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**Regulating the Sharing Economy at the
Legal Frontier: The Case of Uber in the
European Union**

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Abstract

This paper examines the challenges of regulating the sharing economy in the European Union, with a focus on the popular ride-hailing service Uber and the case currently before the European Court of Justice, *Asociación Profesional Élite Taxi v. Uber Systems Spain, S.L.* At the heart of that case is the legal nature of the service Uber provides: is Uber a transport company, or is it an information society service? The dual aspects of the company make it difficult to classify under existing EU law and thus difficult to regulate. This paper evaluates the application of existing EU law to Uber and considers the potential of new harmonized regulation tailored to sharing economy services like Uber.

The paper proceeds in six parts. After a brief introduction, Part II summarizes the regulatory obstacles Uber has encountered in France and Spain to provide context for the legal questions and possible solutions to regulating sharing economy services considered in Parts III–VI. Part III examines the legal nature of Uber under existing EU law. Part IV explores whether Uber has sufficient cross-border elements for the fundamental EU freedom to provide services to apply. Part V evaluates the French and Spanish measures restricting Uber’s activities in those countries for compatibility with EU law. Part VI concludes by arguing in favor of regulating Uber at the EU level, under both existing legislation and under possible future legislation.

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I. Introduction

If you want to call an Uber in the European Union, your ride options will vary depending on where you are. Since Uber first entered the European market in 2009, the popular ride-hailing company has hit roadblocks with local regulators at every turn, with the low-cost Uberpop service currently banned or suspended in Spain, France, Germany, Belgium, the Netherlands, Hungary, and Sweden.¹ Taxi drivers from Bogota² to Cairo³ have demonstrated (often violently) against the company, but opposition within the European Union has been particularly strong, in part because of national laws that can be protective of labor interests at the expense of innovation. Perhaps the most well-known example of European opposition to Uber comes from France, where taxi drivers have smashed cars, burned tires, blocked streets, and disrupted traffic in violent protest against what they perceive as unfair competition and deliberate skirting of the rules to the detriment of traditional taxi drivers.⁴ But while many taxi drivers and regulators

¹ Sam Scheiner, *Uber's 'Not a Taxi Company' Defense on Trial in EU*, WALL ST. J. (Nov. 29, 2016, 11:26 AM), <http://www.wsj.com/articles/ubers-not-a-taxi-company-defense-on-trial-in-eu-1480427094>.

² Adam Justice, *Colombia: Violence Ends with Tear Gas and Arrests as Taxi Drivers Lead Uber Protest in Bogota*, INT'L BUS. TIMES (Mar. 15, 2016), <http://www.ibtimes.co.uk/columbia-violence-ends-tear-gas-arrests-taxi-drivers-lead-uber-protest-bogota-1549640>.

³ Maram Mazen, *Egypt Taxi Drivers Block Major Cairo Street to Protest Uber*, ASSOC. PRESS (Mar. 8, 2016), <http://bigstory.ap.org/article/ff96b31802244e77ae51b657df2b9d2e/witness-says-police-tear-gas-taxi-drivers-protesting-uber>.

⁴ Angelique Chrisafis, *France Hit by Day of Protest as Security Forces Fire Teargas at Taxi Strike*, THE GUARDIAN (Jan. 26, 2016), <http://www.theguardian.com/world/2016/jan/26/french-taxi-drivers-block-paris-roads-in-uber-protest>; Alissa J. Rubin & Mark Scott, *Clashes Erupt Across France as Taxi Drivers Protest Uber*, N.Y. TIMES (June 25, 2015), <http://www.nytimes.com/2015/06/26/business/international/uber-protests-france.html>.

attribute Uber's success to its disregard for or exploitation of existing regulations, Uber views its success as a result of innovation—and it sees any opposition as growth-stifling protectionism.⁵

The tensions between Uber and European regulators have come to a head in *Asociación Profesional Élite Taxi v. Uber Systems Spain, S.L.*, a case currently pending before the European Court of Justice (ECJ).⁶ The court is tasked with resolving a key question that will determine Uber's fate in the EU: is Uber a transport company, or is it an information society service that simply matches third-party drivers with riders through an online platform? If Uber is a transport company, it is subject to national transport regulations, many of which date back to the 1960s.⁷ But if the company is an information society service, it benefits from the freedom to provide services guaranteed under EU law, which limits regulations infringing on that freedom by requiring such measures to be proportionate to the accomplishment of a permissible public interest objective.⁸

Uber has aspects of both an information society service and a transport service, making the company difficult to classify under existing EU law. The dilemma Uber poses to European regulators exposes the shortcomings of current legislation, both EU and national—most of which was written with traditional business models in mind—to a host of new sharing economy

⁵ William Louch, *EU Commission Launches Study on Uber*, PARLIAMENT MAGAZINE (Sept. 1, 2015), <https://www.theparliamentmagazine.eu/articles/news/eu-commission-launches-study-uber>.

⁶ Case C-434/15, *Asociación Profesional Élite Taxi v. Uber Systems Spain, S.L.*, Request for a Preliminary Ruling (Mar. 11, 2015) [hereinafter Request for a Preliminary Ruling], <http://curia.europa.eu/juris/document/document.jsf?text=&docid=170871&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1018770>.

⁷ Emile Picy & Leila Abboud, *French Court Upholds Ban on Uber's Service Using Non-Professional Drivers*, REUTERS (Sept. 22, 2015, 1:15 PM), <http://www.reuters.com/article/us-france-uber-tech-idUSKCN0RM26C20150922>.

⁸ See 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 (Directive on Electronic Commerce), arts. 3.2, 3.4, 2000 O.J. (L 178) 1, 9 [hereinafter "E-Commerce Directive"].

services that operate through online platforms, including the homestay network Airbnb. As Uber’s head of European policy told reporters last summer, “Regulation in some countries was written decades ago before we all carried smartphones in our pockets.”⁹ In light of this uncertainty, this Paper explores the legal nature under existing EU law of the service Uber provides connecting drivers and riders through its technological platform and considers the need for and potential of new EU legislation to fill regulatory gaps, provide legal certainty for service providers, and ensure that the sharing economy continues to grow in Europe in a beneficial way.

The Paper is divided into six parts. Part II briefly summarizes the regulatory obstacles Uber has encountered in France and Spain to provide context for the legal questions and possible solutions to regulating sharing economy services considered in Parts III–VI. Part III examines the legal nature of Uber under existing EU law and concludes the company provides, at the very least, a hybrid information society service that should be subject to regulation at the EU level. Part IV explores whether Uber, if it is at least in part an information society service, has sufficient cross-border elements for the fundamental EU freedom to provide services to apply. Part V evaluates the French and Spanish measures restricting Uber’s activities in those countries for compatibility with EU law—namely, the principle that measures which derogate from the freedom to provide services must not be more restrictive than necessary to achieve Member States’ claimed objectives. Part VI concludes by arguing in favor of regulating Uber at the EU level, under both existing legislation and under possible future legislation that fills existing gaps.

⁹ Mark Scott, *French Law That Banned UberPop Service Survives Legal Challenge*, N.Y. TIMES (Sept. 22, 2015), http://www.nytimes.com/2015/09/23/technology/french-law-that-banned-uberpop-service-survives-legal-challenge.html?_r=0.

II. Legal Challenges to Uber in France and Spain

A. France and the Thévenoud Law

In October 2014, France's much-maligned Thévenoud law came into force, updating the rules on competition for taxi companies and chauffeured cars (the category for non-taxi services known as *voitures de tourisme avec chauffeur*, or "VTCs"). The law also banned Uber's low-cost Uberpop service, which relies on private individuals instead of professional taxi drivers.¹⁰ Shortly thereafter, the Union Nationale des Taxis (a taxi trade association) and three traditional professional chauffeur services sued Uber France and Uber B.V., one of Uber's Dutch subsidiaries, which handles Uber's activities connecting riders and drivers in the European Union. In response, Uber requested that its own constitutional challenges to several major provisions of the law be referred to the Conseil constitutionnel, the body tasked with verifying the constitutionality of France's laws. In particular, Uber challenged three provisions of the Thévenoud law: (1) the prohibition against chauffeured vehicles other than taxis charging a per-kilometer fee; (2) the ban on chauffeured vehicles' use of a smartphone application that uses geolocation technology to show potential riders the location of nearby available vehicles in real-

¹⁰ Conseil constitutionnel [CC] [Constitutional Court] Decision No. 2015-468/469/472, May 22, 2015 (Fr.) [hereinafter May 22, 2015 Conseil constitutionnel Decision], <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-468/469/472-qpc/decision-n-2015-468-469-472-qpc-du-22-mai-2015.143800.html> (English version available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-468/469/472-qpc/version-en-anglais.143998.html>); *France: Constitutional Court Rules on Car-Hiring Services Legislation*, LIBRARY OF CONGRESS GLOBAL LEGAL MONITOR (June 30, 2015), <http://www.loc.gov/law/foreign-news/article/france-constitutional-court-rules-on-car-hiring-services-legislation/>.

time; and (3) the requirement that chauffeured vehicles return to their home base or stop in an authorized parking place after each ride.¹¹

Uber's request was granted, and the Conseil constitutionnel issued its decision in May 2015.¹² The court invalidated the first challenged provision, the prohibition on chauffeured vehicles other than licensed taxis charging a per-kilometer fee, holding that it unjustifiably violated both the freedom of enterprise and the requirement of equality before the law. But the court upheld the other two provisions, reasoning they were justified by the government's interests in preserving public order—specifically, the policing of circulation, waiting on public roads, and standing at rank on public streets—and were not disproportionate in light of these objectives.¹³ In a separate case, Uber challenged another provision of the Thévenoud law that bans Uber's UberPOP service. That provision makes it illegal to connect non-professional drivers with potential customers through a mobile app. Violating this provision is punishable by two years in prison and a 300,000-euro fine.¹⁴ In September, the Conseil constitutionnel upheld the ban.¹⁵

Uber has since opted to take the battle to the EU level, lodging a complaint against France with the European Commission. It also brought complaints against Germany and Spain

¹¹ May 22, 2015 Conseil constitutionnel Decision, *supra* note 10; *France: Constitutional Court Rules on Car-Hiring Services Legislation*, *supra* note 10.

¹² *Id.*

¹³ May 22, 2015 Conseil constitutionnel Decision, *supra* note 10.

¹⁴ CODE DES TRANSPORTS [C. TRANSP.] [TRANSPORTATION Code] art. L. 3124-13 (Fr.), available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029527162&dateTexte=&categorieLien=id>; Bertille Bayart, *Le Cas UberPop Soumis au Conseil Constitutionnel*, LE FIGARO (June 25, 2016, 2:37 PM), <http://www.lefigaro.fr/secteur/high-tech/2015/06/23/32001-20150623ARTFIG00297-le-cas-uberpop-soumis-au-conseil-constitutionnel.php>.

¹⁵ Conseil constitutionnel [CC] [Constitutional Court] Decision No. 2015-484, Sept. 22, 2015 (Fr.), <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-484-qpc/decision-n-2015-484-qpc-du-22-septembre-2015.144387.html>.

for their bans on Uberpop, which both Member States claim fails to comply with local transportation laws.¹⁶ Uber alleged that France, Spain, and Germany are in violation of Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU), which provide for the freedom of establishment and the freedom to provide services, respectively.¹⁷ Concerned that the Thévenoud law will set a bad precedent for stifling innovation, the Commission has increased pressure on France to change the law.¹⁸ As of April 2016, the Commission was reportedly preparing a letter of formal notice, which is “the first stage of an infringement procedure where Brussels suspects that a national measure breaches the EU treaties.”¹⁹ And in March 2016, the Conseil d’État—a national body that serves the dual function of legal adviser to the executive branch and supreme court for administrative justice—ruled that the Thévenoud law’s ban on chauffeured cars’ use of geolocation technology was illegal and that France should have notified the European Commission before enacting the measure.²⁰ If France and the Commission cannot come to an agreement, the Commission could refer the matter to the ECJ.²¹

¹⁶ Tom Fairless, *Uber Files Complaints Against European Governments Over Ban*, WALL ST. J. (Apr. 1, 2015), <http://www.wsj.com/articles/uber-files-complaints-against-european-governments-over-bans-1427885946>.

¹⁷ Consolidated Version of the Treaty on the Functioning of the European Union arts. 49, 56, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]; Julia Fioretti, *Uber Files Complaints Against German and Spanish Bans*, REUTERS (Apr. 1, 2015, 8:39 AM), <http://www.reuters.com/article/us-uber-eu-complaint-idUSKBN0MS4BH20150401>.

¹⁸ Sam Schechner & Valentina Pop, *EU Raises Pressure on France Over Transport Law After Uber Complaint*, WALL ST. J. (May 28, 2015), <http://www.wsj.com/articles/eu-raises-pressure-on-france-over-transport-law-after-uber-complaint-1432829597>.

¹⁹ Julia Fioretti, *EC to Challenge French Taxi Law After Uber Complaint*, REUTERS (Apr. 19, 2016, 6:11 AM), <http://www.reuters.com/article/us-eu-uber-tech-france-idUSKCN0XG0Z0>.

²⁰ Guillaume Périssat, *Uber Gagne Devant le Conseil d’État et s’autorise la Géolocalisation*, L’INFORMATICIEN (Mar. 10, 2016, 2:06 PM), <http://www.linformaticien.com/actualites/id/39807/uber-gagne-devant-le-conseil-d-etat-et-s-autorise-la-geolocalisation.aspx#sthash.VRFkvkpG.dpuf>.

²¹ Fioretti, *supra* note 19.

B. Spain and the Asociación Profesional Élite Taxi Case

Like their French counterparts, Spanish taxi drivers vehemently opposed Uber when the company first entered the Spanish market because of the competition it poses to traditional taxis. In October 2014, when Uber attempted to introduce its technology in Spain, Barcelona's licensed taxi-drivers association, the Asociación Profesional Élite Taxi, went to court asking for a declaration that Uber was trading in breach of Spanish unfair competition law. It also asked the court for damages and an injunction to stop the use of Uber's digital platform in Spain.²² In August 2015, a Barcelona judge referred the case, *Asociación Profesional Élite Taxi v. Uber Systems Spain, S.L.*, to the European Court of Justice (ECJ), asking the court to decide on four related questions about Uber's legal status and the fundamental freedoms the company argues it is entitled to under EU law.²³ Specifically, the ECJ is being asked to decide whether Uber should be classified as a transport company or a digital service provider, also known as an information society service in EU law.²⁴ The distinction is critical: transport is largely within the jurisdiction of the Member States, whereas the EU has the power to regulate information society services across Member States.²⁵ If the Court concludes Uber is an information society service that should benefit from the EU freedom to provide services, it will also need to determine whether Spain's restrictions are contrary to EU law.²⁶

²² *Case C-434/15, Asociación Profesional Élite Taxi – Uber's New Software Destroys the Old Order of Labour*, EU LAW RADAR, (Aug. 13, 2015), <http://eulawradar.com/case-c-43415-asociacion-profesional-elite-taxi-ubers-new-software-destroys-the-old-order-of-labour/>.

²³ Request for a Preliminary Ruling, *supra* note 6.

²⁴ *Id.*

²⁵ Murad Ahmed, *Judge Refers Spanish Uber Case to European Court of Justice*, FINANCIAL TIMES (July 20, 2015, 3:50 PM), <http://www.ft.com/intl/cms/s/0/02e83fde-2ee6-11e5-8873-775ba7c2ea3d.html#axzz47ninosn7>.

²⁶ Request for a Preliminary Ruling, *supra* note 6.

The parties presented their arguments at a hearing before the ECJ in late 2016. Uber contends it provides an information society service, connecting riders with third-party drivers through its smartphone-based app. At the hearing, Uber’s lawyer emphasized the services Uber provides “can’t be reduced to merely a transport service” and stressed that reducing “unnecessary barriers to information society services is critical in the development of the digital single market.”²⁷ But the taxi association counters that Uber is merely a traditional taxi service and thus should be subject to the same national transport laws as other taxi companies, including the requirement of obtaining prior authorization in order to operate.²⁸ At the ECJ hearing, counsel for the taxi drivers argued Uber’s business model “could undermine the rights of consumers” and urged the court “not [to] be misled by labels.”²⁹

Other EU Member States have entered the fray, with the Netherlands siding with Uber and France and Spain siding with the Spanish taxi association.³⁰ The European Commission, which recently issued non-binding guidelines encouraging Member States to clarify how their tax regulations apply to sharing-economy companies,³¹ has also backed Uber.³² Ireland—which, as the European domicile of Google, Facebook, and Twitter, is wary of being viewed as unfriendly to tech—has charted a middle course, arguing Uber works “in the field of

²⁷ Mark Scott, *Uber, Seeking to Expand, Defends Itself at Europe’s Highest Court*, N.Y. TIMES (Nov. 29, 2016), <http://www.nytimes.com/2016/11/29/technology/uber-europe-court.html>.

²⁸ CMS DeBacker, *European Court of Justice to Rule on the Type of Service Uber Provides*, LEXOLOGY (Oct. 29, 2015), <http://www.lexology.com/library/detail.aspx?g=840f9e63-3b54-43ca-a4d3-6db8418477e8>.

²⁹ Scott, *supra* note 27.

³⁰ *Id.*

³¹ David Schrieberg, *Uber Has Its Day in Europe’s Highest Court*, FORBES (Nov. 28, 2016, 4:51 PM), <http://www.forbes.com/sites/davidschrieberg1/2016/11/28/uber-has-its-day-in-europes-highest-court/#2335107d6d8a>.

³² Scott, *supra* note 27.

transportation” but is not necessarily a transportation company.³³ Whatever the court decides, its conclusions will surely influence whether and how the EU regulates Uber and other ride-hailing services in the future. A decision is not expected until April 2017 at the earliest.³⁴

III. Legal Nature of Uber’s Connectivity Service³⁵

A. Information Society Service

Uber’s digital platform easily satisfies the EU definition of an information society service, which EU Directive 98/34/EC defines as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of

³³ Leonid Bershidsky, *EU Court Will Resolve Uber’s Identity Crisis*, BLOOMBERG VIEW (Nov. 30, 2016, 7:29 AM), <https://www.bloomberg.com/view/articles/2016-11-30/taxi-or-tech-eu-court-will-rule-on-uber-s-identity>.

³⁴ *Id.*

³⁵ The legal nature of the services Uber provides is the central question before the ECJ, but the parties even disagree on exactly what those services are. Uber claims two services are being provided—a connectivity service and a transport service—with Uber providing only the first. Uber defines itself in Spain, France, the United States, and elsewhere as a technological platform that connects riders and third-party drivers. See *UBER B.V.: Términos y Condiciones*, UBER, <https://www.uber.com/legal/terms/es/> (last updated Mar. 1, 2016); *UBER B.V.: Conditions Générales*, UBER, <https://www.uber.com/legal/terms/fr/> (last updated Feb. 18, 2016); *Terms and Conditions*, UBER, <https://www.uber.com/legal/terms/us/> (last updated Jan. 2, 2016). The taxi drivers, on the other hand, characterize Uber as providing a transport service, notwithstanding the company’s digital platform.

This Part considers both arguments and concludes that under existing EU law, Uber should be considered at least in part an information society service. Thus, its technology should benefit from the freedom of establishment and freedom to provide services guaranteed by the Treaty on the Functioning of the European Union (TFEU) and various EU Directives. See TFEU, *supra* note 17, arts. 49, 56. But the difficulty in separating Uber’s connectivity services from its transport activities also cuts in favor of creating a new regulatory category for “transportation network companies,” as the U.S. state of California has already done. See Tomio Geron, *California Becomes First State To Regulate Ridesharing Services Lyft, Sidecar, UberX*, FORBES (Sep. 19, 2013, 3:40 PM), <http://www.forbes.com/sites/tomiogeron/2013/09/19/california-becomes-first-state-to-regulate-ridesharing-services-lyft-sidecar-uberx/#311939c067fe>. The possibility of creating a similar regulatory category in the European Union is discussed in the Conclusion of this Paper.

services.”³⁶ The Directive explains, “‘at a distance’ means that the service is provided without the parties being simultaneously present”; “‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means”; and “‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request.”³⁷

Uber’s connectivity technology, which is available as a free smartphone app, fits this definition perfectly. Uber technology functions as follows: To request a ride through the app, the rider taps on a digital map to set her pickup location. A driver accepts the request, and the rider enters the name or address of her destination. The rider can see details about the driver and the vehicle, and she can track the driver’s arrival on the map. When the ride ends, fares are automatically charged to the rider’s credit card, and the rider can anonymously rate the driver on a five-star scale.³⁸ All four requirements in the 1998 Directive are thus easily met: riders individually request rides, drivers respond, and Uber handles payments between the parties, all through Uber’s smartphone app. Accordingly, Uber’s connectivity technology—notwithstanding any possible transportation aspects of the company—qualifies as an information society service and should receive the protections of EU law.

³⁶ 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 and of Rules on Information Society Services, art. 1.2, 1998 O.J. (L 204) 37.

³⁷ *Id.*

³⁸ *Ride*, UBER, <https://www.uber.com/ride/> (last visited Apr. 12, 2016).

B. Electronic Intermediary or Transport Service

In *Asociación Profesional Élite Taxi*, the ECJ must also consider whether Uber qualifies as an electronic intermediary or transport service.³⁹ Electronic intermediary can be easily ruled out. Although EU legislation does not contain a legal definition of an electronic intermediary service, several provisions of the 2000 E-Commerce Directive afford privileges to electronic intermediary service providers, which offer mere conduit, caching, or hosting services. Articles 12–14 of the Directive limit the liability of such service providers for third-party illegal content, subject to certain conditions.⁴⁰ But none of these aspects of electronic intermediary service providers apply to Uber, which actively facilitates rides by connecting drivers and riders with geolocation technology and processes payments through its smartphone technology. Uber is unlike a general communication network, which is confined “solely . . . [to] the transmission of information originating from third parties and the provision of access through a communication network.”⁴¹ Nor does Uber merely offer “caching facilities”⁴² or simply “store information supplied by and at the request of a recipient of the service.”⁴³

The transportation aspects of the company, however, make the transportation service argument more complicated.⁴⁴ The parties in *Asociación Profesional Élite Taxi* are split, with the Spanish taxi drivers arguing Uber provides a transport service, much like a traditional taxi company. Transport services are specifically excluded from the 2006 Services Directive and are

³⁹ Request for a Preliminary Ruling, *supra* note 6.

⁴⁰ E-Commerce Directive, *supra* note 8, arts. 12-14.

⁴¹ *Id.* art. 12.

⁴² *Id.* art. 13.

⁴³ *Id.* art. 14.

⁴⁴ Notwithstanding the aspects of Uber that resemble a transport service, however, Uber’s technology should still benefit from the freedom to provide services, discussed in Part III.

largely within the purview of national regulatory authorities.⁴⁵ Uber, of course, differentiates itself from traditional taxi companies because of its innovative two-way connectivity service. Some commentators agree. Damien Geradin, a professor at Tilburg University in the Netherlands, has opined that Uber is an information society service, not a transport company, because the company “does not create value by performing transport services, but by enabling direct interactions between two distinct categories of users.”⁴⁶ Similar to eBay or Airbnb, “Uber’s platform is also two-sided in that the two sides that the platforms connects (partner-drivers and riders) are linked by ‘indirect network effects’ in that a large number of drivers benefits riders, and vice-versa. Traditional taxi companies hold none of these features.”⁴⁷ Moreover, Nils Wahl, an advocate general at the ECJ, has opined, “if the service in question does not mainly involve actual transport, then the mere fact that it can be linked in one way or another with transport does not in itself mean that it ought to be characterized as such.”⁴⁸

The ECJ has previously counseled that, in considering whether a service with several competing aspects should be classified as a transport service, “it is necessary to consider what the main purpose of the service at issue is.”⁴⁹ Applying this approach, Uber’s main purpose is connecting riders and drivers—not transporting people. For one, Uber does not own any cars: drivers use their personal vehicles to transport riders. Drivers and riders use Uber’s digital

⁴⁵ According to Recital 21 of the Services Directive, “Transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this directive.” Directive 2006/123/EC, of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, 2006 O.J. (L 376) 36, 39 [hereinafter “Services Directive”].

⁴⁶ Damien Geradin, *Online Intermediation Platforms and Free Trade Principles – Some Reflections on the Uber Preliminary Ruling Case 9* (April 5, 2016), available at <https://ssrn.com/abstract=2759379>.

⁴⁷ *Id.*

⁴⁸ Bershidsky, *supra* note 33.

⁴⁹ Judgment of the Court of 1 October 2015, § 51, Joined Cases C-340/14 and C-341/14, R.L. Trijber and J. Harmsen, 2015 [E.C.R.] I-0000.

platform in order to be connected, and nothing more. Uber riders can request a car at any time from wherever they are, view information about their driver, and watch the driver approach their location. And drivers can drive with the Uber technology for any length of time, as short or as long as they wish. To complete the connection, Uber processes all payments between riders and drivers. Thus, although Uber may resemble a taxi company in some respects because it facilitates the transportation of passengers, the service's distinctive and defining feature is its ability to connect drivers and riders through its digital platform.

IV. Applicability of the Freedom to Provide Services

A. Uber's Place of Establishment

Assuming Uber's digital platform is an information society service, the question remains whether Uber should benefit from the protections for freedom to provide services afforded by the TFEU and EU secondary legislation. Article 56 TFEU provides, in relevant part, that "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."⁵⁰ According to the EU E-Commerce Directive, an "established [information society] service provider" is one who "effectively pursues an economic activity using a fixed establishment for an indefinite period," but "[t]he presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of this provider."⁵¹ The Directive adds that a service provider's place of establishment should be determined pursuant to ECJ case law, "according to which the concept of establishment involves the *actual pursuit of an economic activity through a fixed*

⁵⁰ TFEU, *supra* note 17, art. 56.

⁵¹ E-Commerce Directive, *supra* note 8, art. 2(c).

establishment for an indefinite period.”⁵² For a company providing services via an Internet website (or presumably a smartphone app), the place of establishment “is *not* the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity.”⁵³

Under this definition, Uber is established in the Netherlands, where its subsidiary Uber B.V. is located. At least forty-eight employees work at Uber B.V.’s brick-and-mortar office in Amsterdam, though there are likely more employees than that.⁵⁴ As of May 2016, Uber’s website listed more than sixty open positions in the Netherlands ranging from software engineer to legal counsel to data scientist.⁵⁵ Uber B.V. is responsible for, among other things, processing payments and handling law enforcement requests. Whenever a passenger takes an Uber ride in the European Union, the payment is sent to Uber B.V., which then sends approximately eighty percent of that payment back to the driver via another Dutch subsidiary.⁵⁶ Uber’s website also directs law enforcement requests outside the United States to Uber B.V. and lists an Amsterdam address, as well as a special “Law Enforcement Response Team,” based in Amsterdam.⁵⁷ Finally, the “Terms and Conditions” webpages for various EU Member States list Uber B.V. as the service provider, rather than Uber’s local subsidiaries.⁵⁸

⁵² *Id.* recital 19 (emphasis added).

⁵³ *Id.* (emphasis added).

⁵⁴ Brian O’Keefe & Marty Jones, *How Uber Plays the Tax Shell Game*, FORTUNE (Oct. 22, 2015), <http://fortune.com/2015/10/22/uber-tax-shell/>.

⁵⁵ *Careers: Open Roles (Netherlands)*, UBER, <https://www.uber.com/careers/list/?city=all&country=netherlands&keywords=&subteam=&team=> (last visited May 5, 2016).

⁵⁶ O’Keefe & Jones, *supra* note 54.

⁵⁷ *Uber Guidelines for Law Enforcement Authorities*, UBER, <https://www.uber.com/legal/other/guidelines-for-law-enforcement/> (last visited May 5, 2016).

⁵⁸ *See, e.g., Nutzungsbedingungen*, Uber, <https://www.uber.com/legal/terms/de/> (last visited May 12, 2016); *UBER B.V.: Términos y Condiciones*, UBER, <https://www.uber.com/legal/terms/es/> (last updated Mar. 1, 2016).

Although there are Uber subsidiaries in each country where Uber operates, these subsidiaries function merely as “support services” businesses and do not reap direct revenues from rides taken locally. Instead, Uber B.V. supplies funds to local subsidiaries to market the Uber brand. For example, Uber B.V. pays Uber Italy to market the Uber brand in Milan and Rome, but the Italian subsidiary does not connect riders and drivers or process their ride payments. Thus, Uber should be considered established in the Netherlands for purposes of the freedoms guaranteed by EU law.⁵⁹

B. Cross-Border Elements of Uber’s Connectivity Services

Even if Uber is indeed established in the Netherlands through Uber B.V., its connectivity service must still have a cross-border element in order to receive the protections of the freedom to provide services.⁶⁰ Uber must demonstrate there is a cross-border element to connecting riders and drivers and processing payments, which may seem difficult at first glance, since riders and drivers (and their mobile phones) are almost always located within the same Member State for each ride. Nevertheless, Uber’s connectivity service *always* involves information and money crossing borders. Uber B.V. processes the payments for every ride taken in Europe. If a rider takes an Uber ride in Paris or Madrid, her payment actually crosses borders twice: it is sent from her phone to Uber B.V. in the Netherlands, which retains about 20% of the payment and then sends approximately 80% back to the driver’s phone in Paris or Madrid via another Dutch

⁵⁹ The fact that Uber uses third-party providers to handle its servers (including Peak Hosting, a company with locations across the U.S. and Europe) does not compel a different conclusion, since the E-Commerce Directive provides that it is the place where the company pursues its *economic* activity that matters. See Maya Kosoff, *Uber’s Technology Is Reportedly “Hanging by a Thread”—but the Company’s CTO Is Getting It Together*, BUSINESS INSIDER (Sept. 21, 2015, 12:06 PM), <http://www.businessinsider.com/ubers-technology-is-reportedly-hanging-by-a-thread-but-the-company-has-a-new-cto-to-get-it-together-2015-9>.

⁶⁰ See TFEU, *supra* note 17, art. 56; E-Commerce Directive, *supra* note 8, arts. 1.1, 3.2.

subsidiary. And in addition to processing payments across borders, the bulk of Uber's European operation is in the Netherlands. Software engineers, legal counsel, and research and accounting professionals, among others—all of whom provide support services for riders and drivers throughout the EU—are based at Uber B.V.⁶¹

Whether these aspects of Uber are sufficient to meet the cross-border requirement of the freedom to provide services remains an open question. The ECJ has never ruled that information crossing borders brings a service within the protections afforded by the freedom to provide services, but neither has it foreclosed the possibility. In the 1991 case *Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and Others*, the court declined to hold that the provision of information within one Member State *about* a service provided in another Member State was protected by the freedom to provide services,⁶² but it left for another day the questions raised by a situation where aspects of a service *itself* travel between Member States. The 1991 case involved student associations in Ireland that published information about the availability of legal abortions in the United Kingdom, as well as the contact and location information for a number of abortion clinics there.⁶³ Abortion was illegal in Ireland but legal in the United Kingdom.⁶⁴ The Society for the Protection of Unborn Children (SPUC) sued in the High Court of Ireland, asking for both a declaration that distributing the information was unlawful and an injunction.⁶⁵ In defense, the students claimed their activities were protected by the freedom to provide services.⁶⁶

⁶¹ *Careers: Open Roles (Netherlands)*, *supra* note 55.

⁶² Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and Others*, Judgment, 1991 E.C.R. I-4741.

⁶³ *Id.* I-4735-36.

⁶⁴ *Id.* I-4735.

⁶⁵ *Id.* I-4736.

⁶⁶ *Id.* I-4740-41.

The High Court stayed the proceedings and referred several questions to the Court of Justice of the European Communities (as the ECJ was then called), including the question whether there was a right in European Community law for “a person in Member State A to distribute specific information about the identity, location, and means of communication with a specified clinic or clinics in Member State B where abortions are performed,” where abortion is illegal in Member State A but lawful in Member State B.⁶⁷ The Court of Justice concluded there was no cross-border element to the distribution of information within Ireland, since the U.K. clinics themselves had no involvement in the distribution of the information.⁶⁸ Therefore, the student associations’ activities were not protected by the freedom to provide services, and Ireland could lawfully prohibit them from distributing information about abortion services in the U.K.⁶⁹

Information society services like the Uber app enable information and money to cross borders in ways that simply were not possible in 1991, when *Society for the Protection of Unborn Children* was decided, making it difficult to predict how the ECJ might rule today. The uncertainty the Uber case raises for existing case law suggests the ECJ will need to revisit the issue in *Asociación Profesional Élite Taxi*, for it is currently unclear whether payments and other information crossing borders triggers the protections afforded by the freedom to provide services. If the ECJ deems these elements sufficiently cross border, then Member States’ ability to ban or restrict the use of Uber technology will be substantially limited by the EU law principle of proportionality, discussed below.

⁶⁷ *Id.* I-4735-37.

⁶⁸ *Id.* I-4741.

⁶⁹ *Id.*

V. Validity of Restrictions on Uber’s Connectivity Services

A. Grounds for Derogations

Although EU law guarantees the freedom to provide services, this freedom is not absolute. The E-Commerce Directive provides, “Member States may not . . . restrict the freedom to provide information society services from another Member State,”⁷⁰ unless they meet certain requirements. Measures that “derogate from” the freedom to provide information society services are permissible only if they are (i) necessary for public policy, protecting public health, public security, or protecting consumers; (ii) “taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives”; and (iii) “proportionate to those objectives.”⁷¹ As ECJ case law makes clear, it is usually not difficult for Member States to identify acceptable objectives that justify measures derogating from the freedom to provide services;⁷² proportionality thus becomes the heart of the inquiry for derogations from the four fundamental freedoms.

The seminal case on measures that derogate from fundamental EU freedoms was *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, in which the ECJ considered an Italian measure restricting the freedom of establishment.⁷³ Reinhard Gebhard was a German national with a German law degree who moved to Italy in 1978 to join his wife, an

⁷⁰ E-Commerce Directive, *supra* note 8, art. 3.2. This Paper analyzes restrictions on Uber’s freedom to provide its connectivity services under the E-Commerce Directive, rather than under the Services Directive, because the former deal with information society services in particular and thus is applicable under the doctrine of *lex specialis*.

⁷¹ *Id.* art. 3.4

⁷² In the case of Uber, Member States would look to the grounds for derogation in Article 3 of the E-Commerce Directive, rather than looking directly to the TFEU to identify grounds for derogation, since the Directive essentially codifies ECJ case law and has not been challenged for inconsistency with the TFEU.

⁷³ Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, Judgment, 1995 E.C.R. I-4186.

Italian national, and their three children. Initially, Gebhard served as a collaborator; later on, he served as an associate of a set of chambers of lawyers practicing in Milan. In 1989, however, Gebhard opened his own chamber in Milan and called himself an *avvocato* (or “attorney at law”). A number of Italian practitioners, including Gebhard’s former colleagues, lodged a complaint with the Milan Bar Council, arguing Gebhard did not possess the general qualifications required to use the name *avvocato*. Despite a Bar Council directive for the recognition of higher-education diplomas, and Gebhard’s ten years of experience working in Italy, the Bar Council concluded Gebhard lacked the necessary qualification and prohibited him from using the title *avvocato*. The Council also sanctioned the suspension of Gebhard’s professional activity for six months.⁷⁴ Gebhard appealed the decision, and the Council referred several questions relating to the freedom of establishment to the Court of Justice.⁷⁵

The Court of Justice ruled that national measures which might “hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty” must meet four conditions: they “must be applied in a nondiscriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.”⁷⁶ In the case of Uber, a court would probably accept Member States’ stated reasons for banning or restricting Uber—which include preserving public order⁷⁷ and preventing unfair competition⁷⁸—and proceed to whether the restrictions go beyond what is necessary to achieve the stated objectives, a more stringent inquiry.

⁷⁴ *Id.* at I-4189-91.

⁷⁵ *Id.* at I-4193.

⁷⁶ *Id.* at I-4196-98.

⁷⁷ May 22, 2015 Conseil constitutionnel Decision, *supra* note 10.

⁷⁸ CMS DeBacker, *supra* note 28.

B. Principle of Proportionality

Pursuant to the principle of proportionality announced in *Gebhard*, national measures that derogate from the freedoms guaranteed by EU law must go no further than necessary to achieve the objectives identified by the Member State. The ECJ has interpreted this principle strictly. In 1979, in *Rewe-Zentral AG v. Bundesmonopol-verwaltung für Branntwein* (also known as the *Cassis de Dijon* case), the court considered whether Germany's Branntweinmonopolgesetz regulation, which required products sold as fruit liqueur to have a minimum alcoholic content of 25%, was a permissible derogation from the free movement of goods.⁷⁹ Crème de cassis produced in Germany satisfied this standard whereas French Cassis traditionally had an alcoholic content of between 15% and 20%. Rewe-Zentral AG, a Cologne-based importer that wished to market Cassis de Dijon in Germany, challenged the German measure in a local court, arguing the measure had an effect equivalent to a quantitative restriction on trade in violation of the Treaty of Rome.

The local court stayed the proceedings and referred several questions to the Court of Justice for a preliminary ruling, including the question whether fixing a minimum wine-spirit content violated the principle of free movement of goods.⁸⁰ The court accepted Germany's argument that the 25% requirement was justified as a measure to prevent consumer confusion, but it held the measure failed to meet the principle of proportionality. There were other ways for Germany to achieve the same objective, which were less restrictive than the 25% requirement. The court reasoned, "it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the

⁷⁹ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Judgment, 1979 E.C.R. I-00649.

⁸⁰ *Id.* at 651-52.

packaging of products.”⁸¹ And, the court noted, the practical effect of the 25% requirement was “to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other member states which do not answer that description.”⁸² Thus, the German measure impermissibly restricted the free movement of goods.

In 1991, in *Manfred Säger v. Dennemeyer & Co. Ltd*, the Court of Justice likewise ruled a restrictive German law was not a permissible derogation from the freedom to provide services, because it went beyond what was necessary to protect the recipients of the services in question and was thus incompatible with EU law.⁸³ At the time, German law reserved patent renewal services—which entail monitoring patents, informing the patent holder when patent renewal fees become due, and paying patent renewal fees on behalf of the patent holder⁸⁴—to licensed patent agents.⁸⁵ Dennemeyer & Co., a U.K. company that specialized in patent renewal services but did not possess the German qualification, offered its services in Germany at a lower rate than that charged by German patent agents.⁸⁶ Manfred Säger, a patent agent in Munich, challenged Dennemeyer’s actions in court, contending the company was violating German law.⁸⁷

After the local court dismissed Säger’s complaint, Säger appealed to the Higher Regional Court in München, which referred to the Court of Justice the question whether Dennemeyer was required to obtain a permit as specified by German law, even though the company did not need a permit under the laws of many other EU Member States.⁸⁸ The court concluded the German law was inconsistent with Article 59 of the Treaty of Rome, which dealt with the abolishment of

⁸¹ *Id.* ¶¶ 12-13.

⁸² *Id.* ¶ 14.

⁸³ Case C-76/90, *Manfred Säger v. Dennemeyer & Co. Ltd.*, Judgment, 1991 E.C.R. I-04221.

⁸⁴ *Id.* ¶ 3.

⁸⁵ *Id.* ¶ 6.

⁸⁶ *Id.* ¶ 4.

⁸⁷ *Id.* ¶ 2.

⁸⁸ *Id.* ¶ 1.

restrictions on the freedom to provide services within the European Community.⁸⁹ The court emphasized that EU law required “the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.”⁹⁰

The court accepted Germany’s stated objective—consumer protection—but held that the German law went beyond what was necessary to achieve that end. National legislation that reserves the provision of services “to certain economic operators possessing certain professional qualifications” not only had to be “justified by imperative reasons relating to the public interest,” it also had to be “objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services” and could not “exceed what is necessary to attain those objectives.”⁹¹ According to the court, the German measure made offering patent renewal services in Germany contingent upon possessing “a professional qualification which [was] quite specific and disproportionate to the needs of the recipients.”⁹² The court reasoned, “neither the nature of [patent renewal services] . . . nor the consequences of a default on the part of the person providing the service justify[d] reserving the provision of that service to persons possessing a specific professional qualification, such as lawyers or patent agents.”⁹³

C. Application to the French and Spanish Measures

Cassis de Dijon and *Säger* establish that the principle of proportionality is to be applied strictly to measures that derogate from freedoms guaranteed by EU law, including the freedom to

⁸⁹ *Id.* ¶ 21.

⁹⁰ *Id.* ¶ 12.

⁹¹ *Id.* ¶¶ 13-15.

⁹² *Id.* ¶ 17.

⁹³ *Id.* ¶ 20.

provide services. A brief evaluation of the French and Spanish restrictions on Uber's ability to offer its technology suggests these measures are inconsistent with EU law, because they go beyond what is necessary to achieve their claimed objectives.

To begin, although the Conseil constitutionnel concluded France's ban on chauffeured vehicles' use of geolocation technology was not disproportionate to the government's interest in policing circulation, waiting on public roads, and standing at rank on public streets, the ban likely *does* exceed what is necessary to meet those objectives. The ban's practical effect is to promote traditional taxis (and their drivers) while excluding chauffeured vehicles like Uber. This discriminatory effect is similar to the labeling requirement in *Cassis de Dijon*, which promoted German crème de cassis and restricted its French counterpart. And although traffic control is a legitimate objective, restricting geolocation technology to traditional taxis actually undermines that goal. The use of geolocation technology likely *improves* the flow of traffic, since riders can track their driver's progress and meet the vehicle when it arrives. Uber's on-demand connectivity service streamlines the process for both drivers and riders, making it easier to find a driver (or a passenger) and reducing congestion on sidewalks and streets. Reserving the use of such technology to traditional taxi drivers does not further the government's claimed interests; instead, it favors traditional taxis and suppresses competition from drivers using Uber technology.

Though it is difficult to speculate without more facts, the French government's recent actions seem to confirm that the geolocation technology ban goes beyond what is necessary to serve the government's interests and is a disguised attempt to favor a particular type of service provider—traditional taxi drivers. In August 2016, the French government informed the European Commission that it wanted to create a government-made, Uber-like “availability

register” for the regular taxi industry in order to modernize the industry and “optimise [sic] the monopoly over cruising, extended to electronic cruising, in order to improve the meeting of supply and demand for taxis.”⁹⁴ Not only does this proposal reveal that the French government’s true objective is likely to protect incumbent taxi drivers from the competition posed by Uber and similar services, it also suggests the restrictions in the Thévenoud law may be invalid for an additional reason: France failed to notify the Commission before enacting the law, as required by the TFEU. The fact that the government notified the Commission of its plans for the availability register could be taken as an admission of error.⁹⁵

Spain’s restrictive measures also likely violate the principle of proportionality. Spanish courts banned the use of Uber technology on the grounds that Uber lacks the authorization to operate in Spain, and thus, its drivers have been acting anti-competitively. After a judge in Madrid ordered Uber to stop all its activities there, Uber was unable to ignore the ban, because the judge actually “ordered financial service companies to stop processing payments for Uber, and telecoms operators to block access to the app.”⁹⁶ Although the government’s interest in preventing unfair competition appears valid, that objective could be achieved through less restrictive means than an outright ban. Nothing in the nature of driving services justifies limiting them to state-licensed taxi drivers, when other, less-restrictive measures could further the same interest. An outright ban on Uber technology actually undermines fair competition: with Uber out of the picture, consumers are left with no choice but to take a traditional taxi. Uber

⁹⁴ Zoya Sheftalovich, *Uber Picks up Speed: Developments in France and Spain Will Have a Significant Impact on the Way Uber Operates in Europe*, POLITICO (Aug. 13, 2015, 4:34 PM), <http://www.politico.eu/article/uber-complaint-european-governments-anti-uber-laws-ride-sharing/>.

⁹⁵ *Id.*

⁹⁶ *Id.*

technology, in contrast, allows riders to rate their drivers (and vice versa),⁹⁷ which incentivizes higher quality, safer driving services. If Spain was also concerned about consumer safety, it could have required background checks and other safety measures, as already required in many other jurisdictions.⁹⁸ In Spain as in France, the practical effect of the ban on Uber technology is to protect traditional taxi drivers from an innovative and potentially safer competitor. If the ECJ reaches the same conclusion, the case for regulation at the EU level to preclude these types of anti-competitive, protectionist measures will be even stronger.

VI. Conclusion

Regardless of what conclusions the ECJ reaches, the challenges in regulating Uber and other sharing economy services are not going away anytime soon, underscoring the need for harmonized regulation at the EU level. Since Uber burst onto the scene in 2009, it has fundamentally changed the way that services are provided, both within and outside of the transportation sector. “To Uber” has become a verb,⁹⁹ and a host of new apps facilitating services ranging from shopping to cleaning to supplying medical marijuana have become known as the “Uber” of their respective fields.¹⁰⁰ The legal and practical uncertainties surrounding these services could have a significant impact on the European economy, which is already straining under high unemployment in certain Member States, including France and Spain.¹⁰¹ A

⁹⁷ *Details on Safety*, UBER NEWSROOM (July 15, 2015), <https://newsroom.uber.com/details-on-safety/>.

⁹⁸ *Trip Safety: Our Commitment to Riders*, UBER, <https://www.uber.com/ride/safety/> (last visited May 19, 2016).

⁹⁹ Sarah Brown, *5 Tech Companies that Became Verbs*, KSL.COM (Feb. 23, 2016, 11:59 AM), <https://www.ksl.com/?sid=38622802>.

¹⁰⁰ Geoffrey Fowler, *There's an Uber for Everything Now*, WALL ST. J. (May 5, 2015, 1:09 PM), <http://www.wsj.com/articles/theres-an-uber-for-everything-now-1430845789>.

¹⁰¹ In the first quarter of 2016, the unemployment rate in France was higher than ten percent of the working population. *Le Taux de Chômage est Stable au Premier Trimestre 2016*,

recent study cited by the European Commission estimates the five main sharing economy sectors (peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing, and music video streaming) have the potential to increase global revenues from around thirteen billion euros right now to three hundred billion euros by 2025.¹⁰² Services like Uber have a clear European dimension and form part of the Digital Single Market.¹⁰³ Continuing to regulate these services at the national level would frustrate the goals of EU legislation on services—which include simplifying the cross-border provision of services, strengthening consumers’ rights, and ensuring easier access to a wide range of services—and perpetuate the existing legal uncertainty, generating high costs for consumers and service providers and inhibiting the growth of the sharing economy in Europe.¹⁰⁴

As this Paper makes clear, existing EU laws are a clumsy fit for Uber, which undeniably fits the definition of an information society service but has aspects of a transport company. New EU legislation could accommodate the unique nature of ride-hailing companies, perhaps by creating a new regulatory category for “transportation network companies” (TNCs), as California has already done. California requires TNCs to obtain a license from the California Public

INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES, http://www.insee.fr/fr/themes/info_rapide.asp?id=14 (last visited May 12, 2016). During the same period, Spain’s unemployment rate hit twenty-one percent. Joanna Ferreira, *Spain Unemployment Rate*, TRADING ECONOMICS (Apr. 28, 2016, 8:34 AM), <http://www.tradingeconomics.com/spain/unemployment-rate>.

¹⁰² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on Upgrading the Single Market: More Opportunities for People and Business, at 3, COM (2015) 550 final (Oct. 28, 2015) [hereinafter European Commission Communication], <http://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-550-EN-F1-1.PDF>.

¹⁰³ Filipa Azevedo & Mariusz Maciejewski, *European Parliament Briefing: Social, Economic and Legal Consequences of Uber and Similar Transportation Network Companies (TNCs)*, at 5 (Oct. 2015), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/563398/IPOL_BRI\(2015\)563398_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/563398/IPOL_BRI(2015)563398_EN.pdf).

¹⁰⁴ See, e.g., *Single Market for Services*, EUROPEAN COMMISSION, http://ec.europa.eu/growth/single-market/services/index_en.htm, (last visited May 5, 2016).

Utilities Commission, have a minimum of one million dollars in insurance, have mandatory vehicle inspections and driver-training programs, implement a “zero tolerance” policy for drugs and alcohol, and conduct mandatory criminal background checks.¹⁰⁵ In the European Union, instituting such requirements in harmonized legislation would address many of the concerns Member States have identified as justifications for banning or restricting the use of Uber technology, while limiting Member States’ ability to limit competition and stifle innovation.

In any event, now that European consumers have experienced Uber and other ride-hailing companies, it is unlikely taxi drivers will ever return to dominating the industry. Uber, or something like it, is here to stay, and the laws must adapt in response. Action at the EU level would help ensure that Uber lives out its potential to create jobs,¹⁰⁶ meet growing transportation needs, and even reduce car ownership, as cities struggle to combat congestion and pollution.¹⁰⁷ At the same time, the EU could create a framework to apply to other technology-based sharing economy services.¹⁰⁸ As a French entrepreneur who co-founded a European rival to Airbnb put it, “It would be paradise for us if we only had one regulator, not thousands of different

¹⁰⁵ Geron, *supra* note 35.

¹⁰⁶ For instance, in the Paris *banlieues*—suburbs that are plagued with poverty, rampant unemployment, high crime rates, and a reputation for being hotbeds of radical Islamic terrorism—Uber has helped create jobs for poorer youth, some of whom have gone on to start their own businesses employing other Uber drivers. Many have prior criminal convictions and attribute getting their lives back on track to driving with Uber’s technology. Within a few years, Uber and other similar digital platforms have created more than 15,000 jobs for drivers who compete against the 17,000 taxis in Paris. Most Uber drivers in France earn more than twice the minimum wage. Unfortunately, facing pressure from the taxi unions, the French government is considering imposing new restrictions, including prohibiting people with criminal records from obtaining a license. According to research by professors at HEC Paris and the Toulouse School of Economics, if French Uber drivers lost their jobs, more than twenty percent of them would still be jobless two years later. Anne-Sylvaine Chassany, *Uber: A Route out of the French Banlieues*, FIN. TIMES (Mar. 3, 2016, 7:30 PM), <http://www.ft.com/intl/cms/s/0/bf3d0444-e129-11e5-9217-6ae3733a2cd1.html#axzz499OnKAPV>.

¹⁰⁷ Azevedo & Maciejewski, *supra* note 103, at 2, 4.

¹⁰⁸ European Commission Communication, *supra* note 102, at 3.

authorities, that we had to deal with.”¹⁰⁹ From its inception, the EU has been first and foremost an economic union, with the single market as its backbone. With digital sharing-economy services playing an increasingly important role in the single market, it is time for a new approach to regulating these services that transcends outdated and uneven national laws.

¹⁰⁹ Raphael Minder & Mark Scott, *Sharing Economy Faces Patchwork of Guidelines in European Countries*, N.Y. TIMES (Sept. 21, 2014), <http://www.nytimes.com/2014/09/22/technology/sharing-economy-faces-patchwork-of-guidelines-in-european-countries.html>.