

Seeking to regulate Uber? Why not rely on Article 101 TFEU...

Regulating for Globalization

22/02/2018

Pieter Van Cleynenbreugel (Liege Competition & Innovation Institute)

Please refer to this post as: Pieter Van Cleynenbreugel, 'Seeking to regulate Uber? Why not rely on Article 101 TFEU...', Regulating for Globalization, 22/02/2018,

<http://regulatingforglobalization.com/2018/02/22/seeking-regulate-uber-not-rely-article-101-tfeu/>

The private ridesharing opportunities created by *Uber* have disrupted existing private transport services to an unprecedented extent. In the wake of the Court of Justice's recent *Elite Taxi* judgment (C-434/15), it became clear that Member States primarily remain responsible for the regulation of private ridesharing transport services such as *Uber*. The most common approach taken or proposed in that regard is to extend taxi regulations to *Uber*, requiring drivers to obtain a license and to apply State-set or -approved tariffs (as the Brussels taxi plan actually proposes to do, see https://mobilite-mobiliteit.brussels/sites/default/files/taxiplan_presentatio_n.pdf).

The problem with taxi regulations, however, has been the fact that States do not always vigorously enforce them, resulting in cowboy-like behaviour and abusive practices among taxi operators and drivers despite the presence of regulation. From the point of view of EU law, questions could therefore arise as to whether subjecting *Uber* to this kind of regulation is the best strategy to control and regulate its practices.

Confronted with the potentially limited reliability and enforceability of taxi regulations, it deserves to be questioned whether Article 101 TFEU could play a role as an alternative instrument of *Uber* regulation. That provision prohibits agreements between two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition. *Uber* has concluded, with each driver, an agreement enabling the latter to perform, as an independent contractor, services to clients using the *Uber* applications. When offering services through *Uber*, drivers have to abide by a pricing scheme set by *Uber*, which suggests a maximum price the driver is to charge (see <http://help.uber.com>).

Uber-driver agreements would fall within the scope of Article 101 TFEU, if both *Uber* and its drivers are considered as separate entities engaged in particular economic activities. In that respect, convincing arguments had been made that *Uber* and its drivers present themselves as a *single economic entity* escaping from the scope of application of Article 101 TFEU

(<https://lalibrecompetencia.com/2016/02/12/between-an-uber-rock-and-an-uber-not-to-hard-place/>). According to the Court of Justice's *Elite Taxi* judgment, however, both *Uber* and the driver offer complementary, yet distinct services of online intermediation and actual transport of individuals (*Elite Taxi*, para 38), which together give rise to one general service in the field of transport (§40). In distinguishing the two stages of an *Uber* service, the Court seems to acknowledge that different economic operators collaborate in the offering of a transport service to individuals. To the extent that this is the case, *Uber* and its drivers would be seen as separate entities each performing an economic activity, albeit in a coordinated way. In that case, Article 101 TFEU would be applicable to *Uber*-driver agreements.

If Article 101 TFEU applies, agreements concluded could be considered as restrictive by object or at least by effect, all the more since the *Uber* pricing system stimulates drivers not to charge below the projected maximum price. To the extent that this system is illegal under Article 101(1) TFEU, it would fall upon *Uber* to justify the maintenance of its pricing scheme under Article 101(3) TFEU, showing that it is the most efficient way to offer consumers ridesharing services at the best price. Failure successfully to justify this would result in all agreements concluded with drivers being null and void, as per Article 101(2) TFEU. It could be maintained that the *Uber* pricing mechanism could be justified as a matter of Article 101(3) TFEU since it stimulates competition in a sector dominated by monopolies and regulation. The actual successful invocation of this justification is not certain, as neither the European Commission, nor one of the national competition authorities also competent to apply Article 101 TFEU by virtue of Regulation 1/2003, has rendered a decision to that extent.

This uncertainty regarding the application Article 101 TFEU comes in handy as an instrument for regulation. At first sight, the thought of Article 101 TFEU serving as an instrument to regulate *Uber* may strike one as odd or at least counterintuitive. That provision is indeed generally relied on to prohibit anticompetitive practices rather than to serve as a tool directly to impose regulatory requirements on businesses. At the same time, however, the threat of its enforcement could be leveraged as a means to obtain subtle changes in the *Uber* drivers' agreements that would otherwise require direct command and control regulation and enforcement. The fact that the *Elite Taxi* judgment characterised the intermediation and actual transport activities as two complementary activities performed by two different actors creates significant opportunities in that regard. Based on that reasoning, the European Commission – and the national competition authorities – could start probing *Uber*'s activities from the point of view of Article 101 TFEU and the national law equivalent provisions. *Uber*, wanting to avoid the imposition of fines at both EU and Member States' levels could then take steps to avoid the application of Article 101 TFEU.

The easiest way to do so would be to integrate better its drivers into its own company, thus treating them as workers. Qualifying drivers as (part-time) workers may be costly from a tax or social security point of view, but may also directly help to avoid the imposition of multimillion euro fines by competition authorities. To the extent that those authorities effectively

succeed in making a case for the imposition of such fines – sending statements of objections to *Uber* to that extent – they may be able quickly to push the latter into modifying the ways in which it deals with drivers, especially when it turns out that costs of competition law fines would be much higher than having to abide by labour laws in different Member States. Doing so would result in *Uber* and its drivers being considered as a single economic entity, thus escaping Article 101 TFEU scrutiny.

From that perspective, threatening to apply Article 101 TFEU could become an important first step for changing *Uber's* internal organisation. It therefore remains to be explored, both on the level of the European Commission and of national competition authorities united in the European Competition Network, whether this is a feasible strategy in order to avoid differentiated taxi regulations being made applicable to *Uber*. At least a policy option that deserves to be taken seriously?

To make sure you do not miss out on regular updates of the Regulation for Globalization Blog, please subscribe to this [Blog](#).