



UNIVERSITEIT VAN PRETORIA  
UNIVERSITY OF PRETORIA  
YUNIBESITHI YA PRETORIA

**DISRUPTIVE INNOVATIONS AND THEIR EFFECT ON  
COMPETITION LAW**

by

**KEAGILE MATHOBELA**

**12043827**

Submitted in partial fulfilment of the requirements for the degree of:

**MASTER OF LAWS**

in the

Department of Mercantile Law

Faculty of Law

**University of Pretoria**

Prepared under the supervision of

**Professor Corlia Van Heerden**

December 2019

## Acknowledgements

I want to give all the praise, glory and honour to the Almighty God for giving me the strength and perseverance to complete this mini dissertation and to comply with the requirements of the LLM programme. I have truly understood and felt the true meaning of the scripture in 2<sup>nd</sup> Corinthians chapter 12 verse 9 which states: “*My grace is all you need, for my power is greatest when you are weak.*” His grace has carried me through.

I want to express my deepest sense of appreciation to my parents for being the pillars of my strength, my motivation and for their steadfast emotional support and continued financial support during the completion of this LLM degree. A very special thanks goes to my mother for being my personal prayer warrior and fighting the spiritual battle, and to father for his encouragement and always taking an interest in my ideas.

To Siphesihle Makhaphela for inspiring me to finally continue and complete this mini-dissertation, her overwhelming support and unwavering love.

I would like to express my deepest gratitude to my supervisor, Professor Corlia van Heerden for her fruitful insight, patience and guidance throughout this long process.

Finally, this mini-dissertation is dedicated to all Uber drivers who have been victims of violence or have died while trying to put food on the table for their families.

*“A luta continua, vitória é certa”.*



## Declaration of originality

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## Summary

The metered taxi industry has over the years been regulated and controlled by various transport legislation and transport authorities, however because of the nature of the Uber business model, competition laws have been unable to regulate fair competition between Uber, taxi app's such as Uber (like Taxify) and the traditional metered taxi industry.

My dissertation focuses on Uber as a disruptive innovation in the public passenger transport industry. This dissertation explores the Uber business model of the online app and explains whether, if at all, Uber does qualify as a disruptive innovation and if so, to what extent does it pose a threat to its competitors in respect of competition issues such as price fixing, predatory pricing, vertical and horizontal agreements and abuse of dominance. In my dissertation I note the importance that regulators and the competition authorities play in venturing out of their comfort zones and re-examine their assumptions underpinning existing competition regulations in respect of new entrants in the market.

I explore whether Uber has in fact operated outside of the competition regulations and whether its existence should be regulated. Moreover, this dissertation explores whether Uber as a disruptive innovation is potentially limiting on competing brands, such as the metered taxi industry and whether the existence of Uber and operation outside of normal competition legislation may cause the foreclosure and exclusion of competitors and therefore substantially limiting or lessening competition in the public passenger transport market.

Lastly I make comparisons of how other jurisdictions have regulated any of Uber's potential competition law infringements. My focus is based on the European Union and the United States of America jurisdictions.

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## Chapter I – Introduction

### 1.1 Background to Study

The Preamble of the South African Competition Act 89 of 1989 (“Competition Act”) recognises that apartheid and other discriminatory laws of the past resulted in excessive concentrations of ownership, control and power in the economy. These laws had the effect of inadequate restraints against anti-competitive trade practices and unjust restrictions on full participation in the economy. The Competition Act, among other things, seeks to bridge the gap that exists in the economy, by promoting a greater spread of ownership stakes for historically disadvantaged persons,<sup>1</sup> providing consumers with competitive prices and product choices<sup>2</sup> and to provide opportunities for South African participation in the national economy.<sup>3</sup> The Competition Act exists to aid the competition authorities in regulating and ensuring that fair competition is present in the South African market. In light of the preamble and section 2 of the Competition Act, the problems to be dealt with in this dissertation address the issue of disruptive innovations entering different markets.

New entrants in the market are necessary to advance competition, enhance economic activity and ensure that consumers have a variety of options to choose from between different types of products in the market. Over the years technology has improved at an exponential level and this has resulted in various innovations and numerous entrants in the markets. With the help of the rapidly growing technology and the internet, companies have been inventing different gadgets and smart phone apps to function together with the gadgets. The creation of these innovations have proven to be legally challenging for different jurisdictions, therefore leaving these different innovations unregulated and accepting them to roam freely in the market, potentially prejudicing incumbent firms.

Disruptive innovations occur when an innovative, new product is introduced in the market and this product increasingly wins over consumers and ultimately takes over the established market and as a consequence displaces the existing value network.<sup>4</sup> When entering the market these innovations are so advanced to the extent that competition laws are not equipped to regulate such disruptions in the market.<sup>5</sup> Disruptive innovations are potentially limiting on competing brands,<sup>6</sup> as they may have the effect of foreclosure and exclusion of competitors and therefore substantially limiting or lessening competition in the market. The arrival of innovative products is an indication that competition policies need to intervene and adapt, in

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<sup>1</sup> Section 2(f) of the Competition Act 89 of 1989 (“Competition Act”).

<sup>2</sup> Section 2(b) of the Competition Act.

<sup>3</sup> Preamble of the Competition Act.

<sup>4</sup> Lucas *What is disruptive innovation?* (2016) <https://www.weforum.org/agenda/2016/06/what-is-disruptive-innovation/> [accessed 18 March 2019].

<sup>5</sup> Kenza Lynch “An Assessment of the London taxi and minicab industry: the reaction of competition law to Uber” (2016) *QUB Student Law Journal*.

<sup>6</sup> For example Uber versus metered taxi’s and Netflix versus Blockbuster, it has been difficult for the incumbent firms to compete with these new entrants.

order to determine whether such entrants present a threat of substantially limiting or lessening of competition.

Examples of such innovations include Uber Technologies (Pty) Ltd (“Uber”), one of the latest entrants in the transport industry, where a consumer can hire a taxi at the click of a button. Currently Uber is unregulated by the competition authorities. The metered taxi industry has however over the years, been regulated and controlled by various transport legislation and transport authorities, but because of the nature of the Uber business model, competition laws in South Africa have to date been unable to regulate fair competition between Uber, taxi app’s<sup>7</sup> such as Uber (like Taxify) and the traditional metered taxi industry.

## 1.2 Research Question

The question that arises is whether disruptive innovations pose a threat to competition in the different markets, and specifically whether Uber is infringing on any competition rules? If not, is it possible that in future Uber may prove to be problematic for the South African competition authorities?

## 1.3 Nature and scope of dissertation

In this dissertation I will focus on various forms of disruptive innovations including Uber. I will explore the business model of the online apps and explain whether, if at all, it qualifies as a disruptive innovation. If it is a disruptive innovation I will consider to what extent it poses a threat to its competitors in respect of issues such as price fixing, predatory pricing, vertical and horizontal agreements and abuse of dominance.<sup>8</sup> It is important to note that the competition authorities need to venture out of their comfort zones and re-examine their assumptions underpinning existing competition regulations in respect of new entrants in the market.

This dissertation will also highlight the various benefits, advantages and disadvantages of disruptive innovations from a competition law perspective, the shortcomings of competition regulation in South Africa in respect of disruptive innovations and examine the position on disruptive innovations in jurisdictions such as the European Union (“EU”) and the United States of America (“USA”).

This dissertation will accordingly critically engage in this notion of disruptive innovations with a special focus on Uber, by also making reference to the contractual relationship between Uber and its drivers and whether that relationship contravenes any section of chapter two of the Competition Act. In addition to that, this dissertation will engage any other potential infringements on the Competition Act.

## 1.4 Research Questions

In this dissertation I will attempt to answer the following questions:

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<sup>7</sup> An app is a modern term for software application that is downloaded by a smart phone user.

<sup>8</sup> Chapter 2 (Prohibited Practices), specifically, sections 4, 5, 8 and 9 of the Competition Act.

- i) are disruptive innovations infringing on competition law , and if so how can competition authorities ensure that there is compliance with these laws by new entrants in the market;
- ii) is Uber, specifically engaging in anti-competitive conduct, such as predatory pricing?
- iii) what market does Uber operate in ?
- iv) is Uber abusing its dominance in the market ? and
- v) assuming that Uber is a disruptive innovation and assuming that it does in fact engage in prohibited practices, how are competition authorities in the Republic, such as the Competition Commission and the Competition Tribunal ensuring compliance in the market for providing taxi ride services.

### 1.5 Methodology

This study will comprise of doctrinal desktop based research drawing on policy documents, legislation, text books, journal and newspaper articles and case law.

### 1.6 Selection of Comparative Jurisdictions

The South African Competition Act allows consideration of foreign law in interpreting the provisions of the Act.<sup>9</sup> The EU has been globally influential in its development of competition law policies and South African competition authorities take note of developments in the EU given that it is a very active and progressive competition jurisdiction. Recently the Court of Justice of the EU has granted a preliminary ruling, ordering Uber to obtain the necessary licenses and authorisations under national law, because its services fall within the field of transportation.<sup>10</sup> The judgment by the European Court of Justice will be groundbreaking and a global leader in issues dealing specifically with Uber as a disruptive innovation and competition policies.

Although it is a difficult task to compare the USA with South Africa because of the differently structured legal systems, it would be an oversight to exclude *Meyer v Kalanick*<sup>11</sup> from this study. This case was brought on behalf of every American citizen who has ever utilised Uber's services and who had paid the fare in accordance with their business structures. This case has accordingly set precedent on disruptive innovations and anti-trust laws in the USA and could potentially, in future, be of assistance in determining related competition law issues in South Africa.

### 1.7 Chapter lay-out

The dissertation is structured in five chapters which will be divided as follows: Chapter One introduces the topic of the study and sets out the research statement, the nature and scope of the study, the research questions, methodology and selection of comparative jurisdictions as well as the chapter-lay-out.

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<sup>9</sup> Section 1(3) of the Competition Act.

<sup>10</sup> *Xabier Ormaetxea Garai and Bernado Lorenzo Almedos v Administracion del Estado* (Case C-24/15).

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

In Chapter Two I will provide a background on Uber's business model and how it is structured, by making reference to the contractual relationship between Uber and its drivers, and the relationship between the drivers and the consumers. In Chapter Three, I will answer the questions indicated in paragraph 1.4 above by discussing vertical and horizontal restrictive practices, predatory pricing and abuse of dominance and in addition to this, in this chapter I will assess the implication of contravention of the prohibited conduct by Uber as a disruptive innovation, and will also focus on the impact that non-regulation has in respect of competition law and discuss whether there is any merit to claims of Uber being anti-competitive.

Chapter Four will be a comparative chapter and an overview of relevant competition legislation in the EU and the USA, by providing examples of how disruptive innovations are controlled and critically analysing case law and relevant international literature. Chapter Five will be the concluding chapter, wherein I will provide my conclusions and recommendations for reform.

## Chapter II – The legal framework of the South African land public transport industry

### 1.8 The social considerations and historical background of the public transportation industry

The commuter transport industry forms an integral part of the existence, survival and growth of the South African economy as it transports people from point A to point B. South Africa, however, has a distinct background considering the apartheid history of the country. In this context the apartheid system left a legacy of social exclusion and a highly distorted segregation of people from their places of work and the majority of social services required to live a productive life. Thus, the post-apartheid challenges have been to restructure these features of exclusion and inequality and provide a more effective system of public transportation, particularly for those who have been previously disadvantaged and to further create an economy where previously disadvantaged people can become stakeholders of various public transportation systems.<sup>12</sup>

Under apartheid and white minority rule the passenger transport system was a crucial site of contestation and protest. The South African passenger transportation system was by and large designed for daily transportation of labourers to and from the workplace. This often involved transporting Africans from the fringes of urban centres into the cities. The situation has not changed much in post-apartheid South Africa.<sup>13</sup>

It is important to understand the geography of South Africa and as Donaldson explains, a report by the World Bank<sup>14</sup> in the early 1990's considered South African cities as one of the most inefficient in the world. The cities were characterised by the low-density sprawl, fragmentation and separation, all these contributing to the dysfunctional structure where privilege was determined on a racial scale. Black South Africans were systematically marginalised in terms of, among other things, transport and employment.<sup>15</sup>

The provision of a safe, accessible, and affordable public transport infrastructure is therefore a fundamental prerequisite for the socio-economic advancement of the South African population. It also holds the potential to provide for decent wages and working conditions for the public transport sectors employees, as well as for those sectors that depend upon it for demand for their output. In general, there has been a poor post-apartheid government response to escalating the mobility needs of low income travelers, who, in essence constitute the majority of South Africa's population.<sup>16</sup>

An elite class of people are living in advanced areas of South African cities, with access to roads, using cars, meter taxis, Gautrain and Uber and Taxify (Bolt) or any other e-hailing

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<sup>12</sup> D Thomas "Public transportation in South Africa: challenges and opportunities" *World Journal of Social Science Research* (2016) 3 (3) 353.

<sup>13</sup> D Thomas "Public transportation in South Africa: challenges and opportunities" *World Journal of Social Science Research* (2016) 3 (3) 355.

<sup>14</sup> R Donaldson "Mass rapid rail development in South Africa's metropolitan core: Towards a new urban form?" *Land Use Policy* 23 (2006) 344–352.

<sup>15</sup> *Ibid.*

<sup>16</sup> Karen. L "Making the connections between transport disadvantage and the social exclusion of low income populations in the Tshwane Region of South Africa" *Journal of Transport Geography* (2011) 19(6) 1320-1344.

mode of transport, while the poor use a combination of travelling by foot, bicycle minibus taxis, Metrorail trains and sometimes trucks. The conditions in these areas are bleak and some of the problems include lack of access to regular bus or taxi services, as a result of the road not extending to the area, this contributes to reduced access to transportation. Exclusion in both rural and urban areas has been described as “mobility-related exclusion”.<sup>17</sup> This is the process by which people are prevented from participating in the economic, political and social life of the community because of reduced opportunities, services and social networks, due to insufficient mobility in a society and environment built around assumption of high mobility”.<sup>18</sup>

Race, class, gender, (dis)ability are a challenge to transformation. Mobility related exclusion further presents itself to be a challenge for a society aiming to transform the existing inequities of the past. The introduction of the Gautrain, Gaibus, and the Bus Rapid Transport (*Rea-vaya* and *Are-yeng*) bus routes from the townships to the cities were designed to eliminate, or at the very least substantially address the mobility related exclusion. Admittedly, issues surrounding public transport are an area of public policy that intersects with aspects of poverty and a plethora of other social dynamics and in order to change the racial pattern and inequity, government recognises that efficient, affordable and reliable transport systems are critical components of economic development and economic inclusion.<sup>19</sup>

### 1.9 Public transport legislation through the years

The commuter bus system can be traced from the apartheid era, where governments used public transport and commuter bus services as a policy instrument to effect separate development of races. Black communities were located some distance from places of employment, recreation and shopping facilities and cheap subsidised commuter bus services were introduced by government to ease the financial travelling burden.<sup>20</sup>

The commuter subsidy system was originally based on tickets sold over specific distances, with the approval from the Department of Transport. Operators claimed their subsidies from the Department of Transport based on the number of tickets sold over their network of services. This system was open to abuse and further lacked transparency. Operators had indefinite period permits which made it extremely difficult for potential new entrants to enter the industry, which brought about competition related issues in this market.<sup>21</sup>

In 1986, a White Paper on National Transport Policy<sup>22</sup> was accepted by the government and legislated on the entry of the taxi industry. This led to the loss of business for the protected

<sup>17</sup> Kenyon Lyons & Rafferty “Transport and Social exclusion: Investigating the possibility of promoting inclusion through virtual mobility” *Transport Geography* (2002) 10 (3) 207-219.

<sup>18</sup> Kenyon Lyons & Rafferty “Transport and Social exclusion: Investigating the possibility of promoting inclusion through virtual mobility” *Transport Geography* (2002) 10 (3) 207-219.

<sup>19</sup> *Ibid.*

<sup>20</sup> Walters, “Public transport policy implementation in South Africa: Quo vadis?” *Journal of Transport and Supply Chain Management* (2014) [https://www.saboa.co.za/index\\_htm\\_files/134-1126-1-PB.pdf](https://www.saboa.co.za/index_htm_files/134-1126-1-PB.pdf) [accessed 27 March 2019].

<sup>21</sup> Walters “Public transport policy implementation in South Africa: Quo vadis?” *Journal of Transport and Supply Chain Management* (2014) 134.

<sup>22</sup> Department of Transport National Transport Policy White Paper 1996 <https://www.gov.za/documents/national-transport-policy-white-paper#art%208> [accessed 1 August 2019].

bus industry, as many of the bus operators lost a share in their business through the intense competition of the unregulated minibus taxi industry, the minibus taxi industry continued to grow despite the challenges faced by bus operators. In 1987 the first bus services were put out to tender in accordance with the 1986 White Paper stipulations. However government suspended the process of competitive tendering because of issues of funding and tendering too low.<sup>23</sup>

In post-apartheid South Africa, government embarked on a journey to transform the public transport system and to engage with the affected commuters, minibus and bus operators and as to how to improve the public transport policy and the competitive tendering process. The National Department of Transport established a new policy framework for transport. The fundamental tenets of the policy were embedded in the 1996 White Paper on National Transport Policy, this policy is the key to policy document in South Africa on all matters related to transport, it guides all transport legislation, rules, regulations and planning.<sup>24</sup> The policy is designed to meet the needs of the South African people within the constraints of the resources and within the changed political South African environment.

The objectives of the National White Paper on Transport are that the spatial development principles must support passenger transport policy, the principle of devolution of public passenger transport functions to the lowest appropriate level of government.<sup>25</sup> Public passenger transport must be provided efficiently so that public resources are used in an optimal manner, the application of funds to transport improvements should be self-sustaining and replicable. To encourage this, the users of urban transport facilities should pay for all or most of the costs incurred within the limits of affordability.<sup>26</sup> Evidently, the 1996 White Paper considers public transport as critical to advancement of mobility and accessibility and therefore should be provided efficiently and effectively.

The goal of transport is the ‘smooth and efficient interaction that allows society and the economy to assume their preferred form’.<sup>27</sup> The 1996 White Paper recognises transport as a basic human right along with other social services such as education and housing.<sup>28</sup> The policy document further addressed issues that public passenger transport must be operated on a commercial basis as opposed to a social service to strengthen the competitive tendering process. This would allow for previously disadvantaged operators to enter the market and further open the market to potential international operators.

In 2000 the legislature adopted into law the National Land Transport Transition Act (“NLTTA”)<sup>29</sup> to enable transformation and the restructuring of the land transport system of

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<sup>23</sup> Walters “Public transport policy implementation in South Africa: Quo vadis?” *Journal of Transport and Supply Chain Management* (2014) 134.

<sup>24</sup> Luke & Heyns “Public Transport policy and Performance: the results of a South African public opinion poll” *Journal of Transport and Supply Chain Management* (2013).

<sup>25</sup> National Transport Policy White Paper 1986.

<sup>26</sup> Luke & Heyns “Public Transport policy and Performance: the results of a South African public opinion poll” *Journal of Transport and Supply Chain Management* (2013).

<sup>27</sup> Department of Transport 1996.

<sup>28</sup> 1996 White paper Policy p5

<sup>29</sup> Act 22 of 2000.

South Africa. The NLTTA was enacted as a response to the challenges, weaknesses, inefficiencies and problems confronting the public policy industry as witnessed in pre-apartheid South Africa.<sup>30</sup> The NLTTA included all the role players and all levels of government. The main feature of the NLTTA is the requirement for municipal, provincial and national levels of transport planning to be the basis on which all future public transport operating licences are awarded to operators. The NLTTA was finally repealed by the National Land Transport Act (“NLTA”)<sup>31</sup> which commenced on 8 December 2009. The NLTA is the current legislation governing the metered taxis and has been promulgated by all spheres of government. Chapter two of the NLTA regulates the institutional arrangements for land transport and section 11 of the NLTA provides that each sphere of government is tasked with the responsibility of monitoring and overseeing the transport system in so far as land transport activities are concerned.

From the aforementioned it appears that over the years the South African government has put forward a myriad of policies and strategies to improve and promote the efficiency of the public transport system. Despite this, very little has changed over the last 30 years, although projects such as the Gautrain high-speed rail service and a few bus rapid transit routes have been recently introduced to curb the inefficiencies of the past. These projects, however, are not integrated in a logical manner into the broader public transport system and are often referred to as stand-alone interventions because of a lack of managing public transport in terms of integrated transport plans. The current policies have neglected to consider the various innovations such as the e-hailing systems of public transport. The traditional commuter rail, bus and 16-seat taxi industries therefore operate in policy silos and, in the case of the bus and rail industries, are planned and funded independently of each other leading to a further lack of integration. The South African legislature did not anticipate entry of disruptive innovator such as Uber and other smart phone based transport systems. Policy interventions have been implemented partially or not at all, leaving the passenger public transport sector in a state of instability.<sup>32</sup>

#### 1.10 Traditional metered taxis v Uber Technologies Proprietary Limited

The NLTA defines the metered taxi industry as a public transport service operated by means of a motor vehicle. It is available for hire while roaming, either by telephone or otherwise, it may stand at a taxi rank and inside, it is equipped with a sealed meter, for the purposes of determining the fare payable by the consumer.<sup>33</sup> The provisions of the NLTA require that the traditional metered taxi to apply for an area-based permit. A detailed description of the route or routes (or radius) together with allocated taxi ranks, terminal, pick up and drop off points must be specified before obtaining the operating licence.<sup>34</sup> However, the metered taxi may pick up passengers outside of its respective area specified if the fare is pre-booked and the

<sup>30</sup> David “Public transportation in South Africa: challenges and opportunities” *World Social Sciences Research* 2016 (3) 3 p 352, 355.

<sup>31</sup> Act 5 of 2009 (“NLTA”).

<sup>32</sup> Walters “Public transport policy implementation in South Africa: *Quo vadis?*” *Journal of Transport and Supply Chain Management* 8(1) (2014).

<sup>33</sup> Section 1 of the NLTA.

<sup>34</sup> Section 66(1)(a) – (d) of NLTA.

passenger will return to the area. The fares can be determined by the sealed meter or through negotiation between the driver and the passenger, and in addition to these, the meter taxis are required to have special markings.<sup>35</sup>

Metered taxi regulations centers on three fundamental aspects:<sup>36</sup> firstly is the regulation of quantity – which is the number of motor vehicles which operate on the roads. Quantity regulation is a form of restriction which speaks to the number of vehicles which can participate within the metered taxi service market. This element categorically aims to control the supply of vehicles that can enter the market. The regulator through his discretion limits entry into the market through some form of licensing framework deployed to ensure that applicants meet a certain minimum requirement and<sup>37</sup> secondly, the regulation of quality, which is a form of regulation that ensures that the required standards and measures are met and complied with by the driver. In order for metered taxis to compete vigorously in the market there is a strong temptation on the driver’s part to lower costs and the level of service provided in an effort to capture a larger portion in the market share. Quality standards are therefore important to ensure the safety of the passengers and to guarantee that the service provided meets the minimum quality standards. These standards encompass those which apply to the driver – whether he is found to be fit and proper and whether the quality of the vehicle meets the mandatory standards. As such, all mandatory standards should be applied against an objective criterion upon an equal assessment to ensure consistency and transparency when conducting such an inquiry,<sup>38</sup> and finally, the regulation of fares of the metered taxis, which amounts to the prices which can be charged.<sup>39</sup> Pricing information should be made readily available to consumers. The regulation of taxi fares can take various forms of maximum, minimum or fixed charge per kilometer and may depend on the time and distance travelled. The existence of such regulation will limit incumbent firms from charging a monopoly price they would not otherwise charge in a competitive market.<sup>40</sup>

The NLTA provides for the Minister of Transport or Member of Executive Council (MEC)<sup>41</sup> to make regulations providing for a grading system for metered taxis, special requirements for drivers, special marking for vehicles and “any other matter affecting the standard or quality of operation of metered taxis”. Furthermore, various conditions are imposed by the Provincial

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<sup>35</sup> Section 66(4) of NLTA.

<sup>36</sup> OECD ‘Taxi Services: Competition and Regulation’ Roundtable (2007) at 19, available at <http://www.oecd.org/regreform/sectors/41472612.pdf>, [accessed on 2 May 2017]. Also see City of Cape Town’s Transport Authority ‘Meter Taxi Rationalization Strategy Report’ (2014) at 25, available at [http://www.tct.gov.za/docs/categories/1403/Metered\\_Taxi\\_Rationalisation\\_Strategy\\_1.pdf](http://www.tct.gov.za/docs/categories/1403/Metered_Taxi_Rationalisation_Strategy_1.pdf), [accessed 16 April 2019]. Also see D Geradin ‘Should Uber be allowed to compete in Europe? And if so How?’ *Competition Policy International* (2015) at 4, available at <https://www.competitionpolicyinternational.com/assets/Europe-Column-New-Format.pdf>, [accessed 8 April 2019].

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Section 1 of the NLTA provides that the “MEC means the Member of Executive Council of a province who is responsible for public transport in that province” and “Minister means the Minister responsible for transport in the national sphere of government”. As at May 2019 the current Minister of Transport is the Honourable MP Fikile Mbalula and the Gauteng MEC for transport is Ismail Vadi.

Regulatory Entity<sup>42</sup> on the operating license in terms of direction received from the provinces when considering an application for a license. These include, *inter alia*, that the scale of charges is displayed on the doors of the vehicle and that the fare shall be calculated from the time the passenger enters the vehicle.<sup>43</sup>

On the opposite side of the same coin is the smartphone app, Uber, an online system based smart phone app that allows users to connect with drivers of motor vehicles to request a trip to a desired predetermined destination. Users select a location from where they want to be picked up, the app then sends a request notification to a driver located nearby the vicinity of the pick-up location. Uber was launched in 2013 in three cities in South Africa<sup>44</sup> and had over 2 million trips in South Africa.<sup>45</sup> Additionally, users of the Uber app have the option to choose a class of vehicle they prefer to travel in, being UberX, which caters for a party of not more than four passengers per single trip, UberBlack which is the luxury version of Uber and/or UberVan this option caters for a party in excess of four people.<sup>46</sup>

Once the driver accepts the request notification, the app displays the name of the driver, the type of car and the registration number plate. Conveniently, the app gives users the driver's whereabouts, estimated time of arrival and progression to the pick-up site, which can be tracked through the apps' built-in GPS system. Upon completion of the trip, users can either pay in cash or use the cashless payment method by loading credit/debit card details upon activating the Uber account on their smartphones. Furthermore, users are given the option of rating the services of their driver through a five star rating system. Likewise, drivers are also capable of rating users. These ratings are visible on each user's profile upon requesting a trip and are also visible on the driver's profile upon accepting a requested trip.<sup>47</sup>

Evidently, Uber offers users multiple advantages including the option of convenience, reliability and efficiency, chief among them is a user friendly interface which permits users to freely order their preferred vehicles within a reduced timeframe. Most importantly for a consumer is the pricing of trips, which is considerably lower than traditional metered taxis.<sup>48</sup> A study in South Africa revealed that in fact Uber charges significantly lower fares than

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<sup>42</sup> Section 1 of the NLTA provides that the Public Regulatory Entity shall be the provincial regulatory entity contemplated in section 23 of the NLTA. Section 23 provides that this body consists of dedicated officials of the provincial department, appointed either on a full-time or part-time basis by virtue of their specialised knowledge, training or experience of public transport or related matters and is accountable to the head of the provincial government.

<sup>43</sup> Metered Taxi Realization Strategy Report at p8.

<sup>44</sup> Durban, Cape Town and Johannesburg. Uber only stated operating in Pretoria and other major cities at a later stage.

<sup>45</sup> Uber presentation South Africa updated March 2015 [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150901Uber\\_South\\_Africa.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150901Uber_South_Africa.pdf) [accessed 9 April 2019].

<sup>46</sup> Essentially UberX is the general entry level car type which is widely utilized by most users. UberBlack comprises of a number of luxury cars, which translates in a higher price per kilometer travelled. UberVan caters for larger travelling groups and also demands a slightly higher price than UberBlack.

<sup>47</sup> N Ndlovu "Uber v metered Taxis: A competition issue or a regulatory nightmare" Competition Tribunal 2015.

<sup>48</sup> Petropoulos 'Courts should regulate Uber, not ban it' *London School of Economics Business Review* (2016) available at, <http://blogs.lse.ac.uk/businessreview/2016/03/03/courts-should-regulate-uber-not-ban-it/> [accessed 5 April 2019].

regular metered taxis, whose premiums peak at 265% higher than Uber services,<sup>49</sup> this indicates that a consumer of metered taxis is likely to switch to a more affordable mode of transportation. However, the pricing advantages are not isolated from the quality and certainty of using the smart phone app, the ability to rate a driver's service through the app is an added advantage and ensures that the mandatory quality standards are upheld and the driver's reputation is maintained.<sup>50</sup>

From a competition perspective the question is whether there is a suitable substitution or alternative the consumer can use? A suitable substitution would be one that encompasses all aspects of quality, quantity and pricing as discussed in Chapter Three of this dissertation. If the answer is in the affirmative and the consumer is satisfied on all levels of the scale, then it is probable that the consumer will switch to the alternative. Having regard to the high standards of quality, quantity and pricing, it follows that Uber is the substitution to traditional metered taxis and traditional forms of public transport. The added advantages which is offered by Uber services does not exist with the traditional metered taxis, and it is submitted that it is for this reason that Uber may be disruptive innovator and requires regulation in the South African legal framework, which affects incumbent firms from succeeding in the existing market. Uber's user friendly features are attractive to consumers and as explained above, Uber's business model is reasonably transparent, despite the lack of regulation.

Apart from the negative impact of the current economic climate on demand for services, metered taxi operators have had to cope with the disruptive effect of the smartphone-based e-hailing technology introduced by Uber. Stakeholders assert that the Uber's concept is revolutionising the industry, changing the way people think about transportation. Traditional metered taxi operators however see Uber as engaging in unfair competitive practices by operating illegally without permits and charging below-cost rates.<sup>51</sup> Also of concern is the growing number of other services that are in direct competition to some of the traditional 24-hour services offered by the metered taxi industry.<sup>52</sup>

### 1.11 Conclusion

The history of this country has had the effect of oppressing and marginalizing Black people over a long period of time. It has also resulted in the economic exclusion of poor Black people. The introduction of apps such as Uber and other various disruptive innovations<sup>53</sup> however give the youth a chance to grow within the South African economy and to in turn, increase the gross domestic product of the country. The existence of policy documents

<sup>49</sup> Dube 'Uber: a game-changer in passenger transport in South Africa? *CCRED* (2015) available at, <http://www.competition.org.za/review/2015/11/22/uber-a-game-changer-in-passenger-transport-in-south-africa> [accessed 8 April 2019].

<sup>50</sup> N Ndlovu "Uber vs. Metered taxis: a Competition issue or a regulatory nightmare" *Competition Tribunal* 2015 p 4-6.

<sup>51</sup> <https://www.whoownswhom.co.za/store/info/3284?segment=Transportation> [accessed 1 August 2019] see also paper by the Organisation for Economic Co-operation and Development 3 May 2018 page 5 at [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2018\)21/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2018)21/en/pdf) [accessed 1 August 2019].

<sup>52</sup> Kneale *The Metered Taxi Industry* (2016) <https://www.whoownswhom.co.za/store/info/3284?segment=Transportation> [accessed 9 April 8, 2019].

<sup>53</sup> Some of which include Airbnb, UpWork, SweepSouth, Lyft and Taxify etc.

regulating transport should develop with time and assist in making sure that services like Uber are in fact catered for under those policy documents. There are currently 6.7 million unemployed people in South Africa - this is translated to 29% of the populations.<sup>54</sup> By the expanded definition it amounts to 38.5% of people who could be working. According to figures by Statistics South Africa youth aged between 15–24 years old are the most exposed in the South African labour market as the unemployment rate among this age group was at a horrifying 55,2% in the first quarter of 2019.<sup>55</sup> The gig economy creates an explosion of non-traditional work opportunities for those people who are currently unemployed and lack the skills and qualifications to enter into the mainstream corporate labour market. The eruption of non-traditional work opportunities directly result in more efficient services being provided to consumers.<sup>56</sup> However, absent suitable regulation of these irregular modes of providing services to consumers, South Africa is yet to see the decrease of these appalling unemployment statistics.

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<sup>54</sup> Webster *Unemployment in South Africa is worse than you think* (2019) <https://mg.co.za/article/2019-08-05-unemployment-in-south-africa-is-worse-than-you-think> [accessed 23 November 2019].

<sup>55</sup> <http://www.statssa.gov.za/?p=12121>.

<sup>56</sup> Rajah “South Africa's gig economy – A solution to addressing unemployment” *Without Prejudice* (December 2018).

## Chapter III – Intervention by the South African competition authorities

### 1.12 Introduction

New entrants in the market are necessary to advance competition, enhance the economic activity of the country and ensure that customers have the option to choose amongst different varieties of products in the market. Disruptive innovations are potentially limiting on competing brands as they may have the effect of foreclosure on incumbent firms. The Competition Act 89 of 1998 encourages a competitive and transparent economy and promotes consumer choices as a centrepiece to competition in a specific market. The Competition Act envisages markets in which consumers have access to, and can freely select the quality and variability of goods and services which they desire and regulate the transfer of economic ownership in keeping with the public interest.

The evolution of technology innovation and artificial intelligence is becoming a colossal role player in the advancement of humanity. The launch of Uber is no different and has certainly created uproar in the taxi industry, while the development of technology is accelerating every year. Particularly in relation to the information technology-associated sphere there has been an essential drive for global economic growth. The emergence of smart phones' impact on today's business lifestyle, go even further when one takes advantage of the already established networks connecting mobile phones through the internet and app software. Creative business models, such as Uber, Taxify Netflix, Airbnb,<sup>57</sup> develop and begin to agitate the market and disposition incumbent firms by gaining momentum among commercial communities and consumers across the globe. Notably, Uber has been one of the disruptive innovators in the public passenger transport industry.

The entry of Uber into the public passenger transport market has elicited some distress amid incumbent traditional metered taxi companies around the world.<sup>58</sup> Many incumbents have attempted to restrain the operation of Uber on the basis that it operates in circumvention of national transport regulations and that its pricing methods, amongst others, are in contravention of competition/antitrust law.<sup>59</sup> Despite incumbent firms' insistence that Uber lacks regulation in various parts of the world, it continues to generate profit while more people are exposed to the smart phone app.

Technological advancements prove to be difficult particularly for law enforcement, when competition enforcers deal with issues concerning information technology based knowledge such as computer hardware, computing software, internet, e-commerce etc. The challenges for competition authorities are, among others, market definition, and the choice of regulatory

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<sup>57</sup> Tourism Amendment Bill Notice 228 of 2019 states that “short-term home rentals: - means the renting or leasing on a temporary basis, for reward, of a dwelling or a part thereof, to a visitor.” will be legislated under the Tourism Act 3 of 2014 if the Bill is passed as an Act of Parliament.

<sup>58</sup> Dube Uber: a game-changer in passenger transport in South Africa? (2015) <https://www.competition.org.za/review/2015/11/22/uber-a-game-changer-in-passenger-transport-in-south-africa> [accessed 15 November 2015]

<sup>59</sup> Meter taxis lose bid to declare Uber anti-competitive (2016) <https://www.fin24.com/Tech/News/meter-taxis-lose-bid-to-declare-uber-anti-competitive-20161020> [accessed 15 November 2019]

tools, survey of harm to competition and even the determination of whether or not the investigated conduct falls within the realm of competition law.<sup>60</sup>

New technologies or business models can profoundly affect the functioning of existing industries. The most visible examples are internet-based "sharing services" that are disrupting conventional taxi and hotel markets, but there are many others in diverse areas such as finance, retail electricity and automobiles. These disruptive innovations can deliver important benefits to competition and consumers, in terms of new and better services, and can stimulate innovation and price competition from established providers. However, they can also give rise to legitimate public policy concerns<sup>61</sup> and create demands for regulation. Established providers will often lobby for existing regulations to be applied to new providers to lessen their competitive advantage, sometimes claiming rightly or wrongly that this advantage arises from an 'unfair' exclusion from regulatory guidelines.<sup>62</sup> The question remains how far should regulation and law enforcement go? What role should competition policy play in these debates, and how might competition authorities participate?

### 1.13 Disruption in competition law enforcement

The term "disruptive innovation" was first coined in 1995. It is an economics concept used to contemplate about new inventions and how they affect the global market and the economy.<sup>63</sup> Disruption is a process where a company is able to successfully challenge established incumbent business. The original theory focuses on disruptive technologies: it is the evolution of a particular product in a particular market. Summarily, the term refers to a process where a disruptive technology begins to successfully target those segments that have been overlooked by gaining more functionality and frequently lower price, while incumbents are chasing after higher profitability in more demanding segments of the market.<sup>64</sup> Disruptive innovation encompasses a myriad of business models and radical product innovations as they continue to develop in the market. Certain scholars argue that the essence of each type of innovation is fundamentally diverse and should not be conflated;<sup>65</sup> however, the all in one concept of disruptive innovation is diverse and prevalent in the context of competition law.

A disruptive innovation occurs outside the network of established firms. Disruptive innovations introduce a different package of attributes from one that customers historically value. However, important to note is that those new attributes may not surpass all those that the traditional products and services have, but adds value enough of the old features that consumers still need but more importantly, draws attention to them.<sup>66</sup> According to Clayton, Uber is not a disruptive innovation in the taxi industry because it did not originate in a low-

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<sup>60</sup> HF Wei *Does Disruptive Innovation "Disrupt" Competition Law Enforcement: the Review and Reflection* (2016) 1

<sup>61</sup> For example, the safety and privacy of consumers.

<sup>62</sup> OECD-GVH RCC Newsletter Issue No. 5, July 2015 page 10.

<sup>63</sup> Christensen "What is a Disruptive Innovation?" *Harvard Business Review* 2015

<sup>64</sup> Christensen, "The Innovators Dilemma: When New Technologies Cause Great Firms to Fail" *Boston: Harvard Business School Press* (1997).

<sup>65</sup> Christensen "Disruptive innovation: An intellectual history and directions for future research" *Journal of Management Studies* (2018) 1057.

<sup>66</sup> HF Wei (2016) 3.

end or new-market foothold and because it caught on with the mainstream quite rapidly in a way that has been described as being “better than” the incumbents.<sup>67</sup> Other scholars of disruptive innovation disagree with the proposition that Uber is not a disruptive innovation, as it has followed a disruptive path to finally attain success in the taxi industry.<sup>68</sup>

Nevertheless, the test to determine whether or not Uber is indeed a disruptive innovation is based on the simple answer to the following questions:<sup>69</sup>

- i) does it target non-consumers? The simple answer is yes, because when it was first launched, Uber started out by serving people who desired to have a black car service but could not afford the prices.
- ii) is the innovation simpler to use, more convenient, affordable than incumbents existing offering? In Uber’s case, its prices are more affordable and the convenience of having a taxi right at your fingertips is what attracts consumers.
- iii) Does the offering have a technology enabler that can carry its value around simplicity upmarket and allow it to improve? Uber’s mobile technology platform is built alongside mobile phones’ GPS technology; this allows drivers to navigate passengers to their destinations. This service has improved over time, in relation to reliability and quality of service.

There are various other questions that could be asked to determine the magnitude of the disruption that was caused by Uber as a technology based taxi app. What does disruption do? It is common cause that disruption challenges an existing business model, it impacts its revenue and it impacts its customer base. Disruptive innovations compel businesses to think in a different way and outside of the box – to improve its existing offer, to modify and to advance. It is a paradigm shift in the market place.<sup>70</sup> This paradigm shift was seen with inventions such as the iPod, iPhone, Japanese cars, personal computers, Netflix, and Airbnb and, whether or not one agrees or disagrees, Uber. All of these offerings constituted a paradigm shift in that particular market. They offered customers something different and in many cases added new customers to the mix. Therefore, whether or not Uber is, or is not, a disruptive innovation, it has operated outside the reach of regulators and for that reason alone caused disruption in the market and become a regulatory disaster. This resulted in Uber and similar innovations having caused the legislature and competition authorities to intervene in making sense of these types of disruptive innovations.

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<sup>67</sup> Horn Uber, disruptive innovation and regulated markets (2016) <https://www.forbes.com/sites/michaelhorn/2016/06/20/uber-disruptive-innovation-and-regulated-markets/#3d2c137837fb> [accessed 14 April 2019].

<sup>68</sup> Clayton Christensen who first coined the term disruptive innovation in the 1997 disagrees that Uber is a disruptive innovation in his paper “What Is Disruptive Innovation?” Harvard Business Review 2015

<sup>69</sup> Horn *Uber, Disruptive Innovation and Regulated Markets* (2016) available at <https://www.forbes.com/sites/michaelhorn/2016/06/20/uber-disruptive-innovation-and-regulated-markets/#5d83597c37fb> [accessed 22 November 2019].

<sup>70</sup> *Ibid.*

### 1.14 ‘Dominant firms’ engaging in ‘prohibited practices’

In 2015, eight companies and 150 individual drivers<sup>71</sup> in the metered taxi industry filed a complaint against Uber in South Africa in an effort to combat its disruptive nature. The metered taxi industry alleged that Uber was conducting an unfair business practice as it secures partnerships with multinational companies that have exposure to its client base and ultimately giving it unparalleled market access, non-compliant with South African public transport, laws, rules and regulations. This non-compliance entails that it does not pay any permit renewals, rank fees and licensing fees as do other traditional metered taxis and charging below costs rates to the detriment of traditional metered taxi operators. The Competition Commission investigated the complaint under the abuse of dominance provisions of the Competition Act,<sup>72</sup> specifically in relation to predatory pricing.<sup>73</sup> Abuse of dominance<sup>74</sup> is regulated under Chapter II Part B of the Competition Act. As such abuse of dominance is a complicated and controversial area of competition law and the question of whether a firm is dominant or not requires a detailed identification of the relevant market in which the firm operates; a calculation of market shares; and addressing the meaning of market power.<sup>75</sup>

However, the first obstacle before one gets to the applicability of the abuse of dominance provisions provided for in section 8, is the territorial application of the Competition Act provided for under section 3. This section provides that the Competition Act shall apply to all economic activity within, or having an effect<sup>76</sup> within the Republic of South Africa. It is clear from the availability of Uber at almost every significant turn that it operates within the

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<sup>71</sup> <https://www.sabreakingnews.co.za/2016/10/21/uber-beats-anti-competitive-claims/> [accessed 2 May 2019].

<sup>72</sup> Section 8(a) of the Competition Act provides for the prohibition against a dominant firm to charge an excessive price to the detriment of consumers.

<sup>73</sup> Competition Act defines “predatory prices” as prices for goods or services below the firms average avoidable cost or average variable cost. The *Competition Commission of South Africa v Media 24 (Pty) Ltd* [2019] 1 CPLR 27 (CC) defines predatory pricing to mean the following: “Because low prices are generally encouraged by competition law, costs standards have been developed to indicate the line between competitive price cutting and unreasonably low prices that are predatory. Predatory pricing is prohibited in two provisions in the Competition Act. Section 8(d)(iv)” para 11. See also “Predatory pricing is a paradoxical offense. Although antitrust law values low prices and abhors high ones, the ‘predator’ stands accused of charging too low of a price - of doing too much of a good thing. Society considers predation socially harmful because the artificially low prices of today drive out competitors and allow the high prices of tomorrow.”\_Crane “The Paradox of Predatory Pricing” (2005) 91 *Cornell Law Review* 1 at 2–3. at paragraph 1 of *Media 24 Case*.

<sup>74</sup> Sutherland and Kemp (eds) *Competition Law in South Africa* (2017) “To date, there is relatively little South African case law on the abuse provisions, and important questions remain as to how they should be applied in the South African context.”

<sup>75</sup> The power of a firm to control prices, exclude competition, or to conduct itself to an appreciable extent, independently of its competitors, customers and/or suppliers. Section 1 of Competition Act. I discuss the concept of market power later on in this chapter.

<sup>76</sup> In *Competition Commission and others v American Natural Soda Ash Corp CHC Global (Pty) Ltd and others; American Natural Soda Ash Corp CHC Global (Pty) Ltd v Botswana Ash (Pty) Ltd and another* [2005] 1 CPLR 121 (CT) the Tribunal held that the word “effect” should be given an ordinary interpretation and was not limited to adverse effects.

Republic and its effect to the economy is that it provides access to entrepreneurship and increased employability of the citizens of the Republic.<sup>77</sup>

In addition to section 3 and before determining an instance of abuse of dominance case it is essential to answer three vital questions: first, do the abuse of dominance provisions apply to the situation in question? Secondly, is the firm accused of the alleged abuse indeed a dominant firm? If the firm is indeed dominant, the final question to ask whether it engaged in any conduct prohibited under sections 8(a) to (d) of the abuse of dominance provisions. Unless the answer to all three questions is in the affirmative then there is no liability that exists under the abuse of dominance provisions.<sup>78</sup>

The Competition Act prohibits abuse of dominance but does not prohibit any firm from holding a dominant position.<sup>79</sup> In terms of section 7 of the Competition Act a firm is dominant in a specific market if it has at least 45% of the market.<sup>80</sup> This is an irrebuttable presumption and enquiry with regard to dominance ends there.<sup>81</sup> Secondly, it is dominant if it has at least 35%, but less than 45% of that market unless it can show that it does not have market power.<sup>82</sup> The onus is on the firm to prove that it is not dominant in the market, if it cannot discharge this onus then the firm is deemed to be a dominant firm. Finally, a firm is dominant if it has less than 35% of that market, but has the market power.<sup>83</sup> The onus rests with the complainant to prove dominance, and if it is not discharged, the firm is not dominant.

The manner in which dominance must be proved under section 7 depends on the market share enjoyed by the respondent.<sup>84</sup> A market share refers to a portion of the market controlled by the respondent and the size of the portion varies depending on the market considered. Section 1 of the Competition Act defines ‘market power’ as “the ability of a firm to control prices to exclude competition or behave to an appreciable extent independently of competitors, customers and/or suppliers.” The South African legislature has not provided any guidance as to what it meant by “the power to control prices”. Market power also relates to the firm’s ability to raise prices above the competitive level for a sustained period of time.<sup>85</sup>

<sup>77</sup> *Uber’s Submission Public Passenger Transport Market Inquiry 7 June 2018*, “Uber has created substantial self-employment opportunities since entering the SA market. Currently there are over 12,000 active driver-partners across the 5 cities. Many of these operators have been using the app since 2013.” Available: <http://www.compcom.co.za/wp-content/uploads/2018/06/Final-slides-for-PTMI-Uber.pdf> [accessed 1 May 2019].

<sup>78</sup> Sutherland & Kemp *Competition Law of South Africa* (2017).

<sup>79</sup> Section 8 of the Competition Act prohibits a firm from abusing its dominance, if its dominance has been established under any provision in section 7. The abuse of a dominant position by a firm may include refusing competitors access to an essential facility, issues of prices such as price discrimination and excessive pricing of goods or services, or conduct that impedes or prevents others from entering, or expanding in, a market. <http://www.compcom.co.za/abuse-of-dominance/> [accessed 21 November 2019]. See also Section 8(1)(a) - (d) of the Competition Act.

<sup>80</sup> Section 7(a) of the Competition Act.

<sup>81</sup> *Competition Commission v South African Airways (Pty) Ltd* (2) [2004] 1 CPLR 235 (CT) CT para 87.

<sup>82</sup> Section 7(b) of the Competition Act.

<sup>83</sup> Section 7(c) of the Competition Act.

<sup>84</sup> Section 1 of the Competition Act defines ‘respondent’ as a firm against whom a prohibited practice has been initiated in terms of the Competition Act.

<sup>85</sup> Brassey (eds) *Competition law* (2002) p13.

The international tool for defining the relevant market is referred to as the SSNIP test. SNIP stands for “small but significant non-transitory increase in price”.<sup>86</sup> As such when determining the relevant market, the central question to ask is what the options available to the consumers are when they face a price increase.<sup>87</sup> This test is also referred to as the “hypothetical monopolist test”,<sup>88</sup> and according to this test the relevant market is the range of suppliers of all substitute products that could possibly control prices if they were united as a single supplier.<sup>89</sup> The hypothetical monopolist test measures the effect that a small but significant non-transitory increase in price, usually between 5-10%, would have on customers.<sup>90</sup> If the hypothetical monopolist would be prevented from imposing at least a small, but significant non-transitory increase in price because of substitution by customers to other products, the candidate market will not be determined as a relevant market by itself.<sup>91</sup> The purpose of this test is to understand whether there are products other available to the consumer, and how closely those substitutes compete with one another. The test is an abstract tool used to identify those firms that have the ability to significantly constrain the prices which the product or service under investigation is sold.<sup>92</sup> Once this market has been identified the respondent’s power within those boundaries can be assessed. This is an important step in defining the relevant market.<sup>93</sup>

The Tribunal has held that dominance can be established by alleging that the respondent falls within any category under section 7<sup>94</sup> of the Competition Act. Furthermore, the onus of proving each provision varies depending on the subsection of section 7 that the respondent is alleged to fall into, and the relevant subsection must be properly set out, as illustrated above.<sup>95</sup> The Tribunal further held that when bringing an abuse of dominance complaint, parties must primarily establish dominance before they can move on to proving the act of abuse of dominance in respect of the market in which the abuse is alleged. It does not assist the respondent for the allegation of dominance to be clarified only at the hearing or at some later stage.<sup>96</sup> Notably when confronted with a question of dominance, it is first necessary to define the relevant market. One cannot simply know which market is relevant unless one knows the nature of the complaint against the respondent as the market definition must be relevant to the alleged abuse of dominance provisions.<sup>97</sup> Accordingly there is a specific need to identify a market, because without a definition of that market there is no way to measure a

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<sup>86</sup> Kelly & Unterhalter *Principles of competition law in South Africa* (2017) p29.

<sup>87</sup> Neuhoﬀ *Practical guide to the South African Competition Act (2017)* p34.

<sup>88</sup> Sutherland & Kemp *Competition law of South Africa* (2017) p7-19.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Momentum Group Ltd and Bonheur 94 General Trading (Pty) Ltd* (84/LM/Oct04) [2005] ZACT 37 para 13.

<sup>91</sup> “ICN Merger Working Group:: Investigation and Analysis Subgroup” ICN Merger Guidelines Workbook (2006) p20.

<sup>92</sup> Sutherland & Kemp *Competition law of South Africa* (2017) p7-20.

<sup>93</sup> *Ibid.*

<sup>94</sup> *FFS Refiners (Pty) Ltd v Eskom and others* [2003] 1 CPLR 180 (CT) para 13 – 14.

<sup>95</sup> *FFS Refiners (Pty) Ltd v Eskom and others* [2003] 1 CPLR 180 (CT) para 14

<sup>96</sup> *FFS Refiners (Pty) Ltd v Eskom and others* [2003] 1 CPLR 180 (CT) para 13.

<sup>97</sup> *Ibid.*

firm's ability to curtail competition.<sup>98</sup> A failure to place adequate evidence before the Tribunal, to determine the relevant market is detrimental to any abuse of dominance case.<sup>99</sup>

Once the parties have established dominance within the respective markets, the final question to answer is whether the firm has engaged in any conduct prohibited under sections 8(a) to (d). Section 8 of the Competition Act lists all types of conduct that is prohibited by a dominant firm. The provisions of sections 8(c) and (d) both prohibit exclusionary acts, which acts are those that impede or prevent a firm from entering into, or explaining within a specific market.<sup>100</sup> The provisions of section 8(d) lists all five explicit exclusionary acts that a prohibited, while section 8(c) is a catch all section for any other prohibited conduct by a dominant firm. If a complainant brings an application of abuse of dominance relying on section 8(c) as such complainant must prove that the dominant firm has in fact committed an exclusionary act according to the meaning of exclusionary act.<sup>101</sup>

Prior to the amendment of the Competition Act by the 2018 Competition Amendment Act,<sup>102</sup> section 8(1)(d)(iv) prohibited a dominant firm from engaging in an exclusionary act, by selling goods or services below their marginal or average variable cost. This conduct essentially amounted to predatory pricing. However the firm will have a defence if it can prove technological, efficiency or any other pro-competitive gain which outweigh the anti-competitive effect of its conduct. The Competition Act as amended provides for the explicit prohibition against predatory pricing in section 8(1)(d)(iv).<sup>103</sup> The Commission investigated the complaint brought by the metered taxis against Uber under section 8(d)(iv) of the Competition Act, before the amendment came into effect.<sup>104</sup> However, with the new amendments now in effect, Uber might be susceptible to further investigation based on the current amendments.

Predatory pricing refers to a practice where a dominant firm charges below cost or very low prices for its goods or services with the aim of excluding or weakening competitors, and/or preventing new entrants from penetrating the market.<sup>105</sup> The theory of competitive harm envisages a situation where, once competitors have been weakened, excluded or deterred, the dominant firm is able to increase its prices to recover the losses incurred during the period where low prices were charged.<sup>106</sup> Consumers generally benefit at the stage of charging low prices, as lower prices are a good indicator of healthy competition amongst competitors. However, at the stage where the dominant firm increases its prices this can be detrimental for

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<sup>98</sup> Brassey (eds) *Competition law* (2000) p181.

<sup>99</sup> *Cancun Trading No 24 CC and Others and Seven-Eleven Corp SA (Pty) Ltd* (18/IR/Dec99) [2000] ZACT 10 para 32

<sup>100</sup> Section 1 of the Competition Act.

<sup>101</sup> Sutherland & Kemp *Competition law in South Africa* (2017).

<sup>102</sup> As amended by section 44 of the Competition Amendment Act 18 of 2018, with effect from 12 July 2019.

<sup>103</sup> Section 8(d)(iv) of the Competition Act, as amended "*selling goods or services at a predatory price*"

<sup>104</sup> The amendment does not change the result of the investigation by the Commission and for purposes of this dissertation the former provision will be assessed on the basis of predatory pricing, as it essentially amounts to the same provision.

<sup>105</sup> McKenzie & Harten "Is Uber's pricing predatory" *Without Prejudice* (September 2015) p6.

<sup>106</sup> *Ibid* p7.

consumers. Section 8(1)(d)(iv) reflects the view that low prices, in some circumstances, can be to the detriment of healthy competition. Competition authorities should be careful to intervene in the area of predatory pricing, as a mistaken intervention can be dire.<sup>107</sup> If a pro-competitive low price is mistakenly characterised as predatory pricing and subsequently prohibited by the Commission then the affected consumers could face a level of harm. For the concept of the “theory of harm” to manifest itself in reality the Commission should critically analyse the barriers of entry.<sup>108</sup> If barriers to entry into the industry are low, or significantly low then it will be unlikely for the dominant firm to reach the stage where it increases its prices to recover the losses at the initial stage.<sup>109</sup> If a dominant firm raises prices above competitive levels, new entrants will enter the market forcing the dominant firm to decrease its prices.<sup>110</sup> Additionally, if the barriers to entry are low, the dominant firm will have considerable difficulty in attempting to raise prices to recoup the losses while predatory prices were being charged.<sup>111</sup>

In order for the metered taxis to be successful in their complaint they would have to first prove that Uber is a dominant firm in the relevant market as envisaged in section 7 of the Competition Act. A further step would be to determine the scope of the market. To determine the scope of the appropriate market is however a complex exercise. For such determination it is necessary to determine whether Uber falls within the broad market for all public transport, by road or a more narrowly defined market consisting of metered taxis only. The Commission has defined the market, in which Uber operates, as consisting of land based public passenger transport<sup>112</sup> and the NLTA defines “public transport service” as a scheduled or unscheduled service for the carriage of passengers by road or rail, whether subject to a contract or not and where the service is provided for a fare or any other consideration or reward.”<sup>113</sup>

Assuming that the relevant market is the public passenger transport service and assuming that Uber is a dominant firm as envisaged in section 7 of the Competition Act, the next step is determining if the prices charged are below marginal or average variable cost<sup>114</sup> to such an extent that they are predatory on incumbent firms. Taking into account the pricing models, the fare determination for land-based transportation modes varies per transport mode. The NLTA makes provision for the Minister of Transport or an MEC, in consultation with the relevant authority, to determine a fare structure for metered taxis, to be published in the

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<sup>107</sup> *Ibid* p8.

<sup>108</sup> Lloyd & Stark “The surge in coordinated effects theories of harm in competition assessments” *Without Prejudice* (April 2018) p17.

<sup>109</sup> *Competition Commission v British American Tobacco South Africa (Pty) Ltd* Case 05/CR Feb2005.

<sup>110</sup> Lloyd & Stark “The surge in coordinated effects theories of harm in competition assessments” *Without Prejudice* (April 2018) p18.

<sup>111</sup> *Ibid*.

<sup>112</sup> Competition Commission South Africa Public Passenger Transport Market Inquiry Terms of Reference 10 May 2017 & Prepared for the OECD Discussions on the “WP2 Roundtable on taxis, ride sourcing and ride sharing services” submission by the Competition Commission, April 2018.

<sup>113</sup> Section 1 of the NLTA.

<sup>114</sup> Section 1 of the Competition Act, as amended defines “average variable cost” as the sum of all the costs that vary with an indefinite quantity of a particular product, divided by the total produced quantity of that product.

Government Gazette.<sup>115</sup> However, in practice these rules and regulations have not been set by the Minister or the MEC as stipulated in the NLTA. Instead the fare for metered taxis is determined by a meter or by agreement between driver and passenger before the trip starts. There are four components taken into consideration that form part of the fare: the initiation fee; the first kilometre; the subsequent kilometres and the waiting time.<sup>116</sup>

On the flipside of the coin are the app based taxis such as Uber Lyft and Taxify where prices are set in accordance with the demand by the consumers and supply of the service by the drivers. These prices are currently not regulated for Uber under the provisions of the NLTA (which is part of the problem) and these prices have a tendency to surge<sup>117</sup> during periods of high peak such as a special event, weekends and evenings. The purpose of the surge pricing is purportedly to increase the number of drivers on the road offering the service. There are three components taken into account to determine the fare, base fare,<sup>118</sup> time and distance per kilometre.<sup>119</sup> Metered taxis are of the opinion that Uber has the ability to reduce prices below marginal cost as the current regulations do not make any provision for minimum pricing for e-hailing services.<sup>120</sup>

In their complaint submission to the Commission the metered taxis indicated that their prices per kilometre are set and do not surge as with the likes of Uber, Taxify and other app based taxis.<sup>121</sup> The cost to consumers when surge pricing is applied increases by 10–25%. However, despite the surge pricing the metered taxi fares are still significantly higher than app based taxis, which could still amount to anti-competitive conduct, with or without the surge.<sup>122</sup> Besides in terms of section 8(1)(d)(iv) of the Competition Act Uber would have to, in order to be successful, prove that the technological, efficiency, or the other pro-competitive, gains outweigh the anti-competitive effect of its predatory conduct (efficiency justifications).<sup>123</sup>

As previously mentioned, predatory pricing is an exclusionary strategy by a dominant firm to effectively price rivals out of the market in order to entrench its market power in the long term. Authorities must be cautious to only intervene in those instances where it is apparent that below cost pricing by a dominant firm is indeed part of a predatory pricing strategy. Otherwise in those instances where perceived anti-competitive conduct in the form of predatory pricing is prosecuted it may be an unrewarding exercise as the law, in those circumstances, may be used to prohibit ordinary price competition, discounting or

<sup>115</sup> Section 66(3) of the NLTA.

<sup>116</sup> Section 66(4) of the NLTA.

<sup>117</sup> This can also be referred to as dynamic pricing.

<sup>118</sup> This amount is charged to the passenger per trip, irrespective of the length of the trip.

<sup>119</sup> Prepared for the OECD Discussions on the “WP2 Roundtable on taxis, ride sourcing and ride sharing services” submission by the Competition Commission, April 2018.

<sup>120</sup> *Taxi, ride-sourcing and ride-sharing services - Note by South Africa* (2018) Prepared for the OECD on discussions for Competition and Regulation..

<sup>121</sup> Statement of Issues Competition Commission’s Statement of Issues, 2018 para 33 - 36

<sup>122</sup> Prepared for the OECD Discussions on the “WP2 Roundtable on taxis, ride sourcing and ride sharing services” submission by the Competition Commission, April 2018 para 4.9.

<sup>123</sup> *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 [2005] ZACT 50 para 99.

experimental price setting which conduct is typically beneficial to consumers.<sup>124</sup> The most significant South African case in relation to predatory pricing to be decided by the Tribunal and appealed to the Competition Appeal Court (“CAC”) and subsequently the Constitutional Court was the *Media 24* case.<sup>125</sup>

### 1.15 Applicable case law and considerations

The issue in the *Media24* case concerned the application of predatory pricing. Media24 Propriety Limited (“Media24”) owned two relatively small community newspapers, Forum and Vista and its competitor was Gold Net News (“GNN”) which was independently owned, all three newspapers were published in the area around Welkom Free State (“the Goldfields area”) before and during the period of January 2004 to February 2009 (“the compliant period”). The Commission referred the complaint to the Tribunal in which it alleged that during the complaint period Media24, through Forum, had engaged in predatory pricing in the market for advertising in the Goldfields area in contravention of section 8(d)(iv) alternatively section 8(c) of the Competition Act. More specifically, the Commission contended that Media24 had maintained Forum in the Goldfields area as a ‘fighting brand’ to prevent and/or inhibit GNN as well as potential new entrants from entering or expanding within the Goldfields area. It contended that the operation of Forum did not make economic sense other than as a fighting brand to achieve this predatory objective.<sup>126</sup>

The Tribunal held that the respondent had established that the appellant had priced its publication Forum below its average total costs, had intended to predate its competitor, GNN and had the ability to subsequently recuperate what it had lost during this predation period. Hence the Commission had established that Media24 had committed an exclusionary act in terms of section 8(c) of the Competition Act.<sup>127</sup> A number of attempts have been made to formulate an appropriate test to determine when a price is predatory. Professor Areeda, an American academic, in 1975 already, argued that a price should be deemed predatory where the price is pitched below the dominant firm’s “average variable cost”.<sup>128</sup> He argued that vague formulation of predatory pricing is often overlooked by the fact that predation in any meaningful sense cannot exist unless there is a temporary sacrifice by the company and a reasonable expectation of greater future gains.<sup>129</sup> Additionally, predatory pricing would make little economic sense to a potential predator unless they had a greater financial staying power than their rivals and a very substantial prospect that the losses they incur in the predatory period will be exceeded by the profits to be earned after their rivals had been pushed out of the market or completely prevented from entering the market.<sup>130</sup>

<sup>124</sup> CDH “Supplier charged with fixing the price of your coffee fix” *Competition Alert* 2018.

<sup>125</sup> *Competition Commission v Media 24 Ltd* [2015] 2 CPLR 409 (CT).

<sup>126</sup> *Media24 (Pty) Ltd v Competition Commission* (2018) 1 CPLR 56 (CAC) 60 (3).

<sup>127</sup> *Competition Commission v Media 24 Ltd* [2015] 2 CPLR 409 (CT), para 598.

<sup>128</sup> Areeda & Turner “Predatory pricing and related practices under section 2 of the Sherman Act” (1975) 88 *Harvard Law review* 697.

<sup>129</sup> *Ibid* at 697.

<sup>130</sup> *Ibid* at 688.

Authors have considered the question of predatory pricing and the prospects of success after predation and have observed that the prospects of an adequate future payoff, therefore, will seldom be sufficient to motivate predation.<sup>131</sup> This has proven to be true as cases of predatory pricing have been rare. The CAC held that the Competition Act makes it clear that there are two tests which can be applied to determine the existence of predatory pricing. Firstly, a cost benchmark of marginal costs and secondly, of the average variable costs.<sup>132</sup> These concepts have been accepted in economic literature and have been incorporated by the legislature in the Competition Act. The Tribunal's interpretation of section 8(d)(iv) is crafted in *National Airlines (Pty) Ltd v South African Airways (Pty) Ltd and others*<sup>133</sup> where it held as follows:

*"Our approach is to limit the scope of the subsection by critically construing any evidence when considering a complaint predation under the section. Unless the record shows unequivocally that a respondent is pricing below the prescribed cost levels the Tribunal should not make a finding under section 8(d)(iv) but consider the complaint in terms of section 8(c)."*

The point illustrated by the Tribunal is supported by the fact that section 8(d) sets out a specific series of exclusionary forms of conduct, whereas section 8(c) is an expansive "catch-all" provision in respect of other forms of exclusionary conduct, including predation cases. The Tribunal further held that in markets which were characterised by high barriers to entry it is appropriate to adopt the average total cost benchmark.<sup>134</sup> Accordingly, the Tribunal dismissed the Commission's complaint under section 8(d)(iv), and decided the case under section 8(c). The CAC went against the Tribunal and held that it was inappropriate to apply average total cost as it was clear from the express statutory wording of the Competition Act that average total cost cannot be employed in predation cases brought under section 8(d)(iv), not even for a case brought under section 8(c).<sup>135</sup> The CAC further held that the Competition Act is drafted in precise terms, in order to prove predation, the Commission or the complainant must prove that the respondent was a dominant firm involved in selling goods or services below their "marginal or average variable cost". With the proposed amendment to section 8(d)(iv) of the Competition Act prohibiting a dominant firm to "sell goods and services at predatory prices", it is yet to be determined how the competition authorities will approach the conundrum of average total cost vis-à-vis an average variable cost.

The complainant is required to establish that the dominant firms' conduct produces an anti-competitive effect; however, the Competition Act does not stipulate how long a dominant

<sup>131</sup> *Ibid* at 689.

<sup>132</sup> Average variable cost is calculated by the sum of all variable costs divided by the output.

<sup>133</sup> Case 92/IR/Oct00 [reported at [2000] CPLR 230 (CT) at para [102], also see *Media 24 (Pty) Ltd v Competition Commission* [2018] 1 CPLR 56 (CAC) at para 45.

<sup>134</sup> *Competition Commission v Media 24 Ltd* [2015] 2 CPLR 409 (CT) para 91 the tribunal held that average total costs "includes fixed, variable and sunk costs. Nor is the test premised on whether costs are classified as avoidable or not during the period they are assumed to be included." *Competition Commission v Media 24 Ltd* [2015] 2 CPLR 409 (CT) para 221.

<sup>135</sup> *Media24 (Pty) Ltd v Competition Commission* (2018) 1 CPLR 56 (CAC) 60 (3) para 55.

firm must have priced its goods or services below cost. The Tribunal has indicated that the pricing conduct should have been over a sustained period of time and that the conduct should not have been a once-off occurrence or occurred over a limited period of time.<sup>136</sup> This view is consistent with the nature of the exclusionary conduct which entails a gradual suffocation of rivals, as is also illustrated by the fact that the anti-competitive conduct in the *Media24 case* occurred over a period of 5 years. The theory of predation is mindful of the fact that a dominant firm is entitled to compete as vigorously as it wants to, but the difficulty is when that conduct relies on an anti-competitive dividend attributable to the exclusion of an equally efficient rivals(s). Moreover, it is acceptable that in certain markets, where the method of commercialising the price yet to be implemented, that low prices, even as low as zero, may be acceptable, so long as the conduct is not motivated by the desire to exclude rivals, which might be the case with Uber and other similar disruptive technologies. The Tribunal found that, in the *Media24 case*, Media 24's actions had an anti-competitive effect and that there was no evidence of any pro-competitive gain which would outweigh this effect.<sup>137</sup>

In the seminal *SAA case*<sup>138</sup> the Tribunal was faced with the question of what constitutes anti-competitive conduct under the Competition Act. In the *SAA case* the South African Airways (“SAA”) had implemented an incentives scheme for travel agents in terms of which the travel agents would receive a basic commission on sales and thereafter an override commission on sales above certain targets. The override commission was paid on *all* sales, in addition, travel agents were incentivised with incremental commission wherein which they would receive commission upon reaching individually determined sales targets.<sup>139</sup> The Tribunal held that SAA was presumptively a dominant firm in the purchase of domestic airline ticket sales, in that its share in that market exceeded 45%<sup>140</sup>. The Tribunal held that if conduct falls within the ambit of section 8(d), as described in (i)-(v), it is presumed to be exclusionary<sup>141</sup>. The next step is to determine whether the exclusionary act has an anti-competitive effect. The Tribunal held that it will make such a finding if the complainant can satisfy one of two requirements. Firstly, where there is evidence of “actual harm to consumer welfare.”<sup>142</sup> By way of example reference was made to consumers paying more for domestic airline tickets than they would but for conduct in question. The second requirement is, if the exclusionary act is “substantial or significant in terms of its effect in foreclosing the market to rivals.” The Tribunal held that this requirement is partly factual and “partly based on reasonable inferences drawn from proven facts”.<sup>143</sup> In other words, the Tribunal found that it is possible to infer anti-competitive effect where foreclosure can be established. Finally, the Tribunal held that an exclusionary act is different from anti-competitive effect. It explained that an

<sup>136</sup> *Nationwide Airlines and Others v South African Airlines (Pty) Ltd* [1999 - 2000] CPLR 230 (CT) para 238.

<sup>137</sup> *Media24 (Pty) Ltd v Competition Commission* (2018) 1 CPLR 56 (CAC) 60 (4).

<sup>138</sup> *Nationwide Airlines and Others v South African Airlines (Pty) Ltd* [1999 - 2000] CPLR 230 (CT) para 238.

<sup>139</sup> *Competition Commission v South African Airways (Pty) Ltd* (18/CR/Mar01) [2005] ZACT 50 para 21

<sup>140</sup> Section 7 of the Competition Act

<sup>141</sup> *SAA Case* para 132.

<sup>142</sup> *SAA Case* para 132.

<sup>143</sup> *SAA Case* para 132.

exclusionary act assists in guiding the analysis of anti-competitive effects as the word “anti-competitive” has a characterising function, as it signals the intention of the legislature to view competition harm as structural as opposed to a test of abuse of dominance that is based solely on consumer harm.<sup>144</sup> The SAA case shaped the law on the approach to exclusionary conduct as regulated under the Competition Act by the Commission.

Once a complainant is successful in proving that the complainant engaged in conduct that falls within the scope of section 8(d)(i) – (v), and that such conduct produces an anti-competitive effect,<sup>145</sup> the dominant firm is required, in terms of section 8(d) of the Competition Act, to show any efficiency justifications that outweigh its anti-competitive conduct. The burden of proof lies with the respondent i.e. the party against whom the complaint is brought.<sup>146</sup> In theory, the complainant will be successful if the respondent does not lead evidence on the technological, efficiency or other pro-competitive gains. However, in practice the respondent will more often than not attempt to show that the conduct complained of gave rise to such gains. Efficiency justifications must have a direct link to, or be dependent upon, the anti-competitive conduct in question. The test is, that the anti-competitive conduct is a *sine qua non* of the efficiencies and that the gains could not otherwise be achieved, but for the anti-competitive conduct.<sup>147</sup> In circumstances where efficiency justifications have been raised competition authorities have to engage in a balancing exercise by weighing the anti-competitive effect of the conduct with the alleged gains. Sutherland and Kemp indicate that these effects and gains are qualitative concepts and cannot be susceptible to precise measurement or comparison with each other - the weighing exercise is similar to a proportionality test.<sup>148</sup> Where on the balance of probabilities it is unclear whether the efficiency justifications outweigh the anticompetitive effect or *vica versa* the respondent will lose the case under section 8(d).

In weighing the competitive gains against the associated anti-competitive effects, the European Court of Justice (“ECJ”) in *British Airways v EC Commission*<sup>149</sup> held that, were a dominant firm raises a justification for conduct under Article 102 of the Treaty on the Functioning of the EU (“TFEU”), where an exclusionary conduct is disadvantageous for competition, it may be counterbalanced or outweighed by advantages in terms of efficiency. This may benefit the consumer. However, if there is no relation to advantages for the market

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<sup>144</sup> *Ibid.*

<sup>145</sup> The conduct set out in sections 8(d)-(v) is presumed to be anti-competitive (but not per se anti-competitive). Complainant must prove that the conduct in question produces an anti-competitive effect.

<sup>146</sup> The situation is different under section 8(c), the complainant must prove that the conduct in question is anti-competitive. The respondent bears the evidential burden to raise any claimed efficiency justifications, however the complainant bears the overall onus of proving that anti-competitive effect outweighs any efficiencies claimed by the respondent. Under section 8(d) the respondent must prove that the conduct produces efficiency justifications to outweigh the proven anti-competitive effect.

<sup>147</sup> *Patensie Sitrus Beherend Beperk v Competition Commission and Others* [2003] 2 CPLR 247 (CAC), at para 266.

<sup>148</sup> Sutherland & Kemp, (eds) *Competition Law in South Africa* (2000).

<sup>149</sup> 2007 ECR I-2331 para 86.

or the consumer, or if it goes beyond what is deemed to be necessary in order to attain those advantages, that system may be regarded as abuse.<sup>150</sup>

The European Commission (“EC”) has issued guidelines<sup>151</sup> which propose a four step test for assessing the efficiency defence which, in the South African context, having regard to the various emerging business developments, might be useful in expanding how competition authorities deal with such efficiency justifications. Step one: do the efficiencies result from the conduct in question? Step two: if yes, is the conduct indispensable to the realisation of the efficiencies?<sup>152</sup> Step three: if yes, do the efficiencies outweigh any negative effects on competition and consumer welfare in the markets affected by the conduct? Step four: finally, does the conduct eliminate all the effective competition in the market? The EC has indicated that exclusionary conduct which ‘maintains, creates or strengthens a market position approaching that of a monopoly’ can ordinarily not be justified on the basis of the proven efficiencies.<sup>153</sup>

Notwithstanding anything that the Tribunal and CAC have canvassed in their judgments in respect of the efficiency justification, South African authorities are yet to provide guidance on how claimed efficiency justifications will be treated under section 8(1)(d) and (c). As stated above, anti-competitive conduct must be *sine qua non* for the alleged efficiency justifications and the efficiency must be weighed against the effect of that conduct.<sup>154</sup> However an important question that remains is for example, what occurs in situations where the efficiency gains arise in a market different to that in which the anti-competitive conduct occurs? This may very well be the case in the Uber versus metered taxi conundrum, as Uber alleges that they are not competing in the public passenger transport taxi market. In other words, Uber alleges that its services are different from that of metered taxis and as a consequence of that allegation metered taxi alleges that they are suffering the prejudice of Uber’s conduct. Therefore a question for competition authorities is how they will weigh, on a balance of probabilities, whether or not Uber is firstly, engaging in anti-competitive conduct when it claims that it is not offering a taxi service. Second, it will have to be considered whether or not Uber is indeed a taxi service? The fact of the matter is that metered taxis are experiencing the ramifications of Uber’s conduct in the public passenger taxi service market. Finally if Uber can successfully raise efficiency justifications in a market that it does not operate in what will be the effect of that line of thought? The Competition Act is silent on this eventuality. However with the current amendments to the Competition Act and as case law develops, these questions remain to be answered.

<sup>150</sup> [2007] ECR I-2331 para 86.

<sup>151</sup> Guidance on the Commission’s enforcement priorities in applying Article 102 of the European Commission Treaty to abusive exclusionary conduct by dominant undertakings’ (2009/C 45/02) Official Journal of the European Union. [Online] Available: [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224(01)) [accessed 27 May 2019].

<sup>152</sup> That is the *sine qua non* test applied by the CAC supra 45.

<sup>153</sup> Kelly & Unterhalter (eds) (2016) 139.

<sup>154</sup> *Patensie Sitrus Beherend Beperk v Competition Commission and Others* [2003] 2 CPLR 247 (CAC), at para 266.

Pro-competitive gains of below cost pricing might include short run promotional pricing, which is in line with the Tribunal's view that low prices should be for a limited period of time. This is achieved by using the spare capacity in economic downturn, product obsolescence, the introduction of new products, or introduction of using old products in a new, different an innovative way.<sup>155</sup> One could argue that where there is a new entry into a market which is unable to sustain further entry, or where an entrant adopts a business model that is unsustainable, the inefficient entrant forces incumbents to price below average variable cost. In Uber's case, it is submitted that it is the incumbents, namely the meter taxis that are unable to sustain their existence in the market due to their own inefficiencies. Uber as a new entrant has been innovative and its innovation may cause, if not already caused, other similar products in the market to become obsolete.

There are sound reasons for adopting the approach by the EU by limiting the efficiency gains to the market in which the anti-competitive conduct materialises. The efficiency gains mitigate the harmful effects of anti-competitive conduct and could properly be said to do so if the amelioration occurs in the same market in which the anti-competitive effects are felt. Perhaps the competition authorities considered this point as an aggravating consideration for not prosecuting Uber. Uber is a disruptive innovation as it functions in the same way as metered taxis, in all material respects, including the fact that they both perform the same function by providing rides to consumers and, according to the Commission operates in the same market.

Business enterprises that are found to be anti-competitive should indeed be dealt with by the Commission and other competition authorities. The enforcement of section 8 of the Competition Act is complicated and it goes without saying that the law must be calibrated carefully so as not to catch conduct that is benign, or worse, pro-competitive, but also to make provision for anti-competitive conduct to be correctly prosecuted. The Commission found that the Uber or Uber "driver-partners" were not charging prices below cost in any of the cities that Uber operated.<sup>156</sup> The Commission consequently did not refer the complaint to the Competition Tribunal for adjudication. However, the Commission took the view that to engage with the relevant regulators of the transport industry would yield better outcomes for the parties involved.<sup>157</sup>

### 1.16 The Market inquires

The Commission is an independent institution that is subject to the Constitution of the Republic of South Africa, 1996 ("the Constitution") and according to the law it is impartial and must perform its duties without any fear, favour or prejudice.<sup>158</sup> Section 21 of the

<sup>155</sup> Forrester "Disruptive Innovation and implications for competition policy" *EUI Working Paper law* 2018.

<sup>156</sup> Prepared for the OECD Discussions on the "WP2 Roundtable on taxis, ride sourcing and ride sharing services" submission by the Competition Commission, April 2018 para 6 – 7. "In addition, the CCSA will, upon completion of the inquiry, publish the report in the Government Gazette and submit to the Minister of Economic Development Department ("EDD") with or without recommendations" Section 43C(1) of the Competition Act.

<sup>157</sup> *Ibid.*

<sup>158</sup> Section 21 of the Competition Act.

Competition Act provides for the functions of the Commission. The Commission is responsible, *inter alia*, to implement measures and evaluate alleged contraventions under Chapter 2 of the Act, to participate in proceedings of any regulatory body and to advise and receive advice from any regulatory authority.

The Commission may, acting within its section 21 functions and on its own initiative, or in response to a request from the Minister, conduct a market inquiry if it has reason to believe that any feature, or a combination of features of a market for any goods and services prevents, distorts or restricts competition within that market, or to achieve the purpose of the Act.<sup>159</sup> A market inquiry by definition refers to a formal inquiry in respect of the general state of competition in a particular market for particular goods and services, without necessarily referring to the specific conduct or activities of any particular named firm.<sup>160</sup>

When initiating a market inquiry the Commission is required to publish a notice in the *Government Gazette*. The notice must set out the terms of reference for the inquiry, which includes an explanation of the market that is the subject of the inquiry. The Commission must call for members of the public to provide it with relevant information.<sup>161</sup> The terms of reference must be clearly set out, in order to provide those who are affected by the inquiry an opportunity to make submissions on issues raised in the market inquiry.<sup>162</sup> Section 43B (3) expressly provides that the Commission may conduct an inquiry in “any manner” but provides, expressly that this is subject to the application of specific provisions of the Competition Act which regulate the powers of the Commission. When the Commission conducts a market inquiry its powers are more constrained than when it conducts an investigation into a prohibited practice. By way of example, in terms of section 43B (3)(b) of the Competition Act, the Commission is unable to invoke the provisions of section 46 to 49, which empowers the Commission to enter into and search the premises. However, the Commission is entitled to issue summonses pursuant to section 49A, which includes the power to direct a person appearing before the Commission to produce documentation in their possession that may be relevant to the market inquiry. It was clearly the intention of the legislature that market inquiries follow an inclusive public participation process. This assists the inquiry to ensure that it has at its disposal as much relevant information concerning the competition dynamics of the market as possible.<sup>163</sup>

Upon completion of the market inquiry, the Commission must publish a report of the inquiry and submit it to the Minister of Economic Development and Trade and Industry,<sup>164</sup> with or without recommendations. These recommendations may include but are not limited to

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<sup>159</sup> Section 43B of the Competition Act.

<sup>160</sup> Section 43A of the Act, a ‘Market Inquiry’ also refers to the general research into the state, form and nature of competition in a market, rather than the narrow investigation of a specific conduct by a particular firm.

<sup>161</sup> Section 43B(2) of the Competition Act.

<sup>162</sup> Section 43B(4) provides that “*at minimum*” the terms of reference must spell out the scope of the inquiry and the time period within which it will be completed.

<sup>163</sup> Section 43B(3)(d) makes Section 54(b),(e) and (f) of the Competition Act are applicable to market inquiries, which empower the person presiding over the inquiry to accept submissions from any participant in the inquiry.

<sup>164</sup> Honourable MP Ebrahim Patel as at June 2019.

recommendations for new or amended policy, legislation and recommendations to other regulatory authorities in respect of competition matters. The report must be published in the *Government Gazette*.<sup>165</sup> It is the Minister's responsibility to place the report before a committee of the National Assembly. By way of explanation, the Commission does not have the powers to make any structural changes to the particular market that is the subject of its investigation.<sup>166</sup> In other words, the role of the Commission is to identify aspects of the market that may result in the restriction or distortion of competition and make recommendations to, if it chooses to do so, the Minister to enable the legislature to take the necessary steps to make the market more competitive<sup>167</sup> and level the playing field for future and incumbent firms. It remains to be seen to what extent the parties will be able to challenge the outcome of a market inquiry. It is yet to be determined whether the Commission's reports may be taken on review and if so, whether it is reviewable under the Promotion of Administration Justice Act,<sup>168</sup> or in terms of the principles of legality.<sup>169</sup> In the Supreme Court of Appeal the court held that parties are entitled to a hearing when hearing procedures before the Tribunal commence and that the function of the Commission is to investigate and therefore not subject to a review procedure.<sup>170</sup> This principle should not apply in the context of market inquiries, although they may arise in matters being referred to the Tribunal, they culminate in a report containing recommendations intended to form the basis of policy interventions of the State. It is therefore, for this reason that procedural fairness must be observed during market inquiries, as opposed to at the end of the process or prior to any recommendations being acted upon.<sup>171</sup>

### 1.17 **The Competition Commission's public passenger transport market inquiry**

Since 2009 the Commission has received a number of complaints in the land-based public passenger transport industry. The majority of the complaints related to excessive pricing within the industry, with specific reference to taxis. As a case in point, one of the earlier complaints related to Sisonke Taxi Association which operated taxi and shuttle services from Oliver Reginald Tambo International Airport ("O.R Tambo") to various drop off points. The Sisonke Taxi Association alleged that the Airport Company of South Africa was involved in prohibited practices under Chapter 2 of the Act, by denying them entry into the market to render transport services to customers to and from the O.R Tambo in direct competition with the Johannesburg International Airport Association. The Commission investigated the complaint and after completion of its investigation, referred the matter to the Tribunal for

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<sup>165</sup> Section 43C(1)(a)-(b).

<sup>166</sup> Kelly & Unterhalter (eds) *Principles of competition law in South Africa* (2016) 256.

<sup>167</sup> *Supra*.

<sup>168</sup> Act 3 of 2000.

<sup>169</sup> Kelly & Unterhalter *Principles of competition law in South Africa* (2016) 257.

<sup>170</sup> *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd* 2003(3) SA 64 (SCA).

<sup>171</sup> Kelly & Unterhalter *Principles of competition law in South Africa* (2016) 258.

adjudication, however, the Airport Company of South Africa reached a settlement agreement with the Commission to ensure that the market is open for other operators.<sup>172</sup>

This type of tug-of-war and tension in the land-based public passenger transport industry is what has compelled the Commission to conduct a market inquiry. Exercising its powers and in accordance with its function in terms of the Competition Act, the Commission embarked on this investigation into the land-based public passenger transport industry. The Commission believes that there are features, or a combination of features, in the industry that prevent, distort or restrict competition and to further achieve the purpose of the Act. As such, the market inquiry is aimed at determining whether there is sufficient and effective competition within the land based public passenger transport sector.<sup>173</sup>

### 1.18 The scope of the inquiry

The purpose of the market inquiry is to explore the general state of competition in the industry and highlight any discrepancies in and impediments to competition, including but not limited to, any regulations or legislation that may have an adverse effect on competition in the market.<sup>174</sup> The market inquiry focuses on aspects of competition such as price setting mechanisms for different public transport modes and the impact of changing the regulations.<sup>175</sup> The Commission has identified the fundamental modes of public transport to include minibus taxis, localised taxis, metered taxis, “app-based” taxi services, Metrorail, Gautrain and busses (collectively, as a market, referred to as “land based public passenger transport”). The Commission acknowledges that providing meaningful public transportation to the majority of the population of South Africa is essential in pursuit of economic participation.<sup>176</sup>

The market inquiry commenced in June 2017 and in accordance with the provisions of the Competition Act the Commission published the terms of reference, which broadly sets out the themes to be considered by the inquiry. The inquiry analyses the different price setting mechanisms, examines applicable price regulations, and investigates route allocation, licensing and entry regulations. It assesses the impact of operational subsidies granted to commuter busses, Metrorail, Gautrain, it further evaluates the impact of government’s

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<sup>172</sup> *Competition Commission v Airports Company South Africa Ltd* [2013] Consent Agreement Between The Competition Commission And Airport Company South Africa Ltd In Respect Of Contravention Of Section 5(1) Of The Competition Act, 1998 (Act No. 89 Of 1998), as Amended specifically provides that : “*This consent agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and ACSA relating to any alleged contravention of the Act that is the subject of the Commission’s investigation under Commission Case No. 2009Mar4320.*”

<sup>173</sup> *Competition Commission South Africa Public Passenger Transport Market Inquiry Terms of Reference 10 May 2017 No 40837.*

<sup>174</sup> Statement of Issues Competition Commission’s Statement of Issues, 25 April 2018.

<sup>175</sup> *Competition Commission South Africa Public Passenger Transport Market Inquiry Terms of Reference 10 May 2017 No 40837.*

<sup>176</sup> *Ibid*, paragraph 3.

transport plans on dynamism, efficiency and competition in the land based public passenger transport industry and their impact on competition in the market.<sup>177</sup>

The term of reference further acknowledge the emergence of Uber in South Africa and defines a “disruptive technology (innovation)” to mean an innovation that creates a new market and value network and eventually disrupts an existing market and value network, displacing established market leading firms, products and/or alliances.<sup>178</sup> It further defines “App-based taxi” to mean a taxi that uses technology platforms to connect an independent driver to a rider through software technology.<sup>179</sup> The inquiry is a response to the significant change in the offerings of transport services in South Africa, accepting the resistance from metered taxi providers who argue that Uber is not subjected to regulation in the same way as metered taxis. The Commission understands that there has, in addition to Uber, been an emergence of three wheeled vehicles, known as “tuk-tuks”.<sup>180</sup> A tuk-tuk operates mainly within a stipulated radius of designated area within the metropolitan area. Tuk-tuks have been very popular among consumers in the central business district of Sandton and in the metropolitan of the City of Johannesburg. It appears that there are a number of companies offering tuk-tuk services such as etuktuk, Commuta-X with officially issued permits from the Department of Transport.<sup>181</sup>

#### 1.19 **Licensing, route allocation and entry regulations**

The NLTA requires minibus taxis and metered taxis to be issued with certain operating licences before they can provide transport services to consumers. The issuing of operating licences to operators within the transport industry is the function of the Provincial Regulatory Entity in circumstances where the powers are not assigned to municipalities in terms of sections 54(1), 11(2) and 24 of the NLTA. Municipalities on the other hand are transport planning authorities responsible for the implementation of integrated transport plans. Whilst municipalities do not issue operating licences, they make a recommendation to the Provincial Regulatory Entity to either approve or not approve the operating licences. As is often the case with public service entities, municipalities take time to issues their recommendations to the Provincial Regulatory Entity and this results in a backlog of applications and a number of metered taxi operators to be on the road illegally. The misalignment of functions is of great

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<sup>177</sup> At the time of drafting this dissertation the inquiry was still in the process of gathering information and thus there have been no settled views or published reports on the information gathered at the inquiry. The information gathering process is concerned with gathering evidence on the market dynamics in the sector and to understand the impact of the regulatory legal framework on competition. During the information gathering phase, the following milestones were achieved: issuing call for submissions; releasing guidelines for stakeholder participation; targeted information requests; field investigations, stakeholder engagements across all provinces. Stakeholder engagements will continue until the finalization of the Inquiry. This phase will also guide requests for any additional information and clarity that the Inquiry requires as it enters the public hearings phase. Competition Commission’s *Statement of Issues, 25 April 2018*.

<sup>178</sup> Section 1.1.6 of the Terms of Reference.

<sup>179</sup> Section 1.1.1 of the Terms of Reference.

<sup>180</sup> In terms of Section 1.1.19 of the Terms of Reference “a three wheeled vehicle designed or modified solely or principally for transporting not more than three seated persons including the driver”.

<sup>181</sup> <http://www.e-tuktuk.co.za/index.php/about-us/>; <http://www.commutax.co.za/> & <http://www.focusontransport.co.za/features/1314-take-a-tuk> [accessed on 20 February 2019].

concern in the coordination of public passenger transportation while municipalities have been committed to implementing the Integrated Transport Plan for different modes of transportation. However this attempt may prove to be challenging as the implementation responsibility of the Integrated Transport Plan is largely the responsibility of municipalities and the issuing of the licencing function rests with provincial government, as such integration will not be adequately realised by the different levels of government. This is due to the misalignment of functions and lack of cooperation and co-ordination between the implementers of the Integrated Transport Plan.<sup>182</sup>

A number of municipalities do not have the capacity to make recommendations in respect of the operating licences to the Provincial Regulatory Entity or the capacity to do the Integrated Transport Plan. In such instances the Provincial Regulatory Entity issues licences without the consideration of the Integrated Transport Plan and this results in routes being traded excessively and inappropriate infrastructure being put in place by municipalities. When making its recommendation to the Provincial Regulatory Entity, the municipality is required to assess whether there is a need for public transport for a particular route based on its Integrated Transport Plans and each process followed for route allocation differs significantly depending on the mode of transportation. Route allocation is largely dependent upon new developments such as malls, housing complexes. When a new route has been identified, the municipality will hold consultations with the taxi associations that have been operating in the area, or alternatively, taxi operators approach the municipality or the taxi association that is closer to the new route before the route is registered.<sup>183</sup> However, in practice both the municipality and the Provincial Regulatory Entity are not aware of the existence of these new routes and the taxi operators develop the routes based on the needs identified. In reality taxi operators deviate from the routes specified in the operating license to respond to demand as a result of a new development.<sup>184</sup>

### 1.20 Concerns raised through the public participation process

Submissions by the metered taxis indicate that the metered taxi industry allege that the absence of regulatory scrutiny on e-hailing services creates an uneven competitive environment among metered taxis and e-hailing services. This allegation by the metered taxi industry is premised on the lack of regulatory provision for e-hailing services such as Taxify and Uber in that they are not required to incur costs for operating licences and are not limited to designated areas of ranking facilities, such as route allocation. The proposed amendment to section 66<sup>185</sup> of the NLTA will *prima facie* put an end to the metered taxis complaints and concerns.

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<sup>182</sup> Statement of Issues (2018), paragraph 16.

<sup>183</sup> Statement of Issues (2018) paragraph 21.

<sup>184</sup> Statement of Issues (2018) paragraph 20.4.

<sup>185</sup> The new Section 66A of the NLTA Bill proposes to place the e-hailing services on the same footing as that of metered taxis with regard to the allegations by metered taxis.

In its submissions,<sup>186</sup> Taxify alleges that the metered taxis basis for such complaints is unfounded and baseless for the reasons relating to the metered taxis not having the media and technology that is convenient for customers. The proposed amendments to the NLTA do not address this inefficiency by metered taxis.<sup>187</sup> The limitation which amounts to specification for areas of picking up commuters and limiting the routes, as proposed by the amendments effectively inhibits fair competition and has the potential to deter development of the economy, entrepreneurship, empowerment and transformation. However, the proposed amendments do pose a significant risk of creating conflict should the same area be designated at which traditional metered taxis would operate from.

Taxify argues that even if such areas are designated such areas would be identified or identifiable and so too e-hailing drivers, placing them and the commuters at risk of irrational, unreasonable and deadly violence from the metered taxi operators or drivers.<sup>188</sup> Should the designated areas or routes be allocated to e-hailing services, South African commuters would be severally prejudiced and South Africa will be hindered in its progression to develop along with the rest of the world, to its own economic prejudice. These routes will create an artificial distortion in the market that will be to the detriment of transformation, entrepreneurs and consumers. The lower-income consumers who already lack access to reliable and affordable public transport services will be prejudiced, notwithstanding the burden of the effects from the innate unequal apartheid spatial planning.<sup>189</sup>

The proposed regulation of e-hailing services will not create the supposed “*even competitive environment*” between traditional metered taxis and e-hailing services. An e-hailing service provides its services for a different market than metered taxis. E-hailing services are aimed at a higher income market, which includes persons with their own private modes of transportation or access thereto. It is the technological advancement, convenience and security that e-hailing services provide to public consumers which traditional metered taxis cannot do, therefore, it is for these reasons that the proposed regulatory framework will not address the metered taxis’ perceived concerns.<sup>190</sup>

The submissions from Taxify indicates that it welcomes the enabling regulations that will entrench an equal playing field though the requirement of operating licences to be issued to independent/owners, however the legislature must have regard to the safety of the drivers and consumers by instilling a process of background checks. The fourth industrial revolution<sup>191</sup> is

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<sup>186</sup> Taxify’s submissions in assisting its oral submissions for public hearings Re: Public Passenger Transport Market Inquiry 2017 May0001.

<sup>187</sup> *Ibid* para 8.

<sup>188</sup> *Ibid* para 9.

<sup>189</sup> *Ibid* para 10.

<sup>190</sup> *Ibid* para 11

<sup>191</sup> A term first coined by Klaus Schwab founder and executive of the World Economic Forum. HF Wei “Does Disruptive Innovation “Disrupt” Competition Law Enforcement: the Review and Reflection” (2016) also available at Devon McGinnis *What is the fourth industrial revolution?* <https://www.salesforce.com/blog/2018/12/what-is-the-fourth-industrial-revolution-4IR.html>

in a time where real time rating by consumers has been viewed as a better form of quality control, as it is more efficient and convenient for commuters.<sup>192</sup>

According to the timelines set out in the terms of reference the market inquiry is expected to be completed and a report submitted to the Minister of Trade and Industry in March 2020.<sup>193</sup> It is also possible that, during the course of the market inquiry, the Commission may uncover illegal conduct, in which case it may initiate a complaint and commence enforcement proceedings against a particular firm. The market inquiry comes at a time when the country is in dire need of a refurbishment of its public passenger transportation. The market inquiry is the government's attempt to enhance this industry, while the country faces an overwhelming number of young people moving into the working environment, the inquiry is welcomed and the results and referrals of the market inquiry will certainly ensure the government's ability to provide its youth with the opportunity to participate in the economy. Furthermore, the inquiry will enable appropriate and robust competition law application that will serve to improve competitiveness in the public passenger transport sector and derive benefits to consumers.<sup>194</sup> Additionally, this inquiry is a move toward the competition legislation finally aligning with the world's move towards the fourth industrial revolution.

### 1.21 Conclusion

This chapter goes to the crux of the legal challenges facing Uber and the challenges that competition authorities are faced with in the regulation of Uber and other similar disruptive innovations. Uber's precipitous ascent is attributable to amongst other things, its customer service; marketing strategies, convenience and safety standards. These are the things that make Uber appealing to its consumers and give it a competitive edge. The reason why Uber is so promising is not merely because it threatens to undermine the current order, but because it can expand the scope of regulation as an alternative to traditional metered taxis or mini-bus taxis. Uber can do this by solving the problems that markets have had in ensuring that information flows, and people live up to their promises of great services. Whether one admits this or not Uber is an alternative mode of transport and an appropriate substitute for the consumer. Uber has taken the predated concept of using a taxi cab and industrialised and modelled it to suit the world as it is today. Furthermore, and most importantly, the introduction of Uber and other similar apps can foster the healthy competition that is needed to get the most out of the land based public passenger transport market.

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<sup>192</sup> *Ibid.*

<sup>193</sup> *Competition Commission South Africa Public Passenger Transport Market Inquiry Terms of Reference September 2019 No 42725.* In terms of the amendment, the Market Inquiry will be completed by 31 March 2020. As such at the time of submission the market inquiry was embarking on its final phase.

<sup>194</sup> *Competition Commission South Africa Public Passenger Transport Market Inquiry Terms of Reference 10 May 2017 No 40837.*

## **Chapter IV – International Outlook**

### **1.22 Introduction**

The fourth industrial revolution has changed the landscape of the world; it is a world where individuals move between online domains and offline reality with the assistance of connected technology to manage their lives. This global shift towards a more online society has not only caused havoc in South Africa that is but a small drop in the ocean; it has caused an uproar in the entire legal system as we have come to know it. Naturally business people are optimistic about the fourth industrial revolution as this drives different economies, increases the gross domestic product of a specific country and is an opportunity for economic growth and entrepreneurship. Nevertheless, this fast-paced move towards a system of automation and artificial intelligence causes a regulatory nightmare for any law-making body.

Competition authorities play a significant role in shaping the inevitable transitions caused by disruptive innovations and the advancement of the industrial revolution. Their role is to advocate for regulatory responses that do not excessively restrain competition, by enforcing competition rules to ensure that incumbent firms do not foreclose new arrivals from entering the market – and that new arrivals play fair and competitively. The authorities do this through a process of using studies and market inquiries in understanding new technologies and alternative business models, in such a way that they are regulated so as to even out competition and create a spirit of fair competition within the various markets.

Throughout the history of the world technology has shaped different industries from light bulbs, to video games to portable video games and the use of laptops to iPads.. Innovation by a new entrant is inevitable and, more often than not, causes tension between the incumbent and the innovator in circumstances where the existing regulatory framework is based on a system that the innovator does not use. In instances of regulatory mismatch, innovators usually argue that they operate outside the regulatory framework and therefore are not subject to the existing statutory requirements or prohibitions – this is the basis of Uber’s contentions all over the world. Disruptive firms begin operating and providing services without complying with existing regulations and are thus perceived to have circumvented those requirements and prohibitions.

As canvassed in this dissertation, one of the principal criticisms of disruptive innovations, specifically Uber, is about whether its services are regulated by current legislation on vehicle licensing and, consequently, whether it is bound by the same standards as its competitors. In several countries around the world, it is unclear whether Uber can be considered as a taxi service and therefore be required to obey the same laws as a taxi service in that specific country. If not, there are concerns that this leads to unfair competition, undercutting regulated taxi services.

### **1.23 European Union**

Uber and technology companies have been under a lot of global scrutiny, particularly in the EU and have faced not only civil charges but also criminal charges against them. Uber’s

expansion to Europe began in London in 2012 and it has been rolled out to other English cities including Birmingham, Manchester and Leeds. In 2013, Uber began operating in Italy, Sweden and Germany. Since 2015 Uber has had offices in several major Italian cities and has operated in Stockholm since 2013 and in Gothenburg since 2014. In April 2014, UberPOP was introduced in Berlin, Hamburg and Frankfurt, allowing people to order a ‘ride from a private driver for less than the taxi fare’. Uber began operating in Barcelona in April 2014, expanding to Madrid in September and to Valencia a few weeks later. Uber has been present in Hungary since 2014, but only operates in Budapest.<sup>195</sup> In Finland, Uber launched its UberPOP and Uber Black services in November 2014 in Helsinki.<sup>196</sup> In every country in which it operates, Uber insists that it is not providing a taxi service but a technology service: an app used and paid for by drivers to offer services and get clients and used by customers to buy services.

In 2014 the Asociación Profesional Elite Taxi (“Elite Taxi”), a professional organisation representing taxi drivers in Barcelona, brought an action to the Commercial Court in Spain asking the court to, among other things, impose restrictions and penalties to Uber Spain – a company which is part of the Group managing the Uber platform – for engaging in unfair competition towards Elite Taxi drivers. Elite argued that Uber Spain is not entitled to provide a service in the city of Barcelona, as neither Uber nor the drivers concerned have the necessary licences and authorisations required under the city of Barcelona’s regulations on taxi services. The court held that an interpretation of several provisions of EU law was necessary to enable it to give a ruling, the court referred the matter to the Court of Justice concerning the classification of Uber’s activity in view of EU law and conclusions must be drawn from such a classification. The court held in the first instance that the licences and authorisations required by the city of Barcelona could be incompatible with the principle to provide services whilst in the second instance – Member States are in principle entitled to regulate Uber’s activity. The court took the view that it is for the national court to determine, while the service in question is provided partly by electronic means and the other part by definition is not.<sup>197</sup> Uber shut down its ride-sharing service after a judge ruled that Uber drivers are not legally authorised to transport passengers by unfairly competing against licensed taxi drivers.<sup>198</sup>

The Frankfurt Regional Court in Germany issued a temporary injunction against the ride sharing service, it held that Uber drivers are required the necessary commercial permits.<sup>199</sup>

<sup>195</sup> Adam Duncan - <https://www.eurofound.europa.eu/sv/publications/report/2016/eu-member-states/digitalisation-and-working-life-lessons-from-the-uber-cases-around-europe> [accessed 14 June 2019].

<sup>196</sup> <https://www.eurofound.europa.eu/sv/publications/report/2016/eu-member-states/digitalisation-and-working-life-lessons-from-the-uber-cases-around-europe> [accessed 14 June 2019].

<sup>197</sup> Court of Justice of the European Union Advocate General’s Opinion in Case C-434/15 *Asociacion Profesional Elite Taxi v Uber Systems Spain*, SL 11 May 2017.

<sup>198</sup> *Ibid*, the reference for a preliminary ruling is supported by Article 56 TFEU - Article 58(1) TFEU.

<sup>199</sup> <https://www.irishtimes.com/business/technology/frankfurt-court-bans-uber-taxi-services-across-germany-1.1915162> [accessed 22 November 2019] also see Cf. “Uber taxi app banned in Germany following court ruling”, available online: <https://www.euractiv.com/section/social-europe-jobs/news/uber-taxi-app-banned-in-germany-following-court-ruling/> [accessed 23 November 2019]. Cf. Julana: “Uber welcomes today’s Frankfurt court decision lifting the injunction brought by taxi

This decision potentially excludes the company from operating in cities across Germany. It is this decision, the court held Uber and UberPop are in violation of Germany's Passenger Transportation Act.<sup>200</sup> The court further held that Uber's network of drivers lacked the necessary commercial licenses to pick up passengers. However, the court noted that German law allows drivers to pick up passengers without a commercial license only if the driver charges no more than the operating cost of the trip. Uber was subsequently held liable and issued an injunction by the court. At a later stage the court lifted the ban on Uber stating that although the taxi driver's legal arguments were correct, the requirements needed for an emergency injunction were not fulfilled.<sup>201</sup>

#### 1.24 United States of America

Uber's current Chief Executive Officer (CEO), Dara Khosrowshahi ("Dara"), has admitted that Uber's escalating growth of market share in the transport industry has been accompanied by a culture of rule breaking. He explains that, "the culture went wrong" at Uber and "the governance of the company went wrong". Dara has assured the public that the company has changed its ways.<sup>202</sup> The USA District Court for the Northern District of California heard the matter between *Diva Limousine Ltd v Uber technologies Inc.* ("*Diva case*").<sup>203</sup> The court had to determine whether Uber was engaging in unfair competition under the Unfair Practices Act of California.

The court held that Uber had not changed its ways and that it was in violation of various California law. The court further held that California law places an obligation on business to comply with a wide range of protections for their employees, including payment of minimum wage, overtime unemployment insurance etc. Uber insists that its drivers are independent contractors and therefore they are exempt from providing these protections to its drivers as these protections are not a requirement for independent contractors.<sup>204</sup> By avoiding these costs Uber can charge lower prices. Uber's lower prices restrain other companies, in particular the plaintiff in the *Diva Case* from the market share – Uber further constrains Diva Limousine to increase its prices as this would increase its costs to fuel, wages and other

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incumbents", available online: <https://newsroom.uber.com/germany/uber-begrust-die-entscheidung-des-landgerichts-frankfurt-zur-aufhebung-der-einstweiligen-verfugung-gegen-uberpop-3/> [accessed 23 November 2019].

<sup>200</sup> Uber taxi app banned in Germany following court ruling <https://www.euractiv.com/section/social-europe-jobs/news/uber-taxi-app-banned-in-germany-following-court-ruling> [accessed 6 August 2019].

<sup>201</sup> Barainsky *Uber and Taxi Regulations – are Member States preserving a legal monopoly to the detriment of consumers?* (2016) 10.

<sup>202</sup> <https://gigeconomyresources.files.wordpress.com/2019/02/diva-limousine-v-uber.pdf> [accessed 7 August 2019] also see *Diva Limousine, Ltd. v. Uber Technologies, Inc.* <https://www.courtlistener.com/docket/7842285/1/diva-limousine-ltd-v-uber-technologies-inc/> [accessed 7 August 2019].

<sup>203</sup> Case 3:18-cv-05546 2018 <https://dockets.justia.com/docket/california/candce/3:2018cv05546/331828> [accessed 7 August 2019].

<sup>204</sup> Similar to South African labour and employment legislation.

expenses. Consequently Diva Limousine applied for an injunction to prohibit Uber from engaging in this unlawful manner.<sup>205</sup>

The court in the *Diva Case* held that Uber prices its rides below costs to cause harm to its competitors. The fact of the matter is that investors would not have invested in this multi-million company if it were to be on equal footing as ordinary metered taxis or the day to day hire transportation cars. Investors intended that Uber's purpose was to create a Goliath of customers in the millions and drive enough competitors out of the market so that it can later be positioned to charge higher prices.<sup>206</sup> This is the exact definition of the theory of harm discussed earlier in chapter 3 of this dissertation.<sup>207</sup> The court further held that Uber's prices have excluded Diva Limousine from the market as it has priced its rides at a cost that is far below the total costs attributable to those rides.

The USA Court of Appeals for the Second Circuit heard the case between *Spencer Meyer v Uber Technologies (Pty) Ltd* ("the Meyer case")<sup>208</sup> where a user of a technology company's car service smartphone application alleges that the company and its former chief executive engaged in illegal price fixing. The initial complaint was of antitrust violation did not include Uber as a defendant. In the original complaint the plaintiff, Mr Meyer and others similarly affected alleged a horizontal price fixing conspiracy among Uber drivers. The Southern District court of New York, however, found that the pleadings were sufficient enough to allege a hub-and spoke arrangement involving vertical agreements between Mr Kalanick in his capacity as CEO and the drivers.<sup>209</sup> The matter went on appeal and the Second Circuit court sent it back to the District Court to determine whether Uber waived its right to arbitrate the matter first. The *Meyer case* did not go to trial. Passaro however explains, as alluded to below, the arguments that might be advanced by the two parties, should the matter go to trial. These arguments are relevant in the context of alternative business models and antitrust laws.

A "hub and spoke" arrangement refers to a situation when a profitable firm (the hub) organises collusion or colludes in the upstream or downstream firms (the rim) by interacting and communicating with each rim individually (spokes), in an attempt to prevent its market share from shrinking or to maintain high profitability. This form of collusion involves the vertical agreements between the hub and the rim firms and an implied horizontal agreement among the rim firms.<sup>210</sup>

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<sup>205</sup> Case No. 18-cv-05546-EMC (N.D. Cal. Jan. 9, 2019).

<sup>206</sup> <https://gigeconomyresources.files.wordpress.com/2019/02/diva-limousine-v-uber.pdf> also <https://www.courtlistener.com/docket/7842285/1/diva-limousine-ltd-v-uber-technologies-inc/> [accessed 7 August 2019].

<sup>207</sup> Under the heading "Dominant firms engaging in prohibited practices".

<sup>208</sup> *Meyer v. Kalanick*, 291 F. Supp. 3d 526.

<sup>209</sup> Passaro *How Meyer v. Uber could demonstrate that Uber and the sharing economy fit into antitrust law* Michigan Business & Entrepreneurial Law Review 7 (2018) 258.

<sup>210</sup> *Ibid* 265.

The law on hub and spoke arrangements has been widely developed in USA antitrust law.<sup>211</sup> Anti-competitive evidence of hub and spoke arrangements is in the communication between the hub and the rim. Despite the fact that the case has not been adjudicated, in relation to the evidence presented in the *Meyer case* the plaintiff's will possibly argue a hub and spoke arrangement between Uber and its drivers. They will further argue that Uber orchestrates a price fixing scheme among the drivers by making the drivers' continued use of its app dependent on agreeing to its pricing structure.<sup>212</sup> The theory attempts to compare Uber's conduct to that of a typical hub and spoke arrangement by implying that Uber is reaching out to all its prospective drivers with a deal involving anti-competitive price fixing, where the drivers are compelled to accept the deal if they wish be Uber drivers.<sup>213</sup> This argument is likely to succeed as Uber is trying to maintain high prices; whereas if drivers competed on price, prices would likely decrease leading to a decline in Uber's commercial profits.<sup>214</sup>

In response to the plaintiff's arguments Passaro posits that Uber will likely put forward evidence that alludes to the fact that the perceived coercion and invitation to accept to be a driver is merely a necessary feature of its product. Part of Uber's product which is also a key fundamental part of the innovation of the business model is the fact that Uber provides a logical pricing structure which changes in relation to the demand on a particular day. In addition, Uber will likely argue that the agreement between it and its drivers has nothing to do with competing firms the reality is Uber is not trying to maintain high prices in response to a competitor looking to lower them.<sup>215</sup> This is in, my opinion, a stretch of the imagination, to conceive that Uber has been involved in vertical and horizontal agreements that constitute a hub and spoke arrangement. It is also unfortunate that the *Meyer case* has been remitted to arbitration and we will have to await the judgement should it eventually be taken to trial.

### 1.25 Conclusion

In conclusion regulations commonly used by national governments on taxi business involve: licensing entry on the market – this involves limiting the number of operators in the specific area and the financial responsibilities for the companies to ensure their cars this measure is intended to adhere to safety regulations for passengers as insurance may incentivise drivers and companies to properly ensure the safety of their vehicles. These are legitimate public policy reasons as opposed to economic ones. These regulations commonly imposed on the public taxi market have legitimacy and justification and are not created to prevent innovative services, such as Uber, or any other alternative business model from entering the market.

The regulation of any economic activity should be flexible enough to accommodate all developments of supply and demand that are in the public interest, such as economic growth,

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<sup>211</sup> See Richard A. Givens, Parallel Business Conduct under the Sherman Act, 5 antitrust bull 271, 277 (1960). *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), *Toys "R" Us Inc v. FTC*, 221 F.3d 928 (7th Cir. 2000) also See *In re Toys "R" Us Inc*, 126 F.T.C. 415, 420 (1998).

<sup>212</sup> N Passaro *How Meyer v. Uber Could Demonstrate That Uber and the Sharing Economy Fit into Antitrust Law* Michigan Business & Entrepreneurial Law Review 7 (2018) 258.

<sup>213</sup> *Ibid* 268.

<sup>214</sup> *Ibid*.

<sup>215</sup> *Ibid* .

in that specific country. As indicated by Barainsky, a flexible regulatory structure which accommodates innovative business models is in the public interest. It is imperative that competition guidelines and regulations, even if they are used to serve or still are serving legitimate purposes do not prevent innovations from emerging as these innovations could benefit the costumers, the market and, the society in general.<sup>216</sup>

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<sup>216</sup> Barainsky *Uber and taxi regulations – are Member States preserving a legal monopoly to the detriment of consumers?* (2016) 13.

## Chapter V – Recommendations and Conclusion

The most essential challenge facing regulatory bodies today is how to understand and shape the new technology revolution. The fourth industrial revolution captures the idea of the confluence of new technologies and their cumulative impact in our world and the regulation of such new technologies. The questions that I have attempted to explore is whether disruptive innovations in the realm of the current fourth industrial revolution pose a threat to current competition in the different markets, and specifically whether Uber is infringing on any competition regulations and if not, whether it is possible that in future Uber may prove to be problematic for the South African competition authorities? In this dissertation I have critically engaged in the notion of disruptive innovations and traversed the topic of whether the relationship Uber has with its customers and drivers, and the Uber business model as a whole, contravenes any section of Chapter Two of the Competition Act. Without a successful referral to the Commission leading the Commission to investigate this issue, we are yet to find out whether Uber has in fact contravened competition law in South Africa.

In my opinion Uber certainly qualifies as a disruptive business model and most certainly poses a threat to current competition legislation. In particular this kind of business model poses a threat to incumbent competitors in respect of issues such as; predatory pricing and abuse of dominance as dealt with in chapter three. The role of competition authorities is to venture out of their comfort zones and re-examine their assumptions justifying existing competition principles in respect of new disruptive innovator entrants in a particular given market and to develop competition principles in practice so as to accommodate the exponential escalation of such new technologies. To truly understand the effects of innovation within a market, a thorough investigation by the competition agencies into the effects of such innovative products on consumers and competitors at all levels of the supply chain must be undertaken. It would therefore be within the competency of the competition agencies, ideally the Commission, to carry out a complete market inquiry into the land transportation industry.<sup>217</sup> Which the Commission is in the process of doing and the results of that inquiry will regulate these types of transportation innovations moving forward.

The role of the regulator is not to maintain a fair balance of competition, or to maintain the competitive edge of one firm over another as such it should thus be kept in mind that competition law protects competition, not competitors.<sup>218</sup> If a firm is outdone by a more efficient, innovative and aggressive rival, it is good for consumers – that is the essence of competition itself. If Uber wins in the public passenger transport market, it should win fairly, not because it is not regulated by any competition rules, as such an advantageous competitive edge would be unfair and to the detriment of other similar competitors within the same market.<sup>219</sup> However, it is not the duty of competition authorities to unjustifiably curtail the entry of new technologies. This is the age old philosophical dilemma of society developing

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<sup>217</sup> N Ndlovu “Uber v metered Taxis: A competition Issue or a regulatory Nightmare” at p9-10 Competition Tribunal 2015.

<sup>218</sup> *Nationwide Poles v Sasol (Oil) Pty Ltd (72/CR/Dec03)* [2005] ZACT 17.

<sup>219</sup> McKenzie & Harten “Is Uber’s pricing predatory” *Without Prejudice* (September 2015) p6

faster than what the law can handle, as society changes, i.e. moving towards the fourth industrial revolution, so too must the laws governing various aspects of society change.

It goes without saying that there are various gains and disadvantages of disruptive innovations from a competition perspective, but the shortcomings of competition regulation in South Africa in respect of disruptive innovations pose a challenge to not only South Africa, but jurisdictions around the world. Innovative business models such as Uber have notably affected the transportation market in many cities around the world. On the one hand, since the law regulates taxis' tariffs, the entry of the above digital rivals has pushed traditional taxis to improve the quality of their services and in addition, these new operators provide a reliable and affordable transportation option, serving neglected areas and contributing to the employment of various members of the unemployed youth in South Africa.

It is thus submitted that government and competition authorities should collaborate to enable the providers of traditional transportation services in developing and experiencing new technologies and business models. When consumers find a legal offer satisfying their contemporary needs and wants, they will lose any incentive to turn to platforms such as Uber. However, Uber is so convenient and appealing to commuters and has already made its mark, which implies that market incumbents such as metered taxis will need to be quite creative in order to incentivize their consumers to switch back to using their services. In other words, the best way to fight "illegal" (unregulated) business models is to lobby and compel regulators to develop the law in such a way that new and upcoming business models and services which are equally good and efficient can continuously foster healthy competition without necessarily transforming the law. The legislator could decide to manage the upsurge of Uber and introduce specific rules about taxation and safety to safeguard the public interest.

In response to the uproar by metered taxi's to circumvent the entry of Uber into the public passenger market, the legislator has taken action by the introduction of the NLTA Amendment Bill ("the Amendment Bill")<sup>220</sup>, which aims to amend certain provisions of the NLTA to include e-hailing apps including such as Uber and similar technologies under the definition of metered taxi's.<sup>221</sup> This in effect subjects Uber to similar licensing and regulatory requirements as traditional metered taxis.<sup>222</sup> Should any metered taxi vehicle or an e-hailing service vehicle (according to the proposed amendments, this has the effect of including Uber) operate without an operating license, the driver of such a vehicle commits an offence, and if convicted, he or she may attract a term of imprisonment not exceeding two years, or a fine not exceeding R100 000.<sup>223</sup>

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<sup>220</sup> National Land Transport Amendment Bill (B7-2016) ("NLTA Amendment Bill").

<sup>221</sup> The NLTA Amendment Bill defines e hailing service to include any public transport service operated by means of a motor vehicle, which— (a) is available for hire by hailing while roaming; (b) may stand for hire at a rank, and (c) is equipped with an electronic e-hailing technology-enabled application. Furthermore the insertion of section 66A 66A (1)(a) provides that "In the case of electronic hailing services— (a) vehicles are hailed or pre-booked electronically using an e-hailing or technology-enabled application"

<sup>222</sup> Section 1(d) and section 38 (c) of the Amendment Bill.

<sup>223</sup> NLTA Amendment Bill, amends Section 90 of the NLTA.

However it is yet to be seen when the Amendment Bill will be promulgated. It further remains uncertain what the consequences of Uber operators whom do not possess the required operating license under the Amendment Act will be. Will they cease taxi operations until such licenses are obtained? Or will a moratorium on certain provisions of the Amendment Act be imposed to allow much needed time for Uber operators to obtain the required licenses? These questions will be answered in due course by the Amendment Act, courts and competition authorities as the law evolves on this topic.

In conclusion, competition regulation, across the value chain of transportation and economic systems, needs to occur in order to effectively regulate the market and liberate certain aspects of the market to derive the greatest welfare for the consumers, drivers, creators of a disruptive business model and all other stakeholders within the value chain.<sup>224</sup>

The regulation of information sharing, data technology and service systems are fundamental to the relationship between policy makers and such service systems. Public entities have the capacity to support the growth of these service systems and effectively also improve the economy. However, creators of these information sharing apps and service system must co-operate fully with the government and policy makers to ensure that this relationship taps into its full regulatory potential. The other side is the need for both new regulatory schemes, and an alignment between data, information and systems with the policy goals, objectives and targets across ward, municipal, provincial and national levels.<sup>225</sup> The development of competition regulation across various sectors and spheres of formal and informal institutions is paramount to the development of the economy.

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<sup>224</sup> OH Mokwena “Regulating land passenger transport in South Africa: Dynamics of competition across multiple value chains” Competition Commission 2018.

<sup>225</sup> *Ibid.*

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