

**THE UNSUCCESSFUL COURTING OF UBER AND THE EUROPEAN UNION**

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**ABSTRACT**

Uber has become a household name especially in the America and Europe. With one internet application, Uber has transformed the way we “catch a ride.” It has dazzled most of us with its varying options based on our preferences of service ranging from its budget option, the UberX, to the SUV, the Taxi the Black Car, and its most luxurious option, the LUX (Quoracom, 2017). Despite what appears to be the ultimate convenience of having a ride your way, in 2015 alone, fifty lawsuits (Brown, 2016) were filed against Uber in United States Federal Courts (Gesley, 2016). Similarly, but more catastrophic for the company, are the lawsuits were filed against the company in several European countries. This law suits have resulted in banning Uber in several countries, while suspending some services in others (Gesley, 2016). This paper will analyze the European Union’s rulings and the grounds for Uber’s counterclaim citing Article 49 (freedom of establishment) and Article 56 (freedom to provide services) of the Treaty on the Functioning of the European Union (TFEU) (Consolidated version of the treaty on the functioning of the European Union, n.d.).

**Keywords:** Uber , European Union, Courting, Banning Uber

**INTRODUCTION**

Saturated in at least every big city in America is the language, “I am going to Uber” It is so entrenched in the culture that it has seemed to evolve from being solely a noun to also a verb (Gesley, 2016). “I am going to Uber” is a reality that founders Garrett Camp and former CEO, Travis Kalanick wished existed in 2008, when they experienced difficulty during a snowy evening in Paris, hailing a cab (Our Story, n.d.).

The disappointment in Camp’s and Kalanick’s inability to hail a cab, sparked their idea to create a technological platform through a mobile application, where one could easily, for a fee, request for another to render car service from and to a designated location. In 2009, this new idea manifested its physical debut in San Francisco, California as Uber Technologies Inc. classified as, a “transportation network company” (TNC) by the California Public Utilities Commission (CPUC). According to the CPUC, “transportation network companies (TNCs) provide prearranged transportation services for compensation using an online-enabled

application or platform (such as smart phone apps) to connect drivers using their personal vehicles to transport passengers (Gesley, 2016). Uber's argument against it being categorized as a transportation company as opposed to a technology company is based on the strict definition of a TNC. TNC states that transportation companies that respond to a prearranged transportation service by phone are deemed to be taxis, and thus fall under a city's Department of Transportation, requiring government regulation including a taxi license (Special Driver's Licenses in California, n.d.). Since Uber does not respond to a prearranged transportation by telephone, but instead by a mobile or computer application, Uber asserts that it is in fact not a taxi, but a technological company. The technological company has since expanded to 633 cities worldwide, including Europe, with over 150,000 drivers in varying categories (Nilsen, 2015) (Uber, 2017). A publicly traded company, it is deemed the fastest growing company in history, as in just six years, increased in value to \$41 billion (Nilsen, 2015).

A pioneer in sharing economy, Uber allows passengers, after downloading the mobile software application and placing their credit or debit card on file, to schedule a pre-arrange pick up for transportation, and the closest Uber driver, the third party, if available, would respond accordingly. A description of the vehicle and picture of the driver are provided, so the passenger knows ahead what and who to expect. Similar to that which is required of taxi drivers, Uber drivers must pass a background check, an interview but must have a newer version of a four-door car in order to render service (Nilsen, 2015).

Drivers decide if they desire to pick up passengers, based on any prior rated behavior by drivers, with the assumption that those ratings are fair and not discriminatory (Nilsen, 2015). As no money exchange takes place between the third party and the passenger, revenue is therefore split between the third party, 80% and Uber, 20% (What percentage of the money you pay Uber goes to the drivers, n.d.). The honeymoon, however, appears to be over, as conflict between Uber and its drivers, Uber and its riders and Uber and varying municipalities come to a collision.

### **The Legal Challenges for Uber in the European Union**

Article 49 of TFEU one of the treaties upon which the EU was formed, (Treaties of the European Union, 2017) prohibits restrictions on the freedom of establishment of services from nationals of a Member State (Uber was incorporated in Netherlands) in the territory of another Member State. (O'Keefe, B., & Jones, M., 2015). Additionally, Article 56 prohibits restrictions on EU's nationals or Member States to freely provide such services within the Union (Freedom of Establishment and the Free Movement of Services: Articles 49 and 56 TFEU, 2016). Despite these legal premises, Uber has found that some, and in other cases, all of its services were put on a halt in Spain, France, Germany and Belgium (Freedom of Establishment and the Free

Movement of Services: Articles 49 and 56 TFEU, 2016). The question that gave rise to the ongoing controversy was whether Uber was a transport operator, which is regulated by Member States or was it an “information society service,” regulated by the EU; thus, reaping the benefits of the Services Directive 2006/123/EC, which would give Uber the right to be established as a service provider and the freedom to provide those services (Gesley, 2016).

### **Spain**

In Spain, the issue brought to the Commercial Court No. 3 of Barcelona in “Association Professional Elite Taxi vs Uber Systems Spain SL” (C – 434/15) was that Uber is a transport company that utilized unlicensed drivers in violation of the Spanish antitrust laws, thus engaging in unfair competition (Association Professional Elite Taxi v Uber Systems Spain SL, n.d.). The issue, however, according to the Court was first to determine based on Uber’s operations, into which category did it fall under EU law. Based on that determination, the Court could then decide the scope of the law that governs that operation. Requiring a preliminary ruling from the European Court of Justice on this subject matter, Spain presented four questions to the ECJ:

1. What kind of service does UBER offer: a transport service, an electronic intermediary service or an information society service as defined in Art.1(2) of Directive 98/34?
2. If it is an information society service, does it profit from the freedom of services according to Art. 56 TFEU and Directives 2006/123 and 2000/31?
3. Does the Spanish Law on Unfair competition infringe the freedom of establishment?
4. Are the requirements of authorization or license valid measures to regulate the freedom to provide electronic intermediary services? (Elite Taxi vs UBER – Opinion of the Advocate General on UBER's Activity in Spain, 2017).

The Advocate-General defined in his opinion, which is usually accepted by the high court, the service UBER offers. First, he applied strict interpretation to the three criteria of “information society service:”

1. It must be provided for remuneration. This did not pose a problem as Uber doesn’t allow for tips except for its UberTAXI and in Spain, Uber was utilizing its UberPOPS (Kosoff, 2014).
2. Service was warranted upon individual request. In Uber’s case, service was only in response to specific requests from riders.
3. Services must be provided by electronic means. This is where both parties differ in argument. The Advocate-General went to explain that although the services

rendered are in response to requests made on smartphones applications, the services themselves, which was transporting riders to specific locations, were not done electronic. According to Art. 1(2) of Directive 98/34, there is not a requirement for the service to be fully electronic, but if the service calls for other services, and thus cannot work independently of each other, then it is not an information society service. In Uber's case, a rider cannot request transportation independently of Uber's software application, therefore Uber has not met the service by electronic means element and therefore does not fall into the information society service category, but rather a transport company, and requires a license.

Based on this analysis, the Advocate-General was correct when he concluded that the subsequent questions put before the Court were thus, moot, as they were premised upon Uber being an information society service. As Uber was not an information society service, it did not fall under the protection of Articles 49 and 56.

### **Germany**

In Germany, the question before the court was whether Uber fell under the umbrella of the Passenger Transport Act which regulates all motor vehicles, trolleybuses, and trams transporting persons for a cost or in the framework of economic activity (Passenger Transport Act (Personenbeförderungsgesetz (PBefG)), § 1, para. 1, sentence 1.) and thus requires a permit (*Id.* § 2, para. 1, sentence 1.) (Gesley, 2016). The exception of operating without a permit is if the ride was free or if the cost of the ride did not exceed operating costs. Uber did not meet the elements of a Taxi, as its drivers were not at a publicly designated location, and they were not obligated to accept requests within their zones, (*Id.* § 49, para. 4.) It also did not meet the Transport with cars-for-hire elements, as though it transported persons, cars-for-hire may only accept assignments which were received at the place of business of the professional and had to return to the place of business after the conclusion of the ride. (*Id.* § 49, para. 4). For Uber, persons could call for its services to take them to varying specific locations, including home. With this, the question focused on was Uber intermediary or a professional service. Being that Uber provides service for its own benefit and not of others, it is not an intermediary. Additionally, it dictates all the rules and regulations pertaining to its drivers. That leaves the professional service. As it was transporting for a cost, Uber instead of securing a permit, lowered its cost not to exceed operation so it fell within the exception. However, that did not satisfy the Germans.

As Uber fell under neither taxi nor cars-for-hire, how does the Higher Regional Court of Frankfurt am Main and The Higher Administrative Court of Hamburg ban Uber services? On one hand, taxi drivers alleged that Uber may not be a taxi, but it violated German competition law when its drivers can simply make themselves available outside of workplaces without being requested, while taxis and cars-for-hire had to request. Even if the cost was reduced to meet the operational budget, there were other factors that led to “unfair” competition. Another complaint was it was unfair competition for taxis to be designated in one location while Uber has free range. Given that Uber did not meet the requirements to fall under either of the transport categories; it seems as if it also did not meet the guidelines to operate under existing German Transport law for profit. Nonetheless, the Court was wrong in banning Uber’s services in Germany. It is one thing to rule that Uber may not operate as is, as it violates competition laws; it is something else to rule a complete ban, as opposed to giving Uber an opportunity to revamp its services to fit within the laws. More importantly, it stifles competition when the rulings suggested that even if licensed to transport persons, a company can only be in a designated area or only transport roundtrip to a place of business. I believe the rulings and the complaints were routed in fear of competition, which in itself stifles economic growth or entrepreneurship innovations. Perhaps this is where culture outweighs change.

### **The Trend**

Other European countries including Belgium, Britain, France and Spain have gone on to ban Uber based on similar reasons of unfair competition. In Belgium ('Uber Out!' Belgian court bans ride-sharing UberPOP app, company to appeal, n.d.). France joined the trend when it passed the Thevenoud law requiring all drivers who transported passengers for a cost to have a license and the necessary insurance required by the government. In fact, France now deemed it a crime to operate revenue bearing transportation without a license (Scott, D. J., 2014). Madrid has even gone so far as ordering Spanish phone companies to block the Uber app, while a case is pending (MailOnline, S. M., 2014). London banned Uber for reasons having nothing to do with local transportation laws, but rather corporate social responsibility breach (Uber is already effectively banned from a number of countries including France, Spain and Belgium and now London, n.d.).

### **Conclusion**

Uber has endured its share of legal challenges across the globe. Some were due to violations of local laws and when addressed, courts ruled against the company in what appears to be the banning together to preserve the old way of what was, when logic and reasoning no longer

sufficed. It has been allowed to re-operate in some countries like a taxi, while outright denied in others. Precedence has showed us that the slightest deviation of change in how many Europeans conduct taxi or transportation business will shut the doors to entrepreneurs and innovation, if they run the risk of outsmarting the competition. It is a clash of cultures, where difference, even, if operating within the laws, is embraced, versus no acceptance of that which is not familiar and offends the status quo. What we will see not too long from now is Uber still being challenged under the notion of unfair competition because its Taxi services offer more benefits than the competitor. Based on precedence, in the midst of litigation, a law may be passed to outlaw that which is different, thus relinquishing all angles of argument for Uber to flourish in that particular EU Member State.

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