



Uber and competition law

Lylian DENIS

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***Resume:** Since 2011, the company Uber has been active on the passenger transport market. With it, a new competition appears for a profession that was alone on this market for a long time: taxis. Uber is a new business model, a new vision of entrepreneurship with what is known as "Ubérisation". Uber, which offers a platform for putting private drivers and customers in touch with each other, is not exempt from all criticism, as shown by the decision of the French Court of Cassation of 4 March 2020, which reclassified the contract between private drivers and Uber as an employment contract. A legal gust of wind in the Uber model that could lead to a huge tornado. This is particularly true of competition law, which is increasingly questioning the legality of the company's practices.*

I. Background.

a) The Uber company.

Uber is a company that provides a platform with the primary objective of connecting VTC drivers and customers. This company was founded in 2009 and arrived in France at the end of 2011. For the record, Paris was the first city outside the United States where the company was established, and its development soon became exponential.

If we come back to the development of Uber and its commercial strategy, we must necessarily understand what the company is fighting for: their birth is based on an

innovative idea and a fundraising in 2008. Their desire was to modernise an ageing market. Understanding that taxis were in a quasi-monopoly, the creators wondered how to make this market evolve in order to adapt it to the times. They came up with the idea of a (mobile?) application that would allow people to find and book private drivers in a short time and provide a much higher quality service than a taxi can offer. Its business model is based on disintermediation, the mutualisation of

ownership of customers, drivers and users¹. The economic and marketing advantage of this model is the speed offered by digital technology and the fact that it is based on an international network. Uber has broken many rules to offer an attractive service to users by presenting it as a democratisation of access to the services offered by taxis, which are less expensive and faster - a tempting advertisement that will allow them to develop a market share that is more than impressive. This new economic power is so powerful and exponential that it is quickly becoming a cause for concern. The mayor of New York even wanted to limit the number of VTCs in his city, under the pretext of studying their environmental impact and air quality, while Uber reproached the latter for wanting to support taxis. It is true that at that time and even today the "Yellow Cabs" were in a precarious state².

b) The economic development of the Uber company.

Uber is throughout its development "a *story of a frantic race to monopoly, fuelled by record investment*"³. As we have seen above, Uber does not have a classic business model. Its

economic construction is one of the major points of this singularity. Uber's boss Travis Kalanick immediately wanted to appreciate and develop his company by thinking big. The company immediately establishes itself as a global company, which is financed by raising billions of Euros. The idea is an aggressive strategy, incurring itself to insane amounts, to finance the establishment in new cities and the recruitment of new drivers and the goal of these fundraisings is to preserve the capital of the company as well as the previous investors⁴. However, this aggressive strategy is not without risk and the company recorded a loss of 4 billion dollars in 2016⁵. The company is indeed very successful, not profitable yet⁶.

What is paradoxical is that despite the fact that it does not make any profit, the company allows itself to adopt predatory economic strategies. We can specifically take the case of what happened in Paris: the Taxis G7 and Taxis bleus companies will propose new commercial offers in October 2015. Uber immediately responded by announcing that it would lower its fares by 20% in Paris, and even by 25% from 00:00 to 06:00, when taxi fares are highest⁷ - amazing strategy for a company that makes no profit.

¹ M. Salaün, "Uber almighty", *Hypotheses*, November 01, 2015.

² F. Autran, "Pourquoi le maire de New-York veut mettre Uber au point mort", *Libération*, 20 July 2015.

³ B. Hartemann, "Uber: un modèle économique incertain", *Les Echos*, 1 August 2019.

⁴ *Le Figaro*, "Uber raises another \$1.15 billion on the markets".

⁵ J.M. De Jaeger, "Uber has lost \$1.2 billion since the beginning of the year", *La Figaro*, 25 August 2016.

⁶ M. Waintrop, "Uber still running out of profits", *La croix numérique*, August 09, 2019.

⁷ J. M. Gradt, "Uber lowers its VTC rates by up to 20% in Paris", *Les Echos*, 8 October 2015.

Finally, if we look at the economic and commercial strategy implemented by Uber, what can we learn from it? It is not a strategy that is intended to provide immediate results, but rather the construction of a financial bubble based on the future, with the aim of acquiring an almost monopoly on the passenger transport market, a strategy claimed by the firm during its various presentations⁸.

The company therefore wants to become one of the major players in passenger transport, if not the only player. But at what cost? By diverting and playing with the laws, whether it be to create tax⁹ optimisations, or by circumventing French labour law, for which the company was firmly condemned by the French Court of Cassation.

c) The company facing French justice.

On 4 March 2020, the Social Chamber of the French Court of Cassation issued a major and above all unprecedented ruling against the company Uber¹⁰. The major contribution of this ruling is that it requalified the partnership contract of the drivers with the Uber platform as an employment contract¹¹.

In order to establish this relationship, the Social Chamber delved into the concrete

and material employment relationship between Uber drivers and the platform. The Court determined a major element for the requalification of the contract which is the indication of a subordination link. Several elements made it possible to demonstrate this link, like the fact that the drivers do not set the rates which are set at the discretion of Uber through an algorithm. It also noted the sanctions of disconnections to which drivers are exposed in case of refusal of a certain number of rides, and the fact that private drivers in partnership with Uber do not have a clientele, as all data is captured and kept by the platform. *De facto*, VTC drivers in partnership with Uber do not have the characteristics of an individual worker, they are therefore subordinate workers and therefore have an employment contract¹².

This ruling only concerns the contract of one driver, but it is a launching pad for many other cases, demonstrating that this company is not untouchable. The Taxis were quick to take this into consideration and finally have a legal confrontation with the American firm.

II. Uber versus Taxis for Unfair Competition.

⁸ M. Sion, "Uber: an innovative but uncertain business model", The Financial Function Blog, October 28, 2019.

⁹ A. Marcadé, "How Uber managed to pay only 1.4 million euros in taxes in France in 2017", Le Figaro, August 20, 2018.

¹⁰ CCass. soc. 4 March 2020, n°19-13-316, JCP S.

¹¹ F. Champeaux, "L'arrêt Uber", *Liaisons sociales Lamy*, March 13, 2020.

¹² F. Aizicovici, "Uber: pour les chauffeurs, l'arrêt de la Cour de cassation " clôturer le débat juridique " sur leur statut ", *Le Monde*, March 05, 2020.

a) Unfair competition in France.

It is one of the parts of what is called small competition law in France. This sector of the law aims at contributing to other ways of law, to make the economic agents responsible in the implementation of the freedom of trade and industry and their corollary free competition¹³.

The primary objective of this practice is to preserve the individual interests of economic agents, caused by the unfair behaviour of other competing or non-competitive agents. This is the fundamental difference between this concept and that of anti-competitive and restrictive competition practices, which are intended to preserve the general interest and the protection of the market from potential harm to the free play of competition.

The action for unfair competition is based on Articles 1240 of the Civil Code: "*Any act of man, which causes damage to another, obliges the person by whose fault it occurred to repair it.*" and 1241: "*Each person is responsible for the damage he has caused not only by his own act, but also by his negligence or imprudence*". This action makes it possible to obtain from the author of a fault committed in the exercise of his economic activity reparation for the damage

which his disloyalty has caused to another economic agent.

b) Uber faces unfair competition charges in France.

On 9 September 2020, it was revealed that a class action against Uber was underway¹⁴. This action was initiated by Taxis Varois and France Taxis, an action that brings together more than 1,200 plaintiffs¹⁵.

The basis for this action is the decision of the Court of Cassation of 4 March 2020. The plaintiffs claim that the American company is not respecting its obligations and is carrying out acts of unfair competition due to its violation of labour law, allowing it to obtain an economic advantage worth several million euros¹⁶.

This action is also based on two major legal levers: the ruling of the Cour de Cassation, which has retroactive effect, meaning that Uber has been violating labour law from the outset, thereby gaining a significant economic advantage. The second lever is the fact that French pre-trial law is tending more and more to support victims of unfair competition. Until very recently, it was up to the company acting in unfair competition to demonstrate the financial loss,

¹³ C. Tilloy, "Concurrence déloyale - Action en concurrence déloyale", LexisNexis, JurisClasseur Procédures Formulaire, Fasc 10, January 25, 2021.

¹⁴ L. Corot, "Des taxis français attaquent Uber en justice pour concurrence déloyale", *L'usine Digitale*, September 09, 2020.

¹⁵ T. Robert, "1200 taxis want to sue Uber for unfair competition", *assurlandpro*, September 11, 2020.

¹⁶ L. Neuer, "Taxis contre Uber: "On est dans une situation de concurrence illicite", *Le point*, July 20, 2020.

an often difficult and approximate demonstration which prevented this procedure from being fully exploited. But since a decision of the commercial chamber of the Court of Cassation dated 12 February 2020¹⁷, this principle has evolved and been clarified, in particular with regard to compensation for the damage suffered¹⁸. From now on, the judicial regime of unfair competition is based on that of counterfeiting, in other words, the plaintiffs can now evaluate their reparable damages regarding the illicit advantage that the author of the fault has granted himself¹⁹. This simplifies the calculation of the reparable damage, which can now be calculated according to the advantage that the company has granted itself.

The taxis are therefore seeking compensation for the damage they have suffered as a result of this predatory competition from Uber, which has not hesitated to circumvent many of the rules in force to achieve its ends. This action in France is unprecedented at national level, but internationally it is already underway in some countries. We therefore see Uber facing accusations of unfair competition, but from a more global point of view, it is legitimate to

ask whether such a company demonstrates anti-competitive practices that could restrict competition.

III. Uber and its potential antitrust difficulties.

- a) The relevant market in which Uber is positioned.

For a long time, Uber, the company that connects VTC drivers with individuals, has proclaimed itself to be a technology company, more exactly a digital service company²⁰.

There could therefore have been a long and tedious debate about which market the company belongs to. But luckily the Court of Justice of the European Union has already shed some light on this point. In a judgment dated 20 December 2017²¹, the Court of Justice of the European Union declared "*that an intermediation service, such as that at issue, the purpose of which is, by means of a smartphone application, to put non-professional drivers using their own vehicles in touch with persons wishing to make an urban journey, in return for payment, must be regarded as being inextricably linked to a transport service and as therefore falling*

¹⁷ CCass. Com. 12 February 2020, (n° 17-31.614).

¹⁸ D. Roblin-Lapparra, "Pratique Commerciales Trompeuses, Eclaircissement de la Cour de cassation sur l'indemnisation du préjudice subi", *Village de la justice*, March 2020.

¹⁹ L. Neuer, "Taxis contre Uber : "On est dans une situation de concurrence illicite"", Loc.Cit.

²⁰ M. Van De Castele, "VTC : Selon la CJUE, la plateforme Uber relève du secteur des transports", *La Tribune*, 11 May 2015.

²¹ CJEU Press Release No. 136/17 of 20 December 2017 - "The service of matching non-professional drivers provided by Uber falls within the scope of services in the field of transport".

*within the definition of 'service in the field of transport within the meaning of Union law'*²².

De facto, Uber's excessive influence on its drivers and their services means that the latter are recognised as belonging to the passenger transport market. This is a relevant market that was long monopolised by taxis, but which was shaken up with the arrival of VTCs.

b) Uber's potential dominance.

A dominant position under competition law is defined by certain criteria. Although "the existence of a large market share is highly significant"²³, it is not an exclusive condition, it is only an indication. It is a set of elements that make it possible to determine a dominant position. The company must be able to behave in a totally independent manner on the market, whether vis-à-vis its competitors or its customers. The company must be able to behave in a totally independent manner on the market, whether vis-à-vis its competitors or its customers. It is also necessary to take an interest in the structure of the company, because for some years now the competition authorities have been increasingly taking into account the leadership of companies which

are the subject of an analysis of their position on the market²⁴, the disproportion of the financial means of an operator with respect to its competitors²⁵.

As for the company's position as an economic powerhouse, this is more to the point. It is not difficult to identify that a company listed on the stock exchange at almost 100 billion dollars is an economic power. This power has been built up since Uber's inception and through fundraising. But what is particularly interesting is that Uber entered a market that was mostly composed of independent workers (taxis), or sometimes with a few companies that employed taxis. The real concern here is that Uber is in a position of ultra economic power, against competitors who will never be able to innovate and spend as much as Uber does.

Uber's market position can act as an obstacle to the maintenance of effective competition. Since Uber arrived on the market, tensions with taxis have increased. Indeed, the Uber model and all the practices it entails have created a lot of tension. Taxis have a legal framework and an important formalism in order to exercise their profession. Since the law of 20 January

²² Auché-Hédou Avocats Associés, "CJEU: Uber falls within the scope of services in the field of transport".

²³ ECJ, 13 Feb. 1979, Case 85/76, *Hoffmann-La Roche*: ECR 1979, p. 461.

²⁴ EU Commission, 27 July 1991, No 92-163 *Tetra Pak II*.

²⁵ EU Comm. 19 April 1997, n°77-737, *ABG/Entreprise pétrolières opérant au Pays Bas*; EU Comm. 27 July 1991, n° 92-163 *Tetra Pak II*, : Capacity of an undertaking to make financial sacrifices on one or other of its products, without calling into question the overall profitability of its activities.

1995²⁶, access to this profession has been subject to obtaining a certificate of professional competence, as well as a parking permit on the public highway. These licences are limited in number, which will have the effect of creating a real licence market that will give an average price of 250,000 euros per vehicle. Uber, on the other hand, by working only with VTCs, avoids all this formalism, but above all bypasses the laws, whether fiscal or social. Uber uses its influence and its model to produce an activity similar to Taxi, but at a lower cost. So if we ask potential future players in the passenger transport market, what will they prefer: The taxi licence and its extremely high price for a profession that is less and less promoted because of the virulent competition led by Uber? On the other hand, there is the possibility of becoming a VTC driver through an innovative platform, whose clientele is increasingly important. In the current economic context, the choice is quickly made. Competition in the passenger transport market is becoming increasingly restricted and this seems to be due to the influence that Uber has on this market.

The structure of the company and the leadership that it has been able to adopt in the passenger transport market. A market that for a long time was faced with a single model, that of the Taxis. But since the arrival of

²⁶ Law No. 95-66 of 20 January 1995 on access to the activity of taxi driver and the profession of taxi operator, supplemented by Decree No. 95-935 of 17 August 1995 implementing Law No. 95-66 of 20 January 1995.

VTCs and more specifically Uber, everything has changed. In order to pick up a client, a VTC must be booked in advance. Uber has understood this and has created a platform to enable this reservation. The company is structured on this innovation, but also on the construction of a financial bubble established by huge fundraising. Uber has such an aura on the market that this new form of platform structure is called Uberisation. It is easy to understand that the structure of the company, this "hype" that surrounds it, allows it to have an unavoidable leadership on the market.

If we follow these different developments, Uber may eventually meet the criteria for establishing that a company is in a dominant position. But this dominant position is not in itself a concern under competition law, it is the potential abuses that arise from it that can create real problems.

c) Potential abuses by Uber under competition law.

- 1) The company's legal liabilities in the face of antitrust.

In a Communication to Members in 2016²⁷, the European Commission set out its response to the petition presented by Neil Warwick on alleged competition law abuses by Uber²⁸. The petition received a negative

²⁷ European Parliament, Communication to Members of June 29, 2016.

²⁸ N. Warwick, Petition No. 1173/2015, on behalf of the Campaign against Unlawful Taxis In Our Nation Limited, on alleged competition law abuse by Uber.

response from the Commission. The petition raises several points: First, the petition denounced the use of "aggressive discounting strategies", firstly on the recruitment of drivers, by offering them incentives to terminate their current agreements and join Uber. But secondly also with customers with free or heavily discounted rides. The petitioner also denounces the fact that Uber would abuse its dominant position by having the right to integrate its application into Google Maps, but also at the level of DATA by accessing the details of customers contained in their smartphones, to refine and create a particular promotion.

The Commission responded in a relatively summary manner, considering that all the elements provided on the question of dominance are not necessary to demonstrate that the company enjoys such a position. De facto, if no dominant position is demonstrated, it is impossible to find various abuses emanating from this position.

This petition and its negative reception, despite its recent nature, are taking place in a period of transition in competition law. At the moment, antitrust law is facing a revival that seems to favour a new analysis of

Uber's practices. At first, there is an almost Christ-like revelation from the Commission about how to deal with the problems that digital and platforms can present. This is evidenced by the many past and ongoing cases against GAFSA, but also the birth of new legislative regulations such as the P2B regulation²⁹ and the future Digital Market Act³⁰. It can be correlated to the fact that the Commission tends more and more to try to regulate the algorithms as the algorithmic abuse of³¹ the Google Shopping³² case, and the procedure in progress against Amazon³³ both show. There is a sense of a new area of competition that opens up the possibility of a different analysis of the company practices.

2) Potential predatory pricing to drive out competitors.

If the company's dominant position is proven, one may look for correlated with this position. It seems relevant in view of Uber's economic and commercial strategy that it conveys a predatory character. Indeed, the company constantly lowers its prices and makes commercial offers with the aim of diverting customers from the competition.

²⁹ EU Cons. EU, Reg. (EU) 2019/1150, 20 June 2019; OJEU L 186, 11 July 2019.

³⁰ Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15 Dec 2020, COM(2020) 842 final.

³¹ J. Bar-Ilan, "Manipulating search engine algorithms: the case of Google", *Journal of*

Information, Communication and Ethics society, October 19; 2017.

³² EU Commission, Dec. C(2017) 4444 final, June 27, 2017, Case AT.39740, *Google Inc. and Alphabet Inc.*

³³ EU Comm.Press, "Anti-competitive practices: Commission opens investigation into possible anti-competitive behaviour by Amazon" IP/19/4291, Brussels, 16 July 2019.

As regards the textual basis for condemning such a practice, Article L420-5 of the French Commercial Code states that: "*Price offers or practices of selling prices to consumers that are unreasonably low in relation to production, processing and marketing costs are prohibited where the purpose of such offers or practices is to eliminate a company or one of its products from a market or to prevent it from gaining access to a market*". EU case law has provided some essential clarifications, explaining that the predatory nature of the pricing practice is presumed when the prices charged are lower than the average variable costs³⁴, in which case the prices are purely and simply abusive. In French law, the judges also apply the Akzo³⁵ analysis grid.

This type of practice considered abusive will be linked more broadly to an abuse of predatory pricing. The fact is that this practice is clearly aimed at crowding out competition on the market in question through so-called predatory pricing. The ultimate goal of this practice is to eventually be in a monopoly or quasi-monopoly position in order to raise prices and make even greater profits.

Faced with so much loss, one can wonder how Uber manages to convince investors when raising funds. Is it the decentralisation/uberisation system? Or the promise of a return on investment thanks to

the monopoly that Uber will be able to hold by exterminating all competition through its predatory pricing? The answer may be up to the judges, but one suspects that investors with the capacity to inject millions are not only interested in the promise of a new conception of the job market, but rather in the huge promise of the return on investment they have made.

3) Uber and potential predatory abuse of its drivers.

As noted by the Cour Cassation in its judgment of 4 March 2020 that: '*As regards the conditions for providing transport services, the Court of Appeal noted that the Uber application exercises control in terms of accepting rides, since, without being denied, Mr F... states that, after three refusals of solicitations, he is sent the message "Are you still here?", the charter inviting drivers who do not wish to accept rides to "simply" disconnect that this invitation must be set against the stipulations of point 2.4 of the contract, according to which: "Uber also reserves the right to disable or otherwise restrict access to or use of the Driver Application or Uber services by the Customer or any of its drivers or any other reason, at Uber's reasonable discretion", which have the effect of encouraging drivers to remain connected in order to hope to complete a ride and, thus, to be constantly, during the period of connection, at the disposal of the company Uber BV, without being able to actually*

³⁴ ECJ, 3 July 1991, Case C-62/86, AKZO, pt 70-72: ECR 1991, p. I-3359.

³⁵ CA Paris, 8 Apr. 2008, n° 2007/07008: Concurrences n° 2-2008, p. 1, obs. A.-L. Sibony. -

Appeal rejected by Cass. com, 17 March 2009, n° 08-14.503: JurisData n° 2009-047484; JCP E 2009, 1761, comm. B. Duloum.

choose freely, as a self-employed driver would do." The fact is that by this unilateral practice of the company to sanction the driver who does not refuse rides by deactivation or restriction of use, Uber aims at ensuring that the VTC driver cannot use other platforms in parallel or accept other rides even without the use of platforms similar to Uber.

However, the Commercial Code contains an Article L420-2-2 which states that: *"Agreements, concerted practices and unilateral practices whose object or effect is to prohibit or substantially limit the possibility for an undertaking that provides private public passenger transport services or occasional collective passenger transport services using light vehicles to: 1° simultaneously use several intermediaries or players to put customers in touch with each other with a view to carrying out these services; 2° without prejudice to Article L. 3142-5 of the Transport Code, to market the transport services it provides without intermediaries; (...)"*.

So if we take up the various elements of the article and apply them to the case of Uber's practice with its drivers, we realise that through this practice of evicting drivers who do not respond to the application's solicitations are sanctioned, there is a unilateral practice, the aim of which is to limit VTC drivers to using only the Uber platform. This therefore removes the possibility for VTCs to use several intermediaries or actors to put them in contact with customers in order to provide these services, or to market the transport they offer without intermediaries.

Under Article L420-2, we are dealing with the abusive exploitation of a dominant position on the market, at least within the meaning of Article L420-2-2, which the practice explicitly meets the criteria if we follow the demonstration of the Court of Cassation insofar as it concerns the eviction of drivers.

IV. Conclusion.

If we go back to the previous developments, we realise that Uber, being an innovative company, whether from a technological point of view or in the very conception of a company, is nevertheless in breach of numerous legal rules.

However, Uber should not be seen as a company that only causes anti-competitive concerns. The company has had an essential pro-competitive effect on the passenger transport market, removing the kind of monopoly enjoyed by taxis by democratising access to private drivers, known as VTC. This new competition has pushed taxis and other competitors to innovate and develop. These are non-negligible advantages for the market. However, these advantages seem to be obscured by increasingly virulent predatory practices that risk wiping out the new competitive impetus that the company had brought to the passenger transport market. Whether through the potential unfair competition that Taxis accuse it of, or the potential anti-competitive practices that we have considered in our developments.

Furthermore, Uber, like all large digital companies, should not be demonised, but regulated and complied with national and European competition rules.

Lylian DENIS