

## Uber: collusion, or unilateral conduct?

Alexandre Cordeiro Macedo examines Uber's market dominance in Brazil, alongside practices that might restrict competition



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## 1. Introduction

The emergence, amid the digital economy, of companies providing private passenger transport networks has become a constant in the innovative market by the platforms with various sides, the so-called two-sided markets. The trend of such platforms provides greater convenience to passengers who use individual privately remunerated transportation services. However, the high degree of innovation still raises many questions regarding the application of competition law to this type of market and the real benefits brought to consumers.

Uber’s platform, as is the case of any transportation network company (TNC), is a multi-sided platform that promotes interaction between passengers and drivers. It is therefore relevant to analyze – based on the proceeding filed and later dismissed by the CADE General Superintendence – the practice of possible anticompetitive conduct by Uber derived from a business model that didn’t even exist a few years ago.

The case was based on the analysis of anticompetitive practices, especially hub and spoke cartel, the influence to the adoption of uniform business conduct and resale price maintenance, taking into account the traditional analysis methodologies of competition crimes, *per se* rules and rule of reason. It was necessary to verify, from the definition of the query and the rule to be used, the net result that Uber TNC brought to the market and to consumers, through the deep restructuring of Brazil’s passenger transport services.

Multi-sided platforms<sup>1</sup> provide interaction of at least two different groups when making a transaction, for example, suppliers and consumers in the private remunerated individual transport service market. Without the platform, which has the purpose of connecting both sides, this market would probably not exist.

From the competitive point of view, the evaluation is an indispensable task. In view of the innovation and the concentration of such markets with intense network externalities, there is a concern with the exponential growth of anticompetitive practices, especially the increase of the possibility of collusion between the economic agents aiming at price fixing.

The business model developed by a company such as Uber operates as a platform where two types of interdependent agents, in this case drivers and passengers, can interact. In addition, “Uber charges, from each ride made by partner drivers, a fee without dividing costs related to the vehicle used in the provision of remunerated individual passenger transportation services”<sup>2</sup>.

Sharing-economy companies also require centralized coordination. However, the control to be exercised on an innovative platform within a multi-sided market may vary in different degrees<sup>3</sup>. Uber operates in a manner that exerts a high level of centralized control of the suppliers that use it, unlike other platforms that essentially connect suppliers and consumers, exercising reduced control.

Thus, Uber’s operation distinguishes itself from platforms inserted in multi-sided markets, such as Airbnb and eBay, by establishing the price of the service or product offered, controlling the forms of payment through the platform, maintaining features that allow consumers to opine on the service or product offered, and establishing minimum requirements for the service or product offered<sup>4</sup>.

In view of the high control exercised by the Uber platform with its suppliers, since its business model has its own characteristics that tend to coordinate their partner drivers’ performance, questioning the possible practice that restrict competition is pertinent<sup>5</sup>. Such inquiries are basically related to how the Uber platform coordinates this operation.

For the analysis, the fact that Uber establishes the price for the remunerated private passenger transport service provided by partner drivers is especially noteworthy, which would restrict competition between them as to the variable price. Although it is merely a recommendation made by Uber, even if they charge a price lower than established by the platform for each trip, the drivers have no incentive to do so<sup>6</sup>. Consequently, there is a uniformity of prices.

Actually, the approach of this article will occur in two phases: definition of conduct, in other words, categorize Uber’s business model in a few competition violations described in Article 36 of the Brazilian Competition Defense Law (hub and spoke cartel, influence on the adoption of uniform business conduct, or resale price maintenance); and then, define which analysis rule is used, whether rule of reason or unlawful *per se*. We’ll then move on to the analysis of Uber’s behavior in view of the existing legal provision.

### 2. Possible practices restrictive to competition: hub and spoke cartels, influence on the adoption of uniform business conduct and resale price maintenance

Cartelization is essentially characterized as a type of horizontal conduct, in other words, an agreement among competitors. However, there are situations in which a cartel can also assume a vertical nature, in which the so-called hub and spoke cartels are included. In these situations, there is at least one facilitator who acts to allow communication between competitors; this is the case of a distributor that facilitates the cartelization of retailers<sup>7</sup>.

Thus, the hub and spoke cartel is characterized by the convergence of interests between direct competitors who operate in the same relevant market and the facilitator, which can be defined as an individual or legal entity, albeit not operating in the affected market, it “assists in the forming and/or organization of the cartel, allowing it to easily achieve its goals (real or potential)”<sup>8</sup>.

There are also certain referential or cartel-like behaviors that generate doubt regarding its scope as anticompetitive conduct, such as the influence of adopting uniform business conduct, which denotes a coordinated action of economic agents resulting from the agent’s own initiative, without the exchange of sensitive information between direct competitors, in other words, without the intent of coordinated action. This is the case of trade unions or associations, before the Legislative or Executive Power for the approval of rules with restrictive effects to competition, which influence barriers to the entry of competitors.

The unilateral conduct of influencing the adoption of uniform business conduct is established with the presence of an agent who influences others to adopt commercially identical strategies, which have a vertical nature<sup>9</sup>.

Thus, the hub and spoke cartels and the practice of influencing the adoption of a uniform business conduct substantially distinguish themselves by the existence of an agreement and by the exchange of competitively sensitive information between the agents, which are indispensable elements to characterize hub and spoke cartels, and not to induce uniform business conducts.

On the other hand, resale price maintenance (RPM) consists of a type of vertical restriction “established between economic agents that are part of a productive chain at different stages, in order to fix resale prices of products or services”<sup>10</sup>.

RPM is based on a series of “uniform conditions imposed or suggested by the producer for the sale of a certain product. He/She may standardize the maximum or minimum resale price, split territories or any other form of eliminating competition among his/her distributors”<sup>11</sup>. Thus, when economic agents fix resale prices, many have the goal, among other issues, to facilitate the monitoring of collusive conducts and unilaterally increase market power.

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Therefore, the RPM conduct is characterized, in a traditional market, when producers establish, by means of contract, the price to be practiced by distributors/dealers, which may be abusive and limit competition among these economic agents. Moreover, the practice must also be assessed from the point of view of its economic rationality and the positive and negative effects it may generate on competition.

Thus, possible efficiencies can be observed as a result of resale price maintenance, such as for example: i) inducing the elimination of double marginalization with the fixing of the maximum resale price<sup>12</sup>; ii) promoting pre-sale services resulting from the elimination of the free ride effect<sup>13</sup> by fixing a minimum resale price; iii) preserving the image or product; iv) increasing competition among brands; v) incentive of new competitors to enter the distribution market.

As to the competitive analysis methodology of such conducts by the antitrust agency, cartels have been defined as competitive tort, analyzed under *per se* rule<sup>14</sup>. In this sense, the influence to the adoption of a uniform business conduct, when practiced by an agent, whose backdrop purpose of conduct is collusion, must be analyzed by the *per se* rule. On the other hand, regarding a unilateral conduct, without presenting this type of agreement

viability nature between competitors, the conduct must be analyzed by the rule of reason<sup>15</sup>.

In the same sense, resale price maintenance can be considered as unlawful when analyzed under rule of reason<sup>16 17</sup>, where establishing vertical restrictions based on the imposition of minimum resale prices or margins will not be unlawful where it is possible to alternatively demonstrate specific efficiencies to the conduct in question that, “(i) cannot be produced by any other vertical agreement or less suspicious distinct means, (ii) clearly exceed, under the conditions of the market in question, the risks to competition created by the conduct, and (iii) result in a proven benefit to consumers”<sup>18</sup>. Thus, the object of conduct is not, in itself, the limitation of competition.

### 3. The Uber Case

#### 3.1 Hub and Spoke Cartel

The analysis must be initiated by the nature of the fare values imposed on partner drivers and collected from passengers. Can the conduct of centralizing decisions of the form of operation and even determine prices to be charged by all drivers – leading them to a parallelism of conduct – be characterized as hub and spoke cartelization?

In the case investigated by the Superintendence-General of CADE, it was not possible to envisage the practice of hub and spoke cartelization by Uber, because there is no company action that allows communication between partner drivers. There is no action between Uber, as a cartel facilitator, and the competing agents, with the intent of coordinated operation.

Additionally, each driver’s acceptance of the conditions established by Uber constitutes a relationship with a merely contractual purpose and not of collusion or agreement between them. There is no perception of the willingness of fixing prices or manipulating the market<sup>19</sup>, nor with the purpose of centralized collusion at Uber. The possible uniformity of conduct, relative to prices, originates from the Uber business model. Furthermore, the increase of partner drivers makes any type of coordination among them more difficult, because in pulverized markets, cartelization is more difficult<sup>20</sup>.

Thus, the fundamental requirement for any type of cartelization is not established, because there is no agreement to fix prices, to control supply, split up the market, or defraud public bidding, as provided in subitem I, §3, of Federal Law No. 12.529/2011.

#### 3.2 Resale Price Maintenance – RPM

CADE’s case law on RPM affirms that in order to define the lawfulness or unlawfulness of the conduct it is necessary to

address three important issues: “(a) the role of the coercive mechanisms to demonstrate RPM; (b) the assessment of this conduct’s efficiency; and (c) the existence and non-existence of associated anticompetitive risk”.

Uber, in its defense, argued that it merely offers a technological solution that integrates drivers and users who search for a mobility alternative, and thus, doesn’t act a supplier of the services provided by the partner drivers.

The first argument that detracts from the formal characterization of RPM is exactly this one. Uber is not in a supplier and distributor relationship with its partner drivers. This is not a resale operation. The service provided by Uber is not of transportation, but of technology, whose main objective is to connect the demand and supply of private passenger transport services.

RPM conduct is based on the assumption that suppliers fix the prices of their products and services that their distributors, via contract, shall practice. Therefore, Uber cannot fix the price of a service that it does not offer. What would the price of fares stipulated by Uber be? It would only be the basis to calculate the remuneration (commission) that Uber is willing to receive in order to make the connection between demand and supply. As mentioned earlier, Uber retains a percentage of the value of each fare. This percentage must necessarily be levied on “something” and therefore, it is this “something” that determines the final value of the TNC revenue. This is the reason why Uber stipulates the formula for calculating fares, which is the amount for which Uber is willing to provide its technology services.

Furthermore, there were no other requirements characterizing unlawfulness such as, i) the non-existence of coercion to practice suggested prices; and ii) the Uber model does not contain the characteristic of facilitating collusion among the “resellers”.

#### 3.3 Inducement of uniform business conduct

Finally, as to the influence to adopt a uniform business conduct, it can be concluded from its formal configuration, since the platform defines the prices to be charged for each ride, among other rules.

However, despite the referred formal classification corresponding to the description of the legal type, the competitive unlawfulness was not consummated, in view of the absence of negative net effects to the economic order.

Under the rule of reason, the burden of proof belongs to the antitrust authority, which must demonstrate that such a conduct generated losses to the competition. In this specific case, CADE not only failed to demonstrate the negative net

effect, but also verified the opposite. Uber’s entry in the market provided several benefits to consumers, such as better quality of services, greater offer of such services and lower prices.

According to a recent study of CADE’s Department of Economic Studies (DEE)<sup>21</sup>, in 590 Brazilian municipalities, from 2014 to 2016, Uber was not able to set the fare prices of taxicab applications. The study pointed out that, “initially, Uber’s entry in a municipality may have a huge effect, substantially reducing the number of taxicab rides, but over time, a gradual recovery of the number of the incumbent sector’s rides takes place. Furthermore, it was also suggested that the “incumbent sector reacted by granting discounts to fares after a longer period to observe such a reaction”.<sup>22</sup>

As to Uber’s entry in the market, the study also concluded that, “in addition to generating benefits to consumers and encourage the entry of new suppliers in the individual remunerated transport market, such innovations have solved certain market failures that are present in this sector, making the current regulation of taxi services outdated”.

Competition regarding variable prices from a passenger’s point of view has become more intense since the emergence of applications such as VAH<sup>23</sup>, which compares values charged between the available transportation applications for a certain ride at that time.

Uber also provides freedom to all of its users, both partner drivers as well as passengers, which can be simultaneously

registered in more than one competing TNC application. Therefore, the model adopted by Uber is characterized as multi-homing, which reduces the possibility of an eventual market power exercise<sup>24</sup>. Therefore, the current arrangement of this type of market allows passengers who use Uber to choose the TNC they find more convenient among those available.

In short, the fact that the TNCs such as Uber set the prices to be charged by their partner drivers might demonstrate the practice of anticompetitive conduct to influence the adoption of uniform business conduct. However, except for that, the presence of this business model in the market has provided benefits to consumers. In addition, even the implications of price multiplier by Uber, are not able to rule out the benefits of the competition that exists between the TNCs, permitted because of the adoption of the multi-homing model. Thus, the possible influence to the adoption of a uniform business conduct practice by Uber and by other TNCs does not demonstrate a violation of the economic order, pursuant to Article 36 of Federal Law No. 12.529/2011, through the positive analysis of the effects of its entry in the innovative market from different sides. This was precisely the conclusion reached by the CADE Superintendence-General’s NT in this case. ■

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## Footnotes

- 1 Several other authors have attempted to define “multi-sided markets”: EVANS, David S. **The Antitrust Economics of Multi-Sided Platforms Markets**. *Yale Journal of Regulation*, v. 20(2), pp. 352-381, 2003; HAGIU, Andrei. **Merchant or Two-Sided Platform? Review of Network Economics**, v. 6(2), pp. 115-133, 2007; RYSMAN, Marc. **The Economics of Two-Sided Markets**. *The Journal of Economic Perspectives*, v. 23(3), pp. 125-143, 2009; EVANS, David S.; SCHMALENSEE, Richard. **Matchmakers: The new economics of multi-sided platforms**. Boston: Harvard Business Review Press, 2016.
- 2 TECHNICAL NOTE No. 26/2018/CGAA4/SGA1/SG/ CADE. Preparatory Administrative Inquiry Procedure No. 08700.008318/2016-29. **Agents**: Public Prosecutor’s Office of the State of São Paulo and Daniel Braga Frederico. **Principal**: Uber do Brasil Tecnologia Ltda.
- 3 ANDERSON, Mark; HUFFMAN, Max. **The Sharing Economy Meets the Sherman Act: Is Uber a firm, a cartel, or something in between?** *Columbia Business Law Review*, 2017, p. 884: “Sharing economy enterprises do not escape the need for centralized coordination, however. The platforms exercise varying levels of control over suppliers. At one extreme, some platforms exercise very little control and merely allow consumers and suppliers to find each other. (...) At the other extreme, a platform may establish prices and other terms of service. Uber is an example of this higher level of centralized control”.

- 4 ANDERSON, Mark; HUFFMAN, Max. **The Sharing Economy Meets the Sherman Act: Is Uber a firm, a cartel, or something in between?** *Columbia Business Law Review*, 2017.
- 5 In this sense, several articles that have driven this debate are highlighted: ANDERSON, Mark; HUFFMAN, Max. **The Sharing Economy Meets the Sherman Act: Is Uber a firm, a cartel, or something in between?** *Columbia Business Law Review*, 2017; NIAMH, Dunne. **Competition Law (and Its Limits) in the Sharing Economy**. In: DAVIDSON, Nestor; FINCK, Michèle; INFRANCA, John. **Handbook on Law and Regulation of the Sharing Economy**. Cambridge: Cambridge University Press, 2018; NOWAG, Julian. **When sharing platforms fix sellers’ prices**. *Journal of Antitrust Enforcement*, 2018.
- 6 ANDERSON, Mark; HUFFMAN, Max. **The Sharing Economy Meets the Sherman Act: Is Uber a firm, a cartel, or something in between?** *Columbia Business Law Review*, 2017.
- 7 PREWITT, Elizabeth; FAILS, Greta. **Indirect Information Exchanges to Hub-and-Spoke Cartels: Enforcement and litigation trends in the United States and Europe**. *Competition Law & Policy Debate*, v.1(2), pp. 63-72, 2015: “In hub-and-spoke cartels we see a convergence of interests between the third party and the horizontal competitors in favor of forming a cartel”.
- 8 MARTINEZ, Ana Paula. **Cartel Repression: interface between Administrative Law and Criminal Law**. São Paulo: Singular, 2013, p. 140.



- 9 It is important to emphasize that the agent seeking to influence the adoption of uniform business conduct might be a direct competitor or not of the agents who are targets of such influence. In this sense, this behavior can be either horizontal, in other words, when the influencing agent is in the same link of the productive chain as the influenced agents, or vertical, when the influencing agent is in a different link as the agents who will be influenced and that finally, would adopt a uniform business conduct. Such considerations were also emphasized by former Reporting Advisor, Márcio de Oliveira Júnior, of Administrative Proceeding No. 08700.006965/2013-53 (Agent: São José Digital Photo; Principals: Photographer, Storeowner and Videographers' Union of the State of Piauí - Sindfolcepi and Francisco das Chagas Machado Sobrinho): "(...) *the infracting agent who acts as an influencer of the adoption of uniform conduct does not necessarily be in the same market/sector than those involved in the conduct, and does not need to be a competitor of such agents. Thus, it is possible that the influence to the adoption of uniform conduct be characterized both as horizontal as well as vertical conduct (...)*".
- 10 GONÇALVES, Priscila Brolio. **Fixing and Suggestion of resale prices in distribution contracts: Analysis of Competitive Aspects**. 2. Ed. São Paulo: Singular, 2016, p. 173.
- 11 SALOMÃO FILHO, Calixto. **Competition Law: conduct**. São Paulo: Malheiros, 2003, p.296: "[...] *precisely these two characteristics – elimination of competition and its orchestration at a market level other than the one in which it actually occurs – provide individuality to this conduct. Due to these characteristics, its various forms of revelation are called vertical restrictions to competition*".
- 12 GONÇALVES, Priscila Brolio. **Fixing and Suggestion of resale prices in distribution contracts: Analysis of Competitive Aspects**. 2. Ed. São Paulo: Singular, 2016: When suppliers and distributors have the power to fix prices, both will try to maximize profits by practicing the highest prices possible. This occurs when each company makes its decisions independently without taking into consideration the prices practiced by the other company, which consequently will make the product's final price excessively high.
- 13 KLEIN, Benjamin. **Competitive Resale Price Maintenance in the Absence of Free-Riding** (2009). *Antitrust Law Journal*, Vol. 76, No. 2, 2009. Available at SSRN: <https://ssrn.com/abstract=1656052>: "The usual economic analysis is that the elimination of retailer price discounting prevents such free riding because it removes the incentive of consumers to patronize free-riding retailers and forces retailers to compete on non-price dimensions".
- 14 Reporting judge vote of former Advisor Alexandre Cordeiro Macedo in Administrative Proceeding No. 08012.000030/2011-50 – Agent: Public Prosecutor's Office do Estado do Rio de Janeiro; Principals: Scar Rio Peças e Serviços Ltda., Multi Service de Duque de Caxias Comércio e Locação de Veículos Ltda., Toesa Service Ltda., Troiakar Danaren Oficina Multimarcas Ltda. and Peça Oil Distribuidora Ltda.: "*Recent CADE decisions have gone beyond these exegesis guidelines and evolved to understand the infraction as the object when it is a cartel, as infraction per se in the same sense as in force in the case law of the United States. In this sense, for all, I mention PA case No. 08012.010932/2007-18 (marine hose cartel, Reporting Judge Márcio de Oliveira Jr.)*".
- 15 For example, we mention the understanding manifested in Administrative Proceeding No. 08012.004736/2005-42. Agent: Economic Monitoring Office – Seae/MF; Principals: Raízen Combustíveis S.A. and Odon Oliveira Mendes.
- 16 SHIEBER, Benjamin M. **Abuses of economic power: antitrust law and Brazil's and the USA's experience**. São Paulo: Editora Revista dos Tribunais (publisher), 1966, p. 93: "if the agreement is of the type to which the rule of reason applies, it is necessary to perform a detailed survey of the economic factors. Only by means of this survey, can the licit and illicit restrictions be distinguished".
- 17 KLEIN, Benjamin. **Competitive Resale Price Maintenance in the Absence of Free-Riding** (2009). *Antitrust Law Journal*, Vol. 76, No. 2, 2009. Available at SSRN: <https://ssrn.com/abstract=1656052>: "The debate over whether resale price maintenance should be governed by a rule of reason standard as held in *Leegin*, 'or returned to the *Dr. Miles* per se rule,<sup>2</sup> hinges to a large extent on whether or not one views most instances of resale price maintenance as normal competition on the merits. The reasoning underlying *Leegin* is that because resale price maintenance often is the result of procompetitive market forces, plaintiffs should be required to demonstrate a likely horizontal anticompetitive effect; while defendants, on the other hand, need not prove the existence of procompetitive efficiencies to avoid antitrust liability.<sup>3</sup> In contrast, some antitrust commentators conclude that because a credible procompetitive explanation frequently does not exist, resale price maintenance should be subject to a stricter legal standard and prohibited even if a horizontal anticompetitive effect is not demonstrated.
- 18 Administrative Proceeding n. 08012.001271/2001-44. Agent: Justice Department and Citizen Defense Principal: SKF and SKF Brazil. Vote of the Reporting Advisor, Marcos Paulo Veríssimo.
- 19 In this sense: ANDERSON, Mark; HUFFMAN, Max. **The Sharing Economy Meets the Sherman Act: Is Uber a firm, a cartel, or something in between?** *Columbia Business Law Review*, 2017; NIAMH, Dunne. **Competition Law (and Its Limits) in the Sharing Economy**. In: DAVIDSON, Nestor; FINCK, Michèle; INFRANCA, John. **Handbook on Law and Regulation of the Sharing Economy**. Cambridge: Cambridge University Press, 2018; NOWAG, Julian. When sharing platforms fix sellers' prices. *Journal of Antitrust Enforcement*, 2018.
- 20 Several reports that between 2016 and the end of 2017 alone, the number of drivers registered in the Uber app increased tenfold. In this sense, for example: LOBEL, Fabrício. **In Brazil, Number of Uber Drivers Increases Tenfold in One Year**. *Folha de São Paulo*, October 30, 2017. Available at: <https://www1.folha.uol.com.br/cotidiano/2017/10/1931013-numero-de-motoristas-do-uber-cresce-dez-vezes-em-um-anono-brasil.shtml>. Accessed on Sept 9, 2018.
- 21 RESENDE, Guilherme M.; LIMA, Ricardo C. de A. **Working Document No. 001/2018 – Competitive Effects of Sharing Economy in Brazil: Has Uber's entry affected the taxi application market between 2014 and 2016?** *Department of Economic Studies of the Administrative Council for Economic Defense*, 2018. Available at: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/documento-de-trabalho-001-2018-uber.pdf>.
- 22 The DEE study also affirms that "Uber is not only competing with taxi fares via applications, but simultaneously, "may be affecting other modes of transport" and its entry into the market created a new demand for individual remunerated transport, derived for example, from collective transport modes. Therefore, Uber's entry in the shared digital economy market increased competition for individual passenger transport services.
- 23 AGRELA, Lucas. **New App Compares Uber, 99, Cabify and Easy Fares**. *Exame*, June 14, 2017. Available at: <https://exame.abril.com.br/tecnologia/novo-app-compara-precos-de-corridas-na-uber-99-cabify-e-easy/>. Accessed on Nov 24, 2017.
- 24 NIAMH, Dunne. **Competition Law (and Its Limits) in the Sharing Economy**. In: DAVIDSON, Nestor; FINCK, Michèle; INFRANCA, John. **Handbook on Law and Regulation of the Sharing Economy**. Cambridge: Cambridge University Press, 2018, p. 7: "*Multi-homing, whereby suppliers and/or users participate in more than one platform, similarly lessens the ability of platforms to exercise market power*".