be less valuable than the offer of the new entrants.[41] Once again, hence, the antitrust analysis does not necessarily reveal the existence of unlawful conduct. Yet, it serves a twofold aim: it improves our understanding of the business rationale underpinning Uber strategies and it highlight the necessity for the antitrust agencies and authorities to be rapid.[42]

Turning to Uber practices, the Uber pricing system raises two main concerns. Firstly, one could argue that it works as a "hub and spoke" tool, that is, as a central instrument – the "hub" – coordinating the prices that drivers – the "spokes" – are asked to apply.[43] Yet, this theoretical possibility has to be ascertained in practice, that is, by exploring whether Uber's algorithm is daily manipulated to reduce competition among drivers and grant them a supra-competitive overcharge. Instead, if Uber's algorithm works as Uber declares it to work, that is, by mirroring how demand and supply change over

[39] See, D. S. Evans - R. Schmalensee, *Failure to Launch: Critical Mass in Platform Businesses* (2010), accessed 15 July 2017, at https://ssrn.com/abstract=1353502.

[40] Already in J. Eisenach - T. M. Lenard (eds.), *Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace*, Boston, 1998.

[41] The literature about this kind of exclusionary strategies is huge. Thus, we refer to one of the leading contribution on the subject, S. C. Salop - D. T. Scheffman, *Raising Rivals' Costs*, 73 *The American Economic Review* (1983): 267.

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

[43] M. E. Stucke - A. Ezrachi, *Virtual Competition*, Harvard, 2016, at 50-55.

time in relation to the many and diverse routes[44], no kind of collusion occurs and the case of two drivers charging the same price should be regarded as a coincidence due to market forces rather than as a parallel behavior resulting from collusion.

Secondly, and irrespectively on the previous issue, one could argue that the drivers are independent firms sharing the same rules to charge prices – a fact which is anticompetitive in itself. Yet, as the CJEU suggests[45], there is room to argue that Uber's platform and its drivers represent a single economic unit within which no collusion can occur.

In addition, antitrust law cannot (and should not) do anything against the user data that platforms collect while offering their services, although the information extracted from these data serves to hold back consumers. Indeed, the more data the platform collects, the greater its ability to improve its services, the higher the money that it can earn at least from one of its side, and the higher the switching costs that consumers would bear, if they changed platform. However, such positive feedback loop is a by-product of an activity, that of using those data to improve services, that enhances consumer welfare, by improving products and services to better satisfy their needs and wants. Thus, this feedback loop cannot be forbidden by antitrust law. After all, if antitrust law could prohibit it, then what would it do? Should it prevent the platforms from improving their goods? Should it fix a cap about the amount of users that a platform can hold back? Blatantly, these are not antitrust tools or remedies.

A different issue is whether, taken for granted that taxi regulation should apply to Uber, antitrust law should act against Uber, because it does not comply with those national/local regulations that govern taxi services. Actually, platforms like Uber have increased the output of the services available to consumers and reduced the market price of those services. Thus, the mere existence of Uber and its economic activity is not anticompetitive within the meaning of antitrust law, because it does not harm consumer welfare. And this conclusion holds true, even if the evidence shows that Uber's business harms taxi drivers. Indeed, antitrust law does not aim to protect competitors: it wants markets to work as Darwinist mechanisms including firms that smite their rivals because of their merits and excluding firms that are not as meritorious as their rivals are.

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[44] The nature of Uber pricing system has nothing wrong: It mimics the textbook case of a market where prices – but in the Uber case also the quantities, that is, the number of drivers available – adjust themselves almost instantly accordingly to supply and demand. Unlike personalized prices, Uber dynamic price does not change depending on the buyer's reserve price, but because of various factors such as: (a) the company's internal metrics (such as when a web site that sells tickets for shows and sporting events changes its prices because of low traffic logs), (b) competitors' prices (when the company changes its prices to keep up with competitors), (c) the real-time matching of supply and demand (as often happens regarding the prices of airline tickets and hotel rooms), and (d) any other external elements (such as weather conditions, in the case of transport) – See https://newsroom.uber.com/guest-post-a-deeper-look-at-ubers-dynamic-pricing-model, accessed 15 July 2017.

[45] CJEU, *supra* note 36, §§ 39-40, reading that «Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion. That intermediation service must thus be regarded as forming an integral part of an overall service».

Quite obviously, this does not stands for the idea that antitrust agencies and authorities support firms that act in spite of the law. What just said addresses the fact that antitrust enforcers have limited powers. They can only forbid anticompetitive agreements, mergers, and monopolistic practices. They cannot prescribe obligations and commitments to impose, for example, Uber to comply with taxi regulations. Then, when they can, antitrust enforcers work to guarantee a level playing field, as the Italian Competition Authority tried to do within the powers of its advocacy activity.

A final issue that could be further developed in the next future regards the review and rating systems that Uber provides. By tradition, antitrust law does not inquiry whether consumers are well-informed. By tradition, cases of misleading information fall within the scope of consumer protection law and of disclosure regulation.

However, since information is a product, antitrust law can be used to prosecute firms that, by exploiting their unilateral or aggregated market power, harm the well-functioning of the many markets where many types of information are produced and distributed,[46] with the ultimate goal of reducing the quantity and the quality of the information conveyed to consumers (and investors) to take their decisions.[47] Thus, if it were proved that Uber manipulates its rating and review systems, then there could be room for an antitrust intervention, once Uber's dominant position was established.

In summary, though the advent of Uber significantly changed the competitive dynamics in the transport sector, essentially the Uber case is not a matter of antitrust law that usually welcomes new businesses and displacing technologies.

5. Conclusions

It is a fact that Uber (but also Lyft and other ride-hailing companies) have notably affected the transportation market in many cities around the world. On the one hand, since the law regulates taxi's tariffs, the entrance of the above digital rivals have pushed traditional taxi to improve the quality of their services.[48] In addition, these new operators provide a reliable and affordable transportation option, serving neglected areas and providing employment. On the other hand, Uber and the like have raised many

[46] In other words, as long as there are markets delivering information, there can be anticompetitive agreements, mergers and unilateral conduct limiting their output – that is, the amount of the information available to consumers – and the quality of business supply – that is, the accuracy and reliability of information.

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

[48] For example, in the US, today's taxi drives make sure that their cars are clean and provide features like operable credit card readers and air conditioning – see S. Wallsten, *The Competitive Effects of the Sharing Economy: How is Uber Changing Taxis?* (2015), accessed 15 July 2017, at https://www.ftc.gov/system/files/documents/public_comments/2015/06/01912-96334.pdf.

concerns mainly with regard to safety, legality, and (unfair) competition with traditional operators.

We have analyzed in the previous pages the uncertainty on the legal qualification of Uber's services. Given the considerations made above, firstly it appears that the Uber saga is a matter of regulation. We believe that applying to Uber the same requirements applied to taxi drivers and other incumbent operators, that in turn would imply its ban, is wrong.

Broadly speaking, there can be essentially two ways of regulating entrants introducing a new business model, i.e. extending the existing rules to the new emerging system, or using the latter to amend and innovate the former. We believe that the latter option is preferable.

To some extent, the Uber saga recalls the situation of many industries with high regulatory entry barriers in the years of liberalization processes, where the opening of the markets to competition followed the stages and the manners established by legislation. The main difference with Uber (and other platforms, as Airbnb) is that it engaged a sort of "spontaneous liberalization", as it started operating without obtaining necessarily regulatory approval.[49] Thus, the idea that we support is that the peculiarities of Uber, as a matchmaker platform, cannot be wasted, so that it is not appropriate to apply to its services the same rules designed for traditional operators.

Rather, two changes should be encouraged. On the one hand, legislators should enable the providers of traditional services to employ and exploit new technologies. When consumers will find a legal offer satisfying their contemporary needs and wants, they will lose any incentive to turn to Uber. In other words, the best way to fight illegal business models is to develop legal business models that are equally good and efficient. After all, this is what the experience about copyright piracy teaches us. In addition, this is what is already happening in those cities where "traditional" taxi companies have developed their own apps. On the other hand, legislators could introduce specific rules about taxation and safety to safeguard the public interest and decide to manage the advent of Uber.

[49] D. Geradin, *Uber and the Rule of Law: Should Spontaneous Liberalization be Applauded or Criticized?*, in *CPI* (2015).