Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues
No. 277 May 4, 2020
Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Alexa Busser (alexa.busser@columbia.edu)

Regulating multinational digital platform enterprises: The case of Uber*

by
Peter Muchlinski**

Digital platform enterprises are an increasingly central part of the global economy. The European Commission defines an online platform as "an undertaking operating in two (or multi)-sided markets, which uses the internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups."[1] This covers a wide range of enterprises. This *Perspective* confines itself to a single case-study, the regulation of Uber taxi services, as an example of FDI issues involved.

Uber is a US-based company operating a worldwide network of taxi services in many countries. It displays many characteristics of MNEs, including integrated transnational management, a unified business format and a network of overseas subsidiaries, used mainly to organize its tax affairs.[2] Its presence raises questions as to how Uber should be regulated. Host countries can undoubtedly regulate digital platforms where their operations create a nexus with the host country through significant economic and social impacts. Uber has raised questions concerning its treatment of drivers, who use its platform to secure clients, the safety and consumer rights of those clients and Uber's impact on competition in the taxi-services industry. Uber's operations also raise issues relating to tax avoidance, but space prevents further discussion.

Uber has argued that it is only a technology platform, bringing together self-employed drivers with clients, and not a taxi-services enterprise. Under EU law, Uber taxi services are treated as transportation services subject to member state regulation.[3] However, national courts are divided over whether the drivers are employees entitled to labor protection or independent contractors. In addition, in September 2017, Uber had its operator's license removed by Transport for London on the basis that it was not a "fit and proper" private car-hire operator. This ban was provisionally lifted twice, but was reinstated, subject to appeal, in November 2019.[4] As to competition, Uber is often accused of undercutting existing taxi-service providers, including more highly regulated official municipal taxi services.[5] Here the issue is nuanced. Uber can be said to offer greater consumer choice and pricing, but regulators must decide whether this is legitimate competition or an abuse of competitive power undermining market fairness.

The Uber case raises regulatory questions similar to those raised by "brick-and-mortar" foreign investors. However, Uber should not hide behind the "digital veil" and assume no managerial or legal responsibility for the wellbeing of drivers, or the welfare of passengers, just because it offers a cheap taxi service in the so-called "sharing economy." In particular, Uber's precise business field must be legally recognized. It is surprising that Uber London Limited was incorporated in 2012 as engaging in "other information technology service activities" and remains so described,[6] whereas it should be registered as "taxi operation" and "licensed carrier" similar to its competitors.[7] Accurate incorporation would clarify what Uber does and avoid doubts that it should be regulated as a taxi operator and not an information-technology services firm. The latter description may offer an avenue for innovative flexibility in the development of Uber's business model, but this must not come at the price of fair competition and responsible corporate behavior as expected from all taxi firms.

In addition, Uber is undoubtedly an "investor" entitled to protection under international investment agreements (IIAs).[8] This raises further issues concerning the legitimacy of host country regulation. The host country must ensure that its regulatory controls over Uber are IIA compliant. At the minimum, a non-discriminatory approach is required, a risk that arises out of Uber's potential to weaken existing market structures and create a backlash of protectionist regulation. In addition, questions of fair and equitable treatment can arise, should regulators unduly interfere with the operation of Uber's operations and, even, of expropriation if these measures effectively stop Uber from doing business in the host country. Accordingly, while regulators have a key public interest duty to ensure that Uber conforms with the regulatory requirements that apply to all taxi operators, these must be applied in an IIA compliant way.

[**] Peter Muchlinski (pm29@soas.ac.uk) is Emeritus Professor of international commercial law at the School of Law of the School of Oriental and African Studies, University of London. The author is grateful to Joshua Meltzer, Sophie Nappert and Harm Schepel for their helpful peer reviews.

[1] See European Commission, "Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy," Sept. 24, 2015, p. 5.

[2] Brian O'Keefe and Marty Jones "How Uber plays the tax shell game", *Fortune.com*, Oct. 22, 2015.

[3] Case C-434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain SL* ECLI:EU:C:2017:981.

[4] "Uber loses licence to operate in London," *BBC News*, Nov. 25, 2019.

[5] Toby Moses, "Scrapping Uber's licence is unpopular but correct," *The Guardian*, Sept. 23, 2017, p. 39.

[6] Uber London Limited UK Companies House Registration.

[7] See, e.g., Addison-Lee UK Companies House Registration.

[8] Enikő Horvath and Severin Klinkmüller, "The concept of 'investment' in the digital economy: The case of social media companies," *Journal of World Investment and Trade*, vol. 20 (2019), pp. 590-609.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Alexa Busser, alexa.busser@columbia.edu.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at http://www.ccsi.columbia.edu.

Most recent *Columbia FDI Perspectives*

- No. 276, Carolina Arriagada Peters, 'Investment aftercare matters,' April 20, 2020
- No. 275, Karl P. Sauvant, 'Enabling the full participation of developing countries in negotiating an Investment Facilitation Framework for Development,' April 6, 2020
- No. 274, Marta Soprana, 'Outward FDI and a global compact on home-country investment incentives,' March 23, 2020
- No. 273, Ricardo Figueiredo de Oliveira, 'The useful institution of an investment ombudsperson,' March 9, 2020
- No. 272, Wolfgang Alschner, 'Squaring bilateralism with multilateralism: What investment law reformers can learn from the international tax regime,' February 24, 2020

All previous *FDI Perspectives* are available at http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/.