

GETTING OVER UBER IN CANADA

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Introduction

Since its arrival in Canada in 2012, Uber has generated heated discussion among affected interests, notably the established taxi industry, regulatory bodies overseeing the industry, and municipal and provincial governments responsible for putting the existing regulatory frameworks into place. In an effort to stave off the impact of its competitive offerings, Uber has been banned outright in some cities and sued in others, its drivers have been charged with various violations, vehicles have been seized, and extra-legal measures have been employed, ranging from tying up traffic with protests and demonstrations to smashing drivers' cellphones. Emotions have reached such unreasonable extremes that Uber has even been labelled as "worse than ISIS" and accused of engaging in the "genocide" of the taxi industry.

On November 26, 2015, the Bureau entered the roiling Uber debate with the release of a "white paper" entitled "Modernizing Regulation in the Taxi Industry" (the "White Paper"). As denoted by its title, the Bureau's White Paper uses the entry of Uber as a platform upon which to advocate its more general views on regulation of the taxi industry in Canada. While clearly of the opinion that efforts to squelch competition are counterproductive and antithetical to consumer interests, the White Paper does not adopt a dogmatic anti-regulation position in advocating for greater openness to competition. Rather, the White Paper is careful to recognize that regulation still has a role to play in the taxi industry, but one that needs to focus on promoting competition and limiting intervention to the minimum necessary to address legitimate policy concerns.

As discussed below, competition advocacy is an integral element of the Bureau's mandate to champion competition and competitive forces in Canada. In this article, we consider whether and how well the White Paper advances this goal and supports the Bureau's mandate.

The Competition Bureau as Competition Advocate

The Bureau is charged with administering and enforcing Canadian competition law, as embodied principally in the Competition Act (the "Act"). The large part of this mandate is carried out through different forms of enforcement action - investigations, inquiries, contested proceedings, consent agreement settlements, and so on. But so-called "competition advocacy" is another important way for the Bureau to help ensure a competitive marketplace. This involves the Bureau promoting the benefits of competition by means of non-enforcement mechanisms, ranging from making formal submissions before federal and provincial regulatory boards on the one hand to "consciousness-raising" initiatives such as organizing "Cartel Days" and "Fraud Awareness Months" on the other.

The current Commissioner of Competition, John Pecman, has done much to reinvigorate the Bureau's advocacy role since his appointment in 2013. As an example, the Bureau now has a separate branch, the Competition Promotion Branch, charged with encouraging the adoption of pro-competitive policies by governments, regulators, and the business community. The Bureau has also created a new platform on its website devoted to its advocacy function, and periodically publishes The Competition Advocate to share views on this topic.

The Parameters of Bureau Advocacy

In one of his first speeches in office, Commissioner Pecman provided helpful insight into when the Bureau is most likely to engage in advocacy efforts.

First, the Commissioner identified three sectors of the Canadian economy where he thought competition advocacy holds the most promise: the digital economy, the retail sector and the health sector.

The Commissioner then noted the types of competitive restrictions that concern the Bureau the most:

- Restrictions that raise barriers to entry or expansion in a market.
- Restrictions that control how firms are allowed to compete in a market.
- Restrictions that shield firms from competitive pressure.

Finally, the Commissioner noted that, as a practical matter, the Bureau lacks the resources necessary to intervene in every deserving case. As such, he outlined the four strategic criteria which the Bureau will use to triage when to exercise its advocacy mandate:

- Does a forum to present exist, and is there a high level of public interest?
- Will the Bureau be contributing in a useful way?
- Will the Bureau be able to gauge the impact of its advocacy efforts?
- Will its efforts have clear, tangible benefits for Canadians?

Given the foregoing criteria, it is no surprise that the Bureau has chosen to intervene publicly in the current debate over the future of Canada's taxi industry. This issue is obviously of intense public interest, it involves cutting edge innovative business models based on so-called peer-to-peer platforms, and it offers the Bureau the opportunity to promote pro-consumer interests over restrictionist efforts to shield incumbents from competitive pressures. More generally, the debate over Uber (and other ride-sharing services of a similar nature) highlights an important issue that is often central to the Bureau's advocacy efforts - how to strike the correct balance between the sometimes conflicting imperatives of government regulation and free competition.

Competition Bureau Concerns with the Taxi Industry

(i) February 2014 Submission to Toronto Taxi Review

As it happens, the White Paper is not the first time that the Bureau has addressed issues of competition in the Canadian taxi industry. In February 2014, the Bureau submitted a brief to the City of Toronto's Taxicab Industry Review in which it argued that the City of Toronto should increase the number of taxi licences issued to drivers because the City's restrictive approach to licensing created upward pressure on fares and downward pressure on service. For example, the Bureau noted that taxi fares in Toronto were among the highest in North America and that wait times in Toronto also compared unfavourably to those in many other jurisdictions (e.g. the average wait times in Toronto were 9 and 10 minutes compared to Ireland where on average customers waited five minutes or less). The Bureau also argued that low income groups and other vulnerable parts of the population (such as seniors and the disabled) were disproportionately affected by the lack of competition pervading the taxi industry.

The Bureau's position on the need to liberalize licensing restrictions echoed the views of a report issued by the OECD's Competition Committee in 2007 on competition for taxi services. The OECD concluded that omnipresent restrictions on entry represent the greatest impediment to competition in the taxi industry. These restrictions take the form of overall limits on the number of licences available for taxi drivers or rules that call for excessively high quality of cars or driver training. The result is an undersupply of services at competitive prices, with low income consumers being the most significantly disadvantaged. The OECD therefore recommended that the removal of quantitative entry restrictions be the focus of regulatory reform of the taxi industry. As for qualitative restrictions, the OECD recognized that while these have a role to play in promoting consumer welfare, they must be designed carefully to ensure that they do not prevent the development of innovative services and market structures. For example, the OECD suggested that regulators should not set vehicle standards in ways that limit the provision of low price services that meet consumer demand.

In what turned out to be a foreshadowing of the issues it would address in the White Paper, the Bureau's February 2014 submission also discussed the impact of new and emerging technologies on the Canadian taxi industry.

The Bureau recognized that many local municipalities had raised concerns that the new services and their drivers were not in compliance with local regulations and licensing requirements. The Bureau also took notice of possible consumer protection issues, including possible safety and privacy concerns.

On balance, however, the Bureau's position was that both consumers and operators would benefit from competition between traditional and new products and services, and from new methods of delivering these products and services. It therefore invited the City of Toronto, and by extension all relevant Canadian authorities, to re-examine their regulatory frameworks for the taxi industry and to limit their regulatory interventions to cases where they are needed to prevent harm to consumers or taxi operators. As the Bureau's submission stated: "We believe that unwarranted restrictions on competition should be avoided, and any restrictions on competition should be no broader than reasonably necessary to address legitimate subjects of regulation".

(ii) The White Paper

The White Paper provides a more in-depth analysis and discussion of the issues raised by Uber and other ride-sharing applications than does the Bureau's February 2014 submission to the City of Toronto. However, the defining themes and messages are the same, namely that the advent of ride sharing services necessitates a "re-think" of the existing regulatory framework based on the following core principles: (a) competition is the best means to ensure that consumers have access to the broadest range of products and services at competitive prices; and (b) while regulation has a legitimate role to play, restrictions should be limited to meeting legitimate policy objectives, such as protecting the safety of passengers and drivers, and should not be used to impede competition from new entrants. The contribution of the White Paper is to spell out in more detail the Bureau's view of what this revised regulatory framework should look like.

The White Paper begins by citing the competitive benefits resulting from the entry of new ride sharing services (also referred to as "transportation network services" or "TNCs") into Canada: lower prices, reduced waiting times, greater access to and availability of taxi services, improved quality of service and convenience for consumers. The White Paper also acknowledges that part of this overall improvement is due to the competitive reactions of traditional taxi services, e.g., developing their own apps to compete with Uber and a new (and welcome) emphasis in some instances on cleaner vehicles and more courteous service. At the same time, the Bureau does not ignore concerns about public safety that could require regulatory intervention.

In proposing a new framework for the taxi industry, the basic premise of the Bureau's recommendation for change is that all ride providers - traditional taxi services and TNCs - be on a level regulatory playing field. Contrary to the efforts of certain authorities, this does not mean simply imposing the same existing standards across the board on all ride providers; nor does the Bureau suggest the opposite by recommending that all regulations be scrapped. Instead, the Bureau seeks somewhat of a middle ground in which all ride providers - new and old, traditional and TNCs - be subject to a "lighter" regulatory framework in which regulations serve legitimate public policy objectives and are no more intrusive than necessary. The benefit of such an approach, in the Bureau's view, is that it avoids overregulation of the industry, does not favour one class of provider over another, and ensures that traditional services have the flexibility to respond competitively to TNCs to the benefit of consumers (and themselves).

Repeating one of the new mantras currently in favour in Canada, the Bureau recommends further that regulators should employ an "evidence-based" approach to regulation, i.e., rely on empirical evidence whenever possible to test the efficacy of any new proposed regulation.

Finally, the Bureau also suggests that regulators should continually question and revisit the effectiveness of restrictions they impose. To that end, the Bureau recommends the employment of "sunset clauses" so as to

encourage periodic reviews of the effectiveness of and need for regulatory limitations on the taxi industry.

With these basic principles in mind, the White Paper proceeds to set out the Bureau's views on specific issues affecting competition in the taxi industry:

Entry Restrictions - As in its February 2014 submission, the Bureau continues to recommend that regulators remove entry restrictions and transition to an "open entry" system that would allow any qualified applicant to operate a vehicle-for-hire. The Bureau acknowledges that cities that have moved towards open entry systems have experienced mixed results - in some cases, there has been an influx of improperly maintained vehicles and congestion at popular pick-up locations such as hotels and airports. However, the Bureau believes that these issues can be dealt with via new technologies and targeted rules and is still preferable to the blunt instrument of placing an absolute limit on the number of permissible taxi cabs.

Price Controls - One of the obvious goals of removing entry restrictions is to put downward pressure on prices. However, regulation can be an impediment to price reductions if drivers are prevented from reacting to greater competition by lowering prices. While not advocating that price controls be scrapped entirely, the Bureau urges regulators to show greater flexibility in devising rules that will allow all drivers to set their fares more independently in reaction to market forces.

Public Safety and Consumer Protection - The Bureau recognizes that regulators have legitimate objectives in establishing rules to protect the safety of passengers, drivers and third parties and thus recommends that these rules apply to both traditional services and TNCs. However, consistent with its overall theme, the Bureau recommends that regulators relax overly-strict rules that impede competition.

Quality of Service - Similarly, the Bureau recommends that legitimate quality of service regulations be applied equally to both traditional taxi services and TNCs. Again, however, the Bureau cautions against the risk of over-regulation. Differences in quality of service, e.g. providing bottles of water or magazines and driver attire, are an important competitive factor and therefore should not be overly standardized.

Licensing and Training - To obtain a valid taxi driver's license, traditional taxi drivers undergo an intensive licensing process which include providing a driving record and results of a criminal background check, completing educational program requirements and ongoing annual courses and paying annual fees. Generally speaking, TNCs are currently only required to conduct background checks on drivers and offer driver training. The Bureau recommends that regulators create a uniform licensing process for both traditional taxi services and TNCs that will ensure an appropriate level of safe and knowledgeable services without being more burdensome and restrictive than necessary.

Limits on Street Hails - Most Canadian municipalities that permit the operation of TNCs still limit their ability to accept street hails or use taxi stands. The Bureau recommends that regulators consider reducing these restrictions, if not eliminating them entirely, so that the rules are the same for both traditional market participants and TNCs.

Accessibility - Regulators often create rules that mandate or incentivize taxi companies to offer accessible services to persons with disabilities. The Bureau recommends that regulators consider applying the same rules and similar incentives to TNCs so that passengers who need accessible services can also benefit from increased competition.

In summary, the Bureau's White Paper strikes a balance between the twin poles of free competition and all-encompassing regulation. Although clearly reflecting a bias towards competition, the White Paper acknowledges the role that regulation may still have to play in the Canadian taxi market, so long as that role is appropriately defined and limited. As well, the White Paper does not purport to provide regulators with detailed, nuts and bolts advice on how taxi regulations should be restructured. Rather, the Bureau's approach is to set out general principles that regulators and governments can then apply having regard to their greater expertise.

International Context

The Bureau's approach to modernizing the taxi industry is consistent with the views expressed by competition authorities in other jurisdictions that have been grappling with these issues. Not surprisingly, these authorities also support entry by TNCs and have taken a variety of steps to promote greater competition in the industry.

For example, Brazil's Council for Economic Defence ("CADE") has initiated administrative proceedings against individual taxi drivers and their associations for abusive actions against TNCs, such as damaging cars, threatening and injuring TNC drivers and passengers and blocking TNC vehicles from using roadways; the Australian Competition and Consumer Commission ("ACCC") has refused to clear a joint venture of established taxi companies that it found would have hindered entry by TNCs; in Mexico, the competition authority, COFECE, has urged that Uber and other ridesharing services not be subjected to taxi regulations beyond those necessary to protect consumer safety; India's Competition Commission has rejected complaints of unfair business practices brought against Uber and Ola (another ride sharing service) by rival taxi companies; the competition authority in France has issued opinions favourable to Uber and related services; and in the U.K., the Competition and Markets Authority ("CMA") has criticized London's transportation authority for proposing new rules that would impose significant restrictions and burdens on companies such as Uber.

FTC Chairwoman Edith Ramirez provided an excellent summary of the prevailing sentiment among competition authorities in a speech she delivered in October 2015:

The threshold question for policymakers examining new peer-to-peer businesses should be whether there is a public policy justification for regulating the service at all, either through an expansion of existing regulatory schemes or entirely new ones. If there is no public policy rationale justifying regulation, policymakers should allow competition to proceed unfettered. Our experience tells us that consumers generally benefit from the competition that arises between traditional and new business models.

One of our main concerns is that existing regulatory schemes tend to mirror, and perhaps even entrench, traditional business models and thereby chill pro-consumer innovation ... A related concern is that existing regulatory bodies may be controlled or influenced by the very interests they regulate, and that incumbents will use the existing regulatory structure to deter new, potentially disruptive entry ...

Of course, regulatory boards and other policymakers may have legitimate consumer protection and other public interest objectives for regulation, among them public safety. But policymakers must carefully consider the potential competitive effects of such regulations as well as the justifications being urged to support them.

Regulatory frameworks, to the extent they are needed, should be flexible enough to allow new forms of competition. Often, the existing regulations governing the traditional industry (here, taxicabs) have been in place for decades without much change. It is advisable that they be reviewed and revised periodically to facilitate and encourage the emergence of new forms of competition that would benefit consumers.

In addition, any regulatory response should be narrowly tailored to the specific public policy goals that have been identified. We recommend that regulations directed at ride-sharing services should focus primarily on ensuring qualified drivers, safe and clean vehicles, sufficient liability insurance, transparency of fare information, protecting privacy and consumer data, and compliance with other applicable laws.

This is a perfect reflection of the Bureau's approach as well.

Conclusion

The Uber story offers a paradigmatic example of the disruptive impact that a new technology can have on entrenched incumbent interests. It also has presented the Bureau with an excellent opportunity to promote the benefits of innovation and competition in what has to date been a pervasively regulated market.

It is possible to argue that the Bureau should have been even more aggressive in substance and tone in the White Paper. Frankly, the taxi industry's arguments against Uber are not credible and obviously self-serving. However, the Bureau has to operate within the confines of reality and obviously concluded that a measured approach is more likely to gain adherents among key stakeholders.

One also expects that the White Paper will not be the Bureau's last word on this subject. The situation continues to evolve as Canadian authorities are really only at the starting point of grappling with the issues raised by Uber and other ride sharing services. As such, there will be an ongoing need for the Bureau to monitor developments and step in to promote and protect competition as necessary, whether through its advocacy role (as has been the case so far) or otherwise.

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