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The Uber price-fixing ride: what are the anti-trust co-ordinates?

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During December 2015, Spencer Meyer instituted a class action lawsuit against Uber Technologies, Inc's CEO, Travis Kalanick, in the United States. The law suit is based on an allegation that Kalanick had "*orchestrated and facilitated an illegal price-fixing conspiracy in violation of section 1 of the federal Sherman Antitrust Act*". Even though Kalanick attempted to have the class action lawsuit dismissed, his application was denied by Judge Jed Rakoff in the United States District Court on 31 March 2016. This litigation is ongoing.

INTRODUCTION

As a technology company, Uber matches riders (passengers to be transported from one point to another) with drivers (drivers who operate vehicles of various specifications as *quasi* taxis but who generally do not accept payment directly from the passenger) through the use of an application (as an "app") used on smartphone devices. The service offers great convenience to both passengers and drivers, amongst others in relation to payment method, time saving and efficiency of use.

The Uber fare for any trip is calculated by an algorithm which adds a base fare amount plus an amount for the duration of time spent in the car plus an amount calculated based on the distance travelled. However, Uber's fare algorithm also continuously monitors the level of demand for drivers. If it detects that there is a high level of demand in a certain area, the fares for that area increase with the activation of so called "surge pricing". According to Uber the basis for surge pricing is to ensure that passengers can receive service within the shortest timeframe possible.

It is alleged by Meyer that Kalanick, who is not only the co-founder of Uber but also an occasional driver, has conspired with other Uber drivers (who accept Uber's terms and conditions) to use Uber's pricing algorithm to set the prices charged to Uber riders, thereby restricting price competition amongst drivers. The crux of the complaint relates to the fact that drivers using the Uber app do not compete on price (both the standard fare and the surge pricing fare) and therefore riders cannot negotiate fares with drivers for rides.

The fact the Kalanick is also an occasional driver appears to be significant in the current case. It is this fact that Meyer is relying on to allege that the conspiracy perpetrated by Kalanick is horizontal in nature (i.e. as between competitors) and resulted in an agreement to fix prices amongst all competing Uber drivers.

THE JUDGEMENT

Kalanick's defence is that when the drivers agreed to Uber's terms and conditions, they did so individually and entered into an agreement solely with Uber (a vertical agreement) and not with the other drivers (a horizontal agreement). Despite this defence, previous case precedent as cited by Judge Rakoff acknowledges that –

"*where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade*".

It is alleged that Kalanick's actions have given rise to what is commonly referred to as a hub-and-spoke cartel. Judge Rakoff quoted in his judgement the following passage which clearly and succinctly explains a hub-and-spoke cartel –

"*[C]ourts have long recognized the existence of 'hub-and-spoke' conspiracies in which an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.' These arrangements consist of both vertical*

agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the [hub's] terms, often because the spokes would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing."

Notwithstanding that this judgment does not fully consider the merits of the class action lawsuit, it does highlight some interesting observations in regard to innovation in rapidly developing technology markets and the potential consequences that can occur in relation to antitrust infringement. Historically hub-and-spoke cartels were often facilitated through trade associations which created a tangible platform for competitors to collude with one another. Extending the ability to coordinate conduct in the virtual world driven by technology providing a platform for cartel arrangements, presents the same risks from a competition law perspective. The co-ordinates from a competition law perspective for price fixing remain the same.

What does this judgement mean for Uber's chosen business model? Nothing, yet.

This class action lawsuit has been instituted against Uber's CEO and not Uber itself. Accordingly, no order or remedy will ultimately be made against Uber directly (assuming the matter proceeds to trial). However, should the courts conclude that the conspiracy, allegedly orchestrated and facilitated by Kalanick, has given rise to a horizontal price-fixing arrangement amongst Uber drivers which contravenes antitrust laws, Uber would have to closely consider whether changes should be made to its app and, by implication, its existing business model to address the potential antitrust violation which may not be limited to just the United States of America.

CONCLUSION

Whatever the outcome of this case (assuming it proceeds to trial), it is sure to have a significant impact on the way in which companies should consider antitrust implications in rapidly developing technology markets. It should set an interesting precedent in regard to the way in which the creators and operators of IT platforms that are used to create a marketplace are treated from a competition law perspective.

The case highlights the fact that in considering innovative technology solutions, competition law and the competition law cartel "co-ordinates" must be taken into account in order to find a business model that is robust and can withstand scrutiny by competition law regulators.

It remains to be seen if the same issues will be considered in South Africa taking into account that 8 regional taxi companies and 150 individual members of the South African Meter Taxi Association filed a complaint during November 2015 with the Competition Commission alleging that Uber is engaging in anti-competitive behaviour. This investigation is on going.

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