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Regulating Uber in the Light of the Emerging Sharing Economy

Master Thesis

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I hereby declare that I am the sole author
of this Master Thesis and it has
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Abbreviations

CJEU	Court of Justice of the European Union
CPUC	California Public Utilities Commission
ECJ	European Court of Justice
EU	European Union
SMFTA	San Francisco Municipal Transportation Agency
TFEU	Treaty on the Functioning of the European Union
TNC	Transportation Network Company

Introduction

Uber's story started in 2008 in Paris when the founders of Uber had trouble getting a taxi and an idea for an app to do it for them was born.¹ Uber launched in San Francisco, USA in 2010 and has since established itself in around 80 countries and 543 cities.² As can be seen in recent media, Uber's success has not come without struggles and failures leading up to court cases in different countries. However, its story of success also portrays another important aspect – people are loving the service and willing to use it. The fear of regular taxi drivers and transport companies is undeniable given the popularity of Uber, the competition is immense. The sharing economy is growing incredibly fast offering new ways of development without requiring additional infrastructure or space by using existing resources.³ There is an undeniable market demand for such services which shows that consumers have a great interest in the services offered as well as the desire to share their own under-utilized resources.⁴ There is legal uncertainty involved with these emerging services but this is not an excuse to leave the matter unattended.⁵ The popularity of the sharing economy shows that at least for a while, it is here to stay and action will be required to bring it out of the legal grey area.

The regulation of the new sharing economy and services such as Uber and Airbnb is currently in focus in a lot of the European Union countries as well as elsewhere in the world. This makes the subject of the thesis very acute. These types of business models do not fit into any current regulation in the EU, either Union-wide or national, causing multiple legal problems. It is difficult to conclude whether Uber is merely a transport service or an information society service as there is no clear definition for the sharing economy services in the current legislation. In addition, the EU-wide character of the business model makes it difficult to regulate based on a national law that governs, for example, taxi

¹ Finding The Way – Creating Possibilities For Riders, Drivers, And Cities. www.uber.com/en-EE/our-story/ (30.04.2017)

² *Ibid*; Kalanick, T. Uber's Founding, 2010. newsroom.uber.com/ubers-founding/ (30.04.2017); Bond, A.T. An App for That: Local Governments and the Rise of the Sharing Economy. *Notre Dame Law Review Online* 2015, 90 (2), p 83

³ European Commission, 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, Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (30.04.2017), p 2; Miller, S.R. First Principles for Regulating the Sharing Economy. *Harvard Journal on Legislation* 2016, 53, p 157, 159

⁴ Miller, S.R. First Principles for Regulating the Sharing Economy. *Harvard Journal on Legislation* 2016, 53, p 157

⁵ Holloway, C. Uber Unsettled: How Existing Taxicab Regulations Fail to Address Transportation Network Companies and Why Local Regulators Should Embrace Uber, Lyft and Comparable Innovators. *Wake Forest Journal of Business and Intellectual Property Law* 2015, 16 (1), p 40

service providers. Due to this, legal actions have arisen, for instance, in Belgium, France, Germany and Spain with the Member States forwarding preliminary questions to the Court of Justice of the European Union for guidance.⁶ It remains to be answered how these types of services should be regulated. However, Uber itself as a service and as an idea should not be banned simply because it works differently from what was on the market before. Regulators also need to rethink the applicability of outdated stringent regulations to new applications such as Uber as this may lead to the discouragement of innovation.⁷

The hypothesis of this thesis is that the banning of online sharing services like Uber is not a proportional measure and the current regulation needs to be modified or new legislation established to include special provisions for such services. The author believes that in banning Uber, countries are unnecessarily leaving consumers without new innovative services.⁸ This thesis aims to find out what is the current regulatory approach for services like Uber at the national level and look into the applicable legislation in order to define and establish the legal nature of Uber. In addition, this paper will aim to figure out whether the approach of banning services like Uber is compatible with EU law, specifically with the freedom of movement for undertakings and the principle of proportionality. Finally, the analysis will focus on the need of regulating services like Uber and how this could be done at the national and EU level. The thesis will cover the following research questions:

1. What is the legal nature of Uber?
2. How do countries approach the regulation of services in the sharing economy and whether the EU Member States' regulatory approaches are fragmented?
3. Does banning Uber, specifically UberPOP, go against EU law and principles?
4. Is there a need to produce EU legislation for the regulation of sharing economy services?

⁶ CJEU 7.08.2015, C-434/15, *Asociacion Profesional Elite Taxi v Uber Systems Spain S.L.*; CJEU 27.10.2016, C-526/15, *Uber Belgium BVBA v Taxi Radio Bruxellois NV*; CJEU 6.06.2016, C-320/16, *Tribunal de grande instance de Lille v Uber France SAS*

⁷ Ranchordas, S. Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy. *Minnesota Journal of Law, Science & Technology* 2015, 16 (1), p 471

⁸ Posen, H.A. Ridesharing in the Sharing Economy: Should Regulators Impose Uber Regulations on Uber? *Iowa Law Review* 2015, 101, p 408

The thesis consists of six main chapters and starts with explaining the concept of the sharing economy and collaborative economy with an emphasis on the need for regulation in the field. The thesis then continues to define the specific issues circulating Uber. The second chapter focuses on explaining Uber's business model in detail, showing the different customer segments, the way the mobile application works and the cost and revenue involved. The third chapter of the thesis considers the legal challenges of Uber and the current regulatory approaches to Uber in both the European Union as well as the United States of America. This chapter aims to provide a comparative analysis of the different regulatory approaches by the EU Member States and find out whether there is fragmentation between the approaches. An analysis of the approach in the United States of America serves as part of the comparison and as an example of a different regulatory approach. In order to prove the hypothesis, the fourth chapter analyzes the legal nature of Uber. The analysis focuses on defining whether Uber could be a transport service or an information society service. This is the main question of the dispute regarding Uber before the Court of Justice of the European Union.⁹ After that, the fifth chapter focuses on the compatibility of the different approaches to EU law, specifically to principles such as freedom of establishment, freedom to provide services and proportionality. This chapter concludes whether banning Uber is against EU law and its principles. In the sixth chapter, the author analyzes alternative solutions in regulating or not regulating Uber in the example of EU-wide regulation and a national approach proposed in Estonia. The author finally drafts a conclusion on the different regulatory approaches and proposes a solution as well as a possible decision the Court of Justice of the European Union could make in its ongoing case law concerning Uber. This chapter includes interviews with the team proposing the regulatory scheme for Uber in Estonia to gain an insider perspective on the current situation.

The author has used qualitative research methods to prove the hypothesis and answer the research questions. The author has analyzed academic material as well as legislation and court cases gathered on the topic to answer the research questions and prove the hypothesis. In addition, the work includes a comparative analysis based on the different legislative regimes of several countries to look into the legal challenges surrounding Uber and find possible solutions. The work also includes interviews with the relevant people in the legislative process regarding the regulation of services like Uber in Estonia.

⁹ CJEU 7.08.2015, C-434/15, *Asociacion Profesional Elite Taxi v Uber Systems Spain S.L.*

1. The concept of sharing (collaborative) economy and the need for regulation

The concept of sharing economy is difficult to define because the term is used differently in practice and the meaning of ‘sharing’ may vary.¹⁰ One way of defining the sharing economy is a method of organizing economic activities based on sharing different resources.¹¹ The idea behind it is to enable people to use something owned and provided by others instead of establishing ownership.¹² People add these resources or labor to a common pool from which everyone can take.¹³ It is a similar concept to licensing computer software or other information-based products and paying royalties.¹⁴ Bonciu and Balgar bring out three aspects that should be considered as a basis for sharing economy services:

- ownership and willing to share the resource with others;
- informing the public of the possibility of sharing; and
- a reviewing mechanism for both the user of the resource and the owner.¹⁵

Another aspect which could be classified as an element of the sharing economy is the exchange of value, providing a service in exchange for remuneration in the form of selling a service or leasing an asset.¹⁶ Most importantly, an intermediary facilitating the exchange and providing a feedback mechanism is involved in the form of an online platform.¹⁷

This kind of composition can essentially be seen in the case of Uber. Uber drivers are often regular individuals who are willing to share their personal cars to drive others and make an earning. There is no need for actual promotion of the service because Uber as a platform does it for them, however, the information about the driver is disseminated only when the user requests a ride and the driver is available in short distance. Putting the information out there is essential in the sharing economy as it

¹⁰ Martin, C.J. The Sharing Economy: A Pathway to Sustainability of a Nightmarish Form of Neoliberal Capitalism? *Ecological Economics* 2016, 121, p 151; Belk, R. You Are What You Can Access: Sharing and Collaborative Consumption Online. *Journal of Business Research* 2014, 67 (8), p 1595-1596

¹¹ Bonciu, F., Balgar, A.C. Sharing Economy as a Contributor to Sustainable Growth. An EU Perspective. *Romanian Journal of European Affairs* 2016, 16 (2), p 40

¹² *Ibid.*

¹³ Erickson, K., Sørensen, I. Regulating the Sharing Economy. *Internet Policy Review* 2016, 5 (2), p 1

¹⁴ Bonciu, F., Balgar, A.C. Sharing Economy as a Contributor to Sustainable Growth. An EU Perspective. *Romanian Journal of European Affairs* 2016, 16 (2), p 40

¹⁵ *Id.*, p 40-41

¹⁶ Puschmann, T., Alt, R. Sharing Economy. *Business and Information Systems Engineering* 2016, 58 (1), p 96

¹⁷ Lougher, G., Kalmanowicz, S. EU Competition Law in the Sharing Economy. *Journal of European Competition Law & Practice* 2016, 7 (2), p 88

makes people aware of the possibility of sharing rather than making something their own. The third aspect, reviewing the actions of both users and drivers, is another essential part of the sharing economy. The Uber app allows passengers to rate the driver and make comments, which can alert the Uber service of any unsuitable individuals. Similarly, drivers can also rate the users, for example taking into consideration whether the ride was cancelled or the person did not show up or the person was not on their best behavior in the driver's own vehicle. The two-way review system allows to build trust between the different parties in the sharing economy.¹⁸

At the EU level and in the legal considerations of EU institutions the sharing economy is also referred to as the collaborative economy. These terms are sometimes used interchangeably in academic literature as there is no one clear definition for the services categorized under this type of phenomenon but it does not mean that these two terms mean the same thing.¹⁹ The EU institutions have not yet reached a consensus as to what this phenomenon should be defined as. The European Parliament uses the term sharing economy defining it as online platforms that reduce the under-utilization of existing resources.²⁰ These platforms could include access to the following services or resources: transport, accommodation, labor and human capital, intellectual property and consumer durables.²¹ The European Commission has preferred the term collaborative economy in its communications.²² The collaborative economy is seen as online platforms establishing a marketplace for individuals to provide their goods or services temporarily.²³ The Commission identified three aspects, which would be necessary for such a marketplace, including service providers wishing to share their assets or resources (these can be individuals or professional service providers), users for the services offered and intermediary online platforms facilitating the exchange.²⁴ This definition is very similar to the

¹⁸ Bonciu, F., Balgar, A.C. Sharing Economy as a Contributor to Sustainable Growth. An EU Perspective. Romanian Journal of European Affairs 2016, 16 (2), p 41

¹⁹ Martin, C.J. The Sharing Economy: A Pathway to Sustainability of a Nightmarish Form of Neoliberal Capitalism? Ecological Economics 2016, 121, p 151

²⁰ Goudin, P. The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities. European Parliamentary Research Service 2016. [www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777) (30.04.2017), p 5

²¹ *Id.*, p 47

²² European Commission, 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, Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (30.04.2017), p 3

²³ *Ibid.*

²⁴ *Ibid.*

definition and conditions laid out on what constitutes a sharing economy by Bonciu and Balgar. In this case, the term collaborative economy could be used interchangeably with sharing economy. The thesis will use the term sharing economy for the purpose of uniformity.

The sharing economy has become an alternative marketplace because people have a lot of products and resources which they do not use constantly allowing room to share the resource with other people. On the other hand, there exists another part of the society that does not even wish to own certain resources and the sharing economy allows them to have access to use the resources whenever there is a need.²⁵ In addition to transport, a big part of the sharing economy is sharing accommodation. Airbnb is a popular choice amongst travelers and owners allowing people to rent out apartments, which they do not use to those who wish to stay in a home environment when travelling rather than staying in a hotel, for shorter or longer periods of time.²⁶ The sharing economy promotes using existing resources rather than creating new ones, which may have a huge contribution to sustainable economic growth.²⁷ It allows to connect demand and supply in a different way, where people own resources that are only partially used, and other people only wish to use the resources partially as they do not need them at all times. Disseminating information about the possibility of sharing the resources creates the path for the demand and supply to connect and use the resources in a viable way. The sharing economy utilizes resources to their full extent without an increase in the demand for new resources thereby promoting sustainable growth.²⁸

The online platforms also eliminate the usual cost of communication either to book a short-term rental or to book a taxi and provide enough information for both the provider and user to recognize each other easily, eliminating any anxiety related to waiting for a stranger.²⁹ Platforms such as Uber make it easy to dispatch the closest and most suitable driver for the passenger requesting a ride due to

²⁵ Bonciu, F., Balgar, A.C. Sharing Economy as a Contributor to Sustainable Growth. An EU Perspective. Romanian Journal of European Affairs 2016, 16 (2), p 41

²⁶ Miller, S.R. First Principles for Regulating the Sharing Economy. Harvard Journal on Legislation 2016, 53, p 149-151,164

²⁷ Bonciu, F., Balgar, A.C. Sharing Economy as a Contributor to Sustainable Growth. An EU Perspective. Romanian Journal of European Affairs 2016, 16 (2), p 42; Ranchordas, S. Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy. Minnesota Journal of Law, Science & Technology 2015, 16 (1), p 417

²⁸ Bonciu, F., Balgar, A.C. Sharing Economy as a Contributor to Sustainable Growth. An EU Perspective. Romanian Journal of European Affairs 2016, 16 (2), p 43

²⁹ Edelman, B.G., Geradin D. Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber? Stanford Technology Law Review 2016, 19, p 295-296

information being available through the mobile application.³⁰ The platforms also gather information about the quality of the drivers through the rating system, which allows easy observation to remove any low-quality providers.³¹ Furthermore, the reputational systems are an easy way to make any complaints about the service, while it could be burdensome by using regular taxis where any reports need to be made to the taxi company by email or notice or directly to the regulator.³² The feedback mechanism is useful in solving the problems the passengers notice but there are many issues, which the passengers may not see, for instance, if there is anything wrong with the vehicle internally.³³ In countries where it is compulsory to check the roadworthiness of the vehicle every few years, this may not be a problem but it could be in countries that are not strict in enforcing such rules.

There are many risks involved with the sharing economy as with any other business. Innovative solutions end up in the regulatory grey zone because regulators have very little information about any possible effects these services may have.³⁴ Companies like Uber and Airbnb define themselves as merely internet platforms facilitating the exchange of services between individuals acting only as intermediaries.³⁵ This means that the contract for the service provided is concluded between the owner of the resource offering to share it in exchange for remuneration, and the person wishing to use that service or resource. The intermediary platform will not have a contractual role, which is what platforms such as Uber and Airbnb inform their users of in the terms and conditions. As such, there is a clear shift in legal liability from the platforms to the users in the sharing economy.³⁶ However, this does not essentially mean that the intermediary platform will not hold any legal responsibility in case of a dispute.³⁷ Intermediary platforms would be exempted from liability for illegal activity if they had no active role in obtaining knowledge about such activity and if received such information, would act to remove the problem without any delay.³⁸ The question of what kind of role the platform has in

³⁰ *Id.*, p 297

³¹ *Id.*, p 297-298

³² *Id.*, p 300

³³ *Id.*, p 316

³⁴ Ranchordas, S. Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation. *Jurimetrics J.* 2015, 55, p 203

³⁵ Busch, C. *et al* The Rise of the Platform Economy: A New Challenge for EU Consumer Law? *Journal of European Consumer and Market Law* 2016, 5 (1), p 5

³⁶ Erickson, K., Sørensen, I. Regulating the Sharing Economy. *Internet Policy Review* 2016, 5 (2), p 6

³⁷ *Ibid.*

³⁸ European Commission, 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,

these situations can only be decided on a case-by-case basis depending on the factual and legal elements present.³⁹ Imposing a general obligation to monitor the activity of users would fall against this principle and could also make the platforms automatically liable by putting them in an active role.⁴⁰ The European Commission points out that the existing liability regime allows furthering the development of the sharing economy without imposing strict rules, however, the initiative for voluntary action is also expected from the platforms to show their willingness to act in cases of illegal activity they stumble upon.⁴¹

Using existing resources, the sharing economy often affects commercial service providers in the same market. Uber affects the taxi industry in the transport market while Airbnb affects hotels in the accommodation industry. Following this, it can also be said that sharing economy services act as market disruptors.⁴² This view is highly supported by the traditional providers in the market as it points out the sharing economy services as using unfair competition techniques to enter the market without the usual barriers involved.⁴³ These innovators enter the market often anticipating legal uncertainty and only when on the market, deal with compliance to the national laws.⁴⁴ In this view, setting a ban or quantitative restrictions on such services may seem like the only option in order to keep the traditional market from being disrupted. In its recent communication, the European Commission reminded that banning an activity should always be the last resort when other measures are not working to achieve a certain objective.⁴⁵ Therefore, if the Member State can set out other requirements to alleviate the problem without hindering the operations of service providers in the

Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (30.04.2017), p 8

³⁹ *Id.*, p 7

⁴⁰ *Id.*, p 8; Caufmann, C., Smits, J.M. The Sharing Economy and the Law: Food for European Lawyers. *Maastricht Journal of European and Comparative Law* 2016, 23, p 906

⁴¹ European Commission, 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, Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (02.03.2017), p 8

⁴² Lougher, G., Kalmanowicz, S. EU Competition Law in the Sharing Economy. *Journal of European Competition Law & Practice* 2016, 7 (2), p 88

⁴³ *Ibid.*

⁴⁴ Nowag, J. The Uber-Cartel? Uber Between Labour and Competition Law. *Lund Student EU Law Review* 2016, 3, p 95-96

⁴⁵ European Commission, 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, Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (30.04.2017), p 4

sharing economy and without taking away the options to use these services from the consumers, this should be the way forward.

Some of the Member States are slowly but surely taking steps in the light of the Commission's proposal and are trying to regulate the sharing economy (peer-to-peer sharing) services separately from existing services. The sharing economy allows individuals to provide services, which are outside their professional economic activity. This can in turn cause questions regarding tax compliance and enforcement, making it difficult to identify who is a taxpayer and what is their taxable income.⁴⁶ Belgium, for instance, has recently issued the De Croo Act, which introduces a flat rate tax of 10% applicable to income derived from the sharing economy services.⁴⁷ In order to benefit from this tax, the service has to be provided from individual to individual outside of their professional activity, agreed upon through an online platform and the payment is received by the authorized online platform.⁴⁸

The issues surrounding liability, the collection of data, taxation, monitoring, requirements for entering the market and for operating give some indication that current regulatory regimes do not accompany the regulation of sharing economy services. Despite the legal uncertainty, these issues need solving to accommodate the new solutions and leave room for innovation. Many questions can be answered with existing regulatory frameworks, especially at the EU level, but this will require interpretation of rules in ways that have not been done before. In addition, there may be a need for separate regulations either at the EU level to fill in any legal gaps and harmonize the approach between the Member States, or leave it to the Member States with guidelines on interpretation through case law and communications. The thesis will look into possible interpretations for the Uber service under existing EU legislation and the consequences it would bring, as well as alternative solutions to regulating Uber and other intermediary platforms.

⁴⁶ *Id.*, p 13

⁴⁷ Delhayé, L., Berg, S. Collaborative Economy: New Legal Framework Enters Into Full Force on 1 March 2017, 2017. www.lexology.com/library/detail.aspx?g=73cf5d92-a67b-4652-a208-7b818de34366 (30.04.2017)

⁴⁸ *Ibid.*

2. Uber Technologies Inc. business model explained

There is an ongoing debate whether Uber should be classified as a transport company or a digital platform, which has made its way to the Court of Justice of the European Union.⁴⁹ Depending on the classification, Uber should either be regulated similarly to taxi services or like information society services. In order to decide whether Uber is merely a taxi service hiding in the shadows of a mobile application, a closer look needs to be taken at the whole business model of Uber. This chapter considers the variety of services Uber company provides, the customer segments, key activities and resources, channels and cost and revenue structure.

The main channel that Uber uses is a mobile application, although they also have a website to sign up new users and drivers, which form the two customer segments of Uber. Users are classified as anyone who orders a ride through the Uber application. The person needs to be 18 years or older to become a user and enter their bank card details to pay for the ride.⁵⁰ The cost of an Uber ride can be less than a regular taxi so Uber can attract people who wish to pay less for being driven from point A to point B. On the other hand, Uber also offers more premium services for those who are willing to pay more.⁵¹

Requesting an Uber is very easy with the Uber mobile application. The user needs to enter their location to request a ride which is then passed onto the online platform that locates the closest suitable and available driver and informs him or her of the request. The driver needs to confirm the request after which the booking confirmation is sent to the user including the driver's first name, profile photo, rating, car mark and model, and vehicle registration plate. The system also allows both the driver and user to contact each other without actually seeing each other's phone numbers while the driver is making their way to the pick-up location to coordinate any necessary details. The personal phone numbers are protected for privacy reasons but the Uber platform can facilitate an exchange of information if help is requested due to items being lost or found in vehicles.⁵² Once the ride is

⁴⁹ CJEU 7.08.2015, C-434/15, *Asociacion Profesional Elite Taxi v Uber Systems Spain S.L.*

⁵⁰ Uber Legal Terms of Use, 2016. www.uber.com/legal/terms/us/ (30.04.2017)

⁵¹ UberBLACK – Professionally Driven Black Cars. www.uber.com/en-FR/ride/uberblack/ (30.04.2017); UberSELECT – Highly Rated Drivers With High-End Sedans. www.uber.com/en-FR/ride/uberselect/ (30.04.2017)

⁵² User Privacy Statement, 2015. www.uber.com/legal/privacy/users/en/ (30.04.2017); Driver Privacy Statement (Non-U.S.), 2015. www.uber.com/legal/privacy/drivers-non-us/en/ (30.04.2017)

complete, the driver needs to confirm the trip on their application after which the cost is charged to the user and the driver becomes available for other rides. Both the driver and user can then rate the ride experience, which forms the overall rating for both parties.

The services Uber offers differ from city to city due to the different restrictions and requirements set upon similar services. The most controversial service from Uber is UberPOP, a peer-to-peer ride-sharing service. This allows individuals to become drivers while Uber acts as a facilitator for potential clients through online applications. Uber pre-approves the drivers and the conditions they have to pass vary from city to city. The conditions to become an UberPOP driver in Tallinn include the following: the person must be at least 21 years old, have a valid driver's license and experience of at least 2 years, and an eligible 4-door vehicle with proof of vehicle registration and insurance.⁵³ This is the only service that is currently available in Tallinn, Estonia. It has caused the most controversy because it does not use licensed drivers, which means they should not have to conform to the regulations and requirements applicable to taxi drivers.⁵⁴

In addition to the peer-to-peer ride-sharing service, Uber also offers UberX, UberXL, UberBlack and UberSelect services. Uber chooses professional and licensed drivers especially for UberBlack which also makes the service more expensive. The least expensive from the list is UberX which is the simplest in its nature, offering a car service with regular cars for 1-4 people.⁵⁵ UberXL, on the other hand, offers a similar service just for more people, 1-6 persons.⁵⁶ The licensing requirements depend on the city the service is operated in with most cities in the United States not requiring a Commercial Driver's License for UberX or UberXL drivers, thereby making it a similar service to UberPOP in Europe.⁵⁷ UberBlack uses luxury sedans and is a premium service in its nature.⁵⁸ UberSelect offers high-end sedans offering a more high-end version of UberX and a less expensive version of

⁵³ Uber Driver Requirements: How to Drive with Uber in Estonia. www.uber.com/en-EE/drive/requirements/ (30.04.2017)

⁵⁴ Griffin, A. Uber's Cheap Service to Be Banned in France as Paris Taxis Block Roads, 2014. www.independent.co.uk/life-style/gadgets-and-tech/news/uber-s-cheap-service-to-be-banned-in-france-as-paris-taxis-block-roads-9926523.html (30.04.2017)

⁵⁵ UberX – An Everyday Ride At An Everyday Price. www.uber.com/en-FR/ride/uberx/ (30.04.2017)

⁵⁶ UberXL – The Most Affordable Vans and SUVs. www.uber.com/en-FR/ride/uberxl/ (30.04.2017)

⁵⁷ Driving Jobs vs Driving With Uber. www.uber.com/driver-jobs/ (30.04.2017)

⁵⁸ UberBLACK – Professionally Driven Black Cars. www.uber.com/en-FR/ride/uberblack/ (30.04.2017)

UberBlack.⁵⁹ Therefore, while anyone can become an Uber driver, Uber also needs professionals in its field to compete with regular transport services on the market. This allows Uber to attract customers from all fronts, for cheaper and higher-end transport services.

The drivers are pre-approved by Uber and must fit certain criteria to be chosen as an Uber driver. However, in addition to that, the application provides a constant review mechanism in the form of a rating and feedback system for both drivers and users. This means that the selection process does not work only at the pre-approval stage but also continuously when providing services. Uber takes note of negative feedback and has the power of eliminating drivers and passengers from the system if any problems arise. This is a popular way of ensuring customer support as well as eliminating any threats to the users. It works because it is a transparent platform allowing drivers to comment on unruly users as well as passengers to give feedback on drivers that may not be fit for the job. While other parties may argue that this is not enough to ensure public and consumer safety⁶⁰, it provides quick feedback on any problems that may occur. The same cannot be said for many taxi companies where reporting issues with specific drivers may become quite problematic and might not have any consequences for the person involved or for future customers because companies do not want to shed bad light upon themselves.⁶¹ Online feedback mechanisms such as this alleviate the problem of information flow and give the consumers a bigger voice.⁶²

It is interesting to point out, however, that even the professional drivers do not become employees of Uber as Uber insists, but rather partners or independent contractors.⁶³ This establishes another big problem in terms of regulation. The drivers themselves have brought lawsuits against Uber to argue that they should be considered as employees and enjoy applicable employment benefits.⁶⁴ An

⁵⁹ *Ibid.*; UberSELECT – Highly Rated Drivers With High-End Sedans. www.uber.com/en-FR/ride/uberselect/ (30.04.2017)

⁶⁰ Kaufmann, C. The Commission's European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly? *Journal of European Consumer and Market Law*, 5 (6), p 237-238

⁶¹ Edelman, B.G., Geradin D. Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber? *Stanford Technology Law Review* 2016, 19, p 299-300

⁶² Koopman, C. *et al* The Sharing Economy: Issues Facing Platforms, Participants, and Regulators. *Sharing Economy Workshop*. Federal Trade Commission, 2015. ssrn.com/abstract=2610875 (30.04.2017), p 12-13; Thierer, A. *et al* How the Internet, The Sharing Economy, And Reputational Feedback Mechanisms Solve The "Lemons Problem". *University of Miami Law Review* 2016, 70 (3), p 869

⁶³ Chen, M.E. *O'Connor v Uber Technologies Inc.* 82 F. Supp. 3d 1133. *Western State Law Review* 2015-2016, 43 (3), p 325; Means, B., Seiner, J.A. *Navigating the Uber Economy*. *University of California Davis Law Review* 2016, 49, p 1513

⁶⁴ Means, B., Seiner, J.A. *Navigating the Uber Economy*. *University of California Davis Law Review* 2016, 49, p 1513

employment tribunal in the United Kingdom ruled in 2016 that Uber drivers should have the same rights as other full-time employees in the UK.⁶⁵ The court overruled Uber's idea of every driver being self-employed and an individual contractor who is not entitled to benefits. At the same time, it is difficult to make this distinction between an employee and an individual contractor with the new working arrangements in the sharing economy.⁶⁶ The ruling is not yet final with Uber having since launched an appeal.⁶⁷ The thesis will focus on the original business idea from Uber's point of view.

One of Uber's aims is to allow people to earn extra money by providing driving services with Uber or even do it full-time, which means that drivers are not exclusive to Uber by any means. The fare of each the ride is calculated by the Uber servers based on the GPS data of time and distance.⁶⁸ In addition, this price could be multiplied by a constant. This is called surge pricing and is common at peak times, for example, Friday nights, as well as holidays when demand usually exceeds supply.⁶⁹ Uber considers itself a marketplace and the surge price technology allows Uber to cover the unfulfilled requests by increasing the supply through fares higher than normal.⁷⁰ The drivers get the remaining fare after Uber charges a percentage covering the cost of using the application, such as payment processing and customer service, as well as obtaining its revenue.⁷¹ During the employment tribunal proceedings in the UK it was mentioned that the percentage Uber charged had been raised from 20% to 25%.⁷² As Uber does not own the vehicles or consider the drivers as employees, there are also no related costs involved.

⁶⁵ Employment Tribunals of the United Kingdom 28.10.2016, Case No. 2202550/2015 & Others, *Aslam, Farrar & Others vs Uber B.V., Uber London Ltd, Uber Britannia Ltd*, para 129

⁶⁶ Means, B., Seiner, J.A. Navigating the Uber Economy. *University of California Davis Law Review* 2016, 49, p 1515

⁶⁷ Booth, R. Uber Appeals Against Ruling That Its UK Drivers Are Workers, 2016. www.theguardian.com/technology/2016/dec/14/uber-appeals-against-ruling-that-its-uk-drivers-are-employees (30.04.2017); Booth, R. Uber Granted Right To Appeal Against Ruling on UK Drivers' Rights, 2017. www.theguardian.com/technology/2017/apr/19/uber-appeal-uk-employment-ruling-drivers-working-rights (30.04.2017)

⁶⁸ Driving With Uber – How Much Do Drivers With Uber Make? www.uber.com/info/how-much-do-drivers-with-uber-make/ (30.04.2017)

⁶⁹ *Ibid.*

⁷⁰ Edelman, B.G. Whither Uber? Competitive Dynamics in Transportation Networks. *Competition Policy International* 2015, 11 (1), p 31

⁷¹ Prassl, J., Risak M. Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdfork. *Comparative Labor Law and Policy Journal* 2016, 37 (3), p 624; Traum, A. B. Sharing Risk in the Sharing Economy: Insurance Regulation in the Age of Uber. *Cardozo Public Law, Policy & Ethics Journal* 2016, 14, p 519

⁷² Employment Tribunals of the United Kingdom 28.10.2016, Case No. 2202550/2015 & Others, *Aslam, Farrar & Others vs Uber B.V., Uber London Ltd, Uber Britannia Ltd*, para 21

3. Current regulatory approaches to Uber

3.1. The EU Member States

Uber's story has been a successful one considering how much it has grown over the past few years. Unfortunately, this story of success has not been one without failures. Uber is located in a somewhat grey legal area where it is not entirely clear what type of service it is and what rules should be applied. This has caused Uber many legal proceedings and a lot of them have occurred in Europe with many countries outright banning Uber's UberPOP service as it violated national transport legislation and requirements. The struggles of Uber in Europe are discussed in more detail in this chapter. It is important to mention that Uber has also been successful in many EU cities. UberPOP is still operating in cities like Tallinn and Copenhagen⁷³ without having suffered major legal problems and the service has been welcomed by the local users.

3.1.1. France

Paris, France, was the first European city where Uber expanded.⁷⁴ Uber first launched the UberPOP service in Paris, allowing unlicensed individuals to provide rides, therefore, providing a lower cost service than regular taxi service.⁷⁵ This caused many strikes and riots over the years because it was deemed to be unfair with regard to licensed taxi services that Uber could operate without filling any of these requirements.⁷⁶ On 1 October 2014, France passed the Thévenoud Law, which regulates the conditions and requirements for taxis and chauffeured cars.⁷⁷ This law modified the provisions of the Code of Transport that sets out the legal framework for providing such services.⁷⁸ The Law distinguishes between taxi services where the driver would station and circulate the public roadways

⁷³ Uber Moves – Copenhagen. www.uber.com/en-EE/cities/copenhagen (30.04.2017)

⁷⁴ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 76

⁷⁵ *Ibid.*

⁷⁶ Taxi And Rail Strikes Hit European Cities, 2014. www.bbc.com/news/world-europe-27792942 (30.04.2017)

⁷⁷ LOI n° 2014-1104 du 1er octobre 2014 relative aux taxis et aux voitures de transport avec chauffeur, JORF No. 0228, 02.10.2014

⁷⁸ Fioretti, J. EC to Challenge French Taxi law After Uber Complaint, 2016. www.reuters.com/article/us-eu-uber-tech-france-idUSKCN0XG0Z0 (30.04.2017); LOI n° 2014-1104 du 1er octobre 2014 relative aux taxis et aux voitures de transport avec chauffeur, JORF No. 0228, 02.10.2014

in order to look for clients, and pre-arranged transport services, which can be provided by other professions than taxis (chauffeured cars).⁷⁹ Uber was categorized under the definition of chauffeured cars for the purpose of this legislation.

Uber France and Uber BV challenged the constitutionality of this law in the Constitutional Council, which delivered its decision on 22 May 2015. The Constitutional Council confirmed that the provision which allows only taxis to charge customers based on distance driven was against the freedom of enterprise.⁸⁰ In addition, Uber also challenged the provision in the law, which prohibited the usage of a mobile application to allow non-professional drivers to provide a ride for potential customers such as UberPOP.⁸¹ The act established that only licensed transport could be provided to consumers and anyone violating these rules would be faced with imprisonment of up to two years and a fine of 300 000 EUR.⁸² This effectively prohibited UberPOP once the law came into force in January 2015. After months of proceedings and continued riots, Uber decided to stop the UberPOP service.⁸³ The Constitutional Court of France later also decided to dismiss Uber's appeal as it found the claims Uber had made unfounded in the light of the constitutionality of the new transport provisions.⁸⁴ Since then, Uber has continued to operate the low-price UberX service in France by complying with any necessary licensing requirements, as well as other services such as UberGreen using electric and hybrid vehicles and UberBerline offering a premium ride service.⁸⁵ Even so, the riots in France continue as taxi drivers and associations still find the legislation too slack for private hire vehicles such as Uber to operate.⁸⁶

⁷⁹ *Ibid.*

⁸⁰ The Constitutional Council QPC 22.05.2015, Decision No. 2015-468/469/472, *The company Uber France SAS and others*

⁸¹ The Constitutional Council QPC 22.09.2015, Decision No. 2015-484, *The company Uber France SAS and others (II)*, para 1-2

⁸² DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 77; The Constitutional Council QPC 22.09.2015, Decision No. 2015-484, *The company Uber France SAS and others (II)*, para 1

⁸³ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 77; Regan, J., Irish, J. French Taxi Drivers Protesting Against Uber Have Caused Total Chaos In Paris, 2015. www.businessinsider.com/r-taxi-protests-over-UberPOP-block-paris-airports-2015-6 (30.04.2017)

⁸⁴ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 78; The Constitutional Council QPC 22.09.2015, Decision No. 2015-484, *The company Uber France SAS and others (II)*, para 7, 9, 17

⁸⁵ Uber Moves – Paris. www.uber.com/en-EE/cities/paris (30.04.2017)

⁸⁶ Slater-Robins, M., Tasch, B. French Taxi Drivers Shut Down Paris As Protests Over Uber Turn Violent, 2016. www.businessinsider.com/uber-protests-in-paris-2016-1 (30.04.2017)

In addition to the constitutionality issues, France initiated criminal proceedings against Uber for operating its UberPOP service, which is an illegal taxi service pursuant to the 2014 Thévenoud Law.⁸⁷ The law sets a restriction on using online platforms such as the Uber mobile application to organize transport services.⁸⁸ However, the French court in Lille raised the question of whether this sort of regulation should have been reported to the European Commission as a technical regulation relating to information society services and requested a preliminary ruling from the CJEU.⁸⁹ The proceedings are currently ongoing and the hearing took place on 24 April 2017.⁹⁰ It was argued that the law targeted online platforms and as such, should have been notified to the Commission.⁹¹ In addition, the question of whether Uber is a transport company also popped up, an issue to be solved by the CJEU in the proceedings between Spain and Uber.⁹²

3.1.2. Germany

UberPOP launched in Germany in 2013 and started off quickly in multiple cities: Berlin, Munich, Hamburg, Frankfurt and Dusseldorf.⁹³ Its success was again short-lived when the Higher Regional Court of Frankfurt ordered a ban for UberPOP across the country in 2014 as part of a preliminary injunction.⁹⁴ After Uber appealed, the ban was lifted and UberPOP continued to operate.⁹⁵ Another ban was established by the Higher Regional Court of Frankfurt during the main proceedings in 2015 stating that UberPOP violated the German Passenger Transport Act (Personenbeförderungsgesetz) and ordered Uber drivers to comply with the same requirements as taxi drivers.⁹⁶ This proved to be a

⁸⁷ Labbé, C. French Court Fines Uber, Execs for Illegal Taxi Service, 2016. www.reuters.com/article/us-france-ubertech-court-idUSKCN0YV1DQ (30.04.2017)

⁸⁸ LOI n° 2014-1104 du 1er octobre 2014 relative aux taxis et aux voitures de transport avec chauffeur, JORF No. 0228, 02.10.2014; CJEU 6.06.2016, C-320/16, *Tribunal de grande instance de Lille v Uber France SAS*

⁸⁹ CJEU 6.06.2016, C-320/16, *Tribunal de grande instance de Lille v Uber France SAS*

⁹⁰ Fioretti, J. Uber, France Spar Over Whether Company Is a Transport Service, 2017. www.reuters.com/article/us-uber-court-eu-idUSKBN17Q24X (28.04.2017)

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 79

⁹⁴ Landgericht Frankfurt am Main, 25.08.2014, Docket No. 2-03 O 329/14; DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 79

⁹⁵ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 79

⁹⁶ Landgericht Frankfurt am Main, 18.03.2015, Docket No. 3-08 O 136/14; DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 79

setback for Uber as it stopped operating in multiple cities in Germany. Uber continues to operate only its UberX and UberTaxi services in Berlin, and additionally UberBLACK services in Munich.⁹⁷

3.1.3. Belgium

Uber launched UberPOP in Brussels in 2014 but the service was banned already later in the year when the Commercial Court in Brussels decided that Uber drivers would require taxi licenses to operate.⁹⁸ The case was brought on by a taxi operator informing that Uber was operating illegally in violation of fair market practices.⁹⁹ However, even after the order, Uber continued to operate UberPOP in Brussels for a while. This sparked protests and riots by taxi drivers,¹⁰⁰ and court proceedings were again initiated against Uber in 2015. In September 2015, UberPOP was banned in Brussels pursuant to another court decision.¹⁰¹ Since then Uber discontinued UberPOP in Brussels and established its other low-cost service UberX,¹⁰² which uses licensed drivers.

A dispute arose in Belgium between TRB, a company operating a taxi call-center, and Uber, which made its way into the CJEU.¹⁰³ The main question under scrutiny was the same as in many other proceedings, whether the same rules should be applied to Uber as to local taxi services.¹⁰⁴ Uber argued that it merely provides a dispatch service, a platform connecting drivers and passengers, and it does not hire any of the drivers as employees thereby not providing them with a wage as would be the case

⁹⁷ Uber Moves – Munich. www.uber.com/en-EE/cities/munich/ (30.04.2017); Uber in Berlin. www.uber.com/info/uber-in-berlin/ (30.04.2017); DeMasi, A.A. Uber: Europe’s Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 79

⁹⁸ DeMasi, A.A. Uber: Europe’s Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 78; Wauters, R. Brussels Court Bans Uber, Imposes 10, 000 Euro Fine for Every Violation of its Ridiculous Order, 2014. tech.eu/news/brussels-court-bans-uber/ (30.04.2017); Terry, E. The Sharing Economy in Belgium – A Case for Regulation? *Journal of European Consumer and Market Law* 2016, 5 (1), p 45; Commercial Court Brussels 31.03.2014, Case No. A/14/01645, *Taxi Radio Bruxellois*

⁹⁹ Terry, E. The Sharing Economy in Belgium – A Case for Regulation? *Journal of European Consumer and Market Law* 2016, 5 (1), p 45

¹⁰⁰ Fioretti, J. Taxi Jam Brussels in Protest Against Uber, 2015. www.reuters.com/article/us-uber-tech-belgium-idUSKCN0RG1XB20150916 (30.04.2017)

¹⁰¹ DeMasi, A.A. Uber: Europe’s Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 78

¹⁰² Uber Moves – Brussels. www.uber.com/en-EE/cities/brussels/ (30.04.2017)

¹⁰³ CJEU 27.10.2016, C-526/15, *Uber Belgium BVBA v Taxi Radio Bruxellois NV*

¹⁰⁴ *Id.*, para 16

for a normal taxi service.¹⁰⁵ The Brussels District Commercial Court decided to ask the CJEU to clarify the issue whether it would be compliant with the principle of proportionality to apply the same rules to Uber as for taxi services even though Uber does not employ its drivers and the drivers are private individuals that engage in ride-sharing.¹⁰⁶ The CJEU responded to the Belgium court's request on 27 October 2016 stating that the reference for a preliminary ruling was inadmissible as it did not meet the requirements for a reference of similar nature.¹⁰⁷ The CJEU explained that the Belgium court had not provided a detailed description of the activity at issue and had used different terms interchangeably making the description ambiguous.¹⁰⁸ Although the CJEU did not provide an answer on the concept of Uber, in this case, the Belgium court could return with a reference for a preliminary ruling once they specify the issues at hand, or wait until the CJEU makes a decision regarding the categorization of Uber in the Spanish case before the CJEU.¹⁰⁹ However, it seems that Belgium has instead proposed a change in regulation to ensure that booking platforms use licensed drivers as paid transport will be allowed to be provided only with a license.¹¹⁰

3.1.4. United Kingdom

Uber has been operating in London since 2012 and has had many ups and downs. As in other European metropolises, taxi drivers' associations have protested against Uber operating without proper permits and authorizations thereby disrupting competition.¹¹¹ A lawsuit was filed by the taxi industry operators in 2014.¹¹² The United Kingdom's High Court reached a decision on 16 October 2015 establishing that Uber did not constitute a taxi service, therefore, Uber is not breaking any laws associated with taxi services.¹¹³ The Court added that a mobile application operating based on GPS

¹⁰⁵ *Id.*, para 10

¹⁰⁶ *Id.*, para 16

¹⁰⁷ *Id.*, para 30-32

¹⁰⁸ *Id.*, para 29

¹⁰⁹ CJEU 7.08.2015, C-434/15, *Asociacion Profesional Elite Taxi v Uber Systems Spain S.L.*

¹¹⁰ Novak, M. Taxi plan – P. Smet Presents The Principles On Which The Brussels Government Agrees, 2017. www.brusselstimes.com/belgium/8053/taxi-plan-p-smet-presents-the-principles-on-which-the-brussels-government-agrees (28.04.2017)

¹¹¹ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 80

¹¹² *Id.*, p 81

¹¹³ *Ibid.*; Royal Courts of Justice, London, United Kingdom 16.10.2015, EWHC (Admin) 2918 Case No. CO/1449/2015, *Transport for London v. Uber London Limited*, para 20, 29, 49

data with information sent to a server located outside the actual vehicle does not constitute a taximeter.¹¹⁴ On the other hand, the Court established that while taxi regulations were not applicable to Uber, Uber would have to comply with the rules set out for private hire vehicles (PHVs) under the Private Hire Vehicles Act of 1998.¹¹⁵

Following its first proper win in Europe, Uber is facing new difficulties in the United Kingdom. The employment tribunal in London has recently ruled that Uber is actually an employer to its drivers even though Uber claims otherwise.¹¹⁶ This means that Uber drivers are entitled to all the same benefits as other full-time employees. Uber will be appealing this decision; however, this stands as another obstacle in the way of Uber establishing its business model the way they want. Furthermore, the Transport for London has mentioned that it is developing a new set of rules which would also apply to online applications such as Uber and set out stricter rules to operate and use such services.¹¹⁷

3.1.5. Spain

UberPOP launched in Barcelona, Spain, in early 2014 and moved onwards to Madrid later in the year.¹¹⁸ Taxi drivers complained of unfair competition because Uber drivers did not comply with the requirements set out for taxi drivers and launched legal proceedings. A trade association for taxis, Asociacion Profesional Elite Taxi, filed a complaint against Uber Systems Spain because Uber was breaching the unfair competition rules by using misleading practices with consumers and for being non-compliant with the taxi regulations.¹¹⁹ The Spanish court decided in December 2014 to place a

¹¹⁴ *Ibid.*

¹¹⁵ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 81; Royal Courts of Justice, London, United Kingdom 16.10.2015, EWHC (Admin) 2918 Case No. CO/1449/2015, *Transport for London v. Uber London Limited*, para 11, 15; Private Hire Vehicles (London) Act 1998, 1998 Chapter 34, 28.07.1998

¹¹⁶ Employment Tribunals of the United Kingdom 28.10.2016, Case No. 2202550/2015 & Others, *Aslam, Farrar & Others vs Uber B.V., Uber London Ltd, Uber Britannia Ltd*, para 129

¹¹⁷ Royal Courts of Justice, London, United Kingdom 16.10.2015, EWHC (Admin) 2918 Case No. CO/1449/2015, *Transport for London v. Uber London Limited*; DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 81

¹¹⁸ Geradin, D. Online Intermediation Platforms and Free Trade Principles? Some Reflections on the Uber Preliminary Ruling Case. *Internet, Competition and Regulation of Online Platforms* (Ed. Ortiz, A.). *Competition Policy International* 2016, p 122

¹¹⁹ *Ibid.*

ban for Uber in the whole country confirming the views of taxi drivers.¹²⁰ Uber decided to stop its operations in Spain and appealed the decision.¹²¹

These proceedings led to a judge in Barcelona to ask the CJEU for a preliminary ruling on whether Uber should be classified as a transport service or an information society service.¹²² The judge wished to clarify that if Uber was classified in part as an information society service, whether the principle of freedom to provide services and freedom of establishment were guaranteed to Uber.¹²³ In total, the Barcelona judge asked four questions. Firstly, the judge referred to the Services Directive and wanted to clarify whether the service offered by Uber should be classified as a transport service or should it be considered an electronic intermediary service or an information society service.¹²⁴ Secondly, the judge wished to know that in case the service should be considered an information society service, would the right to freedom to provide services be applicable.¹²⁵ In their third question, the court in Barcelona asked whether the Spanish Law on Unfair Competition would violate the provisions of the Services Directive in relation to the establishment of authorization schemes.¹²⁶ Lastly, the court wanted to clarify the applicability of authorization schemes under the E-Commerce Directive and whether the provisions of the Law on Unfair Competition were in breach of the Directive.¹²⁷ The CJEU has not yet passed its ruling on the case but is expected to provide a decision in the first part of 2017. The court proceedings took place late in 2016.¹²⁸ This thesis will include an analysis of parts of the questions referred to the Court of Justice of the European Union and suggest what the Court's ruling should include.

¹²⁰ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 81

¹²¹ *Ibid.*

¹²² CJEU 7.08.2015, C-434/15, *Asociacion Profesional Elite Taxi v Uber Systems Spain S.L.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Chee, F.Y. Uber Defends Business Model, Wants to Avert Strict EU Rules, 2016. www.reuters.com/article/us-uber-court-eu-idUSKBN13O1TU (30.04.2017)

3.2. The United States of America

The United States of America also struggles with regulating the new services arising in the sharing economy. The USA is a federation where federated states have the power to regulate internal matters on their own with federal laws and precedents regulating interstate matters. Therefore, like the EU, the USA faces a similar problem whether issues concerning Uber should be regulated at the state level or federal level. The most notable example on how to solve the regulation concerns surrounding Uber in the United States comes from California. The California Public Utilities Commission (CPUC) has stated that a one-size-fits-all regulatory scheme will not work anymore and new services should be regulated separately.¹²⁹ While services such as Uber should also be licensed and have certain requirements and standards they need to conform to, they should be rather viewed as a separate category and as such, they cannot be outright banned because they operate differently than taxis.¹³⁰ Some of the requirements include safety checks for the vehicles and criminal background checks for the drivers.¹³¹ This has become the present view of categorizing Uber, as a Transportation Network Company (TNC) offering an app-based peer-to-peer car-for-hire alternative to a regular taxi service.¹³²

San Francisco has seen a big impact on the taxi industry since Uber launched. There has been a 65% decline in taxi use in the year 2014 compared to 2012.¹³³ The San Francisco Municipal Transportation Agency (SMFTA) has been concerned about the threat of Uber to the local taxi industry and expressed that regulation in the field is important.¹³⁴ However, the approach from SMFTA has not been to set

¹²⁹ Cannon, B., Chung H. A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies. *Santa Clara Computer & High Tech. Law Journal* 2014, 31 (1), p 48; California Public Utilities Commission Decision No. 13-09-045, Adopting Rules and Regulations To Protect Public Safety While Allowing New Entrants To The Transportation Industry, 23.09.2013, p 65-67

¹³⁰ Bindman, B. Keep on Truckin' Uber: Using Dormant Commerce Clause to Challenge Regulatory Roadblocks to TNCs. *Wash & Lee L. Review Online* 2015, 72 (1), p 174; Ranchordas, S. Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy. *Minnesota Journal of Law, Science & Technology* 2015, 16 (1), p 471

¹³¹ California Public Utilities Commission Decision No. 13-09-045, Adopting Rules and Regulations To Protect Public Safety While Allowing New Entrants To The Transportation Industry, 23.09.2013, p 3

¹³² Bindman, B. Keep on Truckin' Uber: Using Dormant Commerce Clause to Challenge Regulatory Roadblocks to TNCs. *Wash & Lee L. Review Online* 2015, 72 (1), p 173

¹³³ Bond, A.T. An App for That: Local Governments and the Rise of the Sharing Economy. *Notre Dame Law Review Online* 2015, 90 (2), p 87; McNeill, D. Governing a City of Unicorns: Technology Capital and the Urban Politics of San Francisco. *Urban Geography* 2016, 37 (4), p 506

¹³⁴ Bond, A.T. An App for That: Local Governments and the Rise of the Sharing Economy. *Notre Dame Law Review Online* 2015, 90 (2), p 88

any restrictions on Uber and rather make the taxi industry less regulated so it could compete with Uber on the same playing field.¹³⁵ This can be seen for example in the form of lower administrative fees.¹³⁶ This shows that some parts of the USA have moved onwards and made it clear that a ban of TNCs is not the way forward. Innovation should not be hindered due to the lack of understanding of different and new systems, it should be embraced and the legislative field adapted to the new changes. The regulatory agency in San Francisco shows that the problem may not be in regulating services such as Uber in the same way as taxis or in a similar manner, but rather regulating everything less and establishing simpler rules to taxis. On the other hand, there are also cities like New York, Philadelphia, and Austin that have banned ride-sharing and set strict standards for operating services like that which the current business models do not comply with.¹³⁷ However, this might change depending on the general approach regulators take in other states.¹³⁸

States can regulate TNCs in their own way as the Congress has not yet acted in this field. However, if state regulations are found to be discriminatory, protectionist or overly extraterritorial, they are likely to violate the Commerce Clause doctrine.¹³⁹ This doctrine prohibits states to issue legislation that would burden interstate commerce. Courts may invalidate any law that goes against the dormant Commerce Clause.¹⁴⁰ It is important to note that state regulations can be found discriminatory and against the doctrine even if Congress has not acted on the subject matter.¹⁴¹ It essentially limits any power for the states to legislate on certain matters, which could affect trade in other states thereby eliminating any cases of local protectionism.¹⁴² The Supreme Court of the United States has taken a stand, especially for transport cases because of the importance of maintaining a working infrastructure

¹³⁵ *Id.*, p 88-89; McNeill, D. Governing a City of Unicorns: Technology Capital and the Urban Politics of San Francisco. *Urban Geography* 2016, 37 (4), p 507-508

¹³⁶ Bond, A.T. An App for That: Local Governments and the Rise of the Sharing Economy. *Notre Dame Law Review Online* 2015, 90 (2), p 89

¹³⁷ Cannon, B., Chung H. A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies. *Santa Clara Computer & High Tech. Law Journal* 2014, 31 (1), p 44-45

¹³⁸ *Id.*, p 49

¹³⁹ Bindman, B. Keep on Truckin' Uber: Using Dormant Commerce Clause to Challenge Regulatory Roadblocks to TNCs. *Wash & Lee L. Review Online* 2015, 72 (1), p 148

¹⁴⁰ *Id.*, p 151

¹⁴¹ *Id.*, p 152

¹⁴² *Id.*, p 153; Supreme Court of New York 16.05.1994, *C&A Carbone Inc. v Town of Clarkstown*, 511 U.S. 383 (1994)

network.¹⁴³ This was counterbalanced against promoting health and safety in the local state.¹⁴⁴ The Supreme Court established its balancing approach in the case *Kassel*, confirming that regulations that furthered safety so marginally that the benefit was seen as trivial, and interfered with interstate commerce, would be deemed invalid pursuant to the Commerce Clause.¹⁴⁵

The regulation of TNCs can fall under the considerations of the Commerce Clause due to the nature of the service and its application, which affect interstate commerce.¹⁴⁶ As with other transport cases, public health and safety are the main arguments to promote state regulations of TNCs.¹⁴⁷ Therefore, regulations requiring Uber and other TNCs to acquire liability insurance policies and have their vehicles in order can be compatible with the Commerce Clause under the need of public safety and consumer protection.¹⁴⁸ However, scheduled minimum rates that are five times higher than those for taxis are clearly protectionist and would most likely be considered invalid under this doctrine.¹⁴⁹ Therefore, similarly to the EU, should state established regulation impede on interstate commerce and go over what is necessary to achieve its objectives, it could be deemed invalid. This does not ensure a general approach for regulating Uber, as seen through the different examples present in the states, but it does set boundaries on how far the states can go.

¹⁴³ Bindman, B. Keep on Truckin' Uber: Using Dormant Commerce Clause to Challenge Regulatory Roadblocks to TNCs. Wash & Lee L. Review Online 2015, 72 (1), p 161; Petricone, L.J. The Dormant Commerce Clause: A Sensible Standard of Review. Santa Clara Law Review 1987, 27 (2), p 448-449

¹⁴⁴ Bindman, B. Keep on Truckin' Uber: Using Dormant Commerce Clause to Challenge Regulatory Roadblocks to TNCs. Wash & Lee L. Review Online 2015, 72 (1), p 165

¹⁴⁵ *Id.*, p 169; U.S. Supreme Court 24.03.1981, *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981), p 671 – 675

¹⁴⁶ Bindman, B. Keep on Truckin' Uber: Using Dormant Commerce Clause to Challenge Regulatory Roadblocks to TNCs. Wash & Lee L. Review Online 2015, 72 (1), p 170

¹⁴⁷ *Id.*, p 171

¹⁴⁸ *Id.*, p 174

¹⁴⁹ *Id.*, p 175

4. Legal nature of Uber – is it a transport service, an information society service, neither or both?

The court proceedings in many of the EU Member States show the confusion regarding the legal nature of Uber, whether it can be classified as a transport service or an information society service. The outcome will decide if Uber should conform to all the legal requirements applicable to taxi operators and private hire vehicles, or if Uber can enjoy the benefits of the freedom of establishment and free movement of services as an information society service. The confusion surrounding the classification of Uber largely stems from its business model. Uber explains that it is essentially an online platform bringing together drivers and passengers at a distance. It does not own any vehicles and does not employ any of the drivers, which makes it unlike the car service providers we are used to seeing. On the other side of the spectrum, Uber acts as an intermediary in paying the fares to the drivers taking a percentage as its commission, it controls the driver's itinerary as the online platform establishes who provides which ride by making suggestions based on proximity and availability, and essentially offers a very similar service to that of a taxi in terms of paid transport from point A to point B. Establishing which type of service Uber is providing is important to determine whether Uber can benefit from the freedom of establishment and freedom to provide services in the EU. This is necessary to decide whether banning Uber and its peer-to-peer ride-sharing service is against the principles of EU law.

4.1. Uber as a transport service

Article 58 of the Treaty on the Functioning of the European Union (TFEU) establishes that the freedom to provide services in transport will be regulated separately. Therefore, Article 56 on the freedom to provide services is not applicable for services in the transport sector,¹⁵⁰ instead, TFEU Articles 90 – 100 cover the matter. The legislative areas of transport that fall under the scope of TFEU Articles 90 – 100 include international transport between the Member States, including passing

¹⁵⁰ CJEU 22.12.2010, C-338/09, *Yellow Cab Verkehrsbetriebs GmbH v Landeshauptmann von Wien (Yellow Cab)*, para 29-30

through the Member States, the operation of non-resident transport service carriers in the Member States and transport safety.¹⁵¹ Article 91 of the TFEU specifies that the European Parliament and the Council shall set up any necessary rules and conditions applicable in these areas. Article 96 of the TFEU establishes further that imposing rates or conditions that are protectionist in nature shall be prohibited. The Treaty shows a clear European dimension establishing that it deals with transport issues concerning trade between Member States or where multiple states are involved. On the other hand, taxi services and private hire vehicle services are normally very local because the trips usually take place within a specific city or region.¹⁵² As a result, the regulatory framework for the taxi industry is also localized and established by the Member States. The Member States decide upon setting up barriers to enter the market, for example, qualitative or quantitative barriers for the operators or requirements for taxi drivers such as a license or special qualifications.¹⁵³

Should the CJEU decide that Uber is merely a transport company, Uber must conform to the same regulations as taxi companies in the Member States where they have defined Uber as such. The regulation of taxi services differs in the Member States as it falls within the area of national legislation. Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue occupation of road transport operator and repealing Council Directive 92/26/EC does not regulate the taxi industry but it has served as an example and inspiration for the Member States in developing their own taxi regulations.¹⁵⁴ The aim of Council Directive 92/26/EC was to set out qualitative restrictions for the occupation rather than quantitative restrictions.¹⁵⁵ As such, Regulation No. 1071/2009 sets out requirements such as professional competence, good repute and financial stability for road transport operators.¹⁵⁶ This means that the undertakings should comply with necessary laws, not have been

¹⁵¹ Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26.10.2012, Article 91 (1) (a)-(b)

¹⁵² Bekken, J.T. Experiences with (De-)Regulation in the European Taxi Industry. (De)Regulation of the Taxi Industry. Paris, OECD Publishing 2007, p 36

¹⁵³ *Id.*, p 38

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*; Council Directive 96/26/EC of 29 April 1996 on admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations, OJ L 124, 23.05.1996, Article 3

¹⁵⁶ Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue occupation of road transport operator and repealing Council Directive 92/26/EC, OJ L 300/51, 14.11.2009, Article 3 (1)

convicted or have received a penalty in relation to their duties.¹⁵⁷ Qualitative restrictions like these serve as direct barriers to enter the taxi industry market.¹⁵⁸ In many countries there are also requirements set out for the actual drivers, which serve as indirect market entry barriers.¹⁵⁹ This includes requirements concerning licenses, evaluation of suitability in terms of medical and criminal records, as well as knowledge tests to operate in certain cities.¹⁶⁰ When classified as a transport company and subject to national regulation varying from country to country, Uber will likely be subject to many of the taxi operator and driver requirements in order to compete on the market. This will affect Uber's pricing policy due to higher costs and might eliminate the advantages they currently have before the regular taxi services.

If considered a transport service, it will also be left to the Member States to decide whether to classify Uber as a taxi service in the first place or if there might be another category of transport services available it will fall under. This could be done in a similar manner as in California, which regulates services such as Uber separately as Transportation Network Companies.¹⁶¹ As another example, the United Kingdom classifies Uber as private hire vehicles.¹⁶² In the case *Eventech*, the CJEU resolved a question of what constitutes state resources and state aid within the meaning of Article 107 (1) TFEU and whether preferential access to bus lanes can be considered in that scope.¹⁶³ In addition to the main issue, the Court was asked to clarify whether Black Cabs (professional taxis) and private hire vehicles are in the same factual and legal situation to be comparable.¹⁶⁴ The Court concluded that this was for the national court to decide, however, it also provided some guidance on the matter.¹⁶⁵ The Court stated that to answer this question one cannot look only into the market sector where the two services are in direct competition but their differences should also be taken into account, for example, higher

¹⁵⁷ *Id.*, Article 6

¹⁵⁸ Bekken, J.T. Experiences with (De-)Regulation in the European Taxi Industry. (De)Regulation of the Taxi Industry. Paris, OECD Publishing 2007, p 37-38

¹⁵⁹ *Id.*, p 38

¹⁶⁰ *Id.*, p 39

¹⁶¹ Cannon, B., Chung H. A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies. Santa Clara Computer & High Tech. Law Journal 2014, 31 (1), p 43, 48; California Public Utilities Commission Decision No. 13-09-045, Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants To The Transportation Industry, 23.09.2013

¹⁶² Royal Courts of Justice, London, United Kingdom 16.10.2015, EWHC (Admin) 2918 Case No. CO/1449/2015, *Transport for London v. Uber London Limited*, para 11, 15

¹⁶³ CJEU 14.01.2015, C-518/13, *Eventech Ltd v The Parking Adjudicator (Eventech)*, para 29-30

¹⁶⁴ *Id.*, para 29-30, 56

¹⁶⁵ *Id.*, para 57

licensing standards for Black Cabs in terms of knowledge and requirements for accommodating wheelchairs and using a taximeter.¹⁶⁶ Based on the differences conveyed, the Court concluded that the factual and legal status of Black Cabs and private hire cars were sufficiently different.¹⁶⁷ The sharing economy services by definition differ from traditional market players and, therefore, a one-stop-shop approach may not be desirable and could take away the benefits such platforms otherwise convey on consumers.

Uber and regular taxi services are of course in competition with each other as both provide a service to hire cars and it is up to the consumer to decide which service they prefer. There are substantial differences between Uber and taxis. The main idea behind Uber was to provide a delivery of cars to consumers through a mobile application rather than focusing itself on the actual car hire service. The whole transaction was to be made available through the online platform, which provides feedback features and also takes care of the payment of the fare using credit card information.¹⁶⁸ A taxi service is made exclusively for the purpose of providing transport for hire.¹⁶⁹ As there is no immediate feedback system for taxis, for consumer protection and public safety reasons specific regulations apply to taxi operators and drivers including insurance, pricing, vehicle safety, licensing, etc.¹⁷⁰ As an exclusive transport service, the drivers are employees for the taxi operators often with specific working shifts. Taxis also benefit from the ability to respond to consumers coming to ask for the service straight from the street.¹⁷¹ Therefore, there is no need to agree on availability beforehand while it is a requirement with Uber through the mobile application making it a pre-arranged service.

Taxi operators have also created their own mobile applications to hail a taxi without having the need to contact the call center to order a taxi to compete with services such as Uber. In Estonia, there are multiple mobile applications working with taxi operators and drivers, such as Taxigo, Taxofon, and Taxify. The platforms are similar to Uber, however, Taxigo and Taxofon are exclusively oriented

¹⁶⁶ *Id.*, para 59

¹⁶⁷ *Id.*, para 61

¹⁶⁸ Holloway, C. Uber Unsettled: How Existing Taxicab Regulations Fail to Address Transportation Network Companies and Why Local Regulators Should Embrace Uber, Lyft and Comparable Innovators. *Wake Forest Journal of Business and Intellectual Property Law* 2015, 16 (1), p 24-25

¹⁶⁹ *Id.*, p 25

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

towards taxi operators and licensed taxi drivers with fixed prices.¹⁷² Taxofon also offers to book trips online on their website. Taxify is more similar to Uber as it allows both taxi drivers as well as non-professional drivers to provide rides to consumers but it has a different pricing system which uses a combination of what drivers want and ride demand information, the applicability of which also depends on the type of driver.¹⁷³ In addition, the platforms allow payments to be made by card or in cash. Therefore, it is not always clear what characteristics are exclusive to sharing economy services only and which ones can be taken over by the existing industry making the distinction between the two more difficult.

Urban transport services are also excluded from the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (“The Services Directive”). The Services Directive is applicable to services provided by service providers established in a Member State, which excludes transport services that fall within the scope of the TFEU interstate transport section.¹⁷⁴ In addition, the Services Directive specifies that transport services, including urban transport and taxi services, fall outside its scope.¹⁷⁵ The CJEU has stated in joined cases *Trijber* and *Harmsen* that defining what includes transport should not only be considered pursuant to the wording of the Directive provision but also its purpose and structure.¹⁷⁶ This means that transport by waterway as in the cases at hand, should not be automatically considered as transport because a service of that type could also include other aspects besides transport, which could fall under the scope of the Directive.¹⁷⁷ The Court considered the different purposes of the service in the joined cases and concluded that even though it seemed that the service could be defined as transport by waterway the main purpose of it was actually to provide tour guides, which fall under the Directive as tourism services.¹⁷⁸ Therefore, while taxi services are excluded from the scope of the Directive it remains to

¹⁷² Taxofon – Terms of Use. www.taxofon.ee/information/terms-of-use (30.04.2017); Taxigo Drivers. www.taxigo.com/en/driver/ (30.04.2017)

¹⁷³ Gulina, A. Taxify – What Do The Different Types Of Vehicle Markings Mean In The App? 2017. www.help.taxify.eu/taxify-estonia/taxify-soitjale/mida-tahendavad-autotuupide-margistused-appis (30.04.2017); Gulina, A. Taxify – How Does The Time Tariff Apply? 2017. www.help.taxify.eu/taxify-estonia/taxify-soitjale/kuidas-rakendub-ajatariif (30.04.2017)

¹⁷⁴ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (The Services Directive), OJ L 376/36, 27.12.2006, Article 2 (2) (d)

¹⁷⁵ *Id.*, Recital 21

¹⁷⁶ CJEU 1.10.2015, Joined Cases C-340/14 and C-341/14, *R.L. Trijber v College van burgemeester en wethouders van Amsterdam and J. Harmsen v Burgemeester van Amsterdam*, para 46

¹⁷⁷ *Id.*, para 50-51

¹⁷⁸ *Id.*, para 54-58

be clarified whether the main purpose of Uber is actually transport or for example an information society service established in the form of a mobile application or a combination of both. If it is not merely a transport service, then Uber may be protected under the freedom to provide services.

It will be important to look into the relationship between Uber and its drivers as well as vehicles, insurance, and liabilities to decide whether Uber is essentially a transport company. As of now, Uber confirms that Uber drivers are independent contractors and not employees.¹⁷⁹ However, should the CJEU decide otherwise, the business model of Uber also changes. In addition, Uber does not own any of the vehicles operating under its service. If Uber drivers are classified as employees of Uber, issues concerning liability as well as insurance regarding vehicles may arise due to Uber's role as an employer. Uber has also proposed ways to get access to a car through rental companies partnering up with them, which may be a fine line when suggesting that they have no connection to the cars drivers use.¹⁸⁰ In addition, Uber has stated that the goal is to eventually have self-driving cars instead of drivers providing the ride service.¹⁸¹ This would mean that the problem concerning drivers as employees would be eliminated if the vehicles would be owned by Uber and the liabilities also faced by Uber. In that situation, Uber becomes more and more similar to a taxi service and transport company blurring the line as to what the main purpose of the service is – transport or simply a mobile application. It would also move away from a sharing economy service by establishing a commercial business using its own resources.

4.2. Uber as an information society service

The definition of an information society service is provided in Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification). It is any service that is provided for remuneration, at a distance, by electronic

¹⁷⁹ Prassl, J., Risak M. Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork. *Comparative Labor Law and Policy Journal* 2016, 37 (3), p 620-621

¹⁸⁰ Uber Marketplace London. drive.uber.com/ukmarketplace/location/london/ (30.04.2017)

¹⁸¹ Levandowski, A., Kalanick, T. Pittsburgh, Your Self-Driving Uber Is Arriving Now, 2016. www.newsroom.uber.com/pittsburgh-self-driving-uber/ (30.04.2017)

means and at the request of the individual receiving the services.¹⁸² The service has to be sent and received by electronic equipment without both parties being present simultaneously.¹⁸³ The recipient of the services has to make the request, which is provided through the transmission of data by electronic means.¹⁸⁴ The question whether Uber can be classified as an information society service depends on whether consideration is given only to the online platform Uber offers or if the online platform is taken together with the physical ride-sharing service. This can depend on, for example, whether Uber is considered as an employer to Uber drivers, which is part of the debate surrounding the legality of Uber. Focusing on the platform Uber offers for ride-sharing, the service is provided through electronic equipment as it uses a mobile application on smartphones to request a ride and allows to sign up as a user or driver by means of an application or website. The online platform service connecting the driver and passenger is provided for remuneration because Uber takes a commission from the payment made by the passenger for the ride. Payments can be made only through the online platform, which requires passengers to enter their credit card details when registering with the system.

The service is also provided at a distance because the driver and the passenger using the application are never located at the same place. The essence of the online platform is to bring together two parties, one wishing to provide a service, another wishing to receive a service, thereby acting as an intermediary in bringing them together without the parties establishing any contact beforehand. Furthermore, signing up as a passenger or as a driver is done online. Becoming an Uber driver also requires the person to provide copies of certain documents which allows Uber to conduct a background check.¹⁸⁵ On the other hand, after the necessary verification process is complete, it is required to activate your account by either going to an activation center with your car where the driver is provided with everything necessary or something else as the requirements depend on the country and the city.¹⁸⁶ In terms of training, Uber offices offer a briefing for new drivers on how to use the mobile application. Therefore, starting out with the ride-sharing services does entail certain contact with the Uber offices in one way or another, which will depend on the country and city the driver wants to operate in, which

¹⁸² Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241/1, 17.09.2015, Article 1 (2)

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ Uber Driver Requirements: How to Drive with Uber in Estonia. www.uber.com/en-EE/drive/requirements/ (30.04.2017)

¹⁸⁶ *Ibid.*

means that the whole service may not be provided at a distance. Considering the operation of drivers after the starting process, there is no contact with the Uber offices unless the driver requires assistance, although this can also be achieved through a helpline online or on the phone. Depending on the considerations taken on the service, it can be decided that it is provided at a distance because that is what the online platform entails. However, taking into account the initial physical contact required by the driver with Uber to activate the account, then the whole process is not done at a distance and may be problematic to define as such. The thesis focuses on the service of the online platform whereby it connects the driver and the passenger and is therefore provided at a distance fulfilling the condition of an information society service.

The request for the service should also be placed by the recipient of the service individually.¹⁸⁷ Services not requested by an isolated individual include for example television broadcasting and radio broadcasting services because these are rather point-to-multipoint services instead of specific individual requests.¹⁸⁸ Requesting an Uber can be considered as an isolated request by the individual that will be using the ride service. The user requests a ride solely for their own personal use through the mobile application, which then chooses a driver for that particular ride. The driver provides the ride specifically for that user based on the user's request submitted with the mobile application. Therefore, it is an individual, the user, who submits the request and the selected driver responds to the request. The same applies to the driver who, as an individual, submits a request to Uber to become an Uber driver. The driver receives personal verification that they can activate their account and the account is for that person only. Following this, the online platform Uber offers can be defined as an information society service on its own.

Article 5 of Directive (EU) 2015/1535 states that the Member States need to inform the Commission of any legislation they draft, except for transposing international or EU laws, which constitutes a technical regulation within the meaning of this Directive.¹⁸⁹ Technical regulation means any rules regarding the technical specifications or other requirements on information society services, which

¹⁸⁷ CJEU 2.06.2005, C-89/04, *Mediakabel BV v Commissariaat voor de Media*, para 38-39

¹⁸⁸ Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241/1, 17.09.2015, Annex 1, Section 3

¹⁸⁹ *Id.*, Article 1 (f), Article 5

are compulsory to market the product, use the service or establish a service provider.¹⁹⁰ The 2014 Thévenoud Law in France, which sets limits to using online platforms in transport services, may fall under this category if decided so by the CJEU.¹⁹¹ The Court has stated in previous judgements, however, that regulations, which subject the service providers to prior authorization to provide services do not constitute technical regulations within the meaning of the Directive.¹⁹² Therefore, licensing requirements set out by the Member States for Uber drivers or Uber itself as a service provider would not constitute technical regulations and would not require prior notice. This does not mean, however, that regulations, which set out prior authorization requirements are entirely compliant with the rules on information society services.

The rules concerning the freedom to provide information society services and their legal status are laid out in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular, electronic commerce, in the Internal Market (‘the E-Commerce Directive’); the purpose of the Directive is to develop information society services in the internal market without any internal frontiers.¹⁹³ It should be possible to establish and exercise the freedom to provide information society services as all other services without any legal obstacles.¹⁹⁴ The E-Commerce Directive provides that the state where the information society service provider is established should ensure that the provider is compliant with applicable laws.¹⁹⁵ In order to ensure the free movement of information society services, Member States cannot restrict the freedom to provide information society services coming from another Member State.¹⁹⁶ Member States can derogate from these rules only if the measure is proportional and in relation to public policy, public health, and security or for the protection of consumers.¹⁹⁷ The establishment of a provider of information society services will not be subject to prior authorization schemes or similar requirements unless it is not targeted only at information society services.¹⁹⁸ Member States cannot establish administrative authorization requirements on information society services if it impedes the free

¹⁹⁰ *Id.*, Article 1 (f)

¹⁹¹ CJEU 6.06.2016, C-320/16, *Tribunal de grande instance de Lille v Uber France SAS*

¹⁹² CJEU 4.02.2016, C-336/14, *Sebat Ince*, para 76; CJEU 1.02.2016, C-144/16, *Município de Palmela v Autoridade de Segurança Alimentar e Económica (ASAE) — Divisão de Gestão de Contraordenação*, para 30

¹⁹³ OJ L 178, 17.07.2000, Recital 1, 3, Article 1

¹⁹⁴ *Id.*, Recital 5

¹⁹⁵ *Id.*, Article 3 (1)

¹⁹⁶ *Id.*, Article 3 (2)

¹⁹⁷ *Id.*, Article 3 (4)

¹⁹⁸ *Id.*, Article 4

movement of such services. Therefore, regulations concerning the licensing and authorization for operating Uber on the territory of a Member State can be an impediment pursuant to this Directive. It will be important to check the nature of the authorization scheme, its purpose and applicability to specifically decide upon this.

The subjectivity of market access requirements such as authorization schemes to sharing economy platforms will depend on the platform's nature. Uber's online platform can be considered as an information society service based on its definition in which case the applicability of authorization schemes would normally not be allowed under the E-Commerce Directive. However, an online sharing platform may not be considered purely an intermediary but may also offer other underlying services. For Uber, this underlying service is transport. The European Commission in its communication established a criterion for deciding whether a platform also provides other underlying services.¹⁹⁹ Firstly, the platform should have a role in determining the price of the service.²⁰⁰ Secondly, the platform should have a say in the contractual relationship and the conditions between the provider and the user. This means that the intermediary should determine other contractual requirements besides the price, for example, conditions regarding quality and other obligations for the service provider.²⁰¹ Lastly, the platform should have ownership of the assets, which are necessary to provide the service.²⁰² This constitutes the main criteria, which would give an indication that the platform also includes other services, which may not constitute information society services.

In addition to this, the Commission added that incurring costs for providing the service and considering itself liable for any accompanying risks would confirm that the platform has a major role in providing the underlying service.²⁰³ One of the main characteristics of a sharing economy is that the resource is owned by the individual provider not the platform. Therefore, it would be difficult to fit a sharing platform under this criterion established by the Commission. The Commission further

¹⁹⁹ European Commission, 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, Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (30.04.2017), p 6

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

specified that offering certain assistance to service providers using the platform would not in itself constitute as an influence and providing of service.²⁰⁴ For example, facilitating payments is considered as merely supportive in nature.²⁰⁵ The Commission's general rule would be to check how much control the platform provider exercises over the underlying service, because the more control they have, the easier it will be to define it as a provider of the other service as well.²⁰⁶ Ultimately, it will be decided on a case-by-case basis whether a platform is merely an information society service or also a provider of other services such as transport and accommodation. Should it be decided that something is not just an information society service, the provider can be subject to rules applicable to the underlying service.²⁰⁷

While Uber's online platform falls under the definition of an information society service, it is therefore also necessary to check whether Uber has significant control over the ride-sharing and transport service the platform offers based on the criteria the Commission sets out in its communication. Uber does not own any of the vehicles drivers use and does not consider its drivers as employees but rather as partners. On the other hand, Uber manages the pricing of the rides based on a unique algorithm and facilitates the payment of fares to drivers taking upon themselves the cost of managing such a service. This is necessary to manage the fares in a way that would be comfortable for drivers as it would be a different system when all drivers could initiate their own prices, and Uber also wants to earn a percentage from the fares which they could not do if the prices drivers set are too low. Uber does not manage the working hours drivers have and where they want to operate leaving the drivers quite a lot of freedom.²⁰⁸

However, it is questionable whether Uber's pricing and payment system facilitates mere assistance to service providers or constitutes paying the drivers for their service.²⁰⁹ Uber does control certain contractual aspects between the driver and the passenger by establishing rules on the quality of the

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Id.*, p 7

²⁰⁷ *Id.*, p 6

²⁰⁸ Rauch, D.E., Schleicher, D. Like Uber, But for Local Governmental Policy: The Future of Local Regulation of the „Sharing Economy“. George Mason University Law and Economic Research Paper Series, 2015. dx.doi.org/10.2139/ssrn.2549919 (30.04.2017), p 13, 15

²⁰⁹ Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. Common Market Law Review 2017, 54 (1), p 97

service. There are specific requirements in terms of the car used and insurance, which need to be fulfilled by the drivers even though Uber does not own any of the vehicles. This means that Uber does exercise a significant amount of control over the transport service by managing the price and the quality of the service, which may be enough to classify Uber as a provider for the ride-sharing service. In this case, national legislation of this sector could be applied to Uber. This would classify Uber as a provider of both, an information society service as well as a transport service. The question, in that case, would be whether these services can still be distinguished from one another and if the E-Commerce Directive would apply to Uber as an information society service, and national legislation for transport would apply to Uber as a transport service provider.²¹⁰

The author is of the opinion that Uber is primarily an information society service. Therefore, it should enjoy the freedom of movement and freedom of establishment afforded to it within the EU. However, Uber does exercise considerable influence over the contracts established through its platforms in comparison to other sharing economy services. For instance, Airbnb does not exercise extensive quality control over the rentals and allows the users to determine the price.²¹¹ This gives an indication that Uber can be a provider for the underlying transport service and be subject to national transport rules. However, it should not make it impossible for Uber to operate its online platform as it is an information society service. In this light, prior authorization and licensing schemes for Uber as a transport company and licenses to the drivers may be feasible while rules on online platforms need to be scrutinized.

²¹⁰ *Ibid.*

²¹¹ Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 97-98

5. Banning Uber: compatibility with EU law and principles

5.1. Freedom of establishment and freedom to provide services

The freedom to provide services is established under Article 56 of the TFEU. This freedom allows individuals providing services in an EU member state to freely provide their services in other member states without establishing oneself in the other member state.²¹² Restrictions limiting this freedom shall be prohibited.²¹³ Article 56 TFEU is not applicable to transport services and rules regarding interstate transport are covered under Title V of the TFEU instead. The Services Directive further provides that transport services, including urban transport and taxi services, are not covered under the scope of the Directive.²¹⁴ This means that if Uber is classified as merely a transport service, local regulations would apply. Collaborative platforms, which fall outside the scope of the Services Directive would still be protected under the general TFEU rules.²¹⁵ Information society services are covered under the E-Commerce Directive, which establishes the framework of an internal market for such services, and as such, enjoy the right to freedom of establishment and freedom to provide services. The freedom to provide services can be useful for undertakings that are testing out the markets in other countries without having the need to make a permanent establishment to do so, for example, in the form of opening a branch or subsidiary. Four different conditions need to be fulfilled pursuant to Article 56 of the TFEU to benefit from the freedom to provide services: providing services in another Member State so there is an inter-state element, the service is to pursue an economic activity, the provider is already established in one of the Member States, and services are provided in another Member State on a temporary basis.

The interstate element is important for the applicability of both, freedom of establishment and the freedom to provide services. However, to benefit from the freedom to provide services, the service provider needs to be established in one Member State while the recipients of the services are located

²¹² TFEU, OJ C 326, 26.10.2012, Article 56

²¹³ *Ibid.*

²¹⁴ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (The Services Directive), OJ L 376/36, 27.12.2006, Recital 21

²¹⁵ Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 101

in another Member State.²¹⁶ Uber headquarters are established in the United States of America but Uber has a subsidiary in the Netherlands, Uber BV.²¹⁷ The European-scope for Uber services can be achieved in multiple ways. For example, Uber allows Uber drivers to work in neighboring states where Uber is also allowed without any implications. Uber has established its subsidiary in the Netherlands but has also opened offices and branches in other EU states (e.g. Uber Systems Spain) with all of the establishments connected thus competing with national taxi and transport services in each of these Member States.²¹⁸ In addition, the online mobile application is also the same everywhere you travel in the EU where Uber is available, the ride options provided just differ depending on the city. Regarding payments, the information received may go through an entity in another Member State, for example through Uber BV in the Netherlands, and then from that entity return to the Member State where the service provided. Although these may not be traditional examples of the European-scope element required under Article 56 of the TFEU, it establishes that an online intermediary platform and the services it offers is not just a national question but affects different parties in the different Member States.

The service should also be commercial in nature, meaning that it is provided for remuneration and there is an exchange of value.²¹⁹ The remuneration does not necessarily even have to come from the party receiving the service, it can also come from another party.²²⁰ Passengers pay for Uber rides with their credit or debit cards and the money charged depends on the characteristics of that ride, which are calculated through Uber's own algorithms. This fare constitutes as remuneration to the driver for rendering the service of a ride, and a commission is taken by Uber that facilitates the payment and keeps the share in order to uphold the online platform as well as for its own revenue. From a traditional point of view, this can be concluded to be a commercial service. The function of Uber as an intermediary between the provider and the passenger creates a sort of market of supply and demand,

²¹⁶ Craig, P., De Burca, G. EU Law: Text, Cases, and Materials, Fourth Edition. Great Britain, Oxford University Press 2007, p 817

²¹⁷ User Privacy Statement, 2015. www.uber.com/legal/privacy/users/en/ (30.04.2017)

²¹⁸ Barainsky, L. *et al* Uber and Taxi Regulations: Are Member States Preserving a Legal Monopoly to the Detriment of Consumers? 2016. www.researchgate.net/publication/309678711_Uber_and_Taxi_Regulation_European_Competition_Law (30.04.2017), p 13

²¹⁹ Craig, P., De Burca, G. EU Law: Text, Cases, and Materials, Fourth Edition. Great Britain, Oxford University Press 2007, p 818

²²⁰ *Id.*, p 819; CJEU 26.04.1988, Case 352/85, *Bond van Adverteerders and Others v The Netherlands State (Adverteerders)*, para 16

which allows Uber to be considered as a trader in its traditional meaning.²²¹ This is especially so due to the commission charged by Uber on the ridesharing services provided through its platform.

The essential difference between the freedom of establishment and the freedom to provide services is how the economic activity is being pursued, whether it is indefinite or for a temporary period of time.²²² The freedom of establishment presupposes that the person wants to establish a permanent entity in the country while the freedom to provide services allows the person to pursue an economic activity for a limited amount of time. The Court has clarified that opening an office or a branch in another Member State to provide services is not in itself an indicator that the company will be pursuing economic activity there on a permanent basis.²²³ Considering that Uber has shown interest in permanently establishing itself in different cities around the world to provide their services, it may be possible to conclude that any EU law implications on the ban of Uber should be looked at under the freedom of establishment. Based on this, the rest of the chapter will be following the freedom of establishment to confirm whether banning Uber and setting authorization schemes to operate such services can be considered as restrictions which may be prohibited. It does not follow, however, that Uber could not be included in the scope of Article 56 TFEU should its services be defined as temporary in nature for the purpose of that Article and having the EU-scope element.

The freedom of establishment is enshrined in Article 49 of the TFEU, which states that “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.” This means that individuals have a right to be self-employed or form undertakings in the other Member States.²²⁴ The wording of the article refers to natural persons but Article 54 of the TFEU states that the same treatment should also be afforded to the establishment

²²¹ Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 95

²²² Craig, P., De Burca, G. *EU Law: Text, Cases, and Materials*, Fourth Edition. Great Britain, Oxford University Press 2007, p 792-793; Barnard, C. *The substantive law of the EU – The four freedoms*, Fourth edition. Great Britain, Oxford University Press 2013, p 365-366

²²³ Craig, P., De Burca, G. *EU Law: Text, Cases, and Materials*, Fourth Edition. Great Britain, Oxford University Press 2007, p 813-814; CJEU 30.11.1995, C-55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Gebhard)*, para 27

²²⁴ TFEU, OJ C 326, 26.10.2012, Article 49 (2)

undertakings. The same has been confirmed by the CJEU in multiple cases.²²⁵ The freedom of establishment for undertakings is usually exercised in the form of opening branches and subsidiaries in the other Member States.²²⁶ In order to enjoy the freedom of establishment, the undertaking has to be created pursuant to the laws of a Member State and have its registered office, central administration or main place of business in the European Union.²²⁷ The rules of incorporation are based purely on national law and are different in the EU Member States²²⁸. The CJEU has stated in the case *Daily Mail* that the wording of the TFEU articles takes into consideration the differences between the Member States regarding the connecting factor between an undertaking and the Member State required for the incorporation of the undertaking, which can be either the principal place of business, central administration or something else.²²⁹ Therefore, it is an issue of national legislation how a company can be incorporated in that state and how it can be transferred to another state.²³⁰

The purpose of Articles 49 and 54 of the TFEU is to prohibit any discriminating measures against undertakings purely because of the fact that they have been established in another Member State. In addition to that, the Court has concluded that national measures, which do not discriminate based on nationality but are likely to prohibit or impede nationals or undertakings from exercising their freedom of establishment and their freedom to provide services, are also precluded under TFEU Articles 49 and 54.²³¹ It follows that measures, which will make it difficult to freely pursue an economic activity in another Member State are restrictions within the meaning of Article 49 of the TFEU. The CJEU has also clarified that the condition of prior authorization to establish an undertaking from another Member State falls under the scope of Article 49.²³² The requirement of prior authorization may

²²⁵ CJEU 27.09.1989, C-81/87, *The Queen v HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC (Daily Mail)*, para 15; CJEU 6.11.1984, C-182/83 *Robert Fearon & Company Limited v Irish Land Commission (Fearon)*, para 8

²²⁶ Jeon, J., Choi, G.-G. Promotion of the Right of Establishment in EU: Focusing on the Imperative Requirements Doctrine. *Asia Europe Journal* 2016, 14 (3), p 300; CJEU 27.09.1989, C-81/87, *The Queen v HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC (Daily Mail)*, para 17-18

²²⁷ TFEU, OJ C 326, 26.10.2012, Article 54

²²⁸ CJEU 27.09.1989, C-81/87, *The Queen v HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC (Daily Mail)*, para 19-20

²²⁹ *Id.*, para 20-21

²³⁰ *Id.*, para 23-24

²³¹ CJEU 23.12.2009, C-376/08, *Serrantoni Srl, Consorzio stabile edili Scrl v Comune di Milano (Serrantoni)*, para 41; CJEU 1.06.2010, Joined Cases C-570/07 and C-571/07, *Jose Manuel Blanco Perez and Maria del Pilar Chao Gomez v Consejeria de Salud y Servicios Sanitarios and Principado de Asturias*, para 53

²³² CJEU 1.06.2010, Joined Cases C-570/07 and C-571/07, *Jose Manuel Blanco Perez and Maria del Pilar Chao Gomez v Consejeria de Salud y Servicios Sanitarios and Principado de Asturias*, para 54

prevent the undertaking from exercising its economic activities in that Member State through a fixed place of business.²³³ The requirement can induce administrative costs to the undertaking and also eliminates anyone from exercising this activity that does not fit the criteria set out by the national legislation in order to receive the authorization to operate.²³⁴ This has the effect of limiting the number of service providers.²³⁵

Uber has established multiple branches in the European Union and while the establishment of the Uber company itself has not been a problem in the EU, the branches' operations are severely restricted. As established, Article 49 TFEU provides that an EU undertaking's branches in the Member States should be treated under the same rules as local undertakings allowing healthy competition.²³⁶ However, strict regulatory requirements in the form of local taxi regulations can prevent new competitors from entering the market and the following bans based on these regulations could be considered as a restriction under the meaning of Article 49 TFEU.²³⁷ The requirement to obtain authorization to operate in a country, for example as was required from Uber in Spain,²³⁸ can severely affect the company's freedom to pursue their economic activity in that country and pursue any economic activity there at all. This could be considered a restriction on Uber's freedom of establishment. The freedom of establishment is not absolute which is why it is also necessary to look into whether the restrictive measure can be justified.

Limitations to the freedom of establishment are set out in Articles 51 and 52 of the TFEU. Article 51 limits the freedom with regard to the exercise of official authority while Article 52 states that special treatment in the form of restrictions may be afforded to foreign nationals due to public policy, security or public health, which has to be set out in law or by administrative action. The judgement of the case *De Agostini* specified that freedom of establishment can be overridden by a Member State if the

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Id.*, para 55; CJEU 10.03.2009, C-169/07, *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung, Oberösterreichische Landesregierung (Hartlauer)*, para 36

²³⁶ Barainsky, L. *et al* Uber and Taxi Regulations: Are Member States Preserving a Legal Monopoly to the Detriment of Consumers? 2016.

www.researchgate.net/publication/309678711_Uber_and_Taxi_Regulation_European_Competition_Law (30.04.2017),

p 16

²³⁷ *Ibid.*

²³⁸ Why Barcelona Has No Uber, 2016. newsroom.uber.com/spain/mwc16-en/ (30.04.2017)

restrictive measures that have been set out in law are necessary for a requirement of public interest, are proportionate to achieve that purpose, and less restrictive measures would not be able to achieve the same result.²³⁹ The Services Directive lays out a similar criterion under Article 9 regarding the usage of authorization schemes.²⁴⁰ Authorization schemes include the procedures of getting authorizations, licenses or approvals to exercise a service or activity and the obligation to be registered to exercise a certain activity.²⁴¹ Providing a service should be subject to an authorization only under certain conditions. Authorizations and similar procedures have the possibility to hinder freedom of establishment and using schemes like this should be limited to situations where authorization is essential and an *ex post* measure would not suffice.²⁴² The Directive specifies that authorization schemes for this purpose are allowed only if they are non-discriminatory, proportional and necessary.²⁴³ Examples from the Court's case law would include public health, consumer protection and protection of the urban environment as reasons which can override the prohibition of setting out authorization schemes.²⁴⁴ Following this, authorization schemes are allowed if they do not discriminate based on nationality, have a public interest reason as an objective and there are no less restrictive means to pursue the stated objective.²⁴⁵ In order to decide whether banning Uber if it does not comply with national authorization schemes goes against the principle established under Article 49 TFEU, it will be necessary to look at all the justification conditions separately.

5.2. Justification of restrictions and proportionality

The Court has brought out four specific conditions, which need to be fulfilled to apply restrictive measures, which may hinder the fundamental freedoms: they must be applied in a non-discriminatory manner, they should have a public interest objective, they should be suitable and necessary to achieve that objective and they must not be excessive to achieve that objective.²⁴⁶ The principle of non-

²³⁹ CJEU 9.07.1997, Joined Cases C-34/95 and C-35/95 and C-36/95, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and Konsumentombudsmannen (KO) v TV-Shop i Sverige AB*, para 47

²⁴⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (The Services Directive), OJ L 376/36, 27.12.2006, Article 9

²⁴¹ *Id.*, Recital 39

²⁴² *Id.*, Recitals 42, 43, 54

²⁴³ *Id.*, Recital 54

²⁴⁴ *Id.*, Recital 56

²⁴⁵ *Id.*, Article 9 (1)

²⁴⁶ CJEU 31.03.1993, C-19/92, *Dieter Kraus v Land Baden-Württemberg (Kraus)*, para 32

discrimination covers both direct and indirect discrimination. Direct discrimination can be easily distinguished just by the fact that restrictive measures are applied to non-nationals while nationals enjoy another criterion, it is the essence of treating someone differently than your own, whether it is better or worse. The principle also covers indirect discrimination as it may lead to the same results as direct discrimination by applying other distinguishing criteria.²⁴⁷ A measure is indirectly discriminatory if it affects nationals of other Member States more or differently than locals and if there is a risk that because of this, nationals of other Member States are at a disadvantage.²⁴⁸ This may be in the form of a concession, which is granted only to local undertakings due to an absence of transparency to the detriment of other nationals.²⁴⁹ Discriminatory measures can be justified through Articles 51 and 52 of the TFEU. Article 51 covers the activities, which involve official authority in a direct and specific way.²⁵⁰ Article 52 allows derogations based on public policy, security or health.

In both Spain and Belgium, it was considered that Uber was using unfair competition and business practices by derogating from regulations applicable to taxi services.²⁵¹ Therefore, the Uber service was banned as it did not comply with national rules. However, for this to be considered a discriminatory measure, it should either be applied to foreigners only or applied in a way that it affects only foreigners. The issue at hand was not connected to the company being an outsider or based in another country but in defining the actual service it was providing. The question was whether the company provides transport services or information society services. If it can be concluded that it is a transport company, as is the opinion in many countries, then the same rules apply as to other transport companies. For discrimination to arise, the different treatment should arise rather from the foreign nature of Uber in terms of its headquarters and establishment in another Member State. In addition, Article 51 of the TFEU could only be applicable in the case of exercising official authority. Uber is a

²⁴⁷ CJEU 21.06.2001, C-212/99, *Commission of the European Communities v Italian Republic*, para 24

²⁴⁸ CJEU 1.06.2010, Joined Cases C-570/07 and C-571/07, *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios and Principado de Asturias*, para 118-119

²⁴⁹ CJEU 13.11.2007, C-507/03, *Commission v Ireland*, para 30

²⁵⁰ CJEU 21.06.1974, Case 2-74, *Jean Reyners v Belgian State (Reyners)*, para 45

²⁵¹ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 78, 81

private company providing a private service to different individuals without any visible connections to exercising public authority making it fall outside of the scope of Article 51.

The justification of non-discriminatory measures entails that they are to achieve a certain objective of public interest and are necessary to achieve that objective. The Services Directive refers to the case law of the Court of Justice mentioning that consumer protection, protection of the urban environment and prevention of unfair competition constitute policy measures that can override the restriction on creating authorization schemes and therefore constitute as overriding reasons.²⁵² Member States, which have banned Uber have done so by concluding that Uber offers a transport service such as a taxi service and as such, it uses unfair competition practices by operating illegally without obtaining the required licenses for taxi operators. Unfair competition in the form of paying employees less than the normal minimum pay has been considered as an objective of overriding nature by the CJEU.²⁵³ Therefore, restrictive measures on ridesharing and Uber could be justified in case it is concluded that it falls within the same or similar category as other urban transport services. That would mean that by operating without fulfilling the necessary requirements, Uber could charge lower prices and use drivers, who do not fulfill standards as high as for those of taxi drivers.

One of the purposes of regulating services such as taxis is to provide protection for consumers. The question of consumer protection is inherent with services such as Uber as it may not be clearly distinguished if someone is providing services in a professional manner or not, therefore, also making it unclear whether the case would fall under the consumer protection mechanisms established in the EU.²⁵⁴ A feedback and rating mechanism Uber has is a great tool for building trust and solving any issues that may arise but it does not follow that this is a sufficient degree of consumer protection.²⁵⁵ Consumer protection can qualify as a ground to justify interference with the freedom of establishment.

²⁵² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (The Services Directive), OJ L 376/36, 27.12.2006, Recital 40

²⁵³ CJEU 12.10.2004, C-60/03, *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix*, para 41

²⁵⁴ Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 106; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (“Consumer Rights Directive”), OJ L 304/64, 22.11.2011, Article 3

²⁵⁵ Geradin, D. Uber and the Rule of Law: Should Spontaneous Liberalization Be Applauded or Criticized? *Competition Policy International* 2015, 11 (1), p 25-26

In addition to consumer protection, the CJEU recognizes road safety as one overriding reason, which justifies the imposition of restrictions on internal market freedoms.²⁵⁶ Subjecting Uber to certain prior authorization requirements can be justified therefore by reason of road safety. As an online platform, Uber already establishes certain requirements for its users. The drivers using Uber need to have a valid driver's license, driving experience, and no criminal background. Ensuring these qualities is inherently necessary for road safety and the same requirements could be adopted in national legislation to ensure this objective.

Even if measures taken by the Member States are based on a public interest of overriding importance, it is required that the measure does not go beyond what is necessary to achieve that aim. To that effect, it may also be necessary to look whether these measures are proportionate, that is if there would be a way to achieve the same aims by using less restrictive measures.²⁵⁷ Establishing a ban on Uber services may be excused by using a legitimate aim such as ensuring the protection of consumers, road safety or limiting unfair competition practices. However, banning a service is the most extreme measure the Member States could take to achieve those aims. The European Commission in its Communication on a European Agenda for the Collaborative Economy reaffirmed that an outright ban on sharing platforms should be the last resort by the Member States.²⁵⁸ It should be borne in mind that the emerging sharing economy provides opportunities for both traders as well as legislators to review existing regulations in a new light and check, whether the measures used are still necessary to achieve the objectives set out by law.²⁵⁹

The ban on Uber's UberPOP service in Belgium and in Spain for using unfair market practices and not operating pursuant to a license should be scrutinized under the principle of proportionality and necessity.²⁶⁰ As such, if there are less restrictive means available to achieve the objective at hand, the

²⁵⁶ CJEU 16.11.2010, C-383/08, *Commission v Italy*, § 50; CJEU 5.10.1994, Case C-55/93, *Hoge Raad der Nederlanden v Johannes Gerrit Cornelis van Schaik*, para 19

²⁵⁷ CJEU 9.07.1997, Joined Cases C-34/95 and C-35/95 and C-36/95, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and Konsumentombudsmannen (KO) v TV-Shop i Sverige AB*, para 52

²⁵⁸ European Commission, 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, Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (30.04.2017), p 4

²⁵⁹ *Ibid.*

²⁶⁰ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 78, 81

measure can be considered as not necessary and disproportionate. UberPOP is essentially a peer-to-peer example in the sharing economy but because ridesharing is similar to professional transport services such as taxis, it is seen as competition. Preserving the quality of the professional service and protecting the market players from unfair competition may, however, be achieved through other means. Ridesharing and professional transport services are similar on the consumer level, as the consumer would use these services interchangeably. On the service provider level, there are quite a lot of differences between the two services. Sharing economy services by various definitions use online platforms as intermediaries to share assets or resources, which also have a built-in rating system to provide feedback. With Uber, the online platform is the only way to connect drivers and passengers, while traditional taxis can use online platforms, call centers or pick up people also from the street without the passengers first placing an order. In addition, sharing economy services are often provided in the form of peer-to-peer transactions and on a temporary basis in addition to the person's usual or main economic activity.

Therefore, to ensure fair competition between ridesharing and taxis, Member States could set limitations on the income derived from ridesharing or the maximum amount of work hours to distinguish it from professional transport services with higher requirements. Although these types of rules are also restrictive, it would constitute a less restrictive measure than a ban. It would also not become a restriction on the actual information society service itself if it merely acts as an intermediary between supply and demand and would allow the online platform to operate freely with restrictions set out on the drivers to use the platform. In addition, national measures defining ridesharing and establishing quality requirements on the service as well as the platform would constitute less restrictive means to achieve the objectives at hand because it would allow the service to operate and grow rather than constraining it into existing regulatory frameworks and banning it for being different.

Banning sharing economy services to protect consumers may backfire. Sharing economy online platforms operate largely on trust because consumers would not use the service otherwise. The platform needs to ensure that there is a certain level of quality on the services or assets provided. This is usually done as internal regulation within the platforms by setting pre-requisite conditions and later monitoring that these conditions and the level of quality and trust are fulfilled through online feedback systems, which include ratings and reviews. Self-regulation in this type of format may be enough or

may require a legislative approach but the most important aspect of it is that people use the service. This is the easiest way to show that a product is working and there is interest in it by the public. Therefore, banning a service such as UberPOP, which is used by drivers and passengers alike, because of consumer protection reasons would likely be disproportionate. Setting out rules on the platforms and providers ensuring the same standards in law would constitute a less restrictive mean to ensure the same objective is attained, that is the safety of consumers. Therefore, protectionist regulations and unjustified restrictions should be eliminated.²⁶¹

²⁶¹ Edelman, B.G., Geradin D. Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber? *Stanford Technology Law Review* 2016, 19, p 305

6. Alternative solutions for regulating Uber

There are legal issues surrounding Uber and sharing platforms in general concerning liability, taxation, and market access, which show that some regulatory regimes are outdated. As mentioned by the European Commission, despite the legal uncertainty, the default reaction should not be to ban such services because they do not comply with existing rules or to impose new strict rules, which could stifle innovation.²⁶² Although multiple EU Member States have decided to ban Uber services, it will be decided by the CJEU whether this approach goes against the principles and freedoms of the EU. Depending on the Court's definition and application of different EU rules, it could be concluded that a ban is not proportional and other legislative measures should be taken. Estonia does not support banning services like Uber and has confirmed Uber's standing in the legal proceedings with the CJEU.²⁶³ Instead, the country has been working on a different approach in legalizing ridesharing services like Uber, which is examined in detail in this chapter. However, national approaches can lead to very different regulation of what is essentially a service, which could operate in the entire European Union in the same format. With that in mind, it is also necessary to look into regulation or guidelines at the EU level to ensure harmonization of rules between the Member States. Consideration should also be given to a scenario where the market can self-regulate pursuant to current rules.

6.1. The regulation of Uber through a national approach in the example of Estonia

A Bill to regulate ridesharing was introduced in Estonia in early 2016 by the Economic Affairs Committee of the Parliament of Estonia and the discussions over the topic have been ongoing since then. The idea behind the change was to bring the sharing economy and ridesharing out of the legal grey area as the current regulatory platform is ambiguous regarding new online platforms.²⁶⁴ In

²⁶² European Commission, 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, Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (30.04.2017), p 4

²⁶³ Chee, F.Y. Uber Defends Business Model, Wants to Avert Strict EU Rules, 2016. www.reuters.com/article/us-uber-court-eu-idUSKBN13O1TU (30.04.2017)

²⁶⁴ Kukk, M. The Draft Concerning On-Demand Ride Sourcing Passed Its First Reading in the Parliament, 2016. www.riigikogu.ee/istungi-ulevaated/riigikogus-labis-esimese-lugemise-kokkuleppevedude-eelnou/ (30.04.2017)

addition, it was taken into consideration that ridesharing and the sharing economy, in general, should be operating without the state's control as much as possible.²⁶⁵ The head of the Economic Affairs Committee at the time, Toomas Kivimägi, considered that the sharing economy has been around for years in one form or another and pushing these new innovative sharing platforms into existing business models and accompanying legislative rules would constitute a barrier to innovation.²⁶⁶ Hindrek Allvee, Executive Officer in the Transportation and Traffic Division of the Ministry of Economic Affairs and Communications, has further commented that the idea was to legitimize new emerging services and allow everyone to operate because banning is not a solution (Annex 1). This meant that the Bill included more flexible conditions for taxi drivers to facilitate the ongoing competition between the two services. Therefore, much of the focus in Estonia has been in regulating the aspect of the transport service in the sharing economy.

The initial Bill on Amendments to the Public Transport Act (188 SE) introduced during the initiation process has been changed quite a lot during the discussions with another draft completed in December 2016, which was subsequently sent to the different factions of the Parliament for their opinions. The thesis will look at some of the major differences between the two versions and the new direction the legislative change is heading towards.

Ridesharing was initially not referred to as a category of public transport. The initial Bill included ridesharing as a separate concept in addition to all the public transport categories. This was done to establish a clear definition for what ridesharing is and to distinguish it from public transport such as taxi services.²⁶⁷ However, this was a conflicting view as ridesharing was still defined as a transport service done for remuneration by using a car, which qualifies under the definition of public transport in the Public Transport Act.²⁶⁸ The modified Bill on Amendments to the Public Transport Act, the

²⁶⁵ *Ibid.*

²⁶⁶ Varblane, K. Kivimägi: The Sharing Economy Will Not Be Forbidden By Force, 2016. www.riigikogu.ee/pressiteated/majanduskomisjon-et-et/kivimagi-jagamismajandust-jouga-ei-keela/ (30.04.2017)

²⁶⁷ Economic Affairs Committee of the Parliament of Estonia, Meeting Minutes No. 63 of 07.04.2016. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), p 1

²⁶⁸ Bill on Amendments to the Public Transport Act, (188 SE), 25.02.12. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), Section 5 § 5¹; Public Transport Act RT I, 24.03.2016, 4, § 2

Traffic Act and the State Fees Act includes ridesharing, also called on-demand ride sourcing, as one category of public transport to alleviate the issue. As such, ridesharing is defined as the carriage of passengers by way of a vehicle in road transport, which is not any other public transport service and is distinguished by using an information society service to order the ride.²⁶⁹

In addition to the difference in the placement of the definition, the initial Bill included conditions for providing ridesharing services as well as conditions for the intermediary online platform for the requirements it should fulfill.²⁷⁰ It then moved on to considerations regarding taxi regulation and how they can be simplified.²⁷¹ The modified Bill still includes conditions for providing ridesharing services but only includes requirements for the provider of ridesharing rather than requirements for the information society service.²⁷² The modified Bill also includes certain changes regarding taxi services similarly to the first draft, making the rules more simplified. The proposed Bill reduces the amount of training taxi drivers need to go through and therefore alleviates the requirements for obtaining a service provider card required for taxi drivers.²⁷³ In addition, the Bill makes pricing for taxi services more flexible by allowing more time zones instead of two zones as currently applicable (day and night).²⁷⁴ The simplified and more flexible approach is necessary as an update to the current regulation to make it more compatible and competitive with other services such as ridesharing. Hindrek Allvee commented that ridesharing and taxi services are similar services in their nature and, therefore, pursuant to the right to equality, should also be regulated similarly without establishing burdensome requirements on one service and not the other (Annex 1).

²⁶⁹ Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I), 16.16.12. www.riigikogu.ee/download/514028cc-fddc-4e46-9efc-4f512b0a689e (16.04.2017), Section 2, § 5

²⁷⁰ Bill on Amendments to the Public Transport Act, (188 SE), 25.02.12. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), Section 10 § 53¹, 53²

²⁷¹ *Id.*, Sections 13-35

²⁷² Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I), 16.16.12. www.riigikogu.ee/download/514028cc-fddc-4e46-9efc-4f512b0a689e (16.04.2017), Section 9, § 66¹, 66², 66³

²⁷³ Explanation to Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I), 16.16.12. www.riigikogu.ee/download/fe26522b-4d7d-421a-809e-49d5dff525fb (16.04.2017), p 2-4

²⁷⁴ *Ibid.*

The initial Bill established that ridesharing can be provided by both a person duly registered in the business register and a natural person.²⁷⁵ During the committee meetings with the Ministry of Economic Affairs and Communications, it was discussed whether there should be a condition for a specific type of business form that drivers should have to provide ridesharing services, for example as a sole proprietor.²⁷⁶ Setting a rule on people to use a specific type of business may be too restrictive in the sharing economy even though it is done in certain fields.²⁷⁷ However, it remained a point of discussion whether both an undertaking as well as a natural person should be allowed to provide ridesharing services. The modified draft also provides a conclusion on who can be a provider for ridesharing services. It is explained that both legal persons and natural persons can be providers, they just need to submit a notice of economic activity.²⁷⁸ The legal draft itself just states that to provide ridesharing services, the person must submit the necessary notice.²⁷⁹ Therefore, the Bill does not specify the type of person that can provide services but rather leaves room for interpretation to include both. In addition, the requirement of a notice of economic activity does not in itself include a prior authorization mechanism, which may be considered as an impediment to free movement the E-Commerce Directive.

The committee also discussed setting a limit on the income derived from ridesharing to distinguish a provider of ridesharing services from other professional transport providers such as taxi drivers.²⁸⁰ The final opinion remained that a limit on the income would be unnecessary as there are already other requirements and limitations on providing ridesharing services.²⁸¹ Kalle Palling, Member of the

²⁷⁵ Bill on Amendments to the Public Transport Act, (188 SE), 25.02.12. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), Section 10, § 53¹ (1)

²⁷⁶ Economic Affairs Committee of the Parliament of Estonia, Meeting Minutes No. 63 of 07.04.2016. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), p 3

²⁷⁷ *Ibid.*

²⁷⁸ Explanation to Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I), 16.16.12. www.riigikogu.ee/download/fe26522b-4d7d-421a-809e-49d5dff525fb (16.04.2017), p 5

²⁷⁹ Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I), 16.16.12. www.riigikogu.ee/download/514028cc-fddc-4e46-9efc-4f512b0a689e (16.04.2017), Section 9 § 66¹ (1)

²⁸⁰ Economic Affairs Committee of the Parliament of Estonia, Meeting Minutes No. 63 of 07.04.2016. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), p 3; Economic Affairs Committee of the Parliament of Estonia Meeting Minutes No. 93 of 17.10.2016. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), p 5

²⁸¹ Economic Affairs Committee of the Parliament of Estonia, Meeting Minutes No. 97 of 08.11.2016. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), p 7

Parliament of Estonia, explained that this would only punish those providers who worked harder (Annex 2). However, it could be beneficial to set a certain limit on income derived from sharing economy services for more favorable taxation as was done in Belgium with De Croo Act. Hindrek Allvee explained that a similar approach as taken in Belgium will not be discussed during this Bill amendment process as it is a question of economic activity rather than transport (Annex 1). However, as Kalle Palling mentioned, Uber in Estonia has already developed a solution to connect the platform with the tax authorities thereby giving automatic feedback on the drivers' taxable income (Annex 2).

The question raised whether legal entities should be allowed to provide sharing economy services can be seen as a question regarding the definition of the sharing economy. It may seem that only natural persons should be allowed to participate in the sharing economy as it is something done on a temporary basis and outside of the person's main economic activity. Allowing legal entities and businesses to participate may seem as they would be conducting their economic activities in the sharing economy, therefore, moving away from what this economy should be, that is a peer-to-peer market. However, sharing economy should not be limited only to natural persons. The European Commission in its communication provided a definition for the sharing economy and included that service providers that want to provide their assets or services can either be private individuals or professional service providers.²⁸² While it is more common that private individuals provide these services, therefore participating in a peer-to-peer platform, there is also room for business-to-peer and business-to-business platforms in the sharing economy.²⁸³ The view in Estonia with the proposed Bill is similar, allowing all providers to participate.

The initial amendment Bill had conditions for providing the ridesharing service as well as for the online platform, which acts as an intermediary for the service. The requirements for service providers included that ridesharing should be provided only using an online platform, the car should be without any taxi markings so as not to confuse the two services, and the reputation of the provider should be

²⁸² European Commission, 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, Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (30.04.2017), p 3

²⁸³ Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 86

good.²⁸⁴ A provider would have a good reputation if they had not been convicted of a criminal offence or charged for drunk driving.²⁸⁵ The modified version of the Bill still includes the condition of good reputation, while adding that the driver performing the ride should have a valid driver's license and be the owner or responsible user of the vehicle.²⁸⁶ Therefore, the conditions on the service provider are not that different. The condition for using an online platform for the service is already inherent in the definition of ridesharing. The requirement of good reputation remains the same with the new Bill referring to the same requirement under the chapter on taxi services in the Public Transport Act. The modified Bill adds the requirements for the driver, which are like the conditions already present in the online platform. It essentially puts minimum requirements in legislation to ensure that the standard for becoming a ridesharing service provider does not become lower than is already required by existing platforms such as Uber.

The initial Bill also included requirements for the online platforms and the online platform operators. The platform should show information on who the ridesharing provider is, what the approximate price of the ride would be, allow to order rides and allow to pay electronically through the system.²⁸⁷ The operator of the online system should store information on ridesharing, abide by data protection rules, and provide information on conflict resolution.²⁸⁸ The modified Bill does not include a section on the rules applicable to online platforms. Instead, the new Bill establishes rules for the service provider and for providing the service. Pursuant to the new Bill, ridesharing should be provided only through an information society service. The service provider should give the passenger information on the maximum total price before starting the ride, or on the components of the price, and allow the passenger to give feedback on the quality of the ride through the online platform.²⁸⁹ The explanation accompanying the draft Bill states that the passengers need to have clear information on the pricing

²⁸⁴ Bill on Amendments to the Public Transport Act, (188 SE), 25.02.12. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), Section 10 § 53¹

²⁸⁵ *Ibid.*

²⁸⁶ Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I), 16.16.12. www.riigikogu.ee/download/514028cc-fddc-4e46-9efc-4f512b0a689e (16.04.2017), Section 9 § 66²

²⁸⁷ Bill on Amendments to the Public Transport Act, (188 SE), 25.02.12. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), Section 10 § 53²

²⁸⁸ *Ibid.*

²⁸⁹ Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I), 16.16.12. www.riigikogu.ee/download/514028cc-fddc-4e46-9efc-4f512b0a689e (16.04.2017), Section 9 § 66³

system for the rides, although it is not mentioned in the explanation what way the ridesharing service provider should establish that.²⁹⁰

It is understandable why conditions such as mentioned in the new Bill have been included. The idea behind them is the same as in the initial Bill, which set out conditions to the platform and the platform operator. The wording of the new Bill puts the responsibility directly on the provider of the ridesharing service to provide information on the price as well as to allow feedback from the passenger. The wording seems to refer to the driver as the provider based on the conditions laid out on providing ridesharing. This raises a question whether such conditions can be imposed on the service provider if the online platform operator establishes the way the platform works, what information it shows to the passenger and driver, and how it allows feedback. The responsibility would still lie with the platform operator on how the system should operate. The wording could also be understood in a way that the responsibility lies with the platform operator who acts as a provider of the transport services. The undertaking would be responsible for ensuring the passenger gets the necessary information and features not as an information society provider but rather as a ridesharing service provider. However, such differentiation may make it more complicated to interpret who would be the provider. In terms of clarity, the initial Bill set out guidelines specifically for the platform and the operator regarding these conditions. However, regardless of the wording, setting out technical requirements to provide the information society service would entail that Estonia needs to notify the European Commission of the upcoming regulation.²⁹¹

Considering the requirements the new Bill sets out, similarly to the requirements on the drivers, they are already in conformity with the way the online platforms work. Putting this into legislation would entail that these are the minimum requirements that need to be met by all information society service providers for ridesharing services, including any new market entrants. This allows for a stable way to check that requirements are fulfilled and provide protection to consumers in case of conflict. It is one way of looking at how to solve the problem of such services being in a grey legal area. However, it

²⁹⁰ Explanation to Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I), 16.16.12. www.riigikogu.ee/download/fe26522b-4d7d-421a-809e-49d5dff525fb (16.04.2017), p 7

²⁹¹ Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241/1, 17.09.2015, Articles 4,5

begs the question whether regulation at this level is necessary if self-regulation provides similar conditions. The fact that consumers are interested and using sharing economy platforms also shows that the self-regulation mechanism is working and there is trust behind these systems. Of course, legal questions are bound to pop up with any regulations available, which may affect sharing economy services such as Uber in one way or another depending on the definition of the service.

The latest version of the Bill can still be subject to change depending on the further discussions between different parties. The factions of the Parliament have submitted their opinions on the modified Bill and there are still differing thoughts on how ridesharing should be regulated, more specifically what requirements should be placed on the ridesharing service provider.²⁹² There are also certain unanswered questions such as whether traffic insurance should be higher for ridesharing service providers as it is for taxis. This has been one of the questions discussed during the committee meetings and has been brought up again by the Social Democratic Party in their opinion regarding the Bill.²⁹³ Moreover, many interested parties such as the city of Tallinn as well as the Union of Estonian Automobile Enterprises still think that ridesharing is no different from taxi services and therefore, should be regulated in the same way with just as strict rules applying to ridesharing.²⁹⁴ Hindrek Allvee confirmed that the Ministry of Economic Affairs and Communications is currently working on a third version of the Bill based on the guidelines received by the Economic Committee (Annex 1). The new

²⁹² Estonian Reform Party Faction, Opinion of 23.01.2017 on the Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I). www.riigikogu.ee/tegevus/eelnoud/eelnou/arvamused/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus (16.04.2017); Conservative People's Party of Estonia Faction, Opinion of 23.01.2017 on the Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I). www.riigikogu.ee/tegevus/eelnoud/eelnou/arvamused/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus (16.04.2017)

²⁹³ Social Democratic Party Faction, Opinion of 23.01.2017 on the Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I). www.riigikogu.ee/tegevus/eelnoud/eelnou/arvamused/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus (16.04.2017); Economic Affairs Committee of the Parliament of Estonia, Meeting Minutes No. 97 of 08.11.2016. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), p 6-7; Economic Affairs Committee of the Parliament of Estonia, Meeting Minutes No. 102 of 05.12.2016. www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/ (16.04.2017), p 3-4

²⁹⁴ Tallinn Transport Department, Opinion of 08.03.2017 on the Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I). www.riigikogu.ee/tegevus/eelnoud/eelnou/arvamused/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus (16.04.2017); Union of Estonian Automobile Enterprises, Opinion of 24.01.2017 on the Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act (188 SE I). www.riigikogu.ee/tegevus/eelnoud/eelnou/arvamused/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus (16.04.2017)

version may eliminate the concept of ridesharing altogether from the Bill and instead focus on simplifying the rules for taxi services to the extent that no separate regulation would be required for ridesharing. Kalle Palling commented that this would entail the same licensing requirements for both taxis as well as ridesharing providers with the taxi regulation becoming a lot more flexible (Annex 2). The future of this Bill and the final format will depend on the views of the market participants and the Economic Committee of the Parliament.

Solving the regulation of an online platform such as Uber is just solving one problem of many. There are other platforms in other sectors, for example, Airbnb in the accommodation sector, which entails similar legislative issues as Uber, raising questions of liability, consumer protection, taxation, licensing requirements and so on. Moreover, the current Bill puts focus on the ridesharing service provider and tries not to regulate the information society provider to not set any impediments on its function. Therefore, issues such as the definition of an information society service, its purpose, when does an information society service become something more than a mere intermediary but also a provider of its underlying service thereby complicating the issue of liability remain unanswered. As one possibility, it may be reasonable to look at all the information society platforms and establish rules, which would be applicable to all of them because certain requirements may need regulation to ensure their effectiveness.

6.2. EU-wide regulation or directive to bring Uber out of the legal grey area

It is difficult to decide what would be the right balance between regulation and market freedom.²⁹⁵ Self-regulation may be working for the market to a certain extent. However, to ensure the protection of consumers and everyone's rights, it would be easier to set out specific definitions and requirements in law as something to rely on. The Estonian Bill on Amendments to the Public Transport Act, the Traffic Act and the State Fees Act sets out quite general conditions on providing ridesharing services which can be applicable to other information society services and online platforms, for instance, to show the price, owner's information and allow feedback. Setting out general rules for all information

²⁹⁵ Busch, C. *et al* Discussion Draft of a Directive on Online Intermediary Platforms. Research Group on the Law of Digital Services, Journal of European Consumer and Market Law, 5 (4), p 164

society services may be done at a national level but it might be necessary to look at such conditions at the EU level to ensure uniform application and that there are no restrictions on the free movement of such services.²⁹⁶

Pursuant to Article 3 of the TFEU, the EU has competence to regulate matters, which are necessary for the establishment and continuance of the EU internal market. Regulating the sharing economy and intermediary platforms may be necessary to achieve the free movement of such e-services within the Member States to achieve the objective of a Digital Single Market.²⁹⁷ Legislative areas of transport, which can be regulated by the EU include transport between the Member States and transport safety.²⁹⁸ Regulating urban transport, on the other hand, is in the competence of the Member States because it is very local and usually applicable to a certain country or even city.²⁹⁹ Therefore, considering platforms such as Uber as both information society services as well as offering its underlying transport service, regulation on the EU level should not cover requirements regarding transport. It should cover general rules concerning intermediary platforms. The specifics of transport and requirements for drivers as service providers would fall under the national regulatory frameworks. However, these rules should not be an impediment to the establishment of sharing economy services and information society services. Even though connected to a legislative area, which is usually regulated by the Member States, platforms such as Uber offer a European dimension by being available in the same format in different states and having information move around online through different states.³⁰⁰

A research group on the Law of Digital Services published a draft directive on online intermediary services in the Journal of European Consumer and Market Law. The draft was published to retain responses and opinions from different interested parties and scholars to discuss whether this should

²⁹⁶ *Ibid.*

²⁹⁷ European Parliament, Briefing on Social, Economic and Legal Consequences of Uber and Similar Transportation Network Companies (TNCs), 2015. [www.europarl.europa.eu/RegData/etudes/BRIE/2015/563398/IPOL_BRI\(2015\)563398_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/563398/IPOL_BRI(2015)563398_EN.pdf) (20.04.2017), p 5

²⁹⁸ TFEU, OJ C 326, 26.10.2012, Articles 90-100

²⁹⁹ Bekken, J.T. Experiences with (De-)Regulation in the European Taxi Industry. (De)Regulation of the Taxi Industry. Paris, OECD Publishing 2007, p 36

³⁰⁰ European Parliament, Briefing on Social, Economic and Legal Consequences of Uber and Similar Transportation Network Companies (TNCs), 2015. [www.europarl.europa.eu/RegData/etudes/BRIE/2015/563398/IPOL_BRI\(2015\)563398_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/563398/IPOL_BRI(2015)563398_EN.pdf) (20.04.2017), p 5

be the way forward in regulating online platforms.³⁰¹ The draft directive focuses on multiple controversial aspects surrounding information society services and intermediary platforms. The directive would provide a definition on the intermediary platform as well as who would constitute a platform operator, supplier and customer, and trader and consumer in these emerging markets.³⁰² Under the chapter on general provisions, the directive discusses the question of transparency on the relationship between the platform and any of the service providers or suppliers.³⁰³ In addition, the chapter includes comments on how communication should be facilitated between the different parties through the platform and rules on using feedback systems.³⁰⁴ Standards for feedback systems include, among others, submitting information provided by users without any delay, informing the person if their feedback is rejected, ensuring that reviews are provided by actual users in response to actual transactions, and allowing users to report if a review looks fake.³⁰⁵ The online platform operator should also act immediately if they receive information on any criminal or illegal activity.³⁰⁶

The directive then goes on to establish the responsibilities of the platform operator separately for consumers and service providers or suppliers, and the platform operator's liabilities. The operator needs to inform the consumer that the contract for the service or resource will be between the supplier and the consumer.³⁰⁷ The platform operator must provide the supplier with information on fees charged, payment mechanisms, methods of communication with the consumers, whether consumers will be selected by the platform operator or the supplier, and that the contract will be concluded directly between the supplier and consumer.³⁰⁸ The online intermediary operator will not be liable for any non-performance arising from the contract between the supplier and consumer unless there is proof that the operator has influence over the supplier and their actions.³⁰⁹ The platform operator will

³⁰¹ Busch, C. *et al* Discussion Draft of a Directive on Online Intermediary Platforms. Research Group on the Law of Digital Services, *Journal of European Consumer and Market Law*, 5 (4), p 165

³⁰² *Id.*, p 166

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ *Id.*, p 167

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Id.*, p 167-168

be liable for providing misleading information or for not removing such information when informed about it as it is an obligation for the operator to take appropriate measures.³¹⁰

Regulation deals with one important issue – definition. A directive at the EU level would be beneficial to establish a common definition for these intermediary platforms. In addition, it would also solve any disparities between the Member States’ regulations by applying common rules.³¹¹ Otherwise, there can be fragmentation, which can lead to some states recognizing certain platforms and not others. The draft directive does not actually provide a comprehensive solution for this. A platform includes any information society service, which enables contracts between consumers and suppliers.³¹² The definition puts focus on the issue that the platform just enables parties to conclude contracts, which means that it should act as an intermediary. This is important in further provisions of the draft directive regarding questions of liability. Therefore, as with the E-Commerce Directive, it remains to be clarified, whether platform operators that are somewhat involved in the process of concluding such contracts, for example by assisting with terms such as the price, would fall under this definition. This could potentially be solved by the CJEU offering guidelines on what service Uber should be defined as and why, as well as what would be the line where the information society service crosses over from that to the underlying service, where the services cannot be separated anymore.

On the other hand, the draft directive puts focus on the different types of relationships that exist through the sharing economy and intermediary platforms. In particular, it considers that there is a contract between the supplier and the consumer but also that the platform has a separate relationship with both the consumer and the supplier. Furthermore, it puts the responsibility on the platform operator to inform the customer that the contract will be concluded with the supplier, and to ensure that the supplier informs customers if they are acting as a trader.³¹³ This ensures clarity and protection for the customer as a consumer. The CJEU has confirmed in the case *Wathelet* that it is essential for the protection of consumer rights that the consumer should know if the owner of a good is a private

³¹⁰ *Ibid.*

³¹¹ Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 94

³¹² Busch, C. *et al* Discussion Draft of a Directive on Online Intermediary Platforms. Research Group on the Law of Digital Services, *Journal of European Consumer and Market Law*, 5 (4), p 166

³¹³ *Id.*, p 167

individual.³¹⁴ Therefore, if the consumer can easily be misled about the seller and owner of the good, whether it is the platform operator or a private individual, then the seller's liability must be capable of being imposed on the intermediary.³¹⁵ There is an imbalance of information between the consumer and the intermediary, therefore, the intermediary has a duty to inform the consumer about who the actual seller is if they do not want to bear responsibility.³¹⁶ This is in accordance with the purpose of consumer rights, which is to protect the more vulnerable party in the transaction.

Furthermore, users of the online platforms would be able to claim protection as consumers against the platform, which acts as a trader.³¹⁷ By charging commission on payments made by users and obtaining revenue from advertisements, the online intermediaries are likely to be considered as traders acting within their economic activity since they get revenue from providing the platform services.³¹⁸ However, the situation is less clear with persons who are providing services through online platforms because they can do it as part of their economic activity or as private individuals. The Commission explains that it will be important to analyze how often the person provides the service and whether the purpose is to make an earning or just to cover costs.³¹⁹ If the service provider is considered as a trader then the customer can claim consumer protection against the trader, but the trader will then not be able to claim protection as a consumer against the platform operator.³²⁰ If the provider of the service is not a trader then both are able to claim consumer protection against the platform but the issues between themselves would then need to be solved through the terms governing the contract they

³¹⁴ CJEU 9.11.2016, C-149/15, *Sabrina Wathelet v Garage Bietheres & Fils SPRL (Wathelet)*, para 38-39

³¹⁵ *Id.*, para 41-43

³¹⁶ *Id.*, para 40

³¹⁷ Directive 2005/29/EC of the European Parliament and of the Council 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 ('Unfair Commercial Practices Directive'), OJ L 149/22, 11.06.2005, Articles 2, 3

³¹⁸ Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 106

³¹⁹ European Commission, 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, Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (30.04.2017), p 6

³²⁰ Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 120

established.³²¹ The draft directive does not touch upon these issues in depth with the focus being on liabilities by the platform operator towards the different types of users.

While the draft directive does not specifically define the different types of intermediary platforms or the platforms' limits, certain conclusions can be made from other sections in the draft. If the intermediary platform does not have any influence over the contract that is concluded between the supplier and the customer, then they will not be liable for any non-performance or other issues, which may arise from that contract. The platform operator can be liable if they have a predominant influence over the supplier and this can be shown in different ways.³²² In particular, the platform operator has influence over the supplier if the contract can only be concluded through the platform itself, payments can be withheld by the platform, the price and other contract terms are established by the operator, or if the platform operator has taken it upon itself to monitor the suppliers.³²³ This means that platforms, which have control and influence over the underlying service may still fall under the definition of an online intermediary platform. However, they may be held liable for the suppliers' actions due to their active role.

The E-Commerce Directive limits the liability of information society service providers over information they may not have any control over.³²⁴ The provision is applicable for services, which consist of storing information that has been provided by the users.³²⁵ As such, the provider should not be held liable for such information if the provider does not know about the illegal nature of the information, and when becoming aware of such information, acts to remove it straight away.³²⁶ Exemption of liability is possible if the service provider's input is passive and merely technical, which shows the lack of knowledge of illegal activity by the service provider.³²⁷ However, if the provider

³²¹ *Id.*, p 119-120

³²² Busch, C. *et al* Discussion Draft of a Directive on Online Intermediary Platforms. Research Group on the Law of Digital Services, *Journal of European Consumer and Market Law*, 5 (4), p 168

³²³ *Ibid.*

³²⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (The E-Commerce Directive), OJ L 178, 17.07.2000, Article 14

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ CJEU 23.03.2010, Joined Cases C-236/08 to C-238/08, *Google France v Louis Vuitton*, para 114; Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 103

has an active role, for instance, by providing assistance in promoting the sale, they cannot be exempted from liability.³²⁸ A service provider that has a say in the contract terms between the supplier and consumer, that takes a commission from the fee paid, and that somewhat monitors the users and providers on the platform is likely to be characterized as having an active role.³²⁹ Therefore, while intermediary platforms that have a certain role in providing the underlying service may still fall under the E-Commerce Directive, they will not be exempted from liability as they do not act as passive platforms.³³⁰

The draft directive touches upon multiple issues, which have been raised concerning the sharing economy and establishes specific rules and liabilities for the intermediary platforms. It cannot be denied that specific rules would provide clarity and put more trust into such platforms. The directive provides reassurance to consumers in the form of regulating the feedback systems in online platforms and setting out the minimum standards platform operators must follow. The directive also focuses on protecting both, the customers and suppliers participating in the platform, therefore moving away from the usual concept of consumer protection.³³¹ On the other hand, the existing EU regulatory framework is already complicated and adding new rules for recently emerged technologies and innovative solutions may not be desirable. The regulation would have to be flexible enough. Of course, regulation may not stifle innovation at all and instead foster it, either accidentally or through granting certain exemptions.³³² However, the objective to regulate should be necessity and protection of different interests.

Many issues could be solved under the existing framework with further interpretation of the rules in different situations. As a starting point, the European Commission has issued guidelines on how different conflicts concerning the sharing economy should be solved through existing regulation and

³²⁸ CJEU 12.07.2011, C-324/09, *L'Oreal v Ebay*, para 122-124; Hatzopoulos, V., Roma, S., Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 103

³²⁹ Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 104

³³⁰ *Ibid.*

³³¹ Busch, C. *et al* Discussion Draft of a Directive on Online Intermediary Platforms. Research Group on the Law of Digital Services, *Journal of European Consumer and Market Law*, 5 (4), p 165

³³² Hatzopoulos, V., Roma, S. Caring for Sharing? The Collaborative Economy Under EU Law. *Common Market Law Review* 2017, 54 (1), p 126

decided to monitor the actions of Member States.³³³ If the CJEU decides that platforms such as Uber should be considered as information society platforms, but may also be subject to national legislation if they exercise any control over the underlying services, it may be necessary to propose regulatory action in the form of a directive, regulation or guidelines to ensure that the intermediary platforms would still be able to move freely within the Member States. However, specific action can be determined once the CJEU delivers its decision on how such services should be defined.

Setting out guidelines and monitoring the actions of the Member States can be considered as a temporary measure for now. However, even if existing regulation does not cover all the issues related to the sharing economy services, interpretation by the CJEU on how these services should be defined, as well as further guidelines in accordance with the decision could be a solution to the regulatory challenges. The draft directive is one proposal covering many of the questions surrounding the responsibilities of the platform and the reach of its liability and should be considered as one option to move forward. However, regulation in this field by the EU should be sought only if necessary. Further consideration of these issues should be given after clarifications by the CJEU and subsequent communications by the EU institutions have been provided on how the Member States react.

6.3. Self-regulation

Another alternative to EU-wide regulation and national regulation is establishing self-regulatory regimes for the sharing economy.³³⁴ The concept of self-regulation has been defined by the OECD as practice followed by a group of undertakings belonging to an industry whereby they follow a set of rules.³³⁵ There are different ways to achieve this. The undertakings can either cooperate only with

³³³ *Id.*, p 127; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Upgrading the Single Market: More Opportunities for People and Business, Brussels 28.10.2015, COM(2015) 550, p 4.

³³⁴ Goudin, P. The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities. European Parliamentary Research Service 2016. [www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777) (30.04.2017), p 180

³³⁵ Organisation for Economic Co-operation and Development, Industry Self-Regulation: Role and Use in Supporting Consumer Interests, DSTI/CP(2014)4/FINAL, 2015. [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2014\)4/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2014)4/FINAL&docLanguage=En) (30.04.2017), p 11

each other to achieve certain standards, or the industry could also cooperate with the government.³³⁶ Self-regulation can be beneficial to all the parties involved, that is the undertakings, consumers, and government. It is easier for the government as it does not require regulation on a larger scale or at all, and thereby requires less monitoring and resources.³³⁷ Businesses can be interested in self-regulation to maintain a level of quality required demanded by consumers, and to paint a good image on the whole industry to attract customers in general.³³⁸

Uber has faced many difficulties with regulation. However, it has been able to work in most such environments because of the trust placed by passengers in the service. Therefore, it is crucial for a service like this to maintain some sort of internal regulation to preserve that trust. This is common for many businesses operating in different industries but in a lot of cases, there is monitoring by the government authorities, which creates a safety net for both, the consumer and the business. In industries where the regulatory framework may be unclear, self-regulation is a welcome substitute, whether it is a permanent measure or not. Furthermore, effective self-regulation can also be a reason why regulation from the state may not be necessary, which allows more freedom for the industry as there are no strict guidelines.³³⁹

Sharing economy platforms such as Uber and Airbnb have been motivated to introduce self-regulation regimes to ensure that the business runs smoothly. It can already be seen in the form of feedback systems in the sharing economy platforms and through the flow of information regarding the underlying service as well as the service provided by the platform. The feedback systems enable the platforms to remove suppliers and users who are taking advantage of other users and the platform, doing illegal activities, or not performing up to a certain standard required by the platform and wanted by other users. One reason for government regulation is to protect the vulnerable parties, consumers, due to an imbalance of information.³⁴⁰ However, the flow of information is a lot higher because of

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ Goudin, P. The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities. European Parliamentary Research Service 2016. [www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU\(2016\)558777](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2016)558777) (30.04.2017), p 181

platforms operating online, which may lessen the need for regulation.³⁴¹ In addition, cooperation in taxation can work between the information society platform operators and governments without the need for regulation. Uber has been willing to invest in making extensions to its applications, which would allow an information with tax authorities for easier income declarations.³⁴² This would be quite comfortable because all transactions are made through the online platforms.

The author considers that Uber's primary purpose is an information society service and it should enjoy the freedom to move within the EU internal market. Uber does exercise control over its underlying service, transport. Therefore, it could be subject to national legislation concerning urban transport and public transport because it is in the competence of the Member States to regulate such issues. Ridesharing is in itself in competition with taxi services and if one service is subject to regulatory rules, it would be unfair to let other similar services to operate freely without any government intervention. There are of course differences between the services but the idea of transporting someone from one point to another for a fee remains the same and is often what is most important to the users. Even if banning such services has a justification, it is not proportionate as there are often other measures available, which are not as harsh. Otherwise, it is just denying the consumers the benefits online platforms offer. Therefore, Member States should be subject to reviewing their regulations and modifying them if necessary to ensure that such platforms can operate.

³⁴¹ *Ibid.*

³⁴² Laurits, R. Tax And Customs Authority And Uber Are Looking For Ways Of Collaboration To Develop Solutions For The Sharing Economy, 2015. www.emta.ee/et/uudised/mta-ja-uber-otsivad-koostoos-lahendusid-jagamismajanduse-arendamiseksi (20.04.2017)

Conclusion

The sharing economy has stirred a lot of controversy around the world regarding how it should be regulated. With a gradually growing market, there is undeniable interest in the sharing economy services by consumers to use the resources offered as well as share their own with this market growing each year.³⁴³ The number of services and providers have grown tremendously due to the increasing availability of online platforms in the form of websites and mobile applications, which allows anyone from around the world to participate. The platforms connect the supply and demand in traditional markets such as transport and accommodation, which are usually regulated through different licensing and authorization mechanisms. In addition, as opposed to traditional business models, the intermediaries do not own any of the resources offered but rather provide individuals a platform to offer their resources and the possibility to inform a larger audience. The aforementioned online platforms further offer reviewing and feedback mechanisms for all participants to ensure trust between the different sides of the contract. Therefore, systems have allowed regular individuals to provide services in markets, which normally have barriers to enter and in doing so caused controversy in regulating the new platforms and service providers as well as deregulating existing markets.

The sharing economy does not have a uniform definition insofar as the concept of sharing varies between different jurisdictions.³⁴⁴ However, certain aspects are common to emerging sharing economy services despite the place where the service is provided. Firstly, the sharing economy allows individuals, owners of a resource, to share it with others in exchange for remuneration and usually through an intermediary.³⁴⁵ The intermediary provides an opportunity to disseminate information about sharing the resource, facilitates the exchange and monitors the market through reviewing and

³⁴³ European Commission, 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, Brussels 2.6.2016, COM(2016) 356. ec.europa.eu/DocsRoom/documents/16881/attachments/2/translations (30.04.2017), p 2

³⁴⁴ Martin, C.J. The Sharing Economy: A Pathway to Sustainability of a Nightmarish Form of Neoliberal Capitalism? *Ecological Economics* 2016, 121, p 151; Belk, R. You Are What You Can Access: Sharing and Collaborative Consumption Online. *Journal of Business Research* 2014, 67 (8), p 1595-1596

³⁴⁵ Puschmann, T., Alt, R. Sharing Economy. *Business and Information Systems Engineering* 2016, 58 (1), p 96; Bonciu, F., Balgar, A.C. Sharing Economy as a Contributor to Sustainable Growth. An EU Perspective. *Romanian Journal of European Affairs* 2016, 16 (2), p 40-41

feedback mechanisms.³⁴⁶ The Uber platform conforms to these characteristics by connecting private drivers with passengers through its mobile application. However, as with Uber, the platforms claim to be mere intermediaries, which means that actual contracts for the services or resources are concluded between users of the platform thereby shifting the liability and responsibility on private individuals.³⁴⁷ This begs the question where does the liability lie for intermediaries and whether they would still have obligations towards their users. In addition, the individuals will usually provide such services on a temporary basis and outside of their normal economic activity, which may make it difficult to tax the income derived from such services under certain regulatory regimes. Furthermore, by utilizing resources in existing markets, sharing economy services act as market disruptors, which can raise questions in terms of competition practices.³⁴⁸ Existing markets are regulated pursuant to regular business models with a vertical chain of supply and new models with different types of relationships but operating in the same market raise the issue whether they should be subject to the same regulation.

The current regulatory situation in the European Union is already fragmented, which may give cause to start regulating the issue of sharing economy services and intermediary platforms at the EU level. Some countries, such as Estonia, allow UberPOP and Uber to operate and are planning a change in transport regulation to include such services. However, many of the EU Member States have banned UberPOP services because it does not comply with applicable taxi regulations and therefore uses unfair competition practices. France has prohibited services such as UberPOP and categorized Uber as chauffeured car service, requiring that only licensed transport can be provided to consumers.³⁴⁹ Germany ordered UberPOP drivers to comply with the same standards as taxi drivers.³⁵⁰ Belgium also banned UberPOP services in Brussels and raised questions to the CJEU whether subjecting such services to existing taxi regulations was proportionate.³⁵¹ The questions remained unanswered by the

³⁴⁶ Lougher, G., Kalmanowicz, S. EU Competition Law in the Sharing Economy. *Journal of European Competition Law & Practice* 2016, 7 (2), p 88

³⁴⁷ Erickson, K., Sørensen, I. Regulating the Sharing Economy. *Internet Policy Review* 2016, 5 (2), p 6

³⁴⁸ Lougher, G., Kalmanowicz, S. EU Competition Law in the Sharing Economy. *Journal of European Competition Law & Practice* 2016, 7 (2), p 88

³⁴⁹ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 77; The Constitutional Council QPC 22.09.2015, Decision No. 2015-484, *The company Uber France SAS and others (II)*, para 10

³⁵⁰ DeMasi, A.A. Uber: Europe's Backseat Driver for the Sharing Economy. *Creighton International and Comparative Law Journal* 2016, 7, p 79

³⁵¹ *Id.*, p 78; CJEU 27.10.2016, C-526/15, *Uber Belgium BVBA v Taxi Radio Bruxellois NV*

Court due to admissibility issues but another case is pending before the CJEU from Spain. The Spanish court raised the issue of defining sharing economy services such as Uber, whether these should be considered merely information society services or transport services.³⁵² The latter definition would allow the Member States to impose their transport regulations on Uber. The United Kingdom, on the other hand, considers Uber's services to fall under the category of private car hire and distinguishes that the mobile application used is not a taximeter.³⁵³ Licensing requirements still apply to private hire vehicles but the approach is different from professional taxis. On the other hand, the United Kingdom has raised the issue that Uber drivers should be classified as employees rather than private contractors as Uber claims.³⁵⁴

The fragmented approach from the Member States is largely caused by the fact that there is no uniform standard for establishing whether such services are still information society services or transport services. As an information society service, Uber would enjoy more freedom within the EU without being subjected to bans and severe restrictions. If the CJEU categorizes Uber as a transport service, it will be subjected to the different approaches taken by the Member States. However, the conclusion may not be as black and white, whether it is one service or the other. The Uber platform can be defined as an information society service as it is provided through electronic means, at a distance and for remuneration. On the other hand, Uber also exercises a lot of control over the underlying transport service. Uber influences many terms of the contract concluded between the driver and passenger by facilitating the exchange, establishing the price through its unique algorithms, choosing the driver based on availability and proximity, and setting qualitative standards for its drivers and users monitoring it through a feedback system. It may be necessary to see whether the online service can clearly be separated from the transport service to decide which service Uber is providing. Following the analysis and research done in the framework of the given thesis, the author is of the opinion that the decision should include that Uber is, in fact, providing both services, however, the information society service ought to be considered the primary service. As an online platform, Uber should have

³⁵² CJEU 7.08.2015, C-434/15, *Asociacion Profesional Elite Taxi v Uber Systems Spain S.L.*

³⁵³ Royal Courts of Justice, London, United Kingdom 16.10.2015, EWHC (Admin) 2918 Case No. CO/1449/2015, *Transport for London v. Uber London Limited*, para 11, 15, 49

³⁵⁴ Employment Tribunals of the United Kingdom 28.10.2016, Case No. 2202550/2015 & Others, *Aslam, Farrar & Others vs Uber B.V., Uber London Ltd, Uber Britannia Ltd*, para 129

the ability to operate freely within the EU but local rules concerning transport may be applicable to Uber as a transport service provider.

Even with transport regulations being applicable to Uber as a provider and to its drivers, any restrictive measures on the freedom to provide such services and establish itself in a country need to be justified. Information society services enjoy the freedom of establishment and free movement within the European Union and collaborative platforms fall under the scope of TFEU Articles 49 and 56 for protection. Reasons such as consumer protection and public safety can be valid justifications for restrictive measures, however, it does not follow that such measures are necessary to achieve those objectives and could not be achieved through less restrictive means. It should further be deliberated whether regulation is, in fact, necessary to achieve objectives in the public interest or if it should be done just to protect traditional markets. Banning services such as UberPOP should be considered as the last resort and if there are less restrictive measures available to achieve the same goals as the ban then it is not justifiable. In that case, Member States need to revisit their regulations not to impede the operation of collaborative platforms.

In its approach, Estonia concludes that banning services such as Uber cannot be justifiable and to ensure public safety, protection of consumers and fair competition, they can be regulated differently. There is no reason to exclude innovative solutions such as mobile applications from use just because they do not conform to the traditional rules regulating transport services. Legislation, such as proposed by Estonia, is one solution to regulating the sharing economy services. Of course, this regulation only concerns ridesharing services while there are many other market segments the sharing economy has disrupted, which are likely to face regulation as well in the light of this proposal. However, these rules should not impede Uber's right to provide their information society service.

Questions considering the liability and responsibilities of the intermediary platforms may be answered through a new EU Directive. While this approach may be welcomed by many scholars, adding new regulations to an already existing complicated framework needs to be justified and necessary. Many of the issues surrounding such intermediaries could be answered through guidelines on different types of platforms and cooperation with the intermediaries themselves in the form of self-regulation. Regulating the standards for feedback mechanism may not be necessary as it is an essential part for

the sharing economy services to survive because they allow people to build trust with other users. Issues with one platform are also likely to reflect on other platforms, pushing the platform operators for higher standards. In addition, many questions surrounding consumer protection could be solved through accepting the new private relationships, which emerge from the sharing economies and otherwise establishing guidelines on who constitutes a trader on what basis. The Commission has so far preferred to guide the Member States through interpreting existing legislative acts and reprimanding them not to impose harsh measures, which could stifle innovation. Less regulation is a welcome approach.

Uberi reguleerimine areneva jagamismajanduse valguses

Kokkuvõte

Jagamismajanduse reguleerimine ja uued teenused nagu Uber ning Airbnb on hetkel paljudes Euroopa Liidu liikmesriikides pead tõstnud. Uued jagamismajanduse ärimudelid ei sobi esmapilgul olemasolevatesse regulatsioonidesse ei liikmesriikides ega EL tasandil, mis tekitab mitmeid õiguslikke küsimusi. Praegu ei ole kindel, milline oleks selliste platvormide vastutus konfliktide korral, kuidas peaks saadud tulu maksustama ning kuidas peaks jälgima, et teenusepakkujad vastavad vajalikule kvaliteedi standardile. Üheks suurimaks probleemiks on aga välja selgitada, kas selliste teenuste nagu Uber puhul on tegemist infoühiskonna teenusega või transportteenusega. Definitsiooni välja selgitamine aitaks otsustada, kas Uberile võib rakendada kohalikke reegleid, mis kehtivad taksoteenustele, või tuleb Uberi puhul jälgida infoühiskonna teenustele kehtivat reeglistikku. Kuivõrd pole veel selge, millal saab infoühiskonna teenusest transportteenuse pakkuja, siis on mitmed liikmesriigid otsustanud defineerida Uberit kui transportteenuse pakkujat ning teenuse ära keelata, sest Uber kasutab ebaausaid konkurentsivõtteid. Sellest tulenevalt on mõned liikmesriigid pöördunud ka Euroopa Kohtu poole.

Töö hüpoteesiks on, et selliste teenuste keelamine ei ole proportsionaalne ning hetkel kehtivad õigusaktid tuleks ära muuta või kehtestada uued reeglid, et võimaldada uute teenuste toimimine. Sellega seoses vastab töö muuhulgas järgmistele küsimustele: mis on Uberi õiguslik olemus, kuidas EL riigid hetkel reguleerivad jagamismajandust, kas Uberi keelamine läheb vastuollu EL printsiipide ja reeglitega ning kas oleks vajalik koostada uus õigusakt EL tasemel jagamismajanduse reguleerimiseks. Hüpoteesi tõestamiseks ja uurimisküsimustele vastamiseks kasutas autor kvalitatiivseid uurimismeetodeid. Selleks analüüsis autor antud teemal nii akadeemilisi materjale kui ka erinevaid õigusakte ja kohtulahendeid. Lisaks sisaldab töö õiguslikku võrdlust erinevate liikmesriikide regulatsioonide kohta, et uurida, millised on Uberiga seotud väljakutsed. Töö sisaldab ka intervjuud isikutega, kes on seotud Uberi ja sarnaste teenuste reguleerimiseks käimasoleva seadusemuudatusega.

Uberi defineerimine ning lahterdamine on keeruline, sest selles sisalduvad mitme erineva teenuse tüübi aspektid. Uberi mobiilirakendus võib oma olemustelt langeda infoühiskonna teenuste

definiitsiooni alla, sest teenust pakutakse elektroonilisel teel, vahemaa tagant ning teenusepakkuja isikliku taotluse alusel. Uber langeb selle definiitsiooni alla kuivõrd teenuse pakkumine toimub mobiilirakenduse vahendusel, juht ja sõitja ei ole samas kohas kui teenust taotletakse ning ei pea selleks kontakteeruma Uberi kontoriga ja iga sõitja esitab oma sõidusoovi ise oma vajaduste alusel rakenduse kaudu. Teisalt on oluline märkida, et Uberil on palju kontrolli lepingutingimuste üle juhi ja sõitja vahel. Uber määrab oma platvormi kaudu sõidu hinna ja sätestab juhtidele teatud kvaliteeditingimused, mida paljud teised platvormid ei tee. Sellega seonduvalt on võimalik defineerida Uberit ka transpordi pakkujana, kuid see peaks jääma Uberi puhul teisejärguliseks teenuseks. Infoühiskonna teenus peaks olema esmasel kohal kuivõrd Uberi idee on rakenduse vahendusel pakkuda võimalust juhtidel ja sõitjatel kohtuda.

Uberi keelamine läheb vastuollu asutamisvabaduse ja teenuste pakkumise vabadusega, sest meede ei ole proportsionaalne. Olgugi, et Uberi keelamine võib olla tingitud sellistest põhjustest nagu tarbijate õiguste kaitsmine, avalikkuse ohutus ning sõiduohutus, ei saa sellist meedet õigustada kui samasuguseid eesmärke on võimalik saavutada ka teistel viisidel. Uberi poolt kasutatavat infoühiskonna platvormi ei tuleks keelata ainult seetõttu, et see on uudne ja teistsugune. Liikmesriigid võivad sätestada reegleid Uberi juhtidele litsentside näol ning kehtestada teatud raamistiku ka Uberile kui transpordi pakkujale, mis saavutaksid samasugused eesmärgid, millega põhjendatakse Uberi keelamist. Seetõttu peaksid liikmesriigid üle vaatama seadused, mis sellised platvorme keelavad, et võimaldada infoühiskonna teenuste vaba liikumine ja jagamismajanduse eeliste saavutamine. Alternatiiviks keelamisele võib Uberit reguleerida eraldi nagu seda on teinud Eesti. Täpselt ei ole veel teada, milline seadusemuudatus Eestis läbi viiakse, kuid kindel on, et selle raames lubatakse juhtidel kasutada platvorme nagu Uber ning samuti lihtsustatakse taksodele kehtivat reeglistikku. Uus direktiiv või määrus EL tasandil muudaks olukorra samuti selgemaks ning kindlustaks selle, et liikmesriigid käituvad seoses selliste teenustega ühesuguselt ega piira teenuste liikumist. EL tasandil on aga regulatsioon juba üsna keeruline ning uue akti vajadust tuleks tõestada. Seevastu on teretulnud Komisjoni juhised ja iseregulatsioon jagamismajanduses, mis tuleks uuesti üle vaadata Euroopa Kohtu lahendi raames.

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Annex 1. Interview with Hindrek Allvee, Executive Officer in the Transportation and Traffic Division of the Ministry of Economic Affairs and Communications

1. Ühistranspordiseaduse muutmise eelnõu 188 SE I saadeti fraktsioonidele arvamuse küsimuseks detsembris ning vastused on tulnud 2017. a alguses nii fraktsioonidelt kui ka teistelt huvitatud osapooltelt. Kuivõrd Riigikogu lehel on kirjas vaid, et eelnõu on teisel lugemisel, oskate öelda, mis staadiumis on see praegu?

Majandus- ja kommunikatsiooni ministeerium sai Majanduskomisjonilt juhised, mille alusel tuleks eelnõusse muudatused sisse viia vastavalt fraktsioonidelt ja osapooltelt saadud arvamustele. Ministeeriumil on hetkel käsil eelnõu kolmanda versiooni koostamine saadud juhiste baasil. Kolmas eelnõu versioon ei reguleeri kokkuleppevedu eraldi. Selle asemel näeb eelnõu ette lihtsustatud reeglistikku taksodele, kuhu hulka kuulub ka kokkuleppevedu kui tasuline sõitjate vedu.

2. Ühistranspordiseaduse muutmise eelnõu 188 SE I seab üles reeglid kokkuleppevedudele ent paljud reeglid juba vastavad nendele tingimustele, mida infoühiskonna teenusepakkujad ise seavad nii platvormidele (tagasiside pakkumine, informatsioon juhi kohta jne) kui ka juhtidele. Praegusel juhul on tegemist iseregulatsiooniga ning võttes arvesse kui palju inimesi kasutavad näiteks Uberi teenust, tundub, et see süsteem toimib. Kas sellisel juhul on ilmtingimata vajalik läbi viia sellist seadusemuudatust? Kui legaliseerida kokkuleppevedu, kas seejärel on jätkuvalt prioriteediks ka lihtsustada seda raamistikku, mis kehtib taksodele?

Kokkuleppevedude reguleerimise üheks aluseks on võrdse kohtlemise põhimõte, mille alusel peavad analoogsetel teenustel olema ka sarnased piirangud. Kuivõrd ühel transportteenusel on juba seaduses ettenähtud regulatsioon olemas, ning Uberi ja Taxify puhul on tegemist olemuslikult analoogse teenusega nagu taksoteenus, siis tuleb ka sellisele teenusele kehtestada vastavad nõuded.

Antud seadusemuudatuse ja regulatsiooni eesmärgiks on lasta kõigil seaduslikult tegutseda, sest ärimudeli piiramine ei ole lahendus. Samuti ei saa kehtestada ebavõrdseid piiranguid sarnastele teenustele. Näiteks nõue, et kokkuleppeveo puhul peaks vedaja autot omama või olema vastutav kasutaja on ebaproportsionaalne kui taksoteenuse puhul sellist nõuet ei ole. Samuti tuleks lubada taksodel kasutada infoühiskonnaplatforme.

Selliste teenuste nagu Uber ja Taxify toimimine on aga näidanud, et praegu kehtiv taksoreeglite raamistik vajab lihtsustamist ning selle protsessi raames on võimalik kõik tasulised sõitjateveo teenused lihtsustada ja võrdsustada. Praegu koostatakse uut eelnõu versiooni, kus kõigile saab kohustuslikuks loamenetlus lihtsustatud kujul ning sarnaselt taksofirmadele tuleb ka Uberil ja Taxifyl omandada tegevusluba. Vedajal on võimalus valida, kas kasutada sõitmisel taksomeetrit või infoühiskonna platvormi, millele kehtivad erinevad reeglid. Eristus tuleneb sellest, kas soovitakse teenust pakkuda *online*-süsteemi vahendusel või *offline*. Kuivõrd eelnõu kolmanda versiooni tekst on veel tegemisel, siis ei ole kindel, kas see sellisel kujul läheb teisele lugemisele või tulevad mingid teised muudatused sisse.

3. Majanduskomisjoni ja Majandus- ja Kommunikatsiooniministeeriumi istungitel arutati käibe piiri sätestamist kokkuleppevedudele selle definitsiooni osana/ühe kriteeriumina, kuid otsustati see välja jätta. Kuivõrd käibe piirang ei ole võib-olla oluline kokkuleppeveo defineerimisel, on selliseid piiranguid kasutatud näiteks Hollandis, et lihtsustada tulu maksustamist jagamismajanduses oselatevatele teenusepakkujatele. Kas selline lähenemine oleks võimalik ja oodatud ka Eestis?

Käibepiirangu küsimus ei ole seotud antud seadusemuudatusega ning seetõttu ei ole see ka hetkel arutamisel. See on seotud majandustegevuse küsimusega. Antud seadusemuudatus on seotud ainult avalik-õiguslike piirangutega transportteenustele.

4. Kuivõrd Ühistranspordiseaduse muutmise eelnõu 188 SE I enam ei sätesta reegleid eraldi infoühiskonnateenuse platvormi operaatorile ja platvormile, sätestab see pigem reeglid kokkuleppeveo teostamisele. Mitmed neist sätetest on aga otseselt seotud ka platvormi endaga ning kuidas see toimib, näiteks kokkuleppeveo teostaja peab sõitjale teatavaks tegema hinna informatsiooni, ja infoühiskonna teenuse vahendusel tuleb anda informatsioon juhi kohta ja teostatud sõidu kohta, samuti peab infoühiskonnateenuse vahendusel saama anda tagasisidet. Kõik see toimib praegu infoühiskonnateenuse vahendusel ning regulatsiooni eesmärk ongi sätestada nõuded selliselt, et see kataks selle, kuidas süsteemid praegu toimivad ilma, et kvaliteet langeks. Kas sellisel juhul on siiski võimalik, et sellest seaduse muudatusest tuleb teavitada Euroopa Komisjoni, sest tegemist on tehnilise regulatsiooniga, mis sätestab piirangud sellele, kuidas infoühiskonna platvorm peaks toimima?

Tegemist võib olla tehnilise regulatsiooniga ning see on hetkel läbivaatamisel. Eelnõus väljatoodud sätted on sõnastatud nõuetena vedajale.

Annex 2. Interview with Kalle Palling, Member of the Parliament

1. Ühistranspordiseaduse muutmise eelnõu 188 SE I saadeti fraktsioonidele arvamuse küsimiseks detsembris 2016 ning vastused on tulnud 2017. a alguses nii fraktsioonidelt kui ka teistelt huvitatud osapooltelt. Kuivõrd Riigikogu lehel on kirjas vaid, et eelnõu on teisel lugemisel, oskate öelda, mis staadiumis on see praegu?

Eelnõu on endiselt teisel lugemisel. Maikuu jooksul (2017. aastal) menetlus jätkub. Teine lugemine katkestatakse ja antakse uus aeg muudatusettepanekute esitamiseks. Seda põhjusel, et võrreldes algsest pakutuga on palju muutunud.

2. Ühistranspordiseaduse muutmise eelnõu 188 SE I seab üles reeglid kokkuleppevedudele ent paljud reeglid juba vastavad nendele tingimustele, mida infoühiskonna teenusepakkujad ise seavad nii platvormidele (tagasiside pakkumine, informatsioon juhi kohta jne) kui ka juhtidele. Praegusel juhul on tegemist iseregulatsiooniga ning võttes arvesse kui palju inimesi kasutavad näiteks Uberi teenust, tundub, et see süsteem toimib. Kas sellisel juhul on ilmingimata vajalik läbi viia sellist seadusemuudatust? Kas oleks mõeldav jagamismajanduse platvormid ja teenused legaliseerida muul viisil, ilma, et sätestaks neile uusi piiranguid, ning selle asemel üle vaadata olemasolevad reeglid, et need ei piiraks jagamismajandust?

See lähenemine võiks isegi töötada, aga vaid ideaalolukorras. Kahjuks on aga seaduse vastuvõtmiseks vaja Riigikogu enamuse toetust ja saadikute arusaamad jagamismajandusest ning tehnoloogia arengust on erinevad.

3. Majanduskomisjoni ja Majandus- ja Kommunikatsiooniministeeriumi diskussioonid ning huvitatud osapoolte arvamused näitavad, et lisaks kokkuleppevedude reguleerimisele on samavõrd oluline küsimus taksode regulatsiooni ülevaatamine. Kui legaliseerida kokkuleppevedu, kas seejärel on jätkuvalt prioriteediks ka lihtsustada seda raamistikku, mis kehtib taksodele?

Jah. See nägemus, mis pakutakse Majanduskomisjoni poolt Riigikogule teiseks lugemiseks sisuliselt muudab senist taksoduse loogikat, st. tekib paindlik taksoregulatsioon.

4. Majanduskomisjoni ja Majandus- ja Kommunikatsiooniministeeriumi istungitel arutati käibe piiri sätestamist kokkuleppevedudele selle definitsiooni osana/ühe kriteeriumina, kuid otsustati see välja jätta. Kuivõrd käibe piirang ei ole võib-olla oluline kokkuleppeveo defineerimisel, on selliseid piiranguid kasutatud näiteks Hollandis, et lihtsustada tulu maksustamist jagamismajanduses oselatevatele teenusepakkujatele. Kas selline lähenemine oleks võimalik ja oodatud ka Eestis?

Ei. Ettevõtlusega tegelemine ja sellega alustamine peab olema lihtne ja loogiline ning iga piirang peab olema hästi põhjendatud. Käibepiirang seda ei ole. Sisuliselt oleks tekkinud olukord, et tublimad (need kes töötavad rohkem, kelle käive on suurem) saaksid karistatud. Kui töötad piiri täis, siis pead alustama tööd taksoregulatsiooni all või sootuks muu võimaluse leidma. Lisaks on Maksuameti ja platvormide koostöös juba välja arendatud lahendus, kus esimesest sõidust alates saab juhtide

nõusolekul automaatselt andmed tuludeklaratsioonile esitada. See lahendus on maailmas unikaalne ja võimalik meie hästi arenenud e-teenustele.

5. Kuivõrd Ühistranspordiseaduse muutmise eelnõu 188 SE I enam ei sätesta reegleid eraldi infoühiskonnateenuse platvormi operaatorile ja platvormile, sätestab see pigem reeglid kokkuleppeveo teostamisele. Mitmed neist sätetest on aga otseselt seotud ka platvormi endaga ning kuidas see toimib. Kas sellisel juhul on siiski võimalik, et sellest seaduse muudatusest tuleb teavitada Euroopa Komisjoni, sest tegemist on tehnilise regulatsiooniga, mis sätestab piirangud sellele, kuidas infoühiskonna platvorm peaks toimima vastavalt Direktiivile 2015/1535?

Hetkel oleme veendunud, et me ei pea teavitama Euroopa Komisjoni.