THE ECJ’S RULING ON UBER: A NEW ROOM FOR REGULATING SHARING PLATFORMS?

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1. INTRODUCTION

On 20 December 2017, in Case C-434/15, the Court of Justice of the European Union (the “ECJ”) ruled that the service provided by Uber, a peer-to-peer ridesharing, food delivery, and transportation network company, must be classified as a transport service. Therefore, Member States have to regulate the conditions under which the service is provided in conformity with the general rules of the Treaty on the Functioning of the European Union (the “TFEU”).

Uber case centered on a complaint brought by Asociación Profesional Elite Taxi, a professional taxi drivers’ association in Barcelona (Spain) before a Spanish Court (the Juzgado de lo Mercantil No 3 de Barcelona). The complainant sought a declaration that the activities of Uber Systems Spain, which ran a peer to peer service, UberPop, linking non-professional drivers with customers amounted to misleading practices and acts of unfair competition. It argued that it was unfair that Uber did not have to adhere to the same rules in the city regarding licences and authorisations required by law to carry out a transport service. The Spanish court referred the case to the ECJ to determine whether the service provided by Uber was a transport service, an information society service or a combination of both under EU law. If the service at issue was covered by the European directives on services in the internal market2 or on electronic commerce3, Uber’s practices could not be regarded as unfair practices.

The ECJ held that the intermediation service provided by Uber is based on the selection of

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non-professional drivers using their own vehicles. However, Uber provides a smartphone application to these drivers. Without that application, they could not operate and persons wanting to make urban journeys could not use their service. In addition, Uber exercises decisive influence over the conditions under which the service is provided. It does so by determining at least the maximum fare received from the client, before paying part of it to the non-professional driver, and by exercising a certain degree of control over the quality of the vehicles and the drivers. Taking into account those elements, a service such as that under scrutiny must be regarded as inherently linked to a transport service and must be classified as “a service in the field of transport”. Consequently, it must be excluded from the scope of the freedom to provide services in general as well as the directive on services in the internal market and the directive on electronic commerce.

In light of the concerns raised by the judgment, the article will delve into the complexities that new mobility services have posed. After a brief analysis of mobility services in the sharing economy and, in particular, of the Italian and of other Member States’ approach to the issue, the paper will look at whether a regulatory solution could help finding a right balance between the development of mobility services and the safeguards of public interests (such as safety or quality of the service), which have traditionally justified the protection of taxi operators. The solution should be identified in the measure that better safeguards consumer welfare. Indeed, the regulator must always bear in mind that Competition laws protect the competitive process and, even indirectly, consumers. Neither competitors, nor competition laws are tool to be used to influence (or undermine) the innovative process.

2. NEW MOBILITY SERVICES IN THE SHARING ECONOMY

Sharing economy, collaborative consumption or connected consumption are all terms that refer to economic activities involving online transactions on multisided platforms. Sharing platforms, as opposed to other online services, exercise control over each transaction. There are different business models based on platform but the common features is that the platform owner is often a third party between the acquirer and the seller. The platform’s commercial success depends on the extent to which it is able to attract users and earn revenues, for example by charging fees for the transactions. To this end, the platforms usually include “reputational” mechanisms aimed at assuring people of the quality of the system (but there are models based on a pure data exchange mechanism and not on monetary transactions). For example, they provide a ratings system to determine whether a provider is trustworthy and enable users to search for providers’ profiles. They manage the content of

listing and issue minimum quality standards for providers. The platforms usually charge a transaction fee for each exchange and provide an electronic payment system. These tools allow users and providers to transact at higher volumes, and encourage casual participants to join the network. It is thus clear that sharing platforms facilitate the meeting of offer and demand to the benefit of users and the exercise of control is functional to this purpose. Therefore, could they be re-qualified as “services in the field of transport” (and thus subject to stricter regulations) when they play an intermediary role between drivers and users? Some examples will explain the relevance of the issue further.

2.1 The Uber example

In the sharing economy Uber is playing a key role. It has been observed that there is a sort of “uberkization” of the economy and that there is an Uber for everything. Uber is an on-demand service, namely a platform that directly matches customers’ needs with providers. Due to benefits to consumers in terms of lower fares, high quality services and, for instance, user satisfaction, it is challenging traditional taxi services. It has been noted that the absence of costs to start operating as a driver is an incentive to join the system and that could help to reduce capital concentration and produce wider social benefits. In particular, for services like UberPop drivers do not need to be authorized or incur other costs to qualify as taxi operators.

However, sharing economies could also have negative externalities. For example, it has been noted that, once numerous users have joined both sides of the Uber platform, Uber might increase its compensation per ride to attract more drivers. The increase in prices paid by passengers may reduce their demand.

In a dynamic transport sector, the development of alternative cars with driver services (the so-called “VTC” services) to Uber may avoid such opportunistic strategies, which risk reducing the benefits of liberalizing mobility services and lead to the same issues experienced to date with traditional taxi services, for example in terms of high fares. The increase in competition even among unauthorized mobility services will benefit consumers in terms of low prices and better quality of services. Therefore, the re-qualification of unauthorized Uber services as transport services could lead to a distortion of market dynamics not to the benefit of users.

2.2 The case of Mytaxi

Similarly to Uber, Mytaxi operates through a digital application. Users can download the app on their smartphones and open it to start

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7 Tim Worstall, “Uber Reduces Capital Concentration and Increases the Number of Capitalists”, Forbes, 2 August 2015.
booking. Via geolocation, or by entering the address directly to avoid GPS errors, the app identifies the position of the user. After booking, the system starts searching for the nearest taxi driver and the driver arrives at the required point after having provided the user with the vehicle license plate number, and the driver’s photo rating and name. The user can also follow the driver in real time or share the driver’s position with friends and relatives. At the end of the taxi ride the driver enters the amount, waits for the customer to pay and every week the platform provider receives the fees that have been electronically collected. The driver and the user can also directly communicate to inform each other of delays or unforeseen events. The reservation even allows the taxi driver to display the user’s phone number and vice-versa. Also passengers are rated and the system increases the overall transparency of the identity of the premises of the transaction increasing mutual trust. In addition, there is a reviews’ service that enables passengers to rate the taxi driver and the vehicle on a scale of 1 to 5 and includes the possibility to comment. Furthermore, there are benefits for taxi drivers in terms of promotions and taxi drivers who sign up to the service do not have to pay an initial price. There are no penalties for drivers in the event of an anticipated recession as the service does not require a minimum number of trips. The only cost to be incurred is a fee of 7% that is applied to the price of each trip.

These features demonstrate the pro-competitive role that this service (such as Uber) may play not only in terms of reducing fares for users but also in terms of increasing innovation in mobility services. However, the lack of clear rules as to the operation of VTC services makes the current regulatory framework not in line with market dynamics. As it will be clarified, the status quo in Italy and in other European countries are examples of still “incomplete frames” within which new mobility services struggle to develop further.

3. MOBILITY SERVICES IN ITALY

In the last decade, in Italy the increase and the diversification of the offer of mobility services has called to the attention of the antitrust authority the pro-competitive value of new mobility services. In particular, the focus has been on beneficial effects for consumers that could derive from a liberalization of the transport system, in terms of increased quality and low prices. In this context, the section will assess the main developments registered to date and the risks of an unclear legal framework.

3.1 Taxis versus VTC services

As opposed to taxis, which are subject to strict service obligations towards an undifferentiated user, stationing on the square, fixed rates set by the public administration, territoriality, an obligation to begin the service in the municipality that issued the license and service at immediate call, new mobility services are

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9 One of the positive thing that a taxi driver in Italy told me about the Mytaxi system is that it reduces to zero the risk of robbery.
mainly released from the respect of these rules. Thus, they challenge the traditional taxi model.

In this context, a first issue has concerned the legitimacy of not applying the above mentioned obligations to VTC services. On the point, a preliminary distinction has been made between authorized (e.g., UberBlack and Mytaxi) and unauthorized (UberPop) VTC services. As for taxis, authorized VTC services need a licence to operate. The limited number of authorizations issued for VTC services makes that service very valuable and this results in higher prices for final consumers. Authorized VTC operators are also subject to territorial restrictions.

On the contrary, unauthorized drivers have begun operating without acquiring any licence from the competent authorities. As it will be clarified, this has raised concerns of unfair competition and obstacles have been posed to the development of these services in the market. To find a right balance between the competitive advantages deriving from the development of new mobility services and the protection of users – that is traditionally attached to the imposition on taxis of public service obligations – the Italian Competition Authority (the “ICA”) has proposed the inapplicability to VTC drivers of some strict obligations applied to taxis (e.g., stationing and territorial obligations)\(^\text{10}\). A digital platform that connects via a smartphone the demand for and the offer of services provided by VTC operators cannot, by definition, comply with a rule that requires drivers to start the service from the remittance and return there at the end of the fare.

In a scenario similar to the one before the ECJ in the Spanish UberPop case, the ICA has noted the complexities of classifying the new intermediation services as mere transport services. In the words of the ICA, the assessment of these new systems has to take into account “the evident benefits for the competitive process and for final consumers that derive from new communication platforms that link supply and demand for non-scheduled transport services. These tools and a more efficient use of the capacity to offer transport services present in a given urban context allows the greater ease of use of the transport service, better coverage of a demand often dissatisfied, a consequent reduction in costs for users, and – to the extent that it disincentives the use of private vehicles – a decongestion of urban traffic with an improvement in supply conditions of the public transport service and in the conditions of private traffic”\(^\text{11}\). These arguments do not exclude the possibility to control the lawfulness of the activity carried out by unauthorized drivers.

However, the absence of a clear legislative framework has led to contrasting approaches as to the legitimacy of providing mobility services without complying with the “taxi status”.

### 3.2 The legislative framework

Under a normative perspective, transport services are regulated by Law No. 21 of 15 January 1992, which local regulators (regions and municipalities) have to comply with. The

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\(^{10}\) The ICA, opinion No. 1354, 10 March 2017.

\(^{11}\) Unofficial translation. The ICA, opinion No. 1222, 29 September 2015.
law defines a “taxi service” as a non-scheduled public transport service, “aimed at satisfying the needs of individual transport or transport of small groups of people; it serves undifferentiated categories of users; the stationing takes place in a public place; the rates are administratively set by the competent bodies [the municipalities] that also define the features of the service; the collection of the user coincides with the beginning of the service and takes place within the municipal area” (Article 2.1). Furthermore, “the provision of the service is mandatory” (Article 2.2).

The authorized VTC service “is offered to specific users”, who present “a specific request” for a certain service. The driver has to be located exclusively in the territory of the municipality that issued the authorization (Article 3).

Therefore, the exercise of taxi and of some VTC services is respectively subject to a license and to an authorization (Article 8).

Recently, Article 9.3, of Decree Law No. 244 of 30 December 2016 extended to 31 December 2017, and then to 31 January 2018, the deadline for the adoption of a ministerial decree aimed at preventing the abusive exercise of taxis and VTC services.

The annual law on competition No. 124 of 4 August 2017 delegated the Government to adopt, within twelve months, a legislative decree for the revision of the discipline of non-scheduled VTC services. This intervention should provide a legal framework that, inter alia: guarantees “the right to mobility of all citizens”, adapts the offer to new forms of mobility services taking place through technological platforms connecting passengers and drivers, “promotes competition and stimulates higher quality standards”, “ensures better consumer protection”, harmonize regional and local authority competences in order to define common national standards, identify “effective, dissuasive and proportionate” sanctions to contrast abusive phenomena.

Then, according to Decree Law No. 40 of 25 March 2010, as last amended, “no later than 31 December 2018, urgent implementing provisions, designed to prevent practices of improper taxi service and [VTC] service or, however, not compliant with the principles governing the matter” should be adopted. General principles to guide municipalities and regions in issuing the required authorizations should be also clarified.

In this framework, a legislative intervention aimed at reordering the discipline of VTC services is still missing in Italy and the actual lack of clear rules raises real obstacles to the developments of innovation as well pro-competitive services.

3.3 The “unclear” judicial approach

In the meantime, the battle between old models grows. The Italian courts have originally taken a restrictive approach. Regarding unauthorized services such as UberPop, the Court of Milan prohibited on the whole national territory the possibility to provide unscheduled mobility services without the required authorizations.

12 Unofficial translation. Annual law on competition No. 124 of 4 August 2017, Article 1, paragraph 179.

The Court of Rome, on 7 April 2017, inhibited the possibility to provide in the Italian territory unscheduled public mobility services with the use of the UberBlack app and similar ones as well as the promotion of such services to avoid the commission of acts of unfair competition. However, on 11 April 2017, the Court suspended the ban by accepting the interim request of Uber, which alleged that the ban infringed the European principle of freedom of competition. Moreover, according to Uber, the ban was in contrast with consumer protection principles due to the benefits of Uber services in terms of reduced rates as compared to those normally set by law for professional taxi drivers, and the risk of serious and irreparable economic damage if the ban had not been suspended.

On 26 May 2017, the Court of Rome revoked the order adopted on 7 April 2017 and held that obligations such as those concerning the stationing of the vehicles in the remittance were suspended and thus not applicable to VTC services. The Court even referred to UberPop, by noting that the allegation of unfair competition could not apply because it was not an authorized transport service but rather a local public mobility service by unauthorized operators, whose status should be set by the legislator.

4. Mobility services in the new economy: a wider European approach

The continuous development of mobility services is not merely a national issue. Following the elimination of territorial restrictions within Europe and the possibility for European citizens to provide services in different Member States, transport has become a pan-European topic. This assumption has important consequences in the identification of a correct balance between the protection of the traditional business model and the full liberalization of the transport sector in Europe. In this context, in different European countries initiatives have been taken to redress the balance in order not to hinder the development of pro-competitive mobility services.

4.1 The French and the UK examples

In France taxis have a legal monopoly for parking in the public domain, they have reserved parking spaces in airports, in railway stations, and in other key areas in towns, and can use the special lanes reserved for public transport vehicles. To become a taxi, the drivers need to comply with a number of professional qualification requirements. As it happens in Italy, despite the fact that the licences are normally granted for free by the relevant administrative authorities, due to their limited number they are now traded privately and have a significant commercial value.

To set up alternative business models that do not have to comply with strict obligations, new mobility services have steadily developed during the last decade. In particular, following a
regulatory change in 2009, which made registration of private-car service companies easier, the number of registered VTC companies has risen sharply since 2010\(^{15}\).

A similar situation has been registered in the UK, where the traditional taxi model is subject to strict regulations, which even raised State aid issues as to the status of black cabs. In the well-known Eventech case, the ECJ rejected the idea that exclusive access to bus lanes for black cabs amounted to State aid and thus reaffirmed the possibility for traditional transport service operators to retain that exclusive right. The ECJ noted that in London bus lanes may be used by traditional black cabs, while the regulatory framework does not allow other operators such as minicabs to use them because black cabs enjoy a special status. Despite not paying for this exclusive right, they incur costs in meeting the criteria to be classified as black cabs. In this framework, according to the ECJ, the exclusive access to bus lanes does not constitute State aid. In particular, black cabs and minicabs are in different factual and legal situations and the exclusive access to bus lanes is not a selective measure aimed at giving the former a discriminatory advantage\(^{16}\).

4.2 Liberalization versus protectionism

As in Eventech, in the Spanish UberPop case the ECJ seems to have set the balance between the liberalization of mobility services in Europe and the protection of traditional taxi drivers in favour of taxi drivers. It is interesting now to assess whether that decision simply “creates an artificial boundary” to the development of new pro-competitive mobility services\(^{17}\) to the detriment of consumer welfare. Or whether we could restrictively read the ruling as limited to the specific case under scrutiny. A wide interpretation of the notion of “transport service” raises concerns not only with respect to a system like Uber but, moreover, with respect to similar sharing platforms. This could be the case of services such as BlaBlaCar\(^{18}\), when the digital application is simply an instrument to connect offer and demand and the platform does not exercise decisive control on drivers (for example, in terms of prices). The absence of decisive influence should make

\(\text{who have pre-booked such vehicles, does not appear […] to be such as to involve a commitment of State resources or to confer on Black Cabs a selective economic advantage’’. Moreover, “by virtue of their legal status, only Black Cabs can ply for hire; they are subject to the rule of ‘compellability’; they must be recognisable and capable of conveying persons in wheelchairs, and their drivers must set the fares for their services by means of a taxi meter and have a particularly thorough knowledge of the city of London” (§§ 60-63).}


\(^{16}\) Court of Justice, Eventech Ltd v. The Parking Adjudicator, Case C-518/13, 14 January 2015, ECLI:EU:C:2015:9. In the words of the ECJ, “the practice of permitting, in order to establish a safe and efficient transport system, Black Cabs to use bus lanes on public roads during the hours when traffic restrictions relating to those lanes are operational, while prohibiting minicabs from using those lanes, except to pick up and set down passengers


the arguments of the ECJ inapplicable to mere intermediary platforms.

Similarly, to safeguard consumers and step up the liberalization process, that the protection of taxi drivers could slow down, even the French Competition Authority (the “FCA”) has recognized that the current system of taxi fees does not satisfy consumers. Thus, it issued a positive opinion on the introduction of flat rates for taxi services between Paris airports and the city centre. These considerations simply support the argument that a wide interpretation of the notion of “transport service” should not be pursued further.

As it will be clarified, a “liberal” approach should be followed: new mobility services challenge the traditional system of traffic control and call for *de minimis* forms of regulation in contrast with bans aimed at protecting the incumbents.

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5. The present and the future of mobility services: is there a balance?

The ECJ ruling has shed light on the obstacles faced by “non-conventional” mobility services in a context that has been historically locked-in by taxis. The classification of a service such as UberPop as a transport service shields the position of traditional operators to some extent as it raises regulatory barriers to the further development of alternative mobility services.

5.1 The present: the transport sector as a locked-in market

The ruling reflects the *status quo* in Europe. In fact, the liberalization of the transport sector has recently faced strong opposition from taxis. This has led to the ban on Uber and similar mobility services in many jurisdictions. The incumbents have raised obstacles to the development of new services by arguing that Uber (and similar) drivers operate without the required authorizations with related risks to public safety. This concern has been based on unfair competition issues.

In addition to Spain, this happened in France where UberPop was banned after strikes by the taxi unions on the basis of lack of proper authorizations. Similarly in Portugal, where Uber had been operating its service UberBlack since July 2014, and UberX since December 2014, following a complaint by a national association of taxi owners, a preliminary

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The above-mentioned controversies illustrate the need for the legislator to find a balanced solution between banning and regulating new mobility services. This balance will be likely replicated in other sectors subject to “uberalization” and/or “amazonization” so the risk that a conservative approach will paralyze the innovation in Europe is still high. To comply with the ECJ’s ruling in the Spanish UberPop case, national legislators should opt for a regulatory solution. The question now focuses on the extent to which legislators would like to differentiate the regulatory framework for taxi and for other VTC services.

Some questions arise in this respect. In any form of regulation, the first question regulators face is the identification of what to regulate and to which extent regulate it. In this context, a clear distinction between professional and non-professional providers when offering the same services has to be drawn. The extent to which they can coexist and compete and under which regulatory conditions should be considered in order to protect consumer welfare. For example in France, as a result of protests by taxi drivers, the legislator adopted a new set of rules for VTC drivers to ex ante rebalance the different status of taxi services as opposed to VTC services.

5.2 The future: is a regulatory approach the correct solution?

In particular, the government prohibited the display of any distinctive taxi signs on VTCs and imposed stricter qualification requirements for VTC drivers. While taxi drivers argued that these measures did not resolve the conflict, VTC companies said that they were operating in a not-monopolized segment of the market. To ease the tensions, in November 2013, despite a contrary opinion of the FCA, the government drafted a decree to introduce a mandatory 15-minute waiting period between the reservation of a VTC and the effective use of the car by the passenger. On appeal before the French supreme administrative court (the Conseil d’Etat) by VTC companies, on 5 February 2014, the Conseil d’Etat granted interim measures and suspended the decree temporarily. On 24 March 2015, the Conseil d’Etat rejected the request for suspension. According to the proceedings No. I801A and I801B, 27 June 2018.


Furthermore, as a result of the ECJ’s ruling, the issue of whether only unauthorized mobility services or whether all VTC services will face tougher regulation across Europe with an increase in fares for users should be considered. It is undeniable that if even authorized VTC services had to comply with additional regulations, it would result in extra costs. These costs would likely be passed on to passengers. However, to ease these effects, an alternative solution has been proposed by the ICA. Firstly, a form of “deregulation from below” should be pursued. This would lead to a reduction in the constraints already imposed on authorized operators, which are burdened by public service obligations. The distinctions between taxi and authorized VTC services should be also reduced in a “perspective of full substitutability of the two services”. A simple authorization ex ante to operate should be sufficient for authorized drivers and it should have a national scope.

In addition, unauthorized drivers who operate through sharing platforms should not qualify as traditional transport services and a de minimis regulation should be adopted. They should not be forced to conform with the rules applied to traditional transport operators.

Regulation should not concern the pricing component. In fact, the traditional business model with regulated prices has not proved suitable from a consumer welfare perspective. Taxi rides are much more expensive than those offered by unauthorized VTC services. It is true that a “price war” could result in a reduction in quality and it could affect the security of transport services. However, although setting prices for taxi services has traditionally been based on public interest justifications, this regulatory choice does not seem suitable to adequately satisfy user demand.

The application of a minimum set of rules, which do not touch upon pricing, does not imply a lack of control and security checks on the quality of the services provided. To this purpose, for example the regulation of minimum quality standards would inevitably have a floor effect on prices. There would be a breakeven point as it would not be convenient for a VTC service to lower prices further down and at the same time assuring a certain quality of the service. In this context, a de minimis regulation and natural competition in the market will lead to a market equilibrium, which could guarantee fair competition.

Likewise, a system that is based on a limited number of authorizations should be amended.

Conseil d'Etat, the decree has created new obligations for the VTC – such as registration in a VTC register, the good standing of the drivers, financial capacity and insurance. It thus rebalances the protection of taxis and VTC services. Its suspension would simply aggravate the difference of treatment complained of by the applicants.


26 The ICA, advocacy paper No. 1354 cit.

Competition is inevitably a dynamic process and the scarcity of a resource simply locks-in the market, it results in a price-increase and has a deterrent effect on market entry. The limited number of authorizations makes their costs particularly high when traded. In this context, only a few people take the risk of entering the market and the competitive process is inevitably slowed down.

Therefore, it is clear that revisiting the existing regulatory framework on taxi services and reestablishing a level playing field among mobility service providers may reduce the strong opposition to the development of new services²⁸.

On the contrary, the idea of banning unauthorized mobility services is not in line with a pro-competitive approach to the market and it would be detrimental to consumer welfare. Sharing platforms such as Uber benefit consumers by increasing the availability of service providers, lowering costs, and providing altogether new and better quality services.

In this framework, a *de minimis* regulatory approach could help in responding appropriately to changes imposed both by new mobility services and by increasingly demanding users.

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6. CONCLUSIONS

The ECJ’s ruling in *UberPop* has opened up a Pandora’s box regarding the correct approach to new mobility services and, in particular, to unauthorized VTC services. Whether they should be banned, whether a *de minimis* regulation should be adopted, or whether they should be subject to the same rules currently applied to taxi operators in Europe, is still unclear. A formal reading of the judgment would suggest the latter.

However, sharing platforms have brought substantial benefits to consumers, suppliers and to the owner of the same platforms, while challenging traditional incumbents. To further develop these new services, antitrust authorities have engaged in advocacy to highlight the importance of guaranteeing access to market for VTC services. The best solution would seem to be the adoption of a *minimum* set of rules aimed at balancing the contrasting interests of traditional taxi drivers and of new VTC services.

The ECJ’s ruling seems to have pushed the balance too high in favour of protecting traditional operators. Issues such as public safety could not justify the application of the same rules to taxi and VTC services and, in particular, to unauthorized drivers. Also reducing the burdens already imposed on taxi drivers and on authorized VTC services could help to develop more innovative mobility services. The proposed approach would avoid phenomena that could be improperly interpreted as acts of unfair competition to the benefit of consumers. In the present super-fast developing economy that is moving towards the
digitalization, one should expect that the traditional taxi drivers will advocate for the amendment in a pro-competitive way of the old legislative framework. Indeed, such old-fashioned framework is preventing them to join (in a free and full way) the economic benefits deriving from the new digital environment. “Surprisingly” in Europe the claim is exactly the opposite with a proud opposition to innovation. It is now clear that the slowest is the spontaneous adaptation to the new business model, the worst are the negative effects on the income of the taxi drivers whose customer base is quickly switching to new digitalized services. This is a clear example of how dramatically important is for market operators (taxi drivers included) to be aware of the disruptive impact of competition in the market. The only realistic way to react to it is to see the competitive forces as an opportunity for change. Any (even legislative) resistance only benefits, sooner or later, the adapters to the new environment. What a strange world.