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„The Sharing Economy Model - Competition and Labour Law Considerations from Europe and the United States“

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Abstract

As the sharing economy evolves rapidly, it becomes inevitable for the participants to eventually enter tightly regulated markets. Companies which have fast become poster children for this new phenomenon, such as Airbnb, Lyft and Uber, are more and more likely to fall under competition and labour law rules, which are not suited to deal with their model. As a first step, this thesis will examine the sharing economy, its increasing importance to regulators and the extent to which it is currently regulated in Europe and US. Next, it will provide a comprehensive overview of the credible competition and labour law concerns on a European as well as US-level. It will become clear that the current legislation can no longer accommodate the needs of the sharing economy and this calls for an effective and carefully tailored legislative framework. Therefore, this thesis argues in favour of introducing possible future legislation, which can be a better fit for the sharing economy model. In this regard, possible solutions that have been put forward in Europe and the US will be examined.

Abstrakt

Da sich die Sharing Economy rasch entwickelt, wird es für die Teilnehmer unvermeidlich, in geregelte Märkte einzutreten. Unternehmen, die schnell zu Vorzeigekinder für dieses neue Phänomen geworden sind, z.B. Airbnb, Lyft und Uber, werden immer häufiger unter Konkurrenz- und arbeitsrechtlichen Regeln fallen, die nicht geeignet sind, mit ihrem Modell umzugehen. Im ersten Schritt wird diese Masterarbeit die Teilhabe der Sharing Economy, ihre zunehmende Bedeutung für die Regulierungsbehorden und das Ausmaß, in dem es derzeit in Europa und den USA geregelt ist, untersuchen. Als nächstes wird es einen umfassenden Überblick über die glaubwürdigen Wettbewerbs- und arbeitsrechtlichen Bedenken auf europäischer und US-Ebene geben. Es wird deutlich werden, dass die derzeitige Gesetzgebung nicht mehr den Bedürfnissen der Sharing Economy gerecht werden kann, und dies erfordert einen wirksamen und sorgfältig zugeschnittenen Rechtsrahmen. Daher spricht diese Masterarbeit für die Einführung moglicher künftiger Gesetze, die für das gemeinsame Wirtschaftsmodell besser geeignet sein konnen. In dieser Hinsicht werden mogliche Losungen untersucht, die in Europa und den USA vorgestellt wurden.

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Introduction

As the sharing economy evolves rapidly, it becomes inevitable for the participants to eventually enter tightly regulated markets. Companies such as Airbnb, Lyft and Uber, are more and more likely to fall under regulatory, competition and labour law rules, which are not suited to deal with their model. Therefore, the purpose of this thesis is to provide a comprehensive overview of the challenges as well as the possible solutions on a European and United States level. The thesis is split into three main chapters. Chapter I explores the sharing economy and its key players as disruptors of traditional economic models. The rise of the sharing economy also offers opportunities for increased efficiency, growth and jobs, and improved consumer choice, but it has also raised important regulatory questions. Therefore, Chapter I also examines the varying responses from Europe and the United States, focusing mainly on Uber, Lyft and Airbnb as they are widely considered as the poster children for the sharing economy. Chapter II examines the second conflict that stems from the massive rise of non-professional - and non-regulated - service providers, namely the one between the sharing economy and competition (antitrust) law. As Uber and its sharing economy peers have sparked conflicts in both unfair competition law and competition (antitrust) law as such, both are discussed within the framework of EU and United States legislation. Finally, the author considers that competition and labour law matters are tightly intertwined when it comes to the sharing economy. Therefore, Chapter III is dedicated to the classification of the Uber driver-partners as employees, independent contractors or even a new category of workers in the EU and the United States.

In the course of examining the conflicts which arise in the regulatory, competition and labour law landscape were tackled, one observation persists. The sharing economy model cannot easily find its place into pre-existing national legislation. On the one hand, national authorities struggle with correctly fitting its participants within their various legal frameworks and in the process, risk denying consumers the benefits of the sharing economy has to offer. On the other hand, while Uber and similar platforms themselves try to confine themselves to pre-existing definitions, they risk triggering a plethora of legal conflicts which are inevitably interconnected. The most bright example of this is Uber. As the thesis will argue, Uber has defined itself as an information service society service provider to escape unfair competition law liabilities. However, this definition could act to its detriment in the ongoing price-fixing saga. Ironically, by refusing to recognise its driver-partners as employees, Uber might have given up on its only strong defence. Thus, as the thesis will conclude, an immediate actions is required to address the specific needs of the sharing economy to avoid its participants having to find the balance between competition and labour law and choose the lesser of two evils. The sharing economy does not need trade-offs - it needs solutions.

Chapter I
The sharing economy: key players and regulatory challenges

In recent years, the world has witnessed an extraordinary rise of sharing economy platforms, while the most successful among them have fast become the global standard in the sharing economy business. The more “traditional” concepts of providing services from all kinds of sectors are constantly being challenged. These developments call into question a number of regulatory matters and pose new questions for regulators worldwide. This chapter will explore the importance of the sharing economy in today’s society and the need to find workable solutions for this new business model in Europe and the United States.

Exploring the term "sharing economy"

It is easy to understand what the main drivers behind the sharing economy are. On the one hand, new innovative technologies that allow us to connect with people. On the other hand, it is a shift more broadly to values that embrace openness, humanness and connectedness. But how does one define the "sharing economy"? Perhaps the most accurate delineation of the term comes from entrepreneur Alex Stephany, whose five-pillar definition reads as follows: 'The sharing economy is the *value* in taking *underutilized assets* and making them *accessible online* to a *community*, leading to a *reduced need for ownership* of those assets'.[1] Let us have a closer look at those five pillars, as they are what truly makes the sharing economy model so appealing to its users.

First, as the sharing economy evolves, we are seeing a new paradigm of platforms that rely on sponsorships, points, gifts, social interactions, and other forms of exchange to sustain their business models. In this way, sharing platforms have, in effect, redefined value, in that it has created a reciprocal economic value[2]. Second, the sharing economy makes a significant contribution to the sustainability of, most prominently, the tourism and transport sectors, making it possible to optimise already existing resources by deploying underused assets and developing new services and products. Third, clearly the utilisation of these assets would only succeed if it is made available. Considering the extent to which we are all connected via the Internet today, online accessibility to such information is as easy as ever by simply listing your assets on one of the sharing platforms. The fourth and probably the most unique feature of the sharing economy is the sense of belonging it creates - belonging to a community of people who invoke mutual trust in one another. This is often the decisive difference between the sharing economy businesses and their more traditional counterparts. Even though it is a high-stake interaction in terms of the level of trust needed, it has been created. This is most clearly evidenced by examples where people offering places in their own homes to strangers on platforms like Airbnb, or a seat in their car to drive strangers across borders on BlaBlaCar, for instance. Finally, there is an obvious shift from ownership to renting observed

[1] Alex Stephany, *The Business of Sharing: Making it in the New Sharing Economy* (Palgrave Macmillan, 2015)
[2] Ibid

in the sharing economy. This is well illustrated in the car-sharing space. Due to environmental pressures, such as population growth and the growing awareness of climate change, car-sharing startups like Zipcar and Car2Go have made it their mission to take as many cars off the roads as possible. According to a Berkeley multi-city study, Car2Go alone has managed to remove 11 cars from the road (on average) per vehicle across the study cities [3].

Various actors, especially the trade unions, have been critical of the term "sharing economy", because of its positive connotation, and because of the argument that it is not about sharing at all. But however one defines the sharing economy, whether one would call it the "gig economy" or the "collaborative economy", the fact is that we are now living in a world where transactions are made possible that would have been unthinkable 10 years ago. It is an on-demand economy, which provides an instant gratification for people who make use of these platforms with the press of a button. In other words, it makes sure that the right service can be connected between the right person and the right way.

So how does the sharing economy model work in technical terms? Three elements can generally be distinguished, which essentially form a triangular relationship[4]. First, there is the intermediary company, taking the form of a digital platform. This intermediary then helps to connect providers and consumers, who, in turn, perform transactions, such as services, sharing of assets, skills or labour. This model helps reduce transaction costs, as internet technology allows information to be exchanged virtually at no cost. Listings on the platforms, which offer apartment rentals or on-demand services can be done at little costs and potential customers can easily browse at no cost, as the initial registration on the platform most often is made for free. Furthermore, having an intermediary helps mitigate the risks and uncertainty surrounding the conclusion of a transaction with a stranger. Thereby the platform acts as a builder of trust between the service provider and their customer. Another

[3] Elliot Martin and Susan Shaheen, 'Impacts of Car2Go on Vehicle Ownership, Modal Shift, Vehicle Miles Traveled and Greenhouse Gas Emissions' [2016] available at <http://innovativemobility.org/wp-content/uploads/2016/07/Impactsofcar2go_FiveCities_2016.pdf> accessed 15 July 2017

[4] Jon Erik Dolvik and Kristin Jesnes, 'Nordic labour markets and the sharing economy' [2017] ISBN 978-92-893-4884-3 available at <https://norden.diva-portal.org/smash/get/diva2:1072087/FULLTEXT02.pdf> accessed 15 July 2017, p. 13

feature of the platform which ensures this trust is the user-rating systems, which are extremely useful for consumers who want to avoid counterparties with dubious track record of providing or buying the relevant service, be it apartment rental or carpooling.

Through this ease of use and cost reduction, the sharing economy model has increased peer-to-peer services to a substantial size, which can no longer be ignored by traditional businesses. In fact, traditional businesses are encouraged to change their operations to adapt to the techniques used by sharing economy platforms. Perhaps the most prominent examples are the ever increasing in number taxi apps, which make access to taxi rides easier, for example mytaxi in Austria, TaxiMe in Bulgaria or taxi.eu operating throughout Europe, just to name a few. As such, sharing economy services are a strong force to be reckoned with.

Overview of the key players

The rise of the sharing economy has led to widespread disruption in many industries as new business concepts challenge and often surpass traditional ones. Such industries include lending platforms (LookandFin, Prexem, Finsquare), on-demand household services (ShareYourMeal, Josephine, Cleanio), vacation rentals (OneFineStay, HomeAway), and the list goes on[5]. However, the main "disruptors" on a global scale remain Uber, Lyft and Airbnb[6]. They are often seen as the exemplars of the transformative power of digitalisation, and as many other industries are poised to be "disrupted" by new digital business models.

In the car-sharing space, there is no doubt that Lyft and Uber are the leaders, not only due to their success and overall popularity, but also in terms of the number of conflicts with governmental authorities.

Uber launched in 2010 with the aim to solve a simple problem: how to get a ride at the push

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[5] Robert Vaughan and Raphael Daverio, 'Assessing the size and presence of the collaborative economy in Europe' [2016] available at <http://ec.europa.eu/DocsRoom/documents/16952/attachments/1/translations/en/renditions/native> accessed 15 July 2017, p. 25

[6] Arun Sundararajan, 'The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism' [2016], MIT Press, p. 14.

of a button. Uber is an on-demand transportation service which has brought a revolution in the taxi industry all across the world. The business model of Uber has made it possible for people to simply tap their smartphone and have a car arrive at their location in the minimum possible time. As of 20 May 2017, Uber operates in more than 450 cities in 76 countries and reached the whopping 5 billion trips offered worldwide[7]. Unlike traditional taxi companies, Uber's driver-partners are independent, in that Uber does not employ them directly - it simply acts as a matchmaker between the passengers and the drivers. The value proposition of the company is two-fold. Passengers are attracted to Uber, because of almost no waiting time, lower prices as compared to conventional taxis, and cashless payments. Drivers are offered a flexible schedule, as they can accept or reject rides, and it is an additional source of income for them.
Uber also ensures that the ride is tracked via GPS through the app. Once the ride is over, the customer can rate the driver. The rating system is an important part of Uber's business model, as it lets a person know about a specific driver before booking the ride and helps build trust. On the other hand, it also lets Uber evaluate its drivers (partners), so that those with low ratings or bad reviews can be evicted if their rating falls below 4 (out of 5)[8]. Prices for the ride are set by Uber's algorithm and cannot be influenced by the driver. When there is a shortage of supply (indicated by rising waiting times for a pick-up), the rate increases by a multiplying factor (which Uber calls 'surge' pricing), and returns to the base rate when waiting times begin to fall[9].

Lyft is to a large extent similar to Uber in the way their business model is structured. Lyft also acts as an app-based matchmaker between customers, who want a ride, and the nearest available drivers. The drivers are not directly employed by Lyft, but are rather considered independent contractors, similar to Uber's model. Features such as live GPS tracking, cashless payment and post-ride ratings are also available. The main difference between Lyft and Uber arise from their geographical presence, as Lyft is currently only operating in the United States. Another Lyft-specific feature is the possibility to tip your driver after the ride is over.

[7] Dimitri Gore-Coty, '5 Billion Trips' [2017] available at <https://newsroom.uber.com/5billion/> accessed 15 July 2017
[8] Telephone conversation with a representative of Uber on 15 July 2017. The source preferred to remain anonymous.
[9] Uber Help, 'What is Surge?' available at: https://help.uber.com/h/e9375d5e-917b-4bc5-8142-23b89a440eec accessed 15 July 2017

The most notorious disruptor in the hotel industry is Airbnb. Founded in August of 2008 and based in San Francisco, California, Airbnb is a trusted community marketplace for people to list, discover, and book unique accommodations around the world — online or from a mobile phone or tablet. Whether an apartment for a night, a castle for a week, or a villa for a month, Airbnb connects people to unique travel experiences, at any price point, in more than 65,000 cities and 191 countries[10]. Airbnb offers clear value propositions to both homeowners and guests. Owners can list their space on the Airbnb platform and set their own rent, house rules, check-in and out times. Hosts are also free to accept or reject travellers who contact them and are interested in their listing. Travellers, in exchange, are offered a cheaper alternative to traditional hotels, as well as the cosiness of a real home. Both the hosts and the guests can submit a rating and a review via the online platform or the app, based on their mutual experience.

Having established the current key sharing economy players and the scale on which they operate, the following section will concentrate on the regulatory problems faced by each of them and by government authorities respectively.

The European and US sharing economy regulatory landscape

Regulating the sharing economy is a particularly daunting task, because it is still evolving fast. Indeed, one can argue that "there is less ex-ante regulation of sharing economy businesses in comparison to that often applied to traditional commercial suppliers, which can pose a threat to traditional markets"[11].

As Danti has pointed out, the sharing economy model is "more complex and varied, featuring a degree of decentralisation, de-professionalisation and the participation of new economic actors" and there are no "clear lines of distinction between professional service provider and consumer due to the multi sided relationships on sharing economy platforms. As the existing

[10] Airbnb's homepage, available at <https://www.airbnb.com/about/about-us> accessed 15 July 2017
[11] Deni Vitkovic, 'The Sharing Economy: Regulation and EU Competition Law' [2016] Global Antitrust Review, Issue 9, available at: <https://ssrn.com/abstract=2926852> accessed 15 July 2017, p. 87

legal framework was designed to regulate conventional businesses and to protect rights of consumers as the vulnerable party in a business transaction, difficulties come up"[12]. According to Danti, such questions about the rights and obligations of different actors within the collaborative economy arise and create an environment of uncertainty, related to a number of aspects - the applicable regulatory framework and regulatory obligations for different participants[13]. However, in view of its size, the sharing economy can no longer be ignored by regulators.

Expert estimations foresee that by 2020 in the United States, contingent workers will make up nearly half of all US workers, and 11% of these will be working for on-demand platforms [14]. In the EU, in 2015 gross revenue from collaborative platforms was estimated at €28 billion, almost doubling compared to 2014[15]. Accommodation and personal transportation, currently led by Airbnb, Lyft, and Uber, are arguably the two areas in which sharing economy services have gained the most momentum. These two sectors of the sharing economy have also been the ones sparking the most disputes among regulators. In view of their transformative potentials, this section is dedicated to examining the current sharing economy regulatory landscape in Europe and the United States, as well as the most recent developments.

Europe

On a EU level, different Member States and their national regulators may well adopt different regulatory approaches when it comes to the sharing economy. This is largely due to the fact that in the EU, labour unions are quite powerful, to the extent that they can influence significantly the policy making process within the respective Member States. This variability suggests that the European economy may well be set on a path towards a confusing

[12] n 20, p. 17
[13] Ibid
[14] Ursula Huws, 'Platform labour: Sharing Economy or Virtual Wild West?' [2016] Journal for a Progressive Economy, p. 27
[15] 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' [2016] SWD(2016) 184, p. 8-9

"patchwork"[16] in terms of regulation. Indeed, this view is supported by Robert Vaughan and Raphael Daverio in their analysis of the recent changes in the regulatory and policy environment affecting collaborative economy organisations in the Member States[17]. There is a stark difference between the regulatory approaches undertaken in some Member States which have been more accommodating towards Uber and Airbnb such as the Netherlands and the UK, and those that have opted for a stricter regulatory approach, such as Belgium, Germany and Spain.

The Dutch government has prioritised support for the growth of the sharing economy. Minister Henk Kamp promised the emergence of technology-neutral regulations that would ensure that no workers are disadvantaged because of their technological choice (e.g. taxi drivers could replace their meters with applications like Uber's). The city of Amsterdam signed an agreement with Airbnb which explicitly permits renting accommodation via an online platform[18].

In the UK, after Transport for London brought a case to court to determine whether the fare calculation system on Uber's app should be considered as a taximeter, the app was ruled as legal. Moreover, the UK has passed legislation to relax planning permission rules in London for short-term lets[19].

By contrast, in Belgium, as of 1 January 2016, hosts renting accommodation on sharing platforms like Airbnb need to ask permission from local authorities and co-owners of the building. Moreover, UberPOP and UberX have been either banned or subjected to strict regulations requiring drivers to be professionally licensed. In Germany, Uber has also stopped operations in three cities due to the stringent regulatory landscape. Uber has been under a lot of pressure from the Spanish government, as well, eventually being nationally banned as of December 2014. As regards short-term rental platforms, Catalonia enacted regulations, which set a cap on maximum availability of apartments per year[20].

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[16] Malthe Mikkel Munkoe, 'Regulating the European Sharing Economy: State of Play and Challenges' [2017] Intereconomics, Volume 52, Number 1, p. 41
[17] n 5, p. 14
[18] Ibid
[19] Ibid
[20] Ibid

The above examples of actions undertaken by different Member States show a tendency of undertaking unilateral fragmented actions, which at the end of the day only create barriers for sharing economy businesses that wish to grow and scale across borders. Struggling with the fundamentally different rules, regulations and interpretations across Member States will act as a disincentive for such businesses. This could ultimately undermine the purpose of the single market, at least in the area of the sharing economy. However, this does seem like an obvious area where European-level integration could confer benefits[21].

The threat of single market fragmentation has not gone unnoticed by the EU. In an attempt to respond to this challenge, on 11 May 2017, the Committee on the Internal Market and Consumer Protection adopted the own-initiative report by Nicola Danti on a European Agenda for the collaborative economy.[22] In view of the risk of fragmentation, Members have stressed the need to strengthen legal certainty. In particular, the report stresses the need for legal certainty for platforms and their users in order to ensure the development of the collaborative economy in the transport sector in the EU[23]. Members in addition addressed the peer-to-peer accommodation sector and recalled that, according to Commission estimates, peer-to-peer accommodation is, in fact, the largest collaborative economy sector on the basis of generated commerce[24]. In view of this, the report encourages the loosening of the strict regulations imposed by some public authorities that have restricted the supply of tourist accommodation in the sharing economy.

About a month later, on 15 June 2017 the European Parliament finally came back with a response to the proposals laid down in the report.[25] With 510 votes to 60 and 48 abstentions, the European Parliament adopted the resolution on a European Agenda for the Collaborative Economy. In fact, Parliament has suggested that any new regulatory framework should leverage platforms self-governing capacities and peer-review mechanisms, since both have

[21] n 13, p. 41
[22] Nicola Danti, 'Report on a European Agenda for the collaborative economy' [2017], available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0195+0+DOC+PDF+V0//EN> accessed 16 July 2017
[23] Ibid, para 60
[24] Ibid, para 61
[25] Text adopted by Parliament, single reading [2017], available at <http://www.europarl.europa.eu/oeil/popups/printsummary.pdf?id=1494418&l=en&t=E> accessed 16 July 2017

proved to work effectively and take into account consumer satisfaction with collaborative services[26]. This view seems to coincide with the partial self-regulation approach as laid down by Anur Sundararajan. Indeed, he has argued that the features of the sharing economy, such as the peer-review system, are prone to and could even be more successful if self-regulated[27]. Sundararajan notes that self-regulation does not have to mean deregulation or no regulation – but merely a reallocation of the regulatory responsibility to parties other than the government [28]. The adoption of the same logic by the European Parliament should be welcomed as being quite progressive and accommodating of the needs of the sharing economy.

Overall, the resolution on a European Agenda for the Collaborative Economy should be seen as a good starting point for promoting and regulating the sharing economy sector in Europe and will certainly be welcomed by its participants. It is now in the hands of the European Commission to come up with a proposal on how to regulate this emerging form of economy in the context of the single market. As its fragmentation is already a fact, the Commission will certainly face difficulties in promoting both the development the sharing economy and a uniform regulatory approach across the EU.

United States

In the United States, the regulatory landscape is not entirely different than the current state of affairs in Europe, in that individual cities issued legislation banning platforms' operations, effectively leading to a fragmentation within the states. Although Uber, Lyft and Airbnb have been extremely popular with their users in some states, in others these companies have faced significant pushback from the taxi and hotel industries. Their proponents, typically millennials, view the already outdated regulations "as protectionism, serving entrenched operators in the market like taxicabs and hotels"[29].

The problem stems from the fact that the suppliers of products and services on sharing

[26] Ibid
[27] n 6, p. 151
[28] n 6, p. 138
[29] Yanelys Crespo, 'Uber v. Regulation: "Ride-Sharing" Creates a Legal Gray Area' [2016] 25 U. Miami Bus. L. Rev. 79, available at: <http://repository.law.miami.edu/umblr/vol25/iss1/4 accessed 15 July 2017> accessed 16 July 2017, p. 91

platforms often do not have to comply with many laws as their traditional competitors have to. For example, Uber and Lyft drivers do not have to obtain licences as traditional taxi drivers. For instance, they do not need a 'yellow medallion'[30] for taxicabs in New York City. Neither are Airbnb renters subject to the extensive health and safety regulations which hotels typically comply with[31]. This disrupts the established markets, which are under governmental scrutiny to comply with the regulations in place. There are plenty of examples where sharing economy participants have entered into conflicts with local or state governments.

Airbnb has been in a huge legal battle with the state of New York on the legality of Airbnb. Eventually, the state of New York passed a bill banning people from renting their apartments on Airbnb and other similar platforms for less than 30 days, if the hosts are not present.[32] Elsewhere, in Santa Monica, one of the toughest regulations on short-term rentals like Airbnb was passed. According to these new rules, Airbnb hosts will have to live on the property during the renter's stay, register for a business license and collect the city's 14 percent occupancy tax[33]. Nevertheless, these cities are the exception, rather than the rule when it comes to Airbnb, as the platform is fully operational throughout the rest of the United States.

More problematic have certainly been the businesses of Uber and Lyft, as states have been polarised on their approach towards the car-sharing companies. However, similar to the trend in the EU, the United States is starting to move away from a patchwork of local regulations that were in conflict with their business model, to a state-wide regime that provides stability and certainty for riders and drivers alike. Nevertheless, unlike the EU, the United States so far is not willing to go down the path of self-regulation.

The Chicago market was one of the first markets Uber entered, but it was not without

[30] 'NYC Taxi & Limousine Commission - Current Licensees' [2017] <http://www.nyc.gov/html/tlc/html/industry/current_licensees.shtml> accessed 16 July 2017

[31] Occupational Safety and Health Act of 1970, available at <https://www.osha.gov/law-regs.html> accessed 16 July 2017

[32] NY State Senate Bill S6340A, available at <https://www.nysenate.gov/legislation/bills/2015/s6340/amendment/a> accessed 16 July 2017

[33] Santa Monica Home-Sharing Administrative Rules and Regulations, available at <https://www.smgov.net/uploadedFiles/Departments/PCD/Permits/Santa%20Monica%20HomeSharing%20Rules.pdf> accessed 16 July 2017

conflict. Nevertheless, after years of negotiations, on December 3, 2014, Illinois lawmakers approved a compromise bill that placed certain insurance and safety standards on ridesharing companies, which enabled Uber and other ride-sharing companies to legally operate in the entire state of Illinois[34]. The bill effectively allowed ride-sharing companies to legally operate. This was confirmed in the case *Illinois Transportation Trade Association v. City of Chicago*[35], where Judge Posner stated that there are "enough differences between taxi service and TN[E] services to justify different regulatory schemes, and the existence of such justification dissolves the plaintiffs' equal protection claim. Different products or services do not as a matter of constitutional law, and indeed of common sense, always require identical regulatory rules."[36]

Similarly, Colorado also became one of the first states where ride-sharing companies would be authorised to conduct their business. The compromise reached between the state and Uber and Lyft was that, under Colorado's Transportation Network Company Act, the companies would have to comply with specific insurance and safety requirements[37]. This landmark legislation was enacted as early as 2014 and inspired other progressive improvements for ride-sharing companies across other states.

Though much later, in 2017 Uber and Lyft finally won the battle in even highly regulated states like Florida and Texas.

In Miami-Dade County, Uber and Lyft faced taxi companies' resistance and embarked on a three-year battle for the legalization of their services. The County Commission gave initial approval to a proposal legalizing ride-sharing in Miami-Dade in 2014[38]. The legislation would allow ride-sharing companies to operate in Miami under a new section of the county's regulations. However, the proposal was eventually struck down in 2015. In a surprising turn of events, in May 2016, Miami-Dade commissioners on a 9-2 vote passed ordinances that legalized Uber and Lyft's business model.[39] Just one day later, however, Miadeco Corp. filed

[34] n 26
[35] *Illinois Transportation Trade Association v. City of Chicago*, 839 F.3d 594 (7th Cir. 2016)
[36] Ibid, 598
[37] Ibid
[38] Ibid
[39] Douglas Hanks, 'Uber and Lyft are now legal in Miami-Dade' [2016], available at

a class action lawsuit in the Eleventh Judicial Circuit Court in and for Miami-Dade County[40] against the new ordinances. The plaintiffs claimed that the county has violated their equal protection rights with the new ordinance and its actions have resulted in severe dilution of the value of the medallions existing for-hire passenger service providers must possess. In this case, the Eleventh Circuit addressed a nearly identical problematic in the *Illinois* case. Accordingly, District Judge Darrin P. Gayles heavily relied on the reasoning laid down by Judge Posner. Indeed, Judge Gayles stated that the taxi industry and the ride-sharing platforms work in two different classes and therefore, the Seventh Circuit rightly relied on these differences to conclude that "there was a rational reason for distinct regulatory frameworks"[41]. In view of this reasoning, the Eleventh Circuit Court reached the same conclusion and found that there exists a rational means to serve a legitimate end, thereby dismissing the case of the plaintiffs. Its decision was announced on 10 April 2017.

Following this landmark decision, on 10 May 2017[42], Florida followed the example of Chicago, Colorado and Washington D.C. and enacted House Bill 221, which contains statewide regulations specifically pertaining to ride-sharing companies. According to House Bill 221, ride-sharing companies will have to conduct regular background checks on their drivers on a three-year basis. In addition, drivers will have to maintain a primary car insurance.

A similar solution was found in Texas earlier this year. In Austin, Texas, citizens rejected a measure called Proposition 1[43], which would have allowed Uber, Lyft and other ride-sharing platforms to essentially self-regulate. Proposition 1 would have prevented two things which these companies were desperately trying to avoid: conducting mandatory background checks, including fingerprinting drivers and a ban on picking up passengers in lanes. Following the failed implementation of Proposition 1, Uber and Lyft ceased operations in the city.

<http://www.miamiherald.com/news/local/community/miami-dade/article75436467.html> accessed 16 July 2017

40 *Miadeco Corp. et al v Miami-Dade County*, Case No. 16-21976-CIV

41 Ibid, para. 9

42 FL State Senate Bill No. 221: Transportation Network Companies, available at <https://www.flsenate.gov/Session/Bill/2017/0221> accessed 16 July 2017

43 Ordinance No. 20160217-001 on the ordering of a special election to be held in the city of Austin on May 7, 2016 to submit to the voters an ordinance initiated by petition relating to Transportation Network Companies, available at <http://www.stevenzc.com/assets/prop1.pdf> accessed 16 July 2017

However, a little more than a year later, on 29 May 2017, Texas Governor Abbott signed into law House Bill 100[44], which in essence overturned the vote in Austin. This sent a clear message that local governments cannot regulate on their own, as this remains the state's prerogative. As such, Austin and other cities cannot impose their own licensing requirements or any sort of operational requirements on companies like Uber and Lyft. Under House Bill 100, fingerprint background checks will no longer be required. What the ride-sharing companies will have to do, however, is pay an annual fee to the state for a permit and provide ID information of the drivers and their vehicles on the app. Ride sharing companies will also need to be conduct annual background checks on their drivers. Uber and Lyft have subsequently resumed operations in Austin and throughout Texas.

As evidenced by the case studies above, in order to coexist with taxis, what Uber and other ride-sharing companies need is new or modified legislation and regulation. Innovative technology in the transportation industry gives people choices in how they want to get around and whether they want to utilize the empty space in their cars, the effects of which increase economic growth and create new jobs.[45] By following the models of cities like Chicago, Denver, and Washington D.C., officials in states like Florida and Texas, which were previously highly regulated, have finally addressed the unique services that these ride-sharing companies offer. Instead of treating these companies as illegal taxi services, as Miami-Dade County had done for over two years, the County and eventually the entire state of Florida followed the states that reached a compromise to allow these companies to legally operate. David Plouffe, Uber's new Senior Vice President of Policy and Strategy, has welcomed these changes. According to Plouffe, while Uber should be regulated, these regulations should "account for the fact that this is different than hailing a taxi on a street, or calling a taxi on a landline"[46]. Indeed, trying to fit the sharing economy model within outdated regulatory frameworks has proven to be a futile exercise for regulators.

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[44] TX State Senate Bill No. 100, available at <http://www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/HB00100F.pdf#navpanes=0> accessed 16 July 2017

[45] n 26

[46] Interview with David Plouffe, available at <https://www.geekwire.com/2014/uber-pouffe/> accessed 16 July 2017

Conclusion

As we are witnessing the blurring of lines between professional and personal thanks to the sharing economy, it is becoming increasingly clear that this activity is one where the old regulatory boxes just do not fit. As Judge Posner aptly observed, "new technologies, or new business methods, appear, a common result is the decline or even disappearance of the old. Were the old deemed to have a constitutional right to preclude the entry of the new into the markets of the old, economic progress might grind to a halt"[47].

Europe and the United States already find themselves on the right track in trying to find workable solutions for the regulatory challenges. While the United States has opted for a more stringent government-led regulatory approach, Europe is seemingly moving toward self-regulation.

The first approach is inviting for a comprehensive governmental regulation on a local, national or supranational level. When approaching the sharing economy, governments essentially try to find a response "beyond traditional regulation, often requiring changes in the long-established regulatory structures, the problem of determination of the harm caused, and the issue of necessity to address all of the parties involved"[48]. State and local governments thus have the task to ensure that the new rules adequately protect both participants in the sharing economy and their long-established counterparts. In addition, if they manage to strike the right balance, governments have a strong public interest in the regulation of sharing platforms, in that they can extract substantial revenue for the state. So far, state-level government regulation within the United States has managed to fulfil these objectives, evidenced by the increasing number of House Bills successfully passed in the past two years. In Europe, while individual EU Member States have issued stringent government regulations as a response to the sharing economy, the EU as a whole seems to be moving down a path of self-regulation.

[47] n 32, 596-597
[48] n 10, p. 95

This second approach, which is now seemingly adopted by the European Parliament[49], is calling for the introduction of already established self-regulation options to the sharing economy. Self-regulation can be defined as “groups of firms in a particular industry or entire industry sectors that agree to act in prescribed ways, according to a set of rules or principles. Participation by firms in the groups is often voluntary, but could also be legally required”[50]. Indeed, self-regulation has proven to be a successful tool in traditional self-regulation organisations, where peer-to-peer transactions are common, for example, the American Medical Association in medicine and the National Association of Realtors in real estate[51]. What is proposed is essentially an utilisation of digital platforms as partners in the regulation of exchange rather than as subjects requiring governmental regulation. Through their peer-review systems, sharing platforms like Uber, Lyft and Airbnb are already providing the robust trust in these businesses, which traditionally has been the responsibility of the government through industry-specific regulations. However, these platforms now offer the means of the same amount of trust and safety through GPS tracking systems, fixing fares, among others, and perhaps it is time to rethink the role of government in regulating them. In this respect, the EU seems to be more of a forward thinker than the United States are currently.

Evidently, there are underlying differences in the development of a common regulatory framework for the sharing economy model is on both sides of the Pacific. However, regulating the sharing economy is only part of a plethora of problems which this industry is currently facing. What the United States and Europe have in common are the competition law and labour law concerns, which are examined in detail below in Chapter II and Chapter III respectively.

[49] n 22

[50] Gracia Vara Arribas, Bettina Steible and Anthony De Bondt, ‘Cost of non-Europe in the sharing economy: legal aspects’ [2016] available at <http://www.eipa.eu/files/FINAL%20REPORT%20for%20EIPA%20web.pdf> accessed 16 July 2017, p. 59

[51] Molly Cohen and Arun Sundararajan, ‘Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy’ [2015] 82 The University of Chicago Law Review Dialogue 116, p. 125

Chapter II
Competition (antitrust) law challenges

A second conflict that stems from the massive rise of non-professional - and non-regulated - service and goods providers that the sharing economy has enabled, is the conflict between the sharing economy and competition (antitrust) law. It is important to note that for the purposes of Chapter II, both competition (antitrust) law and unfair competition law will be examined. On the one hand, competition law protects the freedom of competition, while on the other hand, unfair competition law relates to the prevention of distortion of this competition. Nevertheless, one cannot function without the other, as competition can only properly work if it is both free and undistorted[52]. With this in mind, Chapter II will examine the problems the sharing economy is facing within the current legal framework of both competition (antitrust) and unfair competition.

Unfair competition law claims

When it comes to unfair competition law, the dominant approach so far has been a "piecemeal approach"[53]. At a EU level, there is no uniform set of regulations governing unfair competition law *per se* which has led to a fragmentation which is still valid today. Historically, the laws against unfair competition have developed within the context of intellectual property rights. This is expressed most strongly in the first and only regulation of unfair competition law at an international level, the Paris Convention for the Protection of Industrial Property of 1883 ("the Paris Convention"). It has been since revised at Brussels in 1900, at Washington in 1911, at The Hague in 1925, at London in 1934, at Lisbon in 1958 and at Stockholm in 1967, and was amended in 1979. Relevant for the regulation of unfair competition was the insertion of Article 10^{bis} during the Washington Conference[54]. Article 10^{bis} (1) states that "the countries of the Union are bound to assure to nationals of such

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52 Frauke Henning-Bodewig, *Unfair Competition Law* (Kluwer Law International 2006), p. 7

53 Ibid

54 Directorate General for Internal Policies, 'Briefing Paper on Addressing unfair commercial practices in business-to-business relations in the internal market' [2011] IP/A/IMCO/NT/2010-18, available at: <http://www.europarl.europa.eu/RegData/etudes/note/join/2011/457364/IPOL-IMCO_NT(2011)457364_EN.pdf> accessed 22 July 2017, p. 8

countries effective protection against unfair competition". Thus, the provision establishes a very flexible minimum standard of protection against unfair competition, because the obligation to assure effective protection does not require the enactment of specific legislation.[55] Despite the resulting fragmentation, progress partially was made through the enacting of the Unfair Commercial Practices Directive (UCPD)[56].

The UCPD was welcomed as a great step towards the harmonisation of unfair competition law within the EU, as it was the first legal instrument that contained a general prohibition of unfair practices[57]. Article 5 of the UCPD introduced, in line with Article 10[bis] of the Paris Convention, a general clause on unfair competition law on a EU level, which stated that "unfair commercial practices shall be prohibited". The general clause introduced in the UCPD replaced the existing divergent general clauses and principles in the Member States and in this way provided a way to simplify the legislative environment in which traders and consumers operate[58]. General clauses such as this one are a flexible tool for controlling the ever changing market practices, for preventing the circumvention of existing statutory provisions and for drawing a line between acceptable and unacceptable commercial innovations. Ideally, the general clause is the happy compromise in drafting a rule, thereby providing legal certainty, that can be interpreted in case law, and thereby providing the flexibility needed to adapt to new unfair trading practices.[59] However, flexibility also means potential for fragmentation. Surely enough, although the UCPD marked an important step towards the harmonisation of the complete area of unfair competition law, it did not address a crucial part of unfair competition: the protection of a trader against the unfair practices of his competitor, for which it received deserved criticism.[60]

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[55] n 50, p.63

[56] Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council

[57] Rogier de Vrey, *Towards A European Unfair Competition Law: A Clash Between Legal Families : A Comparative Study Of English, German And Dutch Law In Light Of Existing European And International Legal Instruments* (Brill Academic Publishers 2006), p. 4

[58] Ibid

[59] Ibid, p. 66

[60] Ibid, p. 309

This limited personal scope of the UCPD ultimately upheld the already existing fragmentation of unfair competition law between businesses.[61] Thus, according to Henning-Bodewig, as long as there are different national states and above all different cultural communities, there will be differences that even the harmonising judicial practice of the CJEU will be unable to eliminate[62]. This fragmentation has naturally reflected on the operations of sharing economy platforms, especially Uber within the EU. So far, the unfair competition conflict has been resolved in several ways in different countries. In the United States, as observed in Chapter I, the state of Colorado and Washington D.C. simply required Uber to conduct more extensive driver background checks, provide extensive insurance and pay standard fees similar to taxi companies. However, the practice across the EU has largely been one of non-cooperation with the sharing economy platform and an outright banning the Uber service[63]. Uber has most prominently faced suspensions in Belgium, France, Germany, Italy and Spain, as observed in a comprehensive study of the ride-sharing market[64]. In most cases, the sharing economy business models have been prohibited on the basis of alleged unfair competition.

In Belgium, the Commercial Court of Brussels condemned Uber in a cease and desist order for unfair commercial practice because it enables drivers who do not have a licence to offer taxi services.[65] Hence, platforms enabling the provision of unauthorised activities have been banned.

Following violent protests on part of the French taxi drivers, a reform of the French Transport code was enacted. In essence, the newly adopted provisions prohibit third-party

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[61] Directorate General for Internal Policies, 'State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation' [2010] IP/A/IMCO/ST/2010-04, available at: <http://www.europarl.europa.eu/document/activities/cont/201007/20100713ATT78792/20100713ATT78792EN.pdf> accessed 22 July 2017, p. 10

[62] n 50, p. xvi

[63] Daniel E. Rauch and Daniel Schleicher, 'Like Uber, but for Local Governmental Policy: The Future of Local Regulation of the "Sharing Economy"' [2016], available at <http://ssrn.com/abstract=2549919> accessed 21 July 2017, p. 21

[64] Commission Staff Working Document, 'A European agenda for the collaborative economy - supporting analysis' [2016] SWD(2016) 184, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0184&from=en> accessed 22 July 2017, pp. 28-29

[65] Comm Bruxelles (cess.), 23 sept. 2015, *Radio Taxi Bruxellois v. Uber*

transport services provided by intermediaries to inform users in real time, by any means, of the availability and location of cars active in the public road, except if they are taxis.[66]

In Germany, Uber exited the market in Düsseldorf, Hamburg and Frankfurt, following several court judgments, which found that using a software application to dispatch and provide bookings for passenger transport should be viewed as an integral part of an overall service which involves a transport service. Therefore the platform would be held liable for the illegality of the provision of the transport service.[67]

In April 2017, Italy woke up to a nationwide ban on the Uber services, following a decision by a Rome judge ruling in favour of Italy's major taxi associations that the ride-sharing service amounted to unfair competition. This is consistent with the 2015 bans on UberPop and UberBlack by the Milan Court on the grounds of unfair competition against companies offering ride-hailing services that were obliged to return to a garage between rides[68].
In Spain, telecom operators and payment service providers were asked by a Madrid Court ruling on interim measures, to disable access to the Uber application on the basis that its operation would constitute unfair competition with licenced taxi drivers[69].

Similarly, in Bulgaria, a market where the Uber service was gaining increasing popularity among both riders and drivers, the Supreme Administrative Court upheld the fine of around EUR 100,000, imposed by the Competition Protection Commission (CPC). The platform was also ordered to immediately halt its operations and has since not operated on the Bulgarian market. The reason behind banning the Uber services were, among others, non-payment of taxi licence fees and thus creating an uncompetitive environment. Meanwhile, Parliament approved the second and final reading of amendments to the Road Transport Act, saying that taxi services may be rendered only by registered carriers with certificates of registration.

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[66] Article L3120-2, paragraph III
[67] For example, Superior Administrative Court (Oberverwaltungsgericht) Hamburg, decision of 24 September 2014 (3 Bs 175/14)
[68] Tribunale di Milano, Sent. 8359 of 6 July 2015
[69] Interim measures 707/2014 of 9 December 2014 by the Juzgado de lo Mercantil, nº2 Madrid.

The Hungarian government also recently passed legislation saying that Uber drivers breached regulations other taxi firms must adhere to after allowing them to operate for two and a half years. The new law permits the Hungarian national communications authority to block internet access to allegedly illegal dispatcher services.

Clearly, matters pertaining to unfair competition law are highly specific to each Member State and are thus reserved as a prerogative for individual Member States. Despite this fact, there are several provisions that can be invoked within the EU treaties.

The first possibility for Uber would be to invoke Article 101 and Article 102 TFEU in conjunction with Article 4(3) TEU. The latter provides for a duty of loyal cooperation between the Member States. This duty requires Member States to take appropriate measures to "ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" and "refrain from any measure which could jeopardise the attainment of the Union's objectives". The case law developed in the CJEU helps better understand the extent of this obligation. In *Inno v ATAB*[70], the CJEU stated that Member States shall not enact or maintain any legislation which would deprive Article 101 TFEU (then Article 85), among other competition law rules, of its effectiveness[71]. Should the measures taken by the Member State impede the functioning of EU competition law, such conflicts between the national rules and EU rules must be resolved by applying the principle that EU law would take precedence.[72] However, in order for such a case to be successful, the relevant Member State needs to have legislation in place which would encourage an agreement running contrary to Article 101 TFEU. This is confirmed by the case of *Cullet v Leclerc*[73] where the CJEU ultimately agreed with the Commission, which considered that Member State measures would have to facilitate unlawful conduct on part of undertakings through specifically designed rules circumventing the rules of competition. As noted, this would only be the case in exceptional circumstances.[74]

[70] Case 13/77, *Inno v. ATAB* [1977] ECLI:EU:C:1977:185
[71] Ibid, para. 32
[72] Case 14/68 *Walt Wilhelm and others v Bundeskartellamt* [1989] ECLI:EU:C:1969:4, para. 6
[73] Case 231/83 *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville* [1985] ECLI:EU:C:1985:29
[74] Ibid, para. 14

In the case of Uber, it would be very difficult to actually enforce Article 4(3) TEU. For the platform to succeed, it would have to successfully argue that measures adopted by the Member State which regulate taxi services facilitate an anti-competitive agreement adopted by taxi companies or outright transform it into national law. Such argument is unlikely to succeed. In *Cullet v Leclerc,* the challenge to a fixed minimum price failed because the minimum price was merely a Member State measure that was completely separate to the anti-competitive agreement in question. Nevertheless, the claim could have some merit. Recent developments in Spain have shown a tendency towards challenging the taxi sector. The Spanish national competition authority (CNMC) has challenged acts of public administrations in Malaga and Cordoba, related to unjustifiable restrictions to competition in the local taxi services market[75]. The CNMC found three measures which have had the effect of restricting competition in the area. First, the regulations set a maximum number of taxi licenses that can operate in the municipalities, limiting the access to the market and restricting free enterprise. Second, there exists a fixed price regime preventing operators to compete freely on the price of taxi services, which is ultimately to the detriment of consumers. Finally, taxi license holders may participate in the administrative decisions regarding the number of taxis and the price levels, which facilitates collusion.[76] If successful, the decision of the court could be a basis for further such actions in Spain and perhaps other countries, where similar regulations are in place on the taxi market. Ultimately, this could work to Uber's advantage in a potential claim invoking Article 4(3) TEU in conjunction with Articles 101 and 102 TFEU. At this moment in time, however, it is too early to tell how solid such claim would be.

A second possibility is to argue that Member States are in violation of the freedom to provide services under Article 56 TFEU. This provision precludes "any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable

[75] OECD Directorate for Financial and Enterprise Affairs, 'Annual Report on Competition Policy Developments in Spain' [2017] DAF/COMP/AR(2017)15, available at: <https://one.oecd.org/document/DAF/COMP/AR(2017)15/en/pdf> accessed 22 July 2017, p. 3

[76] CNMC, 'The CNMC challenges in court the taxi regulations in the cities of Malaga and Cordoba' [2016] available at <https://www.cnmc.es/node/232146> accessed 22 July 2017

to prohibit, impede or render less attractive"[77] the exercise of the freedom of establishment guaranteed thereunder. It should thus be possible to argue that taxi regulations making very hard for companies based in other Member States to provide their services could fall foul with Article 56 TFEU. Restrictions to the free movement principles contained in the TFEU are, however, permitted when "those provisions are necessary to meet overriding requirements of general public importance". Moreover, they need to be proportionate for that purpose. What the deciding factor is therefore whether the aims or overriding requirements could have been met by less restrictive means.[78] To answer this question, one must examine the restrictions imposed by taxi regulations and whether they are necessary to meet overriding requirements of general public importance and whether they proportionate to achieve the objectives they seek to protect. One can only speculate how the courts would interpret this issue.

However, the proportionality would not need to be addressed, if Uber is considered not to provide a service within the meaning of Article 56 TFEU. In this regard, the tensions between Uber and European regulators have come to a head in *Asociacion Profesional Élite Taxi v. Uber Systems Spain, S.L.*[79], a case currently pending before the CJEU. The court is tasked with resolving a key question that will determine Uber's fate in the EU: is Uber a transport company, or is it an information society service that simply matches third-party drivers with riders through an online platform? If Uber is a transport company, it is subject to national transport regulations, but if the company is an information society service, it benefits from the freedom to provide services guaranteed under Article 56 TFEU. In 2014, the Asociacion Profesional Elite Taxi, representing taxi drivers in Barcelona, brought an action before the Commercial Court No 3 of Barcelona, asking the court to impose penalties on Uber Spain, for engaging in a company that belongs to a group managing the Uber platform, for engaging in unfair competition towards the taxi company. In particular, the plaintiffs maintained that Uber Spain is not entitled to provide the UberPop service in the city of Barcelona, as its driver-partners do not possess the same licenses and authorisations as taxi drivers. Since it considered that an interpretation of several provisions of EU law was

[77] Case C-376/08, *Serrantoni Srl* [2009] ECR. I-12169, para. 41
[78] Joined cases C-34/95, 35/95 and 36/95, *De Agostini* [1997] ECR I-3843, para. 52
[79] Case C-434/15 *Asociacion Profesional Elite Taxi v Uber Systems Spain, SL* ECLI:EU:C:2017:364

necessary to enable it to give a decision in the case before it, the Juzgado de lo Mercantil n° 3 de Barcelona decided to refer a number of questions to the Court of Justice concerning the classification of Uber's activity in light of EU law. Specifically, the Commercial Court No 3 of Barcelona asked whether Uber fell within the provisions of Directive 2000/31 ("the e-Commerce Directive) as an information society service provider, or whether Uber provides a transportation service within the meaning of Article 2(2) of Directive 2006/123 ("the Services Directive"). In the first case, Uber would benefit from the principle of the freedom to provide services and licences and authorisations required by the city of Barcelona's regulations could be considered incompatible with this principle. In the second case, the services provided by Uber would fall within the field of transport, which is regulated by the law of the Member States.

At present, the CJEU has not yet issued its judgment, which will undoubtedly have widespread implications for Uber in Europe, as well as for the other sharing economy platforms, operating under a similar triangular structure. However, Advocate General Szpunar delivered his opinion on 11 May 2017. According to Szpunar, Uber is not "a mere intermediary between drivers willing to offer transport services occasionally and passengers in search of such services. On the contrary, Uber is a genuine organiser and operator of urban transport services in the cities where it has a presence"[80]. The determinative issue was the composite nature of the service[81]. The Advocate General suggested that a composite service, i.e. a service comprising both electronic and non-electronic elements, would be treated as an information society service in two cases. First, if the two elements could be seen as economically independent, the electronic element would fall within the scope of the e-Commerce Directive. Second, the composite service should be substantially or predominantly provided by electronic means to be considered as an information society service.[82] However, according to the Advocate General, the Uber platform itself exerts too much control over all relevant aspects of an urban transport service and therefore the two cannot be considered economically independent[83]. Indeed, Szpunar considered that the main activity which gives economic meaning is the supply of transport, while the intermediation

[80] Ibid, para. 61
[81] Ibid, para. 28
[82] Ibid, para. 33-35
[83] Ibid, para. 51

between drivers and riders is ancillary to this. For these reasons, the Advocate General concluded that, in relation to the supply of transport, the supply whereby passengers and drivers are connected with one another by electronic means is neither self-standing, nor the main supply. Consequently, Article 2(2) of the e-Commerce Directive was considered not applicable to Uber's services. In an attempt to cover all scenarios, the Advocate General also explored the scenario, where the electronic intermediation would be regarded as independent from the provision of transport services. Even in such case, Uber would still be liable for a violation of unfair competition, due to the responsibility both for the connection between driver-partners and riders and for the activities of the driver-partners[84].

If upheld by the CJEU, this conclusion leaves no doubt that Uber would be required to obtain the necessary licenses under national law and could be penalised if it fails or refuses to comply with those requirements, including by an outright ban on the service. In view of the fragmented response to Uber across the EU, a unifying decision by the CJEU is a welcome solution, as the drafting of new legislation would arguably take a much longer time. Sharing economy platforms have brought a clear European dimension in an area where Member States were traditionally strongly opposed to the enactment of EU laws[85]. However, as welcome as such decision might be in terms of providing a uniform treatment, it also has the potential to undermine the increased efficiency, growth and jobs, and improved consumer choice, offered by Uber specifically and the sharing economy at large. If Uber is not free to provide services under the TFEU, chances are this would be applied to other platforms which have disrupted long-standing industries in individual Member States.

In a surprising turn of events, however, Uber might benefit from the non-classification as an information society service provider. At the beginning of this Chapter, it was observed that unfair competition law and traditional competition (antitrust) law are closely related. This has never been more true than in the case of Uber. The next Chapter will examine how Uber's arguments that it is not a transportation company but an information society

[84] Ibid, para. 86

[85] Filipa Azevedo, 'Social, Economic and Legal Consequences of Uber and Similar Transportation Network Companies (TNCs)' [2015], available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/563398/IPOL_BRI(2015)563398_EN.pdf accessed 23 July 2017, p. 5

company, could hurt the company in its ongoing competition (antitrust) battle on price fixing.

The case for price fixing: possible solutions in Europe and the United States

The main price-fixing battle Uber faces in the United States is taking place in New York State. In *Meyer v Kalanick*[86], the plaintiffs claimed that Mr. Kalanick, Uber's former CEO, engaged in an illegal price-fixing conspiracy, violating Section 1 of the Sherman Antitrust Act of 1890 ("the Sherman Act"). This section prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" as long as the plaintiff can prove "some form of concerted action between at least two legally distinct economic entities". The conspiracy referred to by the plaintiffs concerns Uber's "surge pricing" algorithm, according to which the prices in a specific area increase, if there is a higher number of people who need a ride in that area. This allows Uber to effectively restrict the price competition among its driver-partners to the detriment of Uber riders. According to Mr. Meyer, "he and the putative class have suffered antitrust injury because, were it not for Mr. Kalanick's conspiracy to fix the fares charged by Uber drivers, drivers would have competed on the price and Uber fares would have been "substantially lower"[87].

The Supreme Court delineated the requirements for the illegality of such conspiracy as early as 1939 in the *Interstate Circuit*[88] case: it is enough for the competitors to accept an invitation to participate in a plan, the consequences of which would be restraining interstate commerce, without any previous agreement.[89] Later on, United States courts coined the term "hub-and-spoke arrangement" to define such conspiracies, where an entity, the hub, coordinates an agreement among competitors at a different level of the market structure, the spokes. Hub-and-spoke arrangements could theoretically be both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to

[86] *Meyer v Kalanick and Uber Technologies, Inc.* [2016] 174 F.Supp.3d 817
[87] Ibid, 822
[88] *Interstate Circuit v. United States* [1939] 306 U.S. 208
[89] Ibid, 226

the terms pre-defined by the hub.[90] As evidenced by the following cases, however, courts are more inclined to regard them as horizontal agreements, which are *per se* illegal under Section 1 of the Sherman Act.

In *Interstate Circuit*, the hub was Interstate Circuit, a motion picture theater chain, which demanded various distributors that supplied movie theaters with films, the spokes, to increase their prices for those movie theaters, where prices were low and respectively where more moviegoers would buy tickets. According to the Supreme Court, the main factors that proved the existence of a horizontal price-fixing conspiracy were that the "each of the distributors knew that the proposals were under consideration by the others" and that each individual distributor had assessed the surge in its profits if they agreed to this action, compared to a risk of substantial loss, if it did not do so.[91] *Interstate Circuit* laid the foundations of price-fixing cases in the United States, and this is evidenced in some more recent cases on hub-and-spoke arrangements. In *Toys "R" Us, Inc v FTC*[92]*,* Toys "R" Us entered into a series of individual vertical agreements with toy manufacturers, each of which agreed to restrict the distribution of toys to warehouse clubs under a new policy issued by Toys "R" Us. The policy set forth several conditions, including: no new or promoted product would be sold to warehouse clubs unless they carry the entire line, Toys "R" Us would need to pre-approve all specials and exclusives to be sold to the warehouse clubs, and there would be no discussion about the prices[93]. The Court stated that this was a "modern equivalent of the old *Interstate Circuit* decision"[94]. However, in this case there was more evidence of the communications between Toys "R" Us and the manufacturers. The chain of emails showed that each manufacturer shifted its model rather abruptly by agreeing to the new policy. Indeed, it would be more logical for a manufacturer to use the highest number of retailers possible than to conclude an exclusive arrangement to carry Toys "R" Us' goods. According to the Court, this was a clear sign that the arrangement was an illegal horizontal agreement, due to the fact that in a legitimate vertical transaction, the manufacturer would have asked Toys "R" Us to be its exclusive carrier[95].

[90] *United States v. Apple, Inc.* [2015]*,* 791 F.3d 290, 314
[91] n 86, 222
[92] *Toys "R" Us, Inc. v. FTC* [2000], 221 F.3d 928
[93] Ibid, 932
[94] Ibid, 935
[95] Ibid, 936

Turning back to *Meyer v Kalanick,* the plaintiffs could have a strong case against Uber based on the cases discussed above and other similar litigation. The Court seemed to confirm this when it found that a horizontal conspiracy was plausible[96]. In this context, the Court agreed that the driver-partners forego competition because the algorithm guarantees that other driver-partners would not undercut their prices, thereby achieving supracompetitive prices.[97] A further indication of the court leaning towards horizontal classification is that Judge Rakoff found that Uber is sufficiently comparable to the *Interstate Circuit* hub[98]. Following this reasoning, Uber could be found to be a hub that orchestrated price-fixing among its driver-partners, or the spokes, by having them agree to the terms and conditions of the Uber app, one of which is agreeing to using the "surge pricing" algorithm. This agreement could be seen as analogous to those concluded between the previously discussed hubs and spokes. One could argue that the driver-partners should not be subject to the same treatment as traditional spokes, due to the fact that Uber and similar platforms have a much larger supplier base than hubs which traditionally collude with only a handful of spokes. In the case of Uber, there are hundreds of thousands of driver-partners in the United States and over a million worldwide[99]. It is therefore difficult to believe that all of these people knowingly used the algorithm developed by Mr. Kalanick to collude. However, the Court in *Meyer v Kalanick* rejected this argument in its entirety. According to Judge Rakoff, it is precisely the sophisticated algorithm which allows for an orchestration of price-fixing on a large scale and this "need not leave antitrust behind"[100].

This runs contrary to what some authors have argued, namely that Uber should be able to forego the applicability of the above "hub-and-spoke" case law, as its innovative business model differentiates it from the traditional hubs in the more established industries.[101] Specifically, the argument goes, the Uber pricing structure could not be put in the same category as "the invention of specific demands sent out to the major players in the up and

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[96] n 84, 825
[97] n 84, 824
[98] n 84, 825
[99] Telephone conversation with a representative of Uber on 15 July 2017. The source preferred to remain anonymous.
[100] Ibid
[101] Nicholas Passaro, 'How Meyer v. Kalanick Could Determine How Uber and the Sharing Economy Fit into Antitrust Doctrine' [2016] available at: <https://ssrn.com/abstract=2880204> accessed 21 July 2017, p. 13

downstream markets"[102]. This line of thought does have its flaws. The fact that sharing economy platforms like Uber have developed cutting-edge algorithms should not automatically exempt them from being classified as hubs. According to Stucke and Ezrachi, the difficulty in enforcing lies mainly in the fact that one needs to examine the design of the algorithm itself and establish whether it was designed in a way that would lead to its exploitation[103]. However, if Mr. Kalanick did indeed design the Uber algorithm in a way that makes it possible for drivers to collude, nothing could stop a court from ruling that this arrangement is a *per se* illegal horizontal "hub-and-spoke arrangement". Not surprisingly, the Court in *Meyer v Kalanick* eventually denied the motion to dismiss and ruled that the plaintiffs presented a plausible claim of horizontal conspiracy[104].

The Court left open the possibility of a vertical agreement classification as well, since the plaintiff "adequately plead a vertical conspiracy between each driver and Mr. Kalanick"[105]. An important distinction is made in the United States between vertical and horizontal conspiracies. In the landmark case of *Leegin*[106], the Court ruled that restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, while vertical price restraints are to be judged according to a more lenient methodology - the so-called *rule of reason*[107].

In an unexpected development, a federal judge granted a request by Uber and its chief executive officer to put the *Meyer v Kalanick* lawsuit on hold[108]. For the time being, the ultimate result of the case is still unclear. Therefore, in the following, the thesis will examine the possible defences available to Uber, both from an EU and United States perspective.

In the United States, the best option for Uber could be to argue a non-violation of antitrust laws based on the rule of reason doctrine for vertical price restraints. This is because, if a *per se* illegality is found, no further effects of the agreement are considered - it is the fact of

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[102] Ibid.
[103] Maurice E. Stucke & Ariel Ezrachi, 'Artificial Intelligence & Collusion: When Computers Inhibit Competition' [2015] available at http://ssrn.com/abstract=2591874 accessed 21 July 2017, p. 15
[104] n 84, 829
[105] n 84, 827
[106] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877
[107] Ibid, 886
[108] *Meyer v Kalanick* [2016] No. 16-2750

coordination in prices that is the issue[109]. Importantly, the Court in *Meyer v Kalanick* is already inclined to decide on a *per se* illegality. By contrast, agreements not classified as *per se* illegal are analyzed under the rule of reason to determine their overall competitive effect. According to the FTC Antitrust Guidelines for Collaborations Among Competitors of April 2000 ("the FTC Guidelines"), these could be agreements that might otherwise be considered *per se* illegal, however they are reasonably necessary to achieve procompetitive benefits from an efficiency-enhancing integration of economic activity. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. The rule of reason analysis allows for more flexibility, as it takes into account various factors that are necessary to determine the overall competitive effect of the relevant agreement. According to the FTC Guidelines, "no one factor is dispositive in the analysis". The nature of the agreement is first examined, more specifically its purpose, whether it is already operating and if yes, if it has caused anticompetitive harm. If the agreement analysis shows that there is anticompetitive harm resulting from it, then the overriding benefits, if any, would need to be examined, in order to determine whether they could offset the harm caused. If the investigation indicates anticompetitive harm, the next step is to assess whether and to what extent the agreement is necessary to achieve procompetitive benefits that likely would offset anticompetitive harms. Therefore, unlike the *per se* rule, the rule of reason allows a decision-maker to consider all of the effects of an agreement or arrangement to decide whether it ought to be permitted under antitrust law[110].

Consequently, after the case is resumed, Uber continue to argue that there is no single multilateral horizontal agreement, but rather a multitude of vertical bilateral agreements, that each of its driver-partners individually agreed to. This classification could give the platform the chance chance of succeeding under the rule of reason doctrine. Nevertheless, there are two downsides to this approach. First, the Court in *Meyer v Kalanick* is already inclined to conclude that there was a horizontal conspiracy. This would arguably prevent the Court from

[109] Paul M. Sanjukta, 'Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications' [2017], p. 245
[110] Ibid, p. 244

objectively weighing the pro-competitive benefits of Uber with the anti-competitive effects. Further, even if the court decides to regard the agreement as vertical, the results of the rule of reason analysis could nevertheless lead to a ruling in favour of the plaintiffs. This is largely due to the fact that none of the factors to be considered is conclusive to the judgment of the Court. Most important of all, Uber has persistently argued that it is not comparable to a traditional taxi company, nor to a car rental company, but that it is a technology company. As established in *Meyer v Kalanick,* the market share of Uber in the technology space is 80%, with Lyft as its only real competitor with 20%[111]. This could invalidate the pro-competitive effect arguments put forward by the platform, as under the rule of reason, the plaintiffs will need to show that the challenged action has had an "*actual* adverse effect on competition as a whole in the relevant market"[112].

In the EU, Uber does not have a pending price fixing litigation. If that was the case, it would be argued that Uber and its driver-partners are in violation of Article 101 TFEU. Under this provision, "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market". However, in contrast to the United States, where the classification as *per se* violation would mean that a balancing exercise cannot take place, in the EU it would be possible to invoke the Article 101(3) TFEU exception to the general prohibition under Article 101(1) TFEU, subject to certain conditions. According to the Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC) ("the 101(3) Guidelines"), Article 101 provides a legal framework for the assessment of vertical restraints, which takes into consideration the distinction between anti-competitive and procompetitive effects. Thus, while Article 101(1) prohibits those agreements which appreciably restrict or distort competition, Article 101(3) exempts those agreements which confer sufficient benefits to outweigh the anti-competitive effects.

To satisfy Article 101(3), an agreement must cumulatively satisfy the following four prerequisites: (i) it must contribute to improving the production or distribution of goods or

[111] n 84, 827
[112] Ibid

contribute to promoting technical or economic progress, (ii) consumers must receive a fair share of the resulting benefits, (iii) the restrictions must be indispensable to the attainment of these objectives, and (iv) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question[113].

As already discussed at length in Chapter I, Uber, Lyft and the other sharing economy platforms have created a welcome disruption in established sectors of the economy. Their business model has absorbed idle capacity which has led to goods being employed more intensively than before, which has in turn made the already existing products and service providers more valuable[114]. Consumers have, in turn, benefitted from this more efficient allocation of resources[115] and the reduction in traffic congestion in cities[116]. Moreover, as the OECD has found, this has helped consumers reduce their payment transaction costs or, at the very least, the sharing platforms provide new alternatives[117]. As noted in Chapter I, this has led to many of the established markets to to take action and revise their own ways of competing with this emerging technologies. With this in mind, it would not be too hard for Uber to argue that it fulfils the first condition under Article 101(3). Indeed, according to the Guidelines on the application of Article 101(3) ("the 101(3) Guidelines), "technical and technological advances form an essential and dynamic part of the economy, generating significant benefits in the form of new or improved goods and services"[118].

According to the Guidelines, the second pass-on requirement of Article 101(3) is fulfilled, where the benefits to the consumers must at least compensate them for any actual or likely negative impact caused to them by the restriction of competition. If the consumers are worse off following the agreement, the second condition of Article 101(3) is not fulfilled. The positive effects of an agreement must be balanced against and compensate for its negative

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[113] Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0427(07) accessed 21 July 2017, para. 34
[114] n 61, p. 15
[115] OECD, 'Hearing on Disruptive Innovation' [2015] available at: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/wd(2015)54&docLanguage=En> accessed 21 July 2017, p. 4
[116] Rosabeth Moss Kanter, *Move: Putting America's Infrastructure Back in the Lead* (New York: W. W. Norton, 2015), p. 140
[117] Ibid
[118] Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC), para. 70

effects on consumers. It is not required that consumers receive a share of each and every efficiency gain identified under the first condition. It suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement. In that case consumers obtain a fair share of the overall benefits. In order for the condition that consumers be allowed a fair share of the benefit to be satisfied, it is not necessary, in principle, for each customer individually to derive a benefit from an agreement, a decision or a concerted practice. Rather, the overall effect on consumers in the relevant markets must be favourable[119]. If a restrictive agreement is likely to lead to higher prices, consumers must be fully compensated through increased quality or other benefits[120]. Therefore, once the Commission establishes that the price is increased as a result of the agreement, consumers would need to be compensated by way of other efficiencies. The approach taken by the Commission in this regard can be observed in *Reims II*[121]. Here the case concerned an increase in cross-border mail tariffs. The Commission concluded that, despite the increased tariffs, consumers would get a fair share of the benefits, in particular in terms of the increase of the quality of the services provided[122]. Conferring such benefits by Uber and other sharing platforms has long been established. As observed by Azevedo, "by facilitating access to information TNCs services may allow for better utilisation of assets and skills; improved utilisation of assets may result in positive outcomes for consumer welfare and efficiency gains in transport services"[123]. It follows that if one was to assess the eligibility of Uber to fulfil the second condition in isolation of the remaining two conditions, one could reasonably conclude that Uber would also check this box. However, as noted by Nicolaides, the second and fourth conditions of Article 101(3) overlap and must, in fact, be assessed simultaneously [124]. The fourth condition has an important role to play, as the assessment of whether the benefits were passed on to consumers could prove to be very subjective[125]. Before its examination, it worth discussing the fulfilment of the third condition.

[119] Case C-238/05, *Asnef-Equifax, Servicios de Informacion sobre Solvencia y Crédito, SL v Asociacion de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECLI:EU:C:2006:734, para 72
[120] para. 85-86
[121] Commission Decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement Case [2003] COMP/C/38.170
[122] Ibid, para. 118
[123] n 83
[124] Phedon Nicolaides, 'The Balancing Myth: The Economics of Article 81(1) & (3)' Legal Issues of Econ. Integration 32(2) [2005], p. 137
[125] Ibid, p. 138

The third and fourth conditions would arguably be the most challenging for Uber. According to the Guidelines, in order for Uber to fulfil the third condition, it would have to put forward an argument that the common surge pricing structure is an essential part of its business. The third condition of Article 101(3) requires that agreements should not contain restrictions which are not indispensable for the achievement of the improvements claimed by the parties. The Guidelines outline a two-fold test for the application the third condition. First, the restrictive agreement as such must be reasonably necessary to achieve the efficiencies. In the *GlaxoSmithKline* decision[126], the European Commission clarified that parties must "demonstrate any causal link between the restriction of competition and the objectives set out in the first condition"[127] of Article 101(3). Thus, the parties to the agreement must consider what the least restrictive arrangement could be, and to show that they could not achieve claimed efficiencies through other, less restrictive arrangements.[128] The restriction is more likely to be indispensable, if the claimed efficiency gains are more uncertain without such restriction. Second, the restrictions that result from the agreement must be reasonably necessary for the realisation of the efficiencies. The parties thus need to prove that both the nature of the restriction and its intensity are reasonably necessary in order to produce the efficiencies[129]. In other words, the undertakings must demonstrate that without the agreement the efficiencies that arise from it will be reduced or eliminated. Thus, under Article 101(3), the parties to the agreement must essentially prove that without it, they would not be able to put their product to market, unless it would result in higher costs.[130] In the case of Uber, the surge pricing algorithm helps Uber generate more revenue, as the platform receives a percentage of the income generated by its driver-partners. As the price rises, price-sensitive customers stop requesting rides and reduce demand, while higher prices are an incentive for driver-partners to drive in areas, where the surge is active. One could argue that without generating enough revenue through the usage of the algorithm, Uber would not be as successful and would not be able to provide consumers with the benefits it confers. However, the efficiencies conferred by the sharing economy as listed above, could well be

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[126] Commission Decision 2001/791/ EC *GlaxoSmithKline* [2001] OJ L302
[127] Ibid, para. 179
[128] n 115, para. 76
[129] n 115, para 78
[130] n 115, para. 109

made possible without needing to resort to such pricing algorithm. Indeed, algorithms may be less problematic in markets with less concentration and may be less likely to facilitate anticompetitive behaviour when the platform allows for alternative price-setting mechanisms.[131] For instance, in the case of Airbnb, another sharing economy poster child, individual hosts are free to set their own prices. This has not hindered the aims of the Airbnb platform, namely to maximise the number of transactions, ensure that listings are optimally priced and to ensure participation on the platform by both hosts and guests.[132] Thus, one could easily argue that the surge pricing algorithm as such is unnecessary for the success of the Uber platform. If Uber allowed drivers to set their own price, natural market forces would result in the proper price. Users would open the app, see all the prices different drivers were offering, and choose accordingly and Uber would not lose consumers in case it allows its driver-partners to set different prices. This would of course come down to the evidence presented, specifically the expert testimony regarding how consumers might respond. The court would have to decide whether any harm would come from removing the restriction to use the algorithm because without showing that Uber needs the algorithm to operate, there is no reason it should escape liability.[133] In sum, while the third condition is not impossible to fulfil by Uber, the company would need to "explain and demonstrate why such seemingly realistic and significantly less restrictive alternatives to the agreement would be significantly less efficient"[134].

As mentioned above, the fourth condition under Article 101(3) is tightly connected to the second condition. Under the fourth condition, Uber would have to prove that even with this hard-core competition restriction, its agreement would still work to the benefit of consumers. According to the Guidelines, the parties must show that the agreement does not hinder the remaining sources of actual and potential competition to function properly. What is important here is that the prohibition on eliminating competition is a narrower concept than that of the existence or acquisition of a dominant position so that an agreement could be regarded as not eliminating competition within the meaning of Article 101(3) of the Treaty,

[131] Oxera, 'When algorithms set prices: winners and losers' [2017], available at: <http://www.oxera.com/getmedia/3243dc6d-9c69-4292-8b47-4366d18903d1/When-algorithms-set-prices-winners-and-losers.pdf.aspx?ext=.pdf> accessed 22 July 2017, p. 21
[132] Ibid, p. 13
[133] n 99, p. 20
[134] n 115, para. 75

and therefore qualify for exemption, even if it established a dominant position for the benefit of its members.[135] Accordingly, the mere finding of dominance is not sufficient to establish that the competition is eliminated, analysis into the degree of market power and the relationship between the agreement and such market power is needed. While there are no specific combined market shares above which an agreement tends to eliminate effective competition, the Commission considers firms with less than 40% market share unlikely to be dominant[136]. The determinative factor is "the degree of competition existing prior to the agreement and…the reduction in competition that the agreement brings about."[137] Although, it is clear that elimination of competition is assessed regarding "relevant market", the fourth condition of Article 101(3) concerns "substantial part of the products in question" which is a different concept from the former notion[138]. Based on that the Guidelines, in cases involving differentiated products, distinguish the competitive constraints according to the degree of substitutability between them. Consequently, the more substitutable the products, the greater the change brought about by the agreement regarding restriction of competition on the market and the more likely that competition in respect of a substantial part of the products concerned being eliminated.

If we examine the composition of the taxi services market before and after Uber entered it, the evidence shows that competition has increased. Certainly Uber is now competing in a market before dominated by long lasting incumbents offering a new alternative to consumers. As it was revealed in a recent study by the Economist, Uber is exerting a competitive pressure on the taxi industry, at least 65% of the growth in Uber rides from June 2013 to June 2015 "has replaced trips that would otherwise have gone to taxis", while the remaining 35% provide service to underserved market segments[139]. Ironically, however, Kalanick has touted Uber's business model as procompetitive. If Uber were a transportation company and would hire its driver-partners as employees, it would be free to compete with other companies using its surge pricing algorithm. But by arguing that it is not a

[135] Case T-395/94 *Atlantic Container Line* [2002] ECR II-875, para 330
[136] European Commission, 'Antitrust procedures in abuse of dominance (Article 102 TFEU cases)', available at: <http://ec.europa.eu/competition/antitrust/procedures_102_en.html> accessed 21 July 2017
[137] n 115, para 107
[138] Ibid, para 113
[139] The Economist, 'Taxis v Uber: Substitutes or Complements?' [2015] available at: <https://www.economist.com/blogs/graphicdetail/2015/08/taxis-v-uber> accessed 21 July 2017

transportation company, Uber has essentially turned its driver-partners into independent firms that compete with each other, thus effectively agreeing to fix prices among direct competitors using the surge pricing algorithm. Curiously, the argument Uber has put forth to fight unfair competition claims, could also be the one that ultimately leads to failing to comply with the fourth condition of Article 101(3). While it may be possible to advance the pro-competitive effect on the taxi and car rental market, the arrangement would fall short of the final requirement of Article 101(3) TFEU. With the case against Uber Systems Spain still pending at the CJEU, the fact that Uber defines itself as a technology company, could pose a problem with the application of the Article 101(3) TFEU exception.

Overall, it seems that obtaining an exemption under Article 101(3) would prove to be a big challenge for Uber. This is especially true with regard to the third and fourth conditions. Therefore, it is worth exploring other alternatives.

One such alternative is for Uber to argue that its driver-partners are agents, as agency agreements fall outside the scope of Article 101 TFEU. According to the Guidelines, an agent could be either a legal or natural person, who may negotiate and/or conclude contracts on behalf of another person, the principal, either their own name or in the name of the principal of the purchase or sale of goods or services by the principal. An agreement will generally constitute a genuine agency agreement where the property in the contract goods or services does not vest in the agent, or the agent does not himself supply the contract services, and the agent does not bear any, or bears only insignificant, commercial or financial risk in relation to the contract negotiated or concluded on behalf of the principal.[140] For the purpose of applying Article 101(1), an agreement will thus generally be considered an agency agreement where property in the contract goods bought or sold does not vest in the agent, or the agent does not himself supply the contract services. In addition, an agent must not contribute to the costs relating to the supply or purchase of the contract goods or services, including transportation costs. Second, the agent must not maintain at their own cost or risk stocks of the contract goods. Third, no responsibility must be undertaken by the agent toward third parties for damage caused by the product or service sold. Fourth, the agent must

[140] Guidelines on Vertical Restraints [2010] OJ C 130, para. 13

generally not take responsibility for customers' non-performance of the contract. Next, the agent must not be directly or indirectly obliged to invest in sales promotion or make any market-specific investments in terms of personnel training or equipment, unless these are fully reimbursed by the principal. Finally, a genuine agent would not undertake other activities within the same product market required by the principal.

This list is not exhaustive. However, where the agent incurs one or more of the risks or costs mentioned, the agreement between agent and principal will not be qualified as an agency agreement. The absence of risk would show that the agent has no presence on the market that is independent from the principal[141]. The question of risk must be assessed on a case-by-case basis, and with regard to the economic reality of the situation rather than the legal form. Such risk analysis is twofold as it involves the assessment of the contract-specific risks and, if needed, the risks related to market-specific investments.

Contract-specific risks are those risks, which are directly related to the contracts concluded or negotiated by the agent on behalf of the principal. Of the above mentioned risks, the contract-specific risks would include agents' contribution to the costs relating to the supply or purchase of the products or services, their responsibility towards third parties for any damages caused by the products, as well as the responsibility for customer non-performance. Following CJEU case law, where an agent bears even one contract-specific risk, there will be no genuine agency. Indeed, the CJEU notes that "representatives can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal"[142]. The contract-specific risks are one of the main reasons why Uber would doubtfully establish an agency relationship with its driver-partners. In particular, Uber would need to establish that the drivers bear no or only an insignificant financial or commercial risk of the transactions with the customers. To establish that the drivers would only bear an insignificant risk might be difficult because of the conditions that

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[141] Okeoghene Odudu and David Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' 51 Common Market Law Review, Issue 6 1721, p. 1735

[142] Joined Cases 40/73 to 48/73, 50/73, 54 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECLI:EU:C:1975:174, para. 539; Case C-266/93 *Volkswagen AG v VAG Leasing GmbH* ECLI:EU:C:1995:345, para. 19

the Commission's set out in its Guidelines on Vertical Restraints.[143]

Examples of market-specific investments would include investments by the agent in equipment, premises or training of personnel (unless fully reimbursed by the principal). The Guidelines on Vertical Restraints give the examples of paying for a petrol storage tank in the case of petrol retail agents or specific software to sell insurance policies in the case of insurance agents[144].

In *Estaciones de Servicio SA v LV Tobar e Hijos,* the CJEU clarified that the requirement that agents not bear market-specific risks will be interpreted strictly, although in practice it will be very difficult to determine what constitutes acceptable risk. While negligible financial and commercial risk will not preclude the possibility of genuine agency, what will amount to more than negligible risk will necessarily turn on the particular facts.[145] In the case of Uber, the terms and conditions set for the driver-partners stipulate that the latter shall bear "the entire risk arising out of use of the services, and any service or good requested in connection therewith, remains solely with [them]"[146]. Moreover, Uber is not liable for any damages or losses that could possibly arise from the use of the services[147]. Of course, one must not be fooled by the carefully drafted terms. As the CJEU has confirmed, it is the economic reality that will determine whether a genuine agency relationship exists as opposed to the legal form of contracts concluded by the agent[148].

The Guidelines offer some further guidance in this respect. Most importantly, for such agreement several important limitations need to be in place, which relate to the ability of the principal to fix the scope of activity of the agent in relation to the services provided. This is highly important, if the principal would assume the risks so as to determine the commercial strategy. However, a closer look at these limitations shows that they are not consistent with the Uber business model.

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[143] Julian Nowag, 'The UBER-Cartel? UBER between Labour and Competition Law' Working Paper [2016] LundLawCompWP 1/2016, p. 7
[144] n 137, para 16
[145] Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, para 44
[146] Uber, 'Legal: US Terms of Use' [2017] available at <https://www.uber.com/legal/terms/us/> accessed 21 July 2017
[147] Ibid
[148] n 139 *Suiker Unie*, para. 539-542

The first limitation listed in the Guidelines concerns the territory in which the agent is allowed by the principal to sell their goods or services. Under the terms and conditions, which are binding to the driver-partners, they are not restricted to a specific territory where they could drive customers. In fact, there have often been instances in which driver-partners have changed cities or even states within the United States[149]. While it is true that such relocation also means new onboarding process, such process is not such as to dissuade the driver-partners from moving freely. After all, this is part of the flexibility value proposition put forward by Uber and without it, it is doubtful that the platform would achieve such a high number of driver-partners worldwide.

The above considerations are also related to the second limitation under the Guidelines, which is that the principal would impose limitations on the customers, to whom the agent may sell their goods or services. The customer base of Uber may change from city to city or state to state. Therefore, by allowing its driver-partners to move freely and provide their services across a wide range of possible territories, Uber does not impose any limitations on their customers. The only requirements regarding customers from Uber to the driver-partners are related to the data collected for each customer, which may vary depending on the country the driver-partners provide the service[150].

Lastly, the Guidelines state, the prices and conditions at which the agent must sell or purchase the goods or services must be set by the principal. Clearly, this limitation is imposed on the driver-partners by the surge pricing algorithm and is also the main reason behind Uber's price-fixing case. Thus, the third limitation seems to be the most plausible argument in favour of an agency agreement between Uber and the driver-partners. This could not, however, negate the fact that, upon examination of all the facts and circumstances related to the risks undertaken by the driver-partners, there is a high probability of failing to classify them as genuine agents.

[149] Telephone conversation with a representative of Uber on 15 July 2017. The source preferred to remain anonymous.
[150] Ibid

Despite being insufficient to tip the scales toward agency classification, this line of thought could well substantiate a claim that the driver-partners are, in fact, employees of Uber. This leads us to what is perhaps the most creative, and arguably the strongest, argument in the case against price-fixing, namely that Uber's driver-partners are not independent contractors or agents, but its employees. Despite the fact that adopting such strategy would be a rather costly solution, it is the lesser of two evils considering the potential criminal liabilities in some countries, including the United States[151]. Moreover, the argument has merit under both EU and United States legislation and case law.

In the United States, this is based on Section 6 of the Clayton Antitrust Act of 1914. This provision states that "the labour of a human being is not a commodity or article of commerce" and therefore, organisations and their members cannot "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws". In Europe, the CJEU issued a judgment along the same lines in 1993. In the *Becu*[152] case, the CJEU stated that since workers are "incorporated into the undertakings concerned and thus form an economic unit with each of them, dockers do not therefore in themselves constitute 'undertakings' within the meaning of Community competition law.[153] This framework provides Uber with a unique opportunity to tip the scales in its favour in a price-fixing case. Ironically, as Passaro rightly argued, Uber has "relinquished a very potent defense"[154] by relentlessly arguing that its driver-partners are independent contractors. Nevertheless, it seems that courts in Europe and the United States are on track to finding a worker, respectively employee status for the driver-partners, thereby potentially closing the door on the ongoing antitrust litigation. Regardless of the docketed appeal, when the *Meyer v Kalanick* litigation is inevitably renewed and an equivalent case is brought to the CJEU, Uber would need to bring forward a strong argument against the price fixing allegations. Therefore, it is these labour law tendencies that will be examined in more detail in Chapter III below.

[151] Section 1 of the Sherman Act 1890, 15 U.S.C § 1
[152] Case C-22/98 *Becu and Others* EU:C:1999:419
[153] Ibid, para. 26
[154] n 99

Chapter III

Labour law challenges

While opening new virtual markets, sharing economy platforms "threaten to dismantle traditional labour markets since they do not seem to ensure a fair protection of workers' rights"[155]. All these intermediaries recruit freelance or casual workers who are labelled as independent contractors even though many indicators seem to reveal a disguised employment relationship. Uncertainty and insecurity is seen as the price for extreme flexibility[156]. Therefore, their classification as an employee would be the "gateway" to labour law protections[157], including the right to organise into trade unions, minimum wage and healthcare benefits, among others. This chapter looks at the labour law challenges faced by the sharing economy and how the "employee vs independent contractor" problem has been solved to date in Europe and the United States. While the below analysis also applies to all sharing platforms, where there is a dubious distinction between employees and independent contractors, such as TaskRabbit, Handy and Amazon Mechanical Turk, this section will focus on Uber and Lyft, as their court cases provide the most insight into how their drivers could be classified.

Laying the groundwork: analysis of the current labour law framework in Europe and the United States

At EU level, legislation leaves the definition of "employee" to the Member States. A standard definition would thus read as follows: "an employee means any person who, in the Member State concerned, is protected as an employee under national employment law"[158]. Even though labour law mostly falls under national competence, the EU has developed certain minimum standards in the field of social policy under Art. 153 of the Treaty on the Functioning of the Union (TFEU).

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155 Antonio Aloisi, 'Commoditized workers: Case Study Research on Labour Law Issues Arising From a Set of "On-Demand/Gig Economy" Platforms' [2016] Comp. Labour Law & Policy Journal, Vol. 37:653, p. 658

156 Ibid, p. 653

157 Miriam A. Cherry and Antonio Aloisi, "Dependent Contractors" In the Gig Economy: A Comparative Approach' [2017] American University Law Review Vol. 66, Issue 3, Article 1, p. 651

158 For example, see Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses

With the approaching of the 21st century, new work arrangements were introduced, which led to their eventual regulation both in Member States and on an EU level with the three key Directives. These three measures concerned generally the so-called "atypical" workers, namely the Part-Time Work Directive (Directive 97/81/EC), the Fixed-Term Work Directive (Directive 1999/70/EC) and, most recently, the Agency Work Directive (Directive 2008/104/EC). These three Directives brought into the fold the concept of protecting atypical workers' rights and regulating their obligations. Their provisions conferred certain rights to such workers and most importantly, the right to paid annual leave, daily and weekly rest and protection in case of overtime work, posted worker rights, the right not to be discriminated against on protected grounds (such as gender and ethnicity), among others. The health and safety of atypical workers at their workplace is also ensured under the three Directives. As noted by Peers[159], the purpose of these Directives is to "protect the atypical workers directly from abusive conditions of employment, and to protect workers with standard employment contracts indirectly from being undercut by atypical workers". As such, they represent EU legislators' aim to liberalise the labour rules applicable to atypical work, while at the same time providing some protection to workers employed in these forms of employment. Nevertheless, as the measures were introduced within the framework of a Directive, EU Member States could enjoy certain leeway in the way the Directives were transposed into their national legislation.

However, despite the fact that defining the term "worker" is a prerogative of the Member States, the Court of Justice of the European Union (CJEU) has defined the concept of worker for the purposes of applying EU law. The CJEU stated in the *Lawrie-Blum*[160] case that "objectively defined, a 'worker' is a person who is obliged to provide services to another in return for monetary reward and who is subject to the direction or control of the other person as regards the way in which the work is done"[161]. Therefore, in order to establish the existence of an employment relationship, one has to examine, on a case-by-case basis, the facts characterising the relationship between the platform and the underlying service

[159] Steve Peers, 'Equal Treatment of Atypical Workers: A New Frontier for EU Law?' (2013) 32 Yearbook of European Law 30-56, p. 30
[160] Case C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* ECLI:EU:C:1986:284
[161] Ibid, para. 14

provider, and the performance of the related tasks, looking cumulatively in particular at the three essential criteria established in *Lawrie-Blum,* namely the existence of a subordination link, the nature of work and remuneration.

A relationship of subordination allows a distinction to be drawn between workers and self-employed persons. This distinction is important for the access to benefits reserved for workers, but unavailable for the self-employed. A report for the European Foundation for Living and Working Conditions database defines self-employed persons as "free professionals", who have their own business and could or could not have employees.[162] As such, they clearly cannot meet the requirement of subordination, as they do not work under the direction of an employer. As the CJEU has noted in *Aldona*[163], in order for there to be a relationship of subordination, the employer would have to determine the choice of activity, remuneration and working conditions[164], which is not the case with self-employed persons.

The second requirement is the nature of the work itself. As early as 1982, the CJEU recognised this as arguably the most factor, which carries the most weight. In *Levin*[165] it was held that the fact that a person is employed only part time or earns a lower income than the set minimum wage is not decisive for the determination of their worker status. What makes the difference is whether that person pursues an activity of economic value which is effective and genuine, excluding activities on such a small scale as to be regarded as purely marginal and accessory[166]. However, part-time work must not be the person's principal activity. All circumstances of the case relating to the nature of the activities concerned and the employment relationship should be taken into consideration[167]. In the case of short-term training, the number of hours needed to familiarise oneself with a task[168] and a gradual increase in remuneration during training may be an indication that the work performed is of

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[162] https://www.eurofound.europa.eu/sites/default/files/ef_files/docs/comparative/tn0801018s/tn0801018s.pdf, accessed 19 July 2017

[163] Case C- 268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* ECLI:EU:C:2001:616

[164] Ibid, para. 71

[165] Case C-53/81 *D.M. Levin v Staatssecretaris van Justitie* ECLI:EU:C:1982:105

[166] Ibid, para. 17-18

[167] Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst*, ECLI:EU:C:2003:600, para. 44-45

[168] Case C-3/90 *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen*, ECLI:EU:C:1992:89, para. 16

growing economic value to the employer[169]. Interestingly, the nature of the legal relationship between the potential employee and the employer is of no consequence in determining their status. For instance, the CJEU held in the case of *Raulin*[170] that a person performing work on an irregular and insecure basis is still to be considered a worker, once the work has been performed and the subordinate nature of the employment is present and the services provided are not of marginal and ancillary nature[171].

The final requirement is for a worker under EU law to receive remuneration in return for their services. Importantly, "remuneration" has been defined quite broadly, as benefits in kind are also considered as remuneration, as in the case of *Michel Trojani*[172]. In fact, only persons performing voluntary work without receiving any form of consideration would be excluded from the "worker" category under this requirement, as they generally do not receive any monetary payment or benefits in kind for their volunteering activities.

Overall, the development of the CJEU test and its subsequent application to a great variety of cases has, over time, ensured that, there is a uniform definition of the term "worker", thereby guaranteeing a minimum set of rights of people in both typical and atypical employment relationships. As such, EU labour law seems, at least at first glance, accommodating to various arrangements which could be concluded between an employer and their workforce. This lies in stark contrast to the relatively "more binary" labour market in the United States. In this respect, it is worth examining the differences and how this affects the digital labour markets in the United States[173].

In the United States, there is a rather circular definition of who constitutes an "employee". An often cited example is the Fair Labour Standards Act (FLSA), which defines "employee" as "any individual employed by an employer", while an "employer", is a person "acting... in

[169] Case C-188/00 *Bülent Kurz, né Yüce v Land Baden-Württemberg* ECLI:EU:C:2002:694, para. 35
[170] Case C-357/89 *V. J. M. Raulin v Minister van Onderwijs en Wetenschappen,* ECLI:EU:C:1991:306
[171] Ibid, para. 14-15
[172] Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS),* ECLI:EU:C:2004:488, para. 22
[173] Codagnone, Abadie and Biagi, 'The Future of Work in the "Sharing Economy", Market Efficiency and Equitable Opportunities or Unfair Precarisation?' [2016], JRC Science for Policy Report, available at: < http://publications.jrc.ec.europa.eu/repository/bitstream/JRC101280/jrc101280.pdf> accessed 18 July 2017

the interest of an employer in relation to an employee".[174] In an attempt to straighten out this circular reasoning, the United States Supreme Court in *Darden*[175] adopted a common law test of what should define an "employee". According to the judgment, in order to determine whether a person is an employee, the following factors should be considered: the skill required, the source of the instrumentalities and tools, the duration of the relationship, and whether the work is part of the regular business of the hiring party, among others[176].

Similar to this common law test, the Internal Revenue Service has adopted an economic reality test, which focuses on the degree of control exercised by the employer as an essential factor in determining whether an employer-employee relationship exists, along with whether the worker's duties are performed for the employer on an ongoing or permanent basis, the extent of the worker's investment in equipment or materials needed to perform the job, the degree to which the worker is engaged primarily for the benefit of the employer, etc.[177]

Having introduced the general US-wide framework, this section will now focus on California labour laws, as this state is the hub for a large portion sharing economy and has also been the battleground for the cases of Uber and Lyft, discussed later on. California law creates a presumption that anyone providing services to a business is an employee, shifting the burden of proof to the party seeking to avoid employment status.[178] The leading case, which lays down the employee test in California is *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*[179]. As part of its decision, the Supreme Court of California developed a multi-factor test that is loosely based on the control test and the economic reality test. Those factors include the following eight "secondary indicia" of employment: (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the

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[174] Richard R. Carlson, 'Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying' (2001) Berkeley Journal of Employment & Labor Law 22, No. 2

[175] *Nationwide Mut. Ins. Co. v. Darden* [1992] 503 U.S. 318

[176] Ibid, 323

[177] Oregon Department of Agriculture, 'IRS 20-Factor Test', available at <http://www.oregon.gov/ODA/shared/Documents/Publications/NaturalResources/20FactorTestforIndependentContractors.pdf> accessed 17 July 2017

[178] Brishen Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' [2016], Harvard Law & Policy Review, Vol. 10, p. 487

[179] *S. G. Borello & Sons v. Department of Industrial Relations* [1989] 48 Cal.3d 341

direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee[180].

Importantly, the listed factors, the Supreme Court notes, are "intertwined and their weight depends often on particular combinations."[181] Therefore, what may seem like a long list is actually not necessarily a checklist, but must rather be assessed in light of the specific circumstances of each case. In reality, however, this balancing exercise has not been easy as applied to more modern-day cases. In *Reyes v. Remington Hybrid Seed*[182] , the court noted that the test offers "little guidance for future cases" mainly because it is difficult to judge which factors really matter and why.[183] This problematic is combined with the fact that the tests were developed during a time when technology did not even exist, let alone create complex triangular relationships, under which sharing platforms operate. Indeed, this makes it incompetent to resolve the issue of Uber and Lyft drivers' status[184].

Addressing the mismatch with the sharing economy: new "worker" category?

In view of the above analysis, it is quite clear that a crude dichotomy such as that between employees and independent contractors is insufficient to deal with the multitude of work arrangements and their nuances in the sharing economy. In this section, the thesis argues that the current framework in Europe and the United States cannot accommodate the sharing economy model and thus cannot adequately protect those working in this sector.

The decisive factor when examining the status of Uber or Lyft drivers is whether and to what

[180] Ibid, 350
[181] Ibid, 351
[182] *Reyes v. Remington Hybrid Seed Co.* [2007] 495 F.3d 403
[183] Ibid, 407
[184] n 10, p. 489

extent the platform exercises control over the drivers. It is not entirely unthinkable that, even when employing persons outside of clear geographical boundaries, such control can still be exercised through modern-day technology[185]. The business model of Uber and Lyft suggests that Uber drivers are monitored through the app. crucially, the rating system is used to monitor the performance of the drivers and if their rating falls below 4 (out of 5), Uber is free to dismiss them. Moreover, the fact that drivers provide the Uber service to Uber customers on behalf of Uber suggests that they are "integrated in the organization, explaining why a relatively high degree of control is necessary, as poor service would harm Uber's reputation and its business vis-à-vis its customers"[186]. Nevertheless, Uber and Lyft have persistently claimed that their drivers are independent contractors. This claim, however, has been unsuccessful in United States courts and more specifically in California, where judges based their conclusions on additional factors, such as the lack of bargaining power of the drivers and their lack of special skills. The more important cases are examined in more detail below.

In the state of California, the application of the traditional test of employment creates significant challenges, as it was developed in the 20th century. As one court observed in *Cotter v Lyft*[187], deciding whether an on-demand driver is an independent contractor or an employee under current law is like being "handed a square peg and asked to choose between two round holes."[188]

In *Cotter*, the plaintiff claimed employee benefits and cost reimbursements, which would follow from his reclassification as an employee rather than an independent contractor. As established, the burden of proof under California law lies with the employer, due to the presumption of employee status. These measures are clearly designed to protect employees as the weaker party in an employer-employee relationship. Independent contractors, on the other hand, are not offered such protection, nor are they entitled to any benefits. The reasoning behind this is they do not have to "suffer the effects of unequal bargaining power

[185] Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach' [2017] available at: <https://ssrn.com/abstract=2877134> accessed 17 July 2017, p. 9
[186] Ibid, p. 9
[187] *Cotter v. Lyft, Inc.* [2016] 60 F.Supp.3d 1067
[188] Ibid, 1081

to any degree comparable to that suffered by employees”[189]. Judge Chhabria rejected that Lyft drivers are independent contractors, as they “use no special skill when they give rides.”[190] It is this lack of special skills that prevents drivers from negotiating any rates with potential customers, which also led Judge Chhabria to argue that the drivers are more likely to be employees. This was additionally supported when the issue of control was considered. Judge Chhabria stated that the right to terminate at will, without cause, is “strong evidence in support of an employment relationship”[191], if not “the strongest evidence of the right to control”[192]. This is supported by the fact that Lyft and Uber use the ratings given by customers and other information collected by the app to monitor drivers’ actions and ensure that they abide by Lyft or Uber rules, which creates subordination[193].

While the degree of control is important, Judge Chhabria gave significant thought also to the “secondary indicia” of the *Borello* test. Indeed, upon their examination, the judge noted that these factors “cut in both directions”[194]. Indeed, some of them support an independent contractor classification, such as whether or not the parties believe they are entering into an employee-employer relationship, which according to the Terms and Conditions of Lyft (and Uber for that matter), they do not. Moreover, it is the drivers who supply the car needed for performing their tasks. On the other hand, the work performed by the drivers is wholly integrated into Lyft's business and, as established earlier by Judge Chhabria, their work is largely under the direction of the principal, or in this case the platform. It is for those conflicting factors that the court in *Cotter v Lyft* concluded that “the test provides nothing remotely close to a clear answer” and the matter should be ultimately decided by a jury[195]. However, due to the settlement eventually reached between the parties[196], the issue remained open.

The unwillingness of California judges to conclude as a matter of law was also demonstrated

189 Ibid, 1075
190 Ibid, 1070
191 Ibid, 1076
192 *Ayala v Antelope Valley Newspapers Inc.* [2017] 59 Cal.4th 528, 532
193 n 17
194 n 19, 1080
195 n 184, 1082
196 n 184

in the *O'Connor v Uber*[197] case. With over 400,000 drivers as plaintiffs, the *O'Connor* case was arguably the largest of this series of cases and could have had potentially the most widespread implications. Here once again, the District Judge applied the *Borello* test of employment, underlying the importance of the right to control factor as well as the non-cumulative application of the secondary indicia[198]. The control element is not met because the drivers enjoy a great flexibility in terms of when and for how long to drive their customers. Nor do they need to accept any "leads" generated by Uber. However, the court found these arguments unconvincing, mostly because Uber's own Driver Handbook expressly states that rejecting too many trips can lead to termination from the platform[199]. On the other hand, the court further argues that secondary factors such as drivers using their own vehicles, and a signed agreement which states that no employment relationship is created, to an extent support an independent classification. Moreover, as noted in previous judgments, it is difficult to judge which factors are actually significant and carry a lot of weight and which do not[200]. In Uber's case, this determination is crucial, especially because not one factors points in the same direction. For instance, while Uber's drivers provide their own vehicles, Uber supplies them with the smartphone with the Uber app, according to the Service Agreement concluded with the drivers[201]. Overall, the indications of subordination seem to outweigh the contrary indications. There is at least some degree of control in this relationship, which is one of the vulnerabilities justifying employee status[202]. The other such vulnerabilities come from the secondary indicia under the *Borello* test. However, at this point in time there is evidently no "clear formulation of which of, and to what extent, these factors are determinative"[203]. Thus, as Judge Chen concluded in *O'Connor v Uber, "*the traditional test of employment - a test which evolved an economic model very different from the new 'sharing economy' - to Uber's business model, creates significant challenges"[204]. This led the court to eventually refuse to decide as a matter of law and denied Uber's motion for summary judgment.

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[197] n 194
[198] Ibid, para 38
[199] Ibid, para 72
[200] n 15
[201] n 28, para 81
[202] n 17
[203] n 3, p. 645
[204] Ibid, para. 85

It is difficult to blame plaintiffs for settling their cases or judges, who would rather leave the decision to juries. One could classify Uber and Lyft drivers as employees, but they are clearly different from regular employees: they do not have a fixed schedule, they have the freedom to choose whether and when to work, as well as for how many hours and they own the vehicle used to provide the service, among others. There are all characteristics which are becoming the standard thanks to the sharing economy and their combination might create an impression that the drivers should be considered independent contractors[205]. At the same time, there are equally strong, if not stronger, strong indications supporting employee status. Importantly, the drivers are unable to influence the cost of the rides, the platform sets the cost of the rides the firm is setting the cost of the ride and retains the right to control the drivers through its monitoring and rating system, as well as the fact that it sets minimum standards for the drivers, which, if not met, would certainly lead to their dismissal. So where does that leave Uber and its fellow sharing platforms?

In the EU, there seems to be as much clarity on this question as in the United States. A recent study could not identify any legal framework specifically addressing crowd employment in Europe[206]. As it currently stands, EU labour law does not accommodate the sharing economy model and it accordingly does not apply to its worker base. This leaves them in a legal grey area, where there is no entitlement to minimum wage, annual leave or pay in case of sickness - benefits normally guaranteed by the three EU Directives regulating the "atypical" workers. Of importance here is of course also the Directive on Health and Safety in Fixed-Term and Temporary Employment (91/383/EEC), which extends the same level of protection to fixed-term and agency workers as to other employees. However, it is difficult to apply any of these Directives to online work exchanges if their legal status, and that of their workforce, is unclear. A particularly important question is what forms of social protection are available to crowd workers, how eligibility can be established and how rights

[205] n 17

[206] Eurofound, 'New forms of employment' [2016], available at < https://www.eurofound.europa.eu/new-forms-of-employment> accessed 17 July 2017

can be claimed.[207]

Taking into account all of the above considerations, the European Commission took the initiative and in 2016, developed the European Agenda for the Collaborative Economy, discussed also in Chapter I, where the thesis examined its contents from a regulatory point of view. It is now worth examining what the European Commission proposes as solutions to the matter at hand. In the report, the sharing economy is generally seen as beneficial to those who seek new job opportunities, especially those which would provide a flexible employment framework. This makes it possible for them to become economically active where more traditional forms of employment are not suitable or available to them. In fact, the Commission welcomes these disruptive models as "part of a more structural shift"[208]. They are also recognized as increasingly blurring the boundaries between the self-employed and workers.

At the same time, the more flexible work arrangements may not be as regular or stable as traditional employment relations. This may create uncertainty as to the applicable rights and the level of legal protection afforded to people working for sharing platforms, mainly due to the fact that arrangements in the context of the collaborative economy are often based on individual tasks performed on an ad hoc basis rather than tasks regularly performed in a pre-defined environment and timeframe. Logically, the report then turns to the examination of the *Lawrie-Blum* criteria for worker status. First, for the criterion of subordination to be met, the service provider must act under the direction of the collaborative platform, the latter determining the choice of the activity, remuneration and working conditions. Thus, the provider of the underlying service is not free to choose which services it will provide and how.[209] Where the collaborative platform is merely processing the payment deposited by a user and passes it on to the provider of the underlying service, this does not imply that the collaborative platform is determining the remuneration. The existence of subordination is not

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207 EU-OSHA, 'A review of the future of work: online labour exchanges or "crowdsourcing": implications for occupational safety and health' [2015] Discussion paper, Bilbao, European Agency for Safety and Health at Work, p. 5
208 n 13
209 Valerio De Stefano, 'The rise of the 'just-in-time workforce': on-demand work, crowdwork and labour protection in the "gig economy" [2016] ILO Conditions of Work and Employment Series No. 71, p. 17

necessarily dependent on the actual exercise of management or supervision on a continuous basis.[210] For the nature of the work criterion to be met, "the provider of the underlying service must pursue an activity of economic value that is effective and genuine, excluding services on such a small scale as to be regarded as purely marginal and accessory. In the context of the collaborative economy, where persons actually provide purely marginal and accessory services through collaborative platforms, this is an indication that such persons would not qualify as workers, although, as examined, factors such as limited working hours and on-and-off work cannot exclude an employment relation without considering the full background"[211]. The third and final remuneration criterion has developed through the CJEU case law as having a very low threshold, as it is only volunteers who do not fulfil this criterion. Thus, as long as the terms of the sharing platform do not provide for a mere reimbursement of costs incurred for the person's activities and they make a profit, they would satisfy the remuneration criterion.[212] In view of these issues, both the Commission and Parliament subsequently in their report from 11 May noted that employment rules need to address the specific needs of people working within the sharing economy.[213]

As can be concluded from the above analysis, there is a general inclination toward employee/worker status with regard Uber and Lyft drivers, rather than independent contractors. However, it is also true that on either sides of the Atlantic, lawmakers have so far not come up with a uniform legislative framework to address the legal grey area that the sharing economy has presented. Against this backdrop, a proposition for the introduction of a new category of workers is gathering momentum in Europe and has proponents in the United States. While United States courts have been reluctant to conclude, as a matter of law [214] whether Uber or Lyft drivers are employees or independent contractors, recent cases in the UK and Spain led to the introduction of a new category of "workers". While the United States has not yet *actually* adopted such category, both judges and commentators are promoting the idea.

[210] Ibid, p. 16
[211] Ibid
[212] n 102
[213] European Parliament, 'Report on a European Agenda for the collaborative economy' [2017] available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0195+0+DOC+XML+V0//EN> accessed 19 July 2017, p. 12
[214] n 194

The concept was first introduced by Harris and Krueger in their 2015 proposal to introduce a new status of "independent workers" - non-employee workers, who benefit from a set of employment rights which is more limited than that enjoyed by employees[215]. This category would be considered as the standard for all sharing platforms, which operate under the triangular model, well known from Uber and Lyft, but also many others. According to the proposal, the "independent worker" may offer their services through multiple intermediaries, and like traditional employees, are integral to the business of the intermediary. However, "independent workers" are not employees because they do not make themselves they do not have an indefinite relationship with any employer and they do not relinquish control over their work hours or the opportunity for profit or loss. "Independent workers" are not independent contractors, either, because some aspects of the methods and means of work—including the price of their services—are controlled by the intermediary and because they are integral to the business of the intermediary. Independent workers are, in some respects, like individuals working for others, and in other respects are like independent businesses (e.g., they use their own equipment and control their own hours). While this creation of a new category might seem appealing, Harris and Krueger's proposal does seem to be fundamentally flawed. Interestingly, while arguing that "independent workers" should receive healthcare benefits and anti-discrimination protection like employees do, they would not be entitled to payment for overtime and minimum wage arrangements[216]. This effectively defeats the purpose of developing a new category tailored to the sharing economy, as the new category of workers would be as deprived of fully enjoying employee rights as they are now. This limitation of the rights of "independent workers" has met widespread criticism.[217] As Cherry and Aloisi note, one cannot exempt someone working in the sharing economy from minimum wage requirements when in fact, "the most salient complaints that gig

[215] The Hamilton Project, 'A Proposal for Modernizing Labour Laws for Twenty First Century Work: The "Independent Worker" [2015], available at: <http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf> accessed 19 July 2017

[216] Ibid

[217] Ross Eisenbrey and Lawrence Mishel, 'Uber Business Model Does Not Justify a New "Independent Worker" Category' [2017] ECON. POL'Y INST., available at <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category> accessed 16 July 2017; n 3, p. 678

workers have brought forward is the lack of a living wage or decent pay"[218].

As flawed as this proposition may be, the introduction of this new category of workers who enjoy a limited set of rights is already a fact, at least in Europe, most prominently in the UK and Spain.

The recent UK Employment Tribunal decision in *Aslam v Uber BV*[219] has confirmed the "legislative creation"[220] of a third category of "workers", who benefit from a set of rights, which are however more limited than the one enjoyed by employees. The case attracted a lot of media attention and was largely thought of *the* case marking the victory for those working in the sharing economy. [221] In *Aslam v Uber BV*, the focus was on the 'practical reality' of the relationship between Uber and its drivers and showed that the drivers, regardless of contractual statements to the contrary, are to be qualified as workers. The Tribunal based its decision on a number of factors, including the fact that Uber interviews and recruits drivers, Uber sets a default route, Uber imposes numerous conditions on drivers and instructs them as to how to do their work, among others. Thus, the Employment Tribunal rejected the view that Uber is a technology company, rather than a transportation company: "The notion that Uber is a mosaic of 30,000 small businesses linked by a common `platform' is to our minds faintly ridiculous. Uber's case is that the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract Uber from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger… The absurdity of these propositions speaks for itself."[222] This is the first significant decision in the UK in

[218] Ibid, p. 678
[219] *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET)
[220] Mark Freedland and Jeremias Prassl, 'Employees, Workers and the "Sharing Economy": Changing Practices and Changing Concepts in the United Kingdom' [2017], available at: <https://ssrn.com/abstract=2932757> accessed 17 July 2017
[221] Ibid
[222] n 219

relation to the employment status of those working in the "gig economy" and has significant implications for, and indeed could force a rethinking of, the sharing economy business model.

The other European jurisdiction that took the leap to craft a new category of worker was Spain. The country introduced the so-called "Trabajador Autonomo Economicamente Dependiente" (TRADE) workers, or economic dependent self-employed workers.[223] As in the UK, the TRADE workers only enjoy limited protections, such as minimum wage, annual leave, and family or sick leave, among others[224]. To distinguish TRADE from independent contractors or self-employed workers, three factors are instructive: (1) a dependence on the principal for at least seventy-five percent of the worker's income, (2) not hiring subcontractors, and (3) the performance of an economic or professional activity directly and predominantly vis-à-vis one single principal. Despite its initial appeal, the new regulation was not the raging success the Spanish authorities had hoped it to be, mainly due to the administrative burden of registering as a TRADE worker[225].

Even though some United States judges recognize that the on/off switch between independent contractor and employee is an imperfect fit for the realities of work today, they have not dared to create another category on their own initiative. Nevertheless, they do seem willing to accept the introduction of a new category of worker. In *Cotter v. Lyft*, the District Judge concluded: "Perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections."[226] Indeed, as litigation over worker misclassification lawsuits has not led to a definitive answer to the employee vs. independent contractors problem, there have been calls to create a hybrid category situated between employee and independent contractor status. Proponents of the idea have argued that such a third category were to exist, proponents argue that the dilemmas surrounding proper worker classification would conveniently disappear.[227] Intuitively appealing, a third category would resolve many of the ongoing disputes over misclassification plaguing the on-demand sector.

[223] n 11, p. 671
[224] Ibid
[225] Ibid
[226] n 184
[227] n 10

Rather than litigate the issue of whether a particular worker or group of workers deserves employee status, gig workers would automatically be sorted into the hybrid "dependent contractor" category.[228] As argued by Abbey Stemler, "this new classification would enable regulators to think differently about how to fill regulatory gaps"[229]. And regulators have not disappointed. In February 2017, Washington State introduced House Bill 2109[230], which in effect creates universal benefits for workers in the sharing economy. The bill requires any "contracting agent", i.e. Uber or Lyft, facilitating at least 50 individual workers in any consecutive 12-month period to contribute funds to qualified benefit providers to provide benefits to its workers. In turn, the qualified benefit providers would allow workers a choice from available benefits to allocate these contributions to health insurance, paid time off, retirement benefits or other benefits. While this bill does not address specifically the classification of those workers, it does provide a creative solution to some of the problems they have raised. The bill is certainly a step in the right direction, as the problems of the sharing economy can be best addressed through legislative action. It remains to be seen whether other states will go a step further and adopt a third category of sharing economy workers, like their European counterparts.

Implications for competition (antitrust) law

The judgment of the UK Employment Tribunal and the other similar movements towards finding worker status for the Uber driver-partners are most likely only the first stage in the development of a uniform definition of the activities of those providing services via sharing platform actors across the globe. It remains to be seen whether courts and legislators in other countries will reach similar conclusions. However, if the arrangement between Uber and its driver-partners is held to be one of genuine employment, this would undoubtedly reflect on the competition (antitrust) battles Uber and other platforms are facing.

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[228] n 17

[229] Abbey Stemler, 'Betwixt and Between: Regulating the Shared Economy' (2016) 43 FORDHAM URB. L.J. 31, p. 61

[230] WA State House Bill 2109, available at <http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/House%20Bills/2109.pdf> accessed 17 July 2017

Although Uber has been consistent in its claims that its driver-partners are merely self-employed independent contractors, finding an employer status for the company might be its best defence yet against price-fixing allegations it is currently facing in the United States and potentially in Europe. This puts Uber in an interesting position of balancing between obligations arising from labour law and those under competition (antitrust) law. On the one hand, having an employment or "worker" relationship with its driver-partners will mean recognising that they enjoy rights to minimum wage and holiday pay, which Uber would have to ensure. With hundreds of thousands of driver-partners, this could prove costly, should such relationship be found to exist on a wider scale. On the other hand, this could be turned into a strong positive for Uber outside of the labour law context. Uber faces a difficult price-fixing case in the United States, where a win seems close to impossible. In this regard, if the Uber driver-partners are ruled to be workers or employees, any legal provisions prohibiting price-fixing between undertakings would no longer be relevant.

Of course, while all important judgments are currently still pending or subject to appeal, there is no telling, how this will play out in the end for the sharing economy model as a whole. For Uber, the only certainty is that if the company does escape competition law liabilities, it will definitely not manage to escape labour laws.

Conclusion

It has become clear, over the course of this analysis, that the sharing economy model has triggered a variety of legal questions that existing laws are not adequately equipped to address. The international dimension of these emerging services has also prompted differing responses to the legal challenges. The EU and the United States are slowly finding workable regulatory solutions. The United States has opted for a government-led regulatory approach, with an increasing number of states adopting legislation specifically tailored to the sharing economy. Within the EU, there is still a fragmentation in terms of how Member States deal with the regulatory, competition and labour concerns. However, the EU as a whole is seemingly moving toward self-regulation, if the European Agenda for the Collaborative economy is anything to go by. It would be interesting to see how this attitude would collide with national interests in the fields where traditionally Member States have had a prerogative, specifically unfair competition and labour laws. Evidently, there are underlying differences in the development of a common regulatory framework for the sharing economy model on both sides of the Pacific. However, regulating the sharing economy is only part of a plethora of problems which this industry is currently facing. What the United States and Europe have also recently tackled common are competition (antitrust) and labour law conflicts. As observed in Chapters II and III of the thesis, the two are inherently dependent on one another. Therefore, Uber and its fellow sharing platforms are put in a position where they need to come up with *new* strategies as national authorities and courts are determined to establish liability under competition (antitrust) and labour laws. This need arises from the fact that claims made previously, mainly by Uber, put the platform in a dangerous position. Uber has persistently argued that it is an information society service provider and at the same time claimed that its driver-partners are independent contractors. Perhaps not thinking too far ahead, the company's lawyers did not realise that both of these arguments can be easily turned against Uber in the context of competition (antitrust) and labour law.

Unfortunately, at this stage it is too early to make any conclusive statements. On all three fronts - regulation, competition (antitrust) and labour - Uber is currently facing either a long legislative process or pending court battles, with uncertain outcomes. Indeed, legal qualification of platform services is a complex task. As the general tone of this thesis suggests, the judiciary and legislative branches would be well advised to use their time wisely. The introduction of possible future legislation, which can be a better fit for the sharing economy model might seem like a long way from now, but it is arguably the only viable solution to all three major problematics examined in this thesis. Indeed, this emerging model is now disruptive enough for all branches of government to have woken up to it. It is in their hands that its immense potential now lies. It is time to start caring about sharing.

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