

# Kluwer Competition Law Blog

## Sharing and traditional economy: a matter of substitutability... between cats and dogs?

Marcin Mleczko (Polish Office of Competition and Consumer Protection) · Friday, March 24th, 2017

Sharing economy firms are disrupting traditional industries across the globe. As Tom Goodwin once put it: *“Uber, the world’s largest taxi company, owns no vehicles. Facebook, the world’s most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory. And Airbnb, the world’s largest accommodation provider, owns no real estate. Something interesting is happening.”* Something interesting is happening indeed, also from the competition law perspective.

One of the general sharing economy’s most attractive features is lower entry barriers: Airbnb facilitates entering the accommodation market and competing with hotels and hostels, and Uber facilitates entering the taxi services market[1]. One can’t argue that it’s for the benefit of the consumers, when sellers can easily enter and exit markets without incurring great costs.

But the new business models put the traditional markets under constant threat. Last year, a French hoteliers body complained against Airbnb over unfair competition by private persons offering accommodation via Airbnb, without having to respect the stringent rules applicable to hotels. Similar actions have taken place all across Europe, putting pressure on regulators and lawmakers. At first, their responses differed to a great extent. However, in the most recent past, many national competition authorities from the EU (see for example Polish[2] or British[3]) have **warned against over-regulating new online and sharing economy markets**, or even taken action against existing restriction. Since the end of 2015, also the European Commission has undertaken many initiatives relating to the sharing economy, including the Communication on a European agenda for the collaborative economy[4]. In the Communication, the Commission uses the term collaborative economy to refer to “business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals”. The Commission intends to provide non-binding legal guidance and policy orientation to public authorities, market operators and interested citizens for the balanced and sustainable development of the collaborative economy with a focus on how existing EU law should be applied to the collaborative economy.

### The US perspective: cats and dogs?

How to approach the fact that suppliers of products and services via sharing platforms often do not

have to comply with laws as their traditional competitors have to: Uber drivers do not have to obtain licences and Airbnb renters are not the subject to extensive health and safety regulations? This particular issue was decided before the United States Court of Appeals in Chicago (hereinafter: the “Court”) on the 7<sup>th</sup> October 2016[5]. The plaintiffs argued that the City has discriminated against them by failing to subject Uber to rules about licensing and fares.

The Court stated that the argument is not valid. Its premise is that every new entrant into a market should be forced to comply with every regulation applicable to incumbents in the market with whom the new entrant will be competing. Describing taxis and Uber the Court used a vivid analogy:

“Most cities and towns require dogs but not cats to be licensed. There are differences between the animals. Dogs on average are bigger, stronger, and more aggressive than cats, are feared by more people, can give people serious bites, and make a lot of noise outdoors, barking and howling. Feral cats generally are innocuous, and many pet cats are confined indoors.”

The Court held that ridesharing services are different animals than taxicabs, and **Uber is as different from taxis as dogs are from cats**: you can’t physically hail down an Uber vehicle on the street but must use a smartphone application to do it for you, and a taxi’s fare structure in the US is determined by the city. In the view of the Court, the plaintiffs in the present case had no stronger argument for requiring that Uber and the other TNPs be subjected to the same licensure scheme as the taxi owners.

“Just as some people prefer cats to dogs, some people prefer Uber to Yellow Cab, Flash Cab, Checker Cab, et al. **They prefer one business model to another.** [...] Suppose the district judge happened to think dogs and cats interchangeable, and on that ground ruled that requiring dogs but not cats to be licensed (the law in Chicago) was a violation of equal protection. The proper response would be that she is entitled to her opinion but not entitled to impose it when **the market perceives**, and as we noted earlier **has reasonable and non-discriminatory grounds for perceiving, a rational difference** between the competing animals that she does not perceive. Her belief that taxis and TNPs are interchangeable is similarly not shared by the entire relevant consumer market.”

In the view of the Court, situation in which prospective entrants to a market who had lower costs than incumbent firms would not be allowed to enter the market unless some regulatory entity burdened the new entrants with regulations (that eliminated any cost advantage the entrants would otherwise have), is an absurd impediment to competition and disservice to consumers.

### **More regulation or less regulation?**

This issue is not a complete novelty. For example in the OECD’s Competition Committee Report

on Competition for Taxi Services from 2007[6] one of the conclusions was as follows: **Restrictions on entry represent the greatest impediment to competition in the taxi industry** (limits on the number of licenses and rules on quality of cars and driver training).

In Federal Trade Commission staff report on taxicab regulation from 1984[7] the findings are similar. The main conclusions were that **restrictions on entry** (numerical limits, limits based on cab/population ratios, or public convenience and necessity requirement) **did not appear to be supported by plausible theoretical arguments**.

In November 2003, the UK Office of Fair Trading – OFT (now CMA), released a report examining seven countries and 13 licensing areas in the UK. They have recommended a **policy of open entry**, maximum fares with flexibility downward and proportionate direct regulation of quality and service attributes. They have found, that there was no clear economic rationale for quantity controls which appear to have been introduced in the 1630s primarily to prevent street congestion.

### **Any other problems?**

Although the competition that arises between ~~eats and dogs~~ traditional and sharing economy models is generally beneficial for consumers, there are already some competition concerns.

For example, there has been a lively debate on **Uber pricing system**[8]. Uber's data on travel habits and preferences allowed it to develop a dynamic pricing scheme. Uber charges at a premium when taxi rides are in most demand, using a “surge pricing” mechanism. Surge pricing changes are driven algorithmically when wait times are increasing dramatically, and unfulfilled requests start to rise. There is a danger, that certain use of algorithmic pricing may influence **market transparency** (which can allow reaching supra-competitive price equilibrium to be agreed by competitors) and even **collusion**.

But what happens if taxis and hotels are unable to respond to the challenge of Uber and Airbnb so there is a chance that they will be gradually driven out of the market? As the sharing economy players become stronger, the focus should be on making sure that the markets remain open to the competitors of Uber and Airbnb (both sharing economy platforms and traditional business models). One must also take into the account the **huge impact of network effects** on the two-sided markets – which can lead any sharing economy business model into a great market power. If it does – many concerns may arise from the potential **abuse of a dominant position**.

Whether competition enforcers have adequate tools for dealing with such harms is for this moment unclear, however many experts agree that they already got what it takes to adequately address potential abuses of dominance by online platforms[9]: “**The digital economy is dynamic but not operating in a legal vacuum**. Many existing rules can be applied to digital business models. Sometimes this may require reinterpretations or adaptations of laws, but often they just need to be enforced.”.

*The views expressed herein are those of the author and do not represent the views of the Office of Competition and Consumer Protection.*

[1] More on the relevant market definition: F. Russo, *Defining the relevant market in the sharing economy*, available at: <https://policyreview.info/articles/analysis/defining-relevant-market-sharing-economy>.

[2] Polish Competition Authority press release: [https://www.uokik.gov.pl/news.php?news\\_id=12353](https://www.uokik.gov.pl/news.php?news_id=12353).

[3] <https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-online-platform-regulation>.

[4] European Commission – Press release „A European agenda for the collaborative economy” [http://europa.eu/rapid/press-release\\_IP-16-2001\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2001_en.htm).

[5] Illinois Transportation Trade Association et al. v. City of Chicago (7 October 2016) – US 7th Circuit Court of Appeals, <https://assets.documentcloud.org/documents/3126078/Illinois-Transport-v-Chicago-1.pdf>.

[6] OECD’s Competition Committee Report on Competition for Taxi Services, October 2007, available at: <http://www.oecd.org/regreform/sectors/41472612.pdf>.

[7] Frankena, M. W. and P. A. Pautler, *An Economic Analysis of Taxicab Regulation*, Bureau of Economics, Federal Trade Commission, 1984, available at: <http://www.ftc.gov/be/econrpt/233832.pdf>.

[8] See for example: <http://abovethecrowd.com/2014/03/11/a-deeper-look-at-ubers-dynamic-pricing-model>.

[9] Olga Batura, Nicolai van Gorp and Pierre Larouche (e-Conomics), *Online Platforms and The EU Digital Single Market*, available at: [http://ec.europa.eu/information\\_society/newsroom/image/document/2016-7/nikolai\\_van\\_gorp\\_-\\_response\\_economics\\_to\\_the\\_uk\\_house\\_of\\_lords\\_call\\_for\\_evidence\\_14020.pdf](http://ec.europa.eu/information_society/newsroom/image/document/2016-7/nikolai_van_gorp_-_response_economics_to_the_uk_house_of_lords_call_for_evidence_14020.pdf).

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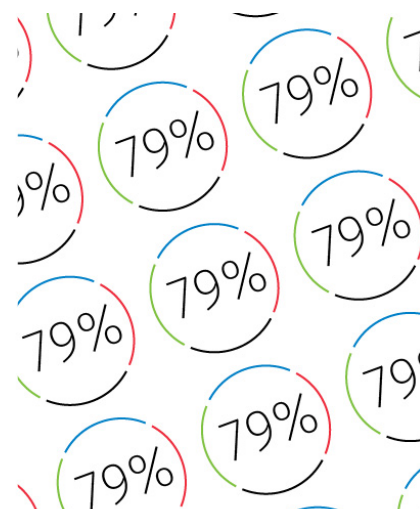
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*Source: OECD* > Consumer welfare

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