

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

Taxi, ride-sourcing and ride-sharing services - Note by Portugal

4 June 2018

This document reproduces a written contribution from Portugal submitted for Item 3 of the 65th meeting of Working Party No 2 on Competition and Regulation on 4 June 2018. More documents related to this discussion can be found at www.oecd.org/daf/competition/taxis-and-ride-sharing-services.htm

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JT03432834

Portugal

1. Introduction

1. Taxi services in Portugal are subject to high regulatory intervention, which may restrain competition among providers. This has become especially relevant in face of the new forms of occasional for-hire transportation as a result of recent technological innovations. On one hand, these new operators still occupy a legal grey area, which generates uncertainty and prevents entry in the market. On the other hand, taxi services themselves have difficulty competing as excessive regulation prevents them from deciding on variables such as price or quality.

2. For these reasons, and following the legislative process, this market has become one of the areas where the Portuguese Competition Authority (Autoridade da Concorrência – AdC), engaged in advocacy initiatives, focused on ensuring a level playing field between taxi services and new operators.

3. This contribution is divided in three parts. Section 2 presents briefly the evolution of the regulatory framework for ride-sourcing in Portugal. Next, section 3 reviews the contributions made by the AdC towards the legislative process both for ride-sourcing and taxis, with an emphasis on the current constraints the latter face vis-à-vis the former. Lastly, section 4 covers the role and effects pricing algorithms may have on this market.

2. Evolution of the ride-sourcing regulatory framework in Portugal

4. The introduction of transport services through electronic platforms (TVDE¹) in Portugal was a turning point in passenger transportation. Uber entered the market in July, 2014, followed by Cabify in May, 2016, and Taxify in January, 2018. These new services came into competition with traditional taxi services, which operated and still operate according to a strict regulatory framework.

5. In response, ANTRAL² submitted an injunction to the District Court of Lisbon and, in April, 2015, the court ordered Uber to cease the provision of platform-based for-hire passenger services in Portugal, as an interim measure³. After a series of appeals by both sides, the Lisbon Court of Appeal ultimately ended up siding with ANTRAL, in December, 2017, without appeal. Nonetheless, Uber has never stopped operating in Portugal, even if its website is down.

¹ “Transporte em veículo descaracterizado em plataforma eletrónica” (electronic platform-based transport in unmarked vehicles).

² Associação Nacional de Transportadores Rodoviários em Automóveis Ligeiros – National Association for Road Transport in Passenger Vehicles

³ Decision of 24 April 2015 of the First Civil Chamber of the District Court of Lisbon in case no. 7730/150T8LSB (injunction).

6. The AdC published in December, 2016, the *Report on Competition and Regulation of Public Passenger Transport Services by Car Hire*⁴, assessing potential restrictions to competition resulting from the regulatory framework applicable to taxi services. This report was preceded by a public consultation in which various stakeholders participated, in July, 2016.

7. In terms of the legislative procedure, there were also important developments, namely the introduction of legislation that would provide a regulatory framework for TVDE's. The AdC issued an opinion to the draft legislation, following the aforementioned preliminary report, in October, 2016⁵.

8. The AdC welcomed these initiatives as they would reduce legal uncertainty in the market for TVDE, and eliminate barriers to innovation. The AdC nonetheless alerted that the opportunity should not be missed in terms of introducing regulatory change on the taxi services market, that is subject to intense regulation. The new legislation would nonetheless create a parallel regulatory framework. The AdC thus advocated for the minimisation of distortions of competition amongst different business models. In some cases, provisions pertaining to qualitatively similar requirements would diverge between the two activities. In others, some provisions apply to one but not the other, even if the underlying rationale would apply to both. Despite that, it is important that this regulatory change happens in a timely fashion and market entry is not hindered by the lack of a regulatory framework for new business models.

9. The draft legislation was submitted to vote in Parliament in January, 2017. After consulting various stakeholders, including the AdC, that issued an opinion in January, 2018⁶, the draft legislation was approved, in March, 2018, and the parliamentary decree was published in April, 2018.

10. However, on April 29th, 2018, the diploma was vetoed by the President of the Portuguese Republic, and submitted back to the parliament. The fundamentals for the decision were that it only addressed the TVDE regulatory framework, abstaining from introducing regulatory changes on taxi services. For that reason, the President of the Portuguese Republic found that “*a balanced solution was not fully reached*”, as the decree lacked enough compensation mechanisms for taxi services.⁷

11. In May, 2018, it was announced that the draft legislation started being amended. Additionally, even before the veto, some parties had issued recommendations to the government to change fixed prices, working conditions, drivers' training requirements, among other features. As such, the current state of play on this issue, in Portugal, remains unresolved, and challenges remain in terms of ensuring a regulatory framework.

⁴ Autoridade da Concorrência, “*Report on Competition and Regulation of Public Passenger Transport Services by Car Hire*”, December 2016, available [here](#), in English.

⁵ Opinion of 6 October 2016 of Autoridade da Concorrência, “*Projeto de diploma de plataformas de mobilidade e TVDE*”, available [here](#) (in Portuguese).

⁶ Opinion of 10 January 2018 of Autoridade da Concorrência, “*Parecer AdC às iniciativas legislativas (Governo, PSD, BE) que estabelecem o regime jurídico para a atividade de transporte individual e remunerado de passageiros em veículos descaracterizados a partir de plataformas eletrónicas (TVDE)*”, available [here](#) (in Portuguese).

⁷ Statement of 29 April 2018 of the President of the Portuguese Republic, “*Presidente da República solicita à AR que reequilibre lei TVDE e modernize lei dos Táxis*”, available [here](#) (in Portuguese).

12. At the EU level, the European Court of Justice (ECJ) ruled, in December, 2017, in a case opposing the Asociación Profesional Élite Taxi and Uber, that the latter must be classified as “a service in the field of transport”⁸. Therefore, it ruled out that companies like Uber merely played an intermediary role, meaning they ought to be regulated similarly to taxi services. Moreover, in April, 2018, the ECJ issued a non-binding ruling stating member-states could ban transport services such as Uber Pop, without notifying first the European Commission⁹. Uber Pop was banned from France because it operated without certified drivers and, under EU law, companies in the digital economy can be protected by the European Commission in similar cases. Lastly, a proposal by the European Commission to impose a 3% digital tax, which would affect TVDE, was submitted to the Council for adoption and the European Parliament for consultation, in March, 2018¹⁰.

3. Distortions to competition

13. In its report on TVDE, from December, 2016, and in its opinions on draft legislation, from October, 2016 and January, 2018, the AdC has focused on the role that quantitative and geographic restrictions, price regulation and quality and security requirements of taxi services might have on competition, while stressing the importance of establishing a level playing field between TVDE and taxi services.

14. Quantitative restrictions to entry were found to be one of the most intrusive regulatory interventions in the market, negatively impacting competition. In the economic literature, the typical reasons to impose quantitative restrictions, such as the existence of negative externalities, do not justify *numerus clausus* for taxi services. Indeed, the high value of taxi licenses is *per se* indicative that these restrictions are imposing a supply shortage on the market.

15. Portuguese taxi licenses grant their holders the right to operate in a single municipality. These geographic restrictions have a negative impact on competition and hamper the efficient use of transport capacity. The elimination of these restrictions would allow for increased competition and a better balance between supply and demand, namely with respect to seasonal variations and passengers moving between nearby municipalities.

16. On the basis of the two last points, the AdC has recommended a reassessment of the need for quantitative and geographic restrictions, especially given that the underlying public policy objectives can be achieved through less restrictive regulation.

17. In the taxi market, prices are set jointly by the DGAE¹¹, sectorial associations (namely ANTRAL and FPT¹²), with participation of the IMT¹³ and the member of

⁸ Judgment of 20 December 2017, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*, Case C-434/15, ECLI:EU:C:2017:981.

⁹ Judgment of 10 April 2018, *Uber France*, C-320/16, ECLI:EU:C:2018:221.

¹⁰ Press release of 21 March 2018 of the European Commission, “*Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the EU*”, available [here](#).

¹¹ *Direcção-Geral das Atividades Económicas* – Directorate-General for Economic Activities.

¹² *Federação Portuguesa do Táxi* – Portuguese Taxi Federation.

¹³ *Instituto de Mobilidade e Transporte, I.P.* – Institute of Mobility and Transport, Public Institute.

government responsible for approving tabulated prices. Taxi fares are the sum of a fixed fee and a variable fee, which is a function of the time and distance of the trip. There can also be extra charges, such as that for luggage, and there are different rates according to the time of day, day of the week and destination¹⁴. All price components are set by the aforementioned institutions and not the drivers.

18. Since taxi drivers cannot set prices, they are prevented from competing on the basis of the price/quality trade-off. This point is especially relevant in face of the new TVDE business models, as taxi service providers become unable to adapt to new entrants, namely through a strategy of diversification of price and quality. Therefore, the current regulatory framework applicable to taxi services becomes even more distortive and is effectively creating an uneven playing field between the two activities.

19. The AdC has proposed that taxi service providers are given greater freedom in choosing market strategies, which would come from price deregulation to the extent possible. If the legislator wishes to protect the consumer from surge pricing and uncertainty, setting maximum prices would be the less restrictive policy, as it would still allow for competition on the basis of the price/quality trade-off, which would not only improve efficiency in the taxi services market itself but allow it to compete with TVDE. Nonetheless, the issues of surge pricing and uncertainty are less relevant for pre-booked services than for street hailing and taxi ranks.

20. Quality and security requirements are usually justified by arguments of asymmetric information between consumers and taxi service providers. Regulatory quality requirements may be needed to ensure minimum safety and quality of service, but they can also disproportionately reduce the scope for service differentiation. Excessive standardisation of supply leads to underinvestment by service providers in quality improvements, creating an adverse selection situation. Moreover, overly restrictive requirements may increase costs of taxi services relative to TVDE, creating an uneven playing field.

21. Under a deregulation scenario, it would be possible to mitigate the effects of asymmetric information through reputation building, namely branding and mechanisms of user evaluation. Currently, branding is restricted for street hailing and taxi ranks as taxi cars can only have one of two colour schemes and any banners for taxi companies must be placed solely on specific places of the windshields. Introducing branding would likely increase competition based on the quality of the service.

4. Pricing algorithms for TVDE

22. The emergence of big data technologies has meant that many high-tech firms are currently able to gather and gain on-demand access to large and rich datasets on its customers and potential customers. This has allowed firms to tailor products to customers' needs, and has had a significant impact on their pricing strategies and strategic interaction.

23. The use of pricing algorithms for dynamic pricing and price discrimination has become widely used by TVDE. Using dynamic pricing, companies can adjust

¹⁴ Price convention of taxis 2013/2014 between the DGAE, ANTRAL and FPT, available [here](#) (in Portuguese).

instantaneously to changes in demand and supply conditions across time, which improves efficiency by ensuring market clearance. Pricing algorithms for price discrimination, on the other hand, are used to better infer the willingness to pay of potential customers or better segment them into groups as to expand markets. For this reason, its effects on consumer welfare are ambiguous.

24. Through dynamic pricing, whenever the number of available drivers in a particular region is too low relative to demand, TVDE increase prices to attract new drivers and repel the potential customers with the lowest willingness to pay. This practice, also known as surge pricing, is often perceived as unfair. Moreover, it is argued against for creating price uncertainty for customers and jeopardising efficiency if they are risk-averse. Nonetheless, there are allocative efficiency arguments for surge pricing. In order to mitigate the possible adverse effects of price uncertainty, one can use instruments that are less restrictive to competition than those prescribed in the current regulatory framework, such as maximum price caps.

25. The benefits of dynamic pricing for consumers would be more limited if surge pricing mostly curtailed demand instead of significantly increasing supply. Indeed, in such a case, TVDE would be simply rationing rides to the consumers with the highest willingness to pay. However, Chen and Sheldon (2015)¹⁵ find that, under surge pricing, drivers are up to 50% less likely to end their session. Nonetheless, these results are not particularly useful to assess the impact of surge pricing on short-run supply. Surge pricing might be endogenous, as drivers will often predict it based on certain events (e.g. concerts). As such, they would lead to an overestimation of the effect of surge pricing on supply. To assess this difference, one would need to compare anticipated versus unanticipated events.

26. As for price discrimination, TVDE usually gather data on all customer interaction with the firm. This includes any personal information provided by the user, location (gathered while the app is open), access times, and customer history (e.g. prices paid or driver of the trip).

27. The combination of publicly available information with the data gathered by TVDE already allows for a great degree of price discrimination in many countries. For instance, through census and housing offers one can identify wealthy neighbourhoods and charge users moving from, to or between them higher prices.

28. Proprietary data, namely from other high-tech companies, can further increase the degree of price discrimination. Browsing history, for instance, can be used to infer willingness to buy luxury goods, which could indicate a higher willingness to pay for TVDE. However, as of May 25th, 2018, such data would be considered information on an identifiable natural person, thus falling under the General Data Protection Regulation (GDPR).

29. Even if personalized pricing is not possible, TVDE could segment the market into increasingly small groups, depending on the available data. TVDE may seek to raise and lower prices to the same groups of consumers, and sort prices according to the willingness to pay of each segment. Through this, there is an ambiguous effect on

¹⁵ Chen, M. K., & Sheldon, M. (2015). “*Dynamic Pricing in a Labor Market: Surge Pricing and Flexible Work on the Uber Platform*”. Working Paper.

consumer welfare, as price decreases expand the lower end of the market but price increases to the upper end transfer surplus from consumers to TVDE.

30. Lastly, the use of pricing algorithms, either for dynamic pricing or price discrimination, may facilitate collusion. This could happen even if they are not explicitly programmed with that end. If both firms use very similar pricing algorithms, often due to open-source software or industry standards, pricing strategies would not only be similar but react simultaneously and in the same fashion to the same events. Additionally, self-learning algorithms interacting with each other might generate collusive equilibria on their own. Lastly, if they also monitor rivals' prices, the detection of deviations and retaliation are much quicker, due to the ease of changing prices.

5. Conclusion

31. The AdC has engaged in several advocacy initiatives regarding public passenger transport services by car hire. The AdC's competitive impact assessment to the legal and regulatory framework applicable to the sector concluded that taxi services in Portugal are excessively regulated, especially when it comes to quantitative, geographic and pricing restrictions. The AdC has further concluded that similar public policy objectives may be achieved using regulation that is both more efficient and less restrictive of competition. These effects are exacerbated in face of new operators (TVDE), as taxi services providers have a limited ability to strategically react, namely on price and quality.

32. Currently, in Portugal, new operators (TVDE) still lack a specific regulatory framework. This context creates legal uncertainty and has a negative impact on competition and consumer welfare.

33. This context, where the two different types of service providers operate in an uneven playing field, with taxis being subject to an intense regulatory framework and new operators facing legal uncertainty from the lack of an adequate regulatory response, hinders competition and efficiency.