

## **Taxi services, platforms and Article 101 TFEU: changing the shape of the transport intermediation services industry?\***

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**ABSTRACT:** The taxi services market has relied on platforms for many years. Taxis can be hailed at the kerb or by using taxi ranks. Often, consumers rely on intermediaries, such as taxi phone lines. The task of these intermediaries is to despatch a call to a driver, so that the latter can meet consumers' demand in each case. Today, the use of phone apps reliant on geolocalisation software is among the most common ways in which calls are despatched to taxi service providers. Apps come with significant benefits for both parties. Consumers can track the car they reserved, whereas drivers can deploy their working time more efficiently since they can locate and respond to calls from customers in areas that are within their reach.

The entry into the market for taxi despatch services of these novel instruments has not been without consequences, however. Are we witnessing a sea change in the way in which traditional platforms in this market have conducted their business so far? What are the competition law implications of the entry of phone apps in the taxi despatch services' market? How far is the application of competition rules going to affect the nature of taxi despatch platforms? What are the implications of these decisions for the functioning of other platform-based markets?

This article analyses this question based on the practice of national authorities who, in a number of contexts, have ruled on the legality of taxi platforms. It will be argued that the emergence of platform dispatchers using geolocalisation technologies may not only "disrupt" those business models that have characterised the taxi despatching market so far. It could also lead to a change in the approach that competition law has adopted in relation to other two-sided markets where intermediation is key to the

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matching of demand and supply, perhaps by spelling the end of “closed” platforms in favour of open models of intermediation.

The article will conclude with some more general reflections on the application of EU competition rules to two-sided markets. It will be submitted that, due to the focus placed on the need to avoid the foreclosure of the market in favour of and by existing incumbents, the ability for users to enter and exit from a platform and, more generally, to rely on a variety of channels for service intermediation, are going to be essential to maintain the openness and competitiveness of these markets.

KEYWORDS: Competition; platforms; taxi services; Italy; national competition authorities.

## ***1. Taxi despatch services as a platform industry – even before digital...***

### ***1.1. App- versus phone-based intermediation for taxi services – some observations***

Taxi services can be provided in a number of ways: taxi drivers can operate independently and therefore queue at taxi ranks or collect passengers at the kerbside. Alternatively, they can rely on call centres that receive calls from perspective passengers and then proceed to assign each “job” to individual drivers. Taxi despatch services, therefore, are provided through platforms and this has been the case for long before Uber. According to, among others, Baldwin and Woodard, platforms can be defined as “products, services, firms or institutions that mediate transactions between two or more groups of agents”.<sup>1</sup> Platform users share the usage of their foundational elements<sup>2</sup> with a view to reaching out to potential demand for their goods or services. As a result, economies of scale are achieved by spreading the costs linked to the functioning of the platform itself across a large number of subscribers.<sup>3</sup> Economies of scope also emerge since, as the platform gains importance, users find it correspondingly easier to come up

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<sup>1</sup> Carliss Y. Baldwin and C. Jason Woodard, “The architecture of platforms: A unified view”, *Harvard Business School Working Paper*, 09-034, 2008, [https://www.hbs.edu/faculty/Publication%20Files/09-034\\_149607b7-2b95-4316-b4b6-1df66dd34e83.pdf](https://www.hbs.edu/faculty/Publication%20Files/09-034_149607b7-2b95-4316-b4b6-1df66dd34e83.pdf), 5.

<sup>2</sup> *Ibid.*, 6.

<sup>3</sup> *Ibid.*

with variations of their services and more generally with ways to address customer demand more efficiently.<sup>4</sup>

Platforms provide to their users a valuable “match-making” service, designed to decrease search costs and facilitate the meeting of demand with supply. As such, there are two sides to a market that relies on a platform. One concerns the relation between platforms and the suppliers of a specific good or service – in the taxi services industry, taxi drivers and their call despatch service provider of choice. This segment is “business-to-business”. Platform users, such as drivers, pay a fee for the usage of the despatch companies’ services.<sup>5</sup> In addition, they often have to commit resources with a view to purchasing equipment that is necessary to the use of the services offered by the platform. The other segment, instead, concerns the relationship between individual consumers – such as, in the taxi services market, passengers – and the platform. Perspective buyers of goods or services rely on the platform with a view to finding a “suitable match” in the form of a supplier of goods or services that can meet their economic demands, as “filtered” through the platform itself.<sup>6</sup> This “business-to-consumer” segment tends to be a no-fee market. Callers to a taxi phone line do not pay any fee for the “match-making”, and their costs are borne by the services’ providers, by being “internalised” in the fees the latter pay to the platform.<sup>7</sup>

The two market segments outlined above are reciprocally interdependent: the nature, scope and intensity of these linkages depend on the way in which the affiliation relation between platforms and their users is actually structured. Thus, for example, “merchants” might decide not to associate with a platform that has not attracted interest among their rivals, for the perception is that, with limited variety in terms of offer, interest from consumers is also likely to be limited, thus prejudicing the merchants’ ability to “drum up” their business through the platform.<sup>8</sup> Buyers, on their part,

<sup>4</sup> Ibid.; see also page 11.

<sup>5</sup> See e.g. Yixuan Zhong et al., “Achieving stable and optimal passenger-driver match in ride-sharing systems”, *15<sup>th</sup> IEEE International Conference on Mobile Ad-Hoc and Sensor Systems*, 2018, <https://ieeexplore-ieee-org.ezproxy.is.ed.ac.uk/stamp/stamp.jsp?tp=&arnumber=8567549>, 125; see also page 127.

<sup>6</sup> Ibid, 126.

<sup>7</sup> See e.g. Jean-Charles Rochet and Jean Tirole, “Platform competition in two-sided markets”, *Journal of the European Economic Association* 1, no. 4 (2003): 991; see also pages 1012-1013.

<sup>8</sup> Andrei Hagiu, “Merchant or two sided platform?”, *Review of Network Economics* 6, no. 2 (2007): 116.

are likely to choose a certain platform by considering “not only the platform’s own characteristics but primarily (...) the goods or services” that can be sourced through the platform. Accordingly, it is submitted that the more the platform is “populated”, the greater the likelihood that this will be appealing to consumers.<sup>9</sup> The existence of network effects on both sides of this market is a key factor in determining how contestable entry to it is for new intermediation services’ providers. If a would-be competitor is not able to secure demand among consumers, its platform is unlikely to attract interest among service providers. Consumers, on their part, are not going to be very keen to rely on a platform that cannot attract a critical number of service providers to ensure that their demand is met.<sup>10</sup>

The nature of the relationship between a platform and its merchant users is a central factor to its ability to compete with incumbent intermediaries on the consumer side of the market. Platforms could allow merchants to rely on a variety of channels of intermediation to identify possible buyers beyond the platform itself. Alternatively, they could subject them to an obligation to offer their services only through the platform itself.<sup>11</sup> A 2013 study addressed this issue of whether “single-homing” should be preferred to “multi-homing” with merchants as a means for platforms to compete effectively on the consumer side of the market. It was suggested that securing “valuable” content (in the eyes of viewers) to the exclusion of rivals appeared to confer the platform in question a competitive advantage on rivals, since it secured a stable supply of services to the de facto exclusion of rivals.<sup>12</sup> It was therefore argued that the stipulation of exclusivity clauses by platforms and merchants could lead to a competitive bottleneck vis-à-vis new entrants on the market for the provision of the intermediation

<sup>9</sup> Robin S. Lee, “Vertical integration and exclusivity in platform and two-sided markets”, *NET Institute Working Paper*, 07-39. 2007. [https://archive.nyu.edu/bitstream/2451/28519/2/Lee\\_07-39.pdf](https://archive.nyu.edu/bitstream/2451/28519/2/Lee_07-39.pdf), 6.

<sup>10</sup> See *inter alia*, *mutatis mutandis*, Catherine E. Tucker, “Digital data, platforms and the usual (antitrust) suspects: Network effects, switching costs, essential facilities”, *Review of Industrial Organization* 54 (2019): especially pages 687-688.

<sup>11</sup> See *mutatis mutandis* Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case I801A, available at: [http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/264D4B0ED3B221FFC12582C6004BBF4E/\\$File/p27244.pdf](http://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/264D4B0ED3B221FFC12582C6004BBF4E/$File/p27244.pdf); especially sections 91-94.

<sup>12</sup> Carmelo Cennamo and Juan Santalo, “Platform competition: Strategic trade-offs in platform markets”, *Strategic Management Journal* 34, no. 11 (2013): 1332-1333.

services in question.<sup>13</sup> By contrast, the absence of single-homing obligations, taken together with the dynamic nature of many platform-based industries, was regarded as a factor capable of ensuring that competition remains very lively on the “business side” of these markets.<sup>14</sup>

The nature of the relationship between platforms and consumers is also extremely important for their appeal. It has been suggested that platforms providing certain services, such as food delivery orders’ fulfilment, tend to be mutually inter-changeable in the eyes of consumers, as well as free. Thus, it is vital for intermediaries not only to attract as many business users as possible, but also to seek to make their own services more “individual”.<sup>15</sup> Competition based on innovation appears to be quite important. The taxi despatch intermediation market provides an apt example of how central it is for platforms to always provide good-quality and cutting-edge services.<sup>16</sup>

There are several radical differences between “traditional” providers and app-based call despatching companies. From the drivers’ standpoint, traditional platforms are often “closed”, whereas app-based ones tend to allow multi-homing: this was certainly the case for MyTaxi. Taxi apps also have a number of appealing features for consumers, which in turn give them a competitive advantage over traditional providers. The existence of a language barrier, for instance, can affect the ability of end users to rely on a “traditional” taxi call centre. By contrast, the circumstance that taxi apps have different language versions and even offer a payment service via credit cards might contribute to minimise the consequences of not being able to speak the local idiom. Geolocation is perhaps the most important factor that makes online intermediaries strong competitors vis-à-vis phone-based providers: being able to respectively locate the consumer seeking out

<sup>13</sup> Mark Armstrong and Julian Wright, “Two-sided markets, competitive bottlenecks and exclusive contracts”, *Economy Theory* 32, no. 2 (2007): 373-374. See also Bernard Caillaud and Bruno Jullien, “Chicken and egg: Competition among intermediation service providers”, *The RAND Journal of Economics* 34, no. 2 (2003): 310; see also page 320.

<sup>14</sup> See e.g., *mutatis mutandis*, *JustEat/HungryHouse* merger decision, adopted by the CMA on 16 November 2017, press release: <https://www.gov.uk/government/news/cma-clears-just-eat-hungryhouse-merger>; see summary, <https://assets.publishing.service.gov.uk/media/5a0c673aed915d0ade60db7c/justeat-hungryhouse-summary-of-final-report.pdf>, 4-5.

<sup>15</sup> See e.g., *mutatis mutandis*, *JustEat/HungryHouse*, cit. (fn. 14), 3-4.

<sup>16</sup> See *inter alia* Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case I801A, paragraphs 84-85; see also, *mutatis mutandis*, *JustEat/HungryHouse*, cit. (fn. 14), 3. For commentary, see *inter alia* Kishore Kumar and Ramesh Kumar Namavaram, “A study on factors influencing consumers in selection of cab services”, *International Journal of Social Science and Humanities Research* 4, no. 3 (2016): especially page 559.

a taxi in real time, ascertaining where a driver is, and the related waiting times mean reduced search costs (these are equal to zero for consumers).<sup>17</sup> The lower costs that are usually associated with app-based intermediation services have also contributed to attract taxi drivers to these new service providers. They no longer have to invest in a radio or similar hardware and can rely on a smartphone to access call despatching.<sup>18</sup>

In light of the forgoing analysis, it may be concluded that competition among platform intermediaries is shaped by a combination of factors, such as the indirect network effects that characterize these markets and the likelihood of bottlenecks that can arise, as a result of which the most popular platform can soon become an unavoidable business partner. It was suggested that, in this context, the nature – whether exclusive or not – of the relation between platforms and their users can have a significant impact on the ability of rivals to enter and expand on the intermediation services markets. Innovation is another important tool for newcomers to gain ground, especially among consumers. The next subsection will summarise some of the implications of the entry of geolocation-based intermediaries in the London cab market as an example of the implications of the entry of these innovative intermediaries.

### ***1.2. Geolocation-led intermediaries and London taxis – the impact of electronic platforms on traditional call despatchers***

The previous section discussed some of the features of platform based markets and showed that due to their two-sided nature, the intensity of competition between different platforms depends on the nature of their relationship with both merchants and consumers. It was also emphasised that, given the strength of the indirect network effects that characterise platform based markets, the ability to appeal to a sufficiently large number of users on both sides is critical for incumbents as well as, if not more, for new entrants. In this context, it was argued that the ability to innovate on the consumer side of the market is central to attracting demand toward platforms. It was suggested that the market for the provision of taxi despatch services is a very good example of these market dynamics.

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<sup>17</sup> See Katrina M. Wyman, “Taxi regulation in the age of Uber”, *New York University Journal of Legislation and Public Policy* 20, no. 1 (2017): 8-9.

<sup>18</sup> Ibid, 14-15. See e.g. Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case I801A, paragraph 71. See also, *inter alia*, Wenbo Zhang et al., “Influencing factors and heterogeneity in ridership of traditional and app-based taxi systems”, *Transportation* 47 (2020): 993-994.

The purpose of this section is to illustrate the impact of the entry of online platforms which rely on geolocalization and on the use of GPS trackers that are now present in modern mobile phones in this industry, with reference to the London taxi services' market.<sup>19</sup> While the limited remit of this article does not allow for an in-depth consideration of the features of this specific market, it is worth recalling that the London market for taxi fares is rather competitive and well regulated.<sup>20</sup> Drivers must be licensed to ply their trade: in particular black cab drivers can both pick up business at kerbside and via phone lines, i.e. via pre-booking. Essential pre-condition for the license is that drivers pass the 'Knowledge of London' examination.<sup>21</sup> However, drivers can still operate without having passed this examination, as long as they are licensed to drive "mini-cabs" that can be pre-booked, usually through a radio call despatch services' provider to which the driver is affiliated. Black cab drivers can also rely on radio platforms to supplement kerbside calls.<sup>22</sup>

GPS-based providers started appearing on the London market in the early 2000s, thanks to the emergence of modern smartphones. Through their central control room, jobs were "automatically assigned by the despatch system to the nearest available taxi".<sup>23</sup> In addition, drivers were not "locked" in a single provider. They could use the GPS-based provider in parallel with traditional radio circuits. They could also continue to pick up kerbside passengers, since the system could "detect the meter-on status" and therefore "pass up" on a particular taxi.<sup>24</sup> This type of service provision, which entailed, in substance, an open platform, had a number of advantages for taxi drivers: it meant lower costs, since the GPS positioning relied on the public GPRS signal, required fewer staff in the central room, and relied on reduced logistical investment.<sup>25</sup> It therefore did away with the need to invest in hardware (such as a radio). Perhaps, more importantly, geolocation allowed them to manage their workflow more effectively by selecting "more local" calls to the area where they found themselves at a given time, therefore optimising both time and resources.

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<sup>19</sup> Walter Skok and Stephen Baird, "Strategic use of emerging technology: The London taxi cab industry", *Strategic Change* 14, no. 6 (2005): 295.

<sup>20</sup> *Ibid.*, 296.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, 296-297.

<sup>23</sup> *Ibid.*, 300.

<sup>24</sup> *Ibid.*, 301.

<sup>25</sup> *Ibid.*, 303.

App-based, GPS-led call despatch intermediaries came to enjoy a significant competitive advantage thanks to the features outlined above, thus attracting taxi drivers that had thus far relied on radio-based platforms.<sup>26</sup> They also made entry into the taxi services market a far more appealing proposition than if perspective drivers had to rely on traditional channels, since they lowered (if not together eliminated) the costs associated with becoming a mini-cab driver significantly.<sup>27</sup> Thus, by creating a “way in” into a highly regulated market that had previously been characterised by high initial costs and tangible barriers to entry, GPS-based despatchers have come to exert greater pressure on traditional incumbent intermediaries, thereby boosting competition and easing entry in the taxi service dispatch market.<sup>28</sup>

In light of this short excursus into some of the implications of the entry of GPS-based call despatch service providers, it is argued that the taxi industry is a very apt example of how platform-based markets behave in response to the entry of new competitors that rely on innovative methods for the provision of services and of the impact that new, more efficient entrants can have on the position of incumbents. However, this entry, to the extent that it disrupts existing methods of intermediation, has significant consequences for the functioning of the industry in question. The scope of this article does not allow a discussion of the consequences of app-based platforms, such as Uber, for the employment status of drivers. It concentrates rather on analysing the implications of the arrival of new app-based entrants through the lens of competition law. In this context, recent case law of the Italian Competition Authority illustrates how the entry in the taxi despatch market of app-based intermediaries can affect traditional incumbents and, more generally, established ways of managing intermediation between taxi drivers and their customers.

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid, 304.

<sup>28</sup> Ibid.

## ***2. From call centres to apps: changing the business model of call despatch services providers?***

### ***2.1. App-based taxi intermediaries: the arrival of Uber on the taxi service market—some observations***

The previous section outlined the characteristics of a “platform industry” and showed how the taxi service market, having traditionally relied on platforms as a means of “mediating” supply and demand of these services, is a very effective example of the impact of technological innovation on existing competition and on the position of incumbents adopting “traditional” modes of service provision. It was argued that the entry into the market of innovative undertakings, such as GPS-based taxi despatch service providers, to the extent that they enjoy significant competitive advantages compared with incumbent providers, can enhance the quality of the offer and lower costs, thus lowering the barriers to entering into the taxi market and reducing costs for drivers. The affirmation of app-based call despatch services can therefore be regarded as a major change in the way in which the taxi industry works: as illustrated in section 2.2, these new tools allow drivers to manage their working time more efficiently by identifying and therefore responding more quickly to potential passengers in their proximity at any given time.<sup>29</sup> Passengers also benefit greatly from app-based call despatchers, since they can identify and track the car allocated to their request and rely on additional services such as online, cashless payment.<sup>30</sup>

The entry of these innovative providers, however, had extremely significant consequences, and not just for how these markets operate, but also for the observance of labour and safety standards and, more generally, for the existing regulatory structures affecting taxi service provision in each jurisdiction. The entry into a number of taxi markets of Uber can be regarded as a major shock for the way in which taxi services had been, respectively, provided by drivers and regulated by the competent authorities, in accordance with a plethora of national and local rules. Discussing the impact of Uber on the New York taxi industry, Wyman argued that Uber represented a radical departure from the traditional “medallion” system, to the extent that it had a “contractual relationship” with its drivers

<sup>29</sup> See e.g. Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case I801A, paragraph 203.

<sup>30</sup> *Ibid.*, paragraph 204.

not as an employer, but as a “fleet manager”.<sup>31</sup> Taxi drivers, therefore, retained their independent status; this has had a number of important consequences for their status as “workers” and for their access to a number of benefits and social welfare entitlements, such as sick pay.<sup>32</sup> In addition, there is the question of whether Uber as a platform should be licensed to operate its services, and the similar issue of whether drivers should obtain a license, in accordance with the relevant national and local requirements. In relation to the status of drivers, Uber initially resisted regulation and in particular the imposition of licensing requirements on drivers, such as fingerprinting and background checks.<sup>33</sup>

The questions concerning the status of Uber drivers – whether they should be regarded as independent contractors, as Uber wished, or as employees or workers – were addressed by the Court of Justice of the EU in the Uber Spain preliminary ruling.<sup>34</sup> The Court refused to accept that the service provided by Uber, namely “connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey”, could be defined as just an “information society service”, and as such fall outside the scope of the regulation of other services, especially taxi transportation services.<sup>35</sup> The Court took the view that Uber’s services were “more than an intermediation service” since, without the platform, it would not have been possible for non-professional drivers to offer passengers their services, nor for passengers to access these services.<sup>36</sup>

In addition, Uber exercised “decisive influence” on the drivers: through the app, it determined the fare for each ride, facilitated payment and exerted a certain degree of control on the quality of vehicles.<sup>37</sup> The Court of Justice therefore concluded that the “intermediation service” could not be separated from the “main component of a transport service”.<sup>38</sup> Uber, as such, was a provider of transportation services and was therefore subject to

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<sup>31</sup> Wyman, “Taxi regulation”, 13-14; see also page 11.

<sup>32</sup> Ibid, 9.

<sup>33</sup> See e.g. Jonathan Hall et al, “Occupational licensing of Uber drivers”, 2018, [https://site.stanford.edu/sites/g/files/sbiybj8706/f/5211-jh\\_occupational\\_licensing\\_of\\_uber\\_drivers\\_for\\_conference\\_posting.1.pdf](https://site.stanford.edu/sites/g/files/sbiybj8706/f/5211-jh_occupational_licensing_of_uber_drivers_for_conference_posting.1.pdf), 3-4.

<sup>34</sup> Judgment of 20 December 2017, *Asociación Profesional Elite Taxis v. Uber Spain SL*, C-434/15, ECLI:EU:2017:981.

<sup>35</sup> Ibid, paragraphs 34-37.

<sup>36</sup> Ibid, paragraph 39.

<sup>37</sup> Ibid, paragraph 39.

<sup>38</sup> Ibid, paragraph 40.

the rules that each member state and its local authorities had laid down for regulating the provision on “non-public transport services”, such as taxi services,<sup>39</sup> and which often included licensing obligations and the imposition of safety standards for drivers.<sup>40</sup>

It is beyond the scope of this contribution to engage in a detailed analysis of the Uber Spain ruling and its implications for the future of what is commonly called the “sharing economy”. However, the ripple effects of this decision were extremely significant, since the judgment meant that Uber was under the obligation to seek a license in every EU city where it wished to operate. The decision of Transport for London to deny Uber a license to operate can be regarded as a very emblematic case of the fallout from this ruling. The impact of Uber’s entry on the London taxi market had been “profound”, although not all its implications were regarded as positive.<sup>41</sup>

Transport for London considered Uber’s terms of services and its practices concerning the selection and identification of drivers.<sup>42</sup> The decision focused on the platform’s inability to ensure the identity of its own drivers and on its *de facto* inability to stop drivers that had previously been excluded from providing services through it to recreate accounts. It was found that Uber’s systems remained relatively weak and open to manipulation, thus falling short of safety standards essential for the security of passengers.<sup>43</sup> Against this background, it can be argued that the decision to exclude Uber from operating on the London taxi market was perhaps inevitable, since, due to the manner in which the platform operated, the all-important concern for passenger safety, which is at the core of any taxi regulation mechanism, could not be addressed. It is acknowledged that the Uber case is characterised by unique features, of which the most prominent is certainly the fact that this platform was aimed primarily at owners of private vehicles who wished to provide rides upon payment to

<sup>39</sup> Ibid, paragraphs 46-47.

<sup>40</sup> *Ex multis*, see Serena Natile, “Is Uber a taxi service?”, *KSLR EU Law Blog*, January 11, 2018, <https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1214#.XoxSd4hKjIU>; see also Vassilis Hatzopoulos, “After Uber Spain: The EU’s approach on the sharing economy in need of review?”, *European Law Review* 44, no. 1 (2019): 96 and 99.

<sup>41</sup> See *inter alia* Walter Skok and Samantha Baker, “Evaluating the impact of Uber on London’s taxi services: A strategic review”, *Knowledge & Process Management* 25, no. 4 (2018): 234 and 235.

<sup>42</sup> Decision of 25 November 2019, *Transport for London*, press release: <https://tfl.gov.uk/info-for/media/press-releases/2019/november/uber-london-limited-found-to-be-not-fit-and-proper-to-hold-a-private-hire-operator-licence>.

<sup>43</sup> Transport for London, loc. ult. cit.

passengers as a “side activity”. However, it could legitimately be queried whether a similar, cautious approach to granting an authorisation could be expected also in relation to more traditional platforms used by licensed, professional taxi-drivers. The next section will consider these implications in light of EU competition rules and in particular Article 101 TFEU by examining the MyTaxi decisions, adopted by the Italian Competition Authority (hereinafter referred to as AGCM).

## ***2.2. MyTaxi: innovative business models against the resistance provided by existing modes of service provision?***

The previous section summarised the history of the arrival of Uber in the taxi services market of many cities around the world and showed, albeit briefly, how the appearance on a very regulated, relatively mature market such as this one of open, GPS-based, leaner platforms challenged consolidated ways of despatching taxi calls and remunerating existing incumbent providers of this service.

This section will turn to examining questions concerning the applicability of Article 101 TFEU to the behaviour of taxi despatch services’ platforms, in light of a set of decisions, concerning the taxi services’ markets in a number of Italian cities and focused on the implications of the entry of new, app-based call despatch service providers into this market which was hitherto organised according to “traditional” methods of intermediation. These decisions were adopted by the Italian Autorità Garante per la Concorrenza ed il Mercato (‘AGCM’) and concerned the compliance of the exclusivity clauses that were included in the agreements between radio-taxi intermediaries and taxi drivers with EU competition rules.

The AGCM started the investigation of the market for call despatch services in a number of Italian cities because of a complaint made by MyTaxi, a new app-based service provider. Part of a German corporate group, MyTaxi had attempted to break in the market for taxi service despatching in Rome and later in Milan and Naples. However, although many taxi drivers had downloaded the app, MyTaxi had experienced a significant number of unanswered “calls” from potential passengers, thereby preventing it from expanding on the relevant market.<sup>44</sup>

In November 2018 the company complained with the AGCM, alleging that the action of three incumbent phone despatchers in the Rome market

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<sup>44</sup> Ibid, paragraph 39.

for taxi despatch services, which was aimed at forbidding taxi drivers from seeking out work through rival platforms, had prevented it from expanding on the relevant market. It was claimed that since “traditional operators” did not allow drivers that used their services to deal also with rival despatchers, new platforms were *de facto* unable to enter and establish themselves in this market.<sup>45</sup> The incumbents countered that it was within their rights, in accordance with the relevant domestic law, to limit the freedom of those drivers that relied on their services, either as members or as “mere users”, to join competing platforms. In their view, the existence of a non-competition clause in the agreement of association signed by it and by individual drivers was indispensable for the maintenance and the attainment of its mutualistic purpose, in line with Article 2527 of the Italian Civil Code.<sup>46</sup>

The incumbents argued that, in any event, app-based services did not belong to the same relevant market as the market for the provision of despatch services through “traditional” means (such as call centres, using the central booking like provided the local authority or hailing the cab at kerbside),<sup>47</sup> due to significant, objective differences between “traditional” and “innovative” despatching services providers and to the characteristics of demand for each service.<sup>48</sup> The investigated entities also declined to admit that their non-competition clauses had led to MyTaxi being *de facto* excluded from the relevant market. They submitted that there was a sufficiently numerous group of “independent taxis” (namely taxi drivers who did not subscribe to traditional platforms for despatching) that could therefore be “contested” by the new entrant.<sup>49</sup> They argued that, in any event, even “tied” drivers could have exercised the right to terminate their contracts with the incumbent intermediaries and therefore move to MyTaxi without having to bear significant costs.<sup>50</sup>

The decision rejected these claims one by one. In respect of the definition of the relevant market, the AGCM took the view that app-based services such as those run by MyTaxi were in direct competition with, and therefore belonged to the same market as, the services offered by

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<sup>45</sup> Ibid, paragraph 2-3.

<sup>46</sup> Ibid, paragraphs 32-33.

<sup>47</sup> Ibid, paragraph 140.

<sup>48</sup> Ibid, paragraphs 139-140.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid, paragraphs 157-158; see also paragraphs 161-162.

traditional platforms.<sup>51</sup> It was emphasised that both services fulfilled the same economic function, namely to allow taxi drivers to access and manage demand for their services. The decision acknowledged that the market was two-sided and consequently that the position of the users of these services should also be taken into account.<sup>52</sup> However, it found that the focus of each taxi despatch services provider was to address the taxi drivers' demands for a reliable mechanism to reach out to those requiring taxi journeys.<sup>53</sup> Accordingly, the AGCM took the view that the predominant aspect of the assessment should be the examination of the "business-to-business" side of this market, namely the implications of the relationship between platforms and driver-users.<sup>54</sup> Since "traditional" and app-based platforms allowed their users to achieve the same objective, namely to maximise the number of journeys in their working time. The circumstance that these services were provided either through a radio and a call centre or by means of a smartphone and a GPS tracker had no bearing on this conclusion.<sup>55</sup>

The decision moved on to consider the legality of the non-competition clauses contained in each of the association agreements stipulated between taxi drivers and the cooperative associations under investigation. It was recognised that, in principle, domestic law could restrain the freedom of members of not-for-profit entities to, *inter alia*, contract with rivals of the same entities if this was regarded as necessary to protect the mutualistic purpose of these associations. However, the AGCM emphasised that these rules should have been read in such a way as to avoid frustrating the full effectiveness of EU competition law.<sup>56</sup> On that basis, the AGCM questioned whether the non-competition clauses at issue remained compatible with Article 101 TFEU for being "strictly related and necessary" to achieve their purported objective. This assessment entailed consideration of the duration, the scope and the magnitude of the effects of these clauses on both the drivers' freedom to seek out more advanced alternatives.

The decision observed that the non-competition clauses affected all users of the services offered by the investigated cooperatives, regardless

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<sup>51</sup> *Ibid*, paragraph 205.

<sup>52</sup> *Ibid*, paragraph 206.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*, paragraph 208.

<sup>55</sup> *Ibid*, paragraph 206.

<sup>56</sup> *Ibid*, paragraphs 219-220.

of whether the former were members of the associations or just users (on an occasional basis) of their services. The clauses had unlimited duration. In addition, they affected the provision of services on a market that was already heavily regulated as regards prices. Accordingly, non-price competition, based on the nature of the service offered, for instance, and/or on the provision of additional services (such as remote payment) were regarded as indispensable to counterbalance the presence of relatively few leading providers and of any barriers to entry or expansion originating from the regulatory framework assisting this industry.<sup>57</sup>

The AGCM emphasised that the new app-based services allowed taxi drivers to optimise working time by selecting jobs that were geographically close to them at any particular time (thanks to the positioning technology used), without start-up costs – all that was needed was a smartphone endowed with GPS positioning software.<sup>58</sup> Traditional despatching instead required drivers to source radio equipment at a cost.<sup>59</sup> App-based services provided a very innovative option to consumers (namely, taxi passengers seeking a ride) as well. Thanks to the geolocalisation services, passengers could both book and track a taxi until pick up, thus avoiding the risk of “no-show”. The additional payment services provided by the app-based platform and the possibility to rate services in each case added to the efficiency of the service and allowed consumers a real opportunity to influence service quality.<sup>60</sup>

In light of these considerations, the AGCM found that, compared with the nature of the services offered by traditional platforms, app-based intermediaries represented an innovative option for consumers as well as for drivers and were, as such, capable of putting competitive pressure on the incumbent providers.<sup>61</sup> The assessment as to the legality of the non-competition clause hinged, therefore, on the question of whether the non-competition obligations imposed on users of traditional platforms had precluded app-based providers from accessing the relevant market.<sup>62</sup> In other words, taking into account both the number of independent taxi drivers and of those drivers that were bound by an obligation not to join

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<sup>57</sup> Ibid, paragraphs 224 and 227.

<sup>58</sup> Ibid, paragraph 226; see also paragraph 232.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid, paragraph 227, see also paragraphs 233-234.

<sup>61</sup> See paragraphs 226 and 227; see also paragraph 229.

<sup>62</sup> Ibid, paragraph 227; see also paragraph 235.

service providers competing with the platform they used, were there sufficient drivers an app-based provider could rely on in order to satisfy the demand for transport services channelled through its app?

The AGCM acknowledged that, in light of their legal and economic context and due to their purpose, these clauses were not restrictions of competition ‘by object’. However, it made clear that they could nonetheless have anti-competitive effects. To assess whether such effects existed as a result, the AGCM relied on the EU Court of Justice’s *Delimitis* test.<sup>63</sup> First, it was indispensable to assess the share of supply of the goods in question insulated from outside competition as a result of the exclusivity obligations, and to consider whether its size was such that it would not be viable for new or existing entrants to expand on the affected market. The second prong of the test relates more specifically to the non-competition/exclusivity clause in examination, and considers whether they had actually precluded the complainant from entering in or expanding on the relevant market.<sup>64</sup>

The AGCM found that the relevant market was already relatively concentrated: there were only a few rivals, and their market shares had been constant over a significant period of time.<sup>65</sup> In addition, only a relative small share of taxi drivers operating across the city of Rome did so without relying on the intermediation services offered by one of the market leaders. However, these drivers were “committed independents” and had therefore manifested no intention to access despatching services.<sup>66</sup>

In light of the forgoing analysis, the AGCM took the view that if one took into account the number of “tied” drivers and, consequently, the share of capacity (in terms of number of journeys) that could be despatched solely via radio-based platforms, only a limited share of drivers and, therefore, of journeys could be potentially despatched by an app-based intermediary. As for drivers using traditional intermediaries, the decision also found that drivers using traditional intermediaries were very reluctant and therefore unlikely to switch to MyTaxi, although the app-based services were less costly and more efficient. This was owed to the fear that, once they had

<sup>63</sup> See paragraph 235; Judgment of 28 February 1991, *Stergios Delimitis v. Henninger Bräu AG*, C-234/89, ECLI:EU:C:1991:91.

<sup>64</sup> Judgment of 28 February 1991, *Stergios Delimitis v. Henninger Bräu AG*, C-234/89, ECLI:EU:C:1991:91, paragraphs 19-24.

<sup>65</sup> Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi 3570*, Case I801A, paragraphs 236-237.

<sup>66</sup> *Ibid*, paragraph 239.

done so, they would have become ineligible for the services provided by the traditional platform they had been using and would have therefore lost a significant part of their customers.<sup>67</sup>

On this basis, the AGCM concluded that the first condition outlined in *Delimitis* had been met since, due to the arrangements, the new entrant would have faced scarce capacity and been unable to satisfy demand from customers coming through its own app.<sup>68</sup> The assessment moved to the second *Delimitis* condition. The AGCM identified the percentage of unanswered calls for a taxi lodged via the MyTaxi app as the proxy for evaluating the foreclosure effect of the incumbents' arrangements vis-à-vis the new entrant.<sup>69</sup> The decision found that since entering the relevant market MyTaxi had struggled to find taxi drivers to fill 50% of the demand for taxi services managed through the app. The AGCM took the view that the cause of scarcity was not exclusively due to "structural" market factors, such as the very limited number of independent taxis who were "interested" in centralised despatching. It was also due to the impact of the non-competition obligations imposed by traditional platforms on drivers using their services, as a result of which the latter could not "multi-home" (i.e. they could not rely on a variety of demand sourcing channels, as opposed to exclusively on radio-based service providers).<sup>70</sup>

The decision found that since taxi drivers who were not "tied" to a platform were limited in number and those already associated to a traditional intermediary were dissuaded from working with MyTaxi by the concern for losing membership of their cooperative, there was very limited space for the new app to enter and grow in the relevant market.<sup>71</sup> In particular, the AGCM pointed to evidence showing that while a significant number of drivers had downloaded the MyTaxi app, the actual number of drivers who had accepted a "job" sourced via their smartphone had decreased gradually, leading to a situation where the intermediary could no longer fill up to 50% of the requests placed by its users.<sup>72</sup> In its view, such a downward trend was directly linked to the non-competition obligations imposed on drivers by the investigated cooperative association.<sup>73</sup>

<sup>67</sup> *Ibid.*, paragraphs 243, 245-247.

<sup>68</sup> *Ibid.*, paragraph 247; see also paragraphs 271-272.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, paragraphs 253, 255-256.

<sup>71</sup> *Ibid.*, paragraph 253; see also paragraphs 255-256.

<sup>72</sup> *Ibid.*, paragraph 262.

<sup>73</sup> *Ibid.*

The decision concluded that these clauses prevented not only cooperative members but also mere users from taking advantage of the demand sourced through the app.<sup>74</sup> This, in turn, precluded the expansion of MyTaxi on the relevant market for the despatch of taxi services in the city of Rome.<sup>75</sup> As a result, the AGCM took the view that since they foreclosed a new entry and/or expansion of a rival to the benefit of the incumbents, the non-competition obligations imposed by the radio-based intermediaries on all drivers using their services were incompatible with Article 101 TFEU.<sup>76</sup>

The importance of the findings made in MyTaxi should not be understated. The AGCM relied on a number of established approaches to the assessment of exclusivity and non-competition clauses and found that especially when these obligations are of unlimited duration and go as far as to bind mere users of these services, they not only jeopardise the entry of more innovative service providers, but also prejudice the welfare of consumers, who are denied the many benefits of app-based platforms.

### ***2.3. More about the MyTaxi “saga”: the decisions concerning taxi despatching in Milan and Naples***

The MyTaxi decision is a very significant development in respect of current competition law approaches to platforms, especially ‘closed’ ones. While the Italian competition agency did not outlaw outright this type of intermediaries, it nonetheless sent a powerful message to them, by limiting quite strictly the scope of any non-competition clauses they may wish to impose on their users. This however was only the first of a short series of decisions that have addressed the difficulties experienced by MyTaxi in trying to enter into the taxi despatching services market in a number of Italian cities. In a later decision, the AGCM had to deal with a similar complaint concerning the imposition of a similar non-competition obligation on taxi drivers using the services of four incumbent intermediaries active in the city of Milan.<sup>77</sup>

MyTaxi’s complaint was similar to the one leading to the 2018 decision. Two of the parties, TaxiBlu and Autoradiotassi, were cooperative

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<sup>74</sup> Ibid, paragraphs 273-274.

<sup>75</sup> Ibid, paragraph 266.

<sup>76</sup> Ibid, paragraphs 283-284.

<sup>77</sup> Decision of 27 June 2018 *MyTaxi/TaxiBlu/YellowTaxi/Autoradiotassi*, Case I801B, available at: [https://www.agcm.it/dotcmsDOC/allegati-news/I801B\\_ch.%20istr\\_omi.pdf](https://www.agcm.it/dotcmsDOC/allegati-news/I801B_ch.%20istr_omi.pdf).

associations and had raised similar arguments as to the respondents in the Rome investigation: these clauses were necessary to protect their mutualistic purpose.<sup>78</sup> YellowTaxi, however, was a commercial undertaking.<sup>79</sup> It argued before the AGCM that according to Article 1567 of the Italian Civil Code, concerning exclusivity clauses in contracts for the provision of services, service providers could prevent their customers from either obtaining services from a third party (namely a rival of the service provider) or from providing the same service in-house.<sup>80</sup>

Just as with the Rome case, the AGCM rejected the allegation that this type of exclusivity clause was ‘indispensable’ for the existence of the relationship between service provider and acquirer because it served the interests of both parties and was therefore aimed at preserving the profitability of the deal for both service provider and acquirer.<sup>81</sup> It was observed that this clause was both of unlimited duration and of overly extensive scope, since it bound both long-term customers of YellowTaxi and occasional users, with whom the company had an “oral contract”. The AGCM concluded that the non-competition clause, despite *prima facie* being consistent with Article 1567 of the Civil Code, was incompatible with Article 101 TFEU for going beyond what was indispensable to attain the objectives that this provision was aimed to secure.<sup>82</sup>

On the basis of the *Delimitis* test,<sup>83</sup> the AGCM found that the non-competition clauses had contributed significantly to sealing off a market that was already both very regulated and characterised by significant barriers to entry and expansion, such as the “sunk costs” associated to adhering to the traditional, radio-based platforms. As a result of these non-competition obligations, drivers were strongly deterred from seeking out the services offered by an app-based platform such as MyTaxi.<sup>84</sup>

It is suggested that the AGCM has taken a very strong stance in favour of opening up the taxi despatch services market, out of a concern for avoiding consolidating positions of market power and the strengthening of barriers to entry likely to work against more efficient rivals. In this context, both decisions emphasised that the exclusive reliance on closed platforms

<sup>78</sup> Ibid, paragraphs 28-29.

<sup>79</sup> Ibid, paragraphs 4 and 6.

<sup>80</sup> Ibid, paragraph 30.

<sup>81</sup> Ibid, paragraphs 135 and 138.

<sup>82</sup> Ibid, paragraphs 193-196.

<sup>83</sup> Ibid, paragraphs 241-246.

<sup>84</sup> Ibid, paragraphs 220-223.

could lead to the inefficient allocation of taxi services, since drivers would be unlikely to use their capacity fully and passengers would consequently be likely to wait longer and potentially pay more for their journeys.<sup>85</sup>

The MyTaxi 'saga', however, did not stop with the above decisions. In February 2019, the AGCM adopted interim measures against a number of taxi despatch intermediaries active in the city of Naples on the grounds that the closed platforms that the investigated firms operated presented a concrete risk for the maintenance of competition on this market.<sup>86</sup> It was found that the incumbent firms had sought to discourage taxi drivers associated with their platforms from also using the services offered by MyTaxi by making threats to terminate the contract concluded by the incumbent with individual drivers and issuing warnings against installing the apps in question.<sup>87</sup> The decision held that since these practices had been adopted when MyTaxi had not established a customer base, in the form of drivers using its services, the action of the incumbent was capable of dissuading individual taxi drivers from using open platforms, thus leading to a loss of competition on the call despatch market as well as on the market for the delivery of transport services to consumers.<sup>88</sup>

In light of the above analysis, it can be concluded that the MyTaxi decisions represent something of a "shake-up" of the way in which the market for the provision of taxi despatch services has operated so far. It is argued that by outlawing the exclusivity clauses that had thus far ensured that a steady supply of taxi services would be managed by the taxi phone lines, the latter had made it very difficult for new entrants to threaten their market leadership in a number of important Italian cities. The foreclosing effect of these clauses was also held to be an obstacle to innovation and to the entry into the market of undertakings that could provide these services in novel ways that could deal more effectively with consumers' demands.

How do the MyTaxi decisions fit with the current interpretation of Article 101 TFEU? And what are the possible implications of adopting a similar position in the future for the development of the approach of competition

<sup>85</sup> See e.g. Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case I801A, paragraphs 92-94.

<sup>86</sup> Decision of 13 February 2019, *Servizi di Prenotazione del Trasporto Taxi – Napoli*, Case I832, available at: [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/E7B2BD080673DA7CC12583AC0059209B/\\$File/p27553.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/E7B2BD080673DA7CC12583AC0059209B/$File/p27553.pdf) (hereinafter referred to as *MyTaxi Napoli* decision).

<sup>87</sup> *Ibid*, paragraphs 28-29.

<sup>88</sup> *Ibid*, paragraph 30.

law to platform markets? The next sections will examine in greater detail the approach adopted by the Italian competition authority in light of the practice developed by other competition agencies and by the EU judiciary in relation to similar questions.

### ***3. Competition law and platform-based industries: time for change?***

#### ***3.1. The notion of ‘ancillary restrictions’ and exclusivity clauses: is this the end of closed platforms?***

The previous sections examined the MyTaxi decisions adopted by the AGCM and argued that the Italian competition authority sent a powerful signal toward taxi despatch intermediaries, warning them that the enforcement of exclusivity clauses might infringe EU competition rules. The purpose of this section is to look more closely at the interpretation of Article 101 TFEU adopted by the AGCM in the MyTaxi cases. Section 3.1 noted that the Italian competition agency rejected the arguments raised by the investigated companies and in favour of excluding app-based platforms from the same relevant market as the one to which “traditional” intermediaries belonged. The MyTaxi/Rome decision emphasised that since both service providers fulfilled the same economic function, namely to mediate between taxi drivers and prospective passengers, albeit by using different technologies, there was no justification for considering these separate relevant markets.<sup>89</sup>

In this respect, a parallel can be drawn with a decision of the Bundeskartellamt (BKamT), the German Competition Office, concerning the legality of a number of practices adopted by “bricks-and-mortar” travel agents in response to the entry in the market for the provision of these services of online platforms providing hotel and travel bookings. In the HRS decision, the BKamT found that “traditional” and online travel agents formed part of a two-sided market.<sup>90</sup> One segment concerned the provision of intermediation services to businesses, such as hotels and travel companies; the other segment, instead, sought to respond to the requests

<sup>89</sup> Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case I801A, paragraphs 32-33; see also paragraphs 139-140.

<sup>90</sup> Decision of the Bundeskartellamt of 20 December 2013, *HRS*, Case B9-66/10, available at: [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf%3F\\_\\_blob%3DpublicationFile%26v%3D3](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf%3F__blob%3DpublicationFile%26v%3D3), paragraphs 2-3; see also paragraphs 71-73 and 100-103.

of individual consumers who wished to book transport and accommodation services, standalone or in conjunction with one another.<sup>91</sup>

Regarding the “business-to-business” segment in particular, the German competition agency rejected the claims that online service providers belonged to a distinct market vis-à-vis the one in which traditional travel agents operated. Instead, it took the view that both online and “bricks-and-mortar” providers were regarded by hotels (especially, it was found, small and medium sized ones) as mutually substitutable.<sup>92</sup> In this specific respect, the HRS decision drew a distinction between online travel agents and hotel websites: it was found that the latter belonged to a different market because they only served to promote individual hotels or hotel chains with a view to selling their services through an online technology.<sup>93</sup>

Against this background, it is submitted that the AGCM’s analysis of the relevant market is broadly consistent with established demand- and supply-side substitutability theories that characterise the approach adopted by other European authorities. Just as in the HRS decision, the Italian competition authority’s analysis appeared to be centred in the economic functions call despatch services’ providers fulfilled on each of the sides of the market, as well as on how the intensity of competition and the possibility to enter into or to expand on the business-to-business segment affected rivalry and entry on the consumer segment.<sup>94</sup> In addition, it is important to note that the AGCM’s view of market definition is “technology neutral”; in other words, it focuses on the nature of the economic activity being performed by each firm as opposed to the way in which they offer their services – whether in a traditional shop or on the internet.<sup>95</sup>

The MyTaxi decisions remain compatible with the EU *acquis* also when it comes to the assessment of the non-competition clauses and in particular of their conformity to the criteria of ‘ancillarity’ enshrined in the CJEU’s case law. In the Remia judgment, for instance, the Court of Justice

<sup>91</sup> Ibid, paragraphs 102-103. For commentary, see *inter alia* Pál Szilagyi, “Online travel agents and competition law”, *European Competition Law Review* 39, no. 10 (2018): 439-440.

<sup>92</sup> HRS decision, paragraphs 76-77.

<sup>93</sup> Szilagyi, “Online”, 441. See Decision of the Bundeskartellamt of 20 December 2013, HRS, Case B9-66/10, paragraph 73.

<sup>94</sup> Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case I801A, paragraphs 245-246; para. 271-272.

<sup>95</sup> See e.g. paragraph 204 of Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case I801A. See also Decision of the Bundeskartellamt of 20 December 2013, HRS, Case B9-66/10, paragraph 73.

held that not every restriction on the freedom of action of the parties to an arrangement infringed Article 101 TFEU, and this was also true of ‘non-competition’ clauses.<sup>96</sup> The Court acknowledged that imposing this obligation was frequent in the context of certain business transactions (such as, for instance, the agreement for the sale of a business) and could even be indispensable to ensure that a deal could take actual effect. Thus, as long as its anti-competitive effects were “inherent in the pursuit” of the public interest objectives that the restraint aimed to attain and the restriction at issue did not appear to go beyond what was necessary to secure these objectives, Article 101(1) TFEU would not apply.<sup>97</sup>

The EU Commission adopted a similar view in relation to other non-competition clauses, such as “non-poaching agreements”, namely the agreement not to seek to hire any staff of the other parties to a broader arrangement for a fixed period post-deal. These types of clauses are often contained in merger deals.<sup>98</sup> The EU Commission has taken the view in a number of decisions that these obligations can be regarded as “strictly related and necessary” to the implementation of a merger, as long as they are limited in time, concern “key staff” and are restricted in order to reflect the “scope of the business” being transferred.<sup>99</sup>

The approach outlined above can be compared with the position of the AGCM in the MyTaxi decisions. The AGCM found that while the clauses at issue were in the abstract consistent with Italian law governing, respectively, cooperative association and service companies, they went beyond what was “necessary” to attain the goals pursued by the relevant domestic rules.<sup>100</sup> The decision acknowledged that non-competition obligations were permissible under Articles 1567 and 2527 of the Civil Code. However, it took issue with the breadth of these obligations, which were both of unlimited duration and encompassed all users of the traditional platforms,

<sup>96</sup> See e.g. Judgment of 11 July 1985, *Remia BV and others v. Commission of the European Communities*, case 42/84, ECLI:EU:C:1985:327, paragraphs 19 and 31-32.

<sup>97</sup> Judgment of 19 February 2002, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, intervener: *Raad van de Balies van de Europese Gemeenschap*, C-309/99, ECLI:EU:C:2002:98, paragraph 97; see also paragraph 107.

<sup>98</sup> See, *ex multis*, Decision of 29 April 1998, *ICI/Williams*, Case no IV.M/1167, 5-6; see Riccardo Tremolada, “Anti-competitive restraints in labour markets-antitrust enforcement in respect of anti-competitive agreements”, *European Competition Law Review* 40, no.10 (2019): 457.

<sup>99</sup> Tremolada, “Anti-competitive”, 457.

<sup>100</sup> See paragraphs 215-217, 221 of Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi 3570*, Case I801A.

regardless of whether they were members of the cooperative associations or mere users of these services. In the AGCM's view, the statutory objectives at issue could have been attained without restricting the freedom of action of the affected taxi drivers so significantly, for instance by requiring only members of the cooperatives to refrain from seeking the services of a rival platform.<sup>101</sup> Limiting the reach of these clauses in this way would have gone some way toward creating some space for competing despatch services providers, including app-based platforms such as MyTaxi, by increasing their opportunity to recruit new drivers and, therefore, fulfil the requests for service placed by app users.<sup>102</sup>

The assessment of the non-competition clause in light of the *Delimitis* test is another key feature of the MyTaxi decisions. The AGCM questioned whether the exclusivity clause contained in the intermediaries' contracts with taxi drivers increased the foreclosure of a market whose contestability was already affected by the existence of similar arrangements. It is submitted that the way in which this assessment was approached is consistent with recent EU acquis. A parallel can be drawn between these decisions and the recent CJEU's preliminary ruling in *Maxima Latvija*, for instance. The ruling arose from a dispute concerning the validity of a commercial real estate lease agreement: among its clauses was a stipulation that existing lessees could oppose the lessor's decision to let premises belonging to the same complex out to new tenants.<sup>103</sup> The Court of Justice held that a similar clause limited the freedom of the lessor to decide whom to lease property to since it subjected the decision to the consent of existing lessees.<sup>104</sup>

This clause was also found to prevent potential lessees from entering the retail market on the grounds that it could stop them from establishing a physical foothold in a certain area and thereby exercise pressure on the existing incumbent lessees, whose tenancy gave them the right to "filter out" new rivals. In the words of the Court of Justice, subjecting a new lease to the assent of existing tenants could de facto "price out" "Maxima Latvija's competitors (...) [from] some shopping centres in which that company operates a large shop or hypermarket".<sup>105</sup> Consequently, this decision

<sup>101</sup> Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case 1801A, paragraph 218; see also paragraph 221.

<sup>102</sup> *Ibid*, paragraph 217.

<sup>103</sup> Judgment of 26 November 2015, *SIA "Maxima Latvija" v. Konkurences padome*, C-345/14, ECLI:EU:C:2015:784, paragraph 15.

<sup>104</sup> See e.g. paragraphs 21-22.

<sup>105</sup> *Ibid*, paragraph 22; see also paragraphs 18-19 and 27.

presents a clear parallel with the exclusivity clauses at issue in MyTaxi, to the extent that it discouraged new entry in the retail market in respect of which estate agents provided an important intermediation service.

The Court of Justice acknowledged that this clause was not a “serious” infringement of competition law and on that basis held that the court seized with the dispute should have looked at the practice in light of the Delimitis test. To this end, the court should have taken into account the existence of regulatory barriers to entry<sup>106</sup> and the question of whether new entrants could have found alternative space in a different location within the same geographic area.<sup>107</sup> If the answer was affirmative, the court should have considered whether the agreement at issue contributed to sealing off this market to an appreciable extent as regards the position of the parties on the market and the duration of the agreement.<sup>108</sup>

In light of the forgoing analysis, it is argued that the MyTaxi decisions are consistent with the CJEU’s approach as in, among other authorities, *Maxijima Latvia*: the AGCM considered the regulatory barriers to the taxi market and highlighted the considerable market share held by the investigated traditional platforms, all of whom tied their business customers with exclusivity obligations.<sup>109</sup> Thereafter, the decision examined the foreclosing impact on MyTaxi and in light of its inability to expand its pool of drivers found that, as a result, it was also unable to meet demand on the consumer market.<sup>110</sup> On that basis, the AGCM reached the conclusion that while the arrangements at issue were not serious infringements of Article 101 TFEU, they nonetheless had an anti-competitive impact, since they had prevented a newcomer from expanding on the market despite offering an innovative and appealing service.<sup>111</sup>

It can therefore be concluded that the MyTaxi decisions are not only consistent with EU precedent, but also an example of how the impact of technologically advanced new entrants can challenge the position of the

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<sup>106</sup> Ibid, paragraph 27. See also, *mutatis mutandis*, Judgment of 6 December 2017, *Coty Germany GmbH v. Parfümerie Akzente GmbH*, Case 230/16, ECLI: EU: C: 2017: 941; see Opinion of AG Wahl delivered on 26 July 2017, *Coty Germany GmbH v. Parfümerie Akzente GmbH*, Case 230/16, ECLI:EU:C:2017:603, paragraphs 62–63.

<sup>107</sup> Ibid, paragraphs 28–29.

<sup>108</sup> Ibid, paragraph 29; see also paragraph 31.

<sup>109</sup> See Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi 3570*, Case I801A, paragraphs 143–145; see also paragraphs 239–242.

<sup>110</sup> Ibid, paragraphs 253–256; see also paragraphs 283–285.

<sup>111</sup> Ibid, paragraph 223.

incumbents and their approach to providing services. The next section will consider some of the possible implications of the application of European competition rules to the operation of platforms more generally and especially the possibility of the latter to “control” in any way the size of their user base, especially their business-to-business segment.

### **3.2. MyTaxi and the future of despatch platforms: all change?**

The previous section analysed the approach prevailing in the MyTaxi decisions and suggested that the Italian competition agency succeeded in constructing a sound and coherent theory of harm and a set of equally compelling legal arguments, the latter based on the EU precedent in this area. This section will explore, albeit briefly, some of the implications of these decisions for the future of this market and, in particular, for the development of these platforms.

It is undoubted that the arrival of app-based intermediaries on the market for the provision of taxi despatch services represents a dramatic change in the way in which we think about “calling a cab”. As illustrated in section 2, these providers are not only efficient because, thanks to the GPS and the real-time positioning, they allow taxi drivers to employ their working time more efficiently. They are also less expensive due to the lack of start-up costs. Finally, app-based providers are more “consumer-friendly”, since they enable users to, inter alia, track the chosen car, “fix” the cost of the ride and pay it in advance, and book services in their own mother language. Their entry into the market has, however, been met with something of a backlash from incumbents. Regulators were also concerned by the entry of some app-based providers.

The earlier discussion concerning Uber, contained in section 2.1, illustrated how much its entry on to these markets was resisted for a number of different reasons. Regulators wished to continue imposing regulatory requirements (such as the obligation to ensure the identity of drivers, their compliance with the duty to take up insurance and their “good standing”), which they saw as essential for the pursuit of important public policy objectives.<sup>112</sup> Similar objections were also made vis-à-vis Uber’s practices on the basis of the perceived need to protect the rights of drivers themselves,

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<sup>112</sup> See e.g., Wyman, “Taxi regulation”, 22-24. See also, *mutatis mutandis*, Decision of 25 November 2019, *Transport for London*.

especially in terms of, *inter alia*, pay and sick leave entitlements.<sup>113</sup> Existing taxi drivers and call despatch operators were just as vocal.<sup>114</sup> Should drivers be “compensated” in some way?<sup>115</sup> Should existing intermediaries be able to maintain their pool of drivers in some way?

It is clear from the MyTaxi decisions that the latter concern was at the forefront of the radio-taxi platforms being investigated in all cases. As the cases showed, incumbents moved relatively promptly toward enforcing the exclusivity clauses contained in the agreements they stipulated with members, as well as with users. Consequently, the MyTaxi decisions have dealt a blow, in many ways, to the established approaches to how these services are offered in several cities, and not just in Italy. As respects Italian markets, the AGCM’s investigative results indicated that the market for call despatch services was considerably regulated and characterised by the presence of a number of incumbent “closed” platforms who together held a significant share of demand. For instance, in the city of Rome, in 2017, this share was estimated to be in the region of between 60% and 75%, spread across the three incumbents investigated by the AGCM.<sup>116</sup> Market share data were even more striking for the city of Milan, where the investigated platforms held jointly over 85% of the market for these services.<sup>117</sup>

Add to this the evidence of the circumstance that the majority of independent drivers were committed to their own autonomy from despatch platforms of any kind<sup>118</sup> and it will become clear that the non-competition clauses assisting incumbent platforms present an additional and rather

<sup>113</sup> See, *inter alia*, Debbie Woskow, “Unlocking the sharing economy – an independent review”, November 2014, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf), 32-33; most recently, in the UK, Rahim Nilufer, Katriina Lapanjuuri, Francesca Day, Hannah Piggott, Ruth Hudson and Klaudia Lubian, “Research on the sharing economy”, *HMRC report* 453, 5 May 2017, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/658728/HMRC\\_Report\\_453\\_Sharing\\_Economy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/658728/HMRC_Report_453_Sharing_Economy.pdf), 48-50 (discussion of perception of employment status).

<sup>114</sup> See e.g., in relation to the “Medallion” system existing in the city of New York, Wyman, “Taxi regulation”, 77-78.

<sup>115</sup> *Ibid*, 82-84.

<sup>116</sup> Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case I801A, paragraph 272.

<sup>117</sup> Decision of 27 June 2018, *MyTaxi/TaxiBlu/YellowTaxi/Autoradiotassi*, Case I801B, paragraphs 95-96.

<sup>118</sup> Decision of 27 June 2018, *MyTaxi/Samarcanda/Pronto Taxi/RadioTaxi* 3570, Case I801A, paragraph 272.

sizeable hurdle for newcomers.<sup>119</sup> It was argued before the AGCM that drivers could have exercised their right to terminate their contract with the “traditional” intermediary. However, in light of the data on market shares outlined above, it can be agreed with the AGCM that terminating contracts for the purpose of directing business toward app-based providers could not constitute a reasonable and sustainable choice, since it would have led to the loss of the whole demand channelled via the traditional intermediaries.<sup>120</sup>

In light of the forgoing observations, would it be legitimate to argue that we are witnessing the end of “closed” platforms, at least in the market for the provision of intermediation services between taxi drivers and prospective passengers, given the impact that non-competition clauses might have on the entry or expansion of rival intermediaries? It could be argued that taxi despatchers can no longer demand full “loyalty” from their users and that they should accept having to operate in competition with other more innovative, cheaper and therefore more appealing intermediaries. At the same time, however, the nature of each intermediary and of the activities that each performs should be taken into account. Thus, it is submitted that it should still be possible for cooperative associations, for instance, to demand a degree of loyalty from their members by preventing them from seeking competing services from another platforms. Accordingly, cooperative associations might consider limiting the reach of these clauses only to their full members and leave “mere users” of their services at liberty to seek out services from “open” platforms, in competition with “closed” ones.

Broadly similar views appear justified also in respect of platforms operated by commercial entities: however, just as with cooperatives, any limitations should be restricted in duration and in scope to what is “strictly related and necessary” to safeguard the mutualistic nature of the association or, respectively, to ensure the appropriate performance of the services contract.<sup>121</sup> To satisfy these requirements, it may be necessary for mutualistic entities to limit the remit of these obligations to members, as opposed to mere users, or to restrict their duration for a start-up period. In any event, total exclusivity, as in the case of the intermediaries investigated in

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<sup>119</sup> Ibid, paragraphs 273-275.

<sup>120</sup> Ibid, paragraph 273; see also Decision of 27 June 2018 *MyTaxi/TaxiBlu/YellowTaxi/Autoradiotassi*, Case I801B, paragraphs 243-244.

<sup>121</sup> See e.g., *mutatis mutandis*, Tremolada, “Anti-competitive”, 462.

MyTaxi, appears irreconcilable with Article 101 TFEU, since it would de facto seal off the relevant markets and slow down innovation and development of this industry. On this point, a recent Competition Paper from the OECD Secretariat highlighted the need to avoid exclusionary practices, such as the imposition of a single-homing obligation for drivers, on the grounds that it could lead to higher prices and damage consumers.<sup>122</sup> These views were also shared by the former Chair of the Competition and Markets Authority, who argued that any proposal to allow platforms to prevent multi-homing (of drivers or of consumers) should be resisted since it would slow down new entries and eventually lead to less price- and quality-based competition.<sup>123</sup>

It is added that this position is also consistent with recent economic literature concerning the functioning of taxi services' intermediation platforms: in 2018, Bryan and Gans suggested that allowing drivers as well as consumers to rely on a variety of channels to, respectively, offer their services and seek a ride was likely to lead to lower prices and to reduce waiting times, providing that there is no incentive created by platforms to "compensate" drivers for choosing idleness.<sup>124</sup> A 2020 study by Cusumano, Yoffie and Gawer, broadly confirming these views, suggested that multi-homing could be regarded as a decisive factor in preventing the emergence of dominant intermediaries.<sup>125</sup> They also argued that how individual platforms deal with multi-homing is likely to be decisive for their survival in the industry in which they operate and speculate that their ability to reduce the scope for using more platforms than just one, on either side, may be necessary to ensure long-term viability and lead to greater product differentiation.<sup>126</sup>

<sup>122</sup> Niccolò Comini, Beyza Erbay and Chris Pike, "Taxi, ride-sourcing and ride-sharing services – a note from the secretariat", *OECD Competition Papers*, DAF/COMP/WP2, 2018, [https://one.oecd.org/document/DAF/COMP/WP2\(2018\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2018)1/en/pdf), paragraphs 136-137.

<sup>123</sup> David Currie, "David Currie on the role of competition in stimulating innovation", Speech at Concurrences Innovation Economics Conference, King's College London, February 3, 2017, <https://www.gov.uk/government/speeches/david-currie-on-the-role-of-competition-in-stimulating-innovation>. See also Yseult Marique and Enguerrand Marique, "Uber in London – ç a battle between public and private regulation", in *Uber & Taxis – ç Comparative legal studies*, ed. David Renders and Rozen Noguellou (Brussels, Bruyllant, 2018), at pages 175-176; see also page 194.

<sup>124</sup> Kevin A. Bryan and Joshua S. Gans, "A theory of multihoming in ride-sharing competition", *Journal of Economics & Management Strategy* 28, no. 1 (2019): 94-95.

<sup>125</sup> Michal A. Cusumano, David B. Yoffie and Annabelle Gawer, "The future of platforms", *MIT Sloan Management Review* 61, no. 3 (2020): 52.

<sup>126</sup> *Ibid.*, 49-50.

Against this background, it is argued that the MyTaxi decisions are not only broadly consistent with the EU competition law *acquis* governing exclusivity clauses, but also compatible with the economic analysis concerning the way in which platform-based markets work and which demonstrates the importance of multi-homing as a decisive factor for ensuring the contestability of these markets. It is acknowledged, as suggested by Cusumano et al., that protecting the size of the platform's user base may actually lead to the emergence of new, more innovative products and services, thus encouraging quality-based rivalry in the long run.<sup>127</sup> On this point, it should be emphasised that Article 101 TFEU does not prohibit all exclusivity clauses. As shown in MyTaxi, it remains possible for intermediaries to demand a degree of "loyalty" from certain users of their services. However, it is submitted that the scope and the duration of these clauses is going to have to be strictly limited to make it possible for rival intermediaries to enter and expand on this market, to the benefit of competition and consumer choice.

In light of the forgoing analysis, it may be concluded that competition law is shaping the present and future of platform-based markets very significantly by promoting openness and user choice on both segments of these industries. As technological solutions evolve, it is going to be important, however, to ensure that both the understanding and the application of competition standards remain flexible and attuned with the need to encourage quality-based rivalry.

#### ***4. Of taxis and beyond: open and closed platforms and the competition rules – Tentative conclusions***

Platforms are a constant presence in many industries where intermediaries play an essential part in the "matching" of providers and users of certain services. Their peculiar features, such as their "two-sided" nature and the need for them to accumulate a certain critical mass of users in order to be viable, call for a careful assessment of the contractual practices that assist their functioning. Technological innovation, the emergence of the internet and of what we call the "sharing economy" have fostered the entry into these markets of new operators whose business models are characterised by low costs, openness and flexibility.

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<sup>127</sup> Ibid.

This contribution examined the consequences of the above changes for two-sided markets, where intermediaries play a key part in allowing service providers to reach out to service users, and focused on the example offered by the taxi services' industry, where the entry of undertakings using new business models reliant on technology is rather illustrative of these challenges. Section 2 summarised the economic implications of this transition and argued that the example of Uber, with its *prima facie* flexibility, low costs and speed of access for both drivers and passengers has been particularly illustrative of the disruptive force of the new model. It was argued that the entry of innovative intermediaries had obvious benefits for passengers, with lower fares and less waiting times, among other consequences. At the same time, it impacted drivers in a less positive and more unpredictable manner: incumbent drivers who relied on traditional methods of sourcing demand for their services saw, among other effects, a reduction of their revenues. Drivers who had chosen to avail of Uber's services on their part reported decreasing satisfaction levels due to the extent of their dependency on the platform not just in relation to sourcing demand, but also to the determination of fare prices and consequently of profit margins.<sup>128</sup>

Section 3 examined the implications of the entry of online, app-based platforms on the market for the despatch of calls to taxi drivers and in particular the question of whether incumbent platforms could in any way seek to maintain a certain level of supply for these services by binding their users to relying on their services. The contribution examined the MyTaxi decisions adopted by the Italian competition agency in respect of the use of loyalty clauses in the taxi despatching service market. It was acknowledged that the established corporate structures that provide similar services, and especially those performing a "mutualistic" function, should be allowed to "work well", if necessary by seeking to maintain a degree of loyalty from their members. However, it was argued that there should always be a concrete opportunity for rivals (especially those who offer the same services in a less costly and more innovative and more consumer-friendly manner) to enter or expand their share of this market segment. For this purpose, any loyalty-inducing obligation should be carefully limited to ensure that service users retain a realistic opportunity to seek out alternative services

<sup>128</sup> See e.g. Janine Berg and Hannah Johnston, "Too good to be true? A comment on Hall and Krueger's analysis of the labor market for Uber's driver-partners", *Industrial and Labor Relations Review* 72, no. 1 (2019): 59-60.

without having to make a “trade-off” between the possibility to access demand through “consolidated” channels and the ability to do so via the new intermediaries.

In its final sections, this contribution tried to gauge some more general implications stemming from the application of the EU Competition Rules to platform-based markets: it was argued that the decisions in comment remain consistent with the more general approach adopted by the Court of Justice of the EU vis-à-vis exclusivity obligations and, in particular, with the notion of ‘ancillary restraint’. Consequently, it was submitted that closed platforms might be difficult to justify, unless the intermediary confines the single-homing obligation within very restricted limits in terms of duration and of personal scope.

In light of the forgoing analysis, it can be concluded that as innovative ways of matching demand and supply of goods and services are found, thanks to the ubiquity of e-commerce and to the importance of platform intermediation, competition law is going to play a decisive role in ensuring that markets remain fully contestable and the development of new business model is promoted. It is acknowledged that, as the Uber case showed, not all problematic issues that arise from relying on these new intermediation tools can be resolved by enhancing competition, and that regulatory responses may be necessary (for instance, when it comes to protecting service providers’ labour rights). Nonetheless, it is clear that avoiding bottlenecks by enabling service providers to seek out customers through a variety of channels is going to be indispensable to foster competition based on quality and innovation and to ensure that demand is met efficiently.

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