COMPETITION ENFORCEMENT CHALLENGES IN SHARING MARKETS

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Antitrust policy analysis on platform and information and communication markets

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.

Airbnb

The world's largest accommodation provider, owns no real estate.

Something interesting is happening.

TOM GOODWIN

SHARING ECONOMY: MULTIPLE DEFINITIONS

- **NOT SECTORIAL**
- **COMMON CHARACTERISTICS:**
  - **Online platforms**
  - **Interaction of private parties (usually by sharing under-used assets)**
  - **Lower transaction costs**
  - **“Unregulated” market**
- **Botsman (2015) “*an economic system based on sharing underused assets or services, for free or for a fee, directly from individuals*”**
- **Frenken et al. (2015) “*consumers (or firms) granting each other temporary access to their under-utilized physical assets ("idle capacity"), possibly for money*”**
- **Oxford Dictionary “*an economic system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the Internet*”**

"To grasp the scale of disruption posed by the sharing economy, consider that […] Uber operates in more than 250 cities worldwide and as of February 2015 was valued at $41.2 billion - a figure that exceeds the market capitalization of companies such as Delta Air Lines, American Airlines and United Continental. PWC's projections show that five key sharing sectors - travel, car sharing, finance, staffing, and music and video streaming - have the potential to increase global revenues from roughly $15 billion today to around $335 billion by 2025."

PWC - The Sharing Economy - Consumer Intelligence Series (2014)

COMPETITION LAW CONCERNS

- Winner-takes-all effect – strong network effects create a ‘tipping point’
- Barriers to multi-homing – locking in suppliers, no ‘reputation’ transfer
- Asymmetries of bargaining power
- Contracts that reference rivals (Apple iBooks case)
  - MFN clauses (Online Travel Agents case)
- Escaping scrutiny – value of transaction v. merger thresholds
- Use of big data
- Price restrictions

ALGORITHMIC PRICING

Digital platforms use data and search algorithms to match the two sides of the market (**platform intermediation**).

In some businesses (airline tickets, hotel booking and online retail), algorithms are commonly applied to determine what price best matches the demand and the offers of competitors.

Consequences:

- **market transparency** (enhance competitive pressure but also allows reaching sustainable supra-competitive price equilibrium to be agreed by competitors)
- **risk of collusion**

AN ISSUE OF LIABILITY

- Common use of algorithms by competitors could qualify as a new form of parallel conduct and, therefore, entails traditional evidence issues of proving an agreement to coordinate pricing.
- Difficulties in outlining liability (lack of direct human intervention).
- Strict liability for “smart machines”?

A CASE STUDY!!

UBER

UBER PRICING

- Uber charges are based on a combination of time and distance parameters and all payments are handled automatically by the Uber service, which charges the passenger's card online. Once destination is reached, a receipt is sent automatically to the passenger's email address.
- On average 80% of the fares goes to the driver, the rest is kept by Uber.
- 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.

Uber Surge Pricing

The Uber fare rates automatically increase, when the taxi demand is higher than drivers around you. The Uber prices are surging to ensure reliability and availability for those who agree to pay a bit more. You can be notified by the app when the **Uber surge pricing** goes down again.

When the **Uber prices are surging**, it also encourages more drivers to get back on the road and be able to earn more money. Usually, the Uber surging only last for a few minutes depends on the demand and the amount of available drivers in your area.

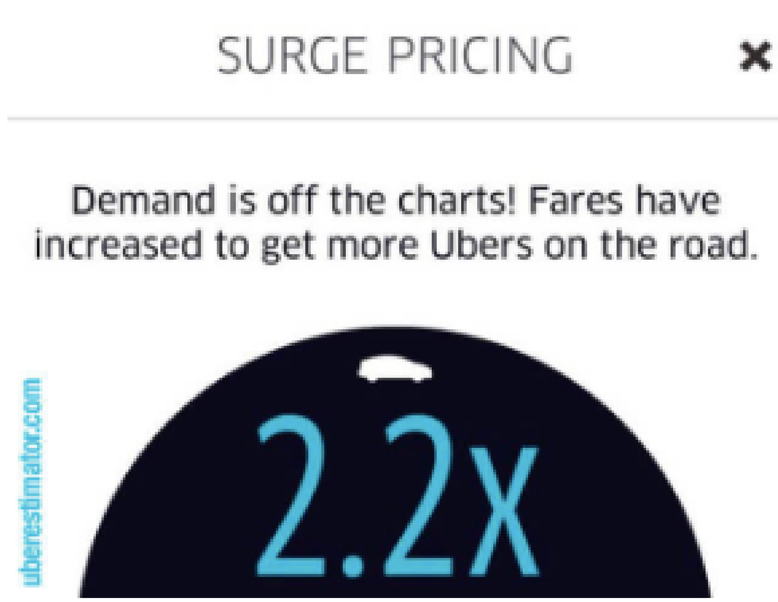
Uber price surging happens often at peak times in the morning and again in the evening rush hours when everyone is heading back from work. So if you want to save some money try to **avoid rush hours**, crowded places or by being a bit patient before booking a UberX ride.

You will never pay the **surged fare price** unless you accept the fare price, the Uber app will always ask you first to confirm the higher fare before requesting a car for you.

If you have time you can easily get notified when the prices are back on normal fare rates by the push of a button on the same screen. Wait a few minutes and pay less.

If you don't like to get surprised feel free to use our Uber fare estimator to calculate the fare prices from your location to your destination address.

Remember when paying surge prices it's a bit like tipping Uber drivers, since the driver will benefit from it as well. Remember that Uber booking fees will be added in US.



"We are not setting the price. The market is setting the price. We have algorithms to determine what that market is."

Travis Kalanick (CEO and co-founder of Uber)

THE “DIGITAL SMOKE-FILLED ROOM”

In the US:

Topkins (2015) - US Department of Justice - plea agreement announced between the DoJ and an executive, David Topkins, of an online art retailer, who was prosecuted for conspiring with competitors to fix the prices of posters sold online via Amazon Marketplace.

Assistant Attorney General Bill Baer stated that the DoJ “*will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the Internet using complex pricing algorithms*”.

Aston (2015) - US Department of Justice - a director, Daniel William Aston, and his company, Trod Ltd., were indicted for conspiring with third-party sellers to fix the prices of posters sold online via Amazon Marketplace.

In both cases, traditional meetings were held to discuss prices and agree to adopt specific pricing algorithms to implement their price-fixing agreements. Since the algorithms were merely used to execute a pre-existing agreement among competitors, there was no difficulty to establish liability under traditional competition law concepts.

THE "DIGITAL SMOKE-FILLED ROOM"

Uber (2016) - US District Court - class action lawsuit against the company's CEO, Kalanick, alleging that he has orchestrated and facilitated an illegal price-fixing conspiracy in violation of Section 1 Sherman Act, thanks to parallel use of the same algorithm by the participants. The complaint focus on the fact that **drivers using the Uber app do not compete on price** (both the standard fare and the surge).

Kalanick's defense is that when drivers agreed to Uber's terms and conditions, they did so **individually** and not with the other drivers.

HUB-AND-SPOKE CARTEL

The US District Court judge, Judge Jed Rakoff quoted in his preliminary judgement (refusing dismissal of the lawsuit) the following passage on hub-and-spoke cartels:

"[C]*ourts have long recognized the existence of 'hub-and-spoke' conspiracies in which an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.' These arrangements consist of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the [hub's] terms, often because the spokes would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing*."

Therefore, "*where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade*".

PRICE-FIXING? THE EU TOOLBOX

C-84/89 ***Wood Pulp II***: Tacit collusion is not forbidden when it arises as a result of natural oligopolistic situation of the market (oligopoly defense).

C-8/08 ***T-Mobile*** on exchange of information: *"This requirement of independence does not deprive economic operators of the* ***right to adapt themselves intelligently to the existing or anticipated conduct of their competitors****, it does,* ***nonetheless, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors*** *or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question […]". (Analogously C-40/73* ***Suiker Unie****; C-172/80* ***Zachner v Bayerische Vereinsbank****)*

Guidelines on horizontal cooperation: even when information is disclosed *"indirectly through a common agency (for example, a trade association) or a third party such as a market research organization or through the companies' suppliers or retailers*" such conduct may well infringe competition law (para. 55).

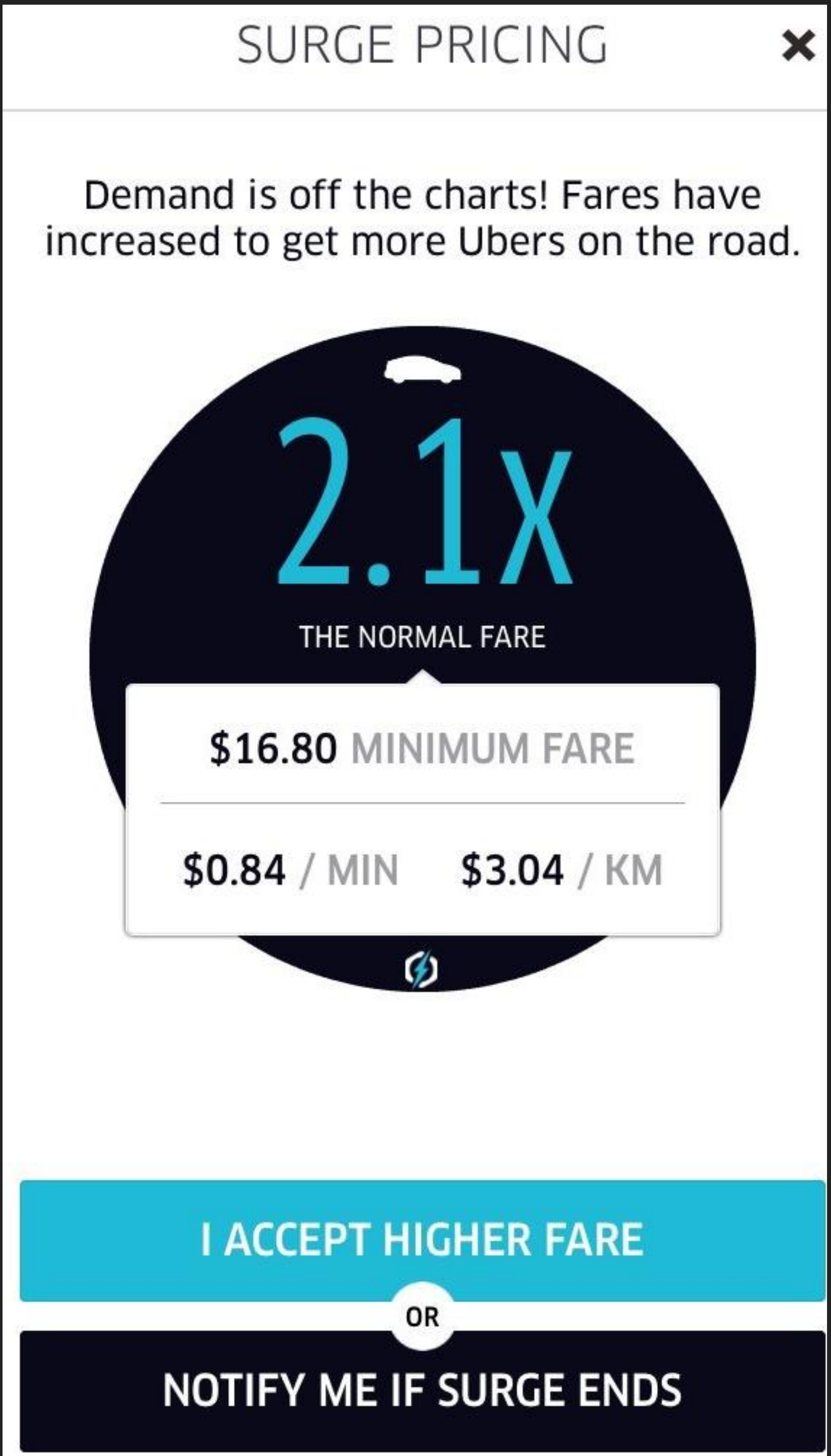
UBER IN THE EU

- Uber activities have been banned or subject to serious restrictions in Belgium, Germany, Italy and Spain but some public authorities are considering regulatory reforms in order to accommodate Uber and analogous companies.
- In May 2016 the Poland competition authority (UOKiK) has declared that Uber does not pose a threat to competition and consumers' protection. According to the President Adam Jasser, "*Uber puts competitive pressure on the traditional taxi service market […] the innovative nature of Uber cannot be categorized as an activity intended to eliminate competition. The basic technology used by Uber is not patent protected and therefore rival firms can use this business model and modify it further, thereby benefiting the development of competition and thereby consumers. This is confirmed by the availability of rival applications similar to Uber in Poland and other countries. Also, the type of service that Uber offers might not be the optimal solution for every consumer as it does not guarantee certain features such as anonymity of the passenger or the option of paying by cash, which might be important for some passengers.*"
- Lord Currie (CMA) (on sharing economies): "*the CMA is instinctively in support of innovation and disruption as a competitive advantage*"

COLLUSION THROUGH OTHER TECHNOLOGICAL MEANS

Case C-74/14 ***Eturas*** - Preliminary reference from the Lithuanian Supreme Administrative Court - More than 30 travel agents in Lithuania allegedly coordinated through an online travel booking system with regard to the limitation of discounts available for clients.

Passive modes of participation are also caught by Article 101(1) TFEU (C-194/14 ***AC-Treuhand v Commission****)* but "*under that provision, the concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two*" (para. 42 and C-286/13 ***Dole Food and Dole Fresh Fruit Europe* v *Commission***).



- Reduction of search costs for users
- Enhanced price discovery (the market can quickly determine the competitive prices of the service)
- Lower prices than regular taxi services
- Possibility to avoid surge prices (drivers will be incentivized to take the road to earn higher fees and price-sensitive users are incentivized to consider alternative transport)
- Guarantee of good service (reputation score of the driver)

CONSUMERS’ BENEFITS

PER SE BENEFICIAL TO CONSUMERS? GLOBAL PERSPECTIVE

- OECD's Competition Committee Report on Competition for Taxi Services (2007):
  - 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)
  - **Undersupply of services at competitive prices, with low income consumers being the most significantly disadvantaged.**
  - Recommended removal of quantitative entry restrictions and, to a lesser extent, of qualitative restrictions

PER SE BENEFICIAL TO CONSUMERS? US AND CANADIAN APPROACH

- In the US, in the private antitrust class action against Uber "[e]*ven if it is proven that Uber has had* ***radically positive effects for consumers so far****, the Uber defendants still might have to overcome the argument that a less restrictive alternative could be employed. How to answer these conventional antitrust questions will be complicated by the unconventional context in which they will have to be considered. Competition law may have to evolve its own techniques as the phenomena and markets that it regulates also evolve.* " (S.K. Mehta - 2016).
- In Canada, in November 2015, the Competition Bureau issued a White Paper on "*Modernizing Regulation in the Taxi Industry*". The White Paper recognizes the role of regulation in the taxi industry, but advocates for greater openness to competition, particularly with respect to preserving consumer interests.

CONCLUDING THOUGHTS

- Is UBER breaching unilateral conduct laws?
  - What is the market?
  - What is the abuse?
- Is UBER an anticompetitive agreement?
  - Do we have an agreement?
    - Is there an agreement/meeting of minds etc?
    - An association of undertakings?
  - Do we have undertakings?
    - Self employed or employee?
  - Consumer Benefits?

"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 […] Regulatory frameworks, to the extent they are needed, should be flexible enough to allow new forms of competition."

Edith Ramirez (FTC Chair)

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THANK YOU FOR YOUR ATTENTION!

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