



# REPORT

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## **TRANSPORT ON DEMAND**

**HOW TO REGULATE RIDE-HAILING IN THE EU?**



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## About CERRE

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CERRE's added value is based on:

- its original, multidisciplinary and inter-sectoral approach;
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- its scientific independence and its impartiality; and
- the direct relevance and timeliness of its contributions to the policy and regulatory development process applicable to network industries and the markets for their services.

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## About the authors



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# **EXECUTIVE SUMMARY**





## Executive summary

Transport on Demand (ToD) offers passengers the choice of pickup and drop-off times and locations, and, occasionally, also of the choice of car and driver. Typically (but not necessarily), ToD is offered by private operators that usually include taxi companies, private hire of a vehicle with a driver (PHV), and intermediaries between the said operators and passengers.

Historically, taxis have been allowed to cruise freely and to be street hailed, while PHVs have been subject to pre-booking and pre-ordering. Nowadays, however, with the development of digital platforms, most taxis may also be booked/ordered in advance, while PHVs become much easier to book and may be a substitute to street-hailed taxis. Therefore, the distinction between taxis and PHVs is increasingly blurred and as such raises the question of whether the regulatory distinction is still justified.

### Current regulation of Transport-on-Demand in the EU

Since the very beginning of the European project, freedom of movement has been one of the core objectives. While freedom is the principle, restrictions are exceptions and should be justified by an overriding reason of general interest.

The EU has intervened in several transport sectors but has left urban ToD completely on the side. Only horizontally applicable instruments, such as minimum rules on consumer protection, car safety, or data protection apply to the sector. A mismatch then appears between the vast array of rules applicable to other modes of transport and (urban) ToD. This regulatory vacuum is filled by regulation at the national or local level.


Due to the absence of sector-specific regulation at EU level, it has been up to the Court of Justice to decide on the legal status of digital platforms involved in ToD. More specifically, the EU Court had to judge whether digital platforms providing intermediation services in the sector of ToD were providers of online intermediation or transportation service, as these activities are subject to different (mutually exclusive) rules.

In the Elite taxi (Uber Spain), Uber France, and Star Taxi cases concerning ToD, as well in Airbnb case, the EU Court held that all platforms offer intermediation service, but, under specific circumstances, a platform may be offering an 'overall' service, encompassing the underlying 'transport' service. According to this judgement, the platform is itself participating in the underlying service when two conditions are met simultaneously: the platform (a) should be making the provision of that service possible, thus creating a market that did not previously exist and (b) the platform should be exercising a decisive influence over the different attributes of this new service. However, the application of these criteria on different ToD platforms is not without problems.

After looking at several national and local case studies on ToD regulation, the report identifies three types of countries: (1) those which have radically simplified their regulation in order to adapt to the digital transformation of the industry (e.g., Croatia, Estonia, Finland and Poland); (2) those that have been rather reluctant to do so, or have done so in a more cautious way (e.g., Belgium, France, Italy and the Netherlands); and one Member State who has reformed its legislation in a more complex way than before (Germany).

While highlighting great diversity among Member States, the report identifies several points of convergence: (a) restrictive measures on ToD remain in most Member States, (b) liberalisation does not mean that licensing is abandoned, (c) the distinction between PHVs and taxis is maintained in most Member States, and (d) PHV and taxi rules are intertwined, i.e., changing rules in one sector requires adaptations in the other.





Uncertainty prevails at EU level, while fragmentation remains at the national level. In order to pursue both the general public policy and the EU-specific policy objectives, some EU intervention in the sector of ToD is deemed necessary.

## Public policy

The core public policy objectives linked to ToD are the protection of public order, safety of passengers and drivers, reduction of negative externalities (congestion, pollution and casualties), and the need to offer a service of general interest of mobility. In relation to the latter, it seems unreasonable to claim that taxis, or ToD in general, partake in public transportation unless such a mission has been expressly entrusted on specific ToD operators.

Hence any territorial or other protections may not be justified on this ground, unless ToD operators are more systematically involved in the provision of services of general economic interest. In relation to the former objectives (security, safety, and externalities reduction), common standards for vehicles and charging bases, as well as common rules and incentives for ToD operators and platforms, in order to deploy electric fleets could show the way forward.

If the above objectives are to be pursued at national and/or local level, further fragmentation may follow. This would negatively affect the various EU policy objectives in the field of ToD. The main objectives relate to the internal market: avoiding restrictive measures that limit companies' freedom of establishment and drivers' freedom to provide services, securing consumer protection, ensuring a level playing field between all economic operators and providing them with legal certainty. Therefore, clarifying the legal status of ride-hailing platforms at EU level and securing a level playing field in the urban transport mobility sector is core for the Internal Market and may only happen at EU level.

The EU Mobility agenda and the need for smarter and more sustainable mobility also need to be considered. Imposing data sharing obligations between public authorities and digital platforms constitutes an important pillar of this strategy and a steppingstone for the creation of the Common European mobility data space as promoted by the European Commission.

Finally yet importantly, it is necessary to set the conditions under which ToD operators may participate in the provision of services of general economic interest. In this way, mobility can be more than a simple commodity and become a right for everyone, and especially for the most vulnerable groups and individuals in the EU.


## Policy recommendations

In view of the above, action at EU level, by means of both binding and non-binding rules, seems necessary. Hard law could take the form of a directive of **minimal harmonisation**, leaving place for **co-regulation**; **self-regulation** could also be streamlined by means of hard or soft law. Any regulation effort of ToD should focus on the three parties involved, i.e., platforms, passengers, and transport companies and drivers:

- Platforms should be fully subject to EU rules for market access, while passengers' rights, already dealt with by the EU in all other transport sectors (air, rail, boat, and coach), should also be adapted to the needs arising from ToD.
- Drivers and transport companies, on the other hand, would be regulated at EU level to the extent necessary for securing the *effet utile* of the rules concerning the two other categories.

The report shows that a **directive would be required**. The directive should factor in the following issues:

- **Common minimum rules and conditions for the delivery of permits** should be established, which would enhance trust between member states, and make possible the mutual recognition of those permits;

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- **Restrictive operational rules** should be banned in principle and only exceptionally admitted if sufficiently justified (e.g., return-to-garage rule, time constraint before embarking a new passenger);
  - **Numerical quotas** should be exceptional and temporary;
  - **Environmental and safety standards** should be set;
  - The **safety** of drivers and passengers should be secured and **driving times may need to be capped**;
  - **Consumer complaints and dispute resolution mechanisms** should be generalised, mainstreamed, and made fast and credible; and
  - The possibility for the European Commission to adopt some delegated act in relation to **data sharing and common APIs** that will facilitate smarter mobility (e.g., data on congestion, proposed itineraries and timetables, connections, ticketing etc.).

**Soft law instrument(s)** would complement this directive and provide guidance on the following issues:

- The adoption of a **complete set of criteria** which would allow for self-assessment by the platforms of their legal status either as digital intermediaries offering information society services in the sense of the relevant EU legislation, or as traditional transportation services;
- The creation of **standardised**, as well as transparent, **reputation, rating and ranking instruments** on drivers and passengers; and
- The update of binding consumer protection rules to the ToD sector, as well as the adaptation of the non-binding **Eu Passenger Bill of Rights** to include rights such as the passenger's right to cancel a delayed ride.



# **GENERAL INTRODUCTION**



## General introduction

### Scope of the research

The first vehicles with a driver available for hire, to carry passengers to a requested destination, made their appearance in Paris<sup>1</sup> or London<sup>2</sup> in the mid-1600s. They were eventually motorised in Europe in the late 19<sup>th</sup> century and, in a more organised manner, in New York in 1907. Interestingly enough, the first motorised taxi in London, the 1897 Bersey, was electrically powered! Another piece of trivia is that the word 'taxi' comes from the French *taximetre*, itself originating from the Latin *taxa* (taxation) and, before that, the Greek *taxis* (payment). The world's first dedicated taxi, the Daimler Victoria, was built in 1897 and came equipped with the (then) newly invented taximeter.<sup>3</sup> Therefore, the operation of taxicabs is, at least from a historical and etymological point of view, strictly associated with taximeters. Given this background, it is not surprising that taxi drivers and transportation authorities – who have, in the meantime, regulated fares and made taximeters compulsory – react negatively to other ways of calculating ride fares, and more generally, to other means of offering transport on demand (ToD, also called 'ride-hailing').

ToD is often defined or recognised by its distinction from regular bus, underground and metro services that operate fixed itineraries based on pre-established schedules and routes. These means are typically organised and/or funded by the State and are often referred to as 'public transport'. ToD, on the other hand, offers passengers the choice of pick-up<sup>4</sup> and drop-off times and locations and, occasionally, also the choice of car and driver. Typically (but not necessarily), ToD is offered by private operators, and the exact scope of the notion depends on domestic legislation. It usually includes taxi companies, private hire of a vehicle with a driver (PHV), and intermediaries between the said operators and passengers. Historically, taxis have been allowed to cruise freely and to be street hailed, while PHVs have been subject to pre-booking and pre-ordering. Nowadays, however, with the development of digital platforms, most taxis may also be booked/ordered in advance, while PHVs become much easier to book and may be a substitute to street-hailed taxis. Therefore, the distinction between taxis and PHVs is increasingly blurred, with some Member States introducing a 'one-tier system' with the progressive liberalisation of taxis, while others operate a 'two-tier system' whereby the distinction between taxis and PHVs is increasingly rationalised. Irrespective of the current choices, the ubiquity of digital platforms and smartphones, together with environmental concerns, may be gradually pointing towards restraining free cruising and street hailing altogether. Therefore, these categories may require a revision, and new, more adapted rules may be put forward.

The aim of the present report is: firstly, to highlight how ToD has radically changed in the last decade, not only from the ongoing digitalisation of everything, but also by rapidly emerging environmental concerns; secondly, to discuss the differences and, also, the complementarity existing between different forms of ToD, and between those and public transportation; and thirdly, identify regulatory vacuums and propose ways to remedy those in order to enhance urban mobility in the EU. The present report follows on earlier research on urban mobility. It seeks to combine those with new EU policy initiatives. The report builds also on earlier roundtables and workshops that included discussions with public and private stakeholders and academics. It aims to identify points of convergence and areas of a tentative agreement for some regulatory interventions, aimed at making urban ToD more efficient and more environmentally friendly.

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<sup>1</sup> M. Bellis, 'Hailing: History of the Taxi', ThoughtCo, 27 Aug. 2020, <https://www.thoughtco.com/hailing-history-of-the-taxi-1992541>

<sup>2</sup> R. Tate, 'A Brief History of Taxicabs 1907-1968', (2018) *Motorcities*, <https://www.motorcities.org/story-of-the-week/2018/a-brief-history-of-taxicabs-1907-1968>

<sup>3</sup> M. Bellis, 'Hailing: History of the Taxi', ThoughtCo, 27 Aug. 2020, <https://www.thoughtco.com/hailing-history-of-the-taxi-1992541>

<sup>4</sup> Either in the form of the driver's estimated time of arrival (ETA) or by fixing precise appointments.



## Approach and methodology

This study seeks to structure and examine the legal challenges faced by digital operators in the transport industry. To do so, CERRE launched an online survey on ToD from 11-28 June 2021, and hosted a workshop on 6 July 2021 with various stakeholder groups representing different interests to better understand their needs and objectives. In addition, this report builds on earlier CERRE research on Shared Mobility (2019)<sup>5</sup>, Digital Markets (2020)<sup>6</sup>, and Mobility as a Service (MaaS, 2021).<sup>7</sup>

Building on the legal issues discussed during the CERRE workshop as well as during the online workshop on local ToD held by the Directorate-General for Mobility and Transport of the European Commission on 29 June 2021, this report seeks to further elucidate the EU's potential role in the field of ToD. Taking stock of the issues already raised and (as will be shown) the EU's current inability to make use of its competencies and intervene in urban ToD, this report proposes reforms to better harmonise and coordinate its response.

## Structure of the report

To achieve the above goals, we are going to:

- highlight the paradox existing between, on the one hand, the crucial role that transport and transport policy have played in the EU, and on the other hand, the extremely scant, if non-existent, regulation of urban transport at the EU level, despite the shared legislative competence with EU Member States (Part 1); then, focus on ToD, and identify the relevant *acquis*, both at the EU and the Member State level (Part 2);
- point out the policy reasons which have so far – and may still – justify rules on ToD, either at the national or the EU level (Part 3), before identifying purely EU interests that may/need to be pursued by the EU (Part 4);
- discuss the kinds, level, and form that regulation could take in the field of ToD, as well as the ways the EU could act in this field (Part 5); and
- propose some policy recommendations (Part 6).

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<sup>5</sup> Crozet Y., Santos G. and Coldefy J., "Shared Mobility, MaaS and the Regulatory Challenges of Urban Mobility" (2019) CERRE Report, accessible at <https://cerre.eu/publications/shared-mobility-and-maas-regulatory-challenges-urban-mobility/>

<sup>6</sup> Krämer J., "Digital markets and online platforms: new perspectives on regulation and competition law" (2020) CERRE Report, accessible at <https://cerre.eu/publications/digital-markets-online-platforms-new-regulation-competition-law/>

<sup>7</sup> "Mobility as a Service (MaaS): A digital roadmap for public transport authorities" (2021) CERRE Report, accessible at <https://cerre.eu/publications/mobility-as-a-service-maas-digital-roadmap-public-transport-authorities/>

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# **PASSENGER TRANSPORTATION IN THE EU**



# 1 Passenger transportation in the EU

## 1.1 Why is transport special for the EU?

The European project has had a long and enduring, even existential, relationship with transport, as a means of moving around the resources needed to rebuild after WWII, while at the same time controlling the means to wage further wars. This thinking led to the creation of the European Coal and Steel Community in 1951. In 1957, with the signature of the EEC Treaty, and the launch of the Single Market objective, transport of passengers (by air, sea, rail, or road) again entered the spotlight. Transport has thus played, and continues to play, a central role in the integration and functioning of the EU Internal Market, a vital precondition to free movement of goods, people and services. In turn, these same freedoms set the conditions and create fresh demand for transport. Transport thus matters for the Internal Market in at least three ways: economic, social, and environmental.

From an economic point of view, at the macro-level, transport is a prerequisite for any attempt at economic integration and, more generally, underpins liberal economic theory, given that it enables a) comparative advantages, b) economies of scale, and c) the allocation of labour. Consequently, the rational and coherent development of transport is directly linked to the modern economy and trade. At the micro-level, transport is major player in its own right worth some 4.6% of EU GDP.<sup>8</sup> On the 'social' side, transport contributes to a deeper integration of EU Member States by enabling personal, cultural and material exchanges. However, it has significant costs for society as a whole, as it creates multiple negative externalities.

Deterioration of the natural and urban environment, traffic congestion, and road accidents are some of the negative consequences of transport. In particular, with regards to climate change, it is estimated that transport is the biggest carbon dioxide emitting sector, responsible for a quarter of all emissions – and increasing by 1.8% per year. According to the European Commission, transport is the only economic sector in which greenhouse gas emissions are higher than in 1990, and continue to rise despite efforts to cut them.<sup>9</sup> Of the different modes of land-based mobility, road transport generates the highest (72%) transport emissions<sup>10</sup> and has the most significant overall externalities. Urban transport accounts for 22% of the EU's CO<sub>2</sub> emissions.<sup>11</sup>

The above findings undeniably ground the European Commission's view that: "Sustainable, smart and resilient transport services and infrastructure are vital to make full use of the economic strengths of all regions of the European Union, to support the Single Market, recover from the current crisis and stimulate future growth, and to enable economic, social and territorial cohesion, while preserving our environment and our health. They also underpin our global competitiveness and our international connectivity."<sup>12</sup>

This shows a deepening political understanding of the role of transport in the modern economy, but it is not an entirely new direction. The founding fathers of the EU Treaties clearly also understood the importance of transport. They described specific competences for Transport Policy in the 1957 EEC Treaty, separate from the general rules on services, which paved the way for a common transport policy. The extensive competencies thus conferred to the EU have been largely ignored by the Council (made up of Member State transport ministers), until its condemnation in one of the rare cases for failure to act initiated by the European Parliament.<sup>13</sup>

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<sup>8</sup> European Commission, 'Employment in the EU transport sector' (2015), <https://op.europa.eu/en/publication-detail/-/publication/50a60344-af85-4083-81b6-386643f1c79c>

<sup>9</sup> European Commission, SWD(2020) 331 final, accompanying the Communication on Sustainable and Smart Mobility, COM(2020) 789 final, p 5.


<sup>10</sup> *Ibid* para 299.

<sup>11</sup> *Ibid* para 432.

<sup>12</sup> *Ibid*.

<sup>13</sup> CJEC, Case 13/38, *European Parliament v Council (transport policy)*, EU:C:1985:220.





This has set in motion a phase of intensive legislative action in all fields of transport, aimed first at liberalising the sector and then at 'adapting it' to new technologies, globalisation, and climate change. Trans-European networks (TENs) have made their way into the Maastricht Treaty (Articles 170-172), while intermodality has been on the European Commission and Council table for some time now. The recent **EU Mobility Strategy** has further stressed the need for sustainable, smart, and resilient mobility<sup>14</sup> while acknowledging that "data sharing and collaborative decision-making enabled by digital technologies propose new solutions to old challenges".<sup>15</sup>

Against this backdrop, and taking into account the underlying logic of the Internal Market, where freedom of entrepreneurship and the abolition of all measures "which prohibit, impede or render less attractive the freedom of establishment or the freedom to provide services"<sup>16</sup> is the rule, it is worth asking why the EU has, so far, abstained from taking any meaningful action in the field of ride-hailing and whether this is a sustainable choice given the technological, social and economic evolutions.<sup>17</sup>

## 1.2 EU passenger acquis

Since the very beginning of the European project, freedom of movement has been one of the core objectives. While freedom is the principle, restrictions are exceptions and should be justified by some overriding reason of general interest, and be both appropriate and proportionate. The EU has enacted legislation to support the freedom of movement of individuals (workers but also European citizens at large) and also to create a level playing field for transport operators. While transport of passengers by air has been regulated in the EU since 1991, passenger transport by road was touched upon by EU legislature only from 2006 – and this only covered bus and coach operations. In 2006, the EU regulated the conditions of access to the market by bus and coach services. Then in 2011, it tackled passenger rights on the same modes.

In 2006, the EU intervened to regulate access to the market for passenger transport services by road. Those rules were reviewed in 2009.<sup>18</sup> However, this instrument only applies to larger vehicles that can carry over nine people, including the driver,<sup>19</sup> and creates a common licence to facilitate the provision of such services in a transnational and long-distance context.<sup>20</sup> The Regulation is silent on the question as to whether public transport companies operating transport of people with reduced mobility and/or in smaller vehicles would also be covered.<sup>21</sup>

Regulation 181/2011 applies to cross-border and long-distance services of passenger transport by bus and coach.<sup>22</sup> This instrument was difficult to agree on because, contrary to air and water transport, no international treaty harmonising the sector could be drawn on for inspiration. The Regulation introduced passenger rights in the event of cancellation, delay, or refusal to board (overbooking), a system of indemnification for accidents as well as specific rights to handicapped persons (or with reduced mobility). Unlike the 2006 and 2009 Regulations, the 2011 Regulation does not define what is meant by bus and coach. Any passenger vehicle could therefore be covered by this Regulation.

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<sup>14</sup> European Commission Communication, 'Sustainable and Smart Mobility Strategy – putting European transport on track for the future', COM (2020) 789 final, p. 2, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0789&from=EN>

<sup>15</sup> European Commission, SWD(2020) 331 final, para 79.

<sup>16</sup> According to constant case law of the Court, see e.g., CJEU, Case C-518/06 *Commission v Italy, Car Insurance*, EU:C:2009:270, para 62.

<sup>17</sup> This issue is further discussed below in the Introduction of Part 4, on EU Internal Market objectives.


<sup>18</sup> European Parliament and Council Regulation No 1073/2009 on common rules for access to the international market for coach and bus services, [2009] OJ L 300/88, ELI: <http://data.europa.eu/eli/reg/2009/1073/oj>

<sup>19</sup> Regulation 1073/2009, Article 1, §1.

<sup>20</sup> Regulation 1073/2009, Article 4 and following.

<sup>21</sup> JP Kestelnoot, *Droit des transports*, coll. Droit Actuel, Larcier, Bruxelles 2020.

<sup>22</sup> European Parliament and Council Regulation No 181/2011 concerning the rights of passengers in bus and coach transport [2011] OJ L 55/1, ELI: <http://data.europa.eu/eli/reg/2011/181/oj>



Regulation 181/2011	Distance <250 km	250 km < distance
<b>Regular transport</b>	Only a few rights (no discrimination, limited obligation towards reduced mobility, complaint handling mechanisms)	Extensive application of rights
<b>Occasional transport</b>	No rights guaranteed	Only a few rights (no discrimination, limited waiver, limited training for limited disability, claims in case of accidents)

However, the Regulation makes a distinction between 'regular services' and 'occasional services', as well as between distances over/under 250 km. Regular services mean those that ensure the transport of passengers "at specified intervals along specified routes, passengers being picked up and set down at predetermined stopping points"; while occasional services are those not covered by the definition of regular services undertaken by the (group) of passengers or the carrier. Taxi and PHVs could potentially fall under this second category, although the Regulations' drafters did not contemplate this. Including taxi and PHV drivers in the scope of the Regulation would also create a distinction between trips over/under 250 km, thus adding a layer of legal uncertainty. Indeed, drivers do not always know the final destination and/or intermediate stops of any given ride. For instance, a taxi or PHV driver operating between Paris and Brussels would fall within the Regulation's scope, while a driver operating between Bratislava and Vienna would not.<sup>23</sup> Clarifications are therefore needed.

Occasional services need to abide by anti-discrimination clauses regarding the country of residence or citizenship of the passenger, especially with matters concerning pricing. In the case of subcontracting, the operator is responsible for acts and omissions of the actual carrier. Operators cannot waive their obligations under the Regulation by a contract but can offer more favourable terms to passengers. Meanwhile, passengers are entitled to compensation for death, personal injury, or luggage damage,<sup>24</sup> including for wheelchairs.<sup>25</sup> If an accident occurs, the carrier needs to assist the passenger's immediate practical needs (facilitating first aid, clothes, accommodation, and food).<sup>26</sup> However, for occasional services, the Regulation leaves out the obligations towards people with reduced mobility.

Urban and short-distance transport of passengers is not regulated at EU level, leaving considerable discretion to local authorities and Member States, both in terms of rules concerning access to the market and rules on consumer protection. This is not to say that no rules at all apply in these areas; general consumer protection instruments often apply horizontally. For instance, the price of a trip needs to be made clear to passengers before departure, to abide by provisions of the Unfair Commercial Practices Directive (UCPD).<sup>27</sup> The same applies to any change of the terms and conditions by an app providing intermediation services in the sector of transport: users need to receive timely and adequate notice before the change can enter into force.<sup>28</sup> Further, horizontally applicable rules in the mobility sector, such as car safety<sup>29</sup> and insurance,<sup>30</sup> also apply to short-distance and urban transport. However, rules on safety (working hours, resting times, specific car safety features),

<sup>23</sup> Regulation (EU) No 181/2011, article 2, (3), *a contrario*.

<sup>24</sup> Regulation (EU) No 181/2011, article 7.

<sup>25</sup> Regulation (EU) No 181/2011, article 17(1) and (2).


<sup>26</sup> Regulation (EU) No 181/2011, article 8.

<sup>27</sup> Articles 6(1)(d) and 7(4)(c) of the European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the Internal Market [2005] OJ L 149/22.

<sup>28</sup> J. Marin, 'Passengers' Rights and Consumer Protection' in MARIN, J, PETROVIĆ, S, *et al.*, *Uber – Brave New Service or Unfair Competition: Legal Analysis of the Nature of Uber Services*, vol 76 (Springer Nature 2019), p. 207-208.

<sup>29</sup> European Parliament and Council Directive 2019/2144 of 27 November 2019 on type-approval requirements for motor vehicles and their trailers, and systems, components and separate technical units intended for such vehicles, as regards their general safety and the protection of vehicle occupants and vulnerable road users [2019] OJ L 325.

<sup>30</sup> European Parliament and of Council Directive 2009/103/EC of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L 263.



specific professional insurance policies or accessibility for reduced-mobility users remain unaddressed in the ToD industry.

### 1.3 Interim conclusion for Part 1

A clear mismatch appears between the vast array of EU rules concerning air, sea, and international road transport, and the absence of any rules specifically concerning urban and short-distance passenger transport by regular cars (i.e., not buses, vans, etc.). The most important horizontal or broad-based instrument applicable to ToD concerns the protection of consumers. The above gap in EU rules concerning urban transport has been in the spotlight lately because of **three independent but concurrent factors**: the **emergence of ride-hailing apps** and other shared mobility means; the **divergent ways in which these have been dealt with** at the national and local level; and the **pressing need to reassess passenger mobility** as a whole, in view of better serving cities while attaining the EU's climate goals.

2



**THE STATUS QUO OF  
TRANSPORT-ON-  
DEMAND IN THE EU**



## 2 The status quo of Transport-on-Demand in the EU

Because ToD has not been regulated at EU level, Member States have had the opportunity – and also the need – to develop their own regulatory regimes. This raises many issues concerning the EU’s fundamental freedoms of service provision and establishment, and the Single Market in general.

Section 2.1 reviews the most important cases delivered by the Court of Justice of the European Union (CJEU) in this area, while Section 2.2 reviews a series of national legislations to show their divergences, but also to identify lines of convergence.

### 2.1 At the EU level: summing up the CJEU case law

How EU law applies to ride-hailing apps has first been discussed by the Court in the two *Elite Taxi* (*Uber Spain*) and *Uber France* cases, concerning *UberPop*, a peer-to-peer service connecting non-professional drivers with riders.<sup>31</sup> The Court had to decide whether Uber is merely an electronic intermediation service (therefore, gaining market access under the favourable e-commerce directive), or whether it is a transportation service (leaving more discretion to the Member States to regulate market access). The Court held that **all platforms offer an intermediation service** but, under specific circumstances, a platform may be offering an ‘overall service’ encompassing the underlying service. According to the judgment in *Elite Taxi*, the platform is itself participating in the underlying service when two conditions are simultaneously met: the platform (a) should be making the provision of that service possible, thus **creating a market which did not previously exist**, and (b) the platform should be exercising a **decisive influence** over the different attributes of this new service.

The Court found the first criterion to be met in this case, given that Uber was creating a new market by allowing non-professional drivers to offer their services. The decisive influence was also ascertained in this case, based on a set of non-exhaustive criteria. Indeed, the platform: i) selected (albeit quite loosely) the drivers, ii) set the conditions for the service provision, iii) controlled the quality of the provision, iv) fixed the price, v) received payment, and vi) could ‘terminate’ those drivers considered unfit. Advocate General Szpunar, in his opinion, clearly distinguished Uber’s business model from other, more traditional, platforms, such as those covering travel and accommodation, such as Booking). Contrary to the *UberPop* intermediation service, these other platforms do not themselves create a new offer, but rather serve as yet another means of promoting pre-existing services. Further, such platforms, again in contrast to *UberPop*, do not determine the content and/or the conditions of the services offered by the providers and promoted through their pages, which retain sole responsibility for the kind and level of services they offer to consumers. Last but not least, such platforms do not exercise ‘entry controls’ on providers accessing the platform; as professionals (and thus not prosumers) are considered to already comply with the applicable rules and regulations.


This judgment has been further clarified – and indeed limited in scope – by the judgments in the *Airbnb*<sup>32</sup> and, more recently, *Star Taxi App* cases.<sup>33</sup> In the former judgment, the Court had to decide whether Airbnb should be treated as real estate brokers and thus subject to the applicable authorisation rules. The Court, however, considered Airbnb to be a mere e-commerce service, based on **three lines of arguments**. Firstly, it held that Airbnb did not create a new market, as short-term and seasonal rentals existed before (albeit to a much more limited degree). Secondly, the Court held that Airbnb did not exercise decisive control over the actual service, essentially because it did not determine prices and because the guidance and incentives it provided were not compulsory.

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<sup>31</sup> CJEU, Case C-434/15, *Asociacion Profesional Elite Taxi v. Uber Systems Spain, SL*, EU:C:2017:981, and Case C-320/16, *Uber France*, EU:C:2018:221; on *Elite Taxi (Uber Spain)* see Finck, ‘Distinguishing internet platforms from transport services: *Elite Taxi v. Uber Spain*’, 55 CML Rev. (2018), 1619-1639; see also Hatzopoulos, ‘After *Uber Spain*: The EU’s approach on the sharing economy in need of review?’, 44 EL Rev. (2019), 89-99.

<sup>32</sup> CJEU, Case C-390/18, *Airbnb Ireland*, EU:C:2019:1112.

<sup>33</sup> CJEU, Case C-62/19, *Star Taxi App*, EU:C:2020:980.



Compared to the judgment in *Elite Taxi (Uber Spain)* and *Uber France* the lack of control here seems to be grounded on two elements: there is no obligation, but mere recommendations, concerning prices; and all the other service conditions (location, size, orientation, layout, style, etc. of the apartments) could not possibly be determined by the platform, therefore its control over the actual service was not a determinant. Moreover, the peer-to-peer reputation rating system, which in *Uber Elite Taxi* was seen by the Court as an instrument of control, by the platform, of its drivers, was qualified in the accommodation industry as merely ‘ancillary’ (para 58) and ‘inherent in intermediation platforms’ for short-term rentals (para 60), and as such not controlling. Thirdly, the lack of direct control of the platform over the service received by the user is further underlined by the Court, noting that Airbnb’s aim is “...not only to provide an immediate service ... but also, based on a structured list ... to facilitate the conclusion of contracts ...”.<sup>34</sup>

More recently, in *Star Taxi App*<sup>35</sup>, the Court held that a smartphone app used for connecting licenced cab drivers with tentative passengers does not offer a transportation service per se. This case was distinguished by the Court from *Elite Taxi (Uber Spain)* and *Uber France* on several grounds: “Unlike the service provider involved in the said case, *Star Taxi App* does not select non-professional drivers using their vehicles but concludes contracts for the supply of services with drivers professionally authorised to provide taxi transport, thus setting neither the price of the trip nor collecting it from the customer who pays it directly to the taxi driver.” The Court also noted that it does not exercise control over the quality of the vehicles, the drivers or their behaviour.<sup>36</sup> Therefore, neither the ‘creation of a new market’ nor the ‘decisive influence’ criteria were satisfied.

These three cases offer some guidance on the proper legal characterisation of platforms and on the (exceptional) circumstances under which a platform would be considered as providing the underlying service. Read together, these judgments set the outer limits for the above legal qualifications, but still leave some grey areas in between. The Court seems to be applying a quite lenient test concerning the ‘creation of new market’ criterion: short-term accommodation indeed pre-dates Airbnb, but the sheer volume of it and the ensuing transformation of the urban environment in many localities have only been possible because of the platform. Similarly, unlicensed drivers pre-existed UberPop; it is the volume associated with the platform’s activity that swayed the Court’s decision, judging it in a new market. A difference that exists between the two activities, and one which is indirectly being taken up by the Court in *Star Taxi App* (para 52) is that drivers, in this latter case, were already licenced professionals, a condition not required of homeowners proposing short-term rentals. In *Elite Taxi (Uber Spain)*, on the other hand, the platform allowed drivers to circumvent existing licensing requirements. It remains that the **‘new market’ criterion seems to be a flexible – and non-conclusive one**. Indeed, if the Court were to pursue this criterion too far, it would mean that more innovative platforms (creating new services) would be more likely to be penalised (held to provide the underlying service).<sup>37</sup> It is also a criterion that is no more relevant for ride-hailing apps given that in the EU all platforms have given up Uber-Pop-type of services, based on unlicensed drivers and only work with licenced taxi or PHV drivers.

The ‘decisive influence’ criterion, on the other hand, according to Airbnb, seems to be revolving around the question of ‘who sets the price’ for the underlying service. In *Uber France* and *Elite Taxi (Uber Spain)* the platform set the maximum price, while in Airbnb and *Star Taxi App* the service providers did so themselves.<sup>38</sup> However, in most ride-hailing platforms it is the platform – not the driver or the company owner – which sets the price; and if price-setting is not absolute, the platform sets a maximum price from which drivers have no good reason to deviate since this is unlikely to bring them any extra rides. Algorithmic price-fixing to respond to surges (and to other platforms’ prices) is one of the strengths of ride-hailing platforms. Hence, if the fact that the platform processes

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<sup>34</sup> CJEU, Case C-390/18, *Airbnb Ireland* para 53.


<sup>35</sup> CJEU, Case C-62/19, EU:C:2020:980.

<sup>36</sup> CJEU, Case C-62/19, *Star Taxi App*, para. 34, translated by the authors as there still no official English version.

<sup>37</sup> Hatzopoulos above fn 31.

<sup>38</sup> Although the reality is that taxi drivers do not set their prices freely, but are bound by the taximeters, themselves regulated by national or local authorities.





the payment does not seem to be raising any issues in the light of Airbnb, the fact that a platform is setting, rather than just recommending, the price for the service is likely to be viewed as a criterion of decisive influence.

Next to the price, there is the issue of overall control exercised by the platform on service providers. In this respect, Airbnb, contrary to what was implied in *Elite Taxi (Uber Spain)* and *Uber France*, suggests that operating a rating app is not always a means of controlling service providers but rather an attribute 'inherent' to the sharing economy. Moreover, while Uber Pop drivers were subject only to platform controls (to ensure some sort of minimum safety and security for passengers), professional licenced drivers are subject to many public rules in Member States. Hence, the level of platform control identified by the Court in the *Uber France* and *Elite Taxi (Uber Spain)* cases is no longer to be found on the current activities of ride-hailing platforms, where professional drivers offer their services. However, the statement of the Court in paragraph 53 of *Airbnb* (quoted above, fn 32) gives importance to the homogeneity level of the underlying service. While a ride is typically a homogeneous experience (with marginal differentiations depending on the car and the driver), a rental apartment differs in so many ways from any other (such as location, size, orientation, architectural design, furniture, swimming pool, etc.), making it much more difficult for the platform to 'control' the service offered in any meaningful manner. The fact that Airbnb classifies and categorises the properties it offers depending on their intrinsic characteristics, as part of its matching function, fundamentally differs from Uber's capacity to actively determine the (fewer) characteristics of a ride offered by its drivers. Therefore, while the above judgments do offer some criteria for legal qualification, these seem to be raising as many questions as they solve. Important legal uncertainty remains, and solving this is crucial for the development of the ride-hailing industry. This uncertainty, already looming before the delivery of the judgments in *Airbnb* and *Star Taxi App* (as illustrated by the European Commission's answer to a Parliamentary question, where it stated with little precision that the ruling in *Elite Taxi (Uber Spain)* "concerns a specific service called UberPop (non-professional drivers using their vehicles), and not all services provided by Uber in general",<sup>39</sup> is even more pressing in the aftermath of these judgments. Ride-hailing platforms thus need to know the conditions under which they may gain market access, as well as the liabilities to which they are exposed in every Member State; the case studies below indicate that their status greatly varies from one Member State to the other.

## 2.2 At the national level: some case studies

While the ToD industry has been developing for a very long time, the EU has not positively intervened in the sector. Verifying the Member States' practices when it comes to regulating ToD is thus necessary. This section shows that diverse measures have been undertaken at the national and local levels, and that the ensuing fragmentation is not without some convergence points, which may be further used as a common starting point for EU action in this field. This section builds on a series of countries, spread across Europe geographically, representing different population and economy sizes, different climates as well as different political and administrative traditions. A series of nine countries was therefore chosen: Belgium, Croatia, Estonia, Finland, France, Germany, Italy, the Netherlands, and Poland. This research has found that, while some Member States have responded to the new needs of ToD by positively trying to adjust and simplify their regulatory environments (Croatia, Estonia, Finland, Poland), others have been more reluctant to do so, or have done so in a more modest way (Belgium, France, the Netherlands, Italy) while one Member State (Germany) has veered towards more complex rules than before.

### 2.2.1 Towards a simplification


#### 2.2.1.1 Croatia

Up to 2018, the taxi market was partially liberalised. Taxi drivers were obliged to acquire a general licence (countrywide) and a permit (locally). Local authorities indicated that they deliver, for their

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<sup>39</sup> Parliamentary question n. E-003428/2018 of Maria Grapini, answered by the European Commission on 19 September 2018: [https://www.europarl.europa.eu/doceo/document/E-8-2018-003428-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-8-2018-003428-ASW_EN.html)





territory, a maximum number of permits, and price regulation was in place. Local administrations were allowed to deliver additional permits for the private hire of a car with drivers, but such a scheme has never been activated.<sup>40</sup> The 2018 reform liberalised the ToD market due to pressures imposed by new business models, to fill a shortage of ToD during the tourist season, and also because the aforementioned PHV scheme was never fully activated.

The new regime for taxis includes that a ride can have only one pick-up point and one drop-off point. Taximeters are no longer compulsory (an electronic app can also be used), and dynamic pricing is allowed.

The new general licensing procedure obliges the drivers to record and provide information about their trips to the public authorities, to have proper financial standing, and to be properly insured. Local authorities cannot issue permits with bespoke conditions; they apply the conditions defined at the national level. A single taxi driver can therefore obtain as many permits as s/he wishes (after paying the corresponding fee) to operate in different areas/zones. The new legislation also introduced a written exam to check drivers possessed the required skills but removed periodical training. Vehicles need to be a maximum of five years old. Intermediaries also need to hire someone in charge of supervising the qualification of their staff and partners. The effectiveness and usefulness of this obligation are still unclear.<sup>41</sup>

The new regime also compels the private hire of a vehicle with a driver to secure the booking through intermediaries (apps, travel agents, and hotels). Such services are only required to have a general licence, and the price of the service needs to be discussed in advance. Transport intermediaries need to obtain a licence from the public authorities.<sup>42</sup>

#### 2.2.1.2 Estonia

Estonia reformed its ToD legislation in 2017. It created a two-tier system, for ToD services working with or without digital intermediaries.<sup>43</sup> All drivers need to be licenced (after showing that they have not committed serious crimes or offenses). Drivers do not have to undertake any exam. Similarly, all cars need to receive adequate registration (after passing a roadworthiness test). On the one hand, taxis need to be equipped with an illuminated sign, a taximeter, a printer, and a price list. Taxi drivers can pick up passengers with or without a booking at taxi ranks or on the street. Their price is regulated. On the other hand, PHV drivers can operate without these traditional taxi features but they are required to operate through digital intermediaries. Drivers can only take passengers with a booking. Their price is not regulated.

Taxi services can also operate PHV services if they want. Both taxi and PHV drivers can operate within or outside the area for which they have been licenced. However, when operating outside their designated service area, they need to abide by the rules of location, including the maximum price that can be imposed, as well as environmental and technical features that cars need to meet.

Digital intermediaries perceive this system as an example of a perfect level-playing field between PHV and taxis. However, some view this as a relative determination because price regulation differs for pre-booked services. Others see it as counterbalancing rising prices in the ToD sector, and hence protecting the consumer.<sup>44</sup> Moreover, PHV drivers can only operate using digital intermediaries who provide the essential infrastructure of the industry. It could be argued that digital intermediaries are 'creating the market' for ToD services. Ride-hailing platforms thus become exposed to liability and procedures outside the scope of the e-commerce directive, under the Elite Taxi (Uber Spain)

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<sup>40</sup> M. Mudrić, 'Croatian Law and Practice – Comparative Analysis' in Marin, J, Petrović, S, *et al.*, *Uber – Brave New Service or Unfair Competition: Legal Analysis of the Nature of Uber Services*, vol 76 (Springer Nature 2019), p. 93.

<sup>41</sup> *Ibidem*, p. 98.

<sup>42</sup> *Ibidem*, p.99.

<sup>43</sup> See Public Transport Act of Estonia, accessible in English at: [www.riigiteataja.ee/en/eli/518012019010/consolide](http://www.riigiteataja.ee/en/eli/518012019010/consolide). See also: [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2018\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2018)4/en/pdf)

<sup>44</sup> <https://bnn-news.com/price-rise-for-app-cabs-noticed-in-estonia-228173>



judgment discussed above when they have enough influence or control over the relationships between the drivers and the passengers.

### 2.2.1.3 Finland

Until 2018, only a limited number of taxis were allowed in Finland. Each taxi driver needed to obtain a licence and could only operate within a specific area. The combination of the two measures was intended to secure better service coverage throughout the country, where many rural areas would have lacked mobility services. Price regulations were also in force. On 1 July 2018, new legislation entered into force to liberalise the market by removing the cap on licences.<sup>45</sup> Under the new law, the licences are allocated to a carrier (a passenger transport company business) and individual drivers instead of a vehicle, thus allowing the use of several vehicles by carriers and drivers. The licences are valid nationwide rather than for the provision of ToD in a defined area. The delivery of a taxi driver's licence is subject to the same requirements as for people working with children. Taxi drivers must also pass a test to show their interaction skills and their ability to provide service to people with disabilities. The fare can be regulated (and a maximum can be imposed) when the journey fares climb more than overall inflation, or when they become unreasonably high.<sup>46</sup> The vehicles need to be equipped with a taximeter only when the price of the journey is based on the distance and time. Therefore, drivers only operating pre-booked trips with prearranged prices do not need to have their cars equipped with a taximeter.

The new law also ensures that transport data must be open, and that intermediaries and dispatch services make sure drivers have a taxi licence at risk of being penalised.

However, in 2021, the government backtracked and imposed new rules because consumers had lost their trust in the ToD industry, especially with regards to the lack of transparency of prices for taxis waiting in ranks or street-hailed.<sup>47</sup> As part of the latest measures, intermediaries were required to inform the authorities of their prices. The government also created additional training for the drivers and imposed higher standards for their exams. A taxi sign is also to become mandatory for better monitoring the sector. The government also made the taximeter mandatory when a flat fare is not negotiated before the journey. In any case (whether a flexible or flat fare is applicable), the car needs to be equipped with a taximeter or equivalent system that collects the data required by law (including localisation) of the journey.

### 2.2.1.4 Poland

Until the 2019 reform, Poland had three distinct regimes for **taxis, private car hires with a driver, and larger private car hires with the driver** (seven to nine passengers, including driver). The number of permits was capped, and it was difficult to obtain one. Drivers needed to show good standing (i.e., no criminal records). Most cities used to impose price regulation, but some had dropped it before the reform.<sup>48</sup> The reform effectively replaced taximeter requirements with a GPS-tracing application and removed some administrative burdens for obtaining permits (although some, such as taking an exam, were already dropped in 2013). The reform maintained the requirement of a permit for drivers and also foresaw the same for intermediaries and app providers. However, licences are not capped anymore. Intermediaries need to keep trip records for a period of five years.

Poland has introduced its licence for intermediaries. The Road Transportation Authority (Główny Inspektorat Transportu Drogowego, GITD) set three significant prerequisites for acquiring an

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<sup>45</sup> See here the English translation of the Act on Transport Services:

[https://www.finlex.fi/fi/laki/kaannokset/2017/en20170320\\_20180731.pdf](https://www.finlex.fi/fi/laki/kaannokset/2017/en20170320_20180731.pdf)

<sup>46</sup> Trafi, the governmental transport authority, monitors prices and needs to justify any interference in the pricing. Trafi recently announced a max price for specific vulnerable groups.

<sup>47</sup> See excerpts of the Finish press, e.g., <https://www.thenomadtoday.com/articulo/business-finland/amendments-to-the-taxi-legislation-come-into-effect-on-1-may/20210409214100010961.html>. See also: <https://valtioneuvosto.fi/en/-/amendments-to-taxi-legislation-to-come-into-force-mainly-on-1-may>

<sup>48</sup> D. Dabek, J. Lemanska, J. Czlowiekowska, 'Uber and taxis in Poland', in R. Noguellou and D. Renders, *Uber and Taxis*, Comparative Law Studies, Bruylant, 2018, p.325.



intermediary licence: a) local legal entity, b) financial ability to operate (annual financial report or financial assets), and c) an intermediary licence fee.

## 2.2.2 *In standstill position: no or modest reforms*

### 2.2.2.1 *Belgium*

Belgium follows three different regimes for ToD, one in each of the three Regions (Brussels, Flanders, and Wallonia). Drivers need to comply with the regime applicable at the pick-up point. Hence, cross-regional services are very difficult or require the driver to have an empty car in one of the two directions.

**In the Brussels area**, there are mainly two types of services: taxi services and car rental with drivers.<sup>49</sup>

- **Taxi services** need a permit to operate. The number of permits is capped and awarded through a public tender. Taxi services benefit from certain rights, such as accepting passengers without prior booking and the use of priority lanes. However, they need to comply with specific taxi fares imposed by public authorities.
- Private hire cars **with drivers** also need a permit to operate. However, the number of permits is not capped. Rides need to be booked before connecting with the passenger. Vehicles need to be booked for periods of a minimum of three hours and at a cost of minimum €108. The vehicle needs to be of a 'luxury' category (i.e., large and expensive cars) and a return-to-garage rule is imposed between two successive rides, because under the 1995 legislation in force, drivers/vehicles are not allowed to carry a 'transmitter' that can give instructions about reservations. A preliminary ruling has been referred to the Belgian Constitutional Court to assess whether smartphones should be considered as 'transmitters'.<sup>50</sup> In November 2021, the Court of Appeal of Brussels delivered a judgement that prohibited Uber to continue operating in Brussels. The reasoning of the court was that Uber had set up a contractual mechanism that allowed it to circumvent the ToD law with regards to the three-hour per client requirement (as it pooled all the clients – and therefore operated over the required time period). In the face of this, the Brussels Government announced that it would adopt promptly a new order that would seek to "improve the quality of services to client, unify the sector under a common legal framework, regulate intermediaries that take bookings and protect the local economy".<sup>51</sup>

Call centres and other intermediaries are not regulated in the Brussels area.

**In Flanders**, the ToD regime was revised in 2019, to include the four following categories: <sup>52</sup>

- **Street taxis** (*straattaxi*) can be ordered and paid via an application or through street-hail and are allowed to operate anywhere in the region. The price (or fare components) needs to be displayed prominently on the app or in the vehicle;
- **Taxi-stand taxis** (*standplaatstaxi*) need to receive the authorisation of both the region and the local authorities to operate, in exchange for which they get exclusive access to taxi stands. Each municipality can indeed set a cap on the number of taxis that can operate under this scheme. These taxis need to have a taximeter and abide by the price regulations;

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<sup>49</sup> D. Renders and D. De Valkeneer, 'Uber and taxis in Brussels' in R. Noguellou and D. Renders, *Uber and Taxis*, Comparative Law Studies, Bruylant, 2018, p. 63-80.

<sup>50</sup> *Moniteur Belge*, 2 March 2021, p. 18470. The question is currently pending before the Court.

<sup>51</sup> R. Vervoort, 'Le gouvernement bruxellois trouve un accord sur la réforme des services Taxis et LVC', *Press Release*, 25 Novembre 2021, accessible at [https://rudivervoort.brussels/news/\\_le-gouvernement-bruxellois-trouve-un-accord-sur-la-reforme-des-services-taxi-et-lvc/](https://rudivervoort.brussels/news/_le-gouvernement-bruxellois-trouve-un-accord-sur-la-reforme-des-services-taxi-et-lvc/)

<sup>52</sup> <https://www.vlaanderen.be/vergunning-individueel-bezoldigd-personenvervoer-taxi#soorten-taxidiensten-en-voorwaarden>

- **Ceremonial transport** can operate for periods of at least three hours (e.g., weddings). This regime is lightly regulated, but does need to be authorised by the Regional authorities;
- **Public transport taxi** (*openbaar vervoer taxi*) is a new form of transport that is not in place yet. It requires that the drivers have a contract with the Regional Ministry of Mobility, but it includes a pricing scheme favourable to users. Indeed, the price is zone based (i.e., how many zones, defined by the Regional government, are crossed from point A to point B). This service is mainly aimed at riders that have reduced mobility opportunities.

**In Wallonia**, there have been four categories of ToD since 2007. The first three require a permit from the Region, while the fourth one requires only a declaration to the Region.<sup>53</sup>

- **Taxis** need to obtain a permit both from the Region and from the local authorities (the cities). They need to comply with price regulations and use a taximeter.<sup>54</sup> Such permits also include an authorisation to provide services as vehicles with drivers or collective taxis (below);
- **Vehicles with drivers** are a form of service that needs to be booked and provide a passenger service for at least three hours or for the clients of a given hotel; or provide at least two transport services within seven days for the same client. They may not 'cruise' to find clients (vehicles need to stay on private property when not used);
- **A collective taxi** is a form of service that allows the prior booking of a seat, not of the vehicle itself. Yet this form of service does not allow for cruising, but they can enter a 'partnership with public transport companies' to improve public transport;
- **General interest transport** requires merely a declaration to public authorities and to abide by specific price regulations. To serve the public interest, prices are kept very low (€0.3/km; or a lump sum of €2.6 for any ride). Passengers simply book a seat rather than the full vehicle.

#### 2.2.2.2 France

Until 2014, **only taxis** could offer ToD services in France.<sup>55</sup> They needed to obtain a permit called 'authorisation to park' for a given territory. This permit was free to obtain from the public authorities but had to be registered on a waiting list, as the number of permits was capped per defined area (zones within administrative Departments or Regions). These permits could also be sold between drivers every five years, to bypass the waiting list. The price of these permits was therefore very high (up to €200,000!).


From 2014 onwards, the regime applicable to these permits has changed, while the permits that already existed remained in effect and could still be sold. The new permits are delivered only for a limited time, and cannot be transferred to anyone else but the driver. In 2016, a reform (the Grandguillaume Act) allowed the licence-holder to employ someone to exploit the licence on his or her behalf.

With the 2014 reform, a second status was introduced in France. The **touristic hire of vehicles with drivers** (*véhicules de tourisme avec chauffeur*) was introduced, serving passengers only upon prior booking. The price is either set before the ride or after the ride by computing time and distance. Between two rides, drivers are not allowed to cruise and need to be parked on private property. There is no obligation to return to the garage, merely to stay away from public roads. Vehicles need to follow certain rules concerning space and engine power. However, hybrid and electric vehicles are exempted from these rules on vehicle power. The drivers need either to pass an exam, which is

<sup>53</sup> <http://mobilite.wallonie.be/home/je-suis/un-citoyen/en-taxi/services-et-solutions/services-autorises-par-le-spw.html>

<sup>54</sup> <https://wallex.wallonie.be/eli/arrete/2014/03/13/2014202110/2014/04/17?doc=27684&rev=29061-19330>

<sup>55</sup> Other services of private hire of luxury vehicle with drivers coexisted, inherited from the Ancient Regime, but had very limited application. Their status provided the ground for the new ToD services introduced with the 2014 reform.



partially the same as for taxi drivers since the 2016 reform.<sup>56</sup> Such a process takes up to one year. Alternatively, drivers have to show good standing in a previous experience of driving passengers. Every five years, the drivers need to take training with an update on passenger transport legislation, customer service, and the evolution of professional practices. Unlike taxis, PHVs' geo-localisation cannot appear on apps before a booking has been made. The 2014 reform also introduced a third status, for occasional transport of passengers. However, this status is abused by some intermediaries. The 2016 reform sought to strictly limit the scope of this new status.<sup>57</sup>

Initially, vehicles with drivers needed to wait for 15 minutes after the booking to pick up passengers, except for clients of four- and five-star hotels. The French Council of State however, quickly struck down this rule.<sup>58</sup> Unlike taxis, PHVs' geo-localisation cannot appear on apps before a booking has been made.

Another reform was tabled in 2019.<sup>59</sup> Ride-hailing platforms need to show the destination and price of each ride to the driver when sending the ride proposal/offer. This new obligation leads drivers to reject unattractive rides, affecting the waiting time of consumers. It also affects the consumer's journey as some rides are cancelled at the last minute by drivers wanting to take a more attractive one.

France also requires registration for operating platforms. The platforms have to be registered at the Ministry of Transport and need to provide two documents: (1) proof of their legal ID and registration with the Trade Registry (*registre du commerce*), and (2) proof of their civil liability insurance covering professional transport and intermediation.

### 2.2.2.3 Italy

In Italy, access to the ToD industry is subject to two main requirements. Firstly, drivers need to register on regional lists after passing an exam. Secondly, they need to obtain a permit (a taxi licence or a PHV-permit). Each municipality allocates these permits through tenders, as their number is capped. For taxis, municipalities set base and maximum tariffs but most of them only allow rigid taximeter fares. Until recently, Italy had a return-to-garage rule for PHVs. The cost of such operational/administrative burdens was typically passed on to passengers. This rule has been struck down by the Italian Constitutional Court but is still enforced in some Regions. For PHVs price needs to be set in advance and drivers may not pick up passengers on the street, unless they have a booking.<sup>60</sup> A recent court judgment, however, allows PHVs to pick up passengers outside the limits of the locality where they obtained the authorisation to operate, but it remains unclear whether this out-of-area activity can be carried out as a regular activity.<sup>61</sup>

Drivers cannot have multiple permits for taxi services but may have several permits for the provision of PHV (although they cannot obtain a permit both as a taxi and a PHV operator). Each of the Italian Regions determines the framework applicable to these permits, and new rules had to be adopted by 2018. However, the regime is rigid<sup>62</sup> and has led to much litigation against new entrants for unfair

<sup>56</sup> See e.g., <https://www.cma-hautsdefrance.fr/examen-taxi-et-vtc/>. See also : Loi n° 2016-1920 relative à la régulation, à la responsabilisation et à la simplification dans le secteur du transport public particulier de personnes [2016] JORF 303 of 30 December 2016.

<sup>57</sup> See A. Brugière and A. Nicot, (2019). 'À la recherche de nouvelles régulations sociales, entre conflits, mobilisations, lobbying et réglementation' *Chronique Internationale de l'IREs*, 168, 139-154. <https://doi.org/10.3917/chii.168.0139>

<sup>58</sup> French Council of State, decision nr 374525, 17 December 2014.


<sup>59</sup> LOI n° 2019-1428 d'orientation des mobilités [2019] JORF 299 of 26 December 2019.

<sup>60</sup> See e.g., E.R. Desana, F. Riganti, S. Secinaro (2021) 'Über Alles or not? the Italian Perspective on the 'Uber Case'' in Z. Ayata, I. Önay (eds) *Global Perspectives on Legal Challenges Posed by Ridesharing Companies* (Springer, Singapore), accessible at [doi.org/10.1007/978-981-15-7035-3\\_9](https://doi.org/10.1007/978-981-15-7035-3_9).

<sup>61</sup> Italian Supreme Court (sentence 24378/2021), 8 September 2021.

<sup>62</sup> S. Torricelli, 'Uber in the Italian non-scheduled public transport market', in R. Noguellou and D. Renders, *Uber and Taxis*, Comparative Law Studies, Bruylant, 2018, p.163-203.





competition.<sup>63</sup> Questions on the Italian regime have led an Italian administrative court to allow for the recognition of foreign permits, who must adhere to strong rules when it comes to national legislation.<sup>64</sup> This is fertile ground for reverse discrimination, i.e., situations where foreigners receive better treatment than nationals.

Proposals for reforms were tabled in 2021 but is uncertain whether they will be successful or what results they will generate.

#### 2.2.2.4 The Netherlands

Until 2000, the taxi market was closed in the Netherlands. A cap on taxi permits in several cities meant that permits were often expensive. Liberalisation efforts set off a taxi war (*taxioorlog*) with critics claiming that the industry is not a perfectly competitive market and that passengers are not well enough informed which affects the quality of the services provided.<sup>65</sup>

In the Netherlands, the 2000 law on passenger transport (*wet personenvervoer 2000*) defines the activity as transporting (a) passengers, (b) by car, (c) for a fee, and (d) that is not on a regular schedule. The legislation distinguishes between contract hire taxis (*contractvervoer*) and street taxis (call taxis and street-hail taxis), and is related to the activities rather than to the driver or the car. It means that a driver can choose between these activities at a different point in time without any formalities:

- **Contract hire taxis** offer services to a passenger multiple times at an uncapped fixed rate.
- **Street-hail taxis** need to obtain permits in some municipalities. These permits require that drivers affiliate with a taxi organisation that ensures a minimum quality of service. Street-hailing taxis also need to comply with price regulation mechanisms (fare structures) and are required to use a taximeter. Their advantage is that they have exclusive access to taxi stands, and can generally use priority lanes, unlike other forms of taxis.
- **Call taxis** are other taxis, including taxis ordered through an application. They also need to comply with price regulations, except if the price has been agreed upon before the trip.

Taxi permits cannot be capped in the Netherlands. Operators and drivers need, however, to obtain a permit and show good conduct (clean criminal record). The permits are not transferable. Cars need to have a 'black box' (data/trip recorder), register trips, working hours and be equipped with a taximeter if a driver wishes to offer street hail services.

### 2.2.3 Increased complexity

#### 2.2.3.1 Germany

In Germany, **taxi services** need to obtain a permit delivered by the city. Most cities (to the notable exception of Berlin and Hamburg) cap the number of licences allegedly to protect the taxi market and public interest (ensuring the availability of transportation services). This creates a secondary market of permits that are sold at very high prices. Taxi drivers are under an obligation to transport passengers and may refuse rides only in very limited circumstances. Taxis can only operate with a taximeter (at the pricing established by the municipality). Municipalities have the discretion to introduce flexible pricing for taxi services. Furthermore, taxis have the advantage of a reduced VAT rate, and they are allowed to use bus lanes and taxi stands.


Concerning **private hire car services**, there are no quantitative limits for permits, no price regulation, and no obligation to transport passengers. Since 2017, private hire car drivers are no

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<sup>63</sup> M. Musi, 'Italian Law and Practice', in Marin, J, Petrović, S, et al., *Uber – Brave New Service or Unfair Competition: Legal Analysis of the Nature of Uber Services*, vol 76 (Springer Nature 2019), p.116-124. *Adde* also: Italian Constitutional Court, judgment No. 56 of March 26, 2020. August 31, Italian Council of State (judgment 6124/2021).

<sup>64</sup> Regional Administrative Court of Lazio, 11 August 2011, N. 09364/2021 REG.PROV.COLL, N. 07605/2020 REG.RIC.

<sup>65</sup> A. Baanders and M. Canoy, 'Ten Years of Taxi Deregulation in the Netherlands – The Case for Re-regulation and Decentralisation', European Transport Conference, Glasgow, 2010 accessible at <https://trid.trb.org/view/1116129>



longer obliged to take an exam to show that they are familiar with the area of operation but remain compelled to take the same State exam as taxi drivers (passenger transport licence). Until 2021, PHV drivers needed to obtain booking orders in person from their home base (a garage) or an intermediary.<sup>66</sup> This notion of 'booking' was interpreted narrowly by the German Supreme Court, meaning that some time had to elapse between the order and the actual pick-up.<sup>67</sup> This system ensured that drivers cannot operate independently and can accept orders from within the car, but only by a dedicated person (transport licence-holder) at their home base. Private hire vehicles were, and still are, obliged to return-to-garage after each trip, except if they have another booking pending. In 2021, the German Parliament adopted new rules for ToD to approach again the notion of 'booking' in a more flexible fashion (and allow automatic transmission of orders to the drivers). This reform also allows licensing authorities to add additional return hubs (garages) for each PHV company.

While these rules seem to introduce simplification, the 2021 reform also introduced a new category of licences for pooling, at the discretion of municipalities, and therefore made it possible for the first time-shared trips (multiple passengers).<sup>68</sup> The regime applicable to this makes the whole system rather more complex. It brings more cars in the cities as already authorised taxi and PHV drivers may not opt-in for pooled transport: it is a separate licence.

Minimum and maximum prices may be imposed on pooling services, while only minimum fares can be imposed for the PHV services. If the minimum price is set significantly above (or under) the minimum price for taxi services, a violation of the principle of non-discrimination is very likely to be found. In addition to the possibility of flexible pricing for taxi services (above), this pricing aspect is likely to cause consumer confusion in the way that fares can or cannot be calculated in Germany.

Municipalities can also subject intermediaries in the ToD industry to specific licences when they reach 25% of market share (based on the number of rides carried out).<sup>69</sup>

The German law on the transport of passengers also applies to foreign taxis and private hire of vehicles that come to Germany as 'transit traffic' or that operate in Germany from abroad. In so doing, Germany accepts that foreign licenced professionals may operate on German territory when agreements are concluded between Germany and foreign authorities (mutual recognition). When such agreements do not exist, the economic operators can obtain ad hoc authorisation from the Federal Ministry of Mobility.<sup>70</sup>

#### 2.2.4 Lines of convergence

From the above outline, it is clear that differences in the regulation of ToD exist not only between the Member States but also between regions and cities within the same Member State. However, this analysis also offers several points of convergence: (a) **many countries have restrictive measures**, (b) **liberalisation does not mean that the licensing system is abandoned**, (c) **many governments still make the difference between PHVs and taxis**, and (d) **PHV and taxi rules are intertwined**, in the sense that any modification in the former category also requires adjustment in the latter.

Several countries (or local governments) have been imposing restrictive measures. Many Member States have imposed burdensome access conditions on drivers (e.g., rigid taxi fares, caps on licences, very difficult exams),<sup>71</sup> as well as restrictive rules of practice (e.g., PHV partners are required to manually accept trip requests at their place of business in Germany). Public authorities have also

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<sup>66</sup> M. Nietsch and G. Schott (2021) 'The Legal Framework for Ridesharing Businesses and the Case of Uber in Germany'. In: Z. Ayata., I. Önay (eds) *Global Perspectives on Legal Challenges Posed by Ridesharing Companies* (Springer, Singapore), accessible at [doi.org/10.1007/978-981-15-7035-3\\_8](https://doi.org/10.1007/978-981-15-7035-3_8)

<sup>67</sup> German Supreme Court (BGH), judg. Of 14 December 1989, I ZR 37/88, *NJW*, 1990, p.1366. See also D. Uwer and A. Drössler, 'Germany' in R. Noguellou and D. Renders, *Uber and Taxis*, Comparative Law Studies, Bruylant, 2018, p.232-250.


<sup>68</sup> Personenbeförderungsgesetz (hereafter 'PBefG'), article 50.

<sup>69</sup> PBefG, article 49.

<sup>70</sup> PBefG, article 53.

<sup>71</sup> Outside the examples provided, Vienna also requires a 'city knowledge' test and languages test.





imposed **time restrictions** in the ToD regimes. With regards to the minimum driving time, there is also the example of Brussels: drivers need to charge a minimum of €90 (adjusted for inflation to €108) and the driver needs to be booked for at least three hours, imposing a de facto minimum waiting time between the onloading/embarkment of successive passengers. Until recently, Germany also interpreted the notion of 'booking' by using time constraints. Transport companies and PHV drivers must wait at least 15 minutes before accepting rides from passengers in some Spanish cities. This is also in line with regimes (outside the above sample) in Greece and Luxembourg. In Greece, transport is subject to the payment of a fee covering a three-hour journey (as opposed to a tariff) set to €180 on mainland Greece. Luxembourg also seeks to impose a minimum one-hour waiting time for PHV drivers. This is only a legislative proposal at this stage. Some stakeholders, however, seek to delineate the waiting time to a 12-hour notice period (advance booking), whereas the Chamber of Commerce considers that under certain circumstances, such as emergencies (e.g., an accident blocking the highway), this delay should be removed. The law is currently under review by the Council of State.

The **return-to-garage** obligations exist only where there is a strong distinction between taxi and PHVs services. This rule comes from a time when GPS-tracing and platforms (which optimise the matchmaking and waiting times of drivers) did not exist, and has tended to be abandoned. Some licensing authorities have retained it on the basis that it may mitigate congestion, but it could have the opposite effect, particularly where garages are located on city fringes.

It is striking, in particular, that even where liberalisation has taken place, **permits are still required**. However, the forms and the level of these permits may differ; they may be subject to a mere registration requirement or more complex exams and controls. In other words, liberalisation does not mean the abolition of all rules; it only means that access to the ToD market – taxi and PHV combined – is easier and that the market is made up of more than local players (though not necessarily reaching the national let alone transnational, level). Liberalisation comes with safeguards, such as background checks, caps in certain hyper-touristic areas, as well as some form of price regulation. Most recent pieces of legislation recognise **replacement of taximeters** with GPS tracing; however, GPS-tracing systems need themselves to be authorised by public authorities for use in the ToD industry.

The two-tier system of taxis and PHVs is maintained in most Member States, with rules for PHVs having been eased during recent years. Taxis, however, reserve some more rights (cruising, street-hailing, use of fast lanes), but are also subject to more obligations (no right of refusal, price caps). In Estonia, Finland, Poland, and, to a lesser degree, Austria, the lines have been blurred between the categories. A single regime applies to all ToD drivers, sometimes with minor deviations for certain types of services or locations. The Netherlands offers yet another take on liberalisation allowing individual drivers to switch between categories, which can be confusing for drivers and customers. The questions hanging over the Dutch approach, together with the Finish misstep (restrictions were reintroduced after a liberalisation attempt), show that it is not a simple linear transition. Here, lessons can be drawn from changes that took shape in Europe's network industries over 30 years ago; **liberalisation of the ToD sector should go hand-in-hand with some reregulation**.

All in all, rules on PHV and taxis are intertwined. When rules are changed in one industry, the other is directly impacted: in Portugal, the complete liberalisation of PHVs has, largely, displaced traditional taxis. A legislative overhaul of one sector requires a rethinking of ToD regulation as a whole. This, in turn, means that a **level playing field** should eventually be created for all ToD participants, in a progressive and coordinated way, taking due account of the legitimate needs of rank- and street-hailing passengers. The Estonian example, which distinguishes between these two hailing activities, rather than simply between taxis and PHVs, seems to be in the right direction. However, as mentioned earlier this system also has its critics. **Regulatory arbitrage allowing for both innovation and protection of passengers needs to be made**.



## 2.3 Interim conclusion for Part 2

The legal situation of ToD is characterised by uncertainty at EU level and great fragmentation at national level. Uncertainty exists both at the level of platforms and dispatchers as well as at the level of drivers and ride operators. For platforms, in particular, the CJEU's case law may lead to surprising results. On the one hand, it imposed restrictions on Uber (for its peer-to-peer service, UberPop, which is no longer offered in Europe) at national and local level. On the other hand, it allowed a smaller, local dispatcher (Star Taxi App) with limited to no trans-national operations to benefit from the more advantageous European rules.

Whenever a platform is not providing the 'underlying service', it will evade the corresponding sector-specific national rules, as these are primarily addressed to drivers and operators.<sup>72</sup> In this respect, most Member States, such as France, Germany and Belgium, maintain distinct legal regimes for traditional taxi and PHV drivers. The existence of a two-tier system is typically underpinned by the recognition of some extra rights in favour of taxi drivers, such as cruising in between rides, queuing in designated taxi stations, street-hailing, and access to restricted driving lanes and city zones. These rights, however, typically come with obligations, such as charging specific prices (via the authorised taximeter) and being prohibited to refuse rides. PHV drivers and operators, on the other hand, may not wait for passengers in designated areas and can be subject to specific rules (e.g., to pick up and drop off passengers in airport areas). On top of this main distinction, PHV drivers are often subject to other restrictive measures including the return-to-garage rule, specific waiting and/or driving times, exclusion from restricted driving lanes and city zones, etc.

Other Member States, such as Austria, Estonia and Poland have abolished the distinction between taxis and PHVs, and have fully liberalised ToD. Liberalisation, as stated in the previous section, does not mean the absence of rules, rather the substitution of qualitative rules with quantitative restrictions underpinned by a freer market logic.

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<sup>72</sup> It will, nonetheless, remain subject to the rules of the e-commerce directives if it qualifies as an information society service. While these rules liberalise the digital industry, they still enable Member States to legislate in the sector.

**3**

**PUBLIC POLICY  
OBJECTIVES JUSTIFYING  
THE REGULATION OF  
TRANSPORT-ON-  
DEMAND**



### 3 Public policy objectives justifying the regulation of Transport-on-Demand

In the previous part, we discussed a wave of ToD liberalisation (with different intensities) in different EU Member States. Here, liberalisation corresponds to the rationalisation of existing restrictive rules. The adoption of such restrictive rules has been historically justified – or at least window-dressed – by the need to protect public policy objectives; and occasionally they have only served to protect the incumbent rent-seeking market players.

Public policy objectives linked to ToD have been largely focused on mitigating risks. As will be developed in the coming pages, they seek to protect other interests, such as the protection of public order (I), safety of passengers and drivers (II), and concerns about traffic and environmental externalities (III). They need to be revisited given the material and legal developments taking place in recent years. Lastly, the idea that existing restrictions to taxis and PHVs are justified by a so-called ‘mission of service of general economic interest’ (SGEI) is also discussed in this chapter (IV).

#### 3.1 Public order, security, safety

While EU legislation on road transport (including buses and coaches) has specific provisions on resting periods, only a few licensing authorities require ToD drivers to take rest breaks. The assumption was that drivers have long waiting times and drive mostly in urban areas where the risks of falling asleep may be lower than on highways. In addition, price regulation also ensures that drivers make decent living wages without having to ‘starve for sleep’. However, the French General Inspectorate for Social Affairs (IGAS) shows that the number of accidents in the taxi industry is much higher than regular car drivers.<sup>73</sup>

Digital platforms optimise the waiting period between two rides. This optimisation, while positive from a consumer and environmental standpoint, reduces the amount of resting time that a driver may have. Indeed, no legislation provides minimum car-driver resting times or regimes (i.e., depending on their schedules, truck drivers may be required to take a full day of rest between trips).<sup>74</sup> Some digital platforms, including Uber, have proactively put in place systems to limit driver hours. Yet the shortage of drivers in several European cities creates an incentive for existing drivers to work longer shifts to optimise the use of their cars. Imposing minimum resting periods for drivers could promote the safety of both drivers and passengers. However, this is easier said than done, given the increasing number of ‘multi-home’ drivers (i.e., they drive for various platforms, hence rendering ineffective measures adopted individually by those). When discussing these safety aspects, regulatory intervention should safeguard the flexibility of drivers in deciding the rides and the platforms/intermediaries they wish to drive for. **Therefore, any control of driving hours should bypass the platforms and other dispatchers and focus on individual drivers; and it should cover PHV and taxi drivers alike.**


The use of an (analogue or digital) tachygraph, in the same way as with lorry drivers, could monitor the driving and resting times of each vehicle and driver, if there are several.<sup>75</sup> Indeed, each driver could use his/her unique personal identifier when switching on the tachygraph. Further, cars are also increasingly connected to smartphones through apps, such as CarPlay and Android Auto. Cars also increasingly log automatically their driving times and distance to be shared on the app of the car manufacturer, for maintenance purposes. These different sources of data could be linked with a government app that monitors the active periods of drivers.

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<sup>73</sup> N. Amar, M. Leconte, et al, ‘*La régulation du secteur des voitures de transport avec chauffeur et des taxis*’, Report of the French General Inspectorate of Social Affairs (IGAS), December 2018, accessible at <https://www.igas.gouv.fr/spip.php?article720>. See however infra, fn 99 and related text.

<sup>74</sup> European Parliament and Council Regulation 561/2006 on the harmonisation of certain social legislation relating to road transport [2006] OJ L 102/1.

<sup>75</sup> European Parliament and of the Council Regulation No 165/2014 on tachographs in road transport [2014] OJ L 60/1.



Because this proposal seeks to guarantee the safety of users as much as drivers and third parties, it should not make a distinction between drivers who are independent contractors or those with an employment contract. It should therefore avoid making any assumption with regards to the status of the drivers under labour law.

While the EU has already harmonised some safety standards for vehicles,<sup>76</sup> certain licensing authorities went further and imposed stronger standards to protect both passengers and drivers. These more stringent standards vary from place to place. Some also have minimum requirements concerning the safety of the vehicle driven. Some EU Member States designate certain brands and models of cars as meeting minimum safety standards. Yet, harmonising the vehicle safety level could help the automotive industry to build cars better suited to ride-hailing. **The harmonisation should take place through self-regulation or industry-wide regulation.**

Another important feature of safety and security relates to the criminal records of drivers. Many countries (e.g., France, Belgium, Denmark) insist that drivers have clean criminal records, some even requiring the same level of good standing for taxi drivers as for teachers or people working with children (e.g., Finland). Indeed, licensing authorities often fear that drivers would commit offenses and pose a threat to the passengers, and put at risk the reputation of the industry for which they have issued permits.<sup>77</sup> Such requirements need to strike a balance between access to the labour market and an enhanced level of consumer trust in the ToD industry.

Some countries also impose obligations on intermediaries to report their drivers' criminal offenses (and records) to the authorities. The GPS-tracing devices replacing taximeters (discussed in Part 2) may also be used to check that drivers comply with the driving code and do not exceed speed limits or violate other traffic rules. While this kind of monitoring and surveillance may be considered invasive,<sup>78</sup> the use of mobile applications also facilitates the reporting of criminal offenses from users to the app, anonymously. In 2017, when the United Kingdom was still in the EU, Uber was refused a renewal of its licence to operate in London (partly) on the grounds that users had made complaints alleging criminal activities by drivers, and that Uber had not proactively notified law enforcement agencies.<sup>79</sup> In the future, digital intermediaries may have to forward such information to public authorities under the proposed Digital Services Act.<sup>80</sup>

### 3.2 Passenger/consumer protection

As discussed in Part 2, protecting ToD users has been largely absent from policymaking agendas at the national level. At the EU level, consumer protection legislation is perceived horizontally and in no way takes into account the specific risks stemming from ride-hailing.<sup>81</sup> Passengers can be considered as consumers of a ToD service, and/or of a transport-connected intermediation service. Yet, in almost all other forms of passenger transport (rail, road by bus and coach, air, boat) passenger protection is specifically regulated at the EU level.<sup>82</sup> From this regulation, the European Commission has

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<sup>76</sup> European Parliament and Council Regulation of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2018] OJ L151/1. See also European Parliament and Council Regulation of 27 November 2019 on type-approval requirements for motor vehicles and their trailers, and systems, components and separate technical units intended for such vehicles, as regards their general safety and the protection of vehicle occupants and vulnerable road users [2019] OJ L325/1.

<sup>77</sup> See e.g., K. Matussek, *UberMust Stop Car Service in Germany's Two Largest Cities* (Bloomberg Sept 26, 2014), online at <https://www.bloomberg.com/news/articles/2014-09-26/uber-faces-ban-in-berlin-after-overturning-german-wide-measure> (visited Sep 14, 2021).


<sup>78</sup> See E. Cobbaut, 'Le travail par l'intermédiaire des plateformes numériques et la protection des données à caractère personnel', in A. Lamine and C. Wattecamps, *Quel droit social pour les travailleurs de plateformes?*, Anthemis, Limal, 2020.

<sup>79</sup> E. Marique and Y. Marique, 'Uber in London: A battle between public and private regulation', in R. Noguellou and D. Renders, *Uber and Taxis*, Comparative Law Studies, Bruylant, 2018, p.163-203. See also <https://theconversation.com/ubers-data-revealed-nearly-6-000-sexual-assaults-does-that-mean-its-not-safe-128689>

<sup>80</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act), 15 December 2020, COM(2020) 825 final.

<sup>81</sup> Consumer protection in ToD is being discussed below, in Part 4, V.

<sup>82</sup> See above fn 15.



identified a core of ten common consumer protection rights, and has treated them as a kind of an 'EU Passenger Bill of Rights'.<sup>83</sup> These core rights are:

1. Right to non-discrimination in access to transport;
2. Right to mobility: accessibility and assistance at no additional cost for disabled passengers and passengers with reduced mobility (PRM);
3. Right to information before purchase and at the various stages of travel, notably in case of disruption;
4. Right to renounce traveling (reimbursement of the full cost of the ticket) when the trip is not carried out as planned, including a minimum time limit to trigger such right which varies depending on the transport mode;
5. Right to the fulfilment of the transport contract in case of disruption (rerouting and rebooking);
6. Right to get assistance in case of a long delay at departure or connecting points;
7. Right to compensation under certain circumstances;
8. Right to carrier liability towards passengers and their baggage;
9. Right to a quick and accessible system of complaint handling;
10. Right to full application and effective enforcement of EU law.

As general principles applicable to all modes of passenger transport, they should also apply to ToD. The way they should be adapted to this transportation mode remains to be put forward by the European Commission. For example, adaptations may be called for in the use of digital media, the 'decisive influence' criterion, the data collected and the innovative services offered by ride-hailing platforms, the specific objectives of urban mobility, as well as the availability of workable alternatives. For instance, the meaning of the notion of 'assistance' needs to be further defined in the context of ToD. Similarly, passengers should be allowed to cancel a trip at no cost if the driver is late (by a certain amount of time – e.g., 20 minutes); with the burden of proof being on the platform to prove that the driver was not late. Given that time is of the essence of any ToD contract, if the driver does not show up within a given time, the user should be free to find alternative solutions. For instance, on a very congested day, passengers may elect to use fixed-rail services when they find out that the driver will be late. However, a balance with the driver's interests needs to be struck, to avoid abuses of the system, such as a late cancellation when s/he has already invested time and effort in reaching the passenger. A small flat-fee could be paid after a certain amount of time has elapsed (e.g., cancellation between 10 and 20 minutes of additional waiting time).

Consumer protection also includes aspects of protecting the privacy of the consumers. While privacy is a fundamental right, the industry is getting involved in the life of the passengers: drivers may overhear passenger discussions, know their whereabouts, where they live and work, whom they spend time with.<sup>84</sup> This kind of information, which is not processed wholly or partly by automated means or as part of a filing system, is not protected under the EU's data protection regime (GDPR). **Therefore, platform-wide self-regulatory initiatives** (e.g., codes of conduct) **defining and describing confidentiality obligations** (already in use by some ride-hailing platforms), **should be generalised and streamlined to address the right to privacy.**


On the other hand, data processed by ride-hailing intermediaries does fall under the GDPR and similar legislation, therefore the only issue there is that of effective enforcement of existing legislation.

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<sup>83</sup> European Commission (2011), 'A European vision for passengers: communication on passenger rights in all transport modes', COM (2011) 898 final, 19 December 2011. See also European Court of Auditors (2017) Passenger Rights in the EU.

<sup>84</sup> B. Rogers, 'The Social Costs of Uber' (2017) 82 University of Chicago Law Review Online 85, pp. 84-85.





In addition, the rating of passengers and drivers is a key feature of most ToD applications. Passengers' ratings by drivers may be affected by implicit biases of the latter, and vice versa. These ratings can therefore become a source of discrimination depending on how they are used, even when not directly shared with other drivers. **Training of passengers and drivers on these (implicit) biases**, as well as developing codes of deontology in a uniform manner in the sector should therefore be contemplated. At the moment, only platform-specific initiatives exist.<sup>85</sup>

### 3.3 Negative externalities: congestion and pollution

#### 3.3.1 Congestion

Despite representing a very small proportion of the vehicle fleet and total vehicle miles travelled, ToD services have been claimed to contribute to a disproportionate share of road congestion, both on the streets and in parking/waiting areas.<sup>86</sup> This finding was based mainly on studies produced in the US, including urban and rural areas with disparate access to public transport. It should be noted that public transport is more widely available and used across the EU urban areas, and studies show that ride-hailing complements it.<sup>87</sup> Current studies on the impact of ride-hailing on traffic in EU cities seem to go in the same direction.<sup>88</sup> This is the main argument used by public authorities for justifying licence caps; often combined with territorial restrictions aimed at ensuring that cars do not concentrate in city centres. ToD liberalisation has had an impact on cities.<sup>89</sup> ToD can indeed become a competitor to private cars but also public transportation services.

#### 3.3.2 Pollution

ToD services make intensive use of the car, as it is a work tool, similar to vehicles used in taxis and other on-demand commercial passenger fleets (about 48,000 km/year, or three to four times as much as a regular driver,<sup>90</sup> with an average of 0.95 passengers in the vehicle, with a vehicle lifetime of seven years).<sup>91</sup> While some research, such as ITF's study<sup>92</sup> showing that, overall, taxis and PHV polluted more for the same distance than privately owned cars, when comparing a single trip in the former to an equivalent in the latter, the actual impact of taxis and PHV in a system of transportation

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<sup>85</sup> See [www.uber.com/legal/en/document/?name=non-discrimination-policy&country=portugal&lang=en](http://www.uber.com/legal/en/document/?name=non-discrimination-policy&country=portugal&lang=en)

<sup>86</sup> Bloomberg, 'How Much Traffic Do Uber and Lyft Cause?', 5 August 2019, accessible at [www.bloomberg.com/news/articles/2019-08-05/uber-and-lyft-admit-they-re-making-traffic-worse](http://www.bloomberg.com/news/articles/2019-08-05/uber-and-lyft-admit-they-re-making-traffic-worse). See also M. Diao, H. Kong, H. and J. Zhao, 'Impacts of transportation network companies on urban mobility', *Nat Sustain* 4, 494–500 (2021), accessible at [doi.org/10.1038/s41893-020-00678-z](https://doi.org/10.1038/s41893-020-00678-z); New York City Taxi and Limousine Commission, Department of Transportation, Improving Efficiency and Managing Growth in New York's For-Hire Vehicle Sector, *Final Report*, June 2019, accessible at [www1.nyc.gov/assets/tlc/downloads/pdf/fhv\\_congestion\\_study\\_report.pdf](http://www1.nyc.gov/assets/tlc/downloads/pdf/fhv_congestion_study_report.pdf); G.D. Erhardt, S. Roy, S. et al., 'Do transportation network companies decrease or increase congestion?' (2019) *Science advances*, 5(5), p.eaau2670; City of Chicago, Transportation Network Providers and Congestion in the City of Chicago, 2019, <https://www.chicago.gov/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2019/October/TNPCongestionReport.pdf>

<sup>87</sup> S. Rao 'Uber and public transport interaction: An analysis of empirical evidence' (2021) *Medium*, accessible at <https://medium.com/uber-under-the-hood/uber-and-public-transport-interaction-an-analysis-of-empirical-evidence-8514302f166f>. See also <https://arxiv.org/ftp/arxiv/papers/2104/2104.04208.pdf>

<sup>88</sup> In Europe, see Transport for London, *Travel in London report*, 11, table 2.1, p.25, accessible at [content.tfl.gov.uk/travel-in-london-report-11.pdf](http://content.tfl.gov.uk/travel-in-london-report-11.pdf). See also Transport & Environment Report, 'Europe's giant 'taxi company': Is Uber part of the problem or the solution?', 2021, accessible at [https://www.transportenvironment.org/wp-content/uploads/2021/07/T&E\\_Europe%20s%20giant%20taxi%20company%20is%20Uber%20part%20of%20the%20problem%20or%20the%20solution...%20\(1\)\\_1.pdf](https://www.transportenvironment.org/wp-content/uploads/2021/07/T&E_Europe%20s%20giant%20taxi%20company%20is%20Uber%20part%20of%20the%20problem%20or%20the%20solution...%20(1)_1.pdf)


<sup>89</sup> X. Fageda, 'Measuring the impact of ride-hailing firms on urban congestion: The case of Uber in Europe' (2021). Papers in Regional Science, 1–24, accessible at [doi.org/10.1111/pirs.12607](https://doi.org/10.1111/pirs.12607). M. Tarduno 'The congestion costs of Uber and Lyft' (2021) *Journal of Urban Economics* vol. 122, p.103318, [doi.org/10.1016/j.jue.2020.103318](https://doi.org/10.1016/j.jue.2020.103318). See also Transport and Environment, Europe's giant 'taxi' company: is Uber part of the problem or the solution? , Briefing accessible at [www.transportenvironment.org](http://www.transportenvironment.org). Compare with OECD(ITF), 'App-Based Ride and Taxi Services. Principles for regulation', 9 May 2016, [www.itf-oecd.org/app-based-ride-and-taxi-services-principles-regulation](http://www.itf-oecd.org/app-based-ride-and-taxi-services-principles-regulation)

<sup>90</sup> See <https://www.uber.com/be/en/about/reports/spark-partnering-to-electrify-europe/>

<sup>91</sup> For instance, a car carries always at least one passenger (the driver), while the driver is excluded from the calculation when it comes to taxis and PHV. Waiting times and cruising times (where the only person in the taxi or PHV is the driver) drop the pollution efficiency ratio of the vehicle. ITF, 'Good to go? Assessing the environmental performance of new mobility', 17 September 2020, [www.itf-oecd.org/good-go-assessing-environmental-performance-new-mobility](http://www.itf-oecd.org/good-go-assessing-environmental-performance-new-mobility), p.28.

<sup>92</sup> ITF, 'Good to go? Assessing the environmental performance of new mobility', 17 September 2020, [www.itf-oecd.org/good-go-assessing-environmental-performance-new-mobility](http://www.itf-oecd.org/good-go-assessing-environmental-performance-new-mobility), p.28.





deserves more nuanced evaluation. Taxi and PHV trips represent a small fraction of overall passenger kilometres travelled, and therefore emissions, in nearly all urban passenger transportation markets, while private cars remain dominant. Recent travel surveys from 12 EU Member States show that taxis' share of overall passenger kilometres travelled is less than a few percentage points, and often below one percent, while private cars and largely solo-driver cars tended to account for more than half.<sup>93</sup>

A sector-specific intervention seems justified to deal with cars used in ToD in light of their shorter lifecycle. Indeed, in the low-emission zones (LEZ) increasingly introduced in many cities, where only the least-polluting categories of cars are allowed, special transition periods are foreseen for private cars because of their long lifecycle. ToD vehicles, on the other hand, because of their intensive use, have a much shorter lifespan. Hence, the strictest pollution rules can be imposed on the ToD sector first, before being generalised to all cars. Yet, the fault does not only belong to the taxi operators. Indeed, some cities/countries have also imposed return-to-garage rules, which contribute to increased levels of congestion.<sup>94</sup>

Some digital platforms active in the field of transport have also pledged to have a green, zero-emission fleet in the coming years. **These commitments should become the norm and – at least indirectly through corporate social responsibility pledges or otherwise – enforceable against all platforms** (and other dispatch intermediaries) in the mobility sector, from PHVs to taxis, but also other commercial vehicles, including company cars.<sup>95</sup> Indeed, transport is (one of) the key culprits in pollution and the only industry whose negative climate impact is not decreasing. Ride-hailing companies have shown that proper regulatory incentives (including mandatory electrification of a fleet) can help those companies in their shift towards more sustainable mobility.<sup>96</sup> At the same time, public authorities should be encouraged, politically and financially, to multiply the loading docks for electric cars and charging stations, offer battery EV incentive bonuses for high-kilometre and lower-income drivers, support the acquisition of second-hand EVs, and other measures that facilitate the electrification of fleets, given the outsized positive impact this can have on climate.<sup>97</sup>

Some cities have also imposed technical standards with regards to the capacity of the vehicles and their safety. Harmonised standards for the use of PHVs and taxis could be both an opportunity for EU 'automobile champions' to develop cars suitable for the EU ToD market, but also to ensure consistent, sustainable standards for the industry. This would also entail positive spill-over effects, as ToD fleets would eventually (typically after five to seven years) reach the second-hand car market, thus spreading the use of higher environmental standards.

### 3.3.3 Casualties

Externalities include casualties in accidents involving third parties. A report by the French government shows that the number of accidents in the PHV sector is higher than for taxis because of longer driving times; and that professional cars in general are involved in more accidents than private ones.<sup>98</sup> This contrasts, however, with an Uber Safety report showing that the fatality rate of ToD vehicles is lower than that of private cars in the US.<sup>99</sup> Additional (EU-based) research is therefore needed to settle the discussion. Overall, the taxi sector is also subject to more traffic accidents

<sup>93</sup> See [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Passenger\\_mobility\\_statistics#Travel\\_mode](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Passenger_mobility_statistics#Travel_mode)

<sup>94</sup> European Commission, 'Study on passenger transport by taxi, hire car with driver and ridesharing in the EU' final report (2016), Annex III, p. 300.


<sup>95</sup> For the enforceability of 'voluntary' CSR pledges see B. Egelund-Olsen and K. Egsig-Sorensen, 'Strengthening the Enforcement of CSR Guidelines: Finding a new Balance Between Hard and Soft Law', 41:1 LIEI 2014, 9-36; and E. Drai, 'Responsabilité sociale des entreprises: un mouvement créateur de valeur' in 54 *Petites Affiches* (2008) 4-8.

<sup>96</sup> Transport & Environment, 'Is Uber delivering on its promises?', November 2021, [https://www.transportenvironment.org/wp-content/uploads/2021/10/2021\\_11\\_Report\\_Uber\\_one\\_year\\_on.pdf](https://www.transportenvironment.org/wp-content/uploads/2021/10/2021_11_Report_Uber_one_year_on.pdf)

<sup>97</sup> A. Jenn 'Emissions benefits of electric vehicles in Uber and Lyft ride-hailing services' (2020) *Nat Energy* 5, 520–525. doi.org/10.1038/s41560-020-0632-7. See also <https://www.uber.com/be/en/about/reports/spark-partnering-to-electrify-europe/>

<sup>98</sup> IGAS report, 2018 – volume 1, supra fn 73.

<sup>99</sup> 'Per 100 million vehicle miles travelled, Uber's motor vehicle fatality rate was about half of the national average', Source: US Safety Report, page 51



because of the higher yearly mileage.<sup>100</sup> However, ensuring smooth handling of insurance complaints about third parties (and not only passengers) is a crucial point in any case,<sup>101</sup> especially in a context where victims may be European citizens from a different EU country than where the accident occurred. **Ensuring a smooth operation of transnational administrative and judicial cooperation (beyond legal jurisdiction and conflicts of law rules) is thus necessary.**

### 3.4 Urban transport as a service of general economic interest (SGEI)

Public service obligations or obligations connected to the provision of a SGEI encompass 'universal service' as defined, for example, in the telecommunications sector,<sup>102</sup> but they also go beyond that.<sup>103</sup> According to the CJEU, the core characteristics of SGEIs are: a) full territorial coverage, b) universal personal coverage (or at least the obligation to offer services to anyone who requires them), c) uniform tariffs, and d) similar quality conditions determined in advance by the competent authority.<sup>104</sup>

SGEI obligations in the area of land (rail and road) transport are specifically regulated in the EU by Regulation 1370/2007.<sup>105</sup> According to the definitions contained therein (article 2) 'public passenger transport' is offered to the public on a non-discriminatory and continuous basis, while 'public service obligation' means "a requirement ... that an operator, if it were considering its commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward".

This Regulation provides general conditions for selecting and paying operators entrusted with such transport obligations. It is based on the assumption that the public authority, directly or indirectly, takes charge of the cost of the transportation provided. Through its content/wording and logic, this Regulation does not seem to apply to ToD. Indeed a public service **contract** under the Regulation, containing specific contractual obligations concerning regularity, coverage, quality, etc. as well as the calculation of the corresponding remuneration, should not be confused with the **licences** delivered by public authorities for taxis and PHVs operating in the free market, even when such authorisations are accompanied by general quality charters, etc.<sup>106</sup>

It is true that in most Member States taxi drivers and vehicles are subject to a licensing/authorisation procedure,<sup>107</sup> but this only indirectly impacts the characteristics of the actual service. Minimum service requirements, as well as accessibility for disabled people, are generally required from taxi operators, but they are not enforced in any meaningful manner anywhere in the EU. The same is true with the rules prohibiting drivers from refusing rides. The one SGEI component that is enforced is tariffs. These are regulated in all Member States, either at the local or at the national level, at considerably higher prices than those practiced by public transport.

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<sup>100</sup> French insurers have been reported to triple the insurance premiums for PHV due to the increased number of accidents in the sector. Rapport IGAS-FR, fn. 50.

<sup>101</sup> This issue is partially handled by the European Parliament and Council Directive 2009/103 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L263/11. These rules are currently under revision. See proposal for a Directive of the European Parliament and the Council amending Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to ensure against such liability, COM(2018) 336, 24 May 2018.

<sup>102</sup> European Parliament and Council Directive 2009/136/EC on universal service and users' rights relating to electronic communications networks and services [2009] OJ L 337/11.


<sup>103</sup> 'Universal service' is the term which has been – and is still used – in the framework of liberalisation of the network industries, see eg European Parliament and Council Directive 2002/22/EC, on universal service and users' rights relating to electronic communications networks and services [2002] OJ L 108/51.

<sup>104</sup> See i.a. CJEU case C-320/91, *Corbeau*, EU:C:1993:198.

<sup>105</sup> European Parliament and Council Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road [2007] OJ L 315/1.

<sup>106</sup> See in this sense CJEU Case C-57/12, *Femarbel v COCOM*, EU:C:2013:517.

<sup>107</sup> European Commission, 'Study on passenger transport by taxi, hire car with driver and ridesharing in the EU' final report (2016), 31-38.



Therefore, the view that taxis participate in the provision of SGEIs may be partly true in practice, especially in areas badly served by public transport. However, from a legal point of view, it seems untenable. Hence, Article 106 TFEU and the so-called ‘Corbeau’ case law allowing for territorial restrictions and special or exclusive rights would, in principle, be inapplicable.<sup>108</sup>

The above general statement, however, does not hold for those taxi operators which are contracted to perform specific trips at specific hours of the day to serve schoolchildren (as is the case in many rural areas of France and Greece) or other specified categories of people. The possibility and procedure for such contracts is regulated in some Member States (e.g., the German Law for Passenger Transport of 16 April 2021, Article 8),<sup>109</sup> while in the others the general public procurement rules and principles should be followed. In the same vein, in Flanders and Wallonia, ToD providers who opt for the system of ‘social transport’ at fixed, extremely low, prices (see Part 2.2.1), also participate in the provision of SGEIs.

It remains, however, that the vast majority of taxis and PHVs do not participate in the provision of SGEIs. Hence, the justification of quantitative and territorial restrictions in favour of taxis, which exist in many Member States and cities, is legally questionable. Given that the EU Internal Market is based on free entrepreneurship and that such restrictions are only exceptionally tolerated if connected to some overriding general interest, it is for the taxi operators and corresponding public authorities which seek to impose ‘protections’ to show that these are justified on a case-by-case basis. Indeed, restrictions to the intermediation activity provided by platforms would be judged under the e-Commerce Directive and the Services Directive, and should also be notified to the European Commission under Article 3(4) of the former Directive<sup>110</sup>; while restrictions to transport itself should fall directly under the Treaty rules on the provision of services. However, as illustrated by the Elite Taxi (Uber Spain) case, the lack of any rules specifically concerning ToD could be leaving too much leeway to national and local authorities, which is a source of fragmentation in the sector. This mattered less when urban transport operated at a purely local level. However, it becomes increasingly problematic as platforms operate at a transnational level and as intermodality and multi-modality become an imperative, thus increasing the risk of further fragmentation and gaps forming in the ToD market.

### 3.5 Interim conclusion for Part 3

The following interim conclusions can be drawn from the arguments in Part 3 of this report.

Firstly, contrary to other modes of transport, there are **no EU rules concerning the welfare and security of ToD drivers** (driving time, rests, etc.) **nor the security of passengers**. Such rules occasionally do exist at the local level, but their real purposes are not always clear, given that local legislatures are often ‘captured’ by established interest groups; the way they are implemented is even less clear.

Secondly, from the passenger’s perspective, urban transport is the **only sector where passengers do not enjoy any specific EU legal protection**, in a way similar to air, boat, rail, or, even, coach transport. The fact that platforms tend to implement basic protections, both contractually and operationally, as well as through safety products and features, is a good start. Although ToD happens essentially locally, if the above matters were left to local or even national regulatory authorities, they would create notable distortions, reverse discriminations, and potentially hamper the Internal Market as well as other rights enjoyed by EU citizens.

Thirdly, technology changes the means of dealing with old issues, such as congestion and pollution, and old means such as the return-to-garage rule and other territorial **restrictions seem less**

<sup>108</sup> CJEU, Case C-320/91 *Paul Corbeau*, EU:C:1993:198.

<sup>109</sup> Available at <https://www.gesetze-im-internet.de/pbefg/BJNR002410961.html>; for a brief presentation of the law see <https://www.gsk.de/wp-content/uploads/2021/03/GSK-Update-Reform-Passenger-Transport-Act.pdf>

<sup>110</sup> CJEU, Case C-390/18 *Airbnb Ireland*, EU:C:2019:1112.



**justified now than in the past.** In particular, concerning the environment, there is a need to adopt common standards for vehicles and charging bases, common rules for platforms, and to provide adequate funding for the deployment of the above.

4



# EU POLICY OBJECTIVES FOR URBAN TRANSPORT





## 4 EU policy objectives for urban transport

The Internal Market and transport policy are **competencies shared** between the EU and its Member States (Article 4 (a) and (g) TFEU). In the area of shared competencies, the EU may only take action, especially in the form of binding rules, if it satisfies the principles of **subsidiarity and proportionality**: it should be able to meet objectives that cannot be achieved at the national level, and it should do so in the least restrictive way. What is more, the Internal Market rules apply, in principle, only in cross-border situations, although purely internal regulations may occasionally be covered. This is either because they restrict exports (see *Alpine Investments*<sup>112</sup>), or because the nature of the activity is such that, were it not for the restrictive national measure, a cross-border element would be extremely likely (see *Parking Brixen*<sup>113</sup>). Similarly, any legislative action in the field of transport should, in principle, aim to facilitate international transport and accommodate non-resident carriers (as well as improve safety, see Article 91(1) TFEU). Therefore, it is important to identify how EU action could be necessary, or at least useful, for securing the Internal Market or international transport.

The Internal Market dimension and the international aspects of ToD, an activity that typically takes place in urban areas and has, so far, been subject to national and local regulation, is not evident. This initial impression needs to be qualified, however. Firstly, the technological newcomers in the ToD sector (i.e., digital platforms offering electronic intermediation services fall within the scope of the e-Commerce Directive<sup>114</sup>) and, as such, come within the Internal Market. Secondly, the EU has several thousand kilometres of internal borders, between countries as well as cities, which share common social and economic realities and between which daily commuting is commonplace. Thirdly, especially after the twin financial and COVID-19 crises, airlines have cut down on direct flights, especially from/to smaller airports (such as those to several central European capitals) thus obliging travellers to ride to an airport in a nearby Member State: the airports of Munich, Vienna, Frankfurt am Main, and Milan are well known for serving passengers from the contiguous Member States. Similarly, travellers from Luxembourg or Strasbourg often fly out of Brussels, Frankfurt, or Paris to reach their preferred destinations. Moreover, the right of Europeans to travel freely within the EU also entails that they have the choice of the means of their transportation and a similar level of service and protections/rights wherever they go.

Lastly, the fact that demand for cross-border ToD has been relatively limited to date may be partly due to the existing restrictions, something that is liable to change. This is captured by the Court ruling that “it is necessary to consider not only the present state of the market but also the possibilities for development within the context of free movement”.<sup>115</sup>

The existence of an Internal Market dimension in the field of ToD having thus been established, there are up to six different grounds justifying EU intervention:

### 4.1 Companies’ freedom of establishment

Platforms, dispatchers, as well as taxi and PHV operators, are all companies that benefit from the right of establishment in other Member States. As explained above, platforms are providers of digital services and enjoy enhanced market access and service provision under the e-Commerce Directive.<sup>116</sup> As things stand, however, this is purely theoretical given both the legal uncertainty covering the operation of ride-hailing platforms and the evident fragmentation of solutions adopted at Member State and even city level (see Part 2.1). For example, France, Poland, Portugal, and

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<sup>112</sup> CJEU, Case C-384/93, *Alpine Investments BV v Minister van Financiën*, EU:C:1995:126.


<sup>113</sup> CJEU, Case C-458/03, *Parking Brixen GMBH v Gemeinde Brixen and Stadtwerke Brixen AG*, EU:C:2005:605.

<sup>114</sup> See eg CJEU, *Star Taxi App*, paras 49 and 55 (supra fn 33).

<sup>115</sup> CJEU, Case 170/78 *Commission v UK, Beer and Wine*, EU:C:1980:53, para 6.

<sup>116</sup> European Parliament and Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) [2000] L178/1.





Romania have all regulated platforms as intermediaries,<sup>117</sup> Germany has regulated them as transport undertakings, Italy has put forward legislation which, had it not been abandoned would have raised important issues of EU law,<sup>118</sup> while in other Member States platforms (such as Belgium) are still unregulated.

The situation of taxi/PHV operating companies is even more disjointed, given that they remain, in principle, subject to the disparate rules of their country – or even locality – and may only claim the freedom of establishment rules of the TFEU. This, in turn, may only concern how they may operate in other Member States, not for a different locality within their State. The following Italian example illustrates the complications this causes.

In Italy, some 29,000 companies operate in the chauffeur-driven car hire sector and, despite interventions by the European Commission, the Italian Competition Authority (*Autorità Garante della Concorrenza e dei Mercati*), and the Transport Regulatory Authority (*Autorità de Regolazione dei Trasporti*), as well as a judgment by the Constitutional Court (*Corte Costituzionale*) declaring several restrictions imposed on PHV drivers and companies as anti-constitutional,<sup>119</sup> many significant restrictions remain in place. Among those, the return-to-garage rule (formally forbidden by the Constitutional Court but still practiced by many regions) means that a driver – or company – established in Naples may not participate in a tender for the provision of services in Rome, as s/he would have to drive the 400 km back to Naples at the end of each working day. This situation, already untenable as it was, became all the more problematic after the recent judgment by the Regional Administrative Tribunal of Lazio,<sup>120</sup> where a dispatching company duly licenced in Slovenia granted permission to operate in Italy based on mutual recognition of permits in other Member States. Hence, after this judgment, a dispatching company or a driver licenced in another Member State may legally take up (secondary) establishment in Rome and participate in tenders there, while a Neapolitan driver would still be excluded because of the return-to-garage rule!<sup>121</sup>

The fact that the Slovenian company had to go to Court to reverse the confiscation and penalty order issued by the Italian authorities, and that the Neapolitan driver still faces discrimination, both under national and EU law, shows that the EU Internal Market is far from meeting ToD needs.

As the Italian example illustrates, the principle of mutual recognition of permits delivered in other Member States should reinforce the principles and actions of the Internal Market. However, left in its 'pure' state (as opposed to 'managed', see the following paragraph), mutual recognition does not help companies operating in other Member States for at least two reasons. Firstly, because this principle, as in the Italian example, serves as a defence before the Courts once the operator has already been brought before it (i.e., facing administrative and occasionally criminal charges), few drivers or companies are willing and/or able to get that far in another Member State. Secondly, because its application supposes that similar licences are being delivered throughout different Member States. This, however, does not hold since (see Part 2.2 of the present study) Member States differ considerably on the types and conditions of the licences issued (i.e., a Member State that treats PHVs and taxis separately is unlikely to recognise licenses issued in Member States that bundle the tow, and conversely).

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<sup>117</sup> See in France, Law 2016-1321 of 7 October 2016, see above fn 94; as well as its implementing decrees 2017-1434, 2017-1435 and 2017-1436 of 29 September 2017.

<sup>118</sup> Legislative proposal 3564/2016, for which see briefly Hatzopoulos, above fn 91, p 230.

<sup>119</sup> Italian constitutional court, Decision n.56/2020, IT:COST:2020:56, available at <https://cortecostituzionale.it/actionSchedaPronuncia.do?anno=2020&numero=56>

<sup>120</sup> Regional Administrative Tribunal of Lazio, Decision n. 09364/2021 REG.PROV.COLL, of 11/8/2021.

<sup>121</sup> It seems that the Italian Courts are well on the way to liberalising transport services, in view of two very recent judgments striking down restrictions to the activities of boat operators licensed in other localities than Venice: the *Consiglio di Stato* has struck down a rule prohibiting 'foreign' boats from approaching the Palazzi, given that such a rule did not apply to local embarkations, (Sentenza 6124/2021, of 31/8/2021); while the *Corte di Cassazione* reversed a confiscation order against a non-Venetian boat transporting tourists to the airport (Sentenza 24378/2021, of 8 September 2021); for both these judgments see Caprino, M 'Ncc, Consiglio di Stato e Cassazione spingono per la liberalizzazione' (9 September 2021) *Il Sole 24 ore*, <https://ntplusediritto.ilssole24ore.com/art/ncc-consiglio-stato-e-cassazione-spingono-la-liberalizzazione-AEFudmh>



The concerns raised about 'pure' mutual recognition (see Italian case) may be tackled by a process of 'managed' mutual recognition. This entails that some common (minimal) parameters are set in advance and, when these are met, Member State authorities may not refuse recognition, unless in exceptional circumstances. Given that the principle of mutual recognition is inherent in the EU *acquis*,<sup>122</sup> such 'managed' mutual recognition could only happen at the EU level, based on either soft or hard law.

Mutual recognition of licences would mean that 'quantitative restrictions' (quotas) imposed in several Member States, such as France, Luxembourg, Latvia, and Germany, would be inoperative as companies could have a formal seat in another Member State and then establish themselves in the one with the quotas. This, however, could be compensated by the possibility for Member States to agree on basic 'qualitative criteria' that should be met for licences to be issued and recognised. Such a development would coincide with the outcomes of the survey and the workshop carried out by CERRE for the preparation of this study.

## 4.2 Drivers' freedom to provide services

What is true for companies is also true for individuals (natural persons), with the difference that the latter is more likely to make use of their right to provide services (rather than to establish themselves) in other Member States. Territorial restrictions are one of the major obstacles faced by individual drivers. Similar to the Neapolitan driver who has to drive back to Naples at the end of every working day (discussed above), is the example of a Brussels driver who may take passengers to the coast in Knokke, but may not bring them back because in Flanders PHVs have only been authorised since 2020 and the relevant service has not been established yet. As, too, a Parisian driver can drive someone to Brussels but may not carry passengers on the return trip, or the Berlin driver who has to return-to-garage after each ride, unless a follow-up journey is immediately available, or again a Barcelona driver who has to wait a minimum amount of time before accepting a new ride.

These restrictions may in part be due to separate licensing procedures (the Brussels and Paris examples), in part connected to some overriding reason of general interest (the Berlin example), or in part reflect efforts to protect the incumbent taxi drivers (the Barcelona example). While the third reason has some merit, the others are plainly obstacles to the Internal Market which need to be tackled. Here again, **the existence of some harmonised conditions for the delivery of licences could be of great help.**


## 4.3 Fragmentation – legal certainty

While diversity in cultures, languages, religions, and traditions is a value actively pursued by the EU, the cacophony of divergent national measures trying to deal with the same problem while pursuing common objectives, clearly runs against the EU's Internal Market ambition. This fragmented landscape is magnified by opposing court decisions in different jurisdictions, which further adds to the legal uncertainty.

Legal certainty is what companies – and especially start-ups – need to survive and scale up. Given that the EU is lagging behind the US and China in terms of its digital economy, it would be shooting itself in the foot to allow such an uncertain legal environment to persist. If, on the contrary, the EU were to set a floor of common rules covering the entire territory and allowing European platforms to develop a solid commercial basis at home, this would allow them to expand more successfully outside the EU as well.

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<sup>122</sup> V. Hatzopoulos, 'Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services' (1999) Bruxelles/Athènes, Bruylant/Sakkoulas; and by the same author, 'Forms of mutual recognition in the field of services' in I. Lianos and O. Odudu (eds) *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (2012) Cambridge: CUP, p 59-98.



Legal certainty is not an EU objective as such, but a general principle of EU law that should always be reflected in EU actions. **Therefore, when adopting measures the EU should give prevalence to those which promote legal certainty over those which do not.**

#### 4.4 Level playing field – non-distortion of the Internal Market

From the developments above it becomes clear that platforms and ToD undertakings are subject to different requirements depending on the Member State they are established in. They have to comply – to a greater or lesser extent, and depending on whether the receiving/host Member State allows for mutual recognition – with the divergent requirements of each Member State they wish to operate in. The fact that some Member States, such as Austria, Estonia and Finland, follow more liberal rules for ToD than others, may have two unwarranted consequences. Firstly, operators established in these countries will benefit from an unfair competitive advantage, linked to lower regulatory and compliance costs. Secondly, to the extent that they can benefit from mutual recognition, operators may be tempted to relocate to these countries. Further, the fact that within a single Member State, professional drivers performing the very same duties and participating in the same ToD market are subject to fundamentally different rules (with taxis typically subject to quotas and regulated prices, while PHVs face operational rules such as return-to-garage, waiting times, etc.) which distort the ToD market both within and outside the borders of any given State.<sup>123</sup>

When assessing which products or services fall within the same market under Article 101 of the TFEU, the key concept is interchangeability.<sup>124</sup> Indeed, the CJEU defines a market as ‘all the products or services which given their characteristics are particularly suited to satisfy constant needs and are only to a limited extent interchangeable with other products or services’.<sup>125</sup> While digital intermediation creates issues in the manner that the markets are defined,<sup>126</sup> the General Court considers that a series of methods can be used to determine the scope of the relevant market. One of those methods is the SSNIP test (small but significant non-transitory in price), which allows for the change in demand to be examined when the price fluctuates.<sup>127</sup> Price change in the PHV sector has a direct impact on the use of taxis, whose prices are usually set by local authorities. While PHV operators can often set their prices more dynamically, price regulation by local authorities may transform the PHV sector into a different market altogether. Conversely, if local authorities set higher/lower prices for the taxi industry, it will have a direct impact on the use of PHV. The creation of two markets is thus a regulatory matter rather than a spontaneous phenomenon, the differences between the two remaining imperceptible to passengers.

Overall, a fragmented regulatory environment imposes extra costs on all parties involved in ToD, which diverts resources from more effective uses thereof. Such set up leaves the market open to distortions, and is especially prejudicial for smaller operators struggling to comply with different national/local arrangements (i.e., they may be forced to restrict themselves to a single Member State or leave the market altogether). The situation is even more alarming as, contrary to the first years of the digital economy when there was a regulatory vacuum, nowadays general/horizontal rules, applicable to all platforms (concerning consumer protection, the proper use of AI, transparency obligations such as the ones foreseen in the draft Digital Services Act), are being imposed one after the other. If European ToD platforms are also subject to the additional burden imposed by these rules, while at the same time unable to fully benefit from the EU Internal Market and its inherent economies of scale, the sector may struggle.

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<sup>123</sup> With the same conclusions, see for instance M. Nietsch and G. Schott (2021) ‘The Legal Framework for Ride-sharing Businesses and the Case of Uber in Germany’. In: Z. Ayata., I. Önay (eds) *Global Perspectives on Legal Challenges Posed by Ridesharing Companies* (Springer, Singapore), accessible at [doi.org/10.1007/978-981-15-7035-3\\_8](https://doi.org/10.1007/978-981-15-7035-3_8)

<sup>124</sup> M. S. Ferro, *Market Definition in EU Competition Law* (Edward Elgar Publishing, 2019), pg 154.

<sup>125</sup> CJEU Case C-7/97 *Oscar Bronner* ECLI:EU:C:1998:569 [1998] ECR I-7791, para 33.

<sup>126</sup> J.U. Franck and M. Peitz ‘Market definition and market power in the platform economy’, CERRE Report, May 2019, accessible at <https://cerre.eu/publications/market-definition-and-market-power-platform-economy/>

<sup>127</sup> Tribunal of the EU, *Topps Europe Ltdv. European Commission*, 11 January 2017, req T-699/14, ECLI:EU:T:2017:2, para 82.



## 4.5 Consumer protection

Consumer protection is a core objective of the EU, both as an end in itself and as a means of realising the Internal Market. EU consumer protection operates in a horizontal, all-encompassing manner: e.g., the Consumer Rights Directive<sup>128</sup> and the Unfair Consumer Practices Directive (UCPD),<sup>129</sup> recently enhanced by the 'Omnibus Directive' on better enforcement and modernisation of EU consumer protection and the Directive on Representative Actions.<sup>130</sup> It also functions in a more sector-specific way where 'information asymmetries' play an important role,<sup>131</sup> such as in consumer credit<sup>132</sup> and in response to consumer vulnerability (e.g., transport by air, boat, or train).<sup>133</sup> Finally, consumer protection is also granted in triangular situations, such as package travel.<sup>134</sup> From the examples given above it becomes clear that road transport in general, and especially ToD, sit well within all three categories.

In ToD, however, many concerns can be allayed thanks to **reputation, rating and ranking systems** built into the platforms. Their utility deserves further consideration. Indeed, these raise two series of issues, one in relation to their fairness and another concerning their effectiveness in informing users and preventing harm. The fairness part appears to be covered to some extent by the UCPD (a consolidated version of which is scheduled to be implemented by Member States by 22 November 2021 and applicable as from May 2022) which imposes on platforms the duty to check that the user submitting a review actually used the product/service. In addition, fake reviews and endorsements will become officially a prohibited practice. Effectiveness deserves further attention and could be enhanced by the existence of common evaluation points, standards, methods, and grades, per economic sector, in a way that increases objectivity and targets the right evaluation points (i.e., acquainting users with the different scales, and rendering evaluations more comparable overall). This could happen either by the EU acting directly or by the platforms urged on by the EU.

## 4.6 Sustainable and smart mobility strategy

### 4.6.1 The EU Mobility Agenda and MaaS

Three-quarters of the EU population lives – and 85% of Europe's GDP is produced – in and around cities.<sup>135</sup> Cities are bound to continue developing in the coming years, the European population will continue growing older, and climate objectives will be increasingly pressing alongside social and geographic inclusion aims. This means that mobility needs will grow and diversify as these many challenges evolve and even converge. As the European Commission has put in its Mobility Agenda, "We must shift the existing paradigm of incremental change to fundamental transformation ...

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<sup>128</sup> European Parliament and Council Directive 2011/83/EU on consumer rights [2011] OJ L 304/64. However, this directive excludes contracts for passenger transport services.

<sup>129</sup> European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

<sup>130</sup> European Parliament and Council Directive (EU) 2019/2161 as regards the better enforcement and modernisation of Union consumer protection rules [2020] OJ L 328/7 and European Parliament and Council Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers [2020] OJ L 409/1; both to be transposed into internal law by the end of the year.

<sup>131</sup> See the issues of transparency in the ToD sector I. Önay, Z. Ayata (2021) 'Policy Implications of the Comparative Findings' In: Z. Ayata, I. Önay (eds) *Global Perspectives on Legal Challenges Posed by Ridesharing Companies* (Springer, Singapore), accessible at [doi.org/10.1007/978-981-15-7035-3\\_12](https://doi.org/10.1007/978-981-15-7035-3_12).


<sup>132</sup> European Parliament and Council Directive 2008/48/EC on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L 133/66; currently under revision, see [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/credit/consumer-credit\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/credit/consumer-credit_en)

<sup>133</sup> European Parliament and Council Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L 46/1; European Parliament and Council Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway [2010] OJ L 334/1; and European Parliament and Council Regulation (EU) 2021/782 on rail passengers' rights and obligations [2021] OJ L 172/1, to enter in effect in 2023.

<sup>134</sup> European Parliament and Council Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] OJ L 326/1.

<sup>135</sup> Eurostat (2016) 'Urban Europe – statistics on cities, towns and suburbs- patterns of urban and city developments (2016).





towards achieving our objectives of a sustainable, smart and resilient mobility.”<sup>136</sup> The European Commission has further observed that the EU cannot rely exclusively on technological solutions, stressing that “immediate action to adapt our mobility system is necessary to tackle climate change”.<sup>137</sup> It has promised to propose regulatory measures, starting in 2021, “to enable innovative and flexible tickets that combine various transport modes and give passengers true options for door-to-door travel”.<sup>138</sup> This objective is often also referred to as Mobility as a Service (MaaS). MaaS has been hailed both by stakeholders<sup>139</sup> and commentators.<sup>140</sup>

For MaaS to achieve its broader objectives (i.e., increase mobility while reducing its environmental footprint), it needs to induce some behavioural change and turn people away from driving – and indeed owning – cars.<sup>141</sup> However, such change is not a given as ToD becomes more prominent. Some early studies in the US even point that ToD increases demand for public transportation. Other studies point to the private car as the main reason for reduced public transport use.<sup>142</sup> Indeed, recent US research shows that shifting private travel to ride-hailing may not be desirable since the latter reduces air pollution by avoiding ‘cold starts’ by older vehicles, but increases fuel consumption, congestion, noise, and crashes, due to the fact that “shared vehicles cruise (or deadhead) between rides”.<sup>143</sup> This study, however, does not take into account ride-hailing’s potential role in supporting a car-free or car-light lifestyle centred on public transport and active mobility modes. Other studies show that ride-hailing is in direct competition with public transportation only during times of increased traffic and in rural (underserved) areas, while in most other circumstances they complement one another.<sup>144</sup> It also underlines that people who ride-hail are more likely to use public transportation and transit than people who use private cars.<sup>145</sup> Other studies yet show that when effectively combined with other means of transportation, especially overground and underground trains, ‘by providing better first- and last-mile connection’, ToD can have positive effects on such public transportation means.<sup>146</sup>

Thanks to a wider ToD offer (and in particular the liberalisation of PHVs), observed mobility has increased by as much as 300% in coastal areas of Croatia.<sup>147</sup> While creating negative externalities, such an increase should, nonetheless, be viewed positively as it is certainly compensating for the lack of efficient public – and even private – transport. For MaaS to be successfully implemented ToD should only marginally compete with public transportation; rather it should complement it either by offering the first and last mile or by serving areas poorly covered by public means.<sup>148</sup> On the other hand, if ToD is to induce the desired **behavioural shift and convince people to give up their cars, it should present itself as a credible and effective alternative**. From the different forms of shared or collaborative mobility (ride-hailing, car-pooling, micro-mobility),<sup>149</sup> ToD is the only direct

<sup>136</sup> European Commission Communication, Sustainable and Smart Mobility Strategy – putting European transport on track for the future, COM (2020) 789 final, p. 2, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0789&from=EN>

<sup>137</sup> *Ibid*, p. 7.

<sup>138</sup> *Ibid*, p. 9.

<sup>139</sup> UITP, Mobility as a Service, Report, April 2019, 26 pages, <https://www.uitp.org/report-mobility-service-maas>; EMTA, Mobility as a service, a perspective on MaaS from Europe’s Transport Authorities, June 2019, 16 pages, <https://www.emta.com/spip.php?article1319&lang=en>

<sup>140</sup> See i.a. CERRE Report ‘Shared Mobility, MaaS and the Regulatory Challenges of Urban Mobility’ (2019) <https://cerre.eu/publications/shared-mobility-and-maas-regulatory-challenges-urban-mobility/>; CERRE Report ‘Mobility as a Service (MaaS): A digital roadmap for public transport authorities’ (2020) <https://cerre.eu/publications/mobility-as-a-service-maas-digital-roadmap-public-transport-authorities/>

<sup>141</sup> CERRE (2019) above p. 23.

<sup>142</sup> *Ibid* p. 26.

<sup>143</sup> M. Ward, J. Michalek and K. Samaras ‘Air Pollution, Greenhouse Gas and Traffic Externality Benefits and Costs of Shifting Private Vehicle Travel to Ridesourcing Services’ (2021) *Environ.Sci. Technol*, 55:19, 13174-13185.

<sup>144</sup> S. Rao, above fn 87, where there are also link to the more extended study.


<sup>145</sup> Transit Centre ‘Who’s on Board 2019: How to Win Back America’s Transit Riders’ (2019) available at [https://transitcenter.org/wp-content/uploads/2019/02/TC\\_WhosOnBoard\\_Final\\_digital-1-1.pdf](https://transitcenter.org/wp-content/uploads/2019/02/TC_WhosOnBoard_Final_digital-1-1.pdf)

<sup>146</sup> *Ibid* p. 29.

<sup>147</sup> Information shared in person by national expert during the CERRE workshop.

<sup>148</sup> European Commission, SWD(2020) 331 final, para 600.

<sup>149</sup> As defined in European Commission, COM(2020) 789 final, above, fn 5. See also European Commission, SWD Evaluation of the 2013 Urban Mobility Package, 24 February 2021, SWD 2021 (47) final.



substitute to car ownership, since it is available irrespective of passenger age and (dis)abilities, weather conditions, etc. Limited MaaS initiatives by public transport operators have been implemented in Berlin and other European cities, while private entities are also keen on partaking in MaaS. If these initiatives are to multiply and expand, and also involve PHVs, a coherent and credible framework for ToD (including drivers, intermediaries and passengers) is indispensable. In this respect, the European Commission has already announced its intention “to ensure that passenger transport-on-demand (taxis and private hire vehicles) can become more sustainable and deliver efficient services to citizens while maintaining a smoothly functioning single market and addressing social and safety concerns”.<sup>150</sup>

#### 4.6.2 Data sharing

The importance of data in the modern economy has been acknowledged for some time now and several initiatives try to foster the free circulation of data. The EU has, early on, pushed for data held by Member State public bodies to be made available for use and re-use (the Public Sector (PSI) Directive),<sup>151</sup> and has recently extended and adapted the relevant rules to make them fit for the digital age, with the ambitious Open Data Directive.<sup>152</sup> Several Member States have taken the lead in pushing their public bodies, and even private ones when entrusted with public missions, to make their data available to third parties. The European Commission, for its part, has adopted a Decision<sup>153</sup> for making its data public as well. Meanwhile, the draft Data Governance Act foresees general sharing obligations for all public administrations,<sup>154</sup> while the forthcoming draft Data Act is expected to set the framework for B2G and B2B data sharing.<sup>155</sup> At the same time, the European Strategy for Data foresees, among the nine European data spaces, the creation of a **Common European Mobility Data Space** to support “an intelligent transport system, including connected cars as well as other modes of transport”.<sup>156</sup>

More delicate is the issue of having private companies share their data, as such data may include personal information of individuals, industrial or business secrets, be protected by intellectual property rights, be subject to licensing, franchise, trade-mark or specialisation agreements, or even underpin mergers and acquisitions, as was the case in the broadly criticised 2014 acquisition of WhatsApp by Facebook.<sup>157</sup> The European Commission has tried to offer some guidance on sharing private sector data and has proposed both some basic principles (such as transparency, shared value creation, etc.) and some business models for such data sharing to take place.<sup>158</sup>

Road transport has been one of the first sectors to transform from data-poor to data-rich and digitally connected: “Indeed, the mobility sector is about to experience a significant change, being today deeply transformed with the rise of Mobility as a Service (MaaS) alongside the emergence of a new wave of technologies integrated into the electric and connected vehicles (more efficient batteries, sensors, fleet telematics, vehicle-to-everything technology, etc.) and preparing the future

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<sup>150</sup> COM (2020) 789 final, p. 9.

<sup>151</sup> Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information [2003] OJ L 345/90.

<sup>152</sup> Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L 172/56.

<sup>153</sup> 2011/833/EU: Commission Decision of 12 December 2011 on the reuse of Commission document [2011] OJ L 330/39.

<sup>154</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on European data governance, 25 November 2020, COM(2020)767 final.


<sup>155</sup> The release of this document was initially foreseen for December 2021, then pushed to February 2022, as some tentative overlaps with existing or forthcoming regulations have been identified; for this initiative, see [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13045-Data-Act-&-amended-rules-on-the-legal-protection-of-databases\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13045-Data-Act-&-amended-rules-on-the-legal-protection-of-databases_en)

<sup>156</sup> European Commission, ‘A European strategy for data’, *Communication*, 19 February 2020, COM(2020)66 final, p 22.

<sup>157</sup> See recently M. Glick and C. Ruetschlin ‘Big Tech Acquisitions and Potential Competition Doctrine: The Case of Facebook’ (October 1, 2019). Institute for New Economic Thinking Working Paper Series No. 104, October 2019, <https://doi.org/10.36687/inetwp104>

<sup>158</sup> European Commission (2018), SWD (2018) 125 final, ‘Guidance on sharing private sector data in the European data economy’, accompanying Communication COM (2018) 232 final, ‘Towards a common European data space’.





autonomous driving (improved localisation techniques, lidar, HD mapping, advanced driver assistance, etc.).”<sup>159</sup>

MaaS, which is most relevant for the present study, requires that contributing transport operators share, in real-time, data of three kinds, according to a 2019 report by the Union International de Transports Publics (UITP)<sup>160</sup>: transport data, access, and ticketing data, and traveller data. The above exchange is hampered by two kinds of obstacles: the lack of appropriate IT tools, and the lack of interoperability between those.<sup>161</sup> A further, very notable obstacle is the lack of trust between the different operators.<sup>162</sup> Belgium’s efforts to develop a single ticketing app for all available urban transport in all three regions have been seriously hampered by the reluctance of different public operators to share their data – and to accept as valid that of others. On the face of this experience, it is daunting to imagine effective data sharing between public and private operators (for the additional reason that these are often competing for the same market segment), between several Member States. Things become even more complicated given that MaaS is not the only aspect requiring data sharing: public safety and security, emissions’ monitoring and taxation, to name a few, are also highly valid reasons for data sharing, requiring the same – and different – data.

The EU has tried to deal with such problems, starting in 2010 with the setting of some common rules and standards concerning the exchange of data necessary for Intelligent Transport Systems (ITS), followed by a Delegated Regulation in 2017.<sup>163</sup> As they are, the rules create few obligations, and essentially only deal with the discovery and exchange of static data, concerning travel and traffic. Further, Application Programming Interfaces (APIs) providing access to dynamic data via the national access points (created by the Directive) should be publicly accessible. The 2017 Delegated Regulation, however, is more about setting standards rather than creating an obligation, let alone a fully-fledged mechanism for the real-time, comprehensive data exchange necessary for further developing MaaS. Moreover, it is based to a large extent on the brokering of data made by national access points, at the national level, and is not geared towards addressing intermodality and MaaS at the EU level. Lastly, given that it applies to ‘transport authorities’ and ‘transport operators’, it is not at all clear that platforms are covered by their scope (as discussed in Part 2.1 it is unclear whether platforms qualify as ‘transport operators’). Several of the above shortcomings are likely to animate discussions around the European Commission’s Multimodal Digital Mobility Services (MDMS) initiative, which seeks to a) amend the 2010 ITS Directive, b) as well as the 2017 Delegated Regulation, c) launch an initiative for enhancing common ticketing, and d) set a stakeholder expert group to support the European Commission.<sup>164</sup>

The development of **common APIs** would be a considerable step towards MaaS. As a recent study by FREE NOW shows, the implementation of every new API by a platform requires almost 600 workdays, while the adaptation of an existing API to new uses demands only 20-30 workdays.<sup>165</sup>

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<sup>159</sup> C. Delonge and A. Strowel ‘Data sharing for a smarter mobility and for connected vehicles: How the design of data flows contributes (or not) to transport policy and innovation’ in Strowel, A and Lazaro, Ch, *Des véhicules autonomes à l’intelligence artificielle: Droit, politique et éthique* (2020) Larcier, Brussels, 186-206, 188, footnotes omitted.

<sup>160</sup> UITP, ‘Unlocking the Value of Data for Public Transport Companies’, 1 October 2018, available at [www.uitp.org/news/unlocking-value-data-public-transport-companies](http://www.uitp.org/news/unlocking-value-data-public-transport-companies)


<sup>161</sup> C. Delonge and A. Strowel, above fn 159, p 194.

<sup>162</sup> Pointed out by one of the surveyed firms DPO.

<sup>163</sup> European Parliament and Council Directive 2010/40/EU on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport [2010] OJ L 207/1, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0040>; and European Commission delegated Regulation (EU) 2017/1926 of 31 May 2017 supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of EU-wide multimodal travel information services [2017] OJ L 272/1. The existence of an obligation to share vehicle diagnostic, repair and maintenance information, already since 2007, does little in the way of achieving MaaS; see European Parliament and Council Regulation (EU) 2018/858 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles [2018] OJ L 151/1.

<sup>164</sup> For which see [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13133-Multimodal-digital-mobility-services_en)

<sup>165</sup> FREE NOW, API integrations @FREE NOW, in file with the authors.



Developing a common API is more than a technical issue because it encompasses two potentially highly political decisions:

- the qualitative and formal characteristics of data to be entered into the API
- the objective behind the optimization of the API: time, price, CO2 emissions...

The use of common APIs, however, must remain a decision reached between organisations that are looking to enter into a MaaS partnership. Careful consideration must be given to safety, privacy, data security, and user experience before an organisation may want to explore MaaS opportunities with others. The Open Mobility Foundation, a non-profit organisation created by municipalities across the USA, “to support the development of open-source standards and tools to that provide saleable mobility solutions for cities”,<sup>166</sup> has adopted and gradually adapted the Mobility Data Specification (MDS) for bikes and scooters which is used in more than 115 cities in the US and elsewhere, including in some European cities.<sup>167</sup> MDS is a set of APIs for standardised information sharing about operations between cities and private companies. It also allows cities to collect data and publish regulations that support efficient traffic management and public policy decisions.

Given that in the US data exchange is not subject to a single privacy framework, such as the GDPR,<sup>168</sup> it is understandable why MDS may not be fully used in the EU; indeed, as it currently stands the MDS discloses passenger location data without purpose-specific limitations. MDS was challenged on constitutional grounds by two reputable privacy groups in the US in 2020, but both were turned down.<sup>169</sup> This, in turn, makes it plain that any EU instrument on the creation of common APIs for transport operators and platforms should not only contain **technical rules** but also **acceptable use** policies, eventually leading to Codes of Conduct and Certifications under GDPR Articles 40 and 42, respectively. These should make sure that the GDPR and the fundamental right to data protection and privacy are respected, but also that it is not (ab)used to protect commercial interests and/or legitimise overboard data requests from government bodies. The EU already has experience with GDPR-compliant data exchange, in areas such as banking and energy supply.<sup>170</sup>

The above issue, in turn, points to a third element that should be put in place to enable effective data exchange: **governance structures** and procedures which will allow for trust to be established and for differences to be resolved between a vast number of parties (public and private) with divergent structures and interests scattered around Europe.<sup>171</sup>

Therefore, the 2010 Directive and the 2017 Delegated Regulation – or, indeed, the latter only – would need to gain more bite and contain rules on these three main issues, at least: common standards for APIs to replace (or talk with) the multitude of different systems used in the Member States; acceptable use policies taking into account the GDPR, but also competition and trade law concerns; and governance structures and procedures to secure the smooth operation of data exchange between many operators.

## 4.7 Provision of SGEIs

By integrating ToD in its Mobility Agenda and in MaaS, and by connecting this Agenda to its environmental ambitions, the EU brings ToD closer to the concept touched on earlier in this study,

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<sup>166</sup> <https://www.openmobilityfoundation.org/>


<sup>167</sup> Such as Hamburg (DE), Ulm (DE), Bergen (NO).

<sup>168</sup> Although privacy concerns have also been expressed – and led to action at the local level against the MDS, see <https://www.bloomberg.com/news/articles/2021-11-10/scooter-rides-have-turned-into-a-data-privacy-fight-with-austin-u-s-cities>

<sup>169</sup> See EFF Brief here: <https://www.eff.org/document/sanchez-v-ladot-opening-appellage-briefpdf>. See also <https://www.eff.org/fr/press/releases/eff-aclu-urge-appeals-court-revive-challenge-los-angeles-collection-scooter-riders>

<sup>170</sup> See, respectively, the Second Payment Service Directive (PSD2), the European Parliament and Council Directive (EU) 2015/2366 on payment services in the internal market [2007] OJ L 337/35; and European Parliament and Council Directive (EU) 2019/944 on common rules for the internal market for electricity [2019] OJ L 158/125.

<sup>171</sup> For an in depth discussion of the governance issues of data sharing see <https://cerre.eu/publications/data-sharing-digital-markets-competition-governance/>



called 'service of general economic interest' (SGEI). SGEIs have been the subject of a 'triple constitutionalisation' from the Treaty of Lisbon, with the TFEU Article 14 giving some competence to the EU, Protocol no. 26 awarding a core role to the Member States and Article 36 of the Charter of Fundamental Rights recognising access to SGEIs as a fundamental right.

Article 14 states that the EU and its Member States 'each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate based on principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions'. For the first time, it gives EU competence in the following terms: "The European Parliament and the Council, using regulations under the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services."

If anything, the EU does have a new – and as yet unused – legal basis for establishing the principles of SGEI in the field of urban mobility. Such principles would remain to be completed and implemented at the Member State level.

Experience at the local level is already progressing regarding the involvement of ToD in the provision of public transport. The use of taxis for bringing children from remote areas to school is already widely practiced in several EU Member States, such as France and Greece. In most of Belgium, as already discussed (Part 2.2.1), a specific ToD scheme is reserved for those drivers who are willing to practice low fixed prices for specific categories of passengers (people with reduced mobility). Further, Uber has entered into agreements with local authorities in the US and the EU to participate in the provision of subsidised public transport, in two ways: either by offering first/last mile mobility in combination with public means of transportation; or by proposing full point-to-point transportation to people with reduced mobility (in some locations) or with very low income (in other locations). In all these cases, passengers pay a small contribution, while the rest is handled by the contracting public authority.<sup>172</sup>

These examples show that the participation of modern ToD in the provision of SGEIs is far from a 'future vision', it is already happening – and is likely to develop more in the years to come. This, in the EU context, raises several issues associated with the selection/procurement procedure to be followed for the choice of platforms providing SGEIs, including how much the public contributes, the applicability of the EU State aid rules and Altmark case law<sup>173</sup>, as well as the European Commission's SGEI Package (also known as the Almuna Package).<sup>174</sup> These issues, as well as on some qualitative criteria and principles for the participation of ToD operators in public transport, should indeed be organised at the EU level.

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<sup>172</sup> The authorities' contribution is also capped and if, for some reason on that day/time the trip should cost more, then the extra charge is back to the passenger.

<sup>173</sup> CJEC, Case C-280/00 *Altmark Trans*, EU:C:2003:415.

<sup>174</sup> This consists of: (a) a Communication from the European Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C 8/4; (b) European Commission Decision (EU) 2012/21 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/3; (c) Communication from the European Commission, European Union framework for State aid in the form of public service compensation [2011] OJ C8/15; and (d) European Commission Regulation (EU) 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] OJ L 114/8.



#### 4.8 Interim conclusion for Part 4

There are **several EU objectives and corresponding legal bases on which the EU may ground the adoption of measures for ToD**. Some correspond to core competencies such as the completion of the Internal Market, while others inform areas in which the EU plays a secondary (yet important) role, such as the provision of SGEIs and employment. The achievement of more 'modern' EU objectives, connected with climate change, the EU Mobility Agenda, and MaaS, also require action from the EU.

Given the above, and taking into consideration the current fragmentation, both at the legal and at the material level, the question may be raised whether **EU action is not only granted but positively required!**

5



**THINKING ABOUT  
REGULATION**



## 5 Thinking about regulation

### 5.1 Competence

For the EU to undertake legislative action, it needs not only to show that it has a legal basis to do so, but also to show that it complies with the principles of subsidiarity and proportionality.

#### 5.1.1 Legal basis

The EU is based on the principle of conferred powers, which means that it can only act in fields where the Member States have transferred powers to the European Institutions. In practice, this means that the EU may only legislate in areas for which there is a legal basis in the Treaty. There are at least three legal bases in the EU Treaty which allow for action in the ToD area. Is there a solid legal base for EU action in the ToD area? Absolutely.

Article 91 of the TFEU regulates the competence of the EU to adopt legislation in the transport sector. So far, the EU has not used this provision – or any other – to regulate ToD. Action under this provision should aim at setting common rules for international transport, to protect carriers from other Member States, to adopt measures with regards to transport safety, or any other ‘appropriate provision’. The policy objectives examined in Part 4 of this study fall within the three latter objectives set by this sector-specific legal base, i.e., international transport, safety and other measures.

The general Internal Market legal basis, Article 114 (TFEU), could also apply with regards to digital intermediaries, offering matchmaking in the field of transport (but not offering transportation services themselves, *per se*), or with regard to a high level of protection for consumers and the environment. Because digital intermediaries in ToD need drivers to perform the actual transportation service, by extrapolation, some aspects of drivers’ activities could be regulated under Article 114. Indeed, the test set by the CJEU in Tobacco advertising,<sup>175</sup> itself quite large, is seen by many as merely a drafting guide, given the extremely flexible subsequent case law of the CJEU.<sup>176</sup> Article 114 has been used for several ongoing proposals of the European Commission which do not squarely fit within the core definition of the Internal Market. Hence, for example, the proposed General Product Safety Regulation justifies recourse to Article 114 by reference to the need to enhance free movement of products, create a level playing field for producers, ensure a high level of consumer protection, avoid regulatory ‘forum shopping’, and secure a strong presence in the global scene. All these reasons would equally apply to ride-hailing.

Lastly, on setting the general principles for SGEIs in the Member State (as explained in Part 4-IV), Article 14 could also apply here, though with more limited scope, and could lead to ‘lower intensity’ harmonisation because this legal basis is only about ‘setting principles and conditions’.

#### 5.1.2 Subsidiarity

To resolve the issue of subsidiarity in EU action of this nature, it is important to assess whether it would be better to regulate at the EU level rather than at the national level.


So far, this study has shown a contradiction concerning the regulation of ToD. On the one hand, an innovative, transnational digital service like UberPop (by Uber) was thrown at the mercy of local authorities, while on the other hand, Star Taxi App, a smaller intermediation company operating mostly at the local level fell fully under the scope of the e-Commerce Directive and enjoyed full market access (above Part 2.1). **Therefore, clarifying the status of ride-hailing platforms at the EU level, and securing a level playing field in the urban transport mobility sector is core for the Internal Market and may only happen at the EU level.**

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<sup>175</sup> CJEC, Case C-376/98 *Germany v European Parliament and Council (Tobacco Advertising)*, EU:C:2000:544.

<sup>176</sup> S. Weatherill ‘The limits of Legislative Harmonisation Ten years after *Tobacco Advertising*: How the court’s case law has become a ‘drafting guide’, *German Law Journal*, 2011, vol12 no 3, p. 830.





Moreover, fixing minimum common criteria for drivers' licences to enhance mutual recognition among Member States, deciding on minimum technical and environmental standards for vehicles, and setting rules for the protection of drivers and consumers in a way that avoids distortions are all things that only the EU can do.

The EU has already regulated long-distance transport, both cross-border and domestic, in 'the coach' Regulation 181/2011. There is no obvious reason justifying a distinction between short-distance and long-distance trips for this purpose. The European Commission has also clarified: "Passenger protection, as part of the Internal Market and common transport policies, is an issue of European scale which requires a solution at the Community level. The liberalisation of a market and taking into account consumer interests especially disabled persons and persons with reduced mobility, are two complementary aspects of the internal market."<sup>177</sup>

The European Commission has also emphasised the importance of harmonising the mobility of European citizens moving for work and leisure, as well as the rights attached to such mobility and the means to protect them.<sup>178</sup>

A level playing field for ride-hailing platforms willing to expand their activities beyond their national borders is necessary. This, in turn, requires some rationalisation of the internal rules on ToD provision. As the Belgian case (Part 2.2.1) shows, several countries hamper the provision of transport services within their territory. EU intervention would therefore reduce compliance costs for both domestic and transnational economic operators, i.e., regardless of their place of establishment.

Lastly and importantly, recent developments in the ToD sector involve digital actors along with offline ones. The existence of digital players can justify EU-wide intervention, as their activities are by nature transnational and beyond the reach of individual governments.

### 5.1.3 Proportionality

Next to the principle of conferral and subsidiarity, a future legislative proposal will have to comply with the principle of proportionality (Article 5 TEU). This means that the EU will only take the action necessary to achieve the objective of the Treaties and no more. Therefore, any harmonisation measure proposed by the European Commission should follow this principle.

Proportionality should not be assessed *ex ante* and *in abstracto*, but *in concreto* for each measure separately. Therefore, at this stage, where the European Commission has not – even informally – proposed legislation, this condition may not be usefully discussed. As a general guideline, however, it may be said that any legal instrument providing, for instance, a 'tool box', a set of criteria, general principles or basic rules to be used by national authorities – while allowing the Member States to adapt the procedures and tools to their needs – would likely satisfy this condition.<sup>179</sup> The common agreement of 'blacklisted' measures and practices, which by definition breach EU law – in a way similar to Article 14 of the Services Directive – would also comply with the principle of proportionality.

## 5.2 From self-regulation to co-regulation?


The platform economy is based on trust in the platforms and service providers that use them. While peer-reviews and rating systems are the flagship instruments for building trust, other, more general, measures of self-regulation also play an important role.

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<sup>177</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on the rights of passengers in bus and coach transport, 4 December 2008, COM (2008) 817.

<sup>178</sup> *Ibid.*

<sup>179</sup> For this kind of approach where the Member States can choose instruments within a tool box developed at the EU Level, see European Commission, proposal for a directive on public procurement, 20 December 2011, COM (2011) 896.



Peer-reviews and reputation/rating systems (with stars, numbers, plain text or a combination thereof) are an inherent feature of any digital platform offering services.<sup>180</sup> They are valuable for the consumer who knows what to expect, but also for the service providers as part of their brand name and image. Indeed, failures and fraudulent behaviour, which undermine these instruments and prejudice the parties involved, have been identified by commentators.<sup>181</sup> Several solutions have been put forward to address this, such as strict and transparent rules as to who can evaluate (and how), more protection against bots, the development of common scales and criteria, the use of third party references and reputation aggregators, and more. The platforms, themselves, have adopted some of the above, or, indeed, put in place other fixes. Several of these solutions have also been turned into legal rules initially in the Member States (with France taking the lead on *la République numérique* and its implementing decree 2017-1436 “on the information obligations relating to online consumer evaluations”<sup>182</sup>), and recently also at the EU level, by the updated Unfair Commercial Practices Directive (UCPD).<sup>183</sup>

Other measures of self-regulation used by the platforms include background checks, identification based on official documents, personality verifications and guidance for service providers, the use of big data analytics for securing transactions, quality charters and equality policies (such as Community Guidelines), the existence of consumer support centres, and the adoption of insurance policies for service providers, consumers or both. Overall, the rules or standards adopted by the platforms aim to deal with the following issues: the conditions of access to the activity (personal qualifications, absence of criminal record); the conditions for exercising the activity (quality of service, use of infrastructure or specific logos, disabled users, gender issues); the performance of the activity to help service providers increase their earnings (algorithms or cameras, performance statistics for each provider, etc.); consumer complaints; and finally, the adoption of insurance policies.

Indeed, ride-hailing platforms are active and have policies in all most of these fields. The existence of self-regulation, however, has not prevented public authorities in many Member States from adopting top-down, restrictive measures pursuing precisely the same objectives (see Part 2.2.4).

A system whereby platforms’ self-regulatory measures/policies could be assessed in the Member State in which they are established, certified, and validated for what they offer, could be a first step towards pre-empting the Member States from adopting duplicate and/or disparate regulation.

Self-regulation, however, may not take care of everything, especially of issues external to the relationship between the parties. Such externalities may require some top-down regulation. In particular, concerning ride-hailing platforms, it has already been observed that “after the judgments of the CJEU in *Elite Taxi* (Uber Spain) and *Uber France*, the need for regulation at the European level is present and pressing. By refusing to recognize the specific characteristics of the collaborative economy, the CJEU is turning on its head the regulatory gap that so far has worked in favour of platforms to their detriment, and favour of their consumers and ‘incumbents’. This result runs counter to the European Commission’s declared intention to foster the development of online platforms and the collaborative economy, as part of the Digital Single Market strategy”.<sup>184</sup>

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<sup>180</sup> The term is taken by the Court’s judgment in *Airbnb*; for an extensive analysis of the role of ratings and the problems associated thereto, see Hatzopoulos, V. *The Collaborative Economy and EU Law* (2018) Hart: Oxford/Portland, p 190-8.

<sup>181</sup> See Hatzopoulos, above fn 180; also G. Zervas and D. Prosperio, ‘A First Look at Online Reputation on Airbnb, Where Every Stay is Above Average’, available at: <https://people.bu.edu/zg/publications/airbnbreviews.pdf>

<sup>182</sup> JORF no. 233 5/1/17, available at: <https://www.legifrance.gouv.fr/eli/decret/2017/9/29/ECOC1716649D/%20jo/texte>

<sup>183</sup> European Parliament and Council Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22; see article 7 para 6 and Annex 1, nos 23(b) and 23(c).

<sup>184</sup> Hatzopoulos, V., ‘The Internal Market and the Online Platform Economy’ in Garben, S and Govaere I (eds) *Internal Market 2.0*, (2021) Hart: Oxford/Portland, 213-232, 229.



### 5.3 Top-down regulation?

Transportation needs are often geography-dependent and vary from country to country, city to city and even locality to locality. This has also been confirmed from the survey and workshop carried out in the framework of this study. Therefore, the role of local and national authorities in regulating transportation, in general, and ToD, in particular, cannot be disputed. The Opinion adopted in June 2021 by the EU Committee of Regions confirms this point.<sup>185</sup> It is also true, at the same time, that the main challenges (quality, reliability, security of service, congestion/pollution, urban planning, etc.) are broadly comparable for all EU countries; and that divergent national measures fragment the Internal Market and impede the scaling up of innovative platforms. This latter point is especially detrimental to European start-ups trying to build a solid basis 'at home' before competing with the US and Asian platforms globally.

Those general observations should be combined with more legal considerations, essentially coming from the CJEU's case law, discussed above (Part 2.1). The Court, already in *Elite Taxi* (Uber Spain) and consistently thereafter, has held the intermediation service provided by platforms to be an 'information society service' (ISS) in the sense of the e-Commerce Directive, fully within the ambit of the Internal Market. On the other hand, it has been held that transportation services fall within the relevant TFEU provisions (Articles 91-100) and are – or are not, as is the case of ToD – liberalised by the secondary legislation issued on that basis.

A third parameter is EU legislation on consumer and data protection, setting common rules from which the Member States may not deviate, often not even to offer a higher level of protection. As already discussed (Part 4-IV) all three elements justifying the adoption of sector-specific rules (i.e., information asymmetries, consumer vulnerability, and triangular situations) are present in road transport, in general, and ride-hailing platforms, in particular.


Given the above, it is suggested that any regulation effort of ToD should focus on the three parties involved, i.e., platforms, passengers, and transport companies/drivers, and follow the logic below:

- a) **Platforms** (and dispatchers), to the extent that they offer digital intermediation services, should be fully subject to the relevant EU rules (i.e., the e-Commerce Directive, the Platform-to-Business Directive, potentially the forthcoming Digital Services Act, and any other text of secondary legislation) and, of course, the Services Directive. They are also subject to CJEU case law concerning the free provision of services and freedom of establishment (companies).<sup>186</sup> Therefore, divergent national regulations should comply with the specific requirements of secondary legislation. If no specific text is applicable, they should be checked as to their justification by some goal applicable to 'general interest', their necessity, and their proportionality under Articles 49 and 56 of TFEU case law. Further, in cases where fragmentation persists, despite the above-mentioned rules (once fully implemented and evaluated), new EU legislation could be envisaged based on Article 114 of TFEU.
- b) **Consumers**, if after assessing the actual risks to which consumers are exposed and which are not covered either by the horizontal consumer and data protection rules or by self-regulation (for which see Part 4, IV), extra protection is deemed necessary, this should occur at the EU level. As explained above, the sector-specific consumer protection rules correspond to either important information asymmetries, or vulnerable consumers or triangular situations, all of which are present in ToD.
- c) **Drivers** (and companies engaging them) should remain subject to national and local rules which, however, should not reduce any *effet utile* of EU rules concerning the other two

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<sup>185</sup> EU Committee of Regions 'Sustainable and Smart Mobility Strategy', CDR 497/2021 (30/6/21), <https://cor.europa.eu/EN/our-work/Pages/OpinionTimeline.aspx?opid=CDR-497-2021>

<sup>186</sup> For which see CJEU, Case C-212/97, *Centros*, EU:C:1999:126; C-208/00, *Uberseering*, EU:C:2002:362; C-167/01, *Inspire Art*, EU:C:2003:512; Case C-411/03 *SEVIC Systems*, EU:C:2005:762 and Case C-210/06 *Cartesio*, EU:C:2008:723.



categories of parties involved. It should stressed that platforms create two-sided markets and that all three ToD parties are needed for the market to function. Moreover, drivers are service providers and their freedom to provide services across borders may well be impaired by internal rules, as the Court has recognised in the seminal *Alpine Investments* judgment.<sup>187</sup> Similarly, dispatching companies should also enjoy the freedom of establishment according to TFEU Articles 49 and 55. Therefore, even in this area, Member States and cities would not be entirely free, but would have to take into account EU laws. Concerning licensing requirements, in particular, the adoption of some common rules and principles would greatly facilitate the mutual recognition of national licences, while helping to create a level playing field for all drivers in the EU. If such requirements were set out systematically and clearly, within 'soft law' (European Commission working paper, recommendation, communication, or other guidance text) that would help national authorities to adjust their, otherwise free, action.<sup>188</sup>

## 5.4 Form

Some of the issues and problems may be facilitated by the adoption of clear guidance, common criteria, or common standards. Between its Communications, staff working documents, programmes, consultation documents, official website, etc., the European Commission has a big arsenal of means for providing such 'soft' guidance. **However, this study has shown that some binding rules are also necessary to achieve the objective of more efficient and sustainable urban transport.** At the same time, the importance of national and local particularities should be acknowledged. Therefore, the European Commission should be heading for 'minimal harmonisation', with grey and black lists of suspicious practices or the outright banning of forbidden practices, building on issues on which there is broad consensus. If taken further, this same text could establish a common set of conditions for the drivers' access to the ToD market, as well as standards for vehicles, especially in the area of environmental protection and safety. The text could also set higher, sector-specific thresholds of protection for ToD consumers. The text could also refer to the due diligence obligations of digital platforms, as discussed under the DSA.

This study also underlined several points of convergence, both in terms of the policies currently in place (Part 2.2.8) and the objectives being pursued (Part 3) by the Member States. It has also highlighted the EU's interests and objectives, which should inform such a legislative initiative. Based on the above, we can now proceed with the following proposals.

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<sup>187</sup> CJEU, Case C-384/93, *Alpine Investments BV v Minister van Financiën*, EU:C:1995:126.

<sup>188</sup> The argument in favour of some stronger EU action in relation to drivers could also be made: given that all three parties, i.e., platforms, consumers and drivers, are needed for the ToD ecosystem to effectively function at the EU level, Member States should actively be precluded from adopting divergent and over-restrictive measures in relation to drivers.

6

**POLICY  
RECOMMENDATIONS**



## 6 Policy recommendations

In the previous parts, we have explained why ToD is important for achieving EU goals related to Internal Market integrity, climate change mitigation, and MaaS deployment. We have also demonstrated that the current regulatory landscape leads to Internal Market fragmentation, distortions of competition, legal uncertainty, and loss of economic welfare (opportunities for drivers to earn a living and platforms to increase revenues). Based on the previous parts' conclusions, it is our view that EU intervention is needed to create a level playing field and establish legal certainty for all parties involved in ToD and, more generally, in the urban transport sector.

In this respect, the recent European Commission's informal announcement that it is envisaging the adoption of guidance in this area, through non-binding instruments of soft law, is welcome. **From the analysis carried out in this research project, however, it would seem that soft law alone would not be sufficient to properly meet the issues and challenges. To secure the minimum convergence needed between Member States' legislations, a mix of hard and soft law is deemed more appropriate.**

### 6.1 Hard law

To respect the principle of subsidiarity and because the differences between national rules reflect different legal traditions and local conditions, Member **States should continue to be able to design different legal categories within the provision of ToD** (such as the distinction between taxis and PHVs). However, **EU laws and principles require that the same rules apply to the same services**. Therefore, artificial distinctions should be avoided and **a level playing field should be maintained between those different categories and the rights and obligations associated thereto**. Such a level playing field should be reached first at the national level, but also between the Member States, to secure the EU fundamental freedoms of movement, service provision, and establishment, and to avoid artificial fragmentation of the Internal Market and distortions to intra-EU competition.

If, however, the EU wanted to be more forward-looking, it could guide the Member States to review their categories based on a new distinction, between on the one hand **platform-hailed taxis and PHVs** and, on the other, **taxis which may only be street-hailed**. Under this scenario, street-hailed taxis would still be subject to regulated prices, territorial restrictions and other rules decided at the local level. Meanwhile, platform-hailed vehicles would benefit from a fully liberalised EU-wide market, with specific entry requirements (see the previous paragraph), but unregulated prices and other operating conditions. Drivers could further decide to enter into public service agreements with their local and/or national authorities, by submitting to the specific requirements of such authorities. A blueprint of such requirements could also be established at the EU level to facilitate the trans-border provision of such services.

For either of the above options, a **directive would be required**. The directive should factor in the following issues:

- **Basic rules and conditions for the delivery of permits** for the providers of different categories of ToD services should be established. These could concern both the drivers' status and capacities (age, experience, criminal record, etc.) and the vehicles' characteristics. Licensing requirements could also include specific environmental and safety standards, as well as minimum/maximum driving obligations during flat/peak hours, to secure services around the clock and to avoid over-congestion during peak hours. Multiple permits in different Member States should be expressly allowed.<sup>189</sup> Guidelines could be provided to national and local authorities wishing to impose stricter rules and to confer extra rights to specific categories of operators. Pushing a step further, the EU-wide

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<sup>189</sup> To comply with the CJEU's case law on 'single seat', see Case 107/83 *Klopp* EU:C:1984:270.





definition of 'universal service' or 'service of general economic interest' in the field of ToD could be given.<sup>190</sup>

- **Restrictive operational rules** other than those eventually contained in the common licensing rules and guidelines, such as return-to-garage, minimum waiting time, minimum length/duration of rides, exclusivity clauses with dispatch centres as well as with platforms should all be banned in principle, and only exceptionally admitted if sufficiently justified by the public authorities concerned. A system of black and grey lists, in a way similar to Articles 14 and 15 of the Services Directive,<sup>191</sup> could be envisaged. For the grey list clauses, the Directive should be fixing specific guidelines concerning the application of the principle of proportionality, in a manner comparable to Directive 2018/958/EU.<sup>192</sup> Local authorities should notify the European Commission about operators using these restrictive operational rules, and the European Commission should review these notifications every three years to assess whether any EU action is needed (review clause).
- Similar conditions for taking up and carrying out ToD activities would also enhance the effectiveness of the EU principle of 'mutual recognition of permits delivered' (to individual drivers and transport undertakings). The **creation of an EU network of national authorities** responsible for overseeing the national ToD sector would further facilitate mutual recognition and limit the possibilities of abuse.
- **Numerical quotas** should be exceptional and temporary, grounded on solid data concerning ToD offer and demand as well as congestion and environmental impact. The quotas should be reviewed yearly to keep up with market fluctuations in this dynamic sector.
- **Environmental and safety standards** should be set in parallel with transport licensing conditions. Safety standards set by any new directive should be subject to modification by some delegated act of the European Commission, after some consultation with stakeholders. Moreover, as a means to pursue environmental objectives and a fair transition for existing taxi licence-holders, new entrants could be compelled to enter the market with electric or hydrogen cars, while already licenced drivers could maintain the right to use their vehicles for a longer period.
- **The safety** of drivers and passengers should be secured and **driving times capped**. Member States may be required to implement a tachygraph or an equivalent app that monitors the driving hours of taxi drivers, to ensure they have adequate resting time. The tachygraph or the app could use the criteria of the motor running as a basis of calculation. A personalised log-in system should be established to account for vehicles used by multiple drivers. The tachygraph or app data should be regularly shared with the authorities supervising ToD.
- **Consumer complaints and dispute resolution mechanisms**, already put in place by several platforms, should be generalised, mainstreamed and made fast and credible. Hence, to complement the Online Dispute Regulation and the P2B Fairness and Transparency Regulation,<sup>193</sup> and once the precise content and scope of the draft Digital Services Act is fixed, it may be necessary to have more specific rules for ToD.
- **Data sharing (and common APIs)** is essential to ensure intermodality, multimodality, MaaS and the transportation and environmental objectives that go with them. The EU

<sup>190</sup> This would be following the legislative pattern of network-based industries, see European Parliament and Council Directive 2009/136/EC on universal service and users' rights relating to electronic communications networks and services [2009] OJ L 337/11.

<sup>191</sup> Directive 2006/123/EC of the European Parliament and the Council on services in the Internal Market [2006] OJ L 376/36.

<sup>192</sup> European Parliament and Council Directive (EU) 2018/958 on a proportionality test before adoption of new regulation of professions [2018] OJ L 173/25.

<sup>193</sup> European Parliament and Council Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes [2013] OJ L 165/1; and Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186/57.



already has some rules in this area (notably the 2010 ITS Directive and the 2017 European Commission Delegated Regulation), which are currently under revision under the Multimodal Digital Mobility Services (MDMS) initiative, as discussed in Part 4, VI-2. In parallel with its 2020 European Strategy for Data and the 2018 Communication on European data spaces, the European Commission has offered guidance and incentives for the development of a Common European Mobility Data Space. Once the new instruments of the MDMS are in place it will be possible to assess their exact scope and impact. In case these are judged insufficient, the proposed directive could foresee the possibility for the European Commission to adopt a delegated act, after consultation with the stakeholders.

## 6.2 Soft law

- The **legal situation of ride-hailing platforms** needs to be clarified given the grey areas left by CJEU case law (see Part 2.1) and given the slightly different business models followed by each one of them. In particular, how the (draft) DSA and other digital-oriented rules apply to them should be clarified. This could be achieved by the adoption of a **complete set of criteria, using soft law**, which would allow for self-assessment by the platform. National authorities in charge of ToD (transportation ministries, specialised bodies, etc.) could 'certify', upon request of the platforms, the outcome of such self-assessment.
- Subject to the issue of driving hours discussed above, **users' safety** and security seem to be duly taken into account both by platforms and by the fact that only licenced professional drivers presently offer ToD services. Consumers, however, would benefit from more **uniform and standardised, as well as transparent, reputation rating and ranking instruments**. The requirement, contained in the UCPD (as modified by the 'Omnibus Directive'), that platforms should make sure that only actual users can evaluate the service is a good – but limited – starting point. Some soft law instruments could offer platforms guidance to that effect, and a system of certification for rating systems could be put in place.
- **Consumers** would further benefit from the update and adaptation of the **EU Passenger Bill of Rights**, already developed by the European Commission for other means of transport including rail, road (bus and coach), air, and boat.<sup>194</sup> It should, in particular, adapt the waiting time requirements and define circumstances giving rise to compensation (or exemption from compensation).

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<sup>194</sup> See above fn 71.



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