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# UBER and UberPop

– To be or not to be banned in the EU?

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# Summary

UBER is a worldwide company growing rapidly. It has invented an application that makes it possible to request a ride from a driver which drives their own car. According to UBER, it is not a transport company but instead a technology platform. Moreover, this new phenomenon, whereby companies are enabling access for consumers to property owned by other consumers, is called sharing economy.

In order to become an UBER driver, one must possess a commercial insurance, a car and a taxi licence. Despite that, UBER also runs an additional low cost service called UberPop. The people who are driving UberPop do not need to have any taxi license or commercial insurance. Moreover, Member States have been taking actions that have resulted in restrictions and bans against both UberPop drivers and the management of UBER. The purpose of this thesis is therefore to examine whether restricting or banning UBER and UberPop constitutes a breach of EU law. In order to do so, the thesis starts with analysing the legal nature of UBER and UberPop. It is my conclusion that UBER could be seen as both a transport service and an information society service. If it is concluded to be only an information society service, it is settled at EU level. While, if it is concluded to be seen as purely a taxi service, it is a matter for the national law. Obstacles can however derive from divergences in legislation and from legal uncertainty regarding which national rules that are applicable. In my consideration, these obstacles should be eliminated by coordinating this issue and clarifying the regulations at EU level. This in order to avoid fragmentation and to avoid obstacles to the internal market.

Limitations of the fundamental freedoms can be made if they are justified. The limitations need to be proportionate, necessary and meet objectives of general interest recognised by the EU. The conclusion of this thesis is that restricting or banning UBER would constitute a breach of EU law. Because the UBER driver actually possess a taxi license and a commercial insurance. Therefore it could not be argued that it is not as safe as regular taxis, since they have the same licenses and insurances. In my consideration, restricting or banning UberPop would not constitute a breach of EU law. At least not as UberPop is functioning today. In my consideration, a restriction of UberPop would be proportionate, necessary and legitimate since the driver does not possess the correct license or insurance. A restriction of UberPop could therefore be justified on grounds of public policy and safety.

# Sammanfattning

UBER är ett globalt företag som växer snabbt. UBER har skapat en applikation som gör det möjligt att, via applikationen, beställa en taxiresa från en person som kör sin egen bil. Enligt UBER är det dock inget transportföretag, utan istället en teknologiplattform. Detta nya fenomen, där företag möjliggör tillgång till andra personers ägodelar, kallas för delningsekonomi.

För att bli en UBER-förare krävs kommersiell försäkring, taxiförarlegitimation samt en bil. UBER har däremot även en lågkostnadsservice som kallas för UberPop. För att köra UberPop krävs ingen taxiförarlegitimation eller kommersiell försäkring. Medlemsstater har dock agerat och infört såväl restriktioner som förbud mot både UberPopförare och mot UBER. Syftet med denna uppsats är därför att undersöka huruvida en restriktion eller ett förbud mot UBER och UberPop är förenligt med EU-rätten. Uppsatsen börjar med att analysera den rättsliga karaktären av UBER och UberPop. Det är min slutsats att UBER både kan ses som en informationssamhällets tjänst, som en taxitjänst. För det fall att UBER endast hade setts som en informationssamhällets tjänst är området reglerat på EU-nivå. Hade UBER istället setts som en taxitjänst, är området reglerat på nationell nivå. När det förekommer rättsosäkerhet samt skillnader i lagstiftning mellan medlemsstaterna, kan det uppstå hinder för den inre marknaden. Min uppfattning är att dessa hinder bör undanröjas genom samordning och reglering på EU-nivå. Detta för att undvika att medlemsstaterna tillämpar olika regler och för att främja den fria rörligheten.

Begränsningar av de grundläggande rättigheterna kan göras om det är motiverat. I sådana fall måste begränsningarna vara proportionella, nödvändiga samt reflektera samhällsintressen som erkänns av EU. Uppsatsens slutsats är att en begränsning eller ett förbud mot UBER är oförenligt med EU-rätten. Detta eftersom UBER-förare faktiskt har kommersiell försäkring och taxiförarlegitimation. Det är därför inte möjligt att argumentera att det inte är lika säkert som vanliga taxibilar, eftersom de har samma taxiförarlegitimation och försäkringar. Min uppfattning är att det däremot är möjligt att begränsa eller förbjuda UberPop, så som det är uppbyggt och fungerar idag. Enligt min uppfattning vore en begränsning, eller ett förbud, proportionerligt, nödvändigt och legitimt eftersom föraren varken har taxiförarlegitimation eller rätt försäkring. En begränsning av UberPop skulle således kunna motiveras med hänsyn till allmän ordning och säkerhet.

# Preface

I would like to express my gratitude to my supervisor, Jörgen Hettne, for his support and comments during the process of writing this thesis. I would also like to thank my family and friends for all the support that I have recieved during my studies.

Lund, May 2016

*Peggy Gustavsson*

# Abbreviations

AG	Advocat General
Charter	European Union Charter of Fundamental Rights
Commission	European Commission
ECHR	The European Convention of Human Rights
ECJ (sometimes mentioned as “The Court”)	The European Court of Justice
EEC	European Economic Community
EU	European Union
GC	The General Court
Member States	The Member States of the European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

# 1 Introduction

## 1.1 Background

We are facing a new era, a new type of market. This phenomenon is called “sharing economy”<sup>1</sup> and it has improved the access to a number of services and facilities.<sup>2</sup>

Maybe you have heard of UBER which is a worldwide company growing rapidly. It could be seen as a large taxi company but it does not own any vehicles.<sup>3</sup> If you want to travel with UBER you use an application on your phone where you choose the pick-up address. It is then possible to follow the driver on the phone and see exactly when the driver will appear. You even pay with the application so there is no need to bring any money. However, if you are using UberPop, this driver does not have any taxi license.<sup>4</sup>

This new type of market is a shift to peer-to-peer<sup>5</sup> accessibility based business models, whereby companies are enabling access for consumers to property owned by other consumers. These companies function through an online platform. It is thereby the online platform that connects consumers that owns certain properties with consumers in temporary need of it. This business model therefore differs from the former solutions for mobility and for other sorts of services. Nevertheless, it also makes it possible to serve the same needs at lower prices.<sup>6</sup>

This new phenomenon, and especially UBER, has however caused a lot of trouble in the Member States. There have been many protests from taxi drivers and some states have even decided to impose a ban on the company.<sup>7</sup> Moreover, this issue is connected with concerns regarding public safety and health. It is also connected with discussions

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<sup>1</sup>Sometimes also called “collaborative economy”, see European Commission - Fact sheet, *A deeper and fairer Single Market*, pages 1-2.

<sup>2</sup>Bonchek, Choudary, *Three Elements of a Successful Platform Strategy*, accessed 2016-04-10.

<sup>3</sup>Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, page 1.

<sup>4</sup>Goodwin, *The Battle Is For The Customer Interface*, accessed 2016-04-08.

<sup>5</sup>Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, pages 3-4. UBER, *Ride*, accessed 2016-04-10.

<sup>6</sup>Peer-to-peer is when the consumers communicate with other consumers, for example programs and technique where the computers can communicate with each other without using a server, see Nationalencyklopedin, *ickehierarkiskt nät*, accessed 2016-04-09.

<sup>7</sup>Dervojeda, Verzijl, Nagtegaal, Lengton, Rouwmaat, Monfardini, Frideres, *The Sharing Economy Accessibility Based Business Models for Peer-to-Peer Markets*, page 3.

<sup>8</sup>Geradin, *Should Uber be Allowed to Compete in Europe? And if so How?* pages 2-3.



concerning the well-being of drivers, passengers, and the liability of the sharing economy practice. Consequently, many of the complaints claim that ridesharing is less safe than taking a traditional taxi.<sup>8</sup>

The regulators in the EU have to deal with the problem that the innovation in the sharing economy should not be strangled by excessive and out-dated regulation. They also have to deal with the need to protect the users of these services from unskilled service providers, from liability, and from fraud.<sup>9</sup> I find this dilemma very interesting and complex and therefore this thesis will try to figure out if this issue should be settled at EU level or at national level. Furthermore, I am therefore going to examine whether restricting or banning UBER and UberPop would be compatible with EU law.

## 1.2 Purpose and Research questions

The purpose of this thesis is to examine whether restricting or banning UBER and UberPop constitutes a breach of EU law. The research questions will, therefore, be:

- What is the legal nature of UBER and UberPop?
- Are the actions towards UBER and UberPop harmonized or fragmented in the EU?
- Should this issue be settled at EU level or at national level?
- Is restricting or banning UBER and UberPop compatible with EU law?

I will answer the research questions gradually throughout this thesis. First, I will answer the research question regarding the legal nature of UBER and UberPop. Then, I will answer the research question regarding the actions towards UBER and UberPop in the Member States. Thereafter, I will answer whether this issue should be settled at EU level or at national level. Finally, I will answer whether restricting or banning UBER and UberPop are compatible with EU law. There will be a conclusion after each chapter and not only in the final chapter. Nevertheless, I will give my concluding remarks regarding this thesis in the final chapter.

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<sup>8</sup>Feeney, *Is Ridesharing Safe?* page 1.

<sup>9</sup>Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, pages 1-2.  
Schulze, Staudenmayer, *Digital Revolution – Challenges for Contract Law*, page 19.

## 1.3 Method, materials and previous research

According to Claes Sandgren, *professor in civil law*, the method should be the approach from the asked research questions through the material towards a conclusion.<sup>10</sup> In order to fulfil the purpose and answer the research questions I will therefore use a traditional legal dogmatic method and an EU legal method. The traditional legal dogmatic method consists of analysing the research questions stated above systematically against relevant legal sources.<sup>11</sup> I have therefore searched for the answers in applicable law, case law, legislative history and doctrine.<sup>12</sup> However, there is not existing only one EU legal method which should always be applied. Instead, it could be said that the EU legal method can be used as an approach to manage the EU legal sources. This is because EU law is consisting of two levels, both the Union level and a national level composed of 28 legal systems. The empowered EU institutions draft legislation within its conferred competence at the EU level. Then each Member State has to realize it within its legal system at the national level.<sup>13</sup> The competence of the EU derives from three different principle: the principles of conferral, subsidiarity and proportionality. These principles are regulated in Article 5 TEU and regulate the limits and the use of the competences.<sup>14</sup> Moreover, the binding legal sources of the EU law are the primary law, binding secondary law, general principles of law and decisions.<sup>15</sup> EU law also exists of non-binding legal sources such as the non-binding secondary law, guidelines, communications, recommendations and opinions of the AG.<sup>16</sup>

This thesis will deal with EU law at EU level. The relevant sources of law are therefore the EU Treaty law, the Charter, secondary law, case law and other instruments, such as guidelines and communications. I have also used some information from sources of a lower hierarchy such as newspaper, in order to see what the debate is in the society. Nevertheless, I will apply both a *de lege lata*- and a *de lege ferenda*-perspective<sup>17</sup>

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<sup>10</sup>Sandgren, *Rättsvetenskap för uppsatsförfattare*, page 35.

<sup>11</sup>Peczenik, *Juridikens teori och metod*, pages 33-34.

<sup>12</sup>Kleineman, *Rättsdogmatisk metod*, pages 21 and 26.

<sup>13</sup>Reichel, *EU-Rättslig Metod*, pages 109-110.

<sup>14</sup>Hettne, Otken Eriksson, *EU-rättslig metod*, pages 80-81.

<sup>15</sup>Craig, De Búrca, *Eu Law – Text, cases and materials*, pages 107-109. See Article 288 TFEU.

<sup>16</sup>Hettne, Otken Eriksson, *EU-rättslig metod*, pages 40-41.

<sup>17</sup>*Lex lata* regards to applicable law and *lex ferenda* regards the law that shall or should be enacted, see Nationalencyklopedin, *lex lata and lex ferenda*, accessed 2016-04-09.

because this area is under development. Consequently, also the law needs to be developed in order to be applicable to new situations.

Since this market is new, there is a lack of scientific publications on the “sharing economy”.<sup>18</sup> There are however, some legal articles regarding this subject.

Nevertheless, there has been published a European Added Value assessment regarding the sharing economy. The Commission is also expected to publish its guidelines on how to apply existing EU legislation on the sharing economy in mid-2016.<sup>19</sup> Also in some of the Member States, there are on-going researches regarding whether the law needs to be changed.<sup>20</sup> Furthermore, there are also two judgments pending before the ECJ and the judgments will probably be announced later this year (2016).<sup>21</sup>

Throughout this thesis, it should be borne in mind that since the ECJ has developed the principles of supremacy and direct effect, the EU law has primacy in relation to the law of the Member States when there is a conflict.<sup>22</sup> Otherwise, the effectiveness of the EU law would be impaired.<sup>23</sup> The ECJ has also made it clear that national courts cannot themselves find that an EU norm is invalid. If there would be divergences between courts in the Member States regarding the validity of EU acts, it could place the unity of the EU legal order in jeopardy.<sup>24</sup> However, according to Case 283/81 *CILFIT*, there is no need to refer a question regarding EU law for a preliminary ruling if it is established that the question is irrelevant; if the question has already been interpreted by ECJ; or if the correct application of the EU law is so obvious so it does not leave any scope for

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<sup>18</sup>Dervojeđa, Verzijl, Nagtegaal, Lengton, Rouwmaat, Monfardini, Frideres, *The Sharing Economy Accessibility Based Business Models for Peer-to-Peer Markets*, page 3.

<sup>19</sup>See European Parliamentary Research Service: Goudin, European Added Value Unit, *The Cost of Non-Europe in the Sharing Economy Economic, Social and Legal Challenges and Opportunities*.

Communication from the Commission, *A Digital Single Market Strategy for Europe*, page 12. European Commission - Fact sheet, *A deeper and fairer Single Market*, pages 1-2. European Committee of the region, *Resolution on the priorities for the 2016 work programme of the European Commission*, para 28.

<sup>20</sup>For example in Sweden see: Kommittédirektiv 2015:136, *Användarna i delningsekonomi*.

<sup>21</sup>Pending Cases: Case C-526/15 *Uber Belgium BVBA v. Taxi Radio Bruxellois NV* and Case C-434/15 *Asociación Profesional Élite Taxi v. Uber Systems Spain, S.L.*

<sup>22</sup>Reichel, *EU-rättslig metod*, page 111; Hettne, Otken Eriksson, *EU-rättslig metod*, page 173. Already in *Van Gend en Loos* and *Costa v. Enel* the Court stated that the EEC Treaty had created a new legal order. The Court stated that the Member States have limited their sovereign rights to the EU, see Case 26/62 *Van Gend and Loos*, [1963] ECLI:EU:C:1963:1, page 12. See also Case 6/64 *Costa v. Enel*, [1964] ECLI:EU:C:1964:66, pages 592-593; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114, para 3.

<sup>23</sup>Case 106/77 *Simmenthal* [1978] ECLI:EU:C:1978:49, paras 18 and 20-21.

<sup>24</sup>Case 314/85 *Foto Frost*, [1987] ECLI:EU:C:1987:452, paras 15 and 20. Craig, De Búrca, *Eu Law – Text, cases and materials*, page 266.

reasonable doubt.<sup>25</sup> Furthermore, according to Article 4(3) TEU the Member States shall take any suitably measure to ensure fulfilment of the obligations from the Treaties and from the acts of the EU institutions. Therefore, according to the principle of supremacy and Article 4(3) TEU, the Member States have to follow EU law. Consequently, if there would be a conflicting national provision the Member States would need to set it aside. This should be borne in mind since it is of importance while assessing if this thesis research questions should be settled at EU level or at national level.

## 1.4 Delimitations

This thesis deals with questions regarding EU law at the EU level. The purpose is to examine whether it is compatible with EU law to restrict or to ban UBER and UberPop. It is therefore of importance to examine if this is an area where EU has the competence or if it is a matter that should be settled by national law. However, due to the limited scope of a thesis, this thesis does not have enough space to examine the view and regulation regarding UBER and UberPop in all Member States. I will therefore only discuss the view in some of the Member States. This is because I still think it is of importance to discuss that this issue is not harmonized in the EU, it is very fragmented.

Because of the limited space, and time, this thesis will not discuss the view from a competition law perspective. Even if it would have been interesting to examine whether the setting of price by UBER could be seen as horizontal price fixing between competitors by means of an applicaton; and thereby considering whether an algorithm could be seen as a so-called hub-and-spoke cartel.<sup>26</sup> Furthermore, this thesis will therefore not examine if UBER and UberPop is engaged in unfair competition with traditional service providers. The thesis will neither examine whether the prohibition of UBER and UberPop constitutes a breach of the principle of free competition.

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<sup>25</sup>Case 283/81 *CILFIT*, [1982] ECLI:EU:C:1982:335, para 21.

<sup>26</sup>A hub-and-spoke cartel is a form of cartel where the original cartelist does not communicate directly with each other. Instead, they use an intermediary who arranges the cartel, see Nowag, *Between an UBER Rock and an UBER Hard Place, the UBER story*, accessed 2016-04-04. See also Maurice, Ariel, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, page 8.

According to UBER, they provide their drivers with a yearly summary with revenues, which their drivers should declare with their tax authorities. It is however the drivers who bear the responsibility to send the data to local taxation authorities. UBER also states that they are open to cooperate with taxation authorities in order to avoid fiscal fraud, but that they need a clear framework in order to do that.<sup>27</sup> Due to the limited scope, this thesis will not analyse UBER from a tax law perspective, although it would also be interesting.

## 1.5 Outline

This thesis is divided into four chapters. First, the legal nature of UBER and UberPop will be examined in order to find out if it is providing a taxi service or if it is an information society service provider. This will be followed by the question regarding whether the reaction to the establishment of UBER and UberPop is harmonized in the EU. In this chapter the reaction in Belgium, Germany, Spain, France, England and Sweden will be examined. The next chapter will investigate if the restriction of UBER and UberPop is a violation of the freedom to provide services or of the freedom of establishment. Moreover, the chapter will also examine the compatibility of the restriction in relation to the Charter. The final chapter will provide a conclusive analysis including my own opinion regarding whether a prohibition of UBER and UberPop constitutes a breach of EU law. Nevertheless, I will not only give a conclusive analysis in the final chapter, I will also give it at the end of chapter 2, 3 and 4. The research questions will therefore be answered gradually during this thesis.

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<sup>27</sup>EurActiv: Casings, *Uber Chief: Uber and Europe is definitely a conversation worth having*, accessed 2016-04-20.

## 2 THE LEGAL NATURE OF UBER AND UBERPOP

### 2.1 The business model of UBER and UberPop

The global taxi industry is facing severe competition from the new entrant, UBER. UBER was founded in San Francisco in 2009 and are currently operating in 408 cities worldwide.<sup>28</sup> Moreover, it has an estimated worth of 68 billion USD without owning any vehicle.<sup>29</sup> It has been said that the strength of UBER is that it reduces the transaction- and search costs for users. The prices are therefore normally lower than the prices for regular taxi services.<sup>30</sup> By using an application on the phone, the user chooses their pick up address and watch the car progress towards their location. Nevertheless, the user does not need to bring any money because all transactions are performed electronically through the application. The users can also rate their drivers, which would be an incentive for the driver to provide good service. Users can also check the profile of the driver before selecting them. According to UBER this makes the users feel safer than entering the car of a complete stranger. Moreover, if the average rating of a driver would be low, the driver would be dismissed by UBER.<sup>31</sup>

According to UBER it is not a taxi company since it does not employ the taxi drivers or own any cars. Instead, UBER states that it is a technology platform. UBER states that they are helping people to get a ride around cities. Moreover, according to UBER, it connects the passenger and the taxi driver through the application and then takes a percentage of the fee. Furthermore, the business plan of UBER is not to compete with taxis but rather with the concept of owning a car. Regarding safety, every UBER driver goes through a background criminal check. It is also checked that every UBER driver has full commercial insurance. If the insurance is not enough, UBER provides a

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<sup>28</sup>UBER, *The UBER Story*, accessed 2016-04-15. The Telegraph: Alpe, *The history of Uber*, accessed 2016-04-22.

<sup>29</sup>Forbes: Chen, *At \$68 Billion Valuation, Uber Will Be Bigger Than GM, Ford, And Honda*, accessed 2016-04-15.

<sup>30</sup>Hamari, Sjöklint, Ukkonen, *The sharing economy: Why people participate in collaborative consumption*, pages 1 and 5. Meller-Hannich, *Share Economy and Consumer Protection*, pages 119-120.

<sup>31</sup>Bruegel: Golovin, *The Economics of Uber*, accessed 2016-04-22. Bruegel: Petropoulos, *Uber and the economic impact of sharing economy platforms*, accessed 2016-04-26. Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, pages 3-4.

corporate insurance, which offers additional support. UBER is also using a tracking technology in order to follow the drivers.<sup>32</sup>

To become an UBER driver you must possess a taxi licence and own a car.<sup>33</sup> Despite that, the company also offers an additional low cost service called "UberPop". The people who are driving UberPop do not need to have any taxi license. Instead, anyone can apply on the website of UBER to become a driver without having to complete a taxi driver education. UBER only demands that the person needs to have a driving license B for at least one year, that the person has no criminal records, and that the person has an insured 5-door vehicle manufactured no later than 2005 (in some cities the person also needs to be 21 years old).<sup>34</sup>

The business model of UBER relies on a peer-to-peer system where consumers conclude contracts with private persons as service providers. These contracts are concluded through the online platform, which is a commercial third party who organises and controls the communication between the parties.<sup>35</sup> Moreover, the peer-to-peer systems performed online, have developed from being known as an online computer technique, to instead becoming a great market.<sup>36</sup> This trend is called sharing economy. Sharing assets is however not a new idea. Because there have been, for many years, both private and public transportation services that gives the consumer access to a vehicle for a specific period.<sup>37</sup> Moreover, the initial idea with the sharing economy was to meet new people, be connected and to save resources. Nowadays it might be to expand personal opportunities. It could therefore be said that it is challenging the traditional business models regarding the taxi services.<sup>38</sup>

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<sup>32</sup>EurActiv: Casinge, *Uber Chief: Uber and Europe is definitely a conversation worth having*, accessed 2016-04-20. Bruegel: Golovin, *The Economics of Uber*, accessed 2016-04-22

<sup>33</sup>UBER, *Driving Jobs vs Driving with UBER*, accessed 2016-04-22.

<sup>34</sup>UBER Newsroom: *Börja köra UberPop i Stockholm eller Göteborg*, accessed 2016-04-05. Independent: Griffin, *Uber's cheap service to be banned in France as Paris taxis block roads*, accessed 2016-04-15. The stack: Anderson, *Here's what an Uber driver in Belgium must do to reach the same standard as a taxi-driver*, accessed 2016-04-10.

<sup>35</sup>Schulze, Staudenmayer, *Digital Revolution – Challenges for Contract Law*, pages 26-27.

<sup>36</sup>Scharf, *Napster's long shadow: copyright and peer-to-peer technology*, pages 807, 810-812. The Telegraph: Sparks, *Uber overtakes New York's iconic yellow cabs*, accessed 2016-04-15.

<sup>37</sup>Barry, Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, page 70.

<sup>38</sup>Hamari, Sjöklint, Ukkonen, *The sharing economy: Why people participate in collaborative consumption*, pages 1 and 5. Meller-Hannich, *Share Economy and Consumer Protection*, pages 119-120. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, *A Digital Single Market Strategy for Europe*, COM(2015)192 final, page 11.

## 2.2 Is UBER providing taxi services?

### 2.2.1 The relevant legislation

In some Member States, it has been ruled that UBER operates as a transport company and that it is in breach of national regulations regarding the activities of professional taxi drivers. UBER however states that it does not provide a transport service; instead it says that it is running an application that allows consumers to request a trip to drivers who are using their own cars.<sup>39</sup>

Regarding the regulation of transport services, it should be noted that Article 58 TFEU excludes transport services. Instead, the freedom to provide transport services is regulated in Articles 90-100 TFEU.<sup>40</sup> According to Article 100 TFEU, those provisions shall apply to transport by rail, road and inland waterway. Moreover, Article 90 TFEU states that the objectives of the Treaties shall be pursued within the framework of a common transport policy. The aim of the EU's land transport policy is to promote mobility that is efficient, safe, and environmentally friendly.<sup>41</sup> According to Article 91(1) TFEU the European Parliament and the Council shall, while acting in accordance with the ordinary legislative procedure and consulting the Economic and Social Committee and the Committee of the Regions, lay down common rules regarding international transport. This also includes transport to or from the territory of a Member State or passing across the territory of a Member State. They shall also lay down measures to improve transport safety or any other appropriate provisions. Moreover, Article 96(1) TFEU states that Member State are prohibited to decide any rates or conditions involving support or protection of a particular undertaking or industry regarding transport operations within the Union, if it is not authorised by the Commission. Road transport within EU is therefore based on common EU rules, while road transport between EU and non-EU countries is still largely based on bilateral agreements between Member States and third countries.<sup>42</sup> For example, already back in 1962, some Member States signed an European Agreement concerning work of crews

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<sup>39</sup>Lexology: CMS DeBacker, *European Court of Justice to rule on the type of service Uber provides*, accessed 2016-04-15. See also chapter 3 of this thesis.

<sup>40</sup>Craig, De Búrca, *Eu Law – Text, cases and materials*, page 822.

<sup>41</sup>European Commission, *Road – Non EU-Countries*, accessed 2016-04-11. See also Commission's White Paper of 12 September 2001, *European transport policy for 2010, time to decide*, COM(2001) 370 final, pages 6-7, and 25.

<sup>42</sup>European Commission, *Road – Promoting efficient, safe and green land transport*, accessed 2016-04-11.



of vehicles engaged in international road transport (AETR). The agreement however, did not enter into force and negotiations were resumed in 1967. Similar work had resulted in the adoption of Council Regulation 543/69 that standardized driving and rest periods of drivers. The Commission brought an action for annulment regarding the legal consequences of the Council proceedings, which had led to the Member States adopting AETR. The Court however concluded, in *Case 22/70 AETR*, that the EU's external capacity covered that.<sup>43</sup>

According to Article 2(1) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (“the service directive”), the Directive shall apply to services provided by a service provider established in a Member State. According to the Service Directive, services within the EU cannot be conditioned on any authorisation scheme unless it is based on criterias that are justified by overriding reasons of the public interest, non-discriminatory, and proportionate.<sup>44</sup> Despite that, Article 2(2)(d) of the Service Directive states that the Directive shall not apply to services in the field of transport, which falls within the scope of Title V TFEU. According to recital 21 of the Service Directive, transport services including taxis are excluded from the scope of the Directive. Consequently, taxi services fall outside the scope of the Service Directive.

There are common rules regarding professional road transport, in Regulation No 1071/2009, on access to the profession and to the market, on minimal standards for working time, driving time and for rest periods.<sup>45</sup> Those rules apply to vehicles with seats for nine passengers, including the driver, and more.<sup>46</sup> According to the regulation, in order for the operators to access the profession, they must fulfill four criterias. Those are a good repute, financial standing, professional competence, and to have an effective

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<sup>43</sup>Case 22/70 AETR, [1971] ECLI:EU:C:1971:32. Craig, De Búrca, *Eu Law – Text, cases and materials*, pages 322 and 324. However, in 2006, the AETR agreement was amended in order to introduce the use of the digital tachograph, which became mandatory for contracting parties in 2010, see European Commission, *Road – Non EU-countries*, accessed 2016-04-11.

<sup>44</sup>See Articles 9 and 10 of the Service Directive.

<sup>45</sup>See Article 6 of Regulation (EC) No 1071/2009 of The European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC. See European Commission, *Road – Promoting efficient, safe and green land transport*, accessed 2016-04-11.

<sup>46</sup>See Article 2 of Regulation No 1071/2009. This regulation replaces EU Council Directive 96/26, on admission to the occupation of road haulage and passenger transport, which was further developed in the Council Directive 98/76/EC.

and stable establishment in a Member State.<sup>47</sup> There are also rules regarding training for professional drivers but those are applicable to vehicles with driving licence of category C, D or E. The rules are therefore not applicable to licence of category B.<sup>48</sup> However, none of these rules do directly apply to taxi services. Despite that, the rules are still of importance since some Member States have used the rules as guidelines for the actual legislation of taxi operators. Moreover, these requirements are also common qualitative requirements on taxi operators.<sup>49</sup> Despite that, the rules regarding the taxi services differ in the Member States. This might be because most of the trips with a taxi take place within a city. When the taxis leave the area where they are stationed they normally return as soon as possible. This might also be because there are alternatives for longer transportations such as buses and trains. Furthermore, in some cities there might even be direct barriers to entry, such as a maximum number of taxis or allowed licences that could be traded. While other Member States relies on more indirect barriers to entry, which are related to factors such as taxi driver requirements. Furthermore, the taxi industry is complex since it has a wide range of regulatory approaches and different organisational structures.<sup>50</sup> Nevertheless, passenger transport and taxi services are excluded from the scope of the consumer rights Directive. This is because it is already subject to other EU legislation, and regarding taxi services to regulation at national level.<sup>51</sup>

## 2.2.2 Relevant case law

In Case C-518/13, the referring court asked whether there was a factual and a legal distinction between the original taxis, the so-called “London Black Cabs”, and private hire vehicles. The case concerned whether allowing Black Cabs but prohibiting private hire vehicles to use bus lanes on public roads in London during some hours except for

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<sup>47</sup>See Article 3(1) of the Regulation No 1071/2009. See also European Commission, *Road – Rules governing access to the profession*, accessed 2016-04-17.

<sup>48</sup>See Article 1 of Directive 2003/59/EC of the European Parliament and of the Council of 15 July 2003 on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers, amending Council Regulation (EEC) No 3820/85 and Council Directive 91/439/EEC and repealing Council Directive 76/914/EEC.

<sup>49</sup>OECD, *(De-)Regulation of the Taxi Industry*, page 38.

<sup>50</sup>OECD, *(De-)Regulation of the Taxi Industry*, pages 36-39.

<sup>51</sup>Recital 27 of Directive 2011/83/EU of the European Parliament and of the council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (“Consumer rights directive”).

picking up and setting down pre-booked passengers constituted a form of state aid. The ECJ answered that the identification of Black Cabs and private hire vehicles, and the assessment of whether those situations may be comparable is an issue that falls within the jurisdiction of the referring court.<sup>52</sup> Nonetheless, the ECJ however gave some guidance. The ECJ stated that the identification of the factual and legal situation of Black Cabs and private hire vehicles cannot be limited to the market sector in which they are in direct competition. Because all journeys are liable to affect the safety and efficiency of the transport on all road traffic. The ECJ also stated that the regulations for Black Cabs differs from private hire vehicles. For example, only Black Cabs must be recognisable and their drivers must set the fares by means of a taximeter. Their drivers also need to have a deep knowledge of London. Therefore, the ECJ concluded that Black Cabs and private hire vehicles are in a sufficiently distinct factual and legal situation so that they are not comparable. Consequently, the bus lanes policy did not confer a selective economic advantage on Black Cabs.<sup>53</sup> As already mentioned, the regulation of taxi services falls within the national regulation, but according to the ECJ Black Cabs and private hire vehicles can be seen to be in distinct factual and legal situations.

Another case, where the national competence was not as clear as in Case C-518/13, is joined Cases C 340/14 and C 341/14. Case C 340/14 concerned an operating authorisation for the transport of passengers by water. It regarded organising tours in Amsterdam by water. The tours were organised on request and in exchange for payment, using an open sloop with an electrical motor, which was able to transport up to 34 persons. This operating authorisation was however refused in Amsterdam.<sup>54</sup> The referring court also asked whether the Service Directive must be interpreted as meaning that the provisions in Chapter III, relating to freedom of establishment, are applicable to internal situations. The ECJ however stated that this service could also be enjoyed by nationals of other Member States and by service providers from other Member States, so it was not a purely internal situation.<sup>55</sup> According to the ECJ, the Service Directive lays down general provisions intended to remove restrictions on the freedom of

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<sup>52</sup>Case C-518/13, *Eventech*, [2015] ECLI:EU:C:2015:9, paras 31, 56-57 and 59.

<sup>53</sup>Case C-518/13, *Eventech*, paras 59-61.

<sup>54</sup>Joined Cases C-340/14 *Trijber* and C-341/14 *Harmsen*, [2015] ECLI:EU:C:2015:641, paras 19-20 and 23.

<sup>55</sup>Joined Cases C-340/14 *Trijber* and C-341/14 *Harmsen*, paras 40-42

establishment for service providers in order to have a free and competitive internal market. The ECJ also stated that the scope of the exclusion in Article 2(2)(d) of the Service Directive, regarding the concept of services in the field of transport, must be interpreted by reference to its purpose and general structure.<sup>56</sup> According to the ECJ, it does not follow from the exclusion that any service regarding transport by waterway must automatically be classified as a transport. Since the service could also include other elements that fall within in the Directive. According to the ECJ, it is therefore necessary to consider the main purpose of the service.<sup>57</sup> Moreover, the ECJ stated that according to recital 33 in the Service Directive, consumer services that fall within the scope include services in the field of tourism and thereby tour guides. According to the ECJ, it was for the referring court to verify it, but the main purpose of the activity did not seem to be to provide a transport service. Consequently, the ECJ answered the question by stating that Article 2(2)(d) of the Service Directive must be interpreted as meaning that an activity, such as the one in the case, does not constitute a transport service which is excluded in the Service Directive.<sup>58</sup> Therefore, the service in this case fell within the Service Directive since the main purpose of the activity was tour guides and not transport services. Regarding UBER however, it is not a “pure taxi service” because there is also an application involved, which will be examined below.

## **2.3 Is UBER providing information society services?**

### **2.3.1 Information society services**

As mentioned above, UBER states that it does not provide a transport service. Instead, it argues that it is providing an information society service.<sup>59</sup> According to Article 1(1)(b) of Directive 2015/1535 (which is a codification of Directive 98/34 and 98/48/EC)<sup>60</sup>

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<sup>56</sup>Joined Cases C-340/14 *Trijber* and C-341/14 *Harmsen*, paras 44 and 46.

<sup>57</sup>Joined Cases C-340/14 *Trijber* and C-341/14 *Harmsen*, paras 50-51.

<sup>58</sup>Joined Cases C-340/14 *Trijber* and C-341/14 *Harmsen*, paras 53-54 and 58-59.

<sup>59</sup>Lexology: CMS DeBacker, *European Court of Justice to rule on the type of service Uber provides*, accessed 2016-04-15. Euobserver: *Uber files complaint against ban in France, Germany, Spain*, accessed 2016-04-16.

<sup>60</sup>Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, which is a codification of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations. It is also a codification of Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (hereinafter “codification”).

information society services are any service that is normally provided at a distance for compensation. It shall be provided by electronic means and at the request of the service recipient.<sup>61</sup> The information society services are economic activities that take place online. Services off-line are therefore not covered.<sup>62</sup> Article 1(1)(i) of Directive 2015/1535<sup>63</sup> states that “at a distance” means that the service is provided when the parties are not being present at the same time. Furthermore, according to Article 1(1)(ii) of Directive 2015/1535<sup>64</sup>, “by electronic means” is that the service is sent and received by means of electronic equipment for the processing and storage of data. It could be transmitted, conveyed and received by wire, radio, optical means or by other electromagnetic means. According to Article 1(1)(iii) of Directive 2015/1535,<sup>65</sup> the service is provided on the individual request of the service recipient through the transmission of data. Furthermore, services which are not provided at a distance are services provided when both the provider and the recipient are physical presence, even if it involves using electronic devices. Therefore, plane-ticket reservations at a travel agency when the customer is physical present by means of a network of computers are excluded. Moreover, access to road networks and to car parks is included as services not provided by electronic means. This is the case even if there are electronic devices at the entrance, and even if the payment is made by electronic devices.<sup>66</sup> Moreover, the aim of the Directive 2015/1535<sup>67</sup> is to prohibit quantitative restrictions on the movement of goods and of measures having equivalent effect. It is also to promote the functioning of the internal market regarding national initiatives of technical standards or regulations.<sup>68</sup> According to Article 1(1)(f) of Directive 2015/1535<sup>69</sup>, technical regulation means for example rules on services, including the relevant administrative provisions, which are compulsory regarding the provision or use of a service, or establishment as a service

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<sup>61</sup>See Recital 17 and Article 2(A) of Directive 2000/31/EC (The E-Commerce Directive). The notification procedure of Directive 2015/1535 (codification) allows the Commission and the Member States to examine the technical regulations Member States intend to introduce for Information Society services before their adoption, see Commission, *The aim of the 2015/1535 Procedure*, accessed 2016-05-02.

<sup>62</sup>Recitals 18 and 21 of the E-Commerce Directive.

<sup>63</sup>(codification).

<sup>64</sup>(codification).

<sup>65</sup>(codification).

<sup>66</sup>See paragraph 1(c) and 2(b) in the Annex I of Directive 2015/1535 (codification), *Indicative list of services not covered by the second subparagraph of point (b) of Article 1(1)*.

<sup>67</sup>(codification).

<sup>68</sup>Recitals 2 and 3 of Directive 2015/1535 (codification).

<sup>69</sup>(codification).

provider. Nevertheless, according to Article 5(1) of Directive 2015/1535,<sup>70</sup> and subject to Article 7, Member States shall immediately communicate to the Commission any draft technical regulation, except when it regards an international or European standard.<sup>71</sup> The Member States also need to give a statement to the Commission regarding why the enactment of the technical regulation are necessary. Moreover, this measure obliges a state to inform the Commission before it adopts any legally binding regulation setting a technical specification. Member States shall postpone the adoption of a draft technical regulation for three months from the date the Commission received the communication.<sup>72</sup> The Commission then notifies the other Member States in order to consider possible amendments. This Directive was given more importance after the decision of ECJ in the Case C-194/94. Which concerned that a national measure, which had not been notified in accordance with the Directive could not be relied on. Nevertheless, this Directive is important when the national rules might impede the free movement.<sup>73</sup> Moreover, since the Directive 2015/1535<sup>74</sup> requires notifications by Member States, it does not create any rights or obligations for individuals.<sup>75</sup> Furthermore, the obligation to notify was discussed by the ECJ in Case C-65/05, which regarded a prohibition by law of Greece on the installation and operation of all electronic games. All electronic games were prohibited on all public or private premises apart from casinos. According to the ECJ, those games are not by nature games of chance. Since they are not played for purpose of winning money.<sup>76</sup> Nevertheless, the ECJ also held that concerning information society services, Article 8(1) of Directive 98/34, which is now codified in Article 5(1) of Directive 2015/1535, imposes a duty on the Member States to notify the Commission immediately of any such draft technical regulation.<sup>77</sup> The measures provided for in the Greek law, should be considered to be technical regulations within the meaning of the Article 1(11) Directive 98/34, which is now codified in Article 1(1)(f) of Directive 2015/1535. Greece was therefore required to

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<sup>70</sup>(codification).

<sup>71</sup>Article 7(1) of Directive 2015/1535 (codification) states that Articles 5 and 6 shall not apply to those laws, regulations and administrative provisions of the Member States for which a specific situation is mentioned. For example if it is a result of a Member State complying with binding Union acts or case law of the ECJ.

<sup>72</sup>See Article 6(1) of Directive 2015/1535 (codification).

<sup>73</sup>Craig, De Búrca, *Eu Law – Text, cases and materials*, page 621. See also Case C-194/94, *CIA Security*, [1996] ECLI:EU:C:1996:172, para 55.

<sup>74</sup>(codification).

<sup>75</sup>Barnard, *The substantive law of the EU – The four freedoms*, page 115.

<sup>76</sup>Case C-65/05, *Commission v. Hellenic Republic*, [2006], ECLI:EU:C:2006:673, paras 1, 36-38.

<sup>77</sup>Case C-65/05 *Commission v. Hellenic Republic*, para 60.

notify the technical regulations.<sup>78</sup> Moreover, Greece could not rely on the exception provided for in Article 9(7) Directive 98/34, codified in Article 6(7) Directive 2015/1535, because the situations in that Article did not exist in Greece at the date when the law was adopted.<sup>79</sup> ECJ therefore concluded that Greece should have notified the Commission at the draft stage. Consequently, since they did not notify the Commission, they had failed to fulfil its obligations under Article 8(1) Directive 98/34, which is now codified in Article 5(1) of Directive 2015/1535.<sup>80</sup>

### 2.3.2 The E-Commerce Directive

According to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the “E-commerce Directive”), the EU is seeking to have close links between the Member States and the people in Europe. This in order to ensure economic and social progress.<sup>81</sup> The purpose of the E-Commerce Directive is therefore to ensure a high level of legal integration in the EU and to establish an area without internal borders for information society services.<sup>82</sup> According to Article 1(1) of the E-Commerce Directive, the Directive tries to help the functioning of the internal market by ensuring the free movement of information society services between the Member States. There are however some legal obstacles which the information society services are facing. These obstacles derive from divergences in legislation and from the legal uncertainty regarding which national rules that are applicable. These obstacles should however be eliminated by coordinating certain national laws and by clarifying certain legal concepts at EU level. The objective of the E-Commerce Directive is therefore to create a legal framework, which ensures the free movement of information society services between Member States.<sup>83</sup> According to the E-Commerce Directive, it is necessary to coordinate the national regulatory measures at EU level in order to avoid fragmentation of the internal market. Furthermore, the legal

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<sup>78</sup>Case C-65/05 *Commission v. Hellenic Republic*, paras 61-62.

<sup>79</sup>Case C-65/05 *Commission v. Hellenic Republic*, para 65. According to Article 6(7) of Directive 2015/1535 (codification), Article 6(1-5) of the Directive shall not apply in cases regarding urgent reasons, such as serious and unforeseeable circumstances relating to the protection of public health or safety, etc.

<sup>80</sup>Case C-65/05 *Commission v. Hellenic Republic*, paras 66 and 68.

<sup>81</sup>Recital 1 of the E-Commerce Directive.

<sup>82</sup>Recital 3 of the E-Commerce Directive.

<sup>83</sup>Recitals 5-8 of the E-Commerce Directive.

framework needs to be clear, simple, predictable and consistent with the rules applicable at international level so they do not impede the innovation.<sup>84</sup> According to Article 3(1) of the E-Commerce Directive, it is the responsibility of the Member States to ensure that the information society services comply with the national provisions applicable. However, according to Article 3(2) of the E-Commerce Directive the Member States may not, when it regards issues that fall within the coordinated field, restrict the freedom to provide information society services from another Member State. Moreover, Article 3(4) of the E-Commerce Directive states that Member States may derogate from Article 3(2) if the measure is necessary for public policy, such as the prevention, investigation, detection and prosecution of criminal offences. Alternatively, if it is necessary in order to protect public health, public security, safeguarding of national security, or protection of consumers. According to Article 3(4)(iii) of the E-Commerce Directive the measures also need to be proportionate. According to Article 4(1) of the E-Commerce Directive, the Member States shall ensure that the information society service provider are not subject to prior authorisation or any other requirement having equivalent effect. Despite that, Article 4(2) of the E-Commerce Directive states that Article 4(1) shall be without prejudice to authorisation schemes, which are not solely targeted at information society services. If the Commission thinks that the measure is incompatible with EU law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or to end the measures.<sup>85</sup>

The E-Commerce Directive does not establish a general liability system for intermediary service providers. Instead, the Directive provides a system of liability exemptions. When the intermediary service provider comply with the requirements and provides mere conduit, caching or hosting, they might not be held liable for the services performed.<sup>86</sup> For example, ECJ concluded in Joined Cases C-236/08 to C-238/08, that Article 14 of the E-Commerce Directive must be interpreted as meaning that the rule applies to an intermediary service provider when the intermediary service provider has not played an active role. This was the case when the intermediary service provider did not have knowledge of or control over the stored data. The intermediary service

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<sup>84</sup>Recitals 59-60 of the E-Commerce Directive.

<sup>85</sup>See Article 3(6) of the E-Commerce Directive.

<sup>86</sup>Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce*, pages 117-118.



provider had stored data at the request of an advertiser. According to the ECJ, the intermediary service provider could not be held liable since it had not obtained knowledge of the unlawful nature of the advertiser's activities.<sup>87</sup>

## 2.4 Conclusion

The new phenomenon “sharing economy” and especially UBER is a much debated topic. Even if the idea of sharing assets is not very new, the idea to earn money by sharing a private car after finding the service receiver through an application is however new. Moreover, it is debated how this new phenomenon should be regulated within the EU. Although there are many rules at EU level regarding transport services, such as professional road transport and training for professional drivers, these are applicable when driving more than eight passengers or when the driver holds a driving license of category C, D or E. Nevertheless, according to the Service Directive, taxi services falls outside the scope of the Directive. Also in Case C-518/13, the ECJ stated that when it regards taxi services, this is a matter for the Member States. The EU-regulation regarding transportation are therefore not applicable to taxi services. Those rules are instead a matter for national law. Consequently, the rules regarding taxi services fall within the competence of the Member States. Since the rules regarding taxi services differ in the Member States, it is hard to give an answer to what rules UBER would need to comply with in order to provide a taxi service. Some Member States might have a limited number of taxi licenses or there might be rules concerning hours of mandatory training. If the Service Directive would have been applicable, the service could only have been conditioned on an authorisation scheme if it was based on criteria that were justified by overriding reasons of the public interest, non-discriminatory, and proportionate. However, in my point of view, UBER could be seen as both a transport service and an information society service. The application could be seen as an information society service because it is provided online and thereby at a distance. It is also provided for compensation by electronic means and at the request of the service recipient. Moreover, according to the E-Commerce Directive, it is possible to oblige UBER to obtain a licence, as long as the requirements in Articles 3(4) and 4(2) of the E-

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<sup>87</sup>Joined Cases C-236/08 to C-238/08, *Google France*, [2010] ECLI:EU:C:2010:159, paras 111-113 and 120.

Commerce Directive are fulfilled. Those Articles requires that the measure is necessary for public policy, such as the prevention of criminal offences. The Articles also include the protection of public health and public security. UBER drivers, except UberPop drivers, have taxi licenses and commercial insurances. In my point of view, it could therefore be justified to also oblige UberPop drivers to obtain a license or to comply with the requirements regarding commercial insurances and hours of training. This with regard to the protection of public health and public security. In my consideration the authorisation scheme is then not solely targeted at the information society service, it also regards the protection of others.

According to the codified Directive 2015/1535, the service is not an information society service when both the provider and the receiver are present at the same time. Regarding UBER, the driver and the receiver are both present in the car, at the same time. Therefore, it might not be possible to state that UBER is either an information society service, either a transport service. Because it is a combination of both. Moreover, regarding UberPop, UBER cannot argue that they do not know that the driver will drive without a taxi license. Because that is the business model of UberPop. Consequently, UBER will not be able to argue that they did not obtain knowledge of the unlawful nature of the service providers activities, such as the intermediary service provider argued in Joined Cases C-236/08 and C-238/08. In those cases, the intermediary service providers were not found to be responsible because they did not know about the unlawful act. In my point of view, UBER would not be successful with such an argument, since they are the one who inform the potential drivers that the only thing they need, in order to drive for UberPop, is their own car and a driving license.

The E-Commerce Directive states that obstacles derive from divergences in legislation and from the legal uncertainty regarding which national rules that are applicable. The E-Commerce Directive also states that these obstacles should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at EU level. In my point of view, there is a lack of legal certainty regarding this issue. In my consideration, this issue is not clear since it could be seen as a “grey zone”. As mentioned above, if it is a taxi service it is up to the Member State to regulate it, but if it is an information society service it is coordinated and protected at EU level.

Nevertheless, it could also be the case that this legislation would need to be developed at EU level in order to not be fragmented or uncertain regarding the new phenomenon, sharing economy. The purpose of the E-Commerce Directive is to ensure a high level of legal integration in EU to establish an area without internal borders for information society services. It is also important that innovation should not be strangled by excessive and out-dated regulation and therefore, in order for the law to be applicable to new phenomenon, the law needs to be developed. It might be frightening for the global taxi industry to face severe competition from UBER. Despite that, one should not forget that UBER is said to reduce the transaction- and search costs for users, which makes it possible to travel by taxi at a lower price. In my point of view, the idea of sharing cars is also good for the environment. Because if less cars are driving, it could reduce the pollution.

In joined Cases C-340/14 and C-341/14, the ECJ stated that the scope of the exclusion in Article 2(2)(d) of the Service Directive, regarding transport services, should be interpreted by reference to its purpose and general structure. Since UBER also includes other elements than the transportation, it could possibly fall within the Directive that regards information society services. If that would be seen as the main purpose of the service. In my consideration, the main purpose regarding UBER would however not be the application but rather the transportation. Because if I would have been a customer to UBER, it would be because of a need to be transported. Despite that, UBER does not own any cars or employ any drivers; they only make the transportation possible by their application. Furthermore, according to UBER their aim is to connect people so they can share their assets. It is then a private person who drives, and a private person who wants to be transported. Consequently, this issue is very complex and it is not very clear what type of service it actually is. Whether UBER is responsible for the transportation or if UBER only should be responsible for the application. However, since this issue is not clear, the Member States should ask the ECJ how this new phenomenon should be classified and regulated. It will therefore be analysed below, what the reaction to UBER and UberPop is in some of the Member States. In my point of view, it is necessary with either a preliminary ruling from the ECJ regarding how this issue should be interpreted, or more legislation at EU level. This in order to avoid that the issue being fragmented at national level, and in order to have an internal market without obstacles.

## 3 The reaction to UBER and UberPop in some Member States

Some Member States have been taking actions against UBER that has resulted in both bans and criminal charges against UBER drivers and management.<sup>88</sup> Below, some of the actions in the Member States will be examined.

### 3.1 Belgium

Already in April 2014 UberPop was banned in Brussels, which the company however ignored.<sup>89</sup> Nevertheless, according to the former Commission Vice President Neelie Kroes, the decision was not about protecting or helping passengers, it was about protecting a taxi cartel. According to her, banning UBER does not give UBER the chance to do the right thing, such as pay taxes, follow rules, and protect consumers. In her opinion, UBER is welcome in Brussels and everywhere else. She also stated that she was concerned regarding how the ban would work in reality; how the police would be able to check the phones to see when someone made an UBER booking. Moreover, according to her the people in Brussels are modern and open, so they should have a chance to use modern and open services.<sup>90</sup>

In the end of September 2015, the Brussels Tribunal of Commerce confirmed the ban on UberPop. The Court gave UBER 21 days to close operations in Brussels otherwise UBER would be fined €10,000 for every pick-up attempt with drivers without a taxi license. However, the ruling does not apply to UBER's other services, where the driver has a taxi license.<sup>91</sup> The Brussels-based company Taxis Verts brought the ruling to court, which is a contact centre between customers and associated taxis. Moreover, Taxis Verts is not subject to the rules regarding taxi services as laid down in a Decree of

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<sup>88</sup>BBC News: Technology, *Uber banned in Germany as police swoop in other countries*, accessed 2016-04-17. Daily Mail: Malm, *Au revoir Uber: Controversial taxi service to be banned in France from the start of 2015*, accessed 2016-04-15. Fortune, *German court places nationwide ban on UberPop*, accessed 2016-04-15.

<sup>89</sup>Euractiv: *Uber ordered to shut Brussels service within 21 days*, accessed 2016-04-20.

<sup>90</sup>Commission: Kroes, *Crazy court decision to ban Uber in Brussels*, accessed 2016-04-11.

<sup>91</sup>Engadget: Dent, *Belgium bans Uber, threatens €10,000 fine for each attempted pickup* accessed 2016-04-10. The Wall Street Journal: Robinson, *Uber Advertises for Manager in Brussels, Where It's Banned*, accessed 2016-04-11.

1995, which professional taxi drivers have to follow. Taxis Verts claimed that UBER offers the same services as themselves since it offers taxi services against payment. Furthermore, it accused UBER of unfair competition in relation to both professional taxi drivers and to companies such as Taxis Verts, to which the drivers are associated. UBER however claimed that the payment, which their users received should be seen as a compensation for their costs. The Brussels Tribunal of Commerce ruled that UBER is offering unlicensed taxi services against what could be seen as a salary, since the payment could exceed their costs. Nevertheless, the Tribunal decided to refer a question for a Preliminary Ruling. The Preliminary Ruling regards whether the strict interpretation of the Decree would interfere with articles in the Charter or the TFEU.<sup>92</sup> The case for Preliminary Ruling, *C-526/15 Uber Belgium v. Taxi Radio Bruxellois NV*, is still pending before the ECJ. The referred questions regard whether the principle of proportionality should be interpreted as precluding a rule in the Decree of 1995 to be interpreted as meaning that “taxi services” also applies to unpaid individuals who are involved in ride sharing by accepting ride requests which are offered through an application by UBER established in another Member State. Furthermore, the Government of the Brussels Region is developing a legal framework for alternative taxi services, such as UBER. It is creating a framework for all types of paid transport in order to abolish unfair competition and social dumping.<sup>93</sup>

## 3.2 Germany

In Germany, there is currently a nationwide ban of UberPop. This is because the court in Frankfurt found that UBER did not have the necessary licenses and insurance for its drivers, and posed unfair competition to the local taxi industry. UBER was thereby found to have violated German laws on commercial passenger transportation. This was however denied by UBER, which stated that it was not subject to rules governing taxi operators since it was connecting drivers with clients. The suit was brought by Taxi Deutschland, a trade group representing the taxi drivers of Germany. The first ban was

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<sup>92</sup>Briefing Paper by European Institute of Public Administration: Vara Arribas, *Cost of non-Europe in the sharing economy: legal aspects*, pages 141-142.

<sup>93</sup>The Wall Street Journal: Robinson, *Brussels to Propose New Laws Governing Uber*, accessed 2016-04-17. Case C-526/15 *Uber Belgium BVBA v. Taxi Radio Bruxellois NV*. See also EU Law Radar: *Case C-526/15, Uber Belgium – facilitating a mobility service not a taxi service*, accessed 2016-04-17.

lifted because the group had waited too long to file the case.<sup>94</sup> The court however re-established the ban because it found that in order for UberPop to operate in Germany, it must hold the official permits required of taxi drivers.<sup>95</sup> There have also been court cases in Hamburg and Berlin, which addressed UBER's failure to comply with local public transport laws, consumer rights and safety concerns. The cities of Hamburg and Berlin also issued administrative decisions prohibiting UBER from offering services through its application. Berlin has also prohibited the service UberBLACK.<sup>96</sup> Consequently, UBER can face fines of up to €250,000 if it drives with unlicensed drivers. In addition, its local employees could be jailed for up to six months if the company violates the injunction. The company's drivers are not seen as employees and would therefore not face any direct penalties.<sup>97</sup>

German law only allows drivers to pick up passengers without a commercial license if the driver only charges the operating cost of the trip.<sup>98</sup> Even if UBER tried to convince the Frankfurt Regional Court that their price was only the transportation costs, the court argued that the price was far higher than the actual costs. Because the overflow of money went to UBER, Dutch taxes (because UBER operated from The Netherlands), and to income for the drivers. Nowadays UBER are therefore only offering transport services provided by licensed independent professional drivers through its services UberX and UberBLACK in Germany.<sup>99</sup>

### 3.3 Spain

UBER started to operate UberPop in Spain at the end of 2013. Consequently, there were strikes by taxi drivers in Madrid and Barcelona and in December 2014, UBER was

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<sup>94</sup>BBC News: Technology, *Uber banned in Germany as police swoop in other countries*, accessed 2016-04-17. Reuters: Auchard, *Frankfurt court bans Uber taxi services across Germany*, accessed 2016-04-17. The New York Times: Scott and Plass, *German Court Lifts Ban on Uber Ride Service*, accessed 2016-04-18.

<sup>95</sup>The New York Times: Eddy, *An Uber Service Is Banned in Germany Again*, accessed 2016-04-20.

<sup>96</sup>Reuters: Auchard, *Frankfurt court bans Uber taxi services across Germany*, accessed 2016-04-17. Library of congress: Goitom and Gesley, *Legal Challenges for Uber in the European Union and in Germany*, accessed 2016-04-22.

<sup>97</sup>The New York Times: Scott and Eddy, *German Court Bans Uber Service Nationwide*, accessed 2016-04-22. Inc: Jordans, *Berlin Bans Uber, Taxi Drivers Cheer*, accessed 2016-04-23.

<sup>98</sup>See the Passenger Transport Act. Reuters: Auchard, *Frankfurt court bans Uber taxi services across Germany*, accessed 2016-04-17. Library of congress: Goitom and Gesley, *Legal Challenges for Uber in the European Union and in Germany*, accessed 2016-04-22.

<sup>99</sup>Briefing Paper by European Institute of Public Administration: Vara Arribas, *Cost of non-Europe in the sharing economy: legal aspects*, pages 147-148. Library of congress: Goitom and Gesley, *Legal Challenges for Uber in the European Union and in Germany*, accessed 2016-04-22.

banned in Spain. The decision stated that UberPop did not comply with Spanish laws and potentially regarded unfair competition for taxi drivers.<sup>100</sup> Both in Madrid and Barcelona cases were brought to the tribunals on grounds of unfair competition. In Madrid, it was the association of taxi drivers who decided to start proceedings against UBER. The ruling established precautionary measures and it was argued that the drivers contracted by UBER did not have the required administrative license to provide the service. Furthermore, the precautionary measures have been prolonged but with some modifications regarding that the unfair competition only relates to UberPop. However, in Barcelona, the Judge referred the case to the ECJ for a preliminary ruling, *Case C-434/15*. The referred questions regard whether UBER should be considered a transport company, an electronic intermediary service or an information society service. It also regards whether restrictions in one Member State regarding the freedom to provide the electronic intermediary service from another Member State, by making the service subject to an authorisation or a licence or a prohibition based on the national legislation on unfair competition, should be valid measures. Furthermore, all legal proceedings against UBER in Spain have been suspended until the ruling of the ECJ.<sup>101</sup> Moreover, the Spanish regulator, the National Authority for Markets and Competition (“CNMC”), will publish a report in which it recommends the Spanish authorities to lift all the unjustified barriers, which are limiting the sharing economy in Spain. The preliminary results were published on March 14 2016, and the board of the CNMC will publish the final approval after the public consultation on the document has been taking place.<sup>102</sup> Moreover, UBER has started to operate in Spain again, but this time with UberX that only consists of professionally licensed drivers<sup>103</sup>

### 3.4 France

The transportation market in France is divided into two sections. The taxis have monopoly on the so-called “cruising market”, while the “advanced booking market” is open to competition. The market for advanced booking includes chauffeur-driven

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<sup>100</sup>The New York Times: Scott, *Uber Suspends Operations in Spain*, accessed 2016-04-22.

<sup>101</sup>Briefing Paper by European Institute of Public Administration: Vara Arribas, *Cost of non-Europe in the sharing economy: legal aspects*, pages 147-148. Case C-434/15, *Asociación Profesional Élite Taxi v Uber Systems Spain, S.L.*

<sup>102</sup>Euractiv: Valero, *Spanish regulator urges scrapping of ‘unjustified’ restrictions on sharing economy*, accessed 2016-04-22.

<sup>103</sup>Reuters: Vega Paul, *Uber returns to Spanish streets in search of regulatory U-turn*, accessed 2016-05-05.

vehicles. Furthermore, the monopoly on the cruising market is justified on public interest grounds, such as the regulating of traffic and parking. Consequently, taxis are being subject to regulated prices and to administrative licence authorizing. This licence can amount up to €230.000. When UberPop started to operate in France, in the first half of 2014, it met many obstacles. Hundreds and even thousands of taxi drivers have blocked roads in France and protested that they claim UBER as unfair business competition since its drivers do not face the same requirements, insurances and taxes. Moreover, the taxi drivers have even staged violent strikes on this issue. The taxi drivers have for example attacked UBER drivers, burned and broke their cars.<sup>104</sup> UberPop has also met obstacles such as court rulings and new legislations. For example in Paris, a criminal court has ruled that UberPop violates a prior decision that bans carpooling for profit. It also ordered the company to pay a €100,000 for illegal practice.<sup>105</sup> Nevertheless, UberPop has been banned in France from January 1st 2015.<sup>106</sup> The French legislator has also adapted a new law, the so-called “Loi Thévenoud”. The new French law prohibits chauffeur-driven vehicles to cruise in a street open to public circulation and limits their use of GPS. It also prohibits electronic cruising through smartphones. The law also regulates the chauffeur-driven vehicles pricing system and requires that all drivers who drive paying passengers have a license and appropriate insurance. It also regulates that drivers like UberPop would need to have 250 hours of professional training.<sup>107</sup> Nevertheless, the prohibition is punished by criminal sanctions whereby the penalties can include a one-year prison sentence and fines of up to \$17,000.

There has also been an amendment to the Transports Code in 2015. This in order to clarify that Car sharing is the common use of a vehicle. It is common use of a vehicle if the costs are shared, and if the driver is already planning on heading that way for their

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<sup>104</sup>Techcrunch: Dillet, *French Anti-Uber Protest Turns To Guerrilla Warfare As Cabbies Burn Cars, Attack Uber Drivers*, accessed 2016-04-25. Daily Mail: Malm, *Au revoir Uber: Controversial taxi service to be banned in France from the start of 2015*, accessed 2016-04-13. The Star, *2 Uber executives ordered to stand trial in France*, accessed 2016-04-11. Independent: Griffin, *Uber's cheap service to be banned in France as Paris taxis block roads*, accessed 2016-04-15. Briefing Paper by European Institute of Public Administration: Vara Arribas, *Cost of non-Europe in the sharing economy: legal aspects*, pages 143-145.

<sup>105</sup>The Wall Street Journal: Schechner, *Uber Technologies Challenges French Court Ruling*, accessed 2016-04-25. Bloomberg: Mawad and Connan, *Uber Avoids Ban in France as Global Legal Battle Spreads*, accessed 2016-04-26.

<sup>106</sup>Independent: Griffin, *Uber's cheap service to be banned in France as Paris taxis block roads*, accessed 2016-04-15.

<sup>107</sup>The New York Times: Jolly and Scott, *France Says It Will Ban Uber's Low-Cost Service in New Year*, accessed 2016-04-10. The New York Times: Fourquet and Scott, *Uber Drivers Face Fines in Paris*, accessed 2016-04-15. Reuters: *EU Commission asks France for more information on taxi law*, accessed 2016-04-15.



own purpose. UBER in France and Netherlands have however challenged these legal barriers before French courts and they have argued that these articles infringes upon the freedom of enterprise, the principle of equality before the law and the right to ownership. The Constitutional Court however held a judgment on 22 September 2015 whereby it concluded to the constitutionality of UberPop's ban. Furthermore, in Paris, two UBER executives have been arrested on charges for running an illegal taxi company, after a police sweep at UBER France headquarters. They were however later released and ordered to appear in a criminal court.<sup>108</sup>

The Commission is said to preparing a challenge to this new French law on taxis and chauffeured cars after UBER filed a complaint against it. UBER has argued that France should have notified Brussels of the new measure. No final decision regarding a formal notice from the Commission has however been taken yet.<sup>109</sup>

### 3.5 England

In order to drive UBER in England you need to have a private hire licence. Transport for London ("TfL") is the regulator for private hire vehicles in London. The Private Hire Vehicles Act 1998 introduced the licensing of private hire vehicles in London. Since then, it is illegal to accept a private hire booking without an operator's licence.<sup>110</sup> Already in May 2012, TfL licensed UBER as a private hire vehicle operator. Despite that, the TfL brought a case to the high court to determine whether the way UBER's application calculates a fare falls under the definition of a taximeter, which is prohibited in private hire vehicles since it is a privilege afforded only to Black Cab drivers. On 16 October 2015, it was ruled that it does not fall under the definition of a taximeter and therefore, the smartphone with the UBER application does not constitute a breach of the taximeter prohibition.<sup>111</sup> Moreover, in December 2015 UBER launched UberPool in

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<sup>108</sup>Briefing Paper by European Institute of Public Administration: Vara Arribas, *Cost of non-Europe in the sharing economy: legal aspects*, pages 143-145. See the Transports Code, article L. 3132-1. Fortune: Groden, *Two Uber executives arrested in France*, accessed 2016-04-27. The Star, *2 Uber executives ordered to stand trial in France*, accessed 2016-04-11.

<sup>109</sup>Fortune: Reuters, *European Commission Joining Uber in Fight Against French Taxi Law*, accessed 2016-05-02. Reuters: *EU Commission asks France for more information on taxi law*, accessed 2016-05-02. Cnet: Collins, *Uber complaint may prompt Europe to challenge French taxi law*, accessed 2016-05-01.

<sup>110</sup>Transport for London: *Private Hire Regulations Review: Response to Consultation and further Proposals*, accessed 2016-05-01. UBER UK, *Make Great Money Driving with UBER*, accessed 2016-04-13.

<sup>111</sup>Case No: CO/1449/2015, *TfL v Uber and Others*, Royal Courts of Justice Strand, London, WC2A 2LL. See also The Guardian: Topham, Hellier, Gani, *Uber wins high court case over taxi app*, accessed 2016-04-29.

London (it also operates in Paris). UberPool allows several customers to share a car if they are heading in the same direction. This is said to reduce pollution, since the strangers who would otherwise be travelling in separate cars will be sharing rides. However, already in September 2015, TfL has put forward proposals for private hire companies, such as UBER. They proposed to install a five-minute wait time between the ordering of a taxi and its arrival and also a ban on showing cars for hire within a smartphone app.<sup>112</sup> The TfL Board for changes considered the recommendations on 17 March 2016 and approved some changes to the regulations. For example, the Board approved that operators will be required to provide specified information to TfL at specified intervals including details of all drivers and vehicles registered with them. The private hire drivers are also required to demonstrate a certain standard of English and they must provide an estimated fare before the journey.<sup>113</sup>

### 3.6 Sweden

UberPop started to operate in Sweden in September 2014. UBER has however decided to shut down UberPop in Sweden from May 18, 2016. Licensed taxi drivers will still be able to drive UberX, UberLUX and UberBLACK.<sup>114</sup> It is possible to get a ride with UBER in Sweden in Gothenborg, Malmo (and Lund), and Stockholm.<sup>115</sup>

In Sweden, there have been more than 20 rulings from district courts against UberPop drivers while around 70 court matters are pending. There has also been a ruling from the Court of Appeal against an UberPop driver.<sup>116</sup> In the Court of Appeal, the UberPop driver was judged to have committed illegal taxi driving and he was also judged for crime against the taxi traffic rules according to chapter 5 paragraph 1 and paragraph 4 in the taxi traffic rules (“Taxitrafiklagen (2012:211)”). The UberPop driver did not possess

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<sup>112</sup>Briefing Paper by European Institute of Public Administration: Vara Arribas, *Cost of non-Europe in the sharing economy: legal aspects*, pages 148-149. The Guardian: Hellier, *UberPool service to allow Londoners to share a taxi with a stranger*, accessed 2016-04-03. Tech Time: Lanaria, *Uber Launches UberPool Taxi-Sharing Service In London And Paris*, accessed 2016-05-03.

<sup>113</sup>Transport For London, *TfL Board approves new plan to modernise London’s private hire industry*, accessed 2016-04-27.

<sup>114</sup>UBER Newsroom, *Uber avslutar UberPop-pilot i Sverige*, accessed 2016-05-11. DN: Larsson, *Uber tvärvänder – lägger ned omstridda tjänsten*, accessed 2016-05-11.

<sup>115</sup>UBER, *Cities*, accessed 2016-04-22.

<sup>116</sup>See for example Stockholms Tingsrätt, B 8250-15 and B 173-16. See also Svenska Taxiförbundet, *Hovrättsdom mot UberPop*, accessed 2016-04-26.

any taxidriver's license. Moreover, the driver was paid and it was concluded that he had intent to drive professional traffic since it happened many times after contact with unknown persons through the UberPop application. Therefore, the UberPop driver was imposed a fine of almost €1200.<sup>117</sup>

The cabinet in Sweden has given a special investigator a mission to examine the sharing economy. The investigator shall also investigate whether the applicable law is appropriate or if it needs to be changed, at both national level and EU level. The mission shall be presented latest at March 31, 2017.<sup>118</sup>

### 3.7 Conclusion

It can be concluded that UBER has met many restrictions. The Member States' actions against UBER have resulted in bans, administrative and/or criminal charges against UBER drivers and management, and even in new regulations. The opposition comes from both professional taxi drivers and trade groups who consider UBER as illegal competition. The opposition also comes from different National Courts and Governments. In my point of view, it is remarkable that not more Member States have asked for a preliminary ruling regarding how UBER should be classified and thereby regulated. It is only Spain and Belgium who has asked for a preliminary ruling. Since, in my consideration, the service of UBER differs from traditional taxis and it is not only an information society service. Moreover, according to Case 283/81 there is no need to refer a question regarding EU law for a preliminary ruling if the question is irrelevant. It is neither necessary to refer a question if it has already been interpreted by ECJ, or if the correct application of the EU law is so obvious so it does not leave any scope for reasonable doubt. With regard to all the different languages that are used within the EU, I doubt that it would be possible to state that there will never be any reasonable doubt. Because the words can have different meanings in the different languages. Nevertheless, this question is not irrelevant because depending on if it would be seen as a taxi service or information society service, it would get different consequences. The competence between EU and the Member States differs, if it is found to be an information society

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<sup>117</sup>Svea Hovrätt, mål nr B 9078-15.

<sup>118</sup>Kommittédirektiv 2015:136, *Användarna i delningsekonomi*, pages 1-3.

service it should be regulated at EU level in order to achieve an internal market without obstacles and barriers to trade. Moreover, it has not already been interpreted by the ECJ. Therefore, all of the Member States should have asked for a preliminary ruling.

In my point of view, it is remarkable that France did not notify the Commission of their new law. In Case C-65/05, the ECJ came to the conclusion that the new law, regarding draft technical regulations, should have been notified. Since Greece did not notify the Commission, they had failed to fulfil its obligations under Article 8(1) Directive 98/34, which is now codified in Article 5(1) of Directive 2015/1535. Nevertheless, according to Article 5(1) of Directive 2015/1535, and subject to Article 7, Member States shall immediately communicate to the Commission any draft technical regulation, except when it regards an international or European standard. The Member States also need to give a statement to the Commission regarding why the enactment of the technical regulation are necessary. This measure obliges a state to inform the Commission before it adopts any legally binding regulation setting a technical specification. In my consideration, France did also adopt a legally binding regulation, which sets a technical standard since it prohibits chauffeur-driven vehicles to cruise in a street open to public circulation, limits their use of GPS, and also prohibits electronic cruising through smartphones. Furthermore, the law also regulates the chauffeur-driven vehicles pricing system and requires that all drivers who drive paying passengers have a license and appropriate insurance. Nevertheless, the drivers also need to have 250 hours of professional training. The prohibition is even punished by criminal sanction. The law might therefore impede the free movement since it makes it difficult, if not impossible, for UberPop to operate in France as it is functioning today.

The reaction to UBER is fragmented in the Member States. In Sweden, it is the drivers which have been penalised, while in other Member States it is the company or the management of UBER that has been penalised. In my opinion, the principle of legal certainty is a very important principle. The law needs to be clear so that everyone has the possibility to obey the law. Maybe it is not so clear for the UberPop drivers that they are actually committing illegal taxi services when UberPop attract new drivers by stating that all you need is a driving license and a car. Even if the reactions towards UBER and UberPop are fragmented in the Member States, it could be stated that

UberPop has met more obstacles than the other services of UBER, where the driver actually has a taxi license. UberPop is banned in almost all of the Member States that I have examined, except for Sweden. In Sweden UBER has however decided to withdraw UberPop. Maybe they did so because the UberPop drivers have been convicted with criminal fines in many cases. Moreover, an UberPop driver was even convicted by the Court of Appeal, which shows that in Sweden it is not legal to drive taxi services without a taxi license. Despite that, according to the former Commission Vice President Neelie Kroes, a decision to ban UBER is about protecting a taxi cartel and not about protecting consumers. In my consideration, I agree when it regards UBER, but not when it regards UberPop. Because UberPop is actually performing the same service as the other UBER drivers except the fact that they do not possess any taxi license or commercial insurance. If it had been like UberPool in Paris and London, whereby the drivers pick up other persons that are going the same way and only get paid the costs, it would in my consideration be different. If it would have been carpooling without profit, and thereby carpooling in order to save resources and for the protection of the environment, it would be another issue. In my consideration, it would then not be to earn money by circumventing the rules. However, as UberPop operates today, it is actually a way to circumvent the rules to not need a taxi license. If the price is higher than the actual cost and if the driver is only driving in that direction in order to drive the customer, it could not be said to be carpooling because then all taxis should be seen as carpooling.

In Belgium, Spain, London and Sweden, the national regulator has started to write reports regarding what national rules that need to be changed in order to follow the development of sharing economies. However, as mentioned above, if this ends with legislation, the Member States should not forget to immediately communicate to the Commission any draft technical regulation. Nevertheless, it is said that the Commission is preparing a challenge to the French law on taxis and chauffeured cars after UBER filed a complaint against it. In my consideration, the new French law is logic because it regulates what UberPop needs to comply with in order to operate in France. Despite that, I do agree that France should have notified Brussels of the new law, since it is actually rules on services which are compulsory regarding the provision or use of a service such as regulated in Article 1(1)(f) of Directive 2015/1535 (codification).

## 4 IS RESTRICTING OR BANNING UBER AND UBERPOP COMPATIBLE WITH EU LAW?

UBER has submitted complaints to the Commission against the Member States, which have in some way restricted their business. They have argued that the restrictions are a violation of Article 49 TFEU (right of establishment) and of Article 56 TFEU (freedom to provide services).<sup>119</sup> Those questions will be examined below.

### 4.1 Would a restriction be a violation of freedom of establishment?

According to Article 3(3) TEU, the Union shall establish an internal market. Moreover, according to Article 26(2) TFEU, the internal market shall be without internal frontiers in which the free movement of goods, services, persons and capital is ensured.

Furthermore, Article 49 TFEU states that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. The freedom of establishment shall include the right to pursue activities as self-employed persons. It shall also include the right to set up and manage undertakings under the same conditions as the Member States own nationals. Moreover, the Court stated, in Case C-221/89, that the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment in another Member State. It should also be for an indefinite period.<sup>120</sup> Article 54 TFEU states that companies shall be treated in the same way as natural persons who are nationals of Member States. The companies however need to be formed in accordance with the law of a Member State. The companies also need to have their registered office, central administration or place of business within the EU. Since there are differences between the national company laws, the ECJ has required that host states should permit companies that are validly

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<sup>119</sup>Reuters: Fioretti, *Uber files complaints against German and Spanish bans*, accessed 2016-05-09. See also Fortune: Reuters, *European Commission Joining Uber in Fight Against French Taxi Law*, accessed 2016-05-09. Cnet: Collin, *Uber complaint may prompt Europe to challenge French taxi law*, accessed 2016-05-09. Reuters, Fioretti, *EU Commission asks France for more information on taxi law*, accessed 2016-05-08.

<sup>120</sup>Case C-221/89 *Factortame II*, [1991], ECLI:EU:C:1991:320, para 20.

incorporated in another state.<sup>121</sup>

According to the case law of the Court, Article 49 TFEU prohibits any national measure that is liable to hinder, or to make the exercise by Union nationals of the fundamental freedom of establishment less attractive. This is the case even if there is no discrimination on grounds of nationality.<sup>122</sup> The ECJ has, however, stated that when the effect on trade is insubstantial, it is not a restriction solely that other Member States apply less strict rules to providers of similar services established in their territory.<sup>123</sup> Despite that, the Court has also stated that a restriction on a fundamental freedom is prohibited by the TFEU even if it is of minor importance.<sup>124</sup> Therefore, the freedom of establishment requires that restrictions are eliminated. Despite that, according to Article 52(1) TFEU, it can be possible for the Member States to retain provisions laid down by law, regulation or administrative action providing for special treatment for non-nationals on grounds of public-policy, security or health. The Court has also held that national measures, which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty, can be justified. They can however only be justified if they fulfil four conditions. First, they must be applied in a non-discriminatory manner. Second, they must be justified by imperative requirements (overriding reasons) based on the general interest. Third, they must be suitable for securing the attainment of the objective that they pursue and fourth, they must not go beyond what is necessary in order to attain that objective.<sup>125</sup> Therefore, a restriction or a ban on UBER could be lawful if it is justified.

If the objective of for example protecting public health could be achieved by less restrictive measures of the freedom of establishment, those measures should be selected. For example in Case C-140/03, which regarded restrictions for opticians, the Court stated that those restrictions could be achieved by less restrictive measures. The Court

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<sup>121</sup>Craig, De Búrca, *Eu Law – Text, cases and materials*, page 820. See for example Case 81/87, *Daily Mail*, [1988] ECLI:EU:C:1988:456, para 16, and C-264/96 *ICI* [1998] ECLI:EU:C:1998:370, para 21.

<sup>122</sup>Case C-55/94, *Gebhard*, [1995], ECLI:EU:C:1995:411, para 37. See also Case C-439/99 *Commission v Italy*, [2002], ECLI:EU:C:2002:14, para 22.

<sup>123</sup>Case C-565/08, *European Commission v. Italian Republic*, [2011], ECLI:EU:C:2011:188 paras 49 and 53.

<sup>124</sup>Case C-498/10, *X*, [2012], ECLI:EU:C:2012:635, paras 30 and 32.

<sup>125</sup>Case C-55/94, *Gebhard*, para 37. See also Case 65/05, *Commission v. Hellenic Republic*, [2006], ECLI:EU:C:2006:673, para 49, and Case C-424/97, *Haim*, [2000], ECLI:EU:C:2000:357, para 57. See also Case C-19/92, *Kraus*, [1993] ECLI:EU:C:1993:125, para 32.

stated so, although the Greek Government argued that in the absence of harmonisation at EU level, each Member State are free to regulate the exercise of professions within its territory. According to the Court, less restrictive measures could be requiring qualified opticians or associates in all opticians' shops. Also rules requiring professional insurance could be less restrictive measures. Consequently, if the restrictions go beyond what is required in order to achieve the objective pursued, the restriction is not justified.<sup>126</sup>

## 4.2 Would a restriction be a violation of freedom to provide services?

Article 56 TFEU states that restrictions on freedom to provide services within the Union shall be prohibited. It shall be prohibited when it regards nationals of Member States who are established in another Member State than the one the receiver of the service is established. Nevertheless, as with the other freedoms, the freedom to provide services does not apply to internal situations.<sup>127</sup> According to Article 57 TFEU, services are normally provided for remuneration and not regulated by the provisions regarding the freedom of movement of goods, capital and persons. For example, the Court has found that prostitution could be regarded as a service provided for remuneration. Since it is regulated and far from being prohibited in all Member States.<sup>128</sup> Despite that, as mentioned in Chapter 2.2.1 of this thesis, Article 58 TFEU excludes transport services. Instead, the freedom to provide transport services is regulated in Articles 90-100 TFEU.

The structure of the freedom to provide services does not differ very much from the provisions on establishment.<sup>129</sup> However, the difference between the right of establishment and the freedom to provide services is that freedom to provide services regards the carrying out of an economic activity for a temporary period, while the right of establishment regards the pursuit of an economic activity for an indefinite period.<sup>130</sup> Moreover, the services can pose different types of problems because not only the

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<sup>126</sup>Case C-140/03, *Commission v. Greece*, [2005] ECLI:EU:C:2005:242, paras 11 and 35-36.

<sup>127</sup>Craig, De Búrca, *Eu Law – Text, cases and materials*, page 824.

<sup>128</sup>Case C-268/99, *Jany*, [2001] ECLI:EU:C:2001:616, paras 18 and 57.

<sup>129</sup>Barnard, *The substantive law of the EU – The four freedoms*, page 365.

<sup>130</sup>Craig, De Búrca, *Eu Law – Text, cases and materials*, page 820.



service provider or the service receiver can move, but also the service itself can move. It is nowadays possible for the service to move over the Internet. The problems relates to the fact that regulations in the different Member States vary. In some Member States, it is the service that is regulated, while in other states it is the service provider that is regulated.<sup>131</sup> Moreover, sometimes it is hard to determine whether the rules on services or the rules on establishment apply. Despite that, the Court has stated in Case C-456/02 that an activity carried out on a permanent basis or without a predictable limit to its duration, would not fall within the service provisions.<sup>132</sup> Nevertheless, also regarding the freedom to provide services, the Court has held that any restriction that is liable to prohibit, impede or to make the exercise of the fundamental freedom to provide services by Union nationals less attractive, should be abolished.<sup>133</sup> Despite that, the national measures that are liable to hinder the exercise of the freedom to provide services, can be justified. According to Article 62 TFEU, Articles 51-54 TFEU shall not only apply to the freedom of establishment, but also to the freedom to provide services. Moreover, the national measures can also be justified if they fulfil the four conditions, which are mentioned in the chapter 4.1 of this thesis. As already mentioned, they must be applied in a non-discriminatory manner; be justified by imperative requirements based on the general interest; be suitable for securing the attainment of the objective that they pursue and they must not go beyond what is necessary in order to attain that objective.<sup>134</sup> According to the Court, examples of imperative requirements are road safety<sup>135</sup> and consumer protection.<sup>136</sup> Moreover, regarding gambling, which has constituted services within the meaning of the treaties, the Court has ruled that it could be restricted. It could be possible to justify a margin of discretion for the national authorities on grounds of the morally and financially harmful consequences that are connected with those types of

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<sup>131</sup>Barnard, *The substantive law of the EU – The four freedoms*, page 378.

<sup>132</sup>Case C-456/02, *Trojani*, [2004] ECLI:EU:C:2004:488, paras 27-28.

<sup>133</sup>Joined Cases C-369 and 376/96, *Arblade*, [1999] ECLI:EU:C:1999:575, para 33. Case C-76/90, *Säger*, [1991] ECLI:EU:C:1991:331, para 12. Case C-118/96, *Safir*, [1999] ECLI:EU:C:1998:170, para 22. Joined Cases C-544/03 and 545/03 *C-Mobistar*, [2005] ECLI:EU:C:2005:518, paras 29 and 35.

<sup>134</sup>Case C-55/94, *Gebhard*, para 37.

<sup>135</sup>In Case 55/93, *Van Schaik*, [1994] ECLI:EU:C:1994:363, para 19; Case C-451/99, *Cura Anlagen*, [2002] ECLI:EU:C:2002:195, para 59; and Joined Cases C-151/04 and 152/04, *Nadin and others*, [2005] ECLI:EU:C:2005:775, para 49, the Court stated that road safety constitutes an overriding reason relating to the public interest.

<sup>136</sup>See Barnard, *The substantive law of the EU – The four freedoms*, page 529. See for example Case 220/83, *Commission v France*, [1986] ECLI:EU:C:1986:46, para 20.

games, both for the individual and for the society.<sup>137</sup> Nevertheless, Case C-36/02 *Omega*, regarded whether it was allowed to prohibit a game involving the simulated killing of human beings. It was thereby concerning a restriction of the freedom to provide services. The Court stated that Article 52 TFEU allows restrictions to be justified for reasons of public policy, public security or public health. In this case, the game was seen to constitute a danger to public policy. The Court however stated that the concept of public policy within the EU must be interpreted strictly. Otherwise the scope could have been determined individually by each Member State. According to the Court, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of the society.<sup>138</sup> The Court also stated that the EU legal order tries to ensure respect for human dignity as a general principle of law. Therefore, the objective of protecting human dignity was compatible with EU law. The Court also stated that since both EU and its Member States shall respect fundamental rights, the protection of them is a legitimate interest that justifies a restriction of the freedom to provide services.<sup>139</sup> According to the Court, measures that restrict the freedom to provide services may only be justified on public policy grounds if they are necessary and only if the objectives cannot be achieved by less restrictive measures. Since only the games which regarded to fire on human targets were prohibited, the measure by the National Authorities was not seen to go beyond what was necessary in order to attain the objective pursued. According to the Court, the prohibition was thereby justified.<sup>140</sup>

### **4.3 Would a restriction be compatible with the Charter?**

The Charter has become a legally binding document of primary EU law, after the entry into force of the Lisbon Treaty.<sup>141</sup> According to Article 6(1) TEU, the Charter has the same legal value as the Treaties. However, long before the drafting of the Charter, the primary EU law has existed of general principles of EU law. The general principles of

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<sup>137</sup>Case C-243/01, *Gambelli*, [2003] ECLI:EU:C:2003:597, paras 63 and 67; Joined Cases C-447/08 and 448/08 *Sjöberg*, [2010] ECLI:EU:C:2010:415, paras 42-43. See also Case C-124/97 *Läärä*, [1999] ECLI:EU:C:1999:435, para 43.

<sup>138</sup>Case C-36/02, *Omega*, [2004] ECLI:EU:C:2004:614, paras 28, 30, 31.

<sup>139</sup>Case C-36/02, *Omega*, paras 34-35.

<sup>140</sup>Case C-36/02, *Omega*, paras 36, 39, 41.

<sup>141</sup>Cruz Villalón, *Rights in Europe: The Crowded House*, page 13.

EU law derive from the case law of the ECJ in the 1970s.<sup>142</sup> The first case which confirmed that general principles of EU law included the protection for fundamental rights was the Case 29/69, *Stauder*. After that, general principles regarding fundamental rights have been developed by the case law of the ECJ.<sup>143</sup> Furthermore, now the general principles are written down in the Charter in order to be more visible. The Charter is not only influenced by the general principles of EU law, it is also influenced by constitutional traditions of the Member States and by international human rights treaties.<sup>144</sup>

According to Article 51 of the Charter, the provisions in the Charter are addressed to both EU institutions and to the Member States when implementing EU law. Since Article 51 determines the scope of the Charter, it could be said to be the most important provision of the Charter. However, only a few rulings have dealt with Article 51 of the Charter, and none of them has clarified the scope of application until the Case C-617/10, *Åkerberg*.<sup>145</sup> According to the explanations regarding Article 51(1) of the Charter, it is stated that it follows from the case law of the ECJ that the Member States are bound to respect fundamental rights when they act in the scope of EU law.<sup>146</sup> Because prior to the Lisbon Treaty case law, two main situations have been distinguished regarding when the Member States are acting within the scope of EU law. One situation regarding national measures implementing or applying EU law<sup>147</sup> and one situation regarding national measures derogating from EU law.<sup>148</sup> Nevertheless, it could be said that the EU fundamental rights bound Member States and their National Authorities both when they adopt administrative or legislative acts, in order to implement EU rules, and when they

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<sup>142</sup>Craig, De Búrca, *Eu Law – Text, cases and materials*, pages 193-194.

<sup>143</sup>Craig, De Búrca, *Eu Law – Text, cases and materials*, pages 383-384.

<sup>144</sup>Groussot, Pech, *Fundamental Rights Protection in the European Union post Lisbon Treaty*, page 3. See also the Preamble to the Charter.

<sup>145</sup>Groussot, Olsson, *Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgments in Åkerberg and Melloni*, pages 8-9. Case C-617/10 *Åkerberg*, [2013], ECLI:EU:C:2013:105.

<sup>146</sup>The explanations relating to the Charter (2007/C 303/02) do not have the status of law but they are however a valuable tool of interpretation. See for example Case 5/88 *Wachauf* [1989], ECLI:EU:C:1989:321, para 19.

<sup>147</sup>According to Case 5/88 *Wachauf*, para 19, the fundamental rights are binding on the Member States when they implement EU law.

<sup>148</sup>According to Case C-260/89 *ERT* [1991] ECLI:EU:C:1991:254, para 41, the Court stated that the EU cannot accept measures which are incompatible with the observance of the fundamental rights. Having said when Member States derogate from EU law, the general principles demand that fundamental rights are respected. See also Groussot, Pech, Petursson, *The scope of application of fundamental rights on Member States Action: In search of certainty in EU adjudication*, page 1.

interpret or apply any domestic legal provision that falls within the scope of EU law.<sup>149</sup> The Case C-617/10 *Åkerberg*, stated that according to the settled case law of the Court, the fundamental rights in the EU legal order are applicable in all situations governed by EU law. According to the Court, it has no power to examine situations outside the scope of EU law, only to situations that falls within the scope of EU law. The Court also referred to the case law regarding the situation when national measurers derogating from EU law. Consequently, it does not seem that the Charter changes the scope of application of fundamental rights protection.<sup>150</sup>

Article 52(1) of the Charter states that any limitation of the rights and freedoms in the Charter must be provided for by law and respect the essence of those. Limitations may therefore be made in accordance with the principle of proportionality. They may only be made if they are necessary and meet objectives of general interest recognised by the EU. Nevertheless, the freedom of establishment is one of the objectives of the Treaty.<sup>151</sup> Consequently, the exercise of those rights may be restricted, if the restrictions correspond to objectives of general interest and are not disproportionate.

### 4.3.1 The principle of proportionality

The principle of proportionality is a well-established principle by the Court. Already in Case C-112/00, *Schmidberger*, before the Charter was applicable, the Court stated that the fundamental freedoms can be subject to limitations when justified by objectives in the public interest. This as long as the derogations are necessary and in accordance with the law.<sup>152</sup> When assessing the proportionality, it is therefore necessary to first identify the relevant interests that are clashing. Then there are normally three steps in the proportionality inquiry. The first step regards if the measure was *suitable* to achieve the desired end. The second step regards if the measure was *necessary* to achieve the desired end. The third step, which is not always applied, regards a balancing of whether

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<sup>149</sup>Groussot, Pech, Petursson, *The scope of application of fundamental rights on Member States Action: In search of certainty in EU adjudication*, page 7. See for example Case C-101/01 *Lindqvist* [2003], ECLI:EU:C:2003:596, para 87, whereby the Court stated that is for the national authorities and courts to not only interpret their national law in a manner which is consistent with the Directive, but also to make sure that their interpretation does not conflict with the general principles protected by the EU law.

<sup>150</sup>Case C-617/10, *Åkerberg*, para 19.

<sup>151</sup>Case C-71/76 *Thieffry*, [1977] ECLI:EU:C:1977:65, para 15.

<sup>152</sup>Case C-112/00, *Schmidberger*, [2003] ECLI:EU:C:2003:333, paras 78-81.

the measure imposed a burden on the individual that was excessive in relation to the objective that was sought to be achieved (*proportionality stricto sensu*). Moreover, the proportionality test provides that measures should not exceed what is appropriate and necessary in order to achieve the objectives.<sup>153</sup> It is also stated in Article 5(4) TEU, that the Union shall not exceed what is necessary to achieve the objectives of the Treaties. According to Article 1 of Protocol 2 on the application of the principles of subsidiarity and proportionality, each institution shall ensure respect for the principles of proportionality in Article 5 TEU. Furthermore, according to Article 49(3) of the Charter, the severity of penalties should not be disproportionate to the criminal offence. Whether a penalty is proportionate or not should be interpreted in light of the Charter. For example in Case C-331/88 *Fedesa*, which regarded whether a directive infringed the principle of proportionality, it was stated that the lawfulness of the prohibition of an economic activity must be appropriate and necessary in order to achieve the objectives pursued by the law. The Court also stated that when there is a choice between several appropriate measures, regard must be taken to the least onerous measure.<sup>154</sup> In that case, the Court stated that with regard to the requirement of health protection, the removal of barriers to trade and distortion of competition could not be achieved by less onerous measures. The Court therefore stated that the measure was proportionate because the importance of the objectives pursued justified the negative financial consequences for the traders.<sup>155</sup>

## **4.3.2 The Economic Freedoms of the Charter**

### **4.3.2.1 Article 15 of the Charter**

Article 15 of the Charter concerns the freedom to choose an occupation and the right to engage in work. According to Article 15 of the Charter, every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. This principle is recognised in the case law of the ECJ.<sup>156</sup> For example, in Case 4/73, *Nold*, the applicant stated that the new trading rules authorized by the Commission was threatening the right to profitability of the

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<sup>153</sup>The Court has sometimes fold step three into step one or step two, and sometimes the Court has not considered it because the applicant did not address it, see Craig, De Búrca, *Eu Law – Text, cases and materials*, page 551.

<sup>154</sup>Case C-331/88, *Fedesa* [1990], ECLI:EU:C:1990:391, paras 12-13.

<sup>155</sup>Case C-331/88, *Fedesa*, paras 16-17.

<sup>156</sup>The explanations relating to the Charter (2007/C 303/02), Article 15.

undertaking and the right of free development of its business activity. Those were rights that were protected by the Constitution of Germany and of other Member States and various international treaties, such as the ECHR. The Court stated that in order to protect the fundamental rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States. It also stated that international treaties could supply guidelines which should be followed. The Court however stated that those rights need to be viewed in the light of the social function. According to the Court, it was legitimate that those rights should, if necessary, be subject to certain limits justified by the general objectives pursued by the Union.<sup>157</sup>

#### **4.3.2.2 Article 16 and Article 17 of the Charter**

According to Article 16 of the Charter, there is a freedom to conduct a business in accordance with EU law and national laws. According to Article 17 of the Charter, no one may be deprived of his or her possessions, except if it is in the public interest.<sup>158</sup> Moreover, according to the Court, persons are entitled to the peaceful enjoyment of their property.<sup>159</sup> The Court has also stated that the carrying on of economic activities must be guaranteed because it forms part of the fundamental rights, which EU law needs to uphold.<sup>160</sup> Despite that, the Court has stated that none of those rights are absolute rights. According to the Court, when several rights protected by the EU legal order clash, the assessment must strike a fair balance between the different fundamental rights and freedoms.<sup>161</sup> Nevertheless, according to Article 38 of the Charter, the EU policies shall ensure a high level of consumer protection.

The fundamental rights must, as mentioned above, be considered in relation to their social function. It would therefore be possible to impose restrictions, if the restrictions correspond to objectives of general interest recognised by the Union. Nevertheless, the restrictions should not constitute a disproportionate or intolerable interference, which

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<sup>157</sup>Case 4/73, *Nold*, [1974] ECLI:EU:C:1974:51, paras 12 to 14.

<sup>158</sup>According to the explanations relating to the Charter (2007/C 303/02), Article 17 of the Charter is based on Article 1 of the Protocol to the ECHR.

<sup>159</sup>Case 44/79, *Hauer*, [1979] ECLI:EU:C:1979:290, para 19.

<sup>160</sup>Case 230/78, *SpA Eridiana and others*, [1979] ECLI:EU:C:1979:216, para 20.

<sup>161</sup>Case C-544/10 *Deutsches Weintor*, [2012] ECLI:EU:C:2012:526 para 54. Case C-12/11 *McDonagh v Ryanair*, [2013] ECLI:EU:C:2013:43, paras 60 and 62. Case T-614/13, *Romonta GmbH v European Commission*, [2014] ECLI:EU:T:2014:835, paras 59 and 77. Case 4/73, *Nold*, para 14. Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderditmarschen*, [1991] ECLI:EU:C:1991:65, para 73.

would impair the essence of those rights.<sup>162</sup> Since the rights are opened to weighing and thereby opened to value judgment, the principles might not be ideologically neutral. In some recent case law it seems that the view of the ECJ is still strongly economically orientated. Therefore, it is not sure that the human rights would prevail the balancing test. In particular when it regards horizontal situations where social rights conflict with economic constitutional rights.<sup>163</sup> Despite that, in Case C-283/11, the Court stated that other fundamental freedoms constituted a legitimate aim in the general interest while balancing with the freedom to conduct a business. Furthermore, the Court stated that less restrictive legislation would not achieve the objective as effectively and that the legislation was necessary.<sup>164</sup> Moreover, the Court has also held that when the measure does not affect the core content of the freedom to conduct a business, that measure does not prevent a business activity from being carried out as such. Therefore, the questioned measure needs to constitute a disproportionate and intolerable interference, which impairs the substance of those rights.<sup>165</sup> According to the Court, when there is a choice between several appropriate measures recourse must be to the least onerous, and the disadvantages must not be disproportionate to the aims pursued.<sup>166</sup>

## 4.4 Conclusion

According to the principle of supremacy and Article 4(3) TEU, the Member States have to follow EU law. If there would be a conflicting national provision, they would therefore need to set it aside. Although, if there is an absence of harmonisation at EU level regarding the exercise of a profession, the Member States are not totally free to regulate it within its territory. Because, both Article 49 TFEU and Article 56 TFEU states that restrictions on the freedom of establishment and on the freedom to provide services of nationals of a Member State in the territory of another Member State shall be prohibited. Moreover, according to the Court, any national measure that is liable to

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<sup>162</sup>Case 5/88, *Wachauf*, [1989] ECLI:EU:C:1989:321, para 18. Case 44/79, *Hauer*, para 32.

<sup>163</sup>Groussot, Pétursson, Pierce, *Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights*, pages 16-17. See also Case C-426/11 *Mark Alemo-Herron*, [2013] ECLI:EU:C:2013:521, paras 35-37.

<sup>164</sup>Case C-283/11 *Sky Österreich*, [2013] ECLI:EU:C:2013:28, paras 52, 55-57, 66.

<sup>165</sup>Case T-614/13, *Romonta*, para 59. Case 4/73, *Nold v Commission*, para 14. Case C-283/11 *Sky Österreich*, para 49.

<sup>166</sup>Case C-343/09 *Afton Chemical*, [2010] ECLI:EU:C:2010:419, para 45. Joined Cases C-581/10 and C-629/10 *Nelson and Others*, [2012] ECLI:EU:C:2012:657, para 71.

prohibit, impede or to make the exercise of the fundamental freedom by Union nationals less attractive, should be abolished. This is the case even if there is no discrimination on grounds of nationality. Despite that, the freedom to provide services or the right of establishment, are not absolute; neither are the Articles in the Charter.

The freedom to provide services, the freedom of establishment and the fundamental rights are protected at EU level. Therefore, in order to restrict those rights and freedoms, the restriction needs to be justified. Moreover, in order for those rights to be applicable, the situation cannot be purely an internal situation. In joined Cases C-340/14 and C-341/14, the ECJ stated that since the service could also be enjoyed by nationals of other Member States and by service providers from other Member States, it was not a purely internal situation. In my point of view, the same assessment would be applicable to UBER. Because also nationals of other Member States could like to enjoy the service and service providers from other Member States could like to perform it.

Restricting or banning UBER and UberPop would, in my consideration, affect the trade and thereby be a restriction on the fundamental freedoms, which should be prohibited. In my point of view, regarding whether it should be seen as an infringement of the freedom to provide services or of the right of establishment, the structure of those freedoms does not differ very much. However, the difference between those freedoms are that the freedom to provide services regards the carrying out of an economic activity for a temporary period, while the right of establishment regards the pursuit of an economic activity for an indefinite period. The assessment therefore depends on whether UBER is carrying out an economic activity for a temporary period or for an indefinite period. In my point of view, it is however rather the right of establishment, instead of the freedom to provide services, that is applicable. Since it would rather be aimed to be carried out for an indefinite period. Moreover, in Case C-456/02, the Court also stated that an activity carried out on a permanent basis or without a predictable limit to its duration, would not fall within the service provisions.

According to the Court and to Article 52(1) TFEU, it is possible for the Member States to retain restrictions laid down by law, regulation or administrative actions to be justified for reasons of public policy, public security or public health. The Court has



also held that national measures that are liable to hinder the exercise of fundamental freedoms guaranteed by the Treaty, can be justified. In order for them to be justified, they however need to fulfil four conditions. Regarding the first condition, it is my point of view that the restrictions regarding UBER are applied in a non-discriminatory manner. The restrictions do not only apply to nationals from other Member States, the restrictions applies to everybody. Regarding the second condition, the restrictions must be justified by imperative requirements (overriding reasons) based on the general interest. In my consideration, the restrictions are justified by imperative requirements. Because, according to the Court, examples of imperative requirements are road safety and consumer protection. Nevertheless, according to the Charter, the policies of the EU shall ensure a high level of consumer protection. The aim for restricting UBER (and especially UberPop) seems to be because of public policy, safety and health. It is also connected with concerns regarding the well-being of drivers, passengers, and limited liability of the sharing economy practice. As already mentioned, ridesharing is considered to be less safe than taking a traditional taxi. Regarding the third condition, the restrictions must be suitable for securing the attainment of the objective that they pursue. The aim of the EU's land transport policy is to promote efficient, safe, and environmentally friendly mobility. However, according to the Court, the concept of public policy within the EU, such as justifications for a derogation from the fundamental freedoms, must be interpreted strictly and only if there is a genuine and sufficiently serious threat to a fundamental interest of the society. Despite that, the Court has also held that the protection of fundamental rights is a legitimate interest that justifies a restriction.

Regarding the safety concern, the users can actually rate the drivers and check the profile of the driver before selecting them and if the rating of a driver is low, the driver will be dismissed. In my point of view, the driver is therefore not a complete stranger, and I would at least feel safer when entering the car with someone who has good ratings, than a complete stranger. However, this does not guarantee that the person actually knows how to drive taxi or if an accident would occur, have the right insurance. Nevertheless, regarding the fourth condition, the restrictions must not go beyond what is necessary in order to attain that objective. Therefore, a restriction or a ban on UBER could be lawful if it could not have been made with less restrictive measures. Since it is

only UberPop that are banned in the Member States, and not the services where the driver actually possess a taxi license, the measures should in my point of view not be seen to go beyond what was necessary in order to attain the objectives. In Case C-140/03, the Court stated that the objective of protecting public health could be achieved by less restrictive measures of the freedom of establishment. According to the Court, the Member State could instead have required that qualified opticians worked in the shop. The Member State could also have rules that required professional insurances. With regard to UberPop, Member States could therefore have applied similar rules. However, in order for UberPop to function they would then still need to change their business model. Because if they would apply to rules requiring qualifications and professional insurances, they would be like the other services of UBER.

Regarding the provisions in the Charter, it should be noted that Article 51 of the Charter determines the scope of the Charter. In my point of view the Charter will still be applicable both when Member States are implementing/applying EU law and when they are derogating from EU law. Because in Case C-617/10 *Åkerberg*, the Court stated that the fundamental rights in the EU legal order are applicable in all situations governed by EU law and the Court also referred to the case law regarding the situation when national measures derogating from EU law. Nevertheless, Article 52(1) of the Charter states that any limitation of the rights and freedoms in the Charter must be provided for by law and respect the essence of those. Limitations may therefore be made in accordance with the principle of proportionality. The limitations also need to be necessary and meet objectives of general interest recognised by the EU.

Regarding the proportionality assessment, it is necessary to first identify the relevant interests which are clashing. The relevant interests regarding UBER are their right of establishment and their freedom to conduct a business, against the protection of consumers and public policy, safety and health. In my consideration, the restriction to ban UberPop is suitable to achieve the desired end. Because the driver does not possess any license or insurance. Nevertheless, UberPop has therefore been seen as illegal taxi services in some Member States. If the driver on the other hand possess a license and an insurance it would, in my consideration, not be possible to restrict them. Because then they follow the same requirements as the other taxi drivers. The second step regards

whether the measure was necessary to achieve the desired end, and I doubt that there would be any other way to stop UberPop other than to ban it. Unless the regulations will be developed, or UBER will change the business idea regarding UberPop. Nevertheless, the third step, which is not always applied, regards a balancing of the different rights that clash. In my consideration, the third step is not always applied because the Court does not want to make a statement regarding which value that is the most important. Moreover, since the rights are opened to weighing and to value judgment, the balancing will show which interest the Court finds the most valuable. This could be very political and in my point of view, it is very important to protect both the economic rights and the human rights. If those two clash, it is therefore very important to consider what the consequences will be when deciding which is the most valuable. Regarding UBER, I consider it more important to protect the economic freedoms than the social freedoms since the negative outcome would be much bigger for UBER than for the consumer, who would actually have a new way to be transported by taxi, which is also less expensive. However, when it regards UberPop I think it is much more important to protect the consumer because then the driver does not have any taxi licenses or the right insurances. Despite that, none of the economic freedoms of the Charter is absolute.

Even if Article 49(3) of the Charter states that the severity of penalties must not be disproportionate to the criminal offence, it is my conclusion that the restriction could not be made with less onerous measures. Because with regard to the protection of consumers, public safety, public policy and health, the removal of barriers to trade could, in my consideration, not be achieved by any other measure than a ban. Since, in most of the Member States, it is illegal to operate as a taxi service without any taxi license or commercial insurance. Regarding UberPop, I therefore find a restriction proportionate and legitimate but not when it regards the other services of UBER because then the driver actually possesses both a taxi license and a commercial insurance.

## 5 CONCLUDING REMARKS

The purpose of this thesis is to examine whether restricting or banning UBER and UberPop constitutes a breach of EU law. During the thesis I started with analysing the legal nature of UBER and UberPop. I concluded that it is not possible to define UBER as either a transport service, either an information society service. Because, in my consideration, it has components of both. It is both an application and thereby information society service, and a transport service. This could however be a problem because taxi services are regulated at national level, while information society services should be coordinated at EU level. Information society services are coordinated at EU level in order to assure the free movement on the internal market. Despite that, it is my conclusion that this question, regarding sharing economy and especially UBER, should be regulated at EU level. The rules should be clear and eliminate potential risks for passengers and drivers. If it is settled at national level, there is a risk that it will be fragmented. In order to have legal certainty and an internal market without obstacles, I therefore think that the best solution would be to solve this issue at EU level.

Nowadays the reaction and actions in the Member States towards UBER and UberPop is very fragmented. In some Member States, it is UberPop that is facing bans, while in other Member States, UberPop is allowed to operate but instead the driver of UberPop faces criminal charges. In France they have even adopted a new law that is prohibiting electronic cruising through smartphones. In my consideration, France should have notified the Commission of their new law, in accordance with Article 8(1) Directive 98/34, which is now codified in Article 5(1) of Directive 2015/1535. Moreover, since this issue is not clear, I find it remarkable that it is only Spain and Belgium who has asked ECJ for a preliminary ruling.

Even if there is no harmonisation at EU level regarding the exercise of a specific profession, the Member States are not totally free to regulate it within its territory. Because, according to the Treaty and the Court, restrictions on the freedom of establishment and on the freedom to provide services of nationals of a Member State in the territory of another Member State shall be prohibited. Moreover, the Court has stated that any national measure, which is liable to prohibit, impede or to make the

exercise of the fundamental freedom by Union nationals less attractive, should be abolished and are thereby prohibited. This is the case even if there is no discrimination on grounds of nationality. Despite that, the freedom to provide services or the right of establishment, are not absolute; neither are the Articles in the Charter. Nevertheless, since those rights are protected at EU level, a restriction needs to be justified. According to the Court and to Article 52(1) TFEU, it is possible for the Member States to retain restrictions justified for reasons of public policy, public security or public health. In order for national measures to be justified, they however need to fulfil four conditions; they must be applied in a non-discriminatory manner, be justified by imperative requirements based on the general interest, be suitable for securing the attainment of the objective that they pursue, and not go beyond what is necessary in order to attain that objective. According to the Court, limitations to fundamental rights must be made in accordance with the principle of proportionality, be necessary and meet objectives of general interest that is recognised by the EU. It is my opinion that restricting or banning UBER constitutes a breach of EU law. Because the UBER driver actually possess a taxi license and a commercial insurance, therefore I do not agree with the argument that it is not as safe as regular taxis, because they have the same licenses and insurances. Moreover, it is timesaving, more flexible and innovative. In my consideration, restricting or banning UberPop would not constitute a breach of EU law. At least not as UberPop is functioning today. In my point of view, it feels like UberPop tries to circumvent the national rules. If UberPop would instead be carpooling, such as UberPool, it would however be different. Because then, passengers that are going the same way could ride together which would be both resource-saving and reducing the pollution.

Consequently, in my point of view, the solution to all this should not be to ban UBER. Instead, it should be to regulate it at EU level. As a final note, maybe it is time for UBER to do like they did in Sweden; to shut down UberPop and focus on their other services. If UBER wants to be considered as a serious company, it should not be associated with a company that is trying to circumvent the rules. When it has potential to be succesful because it is actually inventing new solutions for the taxi market.

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### **Pending Cases**

Case C-434/15 *Asociación Profesional Élite Taxi v. Uber Systems Spain, S.L.*

Case C-526/15 *Uber Belgium BVBA v. Taxi Radio Bruxellois NV*

### **GC**

Case T-614/13, *Romonta GmbH v European Commission*, [2014] ECLI:EU:T:2014:835.

### **National Courts**

#### **England**

Case No: CO/1449/2015, *TfL v Uber and Others*, Royal Courts of Justice Strand, London, WC2A 2LL. Date: 16/10/2015.

#### **Sweden**

Svea Hovrätt, 2016-03-23, in mål nr B 9078-15.

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