

likelihood that the main claim would succeed later on the merits. With regard to this aspect, the Madrid Taxi Association based its demand for precautionary measures on Art 15.2 Unfair Competition Law<sup>6</sup>, which deems as an act of unfair competition the breach of rules that govern competition activities. Taking account of the evidence submitted by the applicant, the court concluded that Uber's activities were openly infringing passenger transportation rules. Concretely, it referred among others to Art 22, 42 and 91 Spanish Law for Road Transport<sup>7</sup> which lay down the obligation for drivers and companies offering transportation services and charging for them to be in possession of an authorising licence.

On the other hand, the court devoted a great part of the ruling to justify the urgency and necessity of the precautionary measures. In this regard, the court did not only confirm the existence of a risk of imminent and irreparable harm for the applicant in case Uber could continue its activities until a final judgment was issued. Moreover, the specific circumstances of the case supported – as the applicant requested it – the adoption of precautionary measures before the filing of the main claim and without having previously heard the defendant. To explain the adoption of these exceptional measures, the court noted that the universalisation and the high speed of communications via Internet enable the operation of a system which is competing in a presumably unfair way and inferring an ongoing and immediate harm to the applicant. As additional arguments the court hinted at the difficulty to obtain the necessary documentation from a foreign company as well as to the fact that Uber operates from the US state of Delaware, a well-known tax haven, and is a pretty intransparent company.

In compliance with the court's order, Uber temporarily suspended UberPop in Spain on 30.12.2014. At the same time, it announced its intention to appeal the court's ruling,<sup>8</sup> which it regarded as highly unusual and overhasty. According to Spanish procedural law, Uber could first contest the precautionary measures adopted without it having been heard by filing an opposition within twenty days after notification of the court's order (Art 739 Code of Civil Procedure). As a further option, Art 241 Law on the Judicial System<sup>9</sup> regulates, as an exceptional legal remedy, the possibility to request the annulment of proceedings based on the violation of fundamental rights conferred by the Spanish Constitution. In both cases, the Commercial Court No 2 of Madrid would be competent to decide.<sup>10</sup> Moreover, in any of these cases the precautionary measures would be suspended. There is, unfortunately, scarce publicly information available on this issue. It seems, however, that Uber has made use of both options,<sup>11</sup> while preparing the defence against the unfair competition claim in the main proceedings. Additionally, just a few weeks ago Uber began to operate again in Barcelona with UberEats, its first on-demand food delivery service outside the United States,<sup>12</sup> reaffirming with this decision its intention to remain present and expand on the Spanish market.

Beyond the battles on the streets and in the courts, the polemic around Uber's service UberPop has triggered a broader social and legal debate in Spain on the advantages of the sharing economy and the necessity to adapt the current legal framework to new business models based on peer-to-peer transactions. In November 2014, the Comisión Nacional de los Mercados y la Competencia (CNMC), the Spanish competition authority, opened a public consultation aimed at collecting information from stakeholders and the public in general on the effects of the collaborative economy and the impact of new business models on the market and on traditional market operators.<sup>13</sup> Building on the information gathered the CNMC will prepare a study with policy recommendations aimed at ensuring an efficient regulation of the affected markets. Not surprisingly, the public consultation has centred – and the study will also do – on two

specific sectors, namely passenger road transportation (taxi and bus services) and tourist accommodation. These industries are not only heavily regulated in Spain, but are sectors where new models for service delivery are having the largest impact and posing a real competitive threat to traditional agents. Though the study is still in its initial phase, the CNMC has already advanced – in line with the view taken by other national competition agencies in Europe<sup>14</sup> – that it positively evaluates the effects of this kind of business models on competition. Furthermore, it has stressed that neither prohibitions nor more regulation may be the optimal policy responses. Rather, the solution may consist in reducing unnecessary and disproportionate sector regulation.<sup>15</sup>

*Beatriz Conde Gallego\**

6 Ley 3/1991, de Competencia Desleal, BOE Nr 10 of 11.1.1991.

7 Ley 16/87, de Ordenación de los Transportes Terrestres, BOE Nr 182 of 31.7.1987.

8 See the official communication of Uber at <blog.uber.com/decision-uberpop\_EN>.

9 Ley Orgánica 6/1985, del Poder Judicial, BOE Nr 157 of 2.7.1985.

10 Because the decisional competence is attributed to the same court, there is a high probability that the opposition measures and the request for annulment of proceedings, respectively, will be rejected. While the decision taken in the context of Art 739 et seq Code of Civil Procedure can still be appealed, there is no ordinary legal remedy against a decision rejecting the admissibility of the annulment request or denying it. In this case, only a constitutional complaint to the Constitutional Court is possible.

11 At least this can be inferred from an interview given by Carlos Lloret, Uber's executive in Spain: "En primer lugar vamos a recurrir la decisión cautelar del juez. Lo recurriremos por la vía ordinaria, con un escrito al juez explicando porque creemos que la medida cautelar no es tan urgente y se ha tomado de manera apresurada. Además, hemos interpuesto un recurso extraordinario de nulidad sobre la base que este auto viola artículos claves de la Constitución Española y de la Convención Europea de Derechos Humanos que garantizan a los acusados el derecho a una defensa justa." The text is available at <entrevistas.ticbeat.com/carles-lloret-uber-esperamos-uberpop-pueda-volver-lo-antes-posible/>. However, it has to be noted that, in this author's view, the reference in the text to the "recurso extraordinario de nulidad" should be understood as a reference to the mentioned "incidente excepcional de nulidad de actuaciones" of Art 241.1.2. LOPJ.

12 See <blog.uber.com/EATS-bcn>.

13 See <cnmc.es/en-gb/promotion/sectoralreportsandstudies/studyonthe-sharingeconomy.aspx>.

14 See eg the interview with the President of the German Bundeskartellamt, <bundeskartellamt.de/SharedDocs/Publikation/DE/Interviews/Rheinische\_Post\_Uber.pdf?\_\_blob=publicationFile&v=3>.

15 See <cnmcblog.es/2014/07/16/economia-colaborativa-y-regulacion/>.

\* Dr iur, Senior Research Fellow, Max Planck Institute for Innovation and Competition, Marstallplatz 1, 80539 München (Germany), EMail: beatriz.conde@ip.mpg.de.

## UBER in Portugal

### I. History of Uber in Portugal

Uber provides services in Portugal since 2014 and there is an intense discussion on the lawfulness of these contracts. The service UberBlack has been available in Lisbon since July 2014. Starting from December 2014, the service UberX has also been available in Lisbon and in Oporto. The service UberPop is not and has never been provided in Portugal.

### II. Discussion surrounding Uber and arguments presented by both sides

Since the service started to be provided in Portugal, the associations representing the sector of public transport by car, commonly known as taxis, have publicly objected to Uber's activity, lobbying the political power and the regulatory authorities so that Uber is prevented from operating in Portugal. As of yet, no judicial action is pending against Uber.

In response to a request for clarification presented by one of those associations<sup>1</sup> the Mobility and Transports Institute (MTI) – the authority responsible for the regulation, promotion and antitrust of land, sea and air transports – stated on 18.12.2014 that “the services allegedly provided by the Uber company, if what has been published in the media is true, represent a violation to the specific legislation on transports”, as – among other aspects – “the public transportation in passenger cars is only allowed when carried out by taxis” and “the drivers of the cars allocated to the taxi transport service must receive vocational training and be certified by the MTI”.

In turn, Uber considers that it does not provide transport services. The Portuguese version of the Terms and Conditions of the company reads as follows: “To avoid any doubts: Uber, itself, **does not** provide transport services and Uber is not a transport company. It is up to the service provider to offer transport services, which can be requested through the use of an application and/or service. Uber acts solely as an intermediary between you and the service provider. The transport services on the part of the service provider are, therefore, governed by the contract (to be) concluded between you and the service provider. Uber will never be a part in that contract”.

The country manager of the company in Portugal added, in an interview to a newspaper, that “all partners connected to the Uber network in Portugal have licences which allow for the commercial transport of people by a private driver. These partners were already operating in Portugal prior to the arrival of Uber and our network connects them to our community of users”<sup>2</sup>.

### III. Identification of the legal issues

The first question that should be considered is whether Uber, despite the qualification appearing in the Terms and Conditions prepared by the company itself, provides transport services and is the counterparty to the contract concluded with the user, regardless of the fact that it hands over the service to a service provider.

Uber appears before the user as the counterparty in the contract, thus making it difficult for the user to conclude from the circumstances that Uber acts as a simple intermediary without any responsibility in the service. Applying article 236 Para 1 Civil Code (CC), it is debatable whether the normal user, when placed in the position of the real user, will deduce from Uber’s conduct that the company is not a party to the contract. Indeed, the strength of Uber’s business is linked to the brand and the application, while the service providers have no notoriety.

Secondly, if we conclude that Uber is not a party to the contract, there is still a problem concerning the service providers contracted by the company. Uber claims that its partners have licences which allow for the commercial transport of people by a private driver, but the licence does not allow for the public transport of people, ie the taxi transport, which clearly seems to be the activity at stake. In our view, the use of an application by a registered user does not change the qualification of the declaration issued by the service provider as a declaration which is addressed to the public in general. Therefore, all the elements of taxi transport are present.

### IV. Legal framework of the taxi transport activity

The activity of public transport by car, commonly known as taxi transport, is extensively regulated and involves very high costs for those who wish to provide it.

Decree Law 251/98, 11.9.1998, amended by Laws 156/99, 14.9.1999, 106/2001, 31.8.2001, and 5/2013, 22.1.2013, and by Decree Laws 41/2003, 11.3.2003, and 4/2004, 6.1.2004, sets

out the regime applicable to this activity, hereafter taxi transport. Law 5/2013, which adapted Decree Law 251/98 to Directives 2005/36/EC and 2006/123/EC, simplified the access to the activity of taxi transport by eliminating the requirements of good repute and technical or professional capacity of the managers of taxi companies, maintaining only the requirement of financial capacity of the company.

This legislative Act also imposes strict rules concerning the existence of taximeters in the taxis. The taximeters shall be placed in the upper half of the tablier or on top of it, in a visible place for the passengers. The price system is laid out in special legislation (Decree Law 297/92, 31.12.1992), which refers to a convention to be concluded between the State and the associations which represent the sector. The last convention was signed on 27.12.2012.

Ministerial order 277-A/99, 15.4.1999, amended by ministerial orders 1318/2001, 29.11.2001, 1522/2002, 19.12.2002, 2/2004, 5.1.2004, and 134/2010, 2.3.2010, regulates Decree Law 251/98 in what concerns the identification standards, the type of vehicle, the conditions for the display of advertisement and other characteristics with which taxis shall comply.

The licences are granted by the city councils, following an application procedure. However, those procedures are rare in the bigger cities because of the high number of taxis already operating there. The licences have, in general, a significant cost.

Law 6/2013, 22.1.2013, establishes the legal framework for the access and exercise of the profession of taxi driver and for the certification of the training entities. To access and exercise the profession the following is necessary: a professional title of taxi driver, which has a high cost, in order to prove that its holder possesses the necessary initial and continuous training; a valid class B driving licence, with an additional endorsement to be a person of good repute, to possess the compulsory education and to master the Portuguese language. This title must be renewed every five years.

Therefore, access to the activity is not easy taking into account the financial and bureaucratic requirements. In addition to being a source of financing for city councils, these legislative Acts aim to ensure the safety and protection of the users’ economic interests, although this is not always achieved.<sup>3</sup>

The policymakers who have already addressed this issue appear to assume a position of principle which is favourable to Uber, although cautiously and emphasising the lack of a legal framework. In news articles published on this subject, both a responsible for one of the parties of the government<sup>4</sup> and members of the Portuguese Parliament from the largest opposition party have pointed out positive aspects and arguments presented by Uber.<sup>5</sup>

### V. Other questions raised by Uber’s activity

A careful reading of the Terms and Conditions which Uber includes in its contracts raises other relevant legal issues.

Regardless of the nature of the contract – a transport or an intermediation contract – there are no doubts that, when the

1 <antral.pt/resources/494586e0963bd345908f7680672376af/geral/re-posta\_int\_-\_uber.pdf>.

2 <observador.pt/especiais/uber-entrou-em-portugal-por-um-buraco-legal>.

3 Uber is still not very well known to the public in general, but it seems to have a good image among its users: <observador.pt/especiais/uber-entrou-em-portugal-por-um-buraco-legal>.

4 <observador.pt/especiais/uber-entrou-em-portugal-por-um-buraco-legal>.

5 <observador.pt/2015/02/20/ps-uber-nao-pode-ser-ilegal-se-houver-ilegalidade-e-nas-empresas-que-prestam-servicos-uber>.

user resorts to Uber's services for purposes that are not related to a professional activity<sup>6</sup> we will be dealing with a consumer contract. Hence, the legal regime set out in Portuguese law for consumer contracts applies. Not all the rules on distance contracts apply, as the contracts for passenger transport services are excluded (Article 2 Para 2 Subpara m Decree Law 24/2014). However, these contracts shall meet some of the formal requirements for distance contracts when they involve an obligation to pay a price.<sup>7</sup>

As these contracts contain general contractual terms that cannot be negotiated by the user Decree Law 446/85, 25.10.1985, on General Contractual Terms (GCT) is also applicable.

The first question raised in the light of this regime is the possibility that the Terms and Conditions are not included in the individual contracts. According to article 5 GCT, the terms shall be communicated "adequately and sufficiently in advance so that, taking into account the importance of the contract and the extension and complexity of the terms, those with common diligence are able to form a complete and effective understanding of the terms". Article 6 CGT stipulates that all aspects in the terms "which justify clarification" shall be clarified. A simple reference to such a wide set of terms hardly complies with these rules, which means that the Terms and Conditions are, in fact, generally excluded from the individual contracts (Article 8 GCT).

In what concerns the content, the term which provides for the total exclusion of liability on the part of Uber for any damages suffered by the user following the contract may be an unfair term (Article 18 Subpara a, b, c and d GCT).<sup>8</sup>

The Terms and Conditions also stipulate that Uber may effect a unilateral amendment to the contractual terms by simply publishing a notice on its website. This term does not ensure that the counterparty is aware of the amendment; hence the amended term cannot be invoked against the user.

As these are consumer relations, the terms on applicable law (Dutch law) and competent jurisdiction (Amsterdam) appear to offend the rules of Regulation (EC) 593/2008 of the European Parliament and of the Council, 17.6.2008, on the law applicable to contractual obligations (Article 6 Para 1 Subpara b) and in Regulation (EU) 1215/2012 of the European Parliament and of the Council, 12.12.2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Articles 17 Para 1 Subpara c and 18), respectively.

The term which indicates that only the English version of the Terms and Conditions is relevant, where it contradicts the Portuguese version, shall also, in our perspective, be excluded from the contract in face of the Portuguese law.

In fact, the Portuguese version is the only one which presents the necessary connection to the contract when the registration is made through the Portuguese application. The English version is excluded from the contract, as the simple reference in a contractual term is not an acceptable connecting factor.<sup>9</sup> Additionally, a term stating that all contractual terms may not apply in a certain situation clearly violates the principles of good faith, thus reflecting a *venire contra factum proprium* (Article 15 GCT). Finally, if the information is clearly addressed to the Portuguese, the requirement that the message must be clear, set out in Articles 5 and 6 GCT, is only met if the message is conveyed in Portuguese language. The Portuguese language shall be used in all messages addressed to Portuguese consumers, in Portugal, whenever the Portuguese law applies.

In short, in addition to the several questions concerning the access to the taxi transport activity by Uber and/or by the service providers working with the company, the standard contract

drafted by Uber raises a significant number of problems in the light of Portuguese law.

Jorge Morais Carvalho\*

6 Carlos Ferreira de Almeida, *Direito do Consumo* (Almedina 2005) 33; Jorge Morais Carvalho, *Manual de Direito do Consumo* (2nd ed, Almedina 2014) 17.

7 Jorge Morais Carvalho and João Pedro Pinto-Ferreira, *Contratos Celebrados à Distância e Fora do Estabelecimento Comercial* (Almedina 2014) 24.

8 Ana Prata, *Contratos de Adesão e Cláusulas Contratuais Gerais* (Almedina 2010) 353 et seq.

9 Jorge Morais Carvalho, *Manual de Direito do Consumo* (2nd ed, Almedina 2014) 68.

\* PhD, Professor of Private Law, Nova Faculty of Law and Autónoma University of Lisbon, Rua de Santa Marta, n° 56, 1169-023 Lisbon (Portugal), EMail: jorgemoraiscarvalho@gmail.com.

## UBER in Italy

Since Uber arrived in Italy in May 2014, its popularity has been steadily growing. But its growth has led to a heated public debate, which has included several violent rallies, which resulted in cases of vandalism of cities by cab licence holders, as well as several threats to Uber's national manager.<sup>1</sup>

Italian cab services constitute a highly regulated industry.<sup>2</sup> The regulations rely on a system of licences, which are administered by municipalities and limited in number. Licences are granted only to individuals and each individual may obtain only one licence. The licences are, however, tradable. Public service obligations apply. Tariffs are largely regulated, at least for routes with high demand. Recent liberalisation attempts,<sup>3</sup> aimed at overcoming the traditional business model based on a single individual's work, have been met with strenuous opposition by established cab drivers.

In recent years, cab drivers have also been confronted with competitive pressure coming from so-called NCC services (no-*leggio con conducente* = private car hire with driver). These services are also regulated, but on different terms<sup>4</sup>, and are often able to guarantee better quality service at lower prices. Cab drivers' unions claim that the administrative restrictions on the geographic scope of the licensed activity are regularly violated.

Against this background, the rapid spread of Uber throughout Italian cities has understandably raised alarm among cab licence holders. Whether the variety of services offered by Uber are to be deemed legal or not under Italian law, and what legislative and administrative changes should be considered for the future if any, has now become the subject of intense debate.

The Italian Minister of Transportation, Maurizio Lupi, has publicly and repeatedly asserted Uber services to be altogether in violation of Italian laws,<sup>5</sup> while Italian Prime Minister Matteo Renzi has praised Uber to be an "extraordinary service."<sup>6</sup> Be-

1 See Il Sole 24 Ore, 'Uber, Tassisti scatenati a Milano. Aggredita la general manager Arese Lucini', 17.5.2014.

2 An overview of sectorial regulation together with an attempt to assess regulatory alternatives can be found in Vincenzo Visco Comandini, Stefano Gori and Flaminia Violati, 'Le licenze taxi: abolizione, regolazione o libero scambio di diritti', *Mercato concorrenza e regole* 2004, 515 ff.

3 Law No 248 of 4.8.2006, commonly known as Decreto Bersani.

4 Law No 21 of 15.1.1992, Legge quadro per il trasporto di persone mediante autoservizi pubblici non di linea.

5 See, for example, <www.mauriziolupi.it/taxi-lupi-uber-pop-illegale-non-garantisce-sicurezza/#.VPs8SSm3JrMs>.

6 See Il Sole 24 Ore, 'Uber, Renzi: servizio straordinario, ci pensiamo la settimana prossima', 22 May 2014.