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# Summary

To share belongings between friends is a common phenomenon. However, sharing as a business trend or even an economic system, in which unfamiliar individuals share assets and skills via online platforms, usually for a fee, is a newer phenomenon. The economic system is generally called “the sharing economy” or “collaborative consumption”. Characteristic for companies involved within the sharing economy are that they increase consumer value. This is made by making a perfect match between a consumer with certain skills or resources with another consumer in need of that skill or resource, at the right time and against reasonable transaction costs. Traditional third parties in a business transaction, such as taxi companies, are no longer needed since individuals buy directly from each other. The new third parties are now online platforms which generally reduce transaction costs for consumers. This is exactly what company Uber enables its users to do with its ridesharing service “UberX/UberPOP”. UberPOP, the term most frequently used in this paper, pairs car owners (drivers) with other persons (passengers) online. Any person with no criminal past and a modern car with four doors can become a driver and is compensated by Uber for driving other Uber users. The concept is similar to regular taxis but it differs by being fully dependent on digital features, such as GPS and Internet, and by using drivers without taxi licenses. Unfortunately, the Californian company Uber and its European subsidiaries, are unable to provide the UberPOP service in many EU Member States. The scepticism is based in the fact that UberPOP is similar to a taxi service, but it does not follow national laws on taxis. UberPOP drivers are regular persons and many European taxi drivers have invested time and money to obtain a taxi licence. They refuse to lose their jobs because of a newcomer who exploit legal loopholes.

The actual issue is the uncertainty of what type of service UberPOP is under EU law. This master thesis is meant to provide an answer on that.

The investigation will cover the nature of the UberPOP service under EU law and whether it is illegal in the EU with regards taken to principles such as free movement of services, anti-discrimination and proportionality. The principles will be discussed in combination with pending ECJ rulings regarding what sort of service UberPOP is. The investigation is desirous, since it is currently uncertain whether UberPOP is a transport service or a digital intermediary service. If the ECJ considers UberPOP as a digital intermediary service, Uber can rely on the principle of free movement of services and Member States cannot easily restrict UberPOP. On the other hand, if UberPOP is considered as a transport service, Member States decide how to regulate it. The reason for this is that transport services are excluded from the scope of the Services Directive. The judgement will have a universal impact on sharing companies competing, by digital means, in the transport sector. These are called Transport Network Companies (TNCs) in California, United States.

TNCs are exclusively regulated in California and they are allowed to operate under certain conditions. For instance, they must have a zero-tolerance policy on drugs and they must have strict safety and insurance policies. The majority of EU's Member States, except Estonia, have no rules for TNCs. However, a briefing sent to the EU Parliament clearly states numerous advantages brought to the EU economy by TNCs, such as increased consumer welfare. That report, written by Azevedo, F. & Maciejewski, also observed the issue on whether TNCs provide transport services or digital services. Hopefully, the preliminary ruling (discussed in section five) and upcoming reports regarding the sharing economy, will give answers. First then, responsible EU institutions will consider the need for further legislative measures.

# Sammanfattning

Att dela med sig är ett vanligt förekommande fenomen bland vänner. Däremot är det en relativ ny företeelse att individer delar tillgångar och färdigheter mot betalning med personer de aldrig har träffat. Idag kan delning sägas vara en ekonomisk trend, eller till och med ett ekonomiskt system, som fått namnet “delningsekonomi” eller “delningskonsumtion”. Det som kännetecknar företag inom delningsekonomi är att de skapar ett mervärde för konsumenter genom att snabbt och billigt para ihop personer som har vissa tillgångar eller färdigheter, med andra personer i behov av dessa. De självklara mellanhänderna för vissa tjänster, t.ex. taxi där taxibolag utgjort mellanhänder, behövs idag inte längre i samma utsträckning eftersom konsumenter kan köpa direkt av varandra. De nya mellanhänderna är onlineplattformar som bidrar till lägre transaktionskostnader för konsumenter. Detta är vad företaget Uber gör med sin tjänst UberPOP. UberX/UberPOP (hädanefter UberPOP) gör det möjligt för bilägare och passagerare bestämma transport över Internet. En vanlig bilförare utan ett kriminellt förflutet och med en nyare fyradörrarsbil, får betalt över Uber för att de transporterar andra användare anslutna till Uber. Konceptet påminner mycket om vanlig taxi, dock är UberPOP och Ubers övriga tjänster, helt beroende av digitala hjälpmedel så som GPS och Internet. Därutöver saknar vanligtvis UberPOP-förare taxiförarlegitimation.

Dessvärre får det kaliforniska företaget Uber och dess europeiska dotterbolag inte tillhandahålla tjänsten UberPOP i många EU medlemsstater. Orsaken är att UberPOP är snarlik en vanlig taxitjänst, men den följer inte gällande taxilagstiftning. Till skillnad från vanliga taxiförare som har investerat tid och pengar för att få en licens, använder UberPOP bilförare. Taxiförare i Europa ser Uber som ett hot mot deras arbete och anser att UberPOP är en olaglig taxitjänst som borde förbjudas. Det egentliga problemet är avsaknaden av tydliga bestämmelser och riktlinjer rörande vilket typ av tjänst som UberPOP är

under EU-rätten. Den här uppsatsen har som syfte att besvara detta genom att undersöka tjänstens karaktär under EU rätten, och huruvida den kan sägas vara laglig utifrån grundläggande EU-rättsliga principer så som fri rörlighet av tjänster och icke-diskriminerings- och proportionalitetsprincipen. Principerna diskuteras ihop med pågående avgöranden i EU-domstolen. Dessa rör vilken typ av tjänst som UberPOP är under EU-rätten. Undersökningen är behövlig eftersom det för stunden råder oklarheter om UberPOP är en transporttjänst eller en digital förmedlartjänst. Om EU-domstolen anser att UberPOP är en digital tjänst omfattas den av principen om fri rörlighet av tjänster. Det gör det svårt för medlemsstater att förbjuda UberPOP. Om å andra sidan UberPOP anses vara en transporttjänst, får varje medlemsstat avgöra om UberPOP ska vara laglig eller inte. Detta beror på att transporttjänster inte omfattas av Servicedirektivet. Avgörandet kommer att påverka alla delningsföretag som med digitala verktyg konkurrerar med vanliga transporttjänster. Dessa företag kallas i Kalifornien (USA) för "Transport Network Companies" (TNCs).

TNCs är specialreglerade i Kalifornien och de tillåts att erbjuda sina tjänster under vissa villkor. Till exempel måste de ha ett totalförbud mot droger och sunda säkerhets- och försäkringsriktlinjer. Majoriteten av EU:s medlemsstater, förutom Estland, saknar regler för TNCs. I en rapport till EU Parlamentet intogs en positiv ställning gentemot TNCs och de anses medföra många fördelar för konsumenter. Enligt rapporten, skriven av Azevedo, F. & Maciejewski, M., är problemet huruvida TNCs ska anses utföra transporttjänster eller digitala tjänster. Det lär EU-domstolens förhandsavgörande om UberPOP som diskuteras i sektion fem och kommande rapporter om delningsekonomin att besvara. Först då vet EU:s institutioner vilka lagstiftningsåtgärder som krävs.

# Preface

My girlfriend inspired me to write about Uber and the sharing economy. This is my final project on the Master program at Lund university. I want to send my deepest regards to the teachers and administrative staff at the faculty who have supported me throughout the program.

*Sincerely*

Felix Johnson

# Abbreviations

EU	European Union
Union	European Union
Treaties	Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)
ECJ	European Court of Justice
Charter	Charter of Fundamental Rights of the European Union
TNC	Transport Network Company
EU Parliament	European Parliament
EU Commission	European Commission
Council	The Council of the European Union
Services Directive	Directive 2006/123/EC
Directive on Electronic Commerce	Directive 2000/31/EC
Technical Standards Directive	Directive 98/48/EC

# 1. Introduction

A common phenomenon between friends and families is to share goods and services to save both time and resources. Due to rapid technological development, individuals can nowadays share goods and services with other people from all around the world. Getting a taxi or renting a hotel room is now easily arranged over online platforms.<sup>1</sup> Unfortunately the legislators of the EU have not adapted to the new trend where consumers buy goods and services from each other over online platforms instead of buying from a traditional third party, such as a taxi company or a hotel.<sup>2</sup> The economic invention is called “the sharing economy” or “collaborative consumption” and people share access to products or services instead of having individual ownership.<sup>3</sup>

Uber is one of the companies involved in the sharing economy. By its “ridesharing” service UberPOP it connects a person who owns a new four door car, with another individual in need of a ride. The driver is compensated with money directly over the Uber platform. Many taxi drivers argue that UberPOP is an illegal taxi service. This because it does not comply with national laws regarding taxi licensing and insurances in many EU Member States. A taxi licence is expensive to obtain and because of UberPOP, many taxi drivers lose their jobs.

There are certain legal issues regarding UberPOP and similar services, for instance Member States regulations on taxi services which regard UberPOP as an illegal taxi service. The problem is that neither Member States nor the EU have regulations which cover services in the intersection between taxi services and digital intermediary services.

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<sup>1</sup> Juul, M. (2015): The Sharing Economy and Tourism, p. 1.

<sup>2</sup> Ibid.

<sup>3</sup> Hamari, J. et al. (2015): The Sharing Economy: Why People Participate in Collaborative Consumption, p. 1ff.

Institutions within the EU have started to draft guidelines regarding how to apply current EU legislation on Uber and similar companies. This include guidance on their position under the Services Directive, the Directive on Electronic Commerce and consumer legislation. They are expected to come in mid-2016.<sup>4</sup> In parallel, there are currently two pending rulings at the ECJ requested from a Spanish and a Belgian judge. They regard whether UberPOP is a transport service or a digital intermediary service.

Companies that are a part of the sharing economy are disliked in many EU Member States because they are successful in finding legal loopholes and circumvent existing laws in certain businesses, for instance the taxi industry. It is important that EU institutions adapt to the digital changes by updating laws and provide guidance on how existing EU law applies to digital services. Since Member States regulate transport services differently, a solution must come from the EU legislators.<sup>5</sup>

## 1.1 Purpose

The primary purpose of this thesis is to provide a good overview of the current legal position of UberPOP under EU law, and give a proposal based upon present laws and legislations on how it can change. The connection between fundamental principles of EU law, found in the Treaties and in case law, and the legality of UberPOP will be illustrated. The purpose will be achieved by discussing pending cases at the ECJ regarding what type service UberPOP is, and also by suggesting a regulatory solution on EU level for UberPOP. The following four questions will be answered:

- What is the sharing economy and why is Uber a part of it?

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<sup>4</sup> Valero, J. (2016): Commission Guidance on Sharing Economy Delayed Until Summer Break.

<sup>5</sup> Azevedo, F. & Maciejewski, M. (2015): Social, Economic and Legal Consequences of Uber and Similar TNCs, p. 1f.

- Why is UberPOP controversial and prohibited by EU Members States?
- Which legislative measures can be taken at EU level in order to enable Uber to provide its service legally?
- With concern taken to the pending cases at the ECJ, can Uber provide its service UberPOP by relying on EU principles such as free movement of services, the principle of proportionality and the principle of non-discrimination?

## 1.2 Method and material

The author uses the EU legal method in this paper. The Treaties, the Charter, case law from the ECJ, and general principles of EU law can advantageously be used as sources when working with this method.<sup>6</sup> As regards the norm hierarchy within the EU, the Treaties together with the general principles of EU law (e.g. proportionality), and legislative acts (e.g. Directives) are considered the most valuable sources of EU law.<sup>7</sup>

A crucial part of this paper is to analyse pending cases at the ECJ. Member States courts are uncertain of how to apply existing EU laws on UberPOP. A court in Spain and in Belgium have asked and this paper investigates the questions and discusses eventual outcomes with regards taken to previous case law and fundamental principles of EU law. That way the author hopes to elucidate the future of UberPOP. Apart from clarifying UberPOP under existing EU law, this thesis also suggests a regulation on EU level for companies providing occasional transport services (TNCs). This is accomplished by analysing a briefing sent to the EU Parliament and by studying legislative material regarding TNCs created by the transport authority of California.

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<sup>6</sup> Hettne, J.; Otken Eriksson, I. (2011): EU-rättslig metod, p. 40.

<sup>7</sup> Prof. Borchardt, K.-D. (2010): The ABC of European Union law, p. 80.

## **1.3 Disposition**

The first part of the thesis clarifies the concept of the sharing economy, i.e. what it is and how it affects the economy in the EU. The following parts will be dedicated to Uber and its service UberPOP. After a short presentation of Uber and a more detailed description of UberPOP, the current position of UberPOP under EU law and how institutions within the EU can change it will be investigated. Section five contains two pending cases at the ECJ, which concern what type of service UberPOP is with regards taken to fundamental principles of EU law. The last analysis section discusses eventual outcomes of the pending rulings and the importance of creating a TNC framework on EU level.

## **1.4 Delimitation**

The sharing economy raises many interesting questions. There are dozens of industries in which the sharing economy expands and outperforms traditional businesses. However, there is probably no company within the sharing economy which has caused so much debate as Uber. The reason is its ridesharing service UberPOP. In order to stay concise, this paper only investigates UberPOP under EU law and excludes other sharing economy services. The author of this paper has chosen to include a smaller section regarding the sharing economy in order for the reader to understand UberPOP better.

UberPOP is also interesting from a competition law perspective. One might argue that UberPOP is built upon anti-competitive agreements between individuals which distort competition on the taxi market. The opinion of the author is that competition law aspects can be regarded first when the EU Commission releases its guidelines regarding UberPOP and similar services in mid-2016.

## 2. The sharing economy

### 2.1 Definition

Sharing goods and services is nothing new; but sharing as a business model built upon and dependent on Internet is quite new. It is called the “sharing economy”<sup>8</sup> and consist of economic activities connecting providers of goods and services via community-based online services, i.e. peer-to-peer-platforms such as mobile applications and websites.<sup>9</sup> A more narrow definition is provided by Oxford Dictionaries Online (ODO) which defines it as “an economic system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the Internet”.<sup>10</sup> All definitions have one thing in common – collaboration. That is why the sharing economy is also called “collaborative consumption”. It is “a system that activates the untapped value of all kinds of assets through models and marketplaces that enable greater efficiency and access”.<sup>11</sup> According to some authors, “the sharing economy” is a misleading term. “Sharing” is built upon social values between friends or others that know each other. Since people do not “share” within the sharing economy, but grant “access” to a specific resource or skill for money, it should be called “access economy”.<sup>12</sup>

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<sup>8</sup> Belk, R. (2014): You Are What You Can Access, p. 1595.

<sup>9</sup> Ibid., p. 1596.

<sup>10</sup> Oxford Dictionaries Online (ODO): definition of “sharing economy”.

<sup>11</sup> Botsman, R. (2014): Sharing's Not Just for Start-Ups, p. 24.

<sup>12</sup> Eckhardt, G.; Bardhi, F. (2015): The Sharing Economy Isn't About Sharing at All.

## 2.2 Models and advantages

The sharing economy consists of three main categories: product service systems, redistribution markets and collaborative lifestyles. The product service systems category includes situations in which people share or rent out goods (access over ownership). Redistribution markets includes platforms dealing with trade, donations and swapping. Resources or capital are transferred between owners over a platform, for instance eBay.<sup>13</sup> Some authors therefore call them capital platforms. The last category, collaborative lifestyles, people with similar lifestyles and interests cooperate and save money and time by sharing, for instance roommates.<sup>14</sup> Another category of the sharing economy is on-demand economy. Consumers with certain needs are immediately matched with goods or services (tasks) from providers. One party performs tasks when the other party demands it over an online platform, for instance Uber.<sup>15</sup> The tasks can be seen as temporary labour and therefore the platforms are sometimes called labour platforms.<sup>16</sup>

The sharing economy disrupts traditional businesses by refurbishing old business concepts to create new markets; some call it “disruptive innovation”.<sup>17</sup> One of these disruptive business models is UberPOP which has totally changed the taxi market in Europe and worldwide. UberPOP and similar sharing concepts increase consumer value by making a perfect match between a consumer with a certain skill or resource, with another consumer in need of that skill or resource, at the

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<sup>13</sup> Hamari, J. et al. (2015): The Sharing Economy: Why People Participate in Collaborative Consumption, p. 3.

<sup>14</sup> Botsman, R. & Rogers, R. (2010): Beyond Zipcar: Collaborative Consumption.

<sup>15</sup> Botsman, R. (2015): Defining the Sharing Economy.

<sup>16</sup> JPMorgan Chase & Co. (2016): Paychecks, Paydays, and the Online Platform Economy, p. 5.

<sup>17</sup> Cortez, N. (2014): Regulating Disruptive Innovation, p. 177.

right time and against reasonable transaction costs. Parts of the transaction chain is excluded, which often results in a lower final price for consumers.<sup>18</sup>

## **3. Uber and ridesharing**

### **3.1 History**

The story of Uber began in 2008 when the company founders' Travis Kalanick and Garrett Camp had trouble getting a taxi in Paris. They suddenly got a brilliant idea: to invent an application making it possible for people to order a cab over the Internet with just a click.<sup>19</sup> Today Uber offers a wide range of Internet-based services, such as the original service UberBLACK. It is a service in which limousine companies fill their vehicles' downtime with more trips. The drivers are required to have a commercial insurance as well as a city and a state limousine driver's licence.<sup>20</sup>

### **3.2 UberPOP**

The service that causes debate and frustrates regular taxi drivers is UberPOP. Worldwide, except in Europe, UberPOP is called UberX and it is a peer to peer ridesharing service using non-professional drivers.<sup>21</sup> In Europe, it is completely different; UberPOP is the name on the original ridesharing service and UberX is the service using professional drivers.<sup>22</sup> The service called UberX in Europe will not be considered in this thesis.

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<sup>18</sup> Azevedo, F. & Maciejewski, M. (2015): Social, Economic and Legal Consequences of Uber and Similar TNCs, p. 2f.

<sup>19</sup> Uber Technologies Inc. (2016): Our Trip History.

<sup>20</sup> Ibid.: UberBLACK vs. UberX.

<sup>21</sup> Rayle, L. et al. (2014) – App-Based, On-Demand Ride Services, p. 2ff.

<sup>22</sup> Geradin, D. (2016): Online Intermediation Platforms and Free Trade.

Hereinafter, UberX and UberPOP refer to Uber's ridesharing service. UberPOP is a service in which ordinary persons use their cars for transporting others.<sup>23</sup> UberPOP is in many ways similar to a regular taxi, but it is cheaper. It enables car owners to share their costs associated with car ownership.<sup>24</sup> There are minimum requirements for becoming an UberPOP driver. Drivers must pass a background check and his or her vehicle must have at least four doors and be produced after 2005.<sup>25</sup> UberPOP is a flexible way for men and women to make money. It enables a more effective use of existing resources and leads to an increased number of cars able to pick people up in uptown and downtown districts. Licensed taxi drivers are interrupted by unlicensed UberPOP drivers who temporarily (occasionally) provide taxi services after a request from another Uber user. Instead of waiting for a booked taxi that might never come, a user is able to track the driver by GPS from the platform and knows exactly when the car arrives. The drivers are paid after Uber has taken its share (5-20 %). The reason why UberPOP is so popular among young people is due to its excellent smartphone application and its presence on social media.<sup>26</sup> Uber's business concepts have been copied by companies in other industries. It is a trend called Uberification.<sup>27</sup>

UberPOP is more popular among consumers than among ordinary taxi drivers. Taxi drivers are forced to comply with national provisions on taxi and pay in order to get a licence. They accuse Uber of engaging in unfair competition by bypassing national legislation. The protests have

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<sup>23</sup> Templeton, B. (2015): What Is the Difference Between UberPOP and UberX?

<sup>24</sup> Akande, M. (2015): Different Types of UberX Services.

<sup>25</sup> Uber Technologies Inc. (2016): UberBLACK vs. UberX.

<sup>26</sup> Pullen, J.P: Everything You Need to Know About Uber.

<sup>27</sup> Hahm, S. (2015): Our Future Economy: "Uberification".

led to restrictions in many EU Member States and Germany, Italy and Spain have banned the service.<sup>28</sup>

### **3.3 Can UberPOP be called a ridesharing service?**

UberPOP is usually called a ridesharing service. Ridesharing is when people decide for days in advance to share a transport on a specific date. Today it is different because people can plan a journey hours or minutes before they ride. It is called real-time ridesharing. The great flexibility of real-time ridesharing is guaranteed by digital features such as smart phones, GPS, cellular networks, and social media platforms. For instance people are able to organise their trips on short notice on Facebook wherever there is cellular coverage.<sup>29</sup> Many authors find it improper to call UberPOP a ridesharing service because ridesharing is when driver and passenger share a ride towards a joint destination. UberPOP drivers do not necessarily share destination with their passengers. Instead, transports are outsourced from a driver pool and UberPOP should therefore be called a ride sourcing service.<sup>30</sup>

### **3.4 Future**

The biggest challenge for services within the sharing economy, for instance UberPOP, are old regulatory provisions that are unsuitable for newer businesses. One example is occupational licensures which are meant to protect and guarantee a minimum standard for certain professions. In a digital and modern world, they create barriers to entry and monopoly markets. This by excluding services which are similar to

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<sup>28</sup> Geradin, D. (2015): Should Uber Be Allowed to Compete in Europe? pp. 1,2 & 5.

<sup>29</sup> Amey, A. (2011): “Real-Time” Ridesharing, pp. 3ff. and 12f.

<sup>30</sup> Rayle, L. et al. (2014) – App-Based, On-Demand Ride Services, p. 2ff.

those carried out in certain professions.<sup>31</sup> The EU Commission must, among other measures, target occupational licensures in order to stimulate entrepreneurship and innovation from sharing economy companies.<sup>32</sup>

Currently, institutions within the EU work on a Digital Single Market Strategy. In 2014, the EU Commission President, Jean-Claude Juncker, stated in his political guidelines that necessary steps will be taken in order to strengthen the digital competitiveness of the Internal Market.<sup>33</sup> A single market strategy communication was sent to the EU Parliament and the Council on the 6<sup>th</sup> of May 2015.<sup>34</sup> As a response, the EU Parliament adopted a resolution called “Towards a Digital Single Market Act” on the 19<sup>th</sup> of January 2016. The EU Parliament suggests that the EU Commission investigate online platforms and their position under existing EU legislation. Thereby the EU Commission should maintain an innovation-friendly policy for online platforms and prioritise transparency, non-discrimination and consumer access to platforms.<sup>35</sup>

A research unit (department B) within the EU Parliament considers the sharing economy as a new opportunity for the creation of jobs and that it will strengthen EU's competitiveness. The EU Commission as well as the Member States are recommended to contribute to the expansion of the sharing economy by identifying regulations hindering its growth. In order to protect consumers, digital companies must combat illegal

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<sup>31</sup> Reinhardt, U. (2014): Does Occupational Licensing Deserve Our Approval? p. 318ff.

<sup>32</sup> Genç, E. (2016): Opinion: It's Time to Ditch EU Anti-Uber Business Rules.

<sup>33</sup> President Juncker's political guidelines (2014): A New Start for Europe.

<sup>34</sup> European Commission (2016): A Digital Single Market Strategy for Europe.

<sup>35</sup> European Parliament (2015): Resolution on Towards a Digital Single Market Act, section 3.3.1, point 69.

activities and the EU Commission must find effective legal remedies within the sharing economy.<sup>36</sup>

Important for UberPOP, the EU Commission launches two studies, one regarding passenger transport by taxi, hire car and ridesharing in the EU, and another regarding consumer issues in the sharing economy. They are expected to come in the middle of 2016. The studies were initiated from questions by the Hungarian government concerning how to apply EU law on services such as UberPOP.<sup>37</sup>

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<sup>36</sup> Ibid., section 3.3.2, p. 77.

<sup>37</sup> European Parliament (2015): Question to the Commission, E-010930/2015.

## 4. Regulating Uber

### 4.1 Transport Network Companies (TNCs)

The California Public Utilities Commission (CPUC) has solved the regulatory issues associated with UberPOP and similar services by creating a new type of service category - Transport Network Companies (TNCs). UberPOP (called UberX in US) is allowed under certain conditions. A TNC is defined as “an organisation whether a corporation, partnership, sole proprietor, or other form... that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles”. TNCs operate under licences that are granted to companies that use drivers without a criminal background who completed a driver program. Moreover, a licence requires an implementation of a zero-tolerance policy on drugs and alcohol. The Uber subsidiary Raiser who provides UberX has obtained a licence.<sup>38</sup> Observe that Uber is not a TNC; the Uber service UberX (UberPOP) is a TNC. Uber connects riders with drivers who do not drive their own personal vehicle; instead they operate in town cars or limousines and the driver may often as well transport customers for another limousine/town car company.<sup>39</sup>

### 4.2 The advantages of Transport Network Companies (TNCs)

The advantages of modern companies as TNCs are many. According to a briefing provided to the EU Parliament, TNCs allow for better utilization

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<sup>38</sup> California Public Utilities Commission (CPUC) (2016): Transportation Network Company (TNC) - Permits Issued.

<sup>39</sup> California Public Utilities Commission (CPUC) (2013): Proposed Decision, pp. 3f. and 24f.

of assets and skills, which in turn increase consumer welfare and lead to efficiency gains in the transport sector.<sup>40</sup> Consumers benefit from less uncertainty and reduced search costs. Instead of being uncertain whether a taxi dispatcher has sent a taxi or not, a consumer can order a transport from indoors and follow the driving progress on a screen. Drivers benefit from TNCs like UberPOP because they are able to organise their working time. They are flexible and can chose to work on weekend nights.<sup>41</sup> TNC services reduce losses in economic efficiency (deadweight losses) from the monopoly market created out of strict national regulations and expensive licence fees for taxis. In many EU Member States, a licence costs up to EUR 500.000. The high fees have an excluding effect which make it possible only for a few to take a license. As a result, competition is weakened. Another gain is that TNCs allow consumers to get a good overview of quality and prices for taxi services. Before consumers order an UberPOP car they can check the rating of their driver. That way the consumer is well informed before he or she orders a transport. As regards prices for taxi transports, it is common that taxis have a price list inside and outside the taxi car. All prices for Uber's services are determined before the ride begins and consumers are able to compare prices across many applications. This lead to greater transparency for consumers.<sup>42</sup>

## **4.3 Regulating Transport Network Companies (TNCs) in the EU**

TNCs are under no specific secondary legislation in the EU. A research unit within the EU Parliament has recommended the EU Parliament to regulate TNCs. A TNC definition on EU level must take into account the close interaction between Information Communication Technology (ICT)

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<sup>40</sup> Azevedo, F. & Maciejewski, M. (2015): Social, Economic and Legal Consequences of Uber and Similar TNCs, p. 2f.

<sup>41</sup> Rogers, B. (2015): The Social Costs of Uber, p.4.

<sup>42</sup> Golovin, S. (2014): The Economics of Uber.

services and transport services, the briefing states.<sup>43</sup> Another concern is to create a TNC status which is accepted by all jurisdictions in the EU. The ECJ and the Member States national courts might qualify services provided by TNCs differently due to contractual provisions and laws on transportation and labour. It is widely agreed upon that UberPOP and similar services could be defined as online-enabled applications or platforms connecting passengers with chauffeurs using their personal vehicles. However, it is still uncertain whether TNCs provide regular services covered by the principle of free movement of services, and/or transport services. The question is investigated by the ECJ currently. There are also two reports which are to be expected in mid-2016, one concerning “consumer issues in the sharing economy” and another on “issues regarding passenger transport by taxi, hire car and ridesharing in the EU”. The judgement, which is analysed together with another ruling later in this paper, will together with the reports be determinant for either classifying TNCs as companies providing transport services or as digital platform/technology companies. Due to the clear European dimension of TNCs, it is necessary that a definition comes from the European legislator.<sup>44</sup> A framework that enhances the benefits and eliminates the associated costs and risks with the sharing economy is needed within EU.<sup>45</sup> In order to create a common framework, it is of great importance that Member States cooperate loyally with the legislative bodies of the EU. They are required to do so according to the principle of loyalty in Article 4.3 TEU.<sup>46</sup> Some European states have begun to modernise their laws better than others. Estonia has started to regulate Uber and similar

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<sup>43</sup> Azevedo, F. & Maciejewski, M. (2015): Social, Economic and Legal Consequences of Uber and Similar TNCs, p. 5f.

<sup>44</sup> Ibid., p. 2ff.

<sup>45</sup> Petropoulos, G. (2016): Uber and the Economic Impact of Sharing Economy Platforms.

<sup>46</sup> Geradin, D (2015): Should Uber Be Allowed to Compete in Europe? p. 7.

services by updating their Public Transport Act (“PTA”). This was made February 2015 and the act now covers rules for occasional service providers such as UberPOP drivers.<sup>47</sup> Providers of occasional services must among other things be registered as commercial or non-commercial entities and have no criminal record. Estonia has also begun to draft an act which allows ridesharing services under certain conditions regarding safety and transparency. It includes rules regarding calculation of fares, obligations to make electronic receipts, and a requirement to display a driver’s photo and a license plate number before a passenger enters a vehicle. The approach taken by Estonia is similar to the TNC classification in California.<sup>48</sup>

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<sup>47</sup> Riigi Teataja (2000): Public Transport Act.

<sup>48</sup> Geradin, D. (2016): Online Intermediation Platforms and Free Trade, p. 18f.

## 5. Pending cases and principles of EU law

The lack of a clear definition of UberPOP or other TNC services under EU law have recently, in August 2015, made a Spanish court in Barcelona to ask the ECJ for a preliminary ruling regarding what type of service UberPOP is.<sup>49</sup> According to a briefing sent to the EU Parliament, the decision will be determinant for classifying TNCs either as transportation services or digital platform providers/technology companies.<sup>50</sup>

The dispute involves UberBV, an Uber subsidiary established in the Netherlands, that performs a variety of intermediation services such as matching drivers with riders and calculating prices for rides. UberBV provides downloadable licences for users (drivers and passengers) located in Spain. Without obtaining any authorisation from Spanish authorities, UberBV launched the UberPOP service in Spain 2014 relying on free movement of information society services. An association of licenced taxi drivers (Asociación Profesional Élite Taxi) immediately protested and sued Uber Systems Spain S.L. (Uber Spain) for breaching the Spanish law on unfair competition by using misleading practises. As has been clarified by the defendant, Uber Systems Spain only provides marketing and support services to Uber BV; it neither operates or licenses the software. The subject matter of the main proceeding is qualification of the service provided by Uber through UberBV, not through Uber Systems Spain.<sup>51</sup> The taxi association claims that UberPOP is a transport service

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<sup>49</sup> Case C-434/15 - *Uber Spain*.

<sup>50</sup> Azevedo, F. & Maciejewski, M. (2015): *Social, Economic and Legal Consequences of Uber and Similar TNCs*, p. 2.

<sup>51</sup> Geradin, D. (2016): *Online Intermediation Platforms and Free Trade*, p. 6f.

and UberBV calls itself an information society service under the Directive on Electronic Commerce.<sup>52</sup> The Spanish Court turns to the ECJ for a preliminary ruling regarding what type of service UberPOP is under EU law.<sup>53</sup> The judge asks whether UberPOP can be considered as a transport activity under Directive 2006/123/EC (the Services Directive)<sup>54</sup>, which is excluded from the scope of that Directive.<sup>55</sup> If UberPOP is no transport service, the Court asks if UberPOP is an electronic intermediary service or an information society service between driver and passenger that manages IT resources, as defined by Article 1(2) of Directive 98/34/EC.<sup>56</sup> If UberPOP is an information society service, the judge has three more questions. The first is whether UberPOP is a service that can benefit from the principle of free movement of services guaranteed by Article 56 TFEU and Directives 2006/123/EC and 2000/31/EC. Secondly, the judge asks whether the Spanish law on unfair competition is contrary to the freedom of establishment and the rules regarding authorisation schemes in Article 9 of the Services Directive. If UberPOP is a service under Directive 2000/31 EC, the Court wishes to know if the Spanish restrictions on providing electronic intermediary services from one Member State to another, are valid derogations from paragraph 2 in accordance with Article 3(4) of the Directive on Electronic Commerce.<sup>57</sup>

The case is of great importance since if UberPOP is considered as a digital platform provider, then Article 2.2d which excludes transport

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<sup>52</sup> Directive on Electronic Commerce (2000/31/EC).

<sup>53</sup> Vousden S: Case C-434/15, *Asociación Profesional Élite Taxi – Uber’s New Software Destroys the Old Order of Labour*.

<sup>54</sup> Directive 2006/123/EC.

<sup>55</sup> *Ibid.*, Art. 2.2d.

<sup>56</sup> Directive 98/34/EC.

<sup>57</sup> Case C-434/15 – *Uber Spain*.

activities from the scope of the Services Directive, does not apply. This means that UberPOP can benefit from the principle of free movement of services and operate legally in the EU. If the ECJ regards UberPOP as a transport activity, each EU country decides whether UberPOP is legal or not. Such a scenario reminds of its current position in which UberPOP is considered legal or illegal from country to country in the EU.<sup>58</sup>

The ECJ judgement will not only affect UberPOP; it will have a universal impact on all TNCs within EU. The author discusses the questions asked by the Court hereunder.

## **5.1 Freedom to provide services**

One of the most important principles of EU law is the principle of free movement of services. It is also important from an economic point of view, since the service sector corresponds to 70% of EUs total GDP. The EU Parliament and the Council continuously search for solutions that simplify for companies that offer cross-border services to operate on the internal market. A part of the principle is freedom of establishment. The core values are found in the Services Directive, Directive on Electronic Commerce and in Article 56 TFEU. The principle of free movement of services is constantly developed by the ECJ.<sup>59</sup> The Directives complement each other and they are based on Article 56 TFEU.<sup>60</sup>

Article 56 TFEU prohibits restrictions on freedom to provide services within EU in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The EU Parliament and the Council have an exclusive right to extend the provisions to nationals of a third country who provide services

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<sup>58</sup> Louch, W. (2015): EU Commission Launches Study on Uber.

<sup>59</sup> Directive 2006/123/EC, recital 1-7 and Directive 2000/31, recital 1.

<sup>60</sup> European Commission (2016): Single Market for Services

and who are established within the EU.<sup>61</sup> Uber is a company established in a third country (United States) and it is incorporated in the Netherlands through UberBV. Articles 49 and 56 TFEU “preclude any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to prohibit, impede or render less attractive the exercise by Community nationals of establishment and the freedom to provide services guaranteed by those provisions of the Treaty”.<sup>62</sup>

Just as the Spanish court has observed in its referred questions, UberPOP is a service. National legislation, such as the Spanish law on unfair competition, restricts Uber from establishing and hinders it from operating. As such, it contravenes Articles 49 and 56 TFEU. The Spanish court must consider whether the requirements imposed on the UberPOP service, are necessary for a purpose of general public importance. Furtherly, derogations from the principle must be proportionate and take into account less restrictive measures which can be used in order to obtain the same purpose. If the purpose of the Spanish law is to protect consumers, which is considered a purpose of general public importance, it is possible to say that restrictions on UberPOP can be justified.<sup>63</sup> For instance, restrictions of advertising services that targeted children under twelve was justified by the ECJ.<sup>64</sup>

Article 49 prohibits restrictions on freedom of establishment of nationals of a Member State in the territory of another Member State. Freedom of establishment gives an exclusive right to set up branches, agencies and other undertakings, as well as a right to conduct self-employed activity

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<sup>61</sup> Consolidated version of TEU and TFEU. Title IV: Free Movement of Persons, Services and Capital.

<sup>62</sup> Case C-376/08 - *Serrantoni Srl*, § 41.

<sup>63</sup> Geradin, D (2015): *Should Uber Be Allowed to Compete in Europe?* p. 8f.

<sup>64</sup> Case C-34/95 - *De Agostini and TV-Shop*, § 44-47.

on the territory of another Member State.<sup>65</sup> Case law indicates that the principle covers both legal persons and natural persons who are nationals of a Member State. Many UberPOP drivers are self-employed persons, conducting business with their own private vehicles over the Uber platform.<sup>66</sup>

The Services Directive has rules regarding freedom of establishment and authorisation schemes in its third chapter called “Freedom of Establishment for Providers”. Authorisation schemes must not discriminate the provider in question, it must be justified on grounds of public interest. Thereto, the authorisation must be proportional, i.e. the objective pursued cannot be attained by less restrictive means.<sup>67</sup> The first condition, non-discrimination, means that an authorisation scheme must not directly or indirectly treat domestic providers and providers from other Member States differently. Regarding proportionality, the EU Commission states that authorisation schemes often can be replaced by less restrictive means such as monitoring of the activities of the service provider by the competent authorities.<sup>68</sup> According to case law, licensing requirements can be justified if they are necessary in order to ensure the protection of certain objectives, such as car and passenger safety. However, they must apply without discrimination on grounds of nationality.<sup>69</sup> In the “Yellow Cab” ruling the ECJ concluded that profitability of a competing bus service is not a reason of public interest which can justify a restriction of a fundamental freedom guaranteed by the Treaty.”<sup>70</sup>

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<sup>65</sup> Case C-55/94 – *Gebhard*, § 23.

<sup>66</sup> Geradin, D. (2016): *Online Intermediation Platforms and Free Trade*, p. 4.

<sup>67</sup> Directive 2006/123/EC, p. 54, Art. 9.

<sup>68</sup> European Commission (2007): *Handbook on Implementation of the Services Directive*, p. 25.

<sup>69</sup> Case C-169/07 - *Hartlauer*, § 44.

<sup>70</sup> Case C-338/09, *Yellow Cab Verkehrsbetriebs v. Landeshauptmann von Wien*, § 45-46.

The importance of free movement of services and freedom to establish is expressed in the Directive on Electronic Commerce. It is stated that “The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movements of goods, services and the freedom of establishment are ensured; the development of information society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.”<sup>71</sup> According to Article 2a of the same Directive, an information society service should be defined as in Article 1.2 of the Technical Standards Directive.<sup>72</sup> Moreover, Article 3.2 forbids Member States to restrict the freedom to provide information society services from another Member State.<sup>73</sup> However, Article 3.4 allows Member States to derogate by public policy reasons, public health, consumer protection etc.

As has been showed above, free movement of services is important for EU and for UberPOP. Any restrictions impeding fundamental principles must be necessary for their objective; they must be proportional. The principle of proportionality will be discussed in a later section.

## **5.2 UberPOP as a transport service**

The Services Directive covers services supplied by providers established in an EU country and excludes services in the field of transport, including port services, falling within the scope of Title V of the Treaty.<sup>74</sup> The excluded services are urban transport, taxis, ambulances

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<sup>71</sup> Directive on Electronic Commerce (2000/31/EC), recital 1.

<sup>72</sup> Directive 98/48/EC Laying Down a Procedure for The Provision of Information in the Field of Technical Standards and Regulations.

<sup>73</sup> *Ibid.*, Art. 3:2.

<sup>74</sup> Directive 2006/123/EC Art. 2.1 and 2.2d, p. 51.

and port services.<sup>75</sup> The Article only targets typical transport activities. Services provided by for instance driving schools and funeral companies, in which transport only constitutes a smaller part of the service, are not excluded.<sup>76</sup> Advocate General Wahl has confirmed that any interpretation of “service in the field of transport” must be carried out “with care”, “especially in respect of services which are only incidental, ancillary or even tangentially connected to transport”. If a service falls under section VI of TFEU (transport), then freedom to provide services and Article 2.2D of the Services Directive does not apply.<sup>77</sup> The same approach was taken in *R.L. Trijber* by Advocate General Spuznar<sup>78</sup> who reflected upon the “rationae materiae” of the Services Directive. He argued that a directive must be interpreted out of its usual meaning in everyday language and in the context in which it occurs, as well as the purposes of the rules in which it is part.<sup>79</sup> The Advocate General found that “where the main purpose of the activity is not the physical conveying of goods or people but other matters [...], one cannot speak of services in the field of transport.”<sup>80</sup> The ECJ took a similar approach in the case and concluded that “A service of that type could include, besides transport, one or more other elements that fall within a commercial sphere that the EU legislature has included in the scope of Directive 2006/123. In those circumstances, it is necessary to consider what the main purpose of the service at issue is.”<sup>81</sup>

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<sup>75</sup> Ibid., recital 21, p. 39.

<sup>76</sup> European Commission (2007): Handbook on Implementation of the Services Directive, p.11.

<sup>77</sup> Opinion of Advocate General Wahl in case C-168/14, *Grupo Itevelesa*, § 22.

<sup>78</sup> Opinion of Advocate General Spuznar in cases C-340/14 and C-341/14, *R.L. Trijber*.

<sup>79</sup> Ibid., § 30.

<sup>80</sup> Ibid., § 37.

<sup>81</sup> Cases C-340/14 and C-341/14, *R.L. Trijber*, supra note 29, § 51.

The position of UberPOP is interesting here. The majority of Uber's services in Europe are provided by Uber B.V., a limited liability company incorporated in the Netherlands. The Uber app, websites, content, products and more are made available by Uber B.V.<sup>82</sup> As regards UberPOP, as well as other services, transportation is only a smaller element of the factual service. Unlike regular taxis, the main purpose is not to transport people physically between two places, but to be a digital intermediation service connecting chauffeurs with passengers.<sup>83</sup> The EU Commissioner Jakub Adamowicz has also observed the difficulty of categorising Uber. In a press conference 2015 he summarised it as "Uber is a technology, but it is a technology that has an impact on transportation. We're taking our time to analyze, see and study"<sup>84</sup>. Worth mentioning is that the Uber head of policy in Europe, Middle East and Africa, Marc MacGann, at that time totally agreed on that Uber is a technology and absolutely not a transport company because Uber does not own cars and Uber does not employ drivers.<sup>85</sup>

### **5.3 UberPOP as a digital service**

The next question referred by the Spanish court is whether Uber provides digital services by "managing IT resources" as an intelligent telephone and technological platform interface and software application which enables an owner of a vehicle and a person who needs to make a journey to connect.<sup>86</sup> The first step is to read Article 1(2) of Directive 98/34/EC (Directive on Technical Standards). It defines an information society service as a service by electronic means which is provided at a distance by individual request for remuneration. The words "at a distance" by

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<sup>82</sup> Uber Technologies Inc. (2016): Terms and Conditions.

<sup>83</sup> Geradin, D. (2016): Online Intermediation Platforms and Free Trade, p. 11.

<sup>84</sup> Sebag, G. (2015): Is Uber a Taxi Service or a Mobile-Phone App? EU Asks.

<sup>85</sup> Ibid.

<sup>86</sup> Case C-434/15 *Uber Spain*.

“electronic means” means that the parties making the transaction are not simultaneously present. An UberPOP user in Stockholm for example, can order an UberPOP car online by using electronic equipment such as a smartphone or a computer. “At the individual request of a recipient of services”, means that the service is provided through transmission of data when it is requested.<sup>87</sup> UberPOP users are able to choose, on-demand, when to request a transport with a click on a smartphone or on another device.<sup>88</sup> Drivers and passengers locate each other with GPS on their devices.<sup>89</sup> Information society services, such as GPS, are vital for all Uber services. Due to a French law that prohibited pairing over GPS for transportation purposes, Uber has not been able to operate in France. Luckily, the French Supreme Court recently (9<sup>th</sup> of Mars 2016) nullified the law. The decision was based upon the fact that the French government had not notified the EU Commission about its prohibition. It is required to do so because GPS services are information society services, which are exclusively regulated under Directive 98/34/EC.<sup>90</sup> France has also ratified a law called “Thevenoud” in October 2014. It requires taxi cars to return to their station after a trip, it forbids use of software that helps to find available consumers (Uber platform), and it prohibits unlicensed services (UberPOP). Uber has complained about the law and argues that it is a measure which clearly favours regular taxis over Uber’s Internet-based ridesharing service. Thereto, France has not notified the EU Commission about the measure. As a response, the EU Commission has prepared a formal notice meant to investigate whether the French law breaches the Treaties.<sup>91</sup> In late May 2016, the EU

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<sup>87</sup> Directive 98/34/EC, p. 5.

<sup>88</sup> Uber Technologies Inc. (2016): Help - How Do I Request a Ride?

<sup>89</sup> Geradin, D. (2016): Online Intermediation Platforms and Free Trade, p. 9.

<sup>90</sup> Schechner, S. (2016): Uber Wins a Round for Its App in France.

<sup>91</sup> Fioretti, J. (2016): EC to Challenge French Taxi Law After Uber Complaint.

Commission will decide whether it will challenge the law at the ECJ. Further the EU Commission spokesman Jakub Adamowicz said that the EU Commission currently investigates how to "encourage the development of new and innovative services and the temporary use of assets, without favouring one business model over another." And, he added, "in mid-2016 we will provide guidance on how existing EU law applies to the collaborative economy".<sup>92</sup>

In the best scenario, all services provided by UberPOP (i.e. application and ridesharing service) can be regarded as information society services which gives UberPOP a right to rely on freedom to provide services under Directive 98/34/EC.

## **5.4 Proportionality and non-discrimination**

The core issues of *Uber Spain* are whether UberPOP is a transport service or a digital intermediary service and whether national rules are compatible with free movement of services and the freedom of establishment. Another pending case called *Uber Belgium* more specifically focuses on whether national provisions respect the principle of proportionality. It is a local ordinance that applies on remunerated occasional private carriers (e.g. UberPOP), as well as on regular taxi services.<sup>93</sup> The dispute involves a taxi call centre in Brussels called TRB who sued Uber BV for unfair competition against taxi call centres and other taxi companies in Belgium. The ground is that Uber BV provides services comparable to taxi services (UberPOP), but it does not comply with applicable regulations such as taxi driver's licencing. That way Uber BV gets a competitive advantage. Uber BV argues that it does not compete with TRB and considers itself as a software intermediary

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<sup>92</sup> Ibid.

<sup>93</sup> Case C-526/15 - *Uber Belgium*.

between a community of private drivers and private travellers, who can share transport costs.<sup>94</sup> Uber BV adds that the Belgian law on taxi services and hiring of vehicles with drivers, does not apply to UberPOP. This because the money that a driver receives for a ride neither constitutes remuneration nor wage. Rather, the driver is compensated for the costs associated with owning a car and transporting others.<sup>95</sup>

Before determining whether it is in accordance with the principle of proportionality to place UberPOP under a local ordinance for taxi services, a preferable starting point is to provide some background on the principle. The principle of proportionality is laid down in Articles 5.1 and 5.4 TEU as well as in Article 52.1 of the Charter.

The principle of proportionality is one of the most important principles of EU law<sup>96</sup> and it should be considered whenever Union competence is exercised.<sup>97</sup> The principle provides that “The content and form of Union shall not exceed what is necessary to achieve the objectives of the Treaties”.<sup>98</sup> It is possible to derogate from the principle if it is necessary to secure other objectives of general interest or in order to protect the freedom and rights of others.<sup>99</sup> The principle has its roots in early case law; “*Internationale Handelsgesellschaft*” is one of the most famous cases. The Advocate General (Lamothe) stated that “the individual should not have his freedom of action limited beyond the degree necessary for the general interest”.<sup>100</sup> In a later case the ECJ highlighted

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<sup>94</sup> Vousden, S. (2015): *Uber Belgium* - Facilitating a Mobility Service.

<sup>95</sup> Ibid.

<sup>96</sup> Sufrin, B.; Jones, A.: Competition law, p. 107.

<sup>97</sup> Art. 5.1 TEU.

<sup>98</sup> Art. 5.4 TEU.

<sup>99</sup> Art. 52 of the Charter.

<sup>100</sup> Advocate General Dutheillet De Lamothe (1970): Opinion, p. 1147.

the importance of the principle with the words: “The principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued”.<sup>101</sup> In many EU countries UberPOP is a prohibited economic activity. As regards the principle of proportionality in *Uber Belgium*, it can be argued that there are less restrictive means available than putting UberPOP under the Brussels ordinance regarding taxis. Uber is a digital platform which by its services enables more effective use of existing resources (private cars). UberPOP makes it possible for vehicle owners to finance some of the costs which are associated with car ownership, for instance fuel, tax and insurance costs. Instead of treating UberPOP as a taxi service, a less restrictive mean is for Belgian authorities to make a TNC classification or just make new laws which better fits electronic services as UberPOP.

The principle of proportionality is useful in situations when interests recognised by the Union collide. *ERT* is a good example.<sup>102</sup> The ECJ concluded that national monopoly provisions regarding television services which discriminate a party established in another Member State must respect the principle of proportionality. The ECJ underlined the importance of interpreting national legislation that obstruct the freedom to provide services “in the light of general principles of law and in particular of fundamental rights”.<sup>103</sup> National legislation with discriminatory effects and which impedes the principle of free movement

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<sup>101</sup> Case C-331/88 - *Fedesa*, § 13.

<sup>102</sup> Case C-260/89 - *ERT*.

<sup>103</sup> *Ibid.*, § 19f.

of services in Article 56, is generally forbidden. The Article should be interpreted strictly and derogations can only be made on grounds of public policy, public security, or public health. Thereto, the scope of application of the Treaties and the Charter overlap.<sup>104</sup>

*ERT* clearly illustrates the close relationship between the principle of proportionality and the principle of non-discrimination. The principle of non-discrimination does not only prohibit different treatment of similar situations (formal discrimination); it also prohibits equal treatment of unequal situations (material discrimination).<sup>105</sup> The Brussels ordinance applies equally on ride shared transports over UberPOP as on regular taxi services. Since UberPOP most likely is no taxi service but a digital intermediary service, it is reasonable to say that the ordinance is discriminatory. The local ordinance and the Spanish law must pass a proportionality test where it is proved that the rules have legitimate aims and are suitable for that aim. Moreover, there are no less restrictive means available and the laws are reasonable and necessary because of the conflict of interests between the parties at hand. If the laws cannot be justified on these grounds, they breach the prohibition on discrimination.<sup>106</sup>

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<sup>104</sup> *Ibid.*, § 24 and § 43.

<sup>105</sup> White, R. C. A. (2004): *Workers, establishment, and services in the EU*, p. 51.

<sup>106</sup> *Ibid.*, p.58.

## **6. Analysis**

### **6.1 The absence of unified legislation in the EU**

The sharing economy is a relatively new economic trend within the Union. Currently there is no clear guidance or regulations on EU level for these consumption activities that takes place over Internet platforms between collaborating individuals. The absence of regulations and guidance affects Uber which is prohibited from providing its ridesharing service UberPOP in many EU Member States. UberPOP is an online service connecting car owners (drivers) with other people in need for transport (passengers). It can be seen as an organised ridesharing service which in many ways is similar to an ordinary taxi service. UberPOP is controversial among ordinary taxi drivers because UberPOP drivers have no taxi driver's licence and anyone who passes a background check and owns a car with four doors can become a driver. Taxi drivers in contrast, have invested time and money to obtain a taxi licence, and are now upset because UberPOP is according to them, an illegal taxi service which does not follow existing laws on taxi services.

At the moment, UberPOP is just a service "similar" to taxi services, but there is a general uncertainty of what type of service UberPOP is under EU law. Hopefully the guidelines expected in the middle of 2016 will clarify how existing EU law applies on UberPOP and similar services.

### **6.2 The future of UberPOP depends on the ECJ**

More European institutions are examining UberPOP under EU law. Whether UberPOP is a transport service or a digital service is currently being examined by the ECJ in two cases – *Uber Spain* and *Uber Belgium*. As previous sections hopefully clarified, UberPOP must be regarded as a digital service in order for Uber to legally provide the UberPOP service

in the whole EU by relying on the principle of free movement of services. If the ECJ considers UberPOP as a transport service, Uber cannot provide the service by relying on free movement of services. In contrast to digital services, transport services are excluded from the scope of the Services Directive, simply meaning that Member States exclusively regulate transport services. The two cases involve several interesting questions. *Uber Belgium* focuses more specifically on the principle of proportionality. UberPOP has already been categorised as a transport service and is forced to comply with a local ordinance on taxis in Brussels. The referring court only wants to assure if that is compatible with the principle of proportionality.

The ECJ might consider UberPOP as a transport service because it is similar to a taxi service. Since Member States have an exclusive right to regulate transport services it is a big risk that UberPOP will continuously be considered an illegal taxi service in many Member States. Such a ruling would slow down the digitalisation process in Europe.

Uber encourages people to use their resources more effectively with UberPOP and they get something in return for their favours. To treat UberPOP as an unlawful taxi service is as improper as it would be to forbid people from expecting something in return for driving a friend to the airport. Unlike illegal taxicab operations, UberPOP is offered in public and consumers know the price and a particular chauffeur's rating before the trip begins. As has been stated in the briefing to the EU Parliament, UberPOP and similar services (TNCs) increase transparency and that benefits consumers.

It cannot be held for certain that the ECJ categorises UberPOP as a digital service; UberPOP might be regarded as a transport service. One argument for such a position is that UberPOP has an obvious impact on the transportation market; it satisfies the same consumer needs as other transport services. For instance, if the price for an UberPOP ride would rise dramatically, it would most likely result in a stronger demand for alternate services, such as regular taxis or public transports.

In any way, the arguments against considering UberPOP as a transport service are stronger. The ECJ can argue that the distinctive feature of the UberPOP service is the arrangement of transports between consumers over its digital platform. UberPOP is an intermediary service fully dependent on digital means such as Internet and GPS, and the digital service is the cornerstone which enables the transport service. This has partly been proved by the fact that the French Supreme Administrative Court has invalidated parts of a French regulation which prohibited drivers from finding customers over GPS and therefore it also prohibited UberPOP. Since GPS services are information society services under Directive 98/34/EC, they are covered by the principle of free movement of services. As the Advocate General rightly stated in case *R.L. Trijber* (2015), the field of transport only covers activities which consist of conveying goods or people. Services in which the transport only constitutes a smaller part, cannot be regarded as services in the field of transport. UberPOP will most likely be regarded as a digital service by the ECJ. If so, treating UberPOP as a transport service and oblige it to comply with an ordinance for taxis, is not in accordance with the principle of proportionality. Digital services are protected by the fundamental principle of free movement of services in Article 56 TFEU. According to the ruling *ERT*, discriminatory provisions which impede the principle of free movement of services, are generally prohibited. The ordinance treats unequal situations equally, which is material discrimination.

The outcome of the cases will not only affect UberPOP but other services provided by TNCs as Sidecar and Lyft. There are a number of arguments observed in the EU Parliament briefing against UberPOP and other TNCs which might be regarded by the ECJ in its rulings. One example is consumer privacy.<sup>107</sup> Uber collects data from riders who might be

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<sup>107</sup> Azevedo, F. & Maciejewski, M. (2015): Social, Economic and Legal Consequences of Uber and Similar TNCs, p. 3.

journalists, elected officials and the information could in worst case be used for improper purposes, such as manipulation of regulators. It is not likely to occur since such a use would damage Ubers reputation and future expansion. Another argument against UberPOP and similar TNCs is consumer protection. Recently an Uber driver in San Francisco struck and killed a young girl.<sup>108</sup>

## **6.3 Institutions within the EU must interfere**

Apart from analysing pending cases, this thesis has also investigated what is currently done at EU level for UberPOP and similar services provided by Transport Network Companies (TNCs). Unlike in California where TNCs are able to compete on certain conditions, EU has no rules for TNCs. Unlike many other Member States, Estonia has regulated occasional services like UberPOP, and welcomes ridesharing as a business model. According to the briefing sent to the EU Parliament it is unfortunate that there is no common framework for TNCs within EU and it is concluded that the ECJ ruling *Uber Spain* (discussed earlier) will be determinant for considering UberPOP and similar services provided by TNCs, as transport services or digital services. In the briefing to the EU Parliament it is recommended that any eventual regulations regarding UberPOP and similar services are made by EUs legislators. This due to the clear European dimension of TNCs and a common framework will avoid conflicting laws between Member States. It is not for certain that the EU Parliament will regulate TNCs. Anyway, this paper suggests a framework on EU level that enhances the benefits and eliminates the associated costs and risks with the sharing economy. A successful strategy might be to create rules similar to those in California and in Estonia. Estonia allows occasional services like UberPOP as long as the providing company complies with certain provisions such as using

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<sup>108</sup> Rogers, B. (2015): The Social Costs of Uber, section 2b.

drivers without a criminal past and offer electronic receipts. The benefits would be enormous for consumers since they would benefit from better price transparency and lowered search costs. A solution on EU level requires that Member States cooperate with responsible institutions within the EU, in accordance with the principle of loyalty.

## **6.4 Regulating UberPOP benefit**

### **consumers**

A TNC regulation would be in accordance with the principle of free movement of services and it would be best for consumers. It would enable Uber to provide the UberPOP service under certain conditions. Taxi companies would welcome a regulation which put UberPOP and similar TNCs under rules. An ECJ decision where UberPOP is regarded as a regular digital service, would raise further concerns, such as passenger safety. Car accidents are common and a unified TNC framework setting certain minimum standards for occasional services like UberPOP, would ensure passenger safety. In addition, UberPOP is not the only TNC service; Lyft and more services are also TNCs. A TNC regulation on EU level puts all similar occasional services under one legal umbrella. Without a Union made TNC framework the ECJ will continuously be busy making preliminary rulings. A TNC regulation guarantees legal certainty for Uber and consumers. It gives Uber a good basis and a possibility, within the scope of the TNC regulation, to customise and improve its services without facing criminal charges. Consumers would be able to use TNC services in the entire EU.

## 7. Conclusion

The European institutions must adapt to the digital era and they have recently begun to do so. Modernisation and the creation of a new “Digital Single Market” takes time. Many companies within the sharing economy (e.g. Uber) are currently in a troublesome situation since they do not know if they are allowed to provide their services. Uber waits for further information from responsible EU institutions and the ECJ regarding its service UberPOP under EU law. This paper has clarified the issues regarding UberPOP and how they can be solved. This thesis has argued for the importance of implementing a Union wide TNC regulation enabling services as UberPOP and other services affecting the transport sector, to operate legally. The complex questions referred in *Uber Spain* and *Uber Belgium* indicate that institutions within the Union must take action and clarify which rules that apply for UberPOP and similar TNCs. Even though the ECJ is able to determine whether UberPOP is a transport service, or a digital service able to rely on the principle of freedom to provide services, it cannot provide a suitable solution for all TNCs. Even if the author believes that UberPOP is a digital intermediary service, due to the fact that its primary function is to pair a transporter and a passenger by digital means, the EU legislator is best suited for finding sustainable solutions made for TNCs.

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