

**UBER CASE, COMPETITION LAW
IMPLICATIONS IN EUROPE AND LATIN
AMERICA: DEFENDERS OF THE OLD ECONOMY
VERSUS ADVOCATES OF THE DIGITAL
REVOLUTION**

*Lavinia Meliti**

I. INTRODUCTION.....	446
II. BACKGROUND.....	447
<i>A. Uber and its Business Model: The Sharing Economy.....</i>	447
<i>B. Uber and Competition Law Implications.....</i>	450
III. UBER: A COMPARATIVE ANALYSIS IN EUROPE AND LATIN AMERICA	452
<i>A. Uber in the United States: Where Everything Started</i>	452
<i>B. Uber in Europe: A General Background</i>	455
1. The Experience in Spain	460
2. The Experience in Italy	463
<i>C. Uber in Latin America: The Fastest Growing Region in the World</i>	465
1. The Experience in Colombia.....	468
2. The Experience in Costa Rica	472
<i>D. The Comparative Paragraph.....</i>	475
IV. CONCLUSION	476

I. INTRODUCTION

“The rise of new software platform present regulators and antitrust agencies all over the world with a challenge.”¹ The transportation company Uber Technologies, Inc. is the largest and most current example of this phenomenon, as it exemplifies the expansion of the sharing economy without a regulatory framework capable of addressing a host of issues.²

This Note offers a comparative analysis of the issues and challenges presented by Uber by focusing, specifically, on those that have emerged in Europe and Latin America including the lengthy legal battle that has characterized its activity, since its debut back in 2009.³

This Note highlights how the evolution of markets and technology is closely related to law, market forces and the obsolescence of legal rules.⁴ This is specifically demonstrated through the comparative law analysis set out in this Note, which describes different national approaches with respect to the problems raised by Uber: the more open one in the United States system and the more restrictive one in Europe and in Latin America.⁵

The decision of the Courts —both on the European and Latin America side— has represented a setback for the future of the American company.⁶ Uber has been a party in many lawsuits and scandals, resulting in “an unprecedented polarization of the public opinion, split between defenders of the old economy and advocates of the digital revolution.”⁷ The former have

* Lavinia Meliti is a dual degree J.D. candidate in May 2020 at Nova Southeastern University, Shepard Broad College of Law. She is a 2018 graduate at Roma Tre University, in Rome, Italy, where she received her Master’s Postgraduate Degree in Law. She fluently speaks English, Italian, and Spanish.

1. Margherita Colangelo & Mariateresa Maggiolino, *Uber: A New Challenge for Regulation and Competition Law?*, MKT. & COMPETITION L. REV. (forthcoming 2017), 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3042514.

2. *Id.*

3. See Beniamino Pagliaro, *La Vita Nuova di Uber: Perché Migliora per i Propri Autisti e Cosa Racconta la Sua Evoluzione nel 2017* [*Uber’s New Life: Why it Improves for its Drivers and What its Evolution Tells in 2017*], LA STAMPA (Dec. 10, 2017), <https://www.lastampa.it/economia/2017/12/10/news/la-vita-nuova-di-uber-perche-migliora-per-i-propri-autisti-e-cosa-racconta-la-sua-evoluzione-nel-2017-1.34081530>.

4. Luca Belviso, *Il caso Uber negli Stati Uniti e in Europa fra Mercato, Tecnologia e Diritto: Obsolescenza Regolatoria e Ruolo delle Corti* [*The Uber Case in the United States and Europe Between Market, Technology and Law: Regulatory Obsolescence and the Role of the Courts*], MEDIA LAWS [M.L.] 144 (2018).

5. *Id.*

6. Francesco De Masi, *The Uber Case: A Ride for the Future of the European Single Market* (2016/2017) (unpublished E.B.L. thesis, Luiss University) (on file with the Department of Law, Luiss University).

7. *Id.*

accused Uber of unfair competition, and the latter have supported its development and fostered technological progress.⁸

In order to achieve a full understanding of the Uber phenomenon, the Note describes its business model and analyses it from the perspective of the European and South American approach, understanding the circumstances that allowed “a small Californian start-up, aiming to revolutionize the concept of urban transport, to become a technological giant worth billions of dollars.”⁹ This requires an understanding of the American law that allowed the rise of Uber.¹⁰ The legal issues that arose around Uber do not differ from those in other legal systems —such as Europe and Latin America— but which have found their original development in the North American Legal System.¹¹

This Note begins with a general overview of the history and fundamental characteristics of the Uber phenomenon, from the establishment of the company in 2009.¹² It also analyzes the wide variety of services offered by the American company and the way in which Uber has organized its corporate structure, in the world of the Sharing Economy.¹³ It then analyses the major competition law issues raised by the development of the Uber platform, and introduces the problems concerning the qualification of the service.¹⁴ Next it examines the Uber Case experience in Europe, specifically in Italy and Spain, and in Latin America, specifically in Colombia, and Costa Rica.

II. BACKGROUND

A. *Uber and its Business Model: The Sharing Economy*

“Sharing Economy means collaborative economy.”¹⁵ It is “an economic system in which goods and services are shared between private individuals, free of charge or in exchange for a sum of money, typically through

8. *Id.*

9. *Id.*

10. Belviso, *supra* note 4, at 148.

11. *Id.* at 149.

12. Pagliaro, *supra* note 3.

13. See Gianluca Modenese, *La Sharing Economy: Il Caso Uber. La Visione Giurisprudenziale e Le Prospettive Future* [The Sharing Economy: The Uber Case. The Jurisprudential Vision and Future Prospects] (2014/2015) (unpublished Econ. & Mgmt. thesis, Università degli Studi di Padova) (on file with Dipartimento di Scienze Economiche ed Aziendali, Università degli Studi di Padova).

14. *Id.*

15. Belviso, *supra* note 4, at 145.

internet.”¹⁶ “The keyword of sharing economy is *sharing*.”¹⁷ Authors emphasized its social aspect, made up of community-sharing, describing this as a move away from the criteria of maximization of profit that is typical of the *homo oeconomicus*¹⁸ in a perspective of classical economy.¹⁹ In fact, it has been observed how the “sharing economy is not a temporary reaction to the crisis, but it is proposed as a structural rethinking of the relationship between the economy and society, based on the creation of social links as a basis for economic exchange.”²⁰

Uber is one of the most popular car-sharing service in the world, and one of the most striking manifestation of the emergence of the contemporary car-sharing economy.²¹ As to the concept of sharing economy, it is common the reference to the “Uberification of Society,” proving the strong relevance this market player has, together with its *modus operandi* and organizational structure.²²

Uber is in fact a corporate group, established in the United States and operating in numerous cities around the world.²³ Founded in San Francisco in 2009—the city that represents the world’s largest start-up incubator—²⁴ Uber soon spread throughout the world,²⁵ achieving considerable success while at the same time giving rise to a series of legal disputes.²⁶ Countries that are very different from each other, in terms of political regime and free market orientation, have alternatively authorized the use of Uber and

16. *Sharing Economy*, OXFORD DICTIONARY, https://www.lexico.com/en/definition/sharing_economy (last visited Oct. 5, 2019).

17. Modenese, *supra* note 13, at 3.

18. See *Homo Oeconomicus*, TRECCANI ENCICLOPEDIA ON LINE, <http://www.treccani.it/enciclopedia/homo-oeconomicus/> (last visited Oct. 5, 2019) (*Homo Oeconomicus*, first stated by J.S. Mill, stands from abstract simplification of the complex human reality, which places as the subject of economic activity an abstract individual, whose actions in the complex social reality can be grasped only the economic reasons, linked to the maximization of wealth).

19. Modenese, *supra* note 13, at 3.

20. Ivana Pais & Marta Mainieri, *Dossier: Sharing Economy*, EQUILIBRI 11, 13 (2015), https://www.feem.it/m/publications_pages/20154221147504Indice_Allettore_Abstracts.pdf.

21. Modenese, *supra* note 13, at 2.

22. Belviso, *supra* note 4, at 146.

23. *Id.*

24. See *San Francisco's 20 Best Startup Accelerators & Incubators*, FOUNDER INSTITUTE (Mar. 1, 2019), <https://fi.co/insight/san-francisco-s-20-best-startup-accelerators-incubators>.

25. Avery Harmans & Paige Leskin, *The History of How Uber Went from the Most Feared Startup in The World to Its Massive IPO*, BUSINESS INSIDER (May 18, 2019), <https://www.msn.com/en-ie/money/business/the-history-of-how-uber-went-from-the-most-feared-startup-in-the-world-to-its-massive-ipo/ss-AABAL20>.

26. Modenese, *supra* note 13, at 11.

opposed it.²⁷ The countries where Uber has been sued range from some North American States to Spain, from China to Australia, to some areas of Latin America to South-East Asia.²⁸

Uber has produced and marketed a mobile software application (e.g. app) on smartphones.²⁹ In the context of urban mobility, the Uber application provides the meeting between demand and supply, where the members of the community—drivers and users— can contact each other.³⁰ The mobility service, provided by the driver, is subject to payment by the user.³¹ This fee, to be paid by credit card, is determined by the Uber group and quantified with an automated algorithm according to the surge pricing mechanism, a methodology according to which the price of the service increases as demand increases.³² Also, the payment is mediated by Uber, which receives the full payment amount, deduct the compensation for the services, and gives the driver the remaining portion.³³ Uber can also evaluate feedbacks given at the end of the ride, and in presence of bad reviews, it may deactivate the profiles.³⁴ “[A] further feature of Uber's service is that it also provides a service with differentiated bands.”³⁵ Other than the basic low-cost option that Uber offers, known as Uber X, there are a series of means of transport gradually bigger and more luxurious, designed for the different types of users.³⁶ In fact, they range from the Uber X service, useful to move from one point to another in the city, to planned transport services (which not surprisingly Uber defines taxi), and then to services of higher range as the Uber Black, where the car is a sedan high-end, or the Uber SUV service, provided by a Superior Utility Vehicle, to the top of the range known as the Lux service, where flagships of major car manufacturers (e.g. Porsche, Mercedes) are offered for transport at very affordable prices.³⁷

27. *Id.*

28. *Id.*

29. Belviso, *supra* note 4, at 146.

30. *Id.*

31. *Id.*

32. Nikhil Garg & Hamid Nazerzadeh, *Driver Surge Pricing*, SSRN 1, 1 (2019), <https://ssrn.com/abstract=3390346>.

33. Belviso, *supra* note 4, at 146.

34. *Id.*

35. Modenese, *supra* note 13, at 13.

36. *Id.*

37. *Id.* at 13–14.

As mentioned above, however, Uber has been at the center of a series of legal disputes.³⁸ It is therefore to the European and Latin American events that the attention must be focused, highlighting on the one hand the experience of Italy and Spain and, on the other hand, the experience of Colombia and Costa Rica.

B. Uber and Competition Law Implications

This section explains how Uber practices can affect antitrust law.³⁹ First, Uber does not simply provide technology.⁴⁰ Uber exists and is developing because, by connecting users and drivers through its platform, it exploits the interdependencies⁴¹ transport demand and driving demand.⁴²

The Uber platform may seem like a complex architecture, but it is actually quite flexible.⁴³ In other words, Uber can diversify its business by combining products and services, as it did with Uber Eats.⁴⁴ Clearly, this has consequences in terms of competitive law, as it follows.⁴⁵ First, because the platform is very dynamic, it can easily enter new markets by offering increasingly new and innovative services.⁴⁶ Secondly, because in doing so Uber will always be able to profit from strategies that ultimately produce exclusive effects for other players in the market, although not necessarily anti-competitive.⁴⁷

Those who enter the market with the aim of offering already established services, find themselves increasing their costs, and forced to use less and more accessible technologies, thus reducing the quality of their offer.⁴⁸ The

38. Heather Kelly, *Uber's Never-Ending Stream of Lawsuits*, CNN BUS. (Aug. 11, 2016, 10:30 AM), <https://money.cnn.com/2016/08/11/technology/uber-lawsuits/>.

39. Colangelo & Maggolino, *supra* note 1, at 10 .

40. *Id.*

41. *Id.*; David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, COLUM. BUS. L. REV. 102, 105 (2005).

42. Colangelo & Maggolino, *supra* note 1, at 10.

43. *Id.*

44. *Id.*; see also *How Does Uber Eats Make Money? Uber Eats Business Model In A Nutshell*, FOUR WK. MBA, <https://fourweekmba.com/uber-eats-business-model/> (last visited Oct. 5, 2019) (in a nutshell, Uber Eats is a three-part marketplace that connects a driver, a customer and a restaurant owner with the Uber Eats platform, located in the center. This market moves around the three players: drivers earn money by delivering orders on time; restaurants pay a commission on orders to Uber; customers pay small thick shipping and sometimes cancellation fees).

45. Colangelo & Maggolino, *supra* note 1, at 10 .

46. *Id.*

47. *Id.*

48. *Id.* at 11.

aim of analyzing Uber's competitive behavior is to improve the understanding of the strategies implemented by the Californian company, so that the antitrust authorities and agencies at global level can have an immediate response.⁴⁹

As far as Uber practices regarding the pricing system are concerned, the competition law has no criticism in this respect.⁵⁰ The Uber system called “surge pricing” —also called the dynamic pricing system— is not anti-competitive, but adapts perfectly to the system of supply and demand.⁵¹ The price of the Uber does not change according to the price of the person who buys the service, but according to other elements such as the price of competitors, the correspondence between supply and demand, or other external elements such as the conditions of transport.⁵² In other words, if the Uber algorithm works as it says, reflecting how market supply and demand change, there is no collusion, and therefore antitrust law cannot change the barriers to entry that protects Uber's market power.⁵³ In addition, Uber collects user data through its platform, in order to retain its consumers.⁵⁴ In doing so, it improves its services, consumer welfare, and therefore profits, and this is not prohibited by antitrust law.⁵⁵ The mere existence of Uber and its economic activity does not appear to be anti-competitive, as it does not harm the welfare of consumers.⁵⁶ The purpose of competition law and agencies is to make markets work, not to protect competitors.⁵⁷ Competition law can only prohibit anti-competitive agreements, mergers and monopolistic practices.⁵⁸ Clearly, this does not mean that antitrust agencies and authorities support companies that act in violation of the law.⁵⁹ As to the context of the battle that taxi drivers are waging against Uber, the aim of the antitrust agencies is to create a single level playing field for Uber and taxi drivers.⁶⁰ Additionally, those agencies cannot prescribe obligations and

49. *Id.*

50. Colangelo & Maggiolino, *supra* note 1, at 11.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 12.

55. Colangelo & Maggiolino, *supra* note 1, at 12.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Colangelo & Maggiolino, *supra* note 1, at 12.

force, for example, Uber to comply with taxi regulations, nor can they exempt taxi drivers from those regulatory obligations to which Uber is not subject.⁶¹

As a result, it looks like the Uber problem is a regulatory problem.⁶² The central issue is whether and how to apply to Uber the same requirements and obligations applied to taxi drivers.⁶³ There are two solutions: to extend the existing rules to the new emerging system, or to use the new system to innovate the first.⁶⁴ It would not seem right to waste opportunities the Uber is offering, applying the same rules as traditional operators.⁶⁵ Rather, it is important to boost progress and development.⁶⁶ Legislators should allow traditional services to exploit new technologies and innovate.⁶⁷ “[T]he best way to fight illegal business models is to develop legal business models that are equally good and efficient.”⁶⁸

III. UBER: A COMPARATIVE ANALYSIS IN EUROPE AND LATIN AMERICA

A. *Uber in the United States: Where Everything Started*

As to the Uber case, the American law deserves special consideration.⁶⁹ The first reason for polarizing the attention towards the American legal system, is the very origins of this market operator.⁷⁰ Uber was founded in 2009 California, starting from 2010 to operate in several cities, such as San Francisco, New York City, Chicago, Washington.⁷¹

At first, the American company established itself in the north-American context, where it provided a new idea of mobility, with lower and competitive prices compared with the ones of the professionals in the sector.⁷² It is in those cities that the first resistance from taxi drivers has inevitably developed, and where certain legal issues have emerged.⁷³ These are problems which, as we shall see, do not differ from those found in other legal systems —such

61. *Id.*

62. *Id.* at 14.

63. *Id.*

64. *Id.*

65. Colangelo & Maggolino, *supra* note 1, at 14.

66. *Id.*

67. *Id.*

68. *Id.*

69. Belviso, *supra* note 4, at 148.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

as Europe and Latin America— but which have found their original development in the North American legal system.⁷⁴

American regulation on urban mobility is affected by the federal structure of the North American legal system, which is divided into three distinct levels of government: federal, state and municipal.⁷⁵ In the area of taxi service, and from a regulatory point of view, the real protagonists that intervened have been the federal states and the various municipalities.⁷⁶ On that regard, it is possible to detect heterogeneity in the different regulatory models adopted by American cities.⁷⁷ First, the provision of a system of licenses, which confers on the municipality the power to issue licenses beyond the predetermined number at the State level (e.g. in Los Angeles).⁷⁸ Second, the existence of tariff regimes, which sometimes are predetermined (as in San Diego and New York City), others not yet characterized by any type of public intervention.⁷⁹ Third, the “presence of service obligations, such as that of providing the requested activity without being able to refuse,” even if uneconomical, or that of offering services of a limited nature also to residents of disadvantaged areas.⁸⁰

The advent of Uber, as already noted, has generated strong resistance from traditional operators and, sometimes, even interventions by the courts.⁸¹ Uber, carrying out an activity of intermediation, has ultimately satisfied the same need for urban mobility that the taxi drivers have provided.⁸² For that reason, Uber’s main accusation has been that of configuring a hypothesis of unfair competition.⁸³ First, the competitive advantage gained despite the lack of homologation, violating the rules relating to the taxi service; second, the nature of the activity itself which, as mentioned, is not dissimilar to the one carried out by the traditional operators of the sector.⁸⁴

74. Belviso, *supra* note 4, at 149.

75. U.S. CONST. art. I, § 8.

76. Belviso, *supra* note 4, at 149.

77. *Id.* at 150.

78. *Id.*

79. *Id.*

80. *Id.*

81. Belviso, *supra* note 4, at 150; *see also* *Yellow Grp. LLC v. Uber Techs. Inc.*, No. 12 C 7967, 2014 WL 3396055, at *1 (N.D. Ill. July 10, 2014) (alleging unfair and deceptive acts, misrepresentation, and unfair competition by Uber).

82. Belviso, *supra* note 4, at 150–51.

83. *Id.* at 151.; *see also* Hannah Posen, *Ridesharing in the Sharing Economy: Should Regulators Impose Uber Regulations on Uber?*, 101 IOWA L. REV. 405, 418 (2016).

84. Belviso, *supra* note 4, at 151.

Another accusation against Uber has been that of not belonging to the sharing economy world, whereas those platforms are characterized by the spirit of sharing, and Uber is allegedly not.⁸⁵ An example is Anchorage, Alaska, where it was challenged the legitimacy of the service before the Superior Court, seeking to impose the performance of the activity in conditions of substantial gratuitousness, therefore without profit margins for the company.⁸⁶ This claim was affirmed by Judge Micheal Corey of the Anchorage Superior Court, and, inevitably, ended up with the choice of Uber to inhibit the service on the territory.⁸⁷

Because municipalities regulate the taxi industry, having their own autonomy, each of them has their own ideas as to how Uber fits into their regulatory frameworks, and as to whether or not Uber should be challenged or rather accepted.⁸⁸ Some municipalities were favorable and aimed at not hindering the entry of the new operator, as happened in Pittsburgh; some others, hostile to the rise of the new entrant and inclined to extend to it the rules already applicable to traditional carriers (such as in New York City);⁸⁹ and finally, municipalities that, fostering innovation, decided to regulate the new platform, while avoiding to prevent its effective operability.⁹⁰ This last option has been implemented by several States, since it is capable—at least in theory—of balancing the interest in technological innovation and in the development of the market.⁹¹ Some of these states—such as California, Colorado, Nevada, Massachusetts—have created from 2013, the category of Transportation Network Companies (TNCs), in which Uber and all those platforms that provide mobility services through technological tools fall automatically.⁹²

85. *Id.*

86. *Id.*

87. *Id.*

88. Posen, *supra* note 83, at 423.

89. See Richard Cohen, *Uber Mows Down Bill De Blasio*, THE WASH. POST (July 27, 2015), https://www.washingtonpost.com/opinions/ubers-bare-knuckle-battle-against-the-taxi-industry/2015/07/27/e0e7be98-3483-11e5-8e6607b4603ec92a_story.html?utm_term=.1c7663d78c95.

(in New York City, the Mayor Bill De Blasio has proposed to introduce, also for the drivers of Uber, the obligation to acquire a license, suggesting the idea of establishing, even for them, a regulated system of entry into the market. This proposal was not appreciated by Uber, who decided to include, in his app, next to the ordinary display mode of the drivers, a fictitious “De Blasio mode,” in order to show the user what would have happened if the proposal of the Mayor had been accepted, with the disappearance of cars in circulation and the communication of a waiting time of 25 minutes).

90. Belviso, *supra* note 4, at 151–52.

91. *Id.* at 152.

92. *Id.*; see also Jeremy Horpedahl, *Ideology Über Alles? Economics Bloggers on Uber, Lyft, and Other Transportation Network Companies*, ECON. J. WATCH, 360 (2015).

Nonetheless, the overall picture seems to be constituted by a myriad of facets, derived also by the federal structure of the United States.⁹³ When the taxi industry was first regulated, no one could have imagined ridesharing services like Uber, as a result of technology and innovation.⁹⁴ As a consequence, it is up to the States to support the experience and the services that Uber provides.⁹⁵ “Society is forever evolving and it is in the best interest of the country, consumers, businesses, and the government to allow these new companies to innovate.”⁹⁶

B. Uber in Europe: A General Background

“Information technology and Internet services are considered to be key tools for economic growth and innovation in the European Union.”⁹⁷ The strategy for the digital single market has been set out by the Commission's Communication, which highlighted that in order to complete the internal market, it is necessary to remove barriers and fill the remaining regulatory gaps.⁹⁸ The full implementation of the digital market, offered directly online or through applications on Internet, is in fact still limited by restriction measures put in place by States and private behaviors, introducing obstacles to its development.⁹⁹ Moreover, it was rightly pointed out that “technologies move too quickly for regulatory comfort.”¹⁰⁰ As a result, the European Union system, together with the member States, are now in front of the need of regulating previously non-existent or even inconceivable cases, that have transnational relevance.¹⁰¹

Today, as to the non-scheduled urban transport, the European regulatory scenario seems to be highly regulated.¹⁰² This picture tends to be homogeneous, as it is characterized by “licensing systems, quotas, administrative tariffs, public service obligations and strict distinctions between taxi services and rental services with drivers.”¹⁰³

93. Belviso, *supra* note 4, at 152.

94. Posen, *supra* note 83, at 432.

95. Belviso, *supra* note 4, at 152.

96. Posen, *supra* note 83, at 433.

97. Gianpaolo Maria Ruotolo, *Il caso Uber nel mercato unico digitale [The Uber Case in the Digital Single Market]*, OSSERVATORIO EUROPEO [O.E.] 429, 429 (2018).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 430.

102. Belviso, *supra* note 4, at 152.

103. *Id.*

After the new economic operator entered the market, there has been a trend towards homogeneity.¹⁰⁴ Specifically, after the entrance of Uber in the most important cities in Europe, in fact, it followed “the claims of the traditional operators of the sector, then the actions of the various administrations involved, and finally the decisions taken by the national courts, almost never willing to accept the requests of the exponents of the new economy.”¹⁰⁵

This attitude of closure has not only affected the *Uberpop* service, but also to the *Uberblack* service.¹⁰⁶ The former —*Uberpop*— is a service of intermediation between non-professional drivers and users.¹⁰⁷ This service is, as it is easy to assume, the one that has generated more problems, because of the greater detachment that characterizes its offer, compared to that traditionally made within the market.¹⁰⁸ As to the second one —*Uberblack*— “is a service of intermediation between professional drivers and users: through this service, drivers already holders of NCC authorization (e.g. *noleggio con conducente*), and therefore professionals, also become drivers of Uber, offering a service additional and parallel to the traditional one.”¹⁰⁹

The judges found themselves having to interpret the nature of the activity carried out by Uber, in order to understand if, behind the guise of inter-electronic mediation, lies, indeed, a substantial transport activity, and unfair competitive practices.¹¹⁰ Specifically, as part of the ongoing battle of the Uber with the European Union (EU), the European Court of Justice (ECJ) was tasked with understanding how the activity of the Uber can be classified: whether to classify it as a provider of transport, or services, and, therefore, how it should be regulated.¹¹¹ Uber has tried to impose its business model and technological innovation throughout Europe, with a value of more than 40 billion dollars.¹¹² As a response, it has been strong the resistance of the European Community, considering the tactics implemented by Uber to be

104. *Id.* at 153.

105. *Id.*

106. *Id.*

107. Belviso, *supra* note 4, at 153.

108. *Id.*

109. *Id.*

110. Belviso, *supra* note 4, at 156.

111. Ijechi Nazirah Nwaozuzu, *Goliath v. Goliath: The Significance of EU Law in the Battle Between Uber and the EU* (2017) (unpublished thesis, National University of Singapore) (on file with National University of Singapore), https://www.academia.edu/36473387/Goliath_v_Goliath_The_significance_of_EU_Law_in_the_battle_between_Uber_and_the_EU (last visited Sept. 19, 2019).

112. *Id.*

anti-competitive.¹¹³ The legal actions taken by the national authorities offer important insights into the battle against Uber.¹¹⁴ Accordingly, it is important to illustrate the experience of the main states belonging to the European Union and, in the next section, analyze how the Commission, the Member States, and Uber have acted in the Uber battle against the European Union, in their respective interests, focusing the attention on the Spanish and Italian experience.¹¹⁵

In France, where Uber has taken its first steps, the adoption of the 2014 *Thèvenoud Law*¹¹⁶ has re-regulated the non-scheduled urban transport sector through several changes to the original transport code.¹¹⁷ It is precisely on the basis of these provisions introduced therein that the *Cour d'Appel de Paris* has inhibited the provision of the *Uberpop* service, considered a form of unfair competition.¹¹⁸ As to Germany, there is a highly administered market and courts, both administrative and civil, have placed themselves in a position of clear closure *vis-à-vis* the new market player.¹¹⁹ In the Netherlands, which as a matter of fact is characterized by a more liberal system, the *Uberpop* service has been inhibited.¹²⁰ In Italy, it is before the courts that the terrain of conflict between traditional carriers and the new entrant has developed.¹²¹ Specifically, the intervention concerned both the *Uberblack* service and the *Uberpop* service.¹²² However, only with reference to the latter service did the ordinary judge come to configure the unfair competition and inhibit the assets of the service.¹²³ Finally, in Spain, there is also here a market full of rules and hostile jurisprudence that inhibits the services offered by the new entrant, as we will see in the next paragraph.¹²⁴

However, before discussing the specifics of decisions taken at the judicial level, it is necessary to explain the internal decision-making mechanism, at the National and European level (e.g. Member States and

113. *Id.*

114. *Id.*

115. *Id.*

116. See Loi 2014-1104 du 1 octobre 2014 relative aux taxis et aux voitures de transport avec chauffeur [Law 2014-1104 of October 1, 2014 relative to taxis and transport vehicles with driver], LEGIFRANCE, Oct. 2, 2014, p. 15938.

117. Belviso, *supra* note 4, at 153.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 155.

122. Belviso, *supra* note 4, at 155.

123. *Id.* at 155–56.

124. *Id.* at 156.

European Union).¹²⁵ The European Law allows National Courts to decide on matters that directly affect the Member State at issue.¹²⁶ Then, the European authorities of competence, and, thus, the European Law, act as a mechanism to control the proportionality and validity of decisions and actions taken at National level.¹²⁷ Specifically, Article 12(3) of Directive 2006/123/EC (e.g. the Services Directive) and Article 3(4) of Directive 2000/31/EC (e.g. the Electronic Commerce Directive) grant national authorities and, therefore, Member States, the power to regulate matters occurring at national level, provided that they do not conflict with the European Directives.¹²⁸

As to Uber, the Advocate General has declared that, according to the Directive 98/34/CE5, the Member States “may prohibit and punish as a matter of criminal law, the illegal exercise of [UberPop] transport activities . . . without notifying the Commission of the draft law in advance.”¹²⁹ Nevertheless, this Opinion has two sides to be considered.¹³⁰ On the one hand, it gives Member States a very strong power to implement regulations against Uber's anti-competitive strategies.¹³¹ On the other hand, the adequacy of the actions taken within this power must be assessed.¹³² The objective of the Advocate General, through this Opinion, was to allow the national authorities to directly regulate the anti-competitive tactics of Uber.¹³³ However, this Opinion has been considered dangerous, because it may introduce a precedent whereby National Authorities may regulate internal matters by applying national laws even before binding European directives.¹³⁴ Therefore, the European Commission¹³⁵ considered it appropriate to stress that national authorities should adopt proportionate measures in the context of the battle against Uber.¹³⁶ The European Commission has in fact clarified that the bans and prohibitions —as to the Directive 98/34/CE5— “can only be used as a last resort.”¹³⁷ However, the

125. See Nwaozuzu, *supra* note 111.

126. *Id.* at 2.

127. *Id.*

128. *Id.*

129. *Id.*; see also Case C-320/16, Uber France SAS, 2017 E.C.R. I-X.

130. See Nwaozuzu, *supra* note 111, at 3.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. See *A European Agenda for the Collaborative Economy*, EUROPEAN COMMISSION (June 2, 2016), http://europa.eu/rapid/press-release_IP-16-2001_en.htm.

136. See Nwaozuzu, *supra* note 111, at 4.

137. *Id.*

States, in response, claimed that Uber's anti-competitive tactics were so serious and obvious that imposing bans was the only possible way out.¹³⁸ The decision expressed by the European Commission has therefore had the objective of favoring, in some way, the international companies that seek to enter the single market, while protecting the public interests of the national authorities.¹³⁹ “EU Law’s ability to check these measures thus serves to not only protect genuine public concerns within Member States, but also to ensure that measures set against anti-competitive tactics are both valid and effective in meeting their objectives.”¹⁴⁰

“Uber's strategy in entering the single market, . . . was to radically change the *status quo* and make the market bend.”¹⁴¹ In response, European law has verified and balanced the measures taken at national level against Uber, seeking to ensure that the same measures could guarantee a balance of competing values.¹⁴² In fact, “the battle between the European Union and Uber appears to be rooted in a conflict of values.”¹⁴³ The European Court, on the one hand, seeks to balance the freedom of services, respect for competition rules, and consumer protection.¹⁴⁴ Uber, on the other hand, tries to fight for the freedom of its consumers.¹⁴⁵

Uber will continue to fight for its place in the single market.¹⁴⁶ The European Union has the objective of creating a digital single market by 2020, and one may finally see how the future battles between the Uber and the EU will proceed to enforce EU law in its current form, or modify it definitively.¹⁴⁷

138. *Id.*

139. *Id.* at 5.

140. *Id.*

141. Nwaozuzu, *supra* note 111, at 5; see Elias Isquith, *Uber fail: Why the Start-up Giant Stumbled in Europe — and How it Could Happen in the U.S.*, SALON (June 1, 2016), https://www.salon.com/2016/01/06/uber_fail_why_the_start_up_giant_stumbled_in_europe_and_how_it_could_happen_in_the_u_s/.

142. Nwaozuzu, *supra* note 111, at 6.

143. *Id.* at 5.

144. *Id.*

145. *Id.*

146. *Id.* at 8.

147. Nwaozuzu, *supra* note 111, at 8.

1. The Experience in Spain

As happened in other countries, in Spain one accusation is directed at Uber: unfair competitor.¹⁴⁸ The Spanish experience will go from the Spanish courts up to the European Court of Justice.¹⁴⁹ Before discussing the Uber case in Spain, it is important to present a brief regulatory analysis of competition law, in order to understand the Spanish experience.¹⁵⁰

One of the most important constitutional principles —Article 38 of the Spanish Constitution— is the freedom of enterprise, with respect to which the public authorities guarantee and protect its exercise.¹⁵¹ This regulation implies, among other things, the prevention and eradication of a series of acts that distort competition in the market, affecting both market participants on the supply side (companies, intermediaries and other producers) and on the demand side (consumers and users).¹⁵² These type of practices —known as unfair— are widely regulated by the Spanish Law of Unfair Competition 3/1991.¹⁵³ Specifically, Article 15 deals with the violation of the aforementioned rules.¹⁵⁴ The latter state that it is considered unfair to prevail on the market, thanks to a competitive advantage acquired through the violation of the laws, and to apply the law the advantage must be significant.¹⁵⁵ In fact, the second part of this Note makes us understand that not all legal violations are, by extension, a source of unfair competition.¹⁵⁶

After having analyzed the Spanish experience, we can now turn on the Uber case.¹⁵⁷ As we will see, the Spanish experience appears to be very similar to the Italian one.¹⁵⁸ On October 2014, an association of taxi drivers in Barcelona (e.g. *Elite Taxi*) brought an action before the Barcelona Commercial Court (e.g. *Juzgado de lo Mercantil n. 3 de Barcelona*), against Uber (*rectius*, Uber Systems Spain S.L.), on several grounds.¹⁵⁹ The first

148. Alejandro Fernández Ortega, *El Caso Uber: Discusión de la Problemática y Análisis Jurídico* [Uber case: Discussion of the Problem and Legal Analysis] (Jan. 20, 2016) (unpublished thesis, Universitat Autònoma de Barcelona) (on file with Facultat de Dret, Universitat Autònoma de Barcelona).

149. *See Id.*

150. *Id.* at 16.

151. *Id.*; *see also* C.E., art. 38, B.O.E. n. 311, Dec. 29, 1978 (Spain).

152. Fernández, *supra* note 148, at 16.

153. *Id.*; *see* Unfair Competition Law (B.O.E. 1991, 3) (Spain).

154. Fernández, *supra* note 148, at 16.

155. *Id.* at 17.

156. *Id.*

157. *Id.* at 18.

158. *Id.* at 11.

159. Belviso, *supra* note 4, at 157.

claim was that of Uber infringing on the rules of non-scheduled urban transport —Article 4 of Law 19/2003— which prescribes the obligation to obtain a license and authorization to carry out transport activities in a speculative, urban and inter-urban manner.¹⁶⁰ Second, the association claimed that there were the elements to think that Uber’s activities were creating unfair competition, in violation of Law 3/1991 of the Spanish Competition Law (e.g. *Competencia Desleal*).¹⁶¹ For these reasons, the association asked the Court to order the company to cease its activity.¹⁶² The commercial Court before which the case was brought, however, had doubts as to whether that type of service was correctly placed on the market.¹⁶³ In other words, the issue was defining whether Uber was a provider of a smartphone app connecting drivers and users, or a transport provider.¹⁶⁴ This question was referred directly from the Spanish Court to the European Court of Justice, with the aim of defining whether the Uber service should be regarded as a transport service —pursuant to Article 58 of the TFEU, or as “an electronic mediation service belonging to the information society”— pursuant to Article 56 TFEU, Directive 2006/123/EU, Directive 2000/31/EC and Directive 98/34/EC.¹⁶⁵

In its judgment of December 20, 2017 the European Court of Justice pointed out that the company creates an offer of urban transport services by technological means, e.g. its application, while not denying that Uber is an intermediary between drivers and customers.¹⁶⁶ Without the latter, drivers would not be able to provide transport services.¹⁶⁷ Thus, the Court highlighted the relationship of instrumentality that exists between intermediation and mobility, “such that the latter would not exist if there were

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Belvisio, *supra* note 4, at 157.

165. *Id.* In order to have a precise legal framework and to understand the decision of the European Court, here a brief analysis of the laws at issue. First, Article 56 of the Treaty on the Functioning of the European Union is one of vital importance, as it embodies the principle of the freedom to provide services in the European law. This provision prohibits restrictions on the freedom to provide services within the EU. In this respect, Directive 2006/123/EC defines the instruments to promote the freedom of establishment and the free movement of service providers. On the other hand, Directive 98/34/EC of the European Parliament lays down a procedure for the provision of information in the field of technical standards and regulations. Finally, Directive 2000/31/EC of the European Parliament deals with certain legal aspects of information society services, in particular electronic commerce. *Id.*

166. Belvisio, *supra* note 4, at 157.

167. *Id.*

not the first.”¹⁶⁸ Moreover, “Uber exercises a decisive influence on the performance of such drivers: establishing prices, intermediate payment, controlling the conduct of drivers and also being able to decide to also deactivate their profiles.”¹⁶⁹ Such characteristics of the service rendered by Uber show, even more clearly, their functional inseparability.¹⁷⁰

Finally, the Court pointed out that the European concept of service in the transport sector must be understood broadly “including not only transport services considered as such, but also any service connected to a physical act of transferring people or goods from one place to another through a means of transport.”¹⁷¹ Accordingly, its activity must be subject to the entire Title VI of the TFEU devoted to transport, and Article 58 TFEU, which deals with the European rules on transport.¹⁷² However, transport is a matter of shared competence, where both the European Union and the Member States may adopt legal acts which are binding on them, and where the states have competence where Union has not exercised it.¹⁷³ In the absence of European provisions on urban transport, the European Court of Justice can only hold by stating that it is up to the Member States to regulate the conditions for the provision of services which are, formally speaking, linked to intermediation and, essentially, to mobility.¹⁷⁴

This issue has been fundamental in the European Union.¹⁷⁵ The position of the Court of Justice on these aspects affected the outcome of the Uber case and its establishment in Spain, but also the rules of the European game, creates a precedent in the EU countries.¹⁷⁶

In this context, “the European institutions have shown their interest in strengthening the links between the digital economy and the single market.”¹⁷⁷ The Spanish professor and philosopher José Ortega y Gasset said that “it is only possible to progress when you think big, you can only move forward when you look far.”¹⁷⁸

168. *Id.*

169. *Id.*

170. *Id.*

171. Belvisio, *supra* note 4, at 158.

172. *Id.*

173. *Id.*

174. *Id.*

175. Fernández, *supra* note 149, at 14.

176. *Id.*

177. *Id.* at 33.

178. *Id.* at 45.

2. The Experience in Italy

Before analyzing the solutions suggested by and adopted by the Italian Court, we must reiterate that the service which the consumer accesses on Uber is actually composed of two distinct parts: on the one hand, in fact, they use the digital platform installed on smartphones in order to book the journey, choose the route and pay; on the other hand, the same customer actually benefits from a transport service.¹⁷⁹ It is, therefore, a composite case in which one of the two activities, taking place online on the platform, could actually fall into the category of intermediation, while the other falls, without doubt, in the category of passenger transport.¹⁸⁰

First of all, it is important to remember that the judicial events in Italy “did not concern Uber *sic et simpliciter*, but rather a specific service offered by Uber —*Uber Pop*— with which it is actually offered . . . a service in many ways similar to that of the traditional taxi.”¹⁸¹ “The difference is that the Uber driver does not possess any professional license, but simply some basic requirements imposed from the Californian society (e.g. driving license for at least three years and without ever having had suspensions, criminal record, *etcetera*).”¹⁸² It follows, that *Uberpop*—standing for “peer-to-peer rideshare service”—allows the customer to share the use of the vehicle with the driver and owner of the same vehicle, by simply paying a fee.¹⁸³

In the spring of 2015, taxi trade unions in Milan, Genoa, and Turin brought proceedings before the Court of Milan to request an order to terminate Uber's activities in the Italian territory.¹⁸⁴ They alleged that *UberPop*, through its app, was engaged in unfair competition in the taxi market, selling public transport services at much lower prices, and at the same time, without having to comply with the mandatory requirements imposed on taxi drivers.¹⁸⁵ Accordingly, a decision was necessary and urgent, as the appellants feared, in the long term, a large loss in profits.¹⁸⁶ The Court of Milan therefore ruled, on May 25th, 2015, in favor of the applicants.¹⁸⁷ Specifically, the Court ordered *UberPop* to cease its activities

179. Ruotolo, *supra* note 97, at 435.

180. Damien Geradin, *Online Intermediation Platforms and Free Trade Principles – Some Reflections on the Uber Preliminary Ruling Case*, SSRN 1, 3 (Apr. 6, 2016), <https://ssrn.com/abstract=2759379>.

181. Modenese, *supra* note 13, at 14.

182. *Id.*

183. Geradin, *supra* note 181, at 4.

184. Alessio Di Amato, *Uber and the Sharing Economy*, IT. L. J., 177, 177 (2016).

185. *Id.*

186. *Id.*

187. *Id.* at 177–78.

on the Italian market immediately.¹⁸⁸ Uber, in its defensive arguments, firmly stated that its activity was not a transport activity, but simply a technological platform.¹⁸⁹ Specifically, Uber stated that its *UberPop* app was limited to create an intermediation between drivers and passengers, and that Uber had nothing to do with the relationship between them, or the activity carried out.¹⁹⁰ As a result of this, Uber claimed that it operates in a completely different market, and that limiting its access to the Italian market would be in breach of European principles of competition law, and of Italian competition law.¹⁹¹ In response, the Italian Court had first noted that the services provided by Uber cannot be qualified as a simple intermediation tool to facilitate car sharing with other passengers.¹⁹² Accordingly, the Court outlined the difference: while in car-sharing services the car is shared with other passengers, who contribute to the costs (e.g. fuel, management costs, tolls), *UberPop* offers the possibility to motorists to sell a transport service for profit.¹⁹³ For the foregoing reasons, the role of Uber cannot be considered extraneous, especially since it has the possibility to influence the prices of the service, which are calculated through the mechanism of Surge Pricing (e.g. increase of the tariff to the increase in demand).¹⁹⁴ On the basis of these considerations, the Court of Milan found it undisputable that the Uber market is not different from that of taxis, as *UberPop* satisfies in equal measure the same service offered by taxis.¹⁹⁵ However, while taxi drivers have to meet tough requirements (e.g. car inspections, special insurance, taxi license, et cetera), *UberPop* drivers do not have to meet the same requirements.¹⁹⁶ By doing so, *UberPop* drivers can make a profit out of offering services at better prices, thus saving costs.¹⁹⁷ This is one of the main reasons why the Court of Milan observed that the *UberPop* service is substantially contrary to European and Italian principles of competition.¹⁹⁸

Furthermore, the purpose of the detailed regulation of taxis is to protect the health and safety of customers, which is why taxi vehicles are periodically checked, the taxi driver undergoes periodic examinations to verify their

188. *Id.* at 178.

189. Di Amato, *supra* note 184, at 178.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Di Amato, *supra* note 184, at 178.

195. *Id.*

196. *Id.* at 178–79.

197. *Id.* at 179.

198. *Id.*

physical and mental capacity, and there is adequate insurance for passengers.¹⁹⁹ The fact that Uber escapes these requirements, as stated by the Court of Milan, is unacceptable and contrary to the law.²⁰⁰ The value of personal safety is the value that —according to the Court— prevails over the value of the market.²⁰¹ This is affirmed by Article 41 of the Italian Constitution,²⁰² and by Article 168 of the Treaty on the Functioning of the European Union.²⁰³

Uber's Italian General Manager, Carlo Tursi, asserted how Uber entered the Italian market with a fairly ambitious project: to offer Italians an alternative service and quality in the mobility.²⁰⁴ What Uber hopes in Italy is to finally witness an update of the legislation in the sector.²⁰⁵ The initial goal is to introduce a low-cost transport services, facilitate the mobility, thus helping the communities where transport innovation is needed the most.²⁰⁶ The final goal is to change the way Italians think about transportation, where having a car is a choice, rather than an obligation.²⁰⁷

C. Uber in Latin America: The Fastest Growing Region in the World

Latin America²⁰⁸ has faced and continues to face many problems related to urban transport and urban mobility, given the absence and inefficiency of public service, informal transport systems, congestion, road accidents, and pollution.²⁰⁹ All of this clearly has different impacts in different cities.²¹⁰ As a matter of fact, Latin America is a region of social inequality, dominated by

199. Di Amato, *supra* note 184, at 179.

200. *Id.*

201. *Id.*

202. *Id.*; see also Art. 41 Costituzione [Cost.] (It.).

203. Di Amato, *supra* note 184, at 179; see also Consolidated Version of the Treaty on the Functioning of the European Union art. 168, May 9, 2008, 2008, O.J. (C 326) 47 [hereinafter TFEU].

204. Biagio Simonetta, *Uber e l'Italia, Storia d'Amore (Turbolenta) Lunga Cinque Anni [Uber and Italy, History of Love (Turbulent) Five Years Long]*, SOLE 24 ORE ECONOMIA [S.24.O.E.] (Feb. 14, 2018), <https://www.ilsole24ore.com/art/uber-e-l-italia-storia-d-amore-turbolenta-lunga-cinque-anni-AEJV2nwD>.

205. *Id.*

206. *Id.*

207. *Id.*

208. See Jonathan Moed, *Uber's Wild Ride To Make Latin America Its Fastest Growing Region*, FORBES (Dec. 20, 2018, 5:21 AM), <https://www.forbes.com/sites/jonathanmoed/2018/12/20/is-uber-operating-illegally-in-its-fastest-growing-region/#5f4f28b61925>.

209. Paola Jirón, *Sustainable Urban Mobility in Latin America and the Caribbean*, REP. ON HUM. SETTLEMENT 1, 1 (2013), <http://www.unhabitat.org/grhs/2013>.

210. *Id.*

different social classes, and transport accessibility problems have a different impact.²¹¹ What the whole region has in common is the process of accelerated urbanization, and a very large percentage of urban population.²¹² There has been incredible urbanization in Latin America in the last 40 years, and the urban population has grown from 50% of the population in 1970, to 80% in 2013.²¹³ As a result of the urbanization process, as many cities were born, they were not able to face the transport system in an organized and planned manner.²¹⁴ The supply of public transport has not kept pace with the growth in demand for transport.²¹⁵ This increase in transport demand has inevitably generated an increase in the number of cars in most cities.²¹⁶ As a result, income has grown and there has been a great expansion in the production of cars and motorcycles, with an average of about 90 vehicles per 1000 inhabitants.²¹⁷ The rate of motorization exceeds that of the Middle East, Asia, and Africa.²¹⁸ Unfortunately, institutional weakness and government control have not been able to respond promptly to these needs, thus contributing to chaos and security.²¹⁹ In order to address these difficulties, some major cities have taken steps to promote progress in an effort to improve mobility conditions.²²⁰ Brazil, and in particular cities such as Curitiba, have implemented innovative and integrated forms of transport.²²¹ The city of Medellin, Colombia, continuously incorporates new and innovative forms of transport, also and above all thanks to the new Mayor Federico Gutiérrez.²²²

Latin America is Uber's most profitable region and fastest growing region in the world.²²³ Active riders amount to twenty-five million per month, in more than two-hundred metropolitan areas in the fifteen countries

211. *Id.*

212. *Id.*

213. Patricia Yañez-Pagans et al., *Urban Transport Systems in Latin America and the Caribbean: Challenges and Lessons Learned*, IZA INST. OF LAB. ECON. 3, 7 (2018).

214. Jirón, *supra* note 209, at 1.

215. Yañez-Pagans et al., *supra* note 213, at 8.

216. Jirón, *supra* note 209, at 1.

217. Yañez-Pagans et al., *supra* note 213, at 7.

218. *Id.*

219. *Id.* at 8.

220. Jirón, *supra* note 209, at 2.

221. *Id.*

222. Ana María Aray Mariño, *Medellin Could Become the Capital of Electric Mobility in Latin America*, LATIN AM. POST (Jan. 5, 2019), <https://latinamericanpost.com/25657-medellin-could-become-the-capital-of-electric-mobility-in-latin-america>.

223. Moed, *supra* note 208.

of Latin America.²²⁴ The success of the Uber company in Latin America is due to several reasons.²²⁵ First, it is its own technological platform and experience.²²⁶ Second, it is the important need for change in the transport service, given the large number of South American population.²²⁷ In addition, the geographical and cultural proximity to the global base of the American Uber, as well as the similarities in terms of technological preferences between Latin America and America, is what places Uber in this competitive position.²²⁸

Nonetheless, in many regions Uber remain unregulated, operating *without the support of local governments*, or even worse, directly against the governments.²²⁹ Despite its parallel growth in the rest of the world, especially in the United States, Uber in Latin America has encountered significant resistance and conflict, with uncertainties about its future.²³⁰ A major factor is that the issue of mobility in Latin America, which is controversial.²³¹ *The impact and growth of Uber* has been so great because of the great need for change that cities have required.²³² However, the absence of regulations on the topic places Uber as a man with no land, where it has not received express consent from the government.²³³ The general motivation of animosity and conflict of “taxi drivers against Uber in Latin America is simple: Uber is taking away [its] customers”²³⁴ Despite the turmoil surrounding Uber and the absence of regulation, Uber continues to expand aggressively, although aware of the insidious situation.²³⁵

Uber's presence in Latin America is wide, and the public has welcomed a large and positive change in the old transport.²³⁶ It is up to local governments to take action and try to mediate between the idea of an old transport system and new technologies.²³⁷ Humberto Pacheco —Uber's Regional General Manager in Mexico— pointed out “[a]t the end of the day

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Moed, *supra* note 208.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Moed, *supra* note 208.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

this isn't a question of Uber, it's a question of smart cities. It's a question of progress and development, of how people can really benefit from the changes technology will bring”²³⁸

1. The Experience in Colombia

In order to understand the regulatory issues that have arisen in Colombia, it is again important to point out the laws that underlie the right of transport in the country.²³⁹ The starting point is Article 5 of Law 336/1996, by which the National Transport Statute is adopted.²⁴⁰ Specifically, it illustrates the difference between the public and private service.²⁴¹ Essential public service, in Colombia, is granted by law to public transportation companies.²⁴² As a result, it will imply the priority of the general public interest over the individual’s interest, for example, the guarantee of the provision of the service, and the protection of users, according to the rights and obligations indicated in the Statute herein.²⁴³

As to private service, the same article places the private transport service in this regulatory scenario.²⁴⁴ It points out how “the private transport is one that tends to satisfy the needs of mobilization of persons or things, within the scope of the exclusive activities of natural and/or legal persons.”²⁴⁵ As such, private transport companies “must comply with the regulations established by the Department of Transportation.”²⁴⁶

Article 9 of Law 105/1993 applies sanctions in case of violations.²⁴⁷ It states that the transportation will impose sanctions for violation to the regulating norms of the transport, according to the special dispositions that govern each mode of transport.²⁴⁸ In other words, the National Transport Statute will come into play in case of violation of transport regulations.²⁴⁹ Whoever contracts, provides or drives private vehicles or equipment, uses

238. Moed, *supra* note 208.

239. See Oficina Jurídica Ministerio de Transporte [Legal Office Department of Transportation], enero 15, 2019, Sol Ángel Cala Acosta, MT No. 20191340006951 (Colom.) [hereinafter Department of Transportation].

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. Department of Transportation, *supra* note 239.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Department of Transportation, *supra* note 239.

transport infrastructure, violates or facilitates the violation of regulations, will be subject to the sanctions provided for in Article 9 of Law 336/1996.²⁵⁰

In addition to the foregoing, Article 131 of Law 769/2002, whereby the National Land Transit Code (e.g. *Código Nacional de Tránsito Terrestre*) is issued, as amended by Article 21 of Law 1383/2010, provides that violators of traffic regulations will be sanctioned with the imposition of fines, according to the type of infraction.²⁵¹ For example, the driver and/or owner of a motor vehicle that incurs any of the aforementioned infractions will be sanctioned with a fine equivalent to thirty current legal minimum wages.²⁵²

“When Uber arrived in Colombia in October 2013, the concept of a private transport service mediated by an app was as new as it was challenging to the country's regulatory framework.”²⁵³ In 2016, the Superintendence of Ports and Transportation (e.g. *Superintendencia de Puertos y Transporte*), sanctioned the company Uber Colombia S.A.S. with a fine of COP \$344,727,000 for failing to comply with the order to cease the facilitation and promotion of the provision of unauthorized transport services in Colombia.²⁵⁴ “On August 19, 2016, the Delegate of Transit and Transport, after having previously sanctioned Uber Colombia S.A.S. for facilitating the violation of rules on passenger transportation, ordered the company to stop promoting, through mass media and advertising, the use of the technological platform that allows the illegal provision of the service.”²⁵⁵ Notwithstanding the order, the Superintendence found that Uber Colombia S.A.S. was still promoting the use of the platform.²⁵⁶ For example, back in November 2nd, 2016, Uber S.A.S. was ordered to stop promoting its unauthorized transportation services in the Cali Airport, through its concessionaire

250. *Id.*

251. *Id.*

252. *Id.*

253. Wilson Vega & Maria Paulina Arango, *La propuesta de Uber para lograr su legalización en Colombia* [*The Uber Proposal to Achieve its Legalization in Colombia*], PORTAFOLIO (May 2, 2019, 11:34 AM), <https://www.portafolio.co/negocios/empresas/la-propuesta-de-uber-para-lograr-su-legalizacion-en-colombia-528818>.

254. *Supertransporte sanciona a Uber por insistir, contra prohibición gubernamental, en la promoción de servicios de transporte no autorizado en Colombia* [*Supertransporte Sanctions Uber for Insisting, Against the Governmental Prohibition, on the Development of tUnauthorized Transportation Services in Colombia*], NOTICIERO DEL TRANSPORTE [TRANSPORTATION NEWS] (Dec. 19, 2016), <https://noticierodeltransportemeta.jimdo.com/2016/12/19/supertransporte-sanciona-a-uber-con-más-344-millones-de-pesos-por-insistir-contra-prohibición-gubernamental-en-la-promoción-de-servicios-de-transporte-no-autorizado-en-colombia/?mobile=>.

255. *Id.*

256. *Id.*

Aerocali S.A.²⁵⁷ Specifically, the Superintendence of Ports and Transport ordered Aerocali S.A., administrator of the Alfonso Bonilla Aragón Airport, “to guarantee immediate compliance with the instruction given by the entity last August 19th, through Resolution 40313.”²⁵⁸ The Resolution required “compliance with the regulations that prohibit the facilitation and/or promotion of the provision of unauthorized transportation services throughout the country.”²⁵⁹

The Santos government, through its Department of Transportation, called the platform illegal and the police chased those who used it.²⁶⁰ In December 2018, the Department of Transportation issued a circular in which it reiterated to the transit authorities of the country that all drivers violating Article 26 of Law 769/2002, for example, providing public transport service with private vehicles without a reasonable cause, must have their driver’s license suspended.²⁶¹ Private drivers using their vehicles for the illegal provision of public passenger transport, will have their driving license cancelled and will only be able to apply for it again in 25 years later.²⁶²

With the arrival of the government of Iván Duque, who has expressed his interest in promoting the so-called orange economy, the possibility of a path towards legalization has been raised.²⁶³ Nonetheless, that did not prevent the Department of Transportation —e.g. *Ministerio de Transporte*— from persecuting those who derive their incomes from Uber’s activities, as public transport service using a private car, against the aforementioned laws.²⁶⁴ “In at least one case, that led to an Uber driver having his license taken away for 25 years.”²⁶⁵

Then on January 15, 2019, the legal office of the Colombian Department of Transportation intervened as to the legality of Uber.²⁶⁶ First, it is important to note that, in accordance with Article 8.1 and 8.8 of the Decree 087 of January 17th, 2011, the legal advisory office of the Department of

257. *Aeropuerto de Cali retira publicidad de UBER, por orden de la supertransporte* [Cali Airport Withdraws Advertising From UBER, by Order of the Supertransporte], MINISTERIO DE TRANSPORTE [DEPARTMENT OF TRANSPORTATION] (Nov. 2, 2016), <https://www.supertransporte.gov.co/documentos/2016/Noviembre/Comunicaciones/CP67.pdf>.

258. *Id.*

259. *Id.*

260. Vega & Arango, *supra* note 253.

261. Department of Transportation, *supra* note 239.

262. *Id.*

263. Vega & Arango, *supra* note 253.

264. *Id.*

265. *Id.*

266. Department of Transportation, *supra* note 239.

Transportation has the duty to advise and/or assist the Department and other dependencies of the Department in the application and interpretation of constitutional and legal norms.²⁶⁷ The office deals with and resolves inquiries and petitions submitted to the Department by persons of a public or private nature.²⁶⁸ In the case discussed here, the office responded to a petition presented by a private individual to the Department of Transportation, through file No. 20183030126012 of December 17, 2018.²⁶⁹ Specifically, it has been inquired whether it is legal for a citizen to contact and contract transport services offered by a vehicle that is attached to Uber.²⁷⁰ The office has explained that Uber —although it defines itself a technological platform, not providing transportation service— is not recognized by the Ministry of Transport as a technological platform in the terms of paragraph 4 of article 2.2.1.3.2.1. of Decree 1079 of 2015 and articles 5 and 6 of Resolution No 2163 of 2016 issued by the Ministry of Transport.²⁷¹ The Ministry of Transport has issued the Circular No. 24 dated December 30th, 2014, requesting “the immobilization of private and public service vehicles that provide unauthorized service through the “Uber” platform,” for failure to comply with the regulatory provisions of the Ministry of Transport and, in particular the aforementioned Circular, resulting in appropriate administrative inquiries and the imposition of any penalties.²⁷²

Luis Lopez, Uber's public affairs manager, argued to the contrary that Uber is a private service.²⁷³ Specifically, “Uber calls it Private Transport by Intermediate Platforms (PTIP) and considers it a new category of transport.”²⁷⁴ According to data from Uber’s headquarters in the United States, Uber in Colombia has about “83,000 drivers and is used monthly by about 2.1 million passengers.”²⁷⁵ “For Uber, the satisfaction of its users goes to the heart of its commercial proposal, and is essential for its long-term survival.”²⁷⁶ “Two years ago, the firm opened a specialized support service

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. Department of Transportation, *supra* note 239.

272. *Id.*

273. Vega & Arango, *supra* note 253.

274. *Id.*

275. Linda Patiño, “*Estamos abiertos a regulación: Uber* [“*We Are Open to Regulation: Uber*], EL TIEMPO (Mar. 16, 2018), <https://www.eltiempo.com/tecnosfera/apps/entrevista-con-humberto-pacheco-gerente-general-de-uber-en-la-region-194566>.

276. *Id.*

for the region, managed from its Experience Center in Costa Rica.”²⁷⁷ “For Pacheco [the Uber Regional General Manager in Mexico], Uber is not outside the law and, in fact, is looking for a dialogue with the Colombian authorities to define a form of regulation.”²⁷⁸ “In addition, he said that it is important to differentiate the shared mobility service from traditional transport systems, which have existed for more than 20 years.”²⁷⁹ “He said that Uber pays taxes in Colombia and that, in case of regulation, he would be willing to contribute more.”²⁸⁰ “If, as its directors hope, a change of government opens the doors to a more fruitful dialogue, Uber would soon have the opportunity to operate in Colombia under the protection of a modern legal framework.”²⁸¹

“The debate about the legality of Uber is worldwide, which is why the platform tries to work with governments to seek a regulation that, according to the firm, allows conditions of competition to be the same for them and for taxis.”²⁸² “Justin Kintz, [Uber's] vice-president of Public Policy and Communications, points out that Bogotá was the first city in Latin America where they arrived five years ago and the issue is still not regulated, but there are 46 cities in the world where there is already clarity in the rules of the game.”²⁸³

2. The Experience in Costa Rica

Uber has been operating in Costa Rica for two years, generating turmoil in the public transport sector.²⁸⁴ In particular, “the main opposition to Uber in Costa Rica is the Union of Costa Rican Taxi Drivers (UTC), which has existed since the 1960s,” and which activity has been made legal by the Costa Rican Public Transport Authority (CTP).²⁸⁵

277. *Id.*

278. *Id.*

279. *Id.*

280. Patiño, *supra* note 275.

281. *Id.*

282. *Uber quiere igualar la competencia* [Uber Wants to Equal the Competition], DINERO (June 13, 2019, 12:01AM), <https://www.dinero.com/empresas/confidencias-on-line/articulo/condiciones-iguales-para-uber-y-taxistas/273193>.

283. *Id.*

284. R. Petersen, *Is Uber Legal in Costa Rica?*, COSTA RICA LAW (Aug. 13, 2017), <https://costaricalaw.com/costa-rica-legal-topics/driving-in-costa-rica/uber-legal-costa-rica/>.

285. *Id.*

“Costa Rica, since the 1980s, has been considered to have a highly inefficient public transport system.”²⁸⁶ It was “in response to this critical situation that the current government promoted a series of legislative reforms aimed at modernizing the system of remunerated transport of buses and taxis.”²⁸⁷ “At the beginning of 2000, in the midst of these transformations of public transport,” the Public Transport Council was created, together with the enactment of the Law No. 7969/2000, regulating the Public Service of Remunerated Transport of Persons in Vehicles.²⁸⁸

While it was believed that the taxi system had managed to complete its modernization, “. . . a proliferation in private transport services occurred, creating social tensions [especially] with those who provided the service in a regulated manner, [meaning taxis], in accordance with the provisions of Law No. 7969.”²⁸⁹ The Legislative Assembly promoted a series of reforms “that concluded in 2011 with the enactment of Law No. 8955, [regulating the] . . . Public Service of Remunerated Transport of People in Vehicles, . . . that gave way to a new form of individual public transport, which was called the Special Stable Taxi Service permit, better known by its acronym SEETAXI.”²⁹⁰

The entry, in the recent years, of technology platform companies brought new challenges into the Costa Rica legislation, currently endowed with a legal framework designed to regulate traditional business models, such as taxis.²⁹¹ This is one of the reasons why the Legislative Assembly, together with the Executive Power, deemed it necessary to provide the country with a new legislation.²⁹² On January 23, 2019, the deputies introduced a new reform project regulating Uber in Costa Rica —as well as other shared transport app— and updated the taxi mode.²⁹³ The reform project had the aim of regulating the activity carried out by Uber, taxis and future actors

286. Reforma al Sistema de Transporte Remunerado de Personas y Regulación de Las Empresas de Plataformas Tecnológicas de Transporte [Reform of the System of Remunerated Transport of Persons and Regulation of Transport Technology Platform Companies], Asamblea Legislativa de La República de Costa Rica [Legislative Assembly of the Republic of Costa Rica], Jan. 22, 2019, p. 3 (hereinafter Legislative Assembly of the Republic of Costa Rica).

287. *Id.*

288. *Id.*

289. *Id.* at 3–4.

290. *Id.* at 4.

291. Legislative Assembly of the Republic of Costa Rica, *supra* note 286, at 4.

292. *Id.*

293. Federico, *Ley para regular Uber en Costa Rica: ¿cuándo será una realidad?* [Law to Regulate Uber in Costa Rica: When Will it Become a Reality?], CAPPLATAM (Jan. 17, 2019), <https://capplatam.com/ley-uber-costa-rica/>.

entering the Costa Rican market, which provides services of remunerated transport of people, using the so-called “collaborative digital platforms.”²⁹⁴

The Legislative Assembly, in its exposure of the motifs, underlined how the advances in Internet communications, smartphones and online applications have facilitated the development and adoption of paid passenger transport, thus improving mobility.²⁹⁵ This type of service, offered by technology platform companies, has led nations globally to continually review their legislation and public policies.²⁹⁶ In other words, States had to ensure that the national legislations reflect the current state of the economy and guarantees compliance with legal responsibilities, citizen safety and the rights of people who integrate this new type of initiative, under a scheme of fair competition.²⁹⁷

The President of the Republic of Costa Rica, Carlos Alvarado, has declared that the government’s commitment, with this reform project, was to advance in a system where taxis and transportation technology platforms coexist in conditions of fair competition.²⁹⁸ Among the most relevant points, raised in the Reform, is the fact that Transport Platform Companies (EPT), such as Uber, must pay “13% of value added tax (VAT) as well as 8.5% for remittances abroad.”²⁹⁹ In addition, they will be declared as public transportation services and must be registered with the Public Transportation Council (CTP) for legal operation in the country.³⁰⁰ Based on the resources generated by the EPT, a standard of 3% of the operation would be established to create a National Mobility Fund for the modernization of public transportation.³⁰¹ Rodolfo Méndez Mata, Minister of Public Works and Transport (MOPT) described the project as “balanced” and recalled the importance of regulating technological platforms where many citizens find employment.³⁰² To draft the proposal, the Executive Branch investigated the

294. Carlos Ubcó, *Proyecto de ley que regula Uber: ¿realmente resuelve la problemática del servicio de transporte remunerado?* [Draft Legislation on Uber Regulation: Does it Really Solve the Problems of the Paid Transport Services?], *EL MUNDO COSTA RICA* (Feb. 12, 2019), <https://www.elmundo.cr/opinion/proyecto-de-ley-que-regula-uber-realmente-resuelve-la-problematica-del-servicio-de-transporte-remunerado/>.

295. Legislative Assembly of the Republic of Costa Rica, *supra* note 286, at 2.

296. *Id.*

297. *Id.*

298. Julio Naranjo, *Gobierno presentó proyecto de ley con el que pretende regular Uber* [Government Presented Bill With Which it Intends to Regulate Uber], *TELETICA* (Jan. 22, 2019), https://www.teletica.com/216139_gobierno-presento-proyecto-de-ley-con-el-que-pretende-regular-uber.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

matter in cities such as New York, Los Angeles, London, Madrid and Mexico City, where it found an agreement for the coexistence of services.³⁰³

What will happen to Uber in Costa Rica is uncertain.³⁰⁴ Nonetheless, Uber claims that it has been working “within a framework of legality and seeking to be part of the development of Costa Rica.”³⁰⁵ Uber will keep asking the government to listen to the multiple voices that call for the existence of “a regulation that promotes innovation, development and technology.”³⁰⁶

D. *The Comparative Paragraph*

It is obvious, given the analysis above, that it would be wrong to think that Uber and its regulations could be traced back to traditional national transport regulations.³⁰⁷

The legal battles in recent years in Europe and Latin American have demonstrated the need for governments to rethink their approach to new technologies, and review their regulatory instruments to address today's challenges.³⁰⁸

The arrival of Uber internationally has created turbulence in national legislatures who, taken by surprise, had to understand the complexity of the phenomenon and find rules that could regulate these technological and collaborative platforms.³⁰⁹ Governments had to settle disputes arising from the resistance of traditional transport operators and local authorities.³¹⁰ For this reason, governments have been called upon to make decisions.³¹¹ “The demand for sharing services is insatiable and growing, as consumers increasingly rely on technological tools to meet their needs, even in the face of their illegality.”³¹² Therefore, banning new platforms from progress is not

303. Naranjo, *supra* note 298.

304. See 4 claves para entender la situación de Uber en Costa Rica [4 Key Points to Understand the Situation of Uber in Costa Rica], FORBES MEX. (Sept. 5, 2018), <https://www.forbes.com.mx/republica-dominicana-fortalece-relacion-con-chile/>.

305. *Id.*

306. *Id.*

307. De Masi, *supra* note 6, at 83.

308. *Id.* at 84.

309. *Id.*

310. *Id.*

311. *Id.*

312. De Masi, *supra* note 6, at 85.

a long-term solution.³¹³ Rather, sharing services should be made transparent, formalized, and regulated.³¹⁴

In the European Union, as in Latin America, creating legislative uniformity seems to be difficult to achieve.³¹⁵ Technology platforms like Uber function generally the same everywhere, regardless of where their users are located; however, the external effects on local economies appear to be significantly different.³¹⁶ This is the reason why different policies are needed for different cities, and even more so for countries in Europe and Latin America.³¹⁷ However, while many European and South American governments have had a mentality of opposition to new forms of innovation to replace traditional systems, this is slowly giving way to deregulation, opening up the market to new players.³¹⁸ Allowing technology platforms to operate alongside traditional operators will remain a pure political decision.³¹⁹

IV. CONCLUSION

“The Uber case fully embodies an aspiration . . . : that of being modern and in step with market and technology.”³²⁰ “The market tends to age the rules” causing the law to risks being obsolete.³²¹ This Note shows how Uber “did not have the space to express itself as it could.”³²² In fact, “instead of enhancing the value of innovation, there have been different requests, interests and considerations, which place the emphasis not only on the already detected unfair competition, but also on the lack of logic of sharing, on the lucrative purpose of the new entrant, and so on.”³²³

Undoubtedly, the opportunities evidenced by the “Uber revolution are great, connected to the development of the market, to efficiency, to economic recovery and, to offer users a quality service at a low price.”³²⁴ Therefore,

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at 86.

317. De Masi, *supra* note 6, at 87.

318. *Id.* at 89.

319. *Id.* at 90.

320. Belviso, *supra* note 4, at 158.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

the law must change, in order to preserve its usefulness.³²⁵ The courts may also be called upon to suggest solutions to make the legal apparatus more suitable to face the challenge.³²⁶

All that remains, is to wait for national legislatures aware of the fact that the delay creates a never-ending jurisprudential quagmire and expands the function of the Courts beyond their own institutional mission.³²⁷

325. Belviso, *supra* note 4, at 159.

326. *Id.*

327. *Id.* at 160.