The “Uber Cartel”: New Wine in Old Bottles?

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1. Introduction

As a result of the enormous development of communication and information technologies in the last decades, a new economic and contractual paradigm has emerged, which academics, observers and the general public describe as collaborative, sharing, peer-to-peer, access or demand economy. A large array of business models fall under this rather imprecise new category, but there are some common elements that most seem to share. Among them, we can count the heavy reliance on multi-sided online platforms, which create a huge virtual marketplace where non-professional sellers or service providers can capitalize their cars, their houses or whatever they have to offer, and that can be of use to others who are willing to pay for them.

Digital platforms are, therefore, at the very heart of collaborative economy models. And this, in turn, raises a new question – or rather, amplifies a question that may be raised whenever the marketplace owner is not the same person who provides the goods and services on display: the interference, and its variable degree, that the platform owner may exert upon how sellers or service providers (its professional users) conduct their businesses, manage their relationship with consumers or set their prices. One of the main questions to ask is, thus, whether a considerable degree of interference by the platform owner might suggest that he should be treated not as a neutral caretaker of an intangible and potentially worldwide market, but instead as a concerned party in the businesses that take place there.

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2 We prefer the term “collaborative economy”, as it is the one that better underlines the collaborative element (rather than sharing) present in the business model. Indeed, when the platform allows a driver to recoup the investment made in a vehicle and turn it into a profit, this seems to be more a collaborative effort than an act of “sharing”. Likewise, “peer-to-peer” relationships seem to imply that provider and user are able to find each other in the marketplace without the brokering of a third party, a logic that does not apply to the Uber business model. In addition, it’s the expression chosen by the EU Commission in its 2016 communication on the matter. See “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European agenda for the collaborative economy”, COM(2016) 356 final.
3 Sundararajan (2012) and Rassman (2014, 81) stress “the allocation of underutilized space, skills, and goods by matching providers who have specific assets or skills with the people who need them.” Cannon (2014, 25), Bond (2015, 78) and Bales et al. (2017, 466) all speak of “an economic system built around unutilized human and physical resources during certain times of the day.”
Such interference is often practically non-existent, as is the case in many platforms where both professional and non-professional dealers are allowed to offer and sell commodities. Typically, the terms of the deal (price, payment method, transportation, inspection, return policies and so forth) are discussed solely between seller and buyer. The platform owner will gladly be confined to the role of setting its general conditions and terms of use, and charging a flat fee or a commission over the user’s sales. In many cases, the platform provides a secure channel for payments, which, in turn, is a rather efficient way to charge those fees or commissions. It also often monitors the behavior of the parties involved, which he does through either a simple rating system, or receiving comments and complaints. In any case, a seller, provider or client that does not comply with the terms set by the platform owner may be banned from using it, and therefore prohibited from carrying out his business in the said market. Even though this applies to both suppliers and final consumers, it is far more relevant for the first category of users, as they are the ones who support its maintenance costs, and, on top of that, the ones whose jobs or businesses can depend on being allowed to use it.

With some more or less important differences this is, by and large, the pattern we find on popular platforms like eBay, Amazon or the portuguese platform OLX. In the private accommodation sector, Booking, Airbnb or TripAdvisor follow a similar model: their owners interfere little, or not at all, with the way the service is provided, and the only assessment of the quality of the services comes from the users’ ratings. Sometimes payments are made through the platform and other times directly to the providers (who will later pay the platform’s fees separately); in either case, the accommodation providers are free to set their prices.

Despite a large variety of competition-related matters arising from all kinds of collaborative businesses, this paper will not discuss models where the platform owner

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4 These problems will not be discussed here, as each of them could easily be the subject of a separate study. Anyway, one common accusation is that of abuse of a dominant position by some of these platforms, regardless of their business model, which can come forward through many different forms. Recently, Booking.com was under fire in Germany and Turkey because of its “guaranteed price” clauses, which seriously undermine smaller competitors, unable to offer such a comfort to their users. Uber has also been under attack due to its “dynamic pricing” policy, which, some argue, is often comparable to excessive pricing policies (we will discuss this matter further, in s. 3.3). More recently, there were also accusations regarding the alleged use of a software (suggestively called Helli) which would allow the platform to identify drivers that worked for rival companies, who Uber would then over contract in order to prevent that outcome. (See Issac et al. 2017). Unexpected “terminations of collaboration” based solely on user ratings, whose legitimacy, validity and accuracy is extremely difficult to verify, may also turn easily into an abusive practice if they are used to pressure drivers into accepting worse working and payment conditions. Regarding this matter, art. 12 of the Portuguese Competition Act contains a mechanism called “abuse of economic dependence” (which is unknown to EU law but exists, for instance, in France: see arts. 420-2 and 442-6 of the Code de Commerce). This regime can prevent non-dominant firms from abusing their relative power towards smaller undertakings. One possible manifestation of such an
acts as a stranger to the service provision. Instead, we will focus upon a model where it is very unclear where the role of its owner as a mere marketplace provider ends, and where his managerial (or at least co-managerial) functions begin. We will try to describe it in the next section.

2. The Uber model

The Uber business model (followed by other platforms, such as Lyft or Cabify) relies very heavily on an application used on smartphones and similar devices, which instantly matches drivers and passengers through a geolocation system. This free, portable and easy-to-use software is at the core of Uber’s success, as it is able to locate both the user and all nearby Uber drivers immediately, enabling a very quick service. It informs the user of the identity of the driver who will pick him up, and, if the user choses to reveal his destination, makes an estimate of the final fare, subject to slight modifications if the duration of the ride exceeds what would be normal for the same journey. The application also processes the final payment through an account opened by the user, to which he had previously transferred some funds. Uber later transfers that payment to the driver, retaining a fee for the use of the platform’s software.\(^5\)

Uber repeatedly claims to be a mere tech platform with no interest in the business of transporting passengers, its business (and its market) being developing, providing and managing a digital tool by which drivers and riders can meet in an easy, efficient and economical manner. A tool through which anyone with a driver’s license, some spare time and a vehicle that abides to the platform’s requirements can make an extra salary with a rather adaptable schedule; and, at the same time, provides users with an alternative to the traditional Taxi services, which have for decades benefited from legal or de facto monopolies in most markets. In fact, adding to the agility that the application allows, it is

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\(^5\) Fees are said to be as high as 25% of the final fare, depending on the market and the specific Uber service concerned.
common to hear users, when comparing Uber service to Taxis, mentioning that drivers act nicer, vehicles are newer and better, they get to choose the radio station and the temperature, and are even often given a bottle of water or equivalent treats (Carvalho 2016, 227). In short, it’s a service that has endowed the market with a new and efficient product, which seems to serve positively both providers and consumers by delivering more features than serving as a mere virtual cab stand, and that can be regarded as a step forward in passengers’ comfort and security, and as creating new working opportunities for anyone who is able to drive (Geradin 2017, 9). To mention only a few:

- payments are made within the app, dispensing with the use of money or credit cards by the passenger; this is a substantial advantage considering that many cabs still don’t accept cards, and that more and more people carry with them very few, if any, currency;
- passenger monitoring of the driver’s location and identity, and vice-versa, increases safety on both sides of the ride, since this data will be stored in the application log – which is very different from picking up an unknown driver or passenger on the street; on a perhaps less important level, it is also of great use on the recovery of lost objects;
- the same app account can be shared by different users in different devices, which, for instance, allows children or adolescents to use their parents app and travel much more safely, since their parents immediately know the identity of the driver and the exact time and place in which the service is requested and executed;
- drivers can adapt their working hours with great flexibility, and easily turn their spare time into a second job; this cannot be underestimated if we keep in mind that Uber was launched in 2010, with a worldwide economic crisis at its peak and unemployment reaching great heights.

So far, we seem to be describing a sort of Columbus’ egg in the private transportation sector, where all is progress and advantages to the entrepreneur, the workers and the final users. But can it really be so perfect?

3. Is it a cartel?

As described, the Uber model brings a set of new functionalities for users, as well as new jobs and business opportunities for drivers who want to become partners.
However, all this is not without consequence. Creating and establishing a strong and reliable brand is incompatible with significant differentiations in the way the service is provided. This means that drivers working with (or for) Uber must follow strict guidelines regarding their vehicle, their conduct and their reliability—which is more than comprehensible. The problem, in terms of competition rules, is that Uber also determines another key element of the service: the price of the ride.

In competition law, the practice of standardizing the price of a service provided by thousands of independent professionals and undertakings is called cartelization. It is the most serious and widespread competition offense, and its condemnation is unanimous in practically all jurisdictions. In many of them, it is even considered a crime, at least in the most serious cases. Let us reflect, then, if the Uber model meets all different elements present on the definition of a cartel.

3.1. The existence of separate undertakings

To have a cartel there must be at least two separate undertakings, not only from a legal, but also from an economic standpoint. In EU law, this derives from the interpretation of the legal texts made by the Commission and the CJEU; in Portuguese law, it is explicitly stated on art. 3(2) PCA. This means that companies that find themselves in a group or control relationship will not be treated as a cartel, even if they are based in different jurisdictions. Any agreement between a parent company and its subsidiary, or between companies belonging to the same group, is deemed to take place...

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6 This is true for most of the common law jurisdictions (USA, Canada, United Kingdom, Australia or South Africa), but also for many other European jurisdictions (Belgium, Denmark, France, Germany or Italy, to mention just a few), and other countries such as Brazil, Japan, Israel or the Philippines. For a recent survey on the matter, see Simpson 2016.

7 This question has already reached the courts in the United States, where Spencer Meyer, a Uber customer, has filed a complaint with the New York Southern District Court against Travis Kalanick (Uber co-founder, and, at the time, its CEO), alleging that the defendant “had conspired with Uber drivers to fix prices through the Uber mobile application(...) in violation of federal and state antitrust laws”. Judge Jed Rakoff has denied Kalanick and Uber’s motion to dismiss the complaint and submit the case to arbitration, as the Judge found that “Mr. Meyer did not have reasonably conspicuous notice of the terms of service and did not unambiguously manifest assent to the terms” (See Meyer v. Kalanick, 200 F. Supp. 3d 408, 420; S.D.N.Y. 2016). However, in August 2017 the Second Circuit Court of Appeals in Manhattan overturned that ruling. The case is still pending a decision.

8 This doctrine is well established since the EU Commission decision in Christiansen & Nielsen (Negative clearance under Art 85 EEC, [1969] OJ Nr. L 165, 1).

9 The CJEU first stated the single economic entity doctrine in its decision of 25.11.1971, Beguelin Import Co. vs. S.A.G.L. Import Export, C 22/71 [1971] ECR 949, para. 4: “The relationship between two companies and one of which is economically wholly dependent from the other cannot be taken into account in determining the validity of an exclusive dealing agreement entered into between the subsidiary and a third party.”
within a single economic unit, and therefore is equivalent to a mere internal division of tasks within that single entity.

According to what Uber repeatedly claims, there is no relation of employment or subordination between itself and its employees. Each driver is free to decide whether or not to provide the services offered, as well as many of the conditions under which he will do it. This seems to be an unambiguous statement, produced by the main concerned party, as to the fulfillment of this first element. However, and as will be further explained, is one that different Courts in different jurisdictions have recently been rejecting. We do not need to say that answering affirmatively to this question is a prerequisite for starting a discussion on whether there is cartel in the Uber system.

3.2. The drivers as single undertakings

It is undisputed that a cartel can only consist of undertakings. Consequently, we can only consider treating Uber as a cartel if drivers can be regarded as such.

Although the Treaty and secondary EU legislation do not contain a notion of undertaking for competition law purposes, the CJEU and the Commission have long established a rather comprehensive concept, which embraces “every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed” (Van Bael and Bellis 2010, 17). Such an ample notion is apt to include large conglomerates as well as individual entrepreneurs, small business owners, or even liberal

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10 According to para. 2.2.1. of the 01.07.2013 “Partner Terms” (a document “purporting to govern the terms of the relationships between Uber and the drivers”), “(t)he Partner acknowledges and agrees that he will retain and, where necessary exercise, sole control over the Driver (...) Uber does not and does not intend to exercise any control over the driver – except as provided under the [Partner] Agreement and nothing in the [Partner] Agreement shall create an employment relationship between Uber and the Partner and/or the Driver or create either of them an agent of Uber... Where, by implication of mandatory law r otherwise, the Driver and/or the Partner may be deemed an agent, employee or representative of Uber, the Partner undertakes and agrees to indemnify, defend and hold Uber harmless from and against any claims by any person or entity based on such implied employment or agency relationship.” See the October 28 2016 decision of the London Employment Tribunals in Aslam and Farrar vs. Uber, Case Nos. 2202550/2015 & others, para. 33.

11 Uber has already claimed, inter alia, that drivers are free to alter the rates that will be charged to the final customer. However, the app does not give the drivers any option to change the fee —, which, in addition, is paid directly to Uber. In the decision mention in the previous fn., the Tribunal noted that “(s)trictly speaking, the figure stipulated by Uber is a recommended fare only and it is open to drivers to agree lesser (but not greater) sums with passengers. But this practice is not encouraged and if a lower fare is agreed by the driver, UBV remains entitled to its ‘Service Fee’ (...) calculated on the basis of the recommended amount.” (para. 19)
professionals such as lawyers, doctors, customs agents, agents and football players. In this light, we believe that independent professional drivers engage in an economic activity, and that the dimension and complexity of their businesses does not hamper their qualification as undertakings for competition purposes. Considering the examples above, we cannot think of any reason to do so.

One important remark should be made. If it is true that small businesses cannot decisively influence the market (thus harming competition in the sense of art. 101 TFEU) when they act alone, or when a few of them enter into any sort of agreement, they can nevertheless collude in a degree that may be relevant for cartel qualification purposes. Price-fixing regulations emanating from professional Boards are a recurring example of what has been said. The Portuguese Competition Authority and courts have already taken

12 In Wouters and Others v. Algemene Raad van de Nederlandse Orde van Advocaten, C-309/99 [2002] ECR I-1577, para. 46, the CJEU has made clear that lawyers fall under the concept of undertaking: “Members of the Bar offer, for a fee, services in the form of legal assistance consisting in the drafting of opinions, contracts and other documents and representation of clients in legal proceedings. In addition, they bear the financial risks attaching to the performance of those activities since, if there should be an imbalance between expenditure and receipts, they must bear the deficit themselves. (...) That being so, registered members of the Bar in the Netherlands carry on an economic activity and are, therefore, undertakings for the purposes of Articles 85, 86 and 90 of the Treaty.”

13 Pavel Pavlov and Others v. Stichting Pensioenfonds Medische Specialisten, Joined Cases C-180/98 to C-184/98 [2000] ECR I-6451, para. 77: “The self-employed medical specialists who are members of the LSV therefore carry on an economic activity and are thus undertakings within the meaning of Articles 85, 96 and 90 of the Treaty.”

14 Commission v Italy C-359/96 [1998] ECR I-3851, paras. 36-38: “The activity of customs agents has an economic character. They offer, for payment, services consisting in the carrying out of customs formalities, relating in particular to the importation, exportation and transit of goods, as well as other complementary services such as services in monetary, commercial and fiscal areas. Furthermore, they assume the financial risks involved in the exercise of that activity. (...) If there is an imbalance between expenditure and receipts, the customs agent is required to bear the deficit himself. (...) In those circumstances, the fact that the activity of customs agent is intellectual, requires authorisation and can be pursued in the absence of a combination of material, non-material and human resources, is not such as to exclude it from the scope of Articles 85 and 86 of the EC Treaty.”

15 Suiker Unie and Others v Commission, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 [1975] ECR 1663, paras. 541-542: “The position is different if the agreements entered into between the principal and his agents, whom the contracting parties call ‘trade representatives’, confer upon these agents or allow them to perform duties which from an economic point of view are approximately the same as those carried out by an independent dealer, because they provide for the said agents accepting the financial risks of the sales or of the performance of contracts entered into with third parties. For in such cases the agents cannot be regarded as auxiliary organs forming an integral part of the principal’s undertaking, so that a clause prohibiting competition which they entered into may be an agreement between undertakings which is prohibited under Article 85.”

16 Union Royale Belge des Sociétés de Football Association ASBL and Jean-Marc Booman, Case C-415/93 [1995] ECR I-5040, para. 73: “In response to those arguments, it is to be remembered that, having regard to the objectives of the Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty (see Case 36/74 Walrave v Union Cycliste Internationale [1974] ECR 1405, paragraph 4). This applies to the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service (see Case 13/76 Dona v Maniero [1976] ECR 1333, paragraph 12).”

17 See, on this respect, the Communication from the Commission (2014/C 291/01), Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), esp. para. 8: “The Commission holds the view that agreements between undertakings which may affect trade between Member States and which may have as their effect the prevention, restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty (...) if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets (agreements between competitors)”. Note that according to the Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (2011/C 11/01), “two undertakings are treated as actual competitors if they are active on the same relevant market.”
action against the doctors,\textsuperscript{18} vets\textsuperscript{19} and dentists\textsuperscript{20} Boards, as they were considered associations of undertakings in the sense of art. 9 of the Portuguese Competition Act (hereinafter, PCA),\textsuperscript{21} and those regulations, imposed on the activity of thousands of individual professionals, had a harmful effect upon the prices, the market and the consumers.

Joining the dots, we can now establish that what the public at large perceives as “Uber” is, in fact, an immensely vast network of agreements between, on one side, a vast multinational corporation that develops and provides a business application and some of the means to use it, and on the other end thousands of (mostly) small transport undertakings that pay a fee for using it; agreements between separate entities that should be considered undertakings for competition law purposes; agreements that may well be considered as a cartel, if their object or effect is to eliminate business risk between parties or to exclude competitors.

3.3. Price-fixing among competitors

Price-fixing is one of the oldest forms of hardcore cartels. Their particularly impairing effect upon the market stems from the fact that they eliminate the price element on competition, allowing different corporations to maintain price standards that are able to secure a safe profit without the risk of rivals winning market shares by reducing their own prices. As in most competition offenses, it may harm non-cartelized competitors\textsuperscript{22} as well as consumers, who have no other option than paying the amount that was agreed upon by alleged rival companies. Having this in mind, many competition statutes, as is the case of TFEU and with PCA, offer an illustrative list of the most critical types of cartels. Both include, at the top of that list, cartels that “directly or indirectly fix purchase or selling prices or any other trading conditions”.

As we have seen before, the Uber app sets the price of the ride by taking into account the distance driven, the time spent and the demand for vehicles at that particular moment. Which is to say that, even though Uber has claimed otherwise, drivers have no

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\item[\textsuperscript{18}] Decision of the Tribunal da Relação de Lisboa (9ª secção) from November 22th, 2007, Proc. 5352/07-9.
\item[\textsuperscript{19}] Decision of the Tribunal da Relação de Lisboa (9ª secção) from June 5th, 2007, Proc. 8638/06-9.
\item[\textsuperscript{20}] Decision of the Tribunal da Relação de Lisboa (9ª secção) from June 19th, 2008, Proc. 1372/06.
\item[\textsuperscript{21}] Art. 9 PCA is a quasi-transcription of art. 101(1) TFEU.
\item[\textsuperscript{22}] If the members of the cartel agree on charging unusually low prices (even outside a predatory price scenario), other companies may be unable to be equally competitive, and thus forced out of the market.
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intervention on setting the final fare. And this, in turn, shows that a whole sub-sector of the transportation activity—in which Uber, on top of all, has a dominant position in many markets—is subject to privately regulated\(^\text{23}\) price-fixing arrangements.

Uber perfected its price-fixing to the point of immediately adapting it to concrete offer and supply equilibrium in a given time and place. If there is a shortage of vehicles (be it because there is an unusual demand for rides or because there are less available drivers), ride fares automatically rise to the price level costumers are now willing to accept, as a consequence of such scarcity. Some authors have praised this surge pricing mechanism as an innovative step towards market equilibrium and consumer satisfaction (Meyer 2016).\(^\text{24}\) Costumers who do not really need an Uber will not be willing to pay a higher price, and thus will manage to get a cheaper alternative and leave the available cars for those who can’t do so; on the other end, if fares are higher so is the drivers’ pay, and more drivers will be available. The fare rise will trigger an increase of the supply.\(^\text{25}\) This system, however, has apparently a serious flaw. It has been reported that drivers in some cities have teamed up to artificially raise prices through a rather simple mechanism: massively logging out of the app at a given time, making the algorithm “believe” that less drivers will be available, and then log in again when it has increased the fares. Of course, the one ultimately cheated is the final user, as he is the one who will pay for the artificially excessive fare. Anyway, and interesting as it is, we won’t discuss this topic further, as it brings no great contribution to the conclusion we believe had already been reached: Uber fixes the price that its partners charge.

One last explanation is still necessary. Strictly speaking, drivers do not collude among themselves. All they do is accepting the flat fares set by Uber for all of them, knowing beforehand that all “competitors” will charge the same. There is no agreement between competitors, but instead a bundle of agreements coordinated by a non-

\(^\text{23}\) We say “privately regulated” since Taxis, which constitute the other large segment of the private passenger transportation business, are in most jurisdictions subject to public regulations that include fixed prices. These public regulations were justified as Taxis have provided an almost public service for decades, as a necessary complement to \textit{stricto sensu} public transportation. That is why traditional cab drivers, contrary (at least for the time being) to those working under these new model businesses, are allowed to use Bus lanes, to occupy public street space (the “cab stands”), and have a special tax status.

\(^\text{24}\) Geradin (2017, 9) also notes that “Uber’s surge-pricing strategy, which increases prices during periods of high demand, has the potential to delay or divert peak-hour demands because riders may wait to travel or use public transit instead”.

\(^\text{25}\) The mechanism applies to transportation by car the same pricing principle that is valid to air travel or hotel reservations: fares are dynamic, and will rise when demand is higher. The problem with implementing this policy on private hire cars is that consumers are not used to, and find it difficult to accept, price uncertainty on such an everyday commodity.
competitor. Since each driver only has an agreement with Uber, it could be argued that this would amount, at most, to something similar to a resale price maintenance agreement, whereby the supplier of the main commodity (the app) sets the price of the final service (the transport). Conceivably, it could be treated as a vertical restraint, or, if all other premises were fulfilled, as an abuse of a dominant position. The collusion element would nevertheless be missing, as there are no “agreements between undertakings, decisions by associations of undertakings or concerted practices” to be sanctioned. At any rate, there are no agreements between the undertakings whose final prices are being fixed.

Recently, however, this kind of behavior has been considered a cartel, albeit of a different sort, and this kind of agreements have been called hub-and-spoke conspiracies. Uber is acting, in fact, as the hub through which information regarding fares reaches all drivers (the spokes, in the bicycle wheel analogy used to name those cartels; see Orbach 2016; Clark 2017). Lacking a stricto sensu agreement, their acknowledging of supposedly confidential information will make them liable of concerting their prices—which is a conduct equivalent to a proper agreement, as far as art. 101 TFUE is concerned. Even if this cartel was only made possible by the intervention of a company who is in a vertical relation towards all others, its effects can be as detrimental to trade as any other (more conventional) type of collusion.26

4. The exemption requirements

Art. 101(3) TFEU establishes a fourfold requirement for exempting otherwise forbidden agreements between corporations. The discussion of the particular conditions regarding their invocation is far beyond the scope of this study, so we will just focus on some aspects of each of the requirements.

26 In Meyer Vs. Kalanick (mentioned in fn.7), District Court Judge Jed Rakoff stressed this point by quoting the decisions in United States v. Apple, Inc., 791 F.3d 290, 314 (2d Cir. 2015) (“[C]ourts have long recognized the existence of “hub-and-spoke” conspiracies in which an entity at one level of the market structure, the “hub,” coordinates an agreement among competitors at a different level, the “spokes.” These arrangements consist of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the [hub’s] terms, often because the spokes would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing.”) and Laumann v. Nat’l Hockey League, 907 F. Supp. 2d 465, 486-87 (S.D.N.Y. 2012), (“where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade.”).
4.1. “Contribution to improving the production or distribution of goods or to promoting technical or economic progress”

The first requirement, contained in the *chapeau* of arts. 101(3) TFEU and 10(1) PCA, addresses the need for a discernible progress, for a measurable economic asset that can counterbalance the harming effects of the agreement. As the CJEU put it, there must be “appreciable objective advantages of such a kind as to compensate for the resulting disadvantages of competition”, which may be assessed by the Commission through a “prospective analysis” regarding its occurrence.

We must ask, therefore, whether the Uber app, and the service it provides and allows, constitutes such an appreciable progress within the market for passenger transportation as to compensate the negative effects of price fixing upon that same market. Even though this is assessment is quite a difficult one to make in a rigorous way, we tend to say it does. The “social and economic” advantages provided by the Uber business model, with all that it entails, seem to be implicit by the overwhelming acceptance of this service in almost every place it settles. For the reasons mentioned above (see s. 2), we believe they represent a step forward in terms of comfort, security and reliability of private transportation service that is significant enough to qualify for this purpose.

4.2. “Allowing consumers a fair share of the resulting benefit”

In a service with these characteristics, an agreement that fulfills the first condition for exemption is very likely to fulfill the second as well. This is because the progress or advantage obtained will resonate directly on the final consumer’s welfare—the increase in comfort, security and reliability that we have just mentioned. In any case, what we must evaluate is whether “the overall effect on consumers in the relevant markets [is]
favorable”, and not, of course, if “each consumer individually [derives] a benefit from the agreement”. Again, and for the reasons already explained, we believe it does.

4.3. “Not imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives”

Adding to the two positive requirements stated on the chapeau, Art. 101(3) further states two negative conditions in items a) and b).

The first, often referred to as the “proportionality requirement”, reflects a general rule of EU law according to which “all exemption and derogation provisions must be interpreted restrictively (...). The parties must aim to achieve their goal in such a way that competition is restricted as little as possible.” (Slot, Farley 2017, 70).

It is important to keep in mind that the restriction must be indispensable to the attainment of the specific advantages and benefits identified in compliance with the two previous requirements. This means that an agreement should be exempted only if such advantages “would either not arise at all, or not occur within the same period of time or to the same extent or with the same degree of probability in its absence.” (Faull, Nikpay 2014, 112). It is easy to imagine how difficult it is to assess the fulfillment of this requirement, as it demands us to apply the counterfactual method and foresee the effects of both the existence and non-existence of the agreement. One must not only determine that the aforementioned positive effects will be achieved by the agreement, but also that those same effects would not be possible in its absence. In our case, we must be able to tell that the advantages described above would not be attained if Uber and its partners did not collude in a price-fixing agreement. Would the same positive effects arise if the Uber app allowed each individual driver to determine his own price, opening the doors to a genuinely free competition on the passenger transport market? We don’t think they would.

Firstly, because the standardized fare is a core element of the Uber business model. If each driver were free to set it, it would have been impossible to establish a heavyweight brand able to compete with the long-standing monopoly of the Taxi industry in virtually

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29 CJEU, Asnef—Equifax, C—238/05, ECR 2006, p.1—11125, para. 72)
30 The same conditions are stated in items b) and c) of art. 10(1) CPA.
31 As is the case of art. 101(3), which is an exemption to the general regime of art. 101(1).
all countries. Users want to be able to make an estimate of how much they will pay for a
ride, and that is impossible unless fares are set by the “hub”—be it through an algorithm
or through any other method. And without a heavyweight brand, the development and
expansion of the Uber app, and all the new features it has brought to final users, would
probably never have happened.

Secondly (and in our opinion more importantly, as it this an unusual element when
evaluating a cartel), if Uber didn’t exist, or at least if it didn’t exist with such a market
power—as it most probably wouldn’t if prices were not coordinated—, many (not to say,
most) of the undertakings that collaborate with it (or work for it) would simply not exist
as well. As we said before, each single driver, or each company that owns a small fleet
and works exclusively for Uber, may qualify as an undertaking for competition law
purposes. However, a great number of them would have never taken the step (and the
risk) of setting up their businesses if they did not have the comfort of having a rather
powerful and widely recognizable brand acting as a safety net. The question we should
ask ourselves is thus, whether these undertakings, which arguably form a cartel, would
even be in the market if it weren’t for the price-fixing collusion. And, as a consequence,
(i) whether it is better to have a cartelized alternative to a pre-existing monopoly or no
alternative at all, and (ii) whether we are better off having thousands of businesses and
professionals with a full-time or part-time occupation and providing a service that clearly
has a great deal of acceptance, or having those same professionals not using their working
capacity at all. I believe the answer is straightforward.

4.4. “Not affording such undertakings the possibility of eliminating competition in
respect of a substantial part of the products in question”

No agreement can be exempted from the prohibition contained in 101(1), of
course, if its effect is that of eliminating all effective competition in the considered
market. Allowing otherwise would be contrary to the most basic principles in preserving
a competitive environment for economic activity.

As Van Bael and Bellis explain (2010, 83), this condition “is more difficult to
satisfy where competition is already precarious prior to the agreement, perhaps due, for

32 As long, of course, as it’s not considered an employee.
example, to high levels of concentration and high entry barriers”. Here, instead, we have the exact opposite. As we already said, prior to Uber’s entrance in the transportation market Taxis had a legal or de facto monopoly in most countries, where they still stand as a particularly regulated and protected sector. Such regulations include, among other aspects already mentioned, fixed prices and limited licenses for each geographical area. This amounts to saying that the Taxi industry is one with very strong barriers to the entrance of new players, and still benefits, by way of public regulations, from the very factor that can transform Uber into a cartel: price-fixing.

These considerations seem enough to conclude, without any doubt, that the fourth condition is fulfilled. Not only did Uber’s price-fixing fail to eliminate substantial competition in the transport market, it is also one of the weapons its competitors are allowed to use, and that for decades allowed them to prevent the emergence of any effective competition in the said market.

4.5. Cartel exemption under US law

One last word must be said regarding US competition law. Although it is common to read that all price-fixing agreements are per se infringements under the Sherman Act, the BMI v. CBS doctrine seems to be applicable to a case such as this. The issue in that case was whether blanket licensing in the music industry should be treated as price-fixing, since ASCAP and BMI charged flat fees for all their affiliated copyright owners. And even though the court ruled that it did, at least in part, it nevertheless said: “We have never examined a practice like this one before. And though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a per se restraint of trade.” In other words, “while horizontal agreements to fix prices are almost always per se illegal, courts must have considerable experience with the relevant business relationships before categorizing the restraint as a per se violation of the Sherman Act” (Clark 2017, 7).

This doctrine resulted in a clear standard approach between American and European antitrust law, whereby even price-fixing arrangements are now subject to the rule of reason. As Gellhorn et al. have put it (2004, 231), “BMI recognized that even

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price-fixing agreements may serve necessary and beneficial purposes”. Moreover, its further developments, notably since NCAA v. University of Oklahoma (1984), have emphasized this alignment, setting appreciation standards that do not stand too far from 101(3) TFEU.

5. Recent developments

Some recent court decisions have contradicted two claims made by Uber: being a tech firm, instead of being in the transportation business, and having no relation of employment with its partner drivers. These decisions cast serious doubts upon one of the assumptions stated above: the separation between Uber and the undertakings it works with, which is indispensable to form a cartel.

The first is the recent CJEU decision on Asociación Profesional Élite Taxi v. Uber Systems Spain SL. In these proceedings, the Court was asked by the Juzgado de lo Mercantil No 3 de Barcelona to give a preliminary ruling on “whether the services provided by Uber are to be regarded as transport services, information society services or a combination of both”, in order to ascertain whether prior administrative authorization may be required for Uber to pursue its activities in Barcelona. This is because if the service at issue were covered by the directive on services in the internal market or the directive on electronic commerce, no further requirements could be demanded in the jurisdiction where the service is provided, and Uber’s practices could not be regarded as unfair.

The Court concluded as follows: “(…) the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, 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 whose main component is a transport service and, accordingly, must be classified not as ‘an information society service’ within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as ‘a service in the field of transport’ within the meaning of Article 2(2)(d) of Directive 2006/123.”

Even though the issue in question is not the same as the one discussed in this paper, the observations made by the Court seriously call into question one of the premises for considering Uber as a cartel: the business independence of its partners, and hence whether they should be regarded as separate undertakings, instead of considering Uber and its partners/drivers a single economic entity for competition law purposes.

Some weeks before the CJEU decision, an UK labor appeal court had also ruled that Uber drivers are employees rather that independent contractors.34 The appeal was brought by Uber, following a decision from the Employment Tribunal35 stating that two drivers were entitled to minimum wage and holiday pay.36 More recently yet, a Paris court held that Uber and its drivers “are bound by no employment contract and that this is in fact a commercial contract concluded between Mr. Menard and Uber”, and denied the plaintiff driver “compensation in lieu of paid holidays and concealed work”.37

All this means that we are probably far from reaching any sort of consensus on these matters, and that only time will tell how they will be solved: by the courts or by somehow reinventing the business model that Uber has managed to put into practice.

34 The decision is available at
https://assets.publishing.service.gov.uk/media/5a046b006e5274a0ce5a1f171/Uber_B.V._and_Others_v_Mr_Y_Aslam _and_Others_UKEAT_0056_17_DA.pdf
35 The first decision is quoted in fn. 10.
36 Although we point out these cases, as they were decided in Europe, there had been similar decisions in the US. In June 3, 2015, the California labor Commissioner ruled that a driver that had worked for Uber should be reimbursed of some work-related expenses, since “Plaintiff was Defendant’s employee.” To support this finding, the Commissioner claimed, inter alia, that “By obtaining the clients in need of the service and providing the workers to conduct it, Defendants retained all necessary control over the operation as a whole. The party seeking to avoid liability has the burden of proving that persons whose service he has retained are independent contractors rather than employees, in other words, there is a presumption of employment (...) Plaintiff’s work was integral to Defendants’ business. Defendants are in business to provide transportation services to passengers. Plaintiff did the actual transporting of those passengers. Without drivers such as Plaintiff, Defendants’ business would not exist (...) Defendants alone negotiate [the cancellation] fee with the passenger. Defendants discourage drivers from accepting tips because it would be counterproductive to Defendants’ advertising and marketing strategy.” Barbara Ann Berwick vs. Uber and Rasier, Case No. 11-46739 EK, Labor Commissioner of the State of California. Available at http://uberlawsuit.com/Decision.pdf
6. Concluding remarks

After all that has been said, we conclude that Uber is a network of agreements between independent undertakings, which it brokers, and which, among other aspects, standardizes the fares for all its partners for the provision of an equivalent service. It is a price fixing cartel.

This being said, we tend to find, however, that, under EU and Portuguese competition law, such price fixing collusion may well fall under the protection of arts. 101(3) TFEU and 10 PCA. We are positive that both negative conditions prescribed in these regulations are fulfilled: *effective competition* in the sector was not eliminated, and fixed prices are *indispensable* to attain the *economic and social progress* that this new service represents both to drivers and to final consumers. Where there may be some doubts, which only a thorough cost/benefit analysis can dissipate, is whether those benefits are sufficient to compensate the elimination of price competition in such a significant parcel of the market.

Even if it is so, the “new wine” served by the Uber model challenges some more or less established categorizations within the “old bottles” of antitrust law, namely regarding the concept of cartel. The most defying of all being, perhaps, the fact that Uber itself creates the opportunities for the emergence of the businesses it is cartelizing. There is no way this fact is not duly taken into account when assessing its overall economic impact.

References


