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## **The regulation of a project of the deregulation: UBER in Brazil and the European Union**

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### Abstract

**Purpose** – This paper focuses on the regulation of Uber at regional level (Sao Paulo and Brasilia), national level (European Member States) and supranational level (The European Commission initiative), which are often too restrictive.

**Methodology/approach/design** – This article analyses standards and literature on regulation, as well as the role of competition. Attention was specially drawn to the market failure theory for justifying regulation, advocated by Breyer, Ogus and Baldwin & Cave. Due to the fact that there will be an evaluation of the regulations in place, consequentialism, welfarism and Pareto are briefly mentioned.

**Findings** – None of the current regulatory responses, at the exception to Sao Paulo and the initiative by the European Commission that are not based exclusively on market failure theory, are working. Indeed, Uber is still banned in various cities. In others, the regulatory burden is so high that it takes away any incentives that Uber created. Regulation is not the only exit to market failure, competition must play a role. Uber is based on deregulation of the market and to try to regulate such concept with conventional theories will only lead to failures and restrictions.

**Practical implications** – This article discusses the possible improvements to the already existing regulations.

**Originality/value** – This paper correlates the regulation of Uber in Brazil and in Europe, explaining the difficulties these regulations are creating for Uber.

Keywords: Uber, Regulation-Brazil, European Union, Market failure

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## Introduction

Regulations are simply rules and norms put in place to achieve social, political, environmental or economic outcomes that could not be otherwise achieved within an open marketplace. Regulations are necessary when competition within a market has the potential to harm society and exploit consumers. In such instances, regulations benefit consumers and can create a healthier business environment. The opposite view is often defended by those who believe regulations are unnecessary as markets can effectively regulate companies that are playing within the market.

Like the oldest profession, taxi service transcends borders and has its roots in the beginning of time. Every modern country – and thus every modern economy – has it. It is the trillion industry that trickles down to the ordinary man, putting food on the table for drivers, and delivering customers to essential destinations, enabling them to carry on their lives (ECONOMIST, 2015).

In early times, taxi service found itself regulated, partially regulated or fully regulated depending on the county. As the evils of the business grew roots, regulations took hold. Now every modern country regulates taxi service, as it brings people intimately close together, allowing the machinations and foibles of human beings to play out in a daily, gritty stage.

Uber – and companies like it – represents a disruptive tear in the taxi service economy. It threatens, as do all new ideas, an existing way of life. Driven by the internet, which enables driver and customer to communicate directly, Uber provides democracy to the taxi service industry, whereby many of the people once slaved to licensed cabs prefer Uber.

While it should be acknowledged that some markets do not have the necessity of regulation, others are heavily relying on regulation. History has proven that the taxi industry needs regulation, as an unregulated taxi industry is harmful to everyone, from the consumer to the driver and the operating companies. For instance, during the Great Depression in the US, people used to drive unlicensed taxis due to the absence of stable jobs. (MUNDY, 2015) Nowadays, such type of behaviour is still taking place, but is relying on new technological method, and is called Uber. Within the crisis that Brazil is currently facing and with people having problems finding jobs, many unemployed decided to drive for Uber, giving them a kind of stability. The number of drivers increased so much, alongside with the conflict of the taxicabs drivers, that government decided to regulate Uber.

Since its launch in Europe, Uber has faced a bumpy regulatory ride which was acknowledged by the European Commission. As a result of the bans in France, Spain and Germany, Uber has filed several complaints with the European Commission alleging that such bans are violating Article 49 (freedom of

establishment) and Article 56 (freedom to provide services) of the Treaty on the Functioning of the European Union (TFEU). The Commission has already demonstrated its support to Uber by investigating manners to regulate the ride-sharing service at a European rather than national level.

Uber is operating in a legal grey area, and consequently, various regulatory authorities have responded in a multitude of ways. These multiple ways of responding to the problem as well as the regulatory battles Uber has faced, and continues to face when entering new markets, has rendered Uber famous worldwide. This paper will explore the regulatory frameworks put in place in Brazil and the European Union to regulate Uber, their rationales and the possible amelioration that could be introduced. To this effect, this article evaluates the principles of regulatory intervention applied to Uber in Brazil, especially Brasilia and Sao Paulo, and the wish of the European Union to legislate on the matter. The hypothesis this article conveys is that sharing economy creates a paradigm shift in the consumption habits. Therefore, new theories should be applied to this new concept. Indeed, Uber is based on a deregulation of the market; hence to try to regulate such concept with conventional theories will only lead to failures and restrictions. The author decided to exclude the responsive regulation theory, as advocated by Ian Ayres and John Braithwaite, as she felt that this theory has been designed in developed economies and therefore, shows limitation when applied as a strategy in developing countries (BRAITHWAITE, 2006). The theory that best fits this article is the “market failure” framework for justifying regulation, advocated by Breyer, Ogus and Baldwin & Cave. Since there will be an evaluation of the regulations in place, consequentialism and welfarism will be briefly mentioned.

## 1. The concept behind Uber: sharing economy

The Internet has changed the way people are able to act and interact in many different markets (BOTSMAN, 2013). The Internet has also driven the development of technology-based platforms that enhance this lifestyle and that are based on the so-called sharing economy. The sharing economy is based on reductions in transaction costs, therefore enabling exchanges that were previously impossible. Firms built upon the sharing economy framework facilitate a more efficient use of underutilized resources or assets to the benefit of both owners and users.<sup>1</sup> Sharing economy businesses have often entered markets subject to

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<sup>1</sup>In a report commissioned by the European Parliament, sharing economy was defined as “the use of digital platforms or portals to reduce the scale for viable hiring transactions or viable participation in consumer hiring markets (...) and thereby reduce the extent to which

significant government regulation. Sharing economies can be distinguished from ‘conventional’ forms of economy due to the requirement of a digital platform which facilitates the interaction between parties (CHUNG, 2015, p. 29).

Uber is the perfect example of a sharing-economy business that was very successful. The company was created in 2009 in San Francisco with the initial proposal of offering luxurious transport. Uber’s ride-share mobile phone application (“app”) was launched in 2010 and rapidly expanded worldwide (UBER). As of December 2016, Uber was servicing 77 countries and 527 cities (Cities).

Uber offers:

“a technology platform that enables users of Uber’s mobile applications or websites provided as part of the Services to arrange and schedule transportation and/or logistics services with third party providers of such services... ”<sup>2</sup>

The app connects private drivers with users who need a ride from point A to point B. The app uses geolocalization technologies to accurately determine the distance between the drivers and consumers and certify the quick arrival of the driver. Customers set their pickup and drop-off locations, can then look at the estimated price and if, agreeing, request a ride, which a driver can accept or not (UBER). Upon acceptance by the driver, the driver’s details are sent to the customer, with his or her localisation and the estimated arrival time. The customer can follow the driver route until his or her location. If, for any reasons, the driver is taking a wrong turn or is not arriving, the customer can cancel the trip, free of charge within the five first minutes of the request. The customer can then order another Uber with the possibility of requesting the same driver if he or she is the closest to the customer’s location.

After the ride, every user of the services has the opportunity to rate the experience and leave additional feedback based on the cleanness, experience, drive, etc.<sup>3</sup> The ratings are recorded and aggregated. If the person has poor feedbacks, the low-ranking passenger or driver is removed from the Uber community (RUSTEN, 2015). Both passengers and drivers can check their ratings.<sup>4</sup>

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assets are under-utilised” (GOUDIN, 2016). The European Commission in its report defined these firms as “value proposition consists of creating a match between a peer owning a certain resource and a peer in need of that resource, at the right time and against reasonable transaction costs.” (COMMISSION, 2015).

<sup>2</sup>Terms & Conditions, nos. 3

<sup>3</sup>Terms & Conditions, nos. 4, para. 4.

<sup>4</sup>In the app under help> account and payment> account settings and ratings> I’d like to know my rating > submit.

The company determines the price through the calculation of a tariff/ km combined with a tariff for the time of displacement, using a similar method as used by the taxi services. The main difference between Uber and taxi is that payment of the services is made through Uber to the third party providing the services via a credit card previously registered by the user.<sup>5</sup> Recently, payments in cash have been accepted. Uber takes a percentage of the fare, in Brazil 25%, and transfers the rest to the driver as payment (How Does Uber Pay Drivers?).

Sharing economy and Uber present multiple challenges related to different areas of law for regulators. At the same time, Uber is using legal loopholes to avoid existing regulations. For instance, in some countries, Uber, by classifying its drivers as independent contractors rather than employees, avoids taxation. “The current frameworks have created a cloudy regulatory environment for Uber’s operations” (LOKE, 2015, p. 5).

All these questions and examples are only a taste of the regulatory hurdles Uber is currently facing. However, Uber is also playing with fire as its typical approach to entering a new market is to launch the app in a new city regardless of the legal framework in place. When facing regulatory challenges, Uber unleashes lobbyists and its newly loyal users to lobby governments and regulators (HELDERMAN, 2014). In other words, Uber has adopted a strategy of crashing the market and then dealing with the fallout. Such approach demonstrates that the company does not care about the regulations in place. As a result, it can be wondered if the company is victim of governments trying to regulate it or is playing a tricky game involving passengers and drivers that are depending on it. Such tactic will push some governments to regulate the company as a defiance to Uber’s defiance.<sup>6</sup> It can, therefore, be wondered whether Uber is engaging in regulatory avoidance, either legitimate or illegitimate.<sup>7</sup>

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<sup>5</sup>Terms & Conditions, nos. 3, 4, para. 1.

<sup>6</sup>Arrogance is the *leitmotiv* of many disruptive tech companies, such as Napster in music. These companies disdain things as they are, but things as they have an existing legal structure that has built up around them. The arrogance of the new companies thus disdains, in one sweep, not only the existing industry protocol (e.g., paying for music) but its concurrent legal structure (e.g., publishing laws).

<sup>7</sup>Illegitimate regulatory avoidance is when the service provider offers a service that, in substance, is within the purpose or goal of a relevant regulation but does not comply with it. On the contrary, legitimate avoidance is when the service provider is offering a service substantively different from the activity which is intended to be regulated, or when the regulation simply does not apply to the activity.

## 2. Welfarism and consequentialism

Perfect competition is an ideal state that does not exist.<sup>8</sup> In order to objectively evaluate regulation, the appropriate moral criteria should be provided. Economists, while evaluating regulation, have invariably had recourse to consequentialism and welfarism. Consequentialists evaluate all kinds of actions, including governmental actions, with reference to a neutral agent ranking of outcomes. Within the consequentialists, a subspecies is welfarism which only accepts well-being as the intrinsically morally relevant feature of outcomes. In other words, for welfarists, if the well-being in outcome x is the same as the well-being in outcome y, both situations are considered morally acceptable (BOADWAY e BRUCE, 1984). This principle is also referred to as the Pareto indifference principle because there is “no difference in the moral ranking of outcomes without a well-being difference” (ALDER, 2009, p. 592).

Most welfarists also accept the principle of Pareto-superiority. Under this principle, the logic is that if outcome x and y are giving the same advantages to every individual, but at least one individual is better off in x, then x is better than y. To avoid absurd cases and compare incomparable outcomes, the Pareto non-comparable was established. Under this principle, if by virtue of Pareto-indifference, x is not equally good as y, then it will be considered Pareto non-comparable.<sup>9</sup> (Chapter 1 Defining Efficiency) Two types of criteria are used. First is the criterion of Kaldor-Hicks efficiency, which is translated as if there is a hypothetical transfer of resources between the persons better off in x to the person worse off in x, making everyone at least as well off in both situations. The second criterion is to rely on the social welfare function (ADLER e SANCHIRICO, 2006; ADLER, 2007; ADLER, 2008; ADLER, 2010). This framework uses a utility function to calculate the well-being of each individual in a specific outcome.

These traditional economic views have created heated debates when applied to regulation - certainly so with the cost-benefit analysis, a technique widely used by economists and vigorously opposed by legal scholars (ADLER e POSNER, 2006; ACKERMAN e HEINZERLING, 2004). Due to the fact that no plausible and reasonably comprehensive normative accounts, that are not based on welfare, and would enable us to analyse regulatory interventions has not yet

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<sup>8</sup>As Viscusi stated: “If we existed in a world that functioned in accordance with the perfect competition paradigm, there would be little need for... regulatory efforts. All markets would consist of a large number of sellers of a product, and consumers would be fully informed of the product’s implications. Moreover, there would be no externalities present in this idealized economy, as all effects would be internalized by the buyers and sellers of a particular product” (KIP VISCUSI, 2005, p. 2).

<sup>9</sup>See the example given by Adler & Posner whereby in x one person gets a slight headache which she avoids in y, but in y millions die painful deaths which they avoid in x (ALDER e POSNER, 2006, p. 24-61).

been developed, the perspective adopted in this article will mainly follow the welfarism theory.

### **3. Regulatory theories: from market failure to deregulation**

Various motives exist to explain the wish of a government entity to regulate a specific field of law. The most frequent is to response to market failure (BALDWIN, CAVE e LODGE, 2012, p. 15). Structural problems are likely to be efficiently and effectively resolved by regulation (DUNNE, 2015). In a world more and more connected, regulation is necessary as the market itself fails to produce the expected results (FRANCIS, 1993, p. Ch.1). However, market failure is a necessary but not sufficient economic justification for state intervention (VELJANOVSKI, 2010, p. 27). In Ogus' opinion, market failure should be accompanied by private law failure before any state intervention occurs (OGUS, 2004, p. 30). Indeed, sometimes existing regulations are not efficient to counter structural problems. Instead, new types of regulations should be enacted to effectively respond to the needs of new businesses. Market absence is the second good reason for regulating a specific market.

Uber is not the first transport market that is facing problems. Its direct concurrent, the taxicab, has already passed through market failure and deregulation. The deregulation of taxicabs in the US has proved to be a failure for many reasons. For instance, among other things, prices increased, with fares becoming confusing and unpredictable to passengers, while the vehicle quality decreased. Taxi riders in low-density areas were neglected and access to 24/7 transportation became difficult. As a result, almost every city that deregulated taxicabs re-regulated the taxi market to reverse the process and provide a better service. (MUNDY, 2015)

It seems that legislators in the European Union and Brazil learned from the mistakes made with the taxi market and decided to quickly regulate Uber. But, is this approach the most appropriate? According to Prosser, it exists four rationales for regulation; 1) market-centered regulation which aims at maximizing economic efficiency and consumer choice, 2) regulation which aims at protecting human rights, 3) regulation aiming at enhancing social solidarity and, finally, 4) regulatory participation and deliberation (PROSSER, 2010, p. 11-20). As Prosser rightly said, it is a matter of description. In the same vein, Orgus argues that what constitutes public interest varies according to time and place, but also according to the values of the particular society (OGUS, 2004, p. 29). Indeed, regulatory laws are not limited to correcting and helping constitute market relations. More importantly, they provide frameworks of rights and processes which will avoid market fragmentation (SHEARING, 1994). Avoiding market fragmentation is an important step to be taken to allow the market to work properly. Regulation is the

primary method for the organization of social relations (BALDWIN, CAVE e LODGE, 2012, p. 22). Often regulation of this type is pursuing a public interest objective (MORGAN e YEUNG, 2007; HANTKE-DOMAS, 2003; LEVINE e FORRENCE, 1990).

Uber is based on the principle of offer and demand but, on top of that, on deregulation and market failure. Uber entered a market that was craving for changes. The more Uber will be regulated, the less interesting it will be compared to taxis, causing a decrease in the amount of work for drivers and a possible increase in the market fragmentation. Such decrease in driving can already be noticed with Uber Black in Brasilia.

At the same time, similar problems as those in the 1970's in the US are resurfacing; quality is slowly decreasing due to an increase supply of drivers and a decrease in drivers' earnings. Inexperienced drivers are struggling with the responsibilities of being professional drivers. As a result, some regulators have imposed pre-existing rules which currently apply to analogous markets, although Uber is not creating similar problems that the regulations are aimed at minimising (KOOPMAN, 2014, p. 5). Indeed, one of the problems created by the deregulation of the taxi in the 1970s, namely the decrease in the quality of service, is regulated by Uber itself, as passengers decide who stays and who leaves the app, by rating the drivers according to the services that were provided.

According to the market failure theory, regulation is justified only if certain failures are occurring in a free market and the market is unable to overcome the effects of such failures (BREYER, 1982; OGUS, 1994; BALDWIN e CAVE, 1999; SALANIE, 2000). Failures within the market can endanger the welfare of the society as a whole and hinder economic efficiency.<sup>10</sup> Starting from the premise of an idealized economy, where everyone is fully informed and fully rational, based on a free market equilibrium, failures of the idealized society can be identified. Such failures justify the actions taken by the government other than maintaining the conditions for market exchange. In other words, this theory explains that, when the market can no more regulate itself, there is a need for external regulation, mostly done by States. This theory is related to the social welfare function and shows that morally best outcomes can be produced by governments through free markets.

Failures within a market can be caused by externalities, monopolies, imperfect information<sup>11</sup>, etc. Externalities can be defined as the well-being of one

<sup>10</sup>Cento Veljanovski defines efficiency as a situation when: “[...] resources, goods and services are allocated to their highest expected valued uses as measured by individual willingness to pay, assuming that the most productive existing technology is used” (VELJANOVSKI, 2010, p. 19).

<sup>11</sup>Ogus described imperfect information as: “The assertion that observed market behaviour in the form of expressed preferences leads to allocative efficiency depends crucially on two

individual (A) depends on the well-being of another individual (B). Therefore, if (B) enhances his or her well-being, (A)'s well-being will be enhanced. Uber is based on externalities: as happy customers grade well allowing drivers to keep driving for Uber; under a certain grade, drivers are removed from the app.

Uber is exacerbating 'traditional' market failures. However, it can be wondered whether it is appropriated to impose rules restricting its activities or not. Indeed, one of the market failures in the taxi industry was the information asymmetries and market power that taxi had. In the case of Uber, these problems are greatly reduced or inexistent, as customers know beforehand the fare they might pay and also can enter a complaint if the driver did not, for instance, take the shortest way. Therefore, Uber should not be subject to regulation related to correcting these market failures.

The wide variety of reactions, from ban to imposition of existing regulations, suggests that there are radically different views on how Uber should be regulated. Uber entered in a sector with a long-standing government regulation which prevented effective competition and created monopolies, i.e the taxi drivers. Monopoly mostly leads to market failures and a need for governmental regulation. (ROSS, 2015) The divergent views about whether Uber should be regulated and if so, how, suggests that the main inquiry is the underlying purpose of the regulation, which will help to determine the applicability and relevance of a rule to Uber.

The main problem with regulation is that rules may fail to capture the intent of the legislator in substance (BLACK, 2007, p. 153). According to Julia Black, rules are either over or under inclusive because they are based on generalisations which are *per se* imperfect. Generalisations are imperfect as they can suppress relevant information or elevate unimportant information. Often rules fail to cover future developments (BLACK, 2007, p. 153-154). Uber often uses the argument that the law is overinclusive and inappropriately restricts its activities because the goals of the regulation do not apply to its activities caught within the regulation. Uber's competitors, on the other hand, argue that the laws be under-inclusive in

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fundamental assumptions: that decision-makers have adequate information on the set of alternatives available, including the consequences to them of exercising choice in different ways; and that they are capable of processing that information and of 'rationally' behaving in a way that maximises their expected utility. A significant failure of either assumption may set up a *prima facie* case for regulatory intervention" (OGUS, 2004, p. 38). However, Schwartz and Wilde disagree by advocating that the traditional approach to imperfect information is not sufficient to evaluate whether the intervention is justified or not. In their view, optimal information focuses on individuals rather than on markets, creating unhelpful assumptions. Instead, they suggest the inquiry should be whether competition amongst firms for particular groups of consumers who search for information is sufficient to generate optimal prices and terms for all consumers, including searching and non-searching customers (SCHWARTZ e WILDE, 1979, p. 636-640).

order to subject Uber to certain rules that are currently not applicable. Uber is, therefore, introducing an ‘unforeseeable course of change’ into the market.

As Cortez said:

“The plight of the modern regulator is to adapt old regulatory frameworks to new technologies and practices. This should not be as paralyzing as it seems.” (CORTEZ, 2014, p. 228)

Sofia Ranchordás followed this idea and argued that the balancing of interests be the core challenge of achieving successful regulation. As she rightly pointed out:

“Regulators should try to understand the challenges of innovation to traditional regulatory instruments and institutions– including how to marry the fast-changing character of innovation with the need for predictability and legal certainty, bridge innovation with regulatory procedure and requirements [...] and convince legislators and regulators to accommodate and incentivize social innovation.” (RANCHORDÁS, 2015, p. 443)

The exercise of balancing requires taking into consideration a number of factors and will greatly depend on personal perceptions on how this balance should be struck. A liberal approach would prescribe regulations not to hold back businesses (KOBIE, 2015, p. 12). Alternatively, the concerns of the regulator might predominantly be the safety and certainty:

“From a regulator’s perspective, a relevant focus point is whether the rationales for the existing or proposed regulations truly apply to the activity in question; if not, the regulatory framework should be altered.” (MAE LOKE, 2015, p. 27)

On top of these questions about the need for regulation, the rationale of such regulation should be investigated. Rationales for regulating Uber may be influenced by the innovative context in which it evolves. Theoretically, innovation can create legitimate reasons to avoid existing and perhaps outdated regulations, as the existing regulatory framework might not effectively deal with new technologies. To apply these regulations to innovations would lead to regulatory failure. Here, welfarism is important to evaluate whether regulatory intervention is justifiable or not.

#### **4. Regulation of Uber in Europe and the UK**

Uber’s first European market was Paris, starting in late 2011, and then was spread across the EU. Uber is currently active in 52 European cities across 22 of the 28 Member States (Cities). Within the European Union, Uber had a significant impact on the labour market. Indeed, solely in France, Uber’s enabled 20.000

drivers, mostly workers that were excluded from the mainstream labour market, such as minorities and other groups, to work (VINOCUR, 2015). Even though Uber created large advantages for the labour market and consumers, various courts across the Union have issued injunctions orders to suspend the firm's operations.<sup>12</sup>

The app's legal status varies considerably across the Union, with three broad distinctive categories of regulatory environments that can be identified. In few Member States, including Denmark, Finland, Poland, Czech Republic, Estonia and Lithuania, Uber faces no restrictions. In the majority of the Member States, Uber is allowed to operate, but its drivers have to meet licensing and other requirements. Finally, in few countries, the app is illegal or pending court rulings on its legality. While some countries that had imposed a ban have lifted it, such as Spain, several other Member States which had taken until now a *laissez-faire* approach, such as Denmark and Poland, are considering regulating the use of the app.<sup>13</sup>

#### 4.1 The existing model: divergent approaches to the regulation of Uber

EU Member States have taken several approaches to the regulation of the sharing economy. In Germany, Uber faced regulatory roadblocks, with, for instance, an edict against the company in the city of Berlin. Similar actions were taken in France, Belgium and Spain at either local or regional level, leading to a suspension of all or some of the services in these countries. State intervention has often followed protests or lobbying from competitors, such as taxi drivers alleging that they were being undercut by rivals who do not face the same regulatory burden.

In response, Uber filed complaints with the European Commission against France, Germany, and Spain, alleging a breach of Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU).<sup>14</sup>

Legal difficulties stem from the categorization of Uber and the qualification of the relationship between Uber and its customers. While Uber claimed that it only provides a digital platform for third party drivers, various European courts did not share this view.<sup>15</sup> The polemic question, in the EU, is

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<sup>12</sup>France, Germany, Portugal and Bulgaria. (BANCALEIRO, 2015)

<sup>13</sup>Earlier this year, the Spanish national competition authority required the Ministry of Transport to lift the ban imposed on private hire licences (CNMC, 2016; VALERO, 2015); For Poland (RYLUKOWSKI, 2015).

<sup>14</sup>Under EU company law a lawfully incorporated subsidiary, according to the threshold set in Article 21 of Directive 2013/34/EU, in one Member States enjoys the freedoms provided for in the TFEU.

<sup>15</sup>Uber mainly based its claim on the classification of the company as "transportation network company" in the California Public Utilities Commission (CPUC). According to

whether Uber is an information society services or a transport service. If the drivers were Uber's employees, Uber would be qualified as transport service and would be subject to the same regulations as taxis.

Information society services are regulated by European law, especially the Service Directive 2006/123/ EC. They also benefit from the freedom of establishment and the free movement of services in the TFEU. Recital 21 and Article 2 of the Service Directive defines information society services as:

“any services normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.”

However, in the same Recital 21, the Directive states quite clearly that:

“Transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive.”

Article 2(1) establishes the scope of the Directive as “This Directive shall apply to services supplied by providers established in a Member State.” While the exclusions are embodied in Article 2(2) which stipulates in paragraph d that “[S]ervices in the field of transport, including port services, falling within the scope of Title V of the Treaty.”

The Directive only provides a minimum harmonisation and grants two major freedoms to the companies it regulates. As a result, the regulation of those companies is more lenient. On the contrary, transport operation is only regulated at Member States level.

To shade light on the matter, a Spanish Court has requested a preliminary ruling from the Court of Justice of the European Union (CJEU) in *Asociación Profesional Elite Taxi* (COURT OF JUSTICE OF THE EUROPEAN UNION. CASE C-434/15, 2015). One of the questions referred requested the Court to define what kind of services Uber provides. Until now the case has not yet been decided.

Another similar preliminary ruling was introduced a bit later by a Belgian court (COURT OF JUSTICE OF THE EUROPEAN UNION. CASE C-526/15, 2015). The particularity of this case is that it has been initiated by TRB, which is a company in Brussels running a taxi call center and which is not subject to Brussels' taxi laws as it is only the taxi drivers on TRB's books that are registered. TRB provides a very similar type of service as Uber, except that TRB does not

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the definition of the CPUC, “transportation network companies (TNCs)” are companies that “provide prearranged transportation services for compensation using an online-enabled application or platform (such as smart phone apps) to connect drivers using their personal vehicles with passengers.”

use an app. In TRB's opinion, Uber relies on a piece of software that allows them to pick up people and take them on journeys akin to a 'taxi service'. The major argument used by TRB is that the Uber's drivers do not possess the relevant taxi license and are not subject to the relevant laws for providing a taxi service. Uber denies being in competition with TRB and reckons that it does not need taxi permits because it is merely supplying a dispatch service, similarly to TRB. On top of that, Uber does not fall under the 1995 Brussels Ordinance concerning taxi services and the hiring of vehicles with drivers, as the money the driver receives neither constitutes remuneration nor a wage. Rather, the money is simply compensation that helps private individuals with the costs associated with running their own car, and who chose to do so by sharing their car with others. Interestingly, TRB does not question the qualification of Uber as a service provider but instead attacks the company on the ground of remuneration. The Belgian judge referred questions mostly related to the principle of proportionality, enshrined in Article 5 of the TEU.

A London judge took a more pragmatic approach when asked whether the app was equivalent to a taxi meter or not. Without resorting to a preliminary ruling, the London judge decided that smartphones are not equivalent to taxi meters and, therefore, its users are not required to possess a license from the city's transport authority. The judge easily decided on the status of the Uber's technology and dismissed the argument made by the cab driver associations. Judge Duncan Ouseley ruled that the regulations do not cover "a device that relies on GPS signal in the course of a journey and forwards GPS data to a server." By ruling so, Judge Duncan Ouseley legalised Uber, at least in London, without requiring the intervention of the CJEU. However, Uber only won a small battle in the view of the many other claims that it is fighting around the world. Moreover, this decision could be later overturned by a higher authority in the UK.

In the meantime, yet another preliminary ruling was referred to the CJEU this time by France (COURT OF JUSTICE OF THE EUROPEAN UNION. CASE C-320/16, 2016). Once again, the question related to the definition of 'information society services' is key to the proceeding.

Germany was probably the most complicated battlefield that Uber had to face. Indeed, several lawsuits were initiated in Germany on top of the various bans in various cities.<sup>16</sup> As a result, Uber B.V, which is Uber's European subsidiary

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<sup>16</sup>In August 2014, the Higher Regional Court of Frankfurt am Main, based on a failure from the drivers of UberPOP to meet the requirements of section 2 of the German Passenger Transport Act (*Personenbeförderungsgesetz* (PBefG)), ended with a preliminary injunction against Uber (LG Frankfurt am Main, docket no. 2-03 O 329/14). However, the injunction was revoked later due to formal reasons (LG Frankfurt, docket no. 2-03 O 329/14). In March 2015, The Higher Regional Court of Frankfurt ruled against Uber and issued a Germany-wide ban on the service UberPOP (LG Frankfurt, docket no. 3-08 O 136/14.). At

with its headquarters in the Netherlands, only offered transport services provided by licensed independent professional drivers in both its UberX and UberBLACK, but also a standard taxi service through UberTaxi. UberPOP, which used private non-licensed drivers with their own vehicles, and which is called UberX in Brazil, was discontinued in all of Germany and many other European countries.<sup>17</sup>

Uber encountered its major roadblocks in Germany due to the German Passenger Transport Act (*Personenbeförderungsgesetz* (PBefG)). Indeed, under § 1, para. 1 first sentence, all transportation of persons with motor vehicles, trolleybuses and trams for remuneration or in the framework of the economic activity of an enterprise is subject to the Passenger Transport Act. Any regular or occasional transport of persons with motor vehicles falling under section 1 is subject to the acquisition of a permit, according to § 2, para. 1, sentence 1. However, there is an exception to the applicability of the Passenger Transport Act embodied in § 47, para. 1; if the price of the ride does not exceed the operating costs. If it is offered for free, the Passenger Transport Act is not applicable. §

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first Uber resisted by lowering its price to the equivalent of the cost of operation (35 cents per kilometre), to take advantage of the exception of the PBefG before completely abolishing the service. In Berlin, a taxi driver sued Uber in civil court alleging that its business model UberBLACK violated German competition law, because drivers were encouraged to make themselves available outside of the place of business without responding to a concrete assignment. In April 2014, the Higher District Court of Berlin granted a preliminary injunction against Uber (LG Berlin, docket no. 15 O 43/14.). Uber appealed the ruling and the appeals court overturned the measure, because the plaintiff had not enforced the injunction (KG Berlin, docket no. 5 U 63/14.). But, in February 2015, the Berlin Higher Regional Court held that the UberBLACK business model violates German competition law and issued a prohibition order against the company in Berlin (LG Berlin, February 2015, main proceedings, docket no. 101 O 125/14.). Uber's appeal failed (KG Berlin, December 11, 2015, appeal, docket no. 5 U 31/15.). The City of Berlin additionally prohibited UberBLACK, arguing that the service was not permitted according to the requirements of the PBefG as the UberBLACK drivers did not receive their assignments at the place of business of Uber and/or return to the place of business after the conclusion of a ride. Higher Regional Court of Berlin-Brandenburg upheld the administrative decision (OVG Berlin-Brandenburg, docket no. OVG 1 S 96.14).

<sup>17</sup>In August 2014, the Higher Regional Court of Frankfurt am Main, based on a failure from the drivers of UberPOP to meet the requirements of section 2 of the PBefG, ended with a preliminary injunction against Uber (LG Frankfurt am Main, docket no. 2-03 O 329/14). However, the injunction was revoked later due to formal reasons (LG Frankfurt, docket no. 2-03 O 329/14). Other German cities such as Hamburg and Berlin issued administrative decisions prohibiting Uber from offering services through its app, UberPOP. The Higher Administrative Court of Hamburg upheld the city's decision (OVG Hamburg, order of September 24, 2014, docket no. 3 Bs 175/14), while the Federal Constitutional Court declined to hear the case (Bundesverfassungsgericht [BVerfG], order of November 13, 2014, docket no. 1 BvR 2861/14). In March 2015, The Higher Regional Court of Frankfurt ruled against Uber and issued a Germany-wide ban on the service UberPOP (LG Frankfurt, docket no. 3-08 O 136/14.). At first Uber resisted by lowering its price to the equivalent of the cost of operation (35 cents per kilometre), to take advantage of the exception of the PBefG, before abolishing the service UberPOP completely.

46, *para.* 1 lists the additional requirements for the occasional transport of persons, which is defined as transport according to the customer's specific requirements. According to the second paragraph of section 46, only taxis (§ 47), excursion and long distance trip organizers (§ 48), and cars or buses-for-hire (§ 49) are allowed to carry out the occasional transport of persons. The definition of taxi in section 47 goes as follows:

“transportation of persons with motor vehicles which the professional makes available at publicly designated locations and with which the transport of a passenger to a specific location is performed.”

Furthermore, taxi drivers are obligated to accept a riding assignment within their assigned zones (§ 49, *para.* 4.). Prices for the ride are fixed by regulation (§ 51). Transport with cars-for-hire is defined as:

“transport of persons with motor vehicles which can only be hired as a whole and with which the professional conducts rides in which the purpose, destination, and course are determined by the passenger and which cannot be qualified as transport with taxis.”

Unlike taxi drivers, cars-for-hire may only accept assignments which were received at the place of business of the professional and had to return to the place of business after the conclusion of the ride (§ 49, *para.* 4).

Although Germany has a relatively strong and rigid regulatory framework, Uber was not yet fitting in any of the established categories. For both the Hamburg and the Berlin courts, Uber was not acting merely as an intermediary between the driver and the consumer but presents itself as a professional to the consumer. It was clear for both courts that Uber concluded the contract with the consumers and handled the payment, since a direct payment to the driver is prohibited by Uber's terms and conditions. Uber is the one contracting the drivers as it sets the prices and coordinates the assignments via its app. Both courts considered that the clauses in the terms and conditions made it irrelevant whether Uber simply acts as an intermediary or not.<sup>18</sup>

As a result of prohibition in various Member States, authorities at EU level are calling for a common approach. Indeed, the growth of the sharing economy businesses has caused tension in several Member States and claims that existing industries are being damaged started to flow in. In the meantime, a 2014 report from the Law Commission for England and Wales recommended the retention of the current two-tier regulatory system which distinguishes between taxis and private hire services. The report also recommended to repeal most of the existing legislation as in the Commission's opinion the law was unduly restrictive and

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<sup>18</sup>OVG Hamburg, *para.* 14; OVG Berlin-Brandenburg, *para.* 28-32.

contained confusing overlaps (LAW COMMISSION FOR ENGLAND AND WALES, 2014, p. 1.3).

#### **4.2 The Commission initiative**

After some complaints from Uber claiming that some of the Member States laws were infringing its right of freedom of establishment and services, which are provided for in Articles 49 and 56 TFEU, the European Commission decided it was time for it to provide guidance. Mid-2016, the Commission restated that countries should only ban sharing economy as a last resort.

The Commission in its new guidelines warned governments to think carefully before cracking down such firms, highlighting the revenues that such businesses create across Europe. However, regulating such business without damaging the ecosystem surrounding start-ups is hard, especially at European level. Certainly so, when no regulation of taxi was ever attempted at EU level and sharing economy based businesses are using the most complicated mean to regulate: technology. One thing is clear for the European Commission: stricter regulations on sharing economy companies are not a viable option, especially if Europe wants to remain attractive and compete with the US.

With a more lenient approach to regulation of sharing economy as a leitmotiv, the Commission's guidelines expressly stipulate that such companies should not be subject to sector-specific rules, i.e rules aimed at taxi, unless the purpose of the rule is to set the price of the service. At the same time, it is not the wish of the Commission to let sharing economy companies run as parallel informal economy operating free from regulation. The Commission, therefore, disagreed with the Law Commission for England and Wales, which advocated the application of broadly similar standards to drivers, vehicles and dispatchers, to the extent that regulation would meet the defined purposes of public safety, accessibility, enforcement of the legislation and environmental protection (LAW COMMISSION FOR ENGLAND AND WALES, 2014, p. 1.24).

Service providers should only be required to obtain licences "where strictly necessary to meet relevant public interest objections" as the Commission put it. The guidelines also recommend that Member States distinguish between individuals providing services on an occasional basis and providers acting in a professional capacity, by establishing thresholds based on the level of activity.

The guidelines are certainly a good starting point and will ease the tensions for a little while, however, it is not a long-term action. The guidelines will ensure that national legislations do not violate the freedom embodied in the EU treaties.

#### **4.3 The possible options to achieve a better legislation**

A level-playing field for drivers would be impossible to achieve due to the difference between taxis and Ubers. In September 2015, Transport for London

proposed new rules for taxi services. Under the proposals, drivers of private-hire minicabs face English-language and navigational tests, stricter insurance requirements and limits on bookings. Such regulatory rules would put in jeopardy Uber and consolidate the monopoly that taxis are enjoying.

Given the disparities between Member States, a single regulatory framework appears to be complicated to achieve. The Service Directive, even though probably applicable, gives room for manoeuvre to the Member States by allowing them to enact technical regulation, which must be notified to the Commission. Such possibility could lead to discrepancies between the regulations of the Member States but does solve the major problem of infringement by national laws of the freedom of services and establishment that Uber should enjoy under EU law. A better solution would be for the Union to enact a regulatory framework that covers all aspects able to infringe competition, the free movement of services and lays down standards. The main danger that such new common framework could create, and as is happening in Brasilia, is that the new rule inhibits the employment flexibility characteristic of Uber.

While enacting regulation, the European Commission should try to avoid various pitfalls, such as a regulation that limits the options available to consumers and providers. Otherwise, it will roll back the progress made. Moreover, flexibility and cost reductions should not be hindered by the new rules. An even more important point that should be avoided at any cost is onerous employment rules that will reduce employment opportunities and consumer welfare.

## **5. Regulation of Uber in Brazil**

Uber was launched in June 2014 in Sao Paulo while the process of regulation started on the 4<sup>th</sup> of May 2015, not even a year later, but was suspended by the city council of Sao Paulo on the 30<sup>th</sup> of June 2015. Similarly to the situation in Europe, there was a strong lobby on the taxis' side to ban Uber. The regulation was enacted on the 10<sup>th</sup> of May, 2016 through a decree. (G1 SÃO PAULO, 2015; PINHO, 2016)

### **5.1 The existing model**

Ex-President Dilma Rousseff criticized ride-sharing software Uber and said that Uber increases unemployment, adding to a chorus of labour concerns about the world's most valuable venture-backed start-up. The idea of regulating Uber came from her as already in 2015 she invited local authorities to regulate the service.

In the three major cities of the country, Sao Paulo, Rio de Janeiro and the capital Brasilia, a ban on the application was agreed (ASSOCIATED PRESS IN RIO DE JANEIRO, 2015). In Sao Paulo, Mayor Fernando Haddad override

attempts by city-council members to ban Uber and other apps through the promulgation of a decree. In Brasilia, although lawmakers had voted to ban the unregulated services of Uber, the Federal District governor decided to veto the ban and set up a commission to decide what was best for the city, following the example of Sao Paulo.

In Sao Paulo, the city created a new class of taxis, in which Uber was accommodated, and allowed only 5,000 operating permits. To fall within this new class, drivers must have official authorization from the city and work as independent contractors.

Surprisingly, Uber has a strong support in Brazil in the ‘person’ of CADE. Indeed, Brazil antitrust watchdog sees:

“(…) the advantages that increased competition could bring to users and advocate a negotiated co-existence between the ride-share service and city taxis.” (PARAGUASSU e BOADLE, 2016)

## 5.2 The regulation in Brasilia and Sao Paulo

According to Article 18 (1) of the *Política Nacional de Mobilidade Urbana*, whose general guidelines are established in the Law 12.587/2012, the regulation of transportation services is a competence of the municipality.

Sao Paulo is the pioneer in Brazil with regard to the regulation of Uber. Instead of following what mayors of other cities have done, the Mayor of Sao Paulo decided to find alternative solutions. The *Decreto Municipal no 56.981*, enacted in May 2016, instituted a specific regulatory regime for the jurisdiction of the municipal district. The solution adopted within that decree is relatively flexible, creative and dynamic.

Article 1 of the *Decreto Municipal no 56.981* establishes the scope and object of the regulation. The law applies to three similar activities that cannot be confused: 1) private initiative of transport of passengers for remuneration of public interest, which includes service as Uber; 2) solitary ride's services, i.e applications such as Lyft and Sidecar; and 3) the vehicle sharing without driver, service of rent of vehicles via sharing economy apps, such as Zipcar. This decree is only regulating sharing economy activities. Therefore, this decree is not applicable to taxis, which are falling under the regime of the *Decreto Municipal no 7.329/1969*. The legislator decided to give the most flexibility possible to this decree as it realised that more sharing economy companies would invade the market.

The wish for sharing economy companies to continue their work in the city is highlighted by the fact that Article 2 establishes guidelines regarding the use of

the road of the municipal district, with for instance Article 2(1) referring to the overload of the infrastructures, rather than restricting the use of these services.<sup>19</sup>

Within the regulation, one of the requirements is the registration of a platform as an Operator of Technology of Transport Accredited (OTTC), according to Article 3. The OTTC is subject to the requirements of Article 6. The requirements are: paragraph 1, to keep update maps in real time for the itinerary; paragraph 2, evaluation of the quality of the service by the users; paragraph 3, the driver's identification with picture, model and plate of the vehicle; and, finally, paragraph 4, emission of detailed electronic receipt for the user at the end of the trip. First, when one reads the requirements, it is obvious that they are based on Uber's way of functioning. Second, the discussion that is occurring in Europe is resolved by this regulation as Uber is not referenced as taxi but as platform.

This decree can be criticised as giving too much in for Uber and allowing Uber to create a monopoly as it already fulfils all the requirements of Article 6. However, Article 15 request drivers for OTTCs to have a professional driver's license, to register to the city hall similar to the Municipal Register of Drivers of Taxi (Condutox), to follow and be approved in a formation course with minimum content, to possess a passengers' accident insurance, besides the obligatory insurance (DPVAT). The age of the cars must not be higher than five years. These requirements are not applicable to shared ride's services.

Contrary to the decree enacted in Sao Paulo, the decree that was drafted in Brasilia in more rigid terms. Article 1 sets the scope and the definitions, while Article 2 deals with the question of taxation. Article 3 of the *Projeto de Lei 777/2015* lists the requirements for the drivers. The drivers must have driver license category "B" or higher with the mention that they are exercising a paid activity (paragraph 1), show a proof of residence less than 3 months old (paragraph 2), show that they are the owner of the car or have a credit for that car (paragraph 3), have a clean criminal record (paragraph 4), show that they have no debts (paragraph 5) and declare that they are not working for the government of the Federal District, trade union, State or municipality or other publicly owned companies (paragraph 6). Surprisingly enough, during my extensive use of the app, most of my drivers were public servants, driving for Uber to make some extra money.

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<sup>19</sup>Art. 2º "O viário urbano integra o Sistema Municipal de Mobilidade e sua utilização e exploração deve observar as seguintes diretrizes: I- evitar a ociosidade ou sobrecarga da infraestrutura disponível; II- racionalizar a ocupação e a utilização da infraestrutura instalada; III- proporcionar melhoria nas condições de acessibilidade e mobilidade; IV- promover o desenvolvimento sustentável da cidade de São Paulo, nas dimensões socioeconômicas e ambientais; V- garantir a segurança nos deslocamentos das pessoas; VI- incentivar o desenvolvimento de novas tecnologias que aperfeiçoem o uso dos recursos do sistema; VII- harmonizar-se com o estímulo ao uso do transporte público e meios alternativos de transporte individual"

Similarly to Sao Paulo, cars must have maximum five years or eight years for hybrid, electric or other technology using non-fossil combustive, Article 4 (1). Cars must also comply with the specificities listed in Article 4(2), namely that the distance between the axes is of 2650 mm, with air conditioning system, space for four persons, leather seats and at maximum seven seats. The value of the insurance must cover a minimum of 50.000 Reais, Article 4(4). In addition, cars have to be distinguishable by some visible signs of the company using its services, according to Article 5. Another requirement very similar to the requirement for taxis was introduced in Article 6, which requires the driver to visibly place an identification tag with his or her photo inside the car.

Article 7 stipulates all the documents that must be shown by Uber to prove that it is a company, making it a heavy administrative burden. Another restriction to Uber is in Article 9, which obliges the company only to accept payments with credit cards that were inserted beforehand within the app. The obligations of the drivers are enumerated in Article 10, with the most absurd being the prohibition for the driver to stop, in order to allow a client to drop in, on parking spots, streets or close to big building where there are commercial activities, service providers, sports, leisure, tourism or cultural activities as well as places with high flow of persons. Reading this paragraph, one may wonder where the drivers can stop, as in the first paragraph the drivers are prohibited to stop at places specially set for taxis or at bus stops. This bill makes the life of Uber and its drivers nearly impossible by impeding their work and giving preference to taxis, especially when reading Article 10 (1) in conjunction with Article 12, which deals with the sanctions involved. According to Article 12(2), the driver faces a sanction of between 200 and 2,000 Reais per infractions while the company faces a fine between 50,000 to 5,000,000 Reais. Thankfully, the Governor of the Federal District decided at the end not to impose quotas on the number of cars that could be registered in Uber (GUILHERME, 2016).

### **5.3 The possible options to achieve a better legislation**

The decree in Sao Paulo offers the flexibility that Uber needs and can be classified as a good regulation. However, in Brasilia, many improvements can be made. Indeed, reading this law, one can feel the hypocrisy of the regulator who enacted a decree so burdensome that a ban of the app would have been better. Especially so, since the buses in Brasilia are not reliable timetable-wise; prohibiting the Uber to stop to take a passenger in would be taking away an opportunity for the passenger to be on time. Moreover, it is common practice for private cars to do the services of the bus for the same price, called *transporte pirata*. However, these cars do normally only stop at bus stops or close to bus stops and are as unreliable as the buses are. The law enacted in Brasilia is privileging taxis to the detriment of Uber and against CADE's opinion. This law

was outdated before even voted, as it is based on old ideas and opinions, hermetic to changes and new technologies, sending a message to the rest of the world of a conservative city. The regulator in Brasilia, unlike the regulator in Sao Paulo, missed its chance to prove that Brasilia was an open-minded city.

## Conclusion

Taxis and Private Hire Vehicles (PHVs) provide a very local service. The majority of trips take place within a city, municipality or a region. As a result of this local focus, the taxi industry and its regulatory framework have developed in a widely divergent manner throughout Europe and the rest of the world. To some extent, the industry has also developed differently within the same country. Some cities have focussed on direct barriers to entry creating a maximum number of cabs and even allowed licences to be traded, whereas other have relied on more indirect barriers to entry into the industry. Uber entered this picture full of market failures and shortfalls. For instance, local governments often limit the amount of licences available for taxis, leading to a low availability in some area depending on the time, similarly to the situation during the Great Depression in the US.

While Uber does compete with regulated providers, such as taxi drivers, it is unclear why sharing economy firms should be subject to the same regulations. Looking at Baldwin's five criteria to assess the need of regulation, namely 1) Is the action or regime supported by legislative authority? 2) Is there an appropriate scheme of accountability? 3) Are procedures fair, accessible, and open? 4) Is the regulator acting with sufficient expertise? 5) Is the action or regime efficient? (BALDWIN, CAVE e LODGE, 2012, p. 27), the last two points are hardly fulfilled. The doubts of the European Court of Justice on whether Uber qualifies as a transport provider or as a technology company highlight the challenges that new firms are creating (AHMED, 2015).

Ogus advocates that regulatory intervention is not flawless and that there is not guarantee that such intervention will reduce inefficiencies. Furthermore, any gains may be outweighed by the increase in transaction costs (OGUS, 2004, p. 30). This view can be linked to the view of Dervojeda about regulation of sharing economy as she stated that "[i]n general, there is a lack of tailored policy frameworks for regulating new sharing economy industries" (DERVOJEDA, VERZIJL, *et al.*, 2013, p. 16). However, by regulating a service such as Uber, regulators face the risks to do more harm than good, especially when regulation occurs at an early stage. Such premature intervention can result in reduction of competition and also have a negative impact on consumer welfare. Uber was launched in June 2014 in Sao Paulo while the process of regulation started on the 4th of Mai 2015, not even a year later. This approach has been described as "a frantic game of 'whack-a-mole'", where regulators struggle to contain

innovations while even more pop up (CBC NEWS, 2015). Such intervention restricts the possibilities of the market to auto-regulate effectively. Regulation is not the ultimate answer to market failure, as it can protect monopolies rather than deterring them, as Stallibrass and Fingleton argue:

“[R]egulators and competition law enforcers should be careful that their interventions do not have the unfortunate side effect of perpetuating regulations that protect market incumbents from competition.” (STALLIBRASS e FINGLETON, 2016, p. 3)

Rules may fail to capture the intent of the legislator in substance (BLACK, 2007, p. 153). Rules are either over or under inclusive because they are based on generalisations which are *per se* imperfect. Applying existing rules to Uber can only lead to Uber relying on the over-inclusive argument, and its competitors and legislators relying on the under inclusive argument. Additionally, inappropriately applying conventional legislations or standard results in companies exploiting loopholes in the existing regulations as Uber is already doing.

Uber has introduced an ‘unforeseeable course of change’ into the market and therefore regulations that are specifically tailored to its needs without reprimanding its flexibility would be the only viable solution. For instance, deregulation has certainly increased customer choice but has not correspondingly resulted in a decrease in price. In Brasilia, the decree enacted is clearly not appropriate to Uber as many requirements are similar to the requirements for taxis while the decree in Sao Paulo is much more tailored to Uber. Indeed, the decree in Sao Paulo instituted a specific regulatory regime for the jurisdiction of the municipal district. The solution adopted within that law is relatively flexible, creative and dynamic. The only critic of the decree is that it gives too much in for Uber allowing it to create a monopoly.

In the European Union, the legal status of the company varies considerably with three broad distinctive categories of regulatory environments; no restriction, ban and allowed to operate under certain requirements. Uber faced some major roadblocks in Germany, France and Spain. However, such conducts were in direct opposition with some of the core provisions of the TFEU, especially Article 49 and 56.

The European Commission seems to have understood that Uber could not be regulated by existing laws due to the unforeseeable course of change that it introduced. The Commission tries to regulate sharing-economy firms without damaging their ecosystem and has already stated that stricter regulation is not a viable option. The Union has an important challenge ahead as no regulation of the taxi was ever attempted at EU level and sharing economy based businesses are using the most complicated mean to regulate: technology. The Commission is

convinced that sector-specific rules is not the most adequate approach to regulate Uber.

Legislators often, when faced with an innovation such as Uber, find themselves at a crossroads (RANCHORDÁS, 2015, p. 1). Uber is blurring the regulatory line. It presents regulators with both opportunities and challenges. As Adam Thierer and others pointed out:

“We argue that the Internet, and the rapid growth of the sharing economy, alleviates the need for much of this topdown regulation, with these recent innovations likely doing a much better job of serving consumer needs. When market circumstances change dramatically—or when new technology or competition alleviates the need for regulation—then public policy should evolve and adapt to accommodate these realities.” (THIERER, KOOPMAN, *et al.*, 2015)

Uber has introduced dynamic in a typically static sector. Innovation is beneficial as it can better serve consumers' needs, but, at the same time, it brings risks and uncertainty to the market. These uncertain conditions can only be balanced through regulation (VAN WAARDEN, 2005, p. 230). However, the relationship between innovation and regulation is full of paradoxes and dilemmas, the most important being competition versus regulation. Regulation and competition are very close relatives that have a complicated relationship. Regulation can reduce the uncertainty innovation creates to a tolerable level, which may increase incentives for further innovation. Competition policy is essential to keep the economy working, certainly when regulation fails. However, competition law is rarely sufficient in sectors with persistent market failures. Indeed, competition law alone sometimes does not create competition. In these cases, monopolies are the main rule (LAROCHE, 2000). Monopolists behaviours, with complete refusal of access to competition, lead to structural problems. Structural problems are likely to be efficiently and effectively resolved by regulation (DUNNE, 2015). Regulations will enable the entry of more competitors into the market, increasing competition, lowering prices and enhancing consumer welfare. Just as competition alone will not cure market failures, regulation will not automatically generate changes or create ideal behaviour. The two need to be combined. Frequent competition law intervention creates better regulation.

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