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Incumbent Strategies against Collaborative Platforms: Lessons from the Battle between Taxi Drivers and Uber in Spain

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ABSTRACT

The purpose of this article is to analyse the strategies that incumbent market participants are using to fight collaborative platforms. Due to space limitations, the focus is on the battle between taxi drivers and Uber in Spain. The first strategy is imitation. Established operators try to copy technological advances to increase competitiveness. It is the most desirable strategy, because it improves competition and encourages innovation. Besides, some incumbents are collaborating with the platforms. Although the assessment of this strategy is positive, it is not easy to achieve due to the lack of willingness of incumbents. Traditional operators have confronted collaborative platforms through different channels. The two most important are judicial and legislative. Regarding the former, incumbents have based the lawsuits on unfair competition. The Spanish experience shows that this strategy is not efficient, as the result is conditioned by several uncertainties. Concerning the second channel, traditional operators put pressure on legislative powers, demanding laws that forbid or restrict the activities of collaborative platforms. The Spanish experience is that this strategy works. Nonetheless, success is not guaranteed, as the outcome relies heavily on the political conjuncture. In addition, it is detrimental to the economic and legal system.

Keywords – *Collaborative economy, unfair competition, regulatory capture, Uber, Airbnb*

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Summary

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1. INTRODUCTION

1.1 THE THREAT OF COLLABORATIVE PLATFORMS

The purpose of this paper is to analyse the strategies used by traditional operators to fight against collaborative platforms. The effectiveness of the strategies is being assessed because they are shifting the economic, social and legal situation. All around the world incumbents are undertaking hostile measures against platforms because they feel threatened by the disruptive force of the collaborative economy. This business model is characterised by the intervention of intermediaries (collaborative platforms) which, thanks to digital technologies, facilitate firms, professionals and consumers (i.e. *prosumers*) to provide services related to (theoretically) underutilised goods. Car-sharing is an illustrative example. Although cars have been shared for a long time, today it is easier for a driver to find people willing to share a trip, and the expenses generated. The reason for this is that there are software tools that match drivers and passengers.

The collaborative economy is more appealing than the traditional one and is attracting the interest of consumers. The reason for its success is using digital technologies to improve the ways of offering products and services or to create new markets that challenge the established ones (cf. Lobel 2016, pp. 15-55; Edelman and Geradin 2016, pp. 3-36; Hatzopoulos and Roma 2017, pp. 4-37; Codagnone and Martens 2016, p. 18 f.; Palienko 2019; PricewaterhouseCoopers 2015, p. 15 ff. and critically Schor 2014, p. 11 ff.). Thanks to these technologies, providers of products and services can reach more people, more directly, in less time (European Commission 2016a, p. 3). In other words, the technologies escalate the volume of what was already being done and allow "instant gratification" (consumers get what they want as soon as possible). Hence, they can reduce transaction costs and diminish the price or increase profits (Lobel 2018, p. 67 ff.). Secondly, due to the growing interest in staying connected and belonging to social networks, they can collect more information and make it available to those who are connected (Möhlmann et al. 2018, p. 27 ff.). Thus, they can reduce information asymmetries and increase consumer trust. Thirdly, their offer connects better with the interests and needs of new generations: it is more sustainable, as it replaces property with access (Kelly 2009 and Acquier et al. 2018, p. 51 ff.). It allows individuals to increase the utilisation of underused products, and participating in it does not require as many resources. Besides, the purchasing experience can be customised. Lastly, the success of the collaborative economy among young people enlarges its power of attraction. On the one hand, platforms are enhancing their market scope and growing among other consumers. On the other, investors are firmly committed to this business model. Their funding allows platforms not only to increase their presence in traditional markets and to confront incumbents, but also to be more innovative and venture into new markets and experiences.

The collaborative economy has a dark side too. On the one hand, it can create negative externalities. For instance, taxi driver organisations criticise it, saying that it increases the number of vehicles on roads and streets. Thus, congestion and pollution increase. The expansion of the collaborative economy in the tourist market boosts the number of private houses addressed to tourist use. Among the various consequences, there is an increase in the price of housing, a decrease in the supply of long-term rental properties and an increase in its prices, as well as neighbourhood conflicts (Barron et al. 2018; Comisión Nacional de los Mercados y la Competencia 2018, p. 5 ff.; García-López et al. 2019 and Felgueroso 2019). Nonetheless, some of the existing studies have been criticised because they do not prove the cause-effect relationship (See Llobet 2018). Traditional operators also suffer negative consequences. Their products lose appeal, their profits decrease, and their future darkens. Taxi drivers are a good example: the increasing appeal of Uber, Didi Chuxing, Lyft, Grab and Cabify reduces the market value of their licences, which most of them had considered as retirement insurance. Therefore, it is logical that they react and use all the available tools to defend their interests. My goal is to analyse them and assess their impact because society may be paying an excessive price to defend the interests of outdated business models.

1.2. THE SPANISH TAXI SERVICE MARKET

The collaborative economy is present in many areas (housing, transport, food delivery, recirculation of products, exchange of goods and services, optimisation of active usage, the building of social connections, etc.). Due to space limitations, they cannot all be examined in this article. Hence, I focus on urban passenger transport in Spain. There are two reasons for this. The first is that I have direct and comprehensive information about the battle between taxi drivers and Uber. The second and main reason is that it is a very complete scenario: taxi drivers have resorted to all kinds of strategies to expel Uber from the market. They have succeeded, at least for the time being. Nonetheless, some references are made to other fields in which the collaborative economy is active, such as tourist rental.

The urban passenger transport market is highly regulated in Spain. One of the reasons for this is the political structure: Spain is divided into regions (*rectius*, Autonomous Communities) that share powers with the (central) State. Articles 148 and 149 of the Spanish Constitution establish the rules relating

to the distribution of competences. According to them, both the central State and the Autonomous Communities have competences to rule on carriage services (Quintana et al. 2014, p. 489 ff. and Cano 2014, p. 766 ff.). Traditionally, the central State has passed the general rules regarding the Planning of Land Transport (essentially, Spanish Act 16/1987, 30 July, on Planning of Land Transport and Royal Decree 1211/1990, 28 September, approving the Regulation on Planning of Land Transport) and some Autonomous Communities have approved rules regarding the routes that lie exclusively within their territory. In addition, there are also municipal rules regarding urban transport, due to the delegation of legislative powers from the Autonomous Communities.

The urban transport services market is the battlefield for the confrontation between taxi drivers and Uber. The applicable laws establish several requirements, limits, and conditions, which can be grouped into three areas. First: access requirements. An administrative authorisation (licence) is necessary to provide public transport services. To obtain this, certain requirements must be met regarding both the vehicle and the licence holder. In addition, administrations can establish quantitative thresholds, which allow them to deny applications when limits are exceeded. Second: the provision of services is not free. Legal rules establish multiple requirements, limits, and restrictions that suppliers must meet, for instance, geographic restrictions. Last: the remuneration of some services is restricted. The most illustrative example is the taxi: municipal administrations fix the rates that must be respected by all drivers.

The problem is that most of these requirements, limits, and charges are outdated. They were introduced a long time ago to solve market failures (Domènech 2015, p. 83 ff.; Velasco 2015, pp. 7-14; Botella 2002, p. 215 and Tarrés 2006, p. 48). Although they achieved their goals, they have had a perverse consequence: they have prevented or restricted competition, with the consequent damage for consumers. Nowadays, technological development provides less aggressive measures that could lead to similar results. For instance, the requirement of authorisation was justified to fight against negative external environmental factors and traffic congestion. Today, software applications and virtual platforms could help to adjust the supply and demand of urban transport. Secondly, the requirements demanded of drivers or vehicles were based on information asymmetries and security reasons. Again, technology helps to reduce the former. Such is the case of online rating and review systems. Their use would eliminate, or at least reduce, the need for requirements to be imposed on drivers and vehicles. The European Commission (2016b, p.10 f.) praises them in its Communication: *A European agenda for the collaborative economy*. Nonetheless, they generate other problems, such as intruding on privacy (Elliott 2016, pp. 9-30). Moreover, they could be of little use in solving security risks. Therefore, the purpose of the legal requirements needs to be examined and only those that respond to security needs that cannot be satisfied with technological measures should be maintained. Last, the justification for fixing taxi fares was to avoid the abuse of taxi drivers' market power. Since traditionally they were hired on the street, consumers did not have the opportunity to compare or negotiate prices. Nowadays, the internet, virtual platforms, and mobile devices mean consumers can know the prices in advance, compare them and decide which option is best. Nevertheless, these technologies may constitute a threat to price competition (Erzachi et al. 2015). Among other reasons, they make it easier for competitors to agree to restrict competition.

1.3. COLLABORATIVE ECONOMY

To finish this introduction I will include a section on the definition of the collaborative economy. There is no single definition or universal understanding of it. On the contrary, the academy has held several and varying conceptions (Codagnone et al. 2016, p. 6 ff; Hatzopoulos et al. 2017, pp. 5-37; Lobel 2016, pp. 4-55 and Alfonso 2016, p. 17. See a more informative but less academic exposition in Botsman 2013). Initially, some authors stressed the idea of 'collaborative consumption'. As this conception proved to be inaccurate, others emphasised the direct link that was created between the provider and the consumer (peer-to-peer economy) or the fact that the former simply responded to the demands of the latter (gig economy or access economy). Some authors have highlighted the key role played by the platforms (platform economy) and the fact that they facilitated the meeting of a large number of bidders and clients (crowd-based economy). Nevertheless, none of these proposals wholly embraces the wide reality covered by this phenomenon. For this reason, we take the European Commission's definition as the starting point. Among other reasons, it may be the seed of future legislation (European Commission 2016a, p. 8).

In the document *A European agenda for the Collaborative Economy*, the Commission gives the following definition: "…the term 'collaborative economy' refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary use of goods or services often provided by individuals". It can be criticised because of its tautology, as it does not define collaborative platforms, although they are a crucial element of the definition. Nonetheless, throughout the document, it refers to entities that use information and communication technologies to create marketplaces or improve existing ones, where enterprises or individuals offer goods or services. Hence, it essentially connects the offer with the demand;

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although it also considers the possibility that the providers are workers of the platform, which will provide the services. This definition – and the characterisation of the platforms – lacks the desirable precision, but it has the advantage that it does not differentiate the collaborative economy and the platforms either according to the size of the platforms or suppliers, or to the profit; all of them are included. This all-encompassing scope fits the Spanish battleground: established market operators are attacking all types of collaborative platforms. Although they publicly charge against the big or best-known ones (Uber and Airbnb), they have also taken small and national platforms to the courts. They have sued all those they consider a threat and the pressure they have put on the legislative power and public administrations has affected all kinds of platforms.

However, when preparing future legislation, the legislator should reflect on the changes that the collaborative economy is experiencing and the role of platforms in the so-called informational capitalism (Cohen 2017, p. 143 ff.). Although at the beginning it was something altruistic and non-profitmaking, the most popular platforms are now multinational enterprises that move millions and practise corporate and financial engineering. Hence, not all the players of the collaborative economy deserve the same rules (Aloni 2018, 143 ff.). It should be taken into consideration that the difference in economic power can lead to advantage-taking, whether of the consumer or of the person providing the service. And here lies one of the most serious criticisms of collaborative platforms: their greatest competitiveness is based on precarious work and tax avoidance.

2. IMITATION

Imitation is one of the first strategies that traditional operators undertake to challenge newcomers. When they feel threatened, they try to replicate the factors of success to avoid losing customers. In the case of the collaborative economy, it is essentially the app. Such has been the case of taxi drivers. Although there were software tools via which their service could be hired online, they were not widely used: taxi drivers and customers did not pay them much attention. But when Uber arrived in Spain and landed in the main cities, taxi drivers and their organisations began to use, promote and improve the existing apps. In a short time they have evolved, changed and joined. For instance, two of the most popular apps were Mytaxi and Hailo. In 2016 they merged. And in 2019 they became Free Now, which was announced with the novelty of offering fixed prices (for the moment only in Madrid), car-sharing and scooter sharing services (for the time being not in Spain).

Nonetheless, the difference between the Uber service, as the paradigm of a platform offering "collaborative" carriage, and traditional taxi drivers does not only lie in hiring services online. Customers highly appraise some features and qualities of Uber's service, such as security, the car's cleanness, the politeness and proper dress of the drivers, the possibility of knowing the exact price in advance and prepaying it. Hence, it is not surprising that, after protests by taxi drivers, although not a necessary consequence of them, the regulation changed. Some regional and local authorities have allowed customers to share taxis, the possibility of fixed prices and imposed dress codes (sportswear, shorts, and flip-flops are forbidden).

Imitation is the best strategy from a neutral perspective and taking into consideration the interests of consumers and the economic system. It maintains competition in the market, as it allows incumbents to continue offering their services without losing ground to newcomers. Besides, it allows them to modernise and improve their offering. If traditional operators have reacted to the pressure of collaborative platforms, it is because their services were less attractive. Imitating the newcomers' offering seems to be an appropriate measure to try to satisfy the wishes of consumers and recover their interest (Vega-Redondo 1997, p. 375 ff. and Friedman et al. 2015, p. 185 ff.). Hence, imitation does not only mean maintaining competition in the market, but it also improves it qualitatively. On the other hand, it forces newcomers not to be complacent with themselves. They may feel pressurised by the reaction of incumbents and keep on innovating, improving services or reducing prices.

However, imitation is not always possible or easy to carry out. Some hindrances discourage traditional operators or prevent them from reproducing the novelties. First, there can be material or social obstacles. Incumbents might not have the knowledge, ability, time or conditions to develop apps that can compete with those of collaborative platforms (for instance, regarding the "impossibility" of imitating Silicon Valley's success, see Jaruzelski et al. 2012). On the other hand, leader operators used to have problems with disruptive technology. Normally big firms that are ahead of their industries do not properly react and end up succumbing to revolutionary changes (see Christensen 2016, xvi f., 4, 225 ff. and Bower et al. 1995, p. 43 ff.). If we look at the brokerage service in the Spanish taxi market, we can see that only two new apps seemed to have some success: Mytaxi and Hailo. However, the success was minimal: they only worked in Madrid and Barcelona, less than 30% of taxi drivers used them, and they represented less than 10% of the taxi intermediation services in 2016 (Source: Comisión Nacional de los Mercados y la Competencia. 2016b, p. 13). On the other hand, the fact that older consumers cannot or do not want to use new technologies can be a disincentive to change and modernise the service.

Another important obstacle could be the pioneer advantage. Although economists have intensely argued on this topic (Gómez-Villanueva et al. 2013, p. 31 ff. See also Golder et al. 1993, p. 158 ff.), early entrants can enjoy some advantages over their competitors (Lieberman et al. 1988, p. 41 ff. Regarding the factors that can influence the result, Suarez et al. 2005). Consumers may prefer early entrants to later ones, especially if the latter are incumbent operators who had not improved their services because they had felt protected by restrictive legislation. Second, the products and services of the pioneers can become the standards that consumers will use to evaluate competing products. Third, pioneers can erect entry barriers by acquiring scarce assets or tying suppliers. For instance, imagine the consequences in the food delivery service market if one collaborative platform could hire the services of all riders on an exclusivity basis (European Commission 2016a, p. 15). Lastly, if the pioneers keep innovating, traditional operators may not be able to keep pace. This probably happens if their attractiveness "persuades" investors to bet on them and inject funds. Nevertheless, first-movers also encounter some disadvantages, such as the ability of late-movers to "free-ride", the need to face some technological or market uncertainties, or the incumbent inertia.

The law can also become an obstacle. First, imitation will be considered illegal if the thing copied is protected by an exclusivity right; for example, a copyright or a patent. Nonetheless, it is doubtful that intellectual property laws provide high protection. In the case of collaborative platforms, the key element is the algorithm. Most legal systems do not give it substantial protection. Such is the case of Spain and the European Union (EU). It cannot be the object of a patent as it is not an invention. Article 4 of the Spanish Act 24/2015, 24 July, on Patents establishes that mathematical methods and computer programmes are not patentable inventions. It might seem that copyright law could protect it. Article 10 of the Spanish Intellectual Property Act (Royal Legislative Decree 1/1996, 12 April) protects original literary, artistic and scientific creations. The letter i) of its paragraph 1 includes computer programmes. However, an algorithm is not a computer programme and, according to the European IP Helpdesk, it is not an intellectual creation, but it has a factual nature (see the answer to a question on the protection of an algorithm that controls the management of hardware equipment: http://www.iprhelpdesk.eu/news/copyright-or-patent-how-protect-my-software). On the other hand, protecting an algorithm through patent or copyright has a considerable inconvenience: the information will be disclosed. Hence, it will probably be better to rely on contractual or trade secret protection (Cohen 2017, p. 154 f.). If the algorithm's information is not generally known, and it has a commercial value and the owner takes measures to keep it secret, they enjoy the protection of the law on trade secrets.

Second, unfair competition is another threat. The unfair competition laws of the European countries do not forbid imitation, as a rule. Nonetheless, it can be deemed unlawful when there are improper circumstances. For instance, article 11 of the Spanish Act 3/1991, 10th January, on Unfair Competition (UCA) states that imitation is free. However, it is unfair: i) when an exclusivity right protects the imitated object; ii) when it creates a risk of association for consumers or it allows the imitator to have an illegal advantage over the reputation or effort of the competitor; and iii) when the imitation is systematic and its purpose prevents a firm from becoming established in a market or expels it.

Third, regulation can be an obstacle when it is so restrictive that it limits the freedom of operators. This is what happens with taxi services in Spain. Legal rules impose access requirements and conditions to provide the service and they limit the activity of taxi drivers. For instance, they are not free to cut fares or to offer fixed prices. Hence, if they want to compete with newcomers, they should ask the competent legislator to introduce the necessary changes in the law. Sometimes there is no need to ask, because legislators modify, on their own initiative, the regulation to improve the service and enhance the competitiveness.

There is another impediment; perhaps the most important one: the lack of willingness to compete. Fighting against newcomers is not easy or comfortable; it requires effort and sacrifice and there is no guarantee of succeeding. Hence, it is preferable to forbid them from entering the market or to drive them out.

This is what has happened in Spain between Uber and taxi drivers. Before the collaborative platform landed, the economic life of the latter was easy, in the sense that there was no competition in the market. They were all exposed to the same conditions and prices. Hence, they did not need to worry about competition, just about finding passengers. The fact that the number of cab licences has not increased during the last twenty years in Spain seems quite revealing (Figure 1). Uber's appearance changed the scenario: taxis had to cope

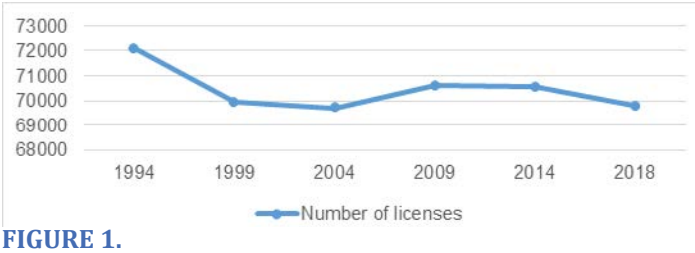

FIGURE 1.
Source: Spanish National Statistics Institute (https://www.ine.es/jaxi/Tabla.htm?path=/t10/p109/l0/&file=00001.px)

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with a new competitor, whose offer was very attractive for consumers. The taxi drivers' reaction was litigation and social protest. They never asked for a more flexible legal regime or for freedom to fix prices. Their only concern was to shut the collaborative platform out of the market.

3. COLLABORATION

Imitation has not been the only non-conflictual strategy employed. On some occasions, incumbents prefer collaboration. Such is the case of restaurant and food delivery services. In recent years, it has become fashionable to order meals and have them delivered, instead of going to a restaurant. Nowadays, it is normal to see young people, provided with bikes and cubic backpacks, queuing at the doors of restaurants to pick up orders and take them to the customers' houses. Most of these riders have been hired by collaborative platforms (Glovo, Deliveroo, Just Eat, Uber Eats, etc.), that offer their services to restaurants and customers. If restaurants see that they are losing competitiveness because of this new fashion, they have two alternatives: imitate or collaborate. They can create their own delivery service and compete not only with other restaurants but also with collaborative platforms. Alternatively, they can join one or several of the latter and collaborate with them. As the saying goes "if you can't beat them, join them".

This strategy also works in the opposite direction: newcomers can use this strategy to overcome the opposition of traditional operators. This is what has happened in the collaborative carriage market. Cabify is a Spanish transportation network company that has always offered vehicle rental services with a driver. It lived harmoniously with taxi drivers until Uber changed strategy and entered the same market. Taxi drivers united and began fighting them. One of the defensive tools used by Cabify has been collaboration. It has offered taxi drivers the possibility of using its app, so consumers could book a taxi (or hire a Cabify car) through it (See "Cabify no cobrará comisión durante tres meses a los taxistas que usen su 'app'." *Expansión*, 29 June 2019). According to newspaper reports, Uber is following the same strategy (for instance, De Las Heras 2019).

Collaboration deserves a positive assessment. As with imitation, it has the advantage of allowing traditional operators to continue in the market, competing with their peers. It helps them to improve their performance too, because they go hand in hand with newcomers. However, there are some obstacles that hinder or prevent collaboration. The main one is willingness. It is essential that traditional operators and collaborative platforms wish to collaborate in order for their relationship to thrive. Thus, the collaboration conditions or offer should be sufficiently attractive. These requirements explain why it is very difficult for cooperation to work in the field of collaborative carriage. On the one hand, taxi drivers do not wish to know anything about collaborative platforms. On the other hand, according to the press, the collaboration offer of these platforms is highly unattractive.

Another important obstacle is exclusivity. On the one hand, it can create a bottleneck and hinder the provision of services. On the other, it demands that the choice be adequate: if traditional operators can bind only one platform, they should make sure that it is best suited to their interests and that it has the potential to compete with others on a lasting basis. Choosing the wrong one will be a failure that can put the firm's survival at great risk. However, exclusivity could be considered illegal as it can represent an agreement between enterprises that restricts competition; i.e. an anti-competitive behaviour. Hence, it could be deemed null and void and the parties could be punished.

4. LITIGATION STRATEGY

4.1. UNFAIR COMPETITION LAWSUITS

Collaborative platforms have been taken to Spanish courts several times for different reasons. Incumbents have sued them for committing acts of unfair competition. They have also denounced them for crimes against tax authorities, crimes against workers' rights, fraud, money laundering and manipulating prices. Besides, they have challenged the laws that ease the service of collaborative platforms or liberalise sectors. Persons who provide services through their apps have demanded to be recognised as "workers", instead of "self-employed persons" as the contracts tend to specify.

We focus here on the first topic because unfair competition has been, and continues to be one of the favourite weapons of Spanish traditional operators to challenge collaborative platforms in the urban passenger transport market: Uber, Cabify, Blablacar and Mytaxi Spain. It seemed to succeed at first: some courts, not only in Spain but also in Europe, have provisionally prohibited Uber from continuing to provide carriage services in their countries (Hatzopoulos et al. 2017, pp. 9-37 and Górriz 2015, p. 80 ff.). However, this strategy is failing in Spain: first instance judges have dismissed cases. Appeal courts seem to be doing the same, but it will be wise to wait until the Supreme Court decides.

The first issue that deserves attention is the scope of application of the law. The essential rule is the Spanish Act 3/1991, 10th January, on Unfair Competition. Article 2 establishes that it rules all the acts carried out in the market and for concurrent purposes. In turn, article 3 says that natural or legal persons participating in the market are subject to the law. The topic has

raised little concern regarding collaborative platforms. Although they stress they are intermediaries, it is obvious that they offer services in a market and compete with other operators. Nonetheless, the issue can raise doubts regarding those persons who offer things or services through apps of collaborative platforms. On the one hand, the Unfair Commercial Practices Directive restricts its application to business-to-consumer commercial practices. Hence, a consumer-to-consumer relationship would fall outside of its scope of application (cf. Judgment of the European Court of Justice 4 October 2018 (C-105/17), *Kamenova*). On the other hand, article 34(2) UCA establishes that when a worker commits the unfair act, the legal action must be brought against the employer.

The most important act of unfair competition, for our case, is violation of the law: it is the legal basis on which the courts of Germany, Italy and Spain base the interim measures that forbid Uber from providing carriage intermediation services. Nonetheless, it is possible that different national laws add other considerations. For instance, article 15 UCA requires the advantage to be significant and presumes that the perpetrator took advantage when the purpose of the breached law is to regulate the concurrent activity (I analysed its application to Uber in Górriz 2015, p. 77 ff.).

Spanish plaintiffs have alleged three other unfair competition acts. The first is the act of deception. According to article 5 UCA, it is unfair to provide false or misleading information, as it may alter the economic behaviour of its addressees. The second is price below marginal cost. Article 17 UCA recognises the freedom to set prices. Thus, they do not need to cover production costs. Nonetheless, in this case, they are unfair when i) they can mislead consumers, ii) their effect is to discredit a product or commercial establishment, or iii) they are part of a strategy to eliminate a competitor. The third and last unfair competition act is an act contrary to good faith. Article 4 uses it as a closure clause. Spanish courts have constructed its meaning based on the principles of own effort, transparency and consumer sovereignty (for instance, Judgment of the Spanish Supreme Court 628/2008, 3 July. Also, Judgments of the Spanish Supreme Courts 64/2017, 2 February; 468/2013, 15 July and 395/2013, 19 June).

The solution to most of the cases depends on the qualification of the activity of the collaborative platform. If it provides carriage services, it is subject to transport regulations that normally require administrative authorisation to access the market and impose several duties on the operators. Nevertheless, if it provides information society services, the EU Directive on electronic commerce does not allow requirements to be accessed – only exceptional cases- and establishes a special legal regime. The Commercial Court number 3 of Barcelona requested a preliminary ruling regarding the services of Uber. In Judgment 20.12.2017 (C-434/15), the European Court of Justice (ECJ) gave a general answer but qualified the decision in the particular case. It maintained that, as a rule, an intermediation activity that merely connects non-professional drivers with persons who want to make an urban journey is a separate service from transport. However, this was not the case with Uber, because the collaborative platform had created the market and controlled the carriage services provided by the drivers.

Because of this decision, or despite it, Spanish courts have rejected the argument that collaborative platforms have committed an act of unfair competition because they did not have an administrative authorisation to provide carriage service. Regarding Blablacar, an originally French app for carpooling, the Commercial Court 2 of Madrid (Judgment 30/2017, 2 February, confirmed by the Appeal Court of Madrid in the Judgment 86/2019, 18 February) based its decision on two arguments. The first is that the owners of the app did not provide carriage service. They were just intermediaries, so they performed information society services. The second reason was the qualification of the carriage: according to the law, it was not a "public" service but a "private" one (cf. article 62 of the Spanish Act 16/987, 30 July, on Planning of Land Transport). The activity was not performed by professional drivers, but by private individuals who accepted people willing to share car and travel expenses. Thus, according to transport regulations, no authorisation was needed.

The solution was similar in the case of Cabify, a Spanish app that provides vehicles for hire with a driver service. In a judgment given before the decision of the ECJ on Uber, the Commercial Court 12 of Madrid maintained that the owner of the app was just an intermediary: Maxi Mobility Spain SA was not the provider of the carriage services performed through the app (Judgment 159/217, 13 June). Besides, it had not been proven that the drivers or the collaborative platform had breached the law and acquired a significant advantage. At the appeal stage, the provincial court of Madrid upheld the decision but changed the grounds (Judgment 14/2019, 18 January). First, the facts of the Uber and Cabify cases were different. Second, Maxi Mobility Spain SA received authorisations to provide services when the Spanish 2009 Omnibus Act deregulated carriage.

The solution of the Uber case was restricted by the ECJ's answer to the preliminary ruling. Nonetheless, the Commercial Court 3 dismissed the claim. First, it expressed its doubts regarding the necessity of authorisation. The reason was that, due to several legislative changes, it was not clear whether or not carriage intermediaries needed a licence to provide their services. However, the main reason was that the defendant was not the owner of the app. The plaintiff sued Uber Systems

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Spain SL, which is a subsidiary of Uber Technologies Inc. The former did not create the market or control the drivers, it did not own the vehicles, it did not hire the drivers and it did not fix their prices or the conditions of the service. Hence, the judge dismissed the claim.

The same reasons led to the dismissal of Uber Systems Spain SL having committed an act of deception. The taxi drivers' association that brought the claim maintained that it had misled consumers by advertising its activity as lawful. The Commercial Court repeated that the defendant did not own the app, did not hire the drivers and was not responsible for the advertisements.

The unfair competition act of breaching the law also raises other questions regarding the app Cabify. An organisation of taxi drivers complained that its owner had committed two breaches. The first referred to hiring services. According to the law, vehicle rental with driver services can only be hired online; they cannot be contracted while the cars are on the road or at taxi ranks. The second breach was that Cabify's drivers have not documented the trips as prescribed by legal rules. The Commercial Court 12 of Madrid dismissed the claim. First, the prohibition and the obligation did not fall on the collaborative platform, which was just an intermediary, but on the drivers. Second, the plaintiff did not prove the infringements or the advantage. Lastly, the failure to provide documentation was not relevant enough for the Unfair Competition Law.

Regarding prices below costs, a taxi union argued that Mytaxi Iberia SL, the Spanish subsidiary of a German company that owns an app that links taxi drivers and customers, committed an act of unfair competition as it announced discounts to people who hired taxi services through its app. According to the plaintiff, this was illegal because local authorities fixed compulsory taxi fares. Again, the Commercial Court 3 Barcelona dismissed the claim. Mytaxi Iberia was not subject to taxi fare regulation, as it did not provide taxi services. It was just an intermediary.

Last, the argument of not fulfilling the *bona fide* requirements fared no better. Spanish case law considers it as an *ultima ratio*. Although it is a true legal norm, with binding force, it can only be applied when the facts do not fit any of the other unfair competition prohibitions (for instance, Judgments of the Spanish Supreme Court 570/2014, 29 October; 468/2013, 15 July; 395/2013, 19 June; 75/2012, 29 February and 48/2012, 21 February). This was not the case, as other prohibitions had been invoked and dismissed.

4.2. CRITICAL ASSESSMENT

When assessing this strategy, the motives of incumbent operators are obvious. It allows them to achieve their goal: to expel competitors from the market. Some of the remedies established by the UCA are the cessation of the illegal conduct and prohibition of its future reiteration (article 32). Besides, it also means asking for the removal of harmful effects and, of course, compensation for damages. In addition, it is possible that the decision will become law and receive a larger application – not just between the parties to the lawsuit. This is what is happening in California with the presumption that persons who provide services in return for payment are workers and not self-employed people (*AB-5 Worker status: employees and independent contractors*). Section 1 explains that the aim is to modify the legal definition of "worker" to incorporate the doctrine of the case *Dynamex Operations West, Inc. V. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 (Zaller 2019; De Silva et al. 2019 and Lake 2019). Besides, the judiciary expenses are *prima facie* reasonable and lawsuits are quite fast. Court fees are not disproportionate and the same is the case with lawyers' remuneration, due to the competition that exists in Spain. Regarding the time, it takes less than five years to have a final judgment. According to statistics, lawsuits last between one and two years (18.7 months in 2018 and 21.5 in 2017) at first instance. The appeal to the regional Appeal Court is resolved in less than one year (around 8 months). The appeal before the Supreme Court needs more time: two and a half years (33 months in 2018, 27.7 in 2017) (Source: Spanish General Council of the Judiciary).

Nonetheless, judicial confrontation has considerable risks and disadvantages. The first is losing: as we have seen, all the actions brought against collaborative platforms regarding unfair competition have been dismissed (something similar happens in the United States, according to Cohen 2017, 177 ff.). Although the battle has not finished, judicial decisions in the first instance, and one on appeal have been favourable to the defendants. Secondly, time and cost. Although they are not disproportionate in Spain, the situation worsens when doubts arise about the compatibility of the national law with the EU legal system. A reference for a preliminary ruling to the European Court of Justice increases the time needed to reach a definitive solution. And since time is money, total costs can be high. These inconveniences do not only harm the lawsuit's parties, but they can be detrimental to the legal system too. They contribute to judicial collapse and force economic resources to be allocated to judicial administration instead of elsewhere.

Another drawback is the lack of certainty. It is an inherent feature of judicial proceedings, because the outcome does not just depend on a party being right, but also on the lawyer's expertise, on the evidence that can be provided and on the judges' receptiveness. The features of the judicial system play a role too. The rule of precedent does not bind Spanish judges, as members of a civil law country. Hence, it is not extraordinary

that the three instances do not decide in the same vein; i.e., the Appeal Court can overturn the first instance verdict and the Supreme Court can uphold or revoke it. The fact that a higher court opts for one solution does not provide enough of a guarantee that lower courts will follow it; they may hold the opposite view. Besides, it is normal for Appeal Courts to disagree on an issue and the Supreme Court decides which view is right. But a Supreme Court ruling does not provide an absolute guarantee, unless it has given a judgment to establish case law doctrine.

Uncertainty increases when cases concern new technologies. The reason for this is that the doubts of lawyers and judges grow. On the one hand, they may have little knowledge about the new technologies. On the other, the interpretation and implementation of the law become more problematic. The Spanish case law on collaborative transport proves this. The doubts of the judge of the Commercial Court 3 of Barcelona on the qualification of Uber's services led him to submit a preliminary ruling to the ECJ. Although the ECJ maintained that the collaborative platform provided transport services instead of information society services, the Spanish judge dismissed the claim. The reason was that the defending party was not the owner of the app. Thus, it had not committed an unfair competition act. In other words, the plaintiffs should have sued the parent company and not the Spanish subsidiary. However, it is not easy to know whom to sue, due to the extreme complexity of the corporate structure of collaborative platforms (Noto La Diega 2016, p. 399 ff.). There have also been cases in which judges censure the parties for their "ignorance" of the market's reality. For instance, the Spanish *Audiencia Nacional* [Spanish High Court] has not admitted a criminal lawsuit against providers of vehicle rental with driver services (Cabify, Uber, etc.). It maintained that the plaintiff's allegations were based on a false premise: the Spanish market of urban passenger transport services is not free; quite the opposite, it is a highly regulated market, especially regarding taxi services (Order 3.10.2019 (Roj: AAN 1860/2019 – ECLI: ES:AN:2019:1860A)). Besides, the plaintiffs had not provided any sound evidence of deception and, regarding taxes, the *Audiencia Nacional* stressed that collaborative platforms are normally intermediaries and do not provide services to end customers. Thus, they do not have to pay taxes related to them. In the criminal case we have mentioned, the *Audiencia Nacional* stated that the principle of the free market could not be applied to the conflict between taxi drivers and collaborative platforms as the urban passenger market is intensively regulated.

Regarding the difficulty of cases related to collaborative platforms, it is worth highlighting that their heterogeneity is a handicap, because the judicial solution for one of them may not be valid for the others (Rodríguez 2018, p. 62 ff.). For instance, the owners of Blablacar do not control the providers of carriage services; they simply put passengers and non-professional drivers in contact. In contrast, according to the Advocate General Szpunar, Uber created a new market and controlled it. The solution of this case cannot be applied to the claim against the owners of Cabify, as they have administrative authorisations to perform carriage services. Similarly, the appeal to comparative law is of little help because of the differences between national legal systems. Nonetheless, the fact that another State has banned a service can be an interesting argument to convince a judge.

Last, but not least, a legal victory does not necessarily mean complete success. Apart from cases where the defendant is insolvent, it is possible that it will change strategy and, hence, the judgment becomes ineffective. This could have been the case of Uber, if the association of taxi drivers had won the case. As the Commercial Court 2 of Madrid provisionally banned UberPop's activity, Uber Technologies Inc. looked for an alternative way to carry out business in Spain and began offering car rental services with a driver. The firm and its drivers got the necessary administrative authorisation and continued with the transport activity competing with taxi drivers. The change of business tactic forced taxi drivers to modify their strategy or to implement another one. They began to pressurise public authorities to tighten the legal regime of the car rental with driver service, as we will see in the next section. However, they continue fighting in the courts, claiming that collaborative platforms breached, and continue to breach, the law. According to the press, in 2019 taxi drivers' organisations sued Uber and Cabify for not fulfilling the regulation on car rental services with driver (see Efe 2019 and Garrido 2019).

5. LEGISLATOR CAPTURE

5.1. INTRODUCTION

Traditional operators have used another controversial weapon against collaborative platforms: the capture of the legislator. They have undertaken several measures to have laws passed that prevent or hinder new operators from performing their activity (Miller 2016, p. 184 ff.). This strategy has succeeded in Spain: the mobilisation of traditional operators led to the approval of different legal rules that have affected collaborative platforms. Some of them have left the market (Uber) and others are facing serious difficulties to continue developing their economic activity (Cabify). However, there are newcomers who, despite complications, remain fruitfully in the market (Airbnb).

Nonetheless, the success of this strategy could be considered temporary, as some of the laws that have been passed are being appealed in the courts. The reason for challenging them is that

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they restrict two fundamental rights: the freedom to conduct a business and the freedom to provide services. Article 38 of the Spanish Constitution recognises entrepreneurial freedom. Although it is not an absolute right, laws and acts that restrict it should be justified in the defence of interests that deserve protection. Besides, they should be proportional, in the sense that they do not introduce restrictions that go beyond what is necessary, and non-discriminatory. The freedom of services is a core principle of the EU Law and, thus, of the Spanish legal system. It has been developed by the EU Services Directive and, regarding the services of the information society by the EU E-commerce Directive. Generally, they prohibit prior authorisation requirements. Exceptionally, they can be accepted, but they must be based on overriding reasons of general interest and be necessary, proportional and non-discriminatory (Hatzopoulos et al. 2017, pp. 17-37). Thus, the laws that collide against these two principles can be valid and effective, but they must respect the principle of efficient economic regulation, in the sense that they do not introduce restrictions that are unnecessary, excessive or distorting. Besides, those who challenge the validity of the laws that restrict the collaborative economy rely on the Spanish Act 20/2013, on Guarantee of Market Unit. Inspired by the EU Services Directive, it aims to create an environment that promotes competition and investment that allows companies to grow, increase their competitiveness and create more employment. Thus, it forces all public administrations to respect its principles. Article 5 establishes that, when public authorities restrict access or the exercise of economic authority, they shall base its necessity on overriding reasons of public interest, that are listed in article 3.11 of the Act 17/2009, 23 November, on the free access to the services activities and their practice. In addition, it must be proportional to that reason and there should be no less restrictive means of achieving the same effect.

5.2. THE URBAN PASSENGERS TRANSPORT MARKET

We will use two real examples to explain the capture of the legislator in Spain. The first is the urban passenger transport and shows the defeat of Uber (Górriz 2019; regarding other States, see Edelman et al. 2016, pp. 12-36; Lobel 2016, pp. 23-55 and Wyman 2018, p. 129 ff.). The starting point was 2014 when the Commercial Court 2 of Madrid provisionally forbade the app UberPop, through which the services of the collaborative platform had been provided. Uber looked for an alternative and found the solution in vehicle rental with driver services: obtaining authorisations meant it could legally continue its activity in Spain, competing with taxi drivers. Moreover, there were two important advantages. The first one was the price: vehicle rental with driver services was not subject to taxi fare regulation, rather the provider could establish the remuneration it desired - as long as the passenger accepted it. The second advantage was the ease of obtaining authorisations. The so-called Omnibus Act of 2009 had liberalised the land transport market (Act 25/2009, 22 December, on the Modification of various Laws for their Adaptation to the Law on free Access to Service Activities and their Exercise). It transposed the EU services directive into national law, but it broadened its scope to issues that were beyond the European rule; for instance, carriage.

With the change of government, the approach to the land transport market transformed. The Spanish Act 9/2013 began to harden the regime of vehicle rental with driver services (Act 9/2013, 4 July, modifying Act 16/1987, 30 July on Land Transport Planning and Act 21/2003, 7 July, on Air Safety). It required an administrative permit, but it did not fix requirements: these were left to regulatory development. This occurred with Royal Decree 1057/2015, 20 November which modified the Regulation on Transport Planning. On the one hand, it established very stern requirements to obtain authorisation. For example, the proportionality rule: there can only be one vehicle rental licence for every 30 taxi licences. On the other hand, it reintroduced operating restrictions. The most significant was (and still is) that vehicle rental with driver services cannot be hired on the street or at a taxi rank. This proves the will to protect taxi services from external competition: hiring them by phone or through digital devices was not the norm.

It is essential to highlight that from 2009 to the end of 2015 there was an avalanche of requests for vehicle rental with driver authorisations. As public administrations refused to give them, petitioners appealed to the courts. Since 2017, the Spanish Supreme Court has upheld their requests and ordered public administrations to grant them all. The consequence is that it is impossible to fulfil the proportionality rule: because of the 2009 liberalisation, the proportion between vehicle rental with driver and taxi licences is not 1/30 but nearly 1/4 (Delle Femmine and Grasso 2019 and "Cabify and National Express emergen como grandes tenedoras de licencias VTC" *Cinco Días*, 11 November 2019). However, it is important to stress that this situation is not the result of the administrations' will, but the consequence of the liberalisation that took place 10 years ago.

The change in Uber's competitive strategy forced taxi drivers to modify their plan: although they did not completely abandon the judicial route, they started to pressurise public authorities. Taxi drivers revolted against the owners of vehicle rental with driver licences. They gradually increased their protest actions; for instance, they blocked the streets of big cities for several days or weeks. On the one hand, they were demanding the enforcement of the existing laws; especially of the proportionality rule. On the other, they were asking for regulation of vehicle rental with driver to be tightened.

Public authorities responded to the protests by approving new rules that strengthened the legal regime of vehicle rental with driver. From 2017 to 2019, they passed one Royal Decree and five Decree-Laws, a type of legal rule designed for situations of extraordinary and urgent need. The Spanish Government approved the Royal Decree 1076/2017, 29 December and the Royal Decree-Laws 3/2018, 20 April and 13/2018, 28 September. The Catalan Government approved the Decree-Laws 5/1017, 1 August and 4/2019, 29 January (Górriz 2019). Essentially, they increased the requirements necessary to obtain an administrative permit and augmented the duties, burdens and restrictions of the services. For instance, Royal Decree-Law 13/2018 establishes that the existing vehicle rental with driver licences can be used to provide an interurban service only. In other words, they do not enable urban carriage, which represents the overwhelming majority of services that were being provided under those authorisations. Aware of the harm that it was causing, it provided for a four-year extension during which the licence holders could continue with their activity, as compensation. After this period, persons who wanted to provide urban vehicle rental with driver services should obtain authorisation from regional or municipal administrations. Besides, it enables Autonomous Communities to modify the law. Although the Act and the Regulation on Land Transport Planning still govern the authorisations to provide vehicle rental with driver services, Autonomous Communities can modify them in relation exclusively to the legal regime of these services.

Thanks to this legislative authorisation, the Catalan Government approved the Decree-Law 4/2019, the measures of which achieved the objective of driving Uber out of Barcelona. Its article 4.2(2) imposes a minimum period of 15 minutes between hiring and providing the service. Besides, it allows municipal administrations to extend this period. In addition, it prohibits geolocation before hiring the service and the parking of vehicles on the streets. Thanks to this empowerment, the Barcelona City Council has extended the pre-contracting period to 60 minutes. But Catalonia's High Court (*Tribunal Superior de Justícia de Catalunya*) has provisionally suspended the effectiveness of the municipal rule (see Comisión Nacional de los Mercados y la Competencia. 2019).

The competition authorities have harshly and repeatedly criticised these laws (for instance, Comisión Nacional de los Mercados y la Competencia. 2016a and Autoritat Catalana de la Competència. 2018). Essentially, these authorities assert that their legal basis is weak and that they introduce restrictions to competition, in favour of taxi drivers, that are detrimental to the economy. Furthermore, these authorities have challenged the validity of the laws in the courts. Nonetheless, their claims have been dismissed until now. The key decision is Judgment 921/2018, 4 June, in which the Spanish Supreme Court examined the validity of Royal Decree 1057/2015 (see also Judgment of the Spanish Supreme Court 14.2.2012 (Roj: STS 1076/2012 – ECLI:ES:TS:2012:1076) on the validity of Royal Decree 919/2010 that also governed vehicle rental with driver services). The point of departure is the assessment of the validity of its legal basis. According to the preamble of the Royal Decree 1057/2015, it is to guarantee a balance in the offer of urban passenger transport provided by cars. The court maintained this was correct. First, the taxi is a service of public interest. It is highly regulated as public powers want to achieve suitable levels of quality, security and accessibility. Second, the rules that are approved to achieve this goal are lawful because they pursue a justifiable aim for public powers. Third, since vehicle rental with driver and taxi services compete, when regulating them the legislator is looking for a balance between the two. The Spanish Supreme Court then analysed the requirements and restrictions challenged by the CNMC one by one. It maintained that they were all legal (the proportionality rule, the requirements of the vehicles, the prohibition of hiring services on the street or at taxi ranks, the obligation to provide at least 80% of the services in the community where the license is domiciled), except one (the requirement of a minimum fleet). Although the arguments of the court are open to criticism (Górriz 2018), the judgment is unappealable.

5.3. THE TOURIST RENTAL MARKET

The services of non-hotel tourist accommodations provide another example of the legislator's capture. They are important for the Spanish economy as they relate to two key issues: the right to housing and tourism (Doménech 2017, p. 45). The irruption of collaborative platforms in this market has affected traditional operators as well as neighbours. These groups can exercise more pressure on public administrations and regional/local legislators than collaborative platforms and tourists. They have indeed made use of their influence to have some legal rules approved that apply to the services provided by or through collaborative platforms; legal rules that do not benefit newcomers (Doménech 2017, p. 52). Nonetheless, before explaining their content it is essential to remember that, according to the Spanish Constitution, both the State and the Autonomous Communities could legislate on vacation rental. Initially, the rental of tourist homes was ruled by the Spanish Act 29/1994, 24 November, on Urban Rents. But in 2013 the Spanish Parliament modified the law to exclude from it the rental of touristic houses. The preamble of the Act 4/2013, 4 June, on flexibility measures and promotion of the housing rental market explained that the use of private housing for tourism was increasing and threatening traditional forms of

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this activity. As it could be considered unfair competition and a kind of illegal intrusion, it was worth subjecting it to suitable special rules; i.e. the ones passed by regional parliament (see De La Encarnación 2016, pp. 7-26). However, at the beginning of 2019 the Spanish Government approved a rule that restricts tourist rental services. It allows the neighbours to prevent a flat from being rented and to increase its contribution to community expenses. It is the Royal Decree-Law 7/2019, 1 March, establishing urgent measures regarding housing and rent. It is worth mentioning that an appeal of unconstitutionality has been filed against it.

Most of the Autonomous Communities began to rule on the subject. They greatly increased the legislative activity when the arrival of the collaborative economy in the tourism sector began to be a threat to hotels and other traditional operators (a list of the different laws is available at https://www.iberley.es/revista/arrendamiento-turistico-vivienda-modificaciones-ley-arrendamientos-urbanos-205). Although there are differences, their laws follow the same direction: they all introduce restrictions on the rental of tourist houses. In contrast to what happens in other countries, some of which promote these new types of house rental, Autonomous Communities have hardened the conditions to offer tourist rental (Lora-Tamayo 2017, p. 286). Due to space limitations, I cannot explain the restrictions that each law establishes. I think that it is sufficient to describe the most popular (see the report of the Spanish National Commission of the Markets and the Competition: *E/CNMC/003/18 Estudio sobre la regulación de las viviendas de uso turístico en España*, p. 40 ff.). First, they limit the type of house that can be rented or the area where the tourist rental offer is allowed. The Decree 113/2015 of the Community of the Canary Islands is a wonderful (surreal) example, as it forbids offering tourist rental (services offered through "tourist channels", i.e. online) in tourist areas. Another example is the prohibition of renting single rooms. Second, several laws require a "responsible statement": before starting the activity, the proprietor must declare to the competent administration that their enterprise and the house meet the tourist accommodation requirements. Third, they must enrol in a special registry of the Autonomous Community. Fourth, in some Autonomous Communities the house must be identified with a plate that indicates its nature as tourist housing and the administrative authorisation. Fifth, some laws also establish a minimum or maximum number of rental days. Sixth, some Autonomous Communities have established a tourist fee that must be paid by the consumer of the tourist housing rental. Seventh, some technical requirements, minimum equipment or minimum services are imposed; for example cleaning, bed linen supply, household goods, etc. The idea is that the rented house must have a minimum quality that guarantees its habitability. Last, some laws require customer service 24 hours a day. In other words, the property owner must provide a telephone number or an email address that allows the customer to contact them at any time.

The validity of these laws has been challenged. Associations of tourist property owners, as well as the Spanish competition authority, have sued autonomous administrations complaining that some of the rules are illegal. They establish some restrictions that do not respond to reasons of public interest or that are not necessary, proportional or non-discriminatory. The response of the courts has been heterogeneous. It could be though that this is not exceptional, but the normal situation in Spain when different tribunals must decide on similar cases. Nonetheless, the case law of the Spanish Supreme Court is heterogeneous too (Judgments 1741/2018, 10 December; 1766/2018, 12 December; 1816/2018, 19 December; 2/2019, 8 January; 25/2019, 15 January; 26/2109, 15 January and 1237/2019, 29 September). It has maintained that some restrictions are illegal and others lawful. The reason for this is that each requirement, duty and burden must be analysed separately and assessed whether it is restrictive and, if so, whether it meets the lawfulness requirements.

Thus, the Spanish Supreme Court has rendered void the prohibition of renting tourist houses through tourist channels in tourist zones. The reason is that "(t)he only explanation plausible to this shortcut is that its aim is favouring the offer of tourist accommodation products traditionally implanted mostly in these tourist areas, thereby violating free competition in the provision of services" (Judgment 1766/2018, 12 December). The same happens with the prohibition to rent single rooms (Judgments 25/2019, 15 January and 26/2109, 15 January). Third, the obligation of the proprietor to register in the Tourist Enterprises Registry does not pass the necessity and proportionality tests (Judgment 1741/2018, 10 December). The last issue will have important effects as some autonomous administrations were fining collaborative platforms for not being enrolled in the official register.

In contrast, the requirement of having a map of the house, signed by a competent technician, available to the interested parties is legal. However, it does not need to be endorsed by the corresponding professional associations. This obligation, which some laws established, is illegal because that kind of endorsement cannot be the general rule but the exception. In this case, it is neither necessary nor proportional. The establishment of a minimum or maximum duration of the rent is legal, according to the Spanish Supreme Court, when it is used to determine the applicable law (Judgement 1237/2019, 29 September). Nonetheless, we think that the solution would be different if the rental contract were forbidden because of its

excessive or insufficient duration. Last, the Spanish Supreme Court maintained as lawful the obligations to identify the house with a plate, to have minimum equipment and to have a 24-hour customer service (Judgement 1237/2019, 29 September). The reason for the first condition is that it gives consumers the confidence that the house fulfils the legal requirements. The other two guarantee the quality of the product.

5.4. CRITICAL ASSESSMENT

The previous considerations show that the capture of the legislator has been the most effective strategy to fight against collaborative platforms in Spain. It has been more successful than judicial proceedings. Regarding the urban passenger transport services, pressure from taxi drivers led to the approval of several rules that caused Uber to leave. It has left the Spanish cities in which it operated because the legal conditions were too harsh. However, the pressure has not been as successful in the field of tourist rental. The laws approved by the Autonomous Communities have hardened the requirements to access the market and have increased the restrictions to provide services. Hence, individuals have more difficulty offering their homes through collaborative platforms and complying with the law. Notwithstanding, collaborative platforms continue to operate in the Spanish market, and they represent an important source of competition to traditional operators.

When evaluating this strategy, several circumstances must be taken into account. Firstly, its success depends on the political conjuncture. The capture is easier the weaker and closer the legislator is. The fight between taxi drivers and Uber took place at a time when no government had an absolute majority and, thus, the parliaments were quite fragile. Furthermore, the Spanish governments of recent times have been involved in cases of corruption or internal conflicts that have made them very vulnerable to pressure. Hence, when possible, they have transferred legislative power to the Autonomous Communities. Something similar happened at the regional level. For instance, the Catalan Government approved the rules on vehicle rental with driver during the political process of independence from Spain and allowed (forced) the City Council of Barcelona to harden the rules it has approved. Spanish taxi drivers will not have it as easy if the European Commission decides to legislate on the collaborative economy, although they will have the support of their colleagues from other member states. Moreover, it is a very real threat: Spanish laws could be ineffective or repealed if the EU decides to regulate this subject (this is what happened with the decision of the Boise to ban Uber. The Idaho legislator passed a statute in which the State assumed competences on transportation network companies. See Miller 2016, p. 156 f.).

Second, parliaments and governments do not have absolute power to pass the laws they desire. There are some principles and legal rules they must respect; for instance, the EU Law or the freedoms of enterprise and services. As we have seen, the laws that collide with them can be (partially) overruled. And this fact leads us to another topic: the costs of the pressure. Effectively, the capture of the legislator entails significant costs. It is not easy to exert sufficient pressure on a national parliament or government to cause it to approve a law that only benefits certain operators. In the case of Uber, taxi drivers needed to demonstrate and close the streets of the main cities for several days (weeks in Madrid). It could be though that the difficulty increases when the (central) State delegates the responsibilities to regional bodies because it is not enough to capture just one legislator but several. Hence, costs and exhaustion increase. Nonetheless, the closer the powers are, the more sensitive they are to the complaints and protests of the citizens and economic operators. Hence, pressure has a greater effect on regional authorities than on State ones. And the same happens with municipal authorities. Besides, it is important to take into consideration that challenging the laws passed in the courts could be detrimental for incumbent operators. Although the latter do not support the costs of the judicial processes, it can make parliaments, governments and public administrations less responsive to their claims. In addition, it can produce disappointment if, finally, the pressure is unsuccessful.

Third, the capture of the legislator is detrimental to the legislative process. It increases legislative pollution. It leads to the approval of legal rules that are not strictly necessary and that complicate the work of the jurist. It is especially dangerous for a country, such as Spain, in which public powers try to solve social conflicts by passing laws that may not be enforced. Besides, laws that are the result of pressure are often defective. They are passed hastily, without the help of experts, without consulting all interested parties and without the required reflection. Hence, there is a great risk that they will be challenged in court and that the judges will repeal them, with the consequent legal security problems. It is worth mentioning that some of the laws we have seen are Royal Decree-Laws. According to article 86 of the Spanish Constitution, they can only be passed in the event of extraordinary and urgent need (such as natural disasters). I do not think that the conflicts between incumbents and collaborative platforms meet these requirements.

Lastly, this kind of law can harm the national economy (García 2018). They hamper the activity of newcomers, who are usually more innovative and efficient, to maintain the *status quo* of traditional industry players (Lobel 2016, pp. 24-55). Thus, they reduce the existing competition and hinder innovation.

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The result is not only that collaborative platforms lose, but also consumers and the national economy, in general, are damaged.

6. CONCLUSIONS

Established market operators use imitation and confrontation, both judicial and legal strategies, to fight against newcomers. The analysis of the confrontation between Spanish taxi drivers and Uber proves that capture of the legislator seems to be the most effective strategy. Due to the social pressure of the former, legislative powers have increased the duties, obligations and charges of the providers of collaborative carriage services so much that Uber ended up leaving the market. Nonetheless, the success is not complete: Cabify has stayed in the market because its lawyers maintain there is a legal gap. And something similar occurs in the market of tourist accommodations services. On the other hand, the success could be temporary: Spanish competition authorities have announced that they are judicially challenging these laws. Thus, the Spanish Supreme Court may hold them void. Nonetheless, this is not likely if we take into consideration its past judgment 921/2018, 4 June.

The analysis of the Spanish legislative battle highlights another important lesson: the regulatory capture works when public powers are fragile. The closer and weaker they are, the greater the chances of success of social pressure. It does not seem likely that the European authorities will be as receptive to the demands and complaints of the taxi drivers of Madrid and Barcelona. It is important to remember that the European Commission has taken the side of the collaborative economy. The reason for this is that it can be a source of growth, enrichment and employment: "some experts estimate that the collaborative economy could add EUR 160-572 billion to the EU economy. Therefore, there is a high potential for new businesses to capture these fast growing markets" (European Commission 2016b, p. 2. The Commission report is based on Goudin 2016).

In my opinion, regulatory capture is highly negative. First, it means the triumph of the interests of incumbent operators that do not necessarily represent the interests of consumers and the general economy. Usually, the opposite applies: their victory is detrimental to the national economy. Second, it produces defective legislation that can be a source of litigation. Last, it increases legislative pollution, which is very worrying in a country that passes laws to solve social problems but does not care about their enforcement.

Litigation has not been an effective strategy. As we have seen, Spanish traditional operators have lost the unfair competitions lawsuits against collaborative carriage platforms. They can indeed appeal to higher courts; nonetheless, there is no guarantee of winning. In addition, winning does not necessarily mean ultimate success. If the platforms change strategy or they lobby public authorities to obtain protective laws, victory can be Pyrrhic.

Litigation is full of uncertainties, which increase when the case deals with technological issues. The outcome depends on many factors (e.g. the legal abilities of the lawyers or the knowledge of the jurists). Besides, there are negative external factors. On the one hand, time and costs for the parties. On the other hand, work overload for judges and the necessity to devote resources to the judicial administration, which could have been devoted to other purposes.

Last, imitation and collaboration are the most desirable strategies. They essentially improve competition and boost innovation. They allow incumbents to continue in the market, competing with newcomers. They enhance their services, by adapting them to the needs and desires of the consumers. They force newcomers – and traditional operators – to keep on innovating to succeed and not succumb to competitors.

Nonetheless, there are economic, legal and social obstacles that make imitation difficult. Traditional actors may need financing to develop computer applications that improve their service. Highly regulated markets limit the answer of established operators. They cannot undertake the strategies they want; for instance, lower prices. Besides, they must want to compete. However, it is not easy to acquire this will, when they have not traditionally needed to face competitors because regulation protects them. Something similar happens with collaboration: it is not possible if incumbents are not ready to compete.

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