

# *UBER vs. METERED TAXIS: A COMPETITION ISSUE OR A REGULATORY NIGHTMARE*

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## I INTRODUCTION

The entry of Uber Technologies (Pty) Ltd (Uber) into the transport sector has triggered some discomfort amongst incumbent traditional metered taxi companies around the world. Many incumbents have attempted to curtail 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. Many have described this new entrant as a disruptive innovator due to the notion that it has altered the manner in which public transport services are provided to consumers. In this paper, firstly, we venture on to discuss the legal framework of the South African metered taxi industry. Secondly, the Uber business model is set out and the accompanying advantages thereto. Furthermore, we discuss the anticompetitive and unfair competition issues that have been raised in South Africa and other jurisdictions, before we conclude that most competition agencies are at a crossroads in determining whether Uber violates competition law. Thirdly, the issue of regulation pertaining to the roles of the competition authorities and government regulators is discussed. Finally, we conclude.

## II LEGAL FRAMEWORK OF THE METER TAXI INDUSTRY

It may seem that the metered taxi industry is relatively straightforward. However its perceived simplicity is masked by a fairly structured legal framework. At the heart of this framework is the National Land Transport Act<sup>1</sup> (the Act) that, *inter alia*, serves to inform and facilitate the process of transforming and restructuring the national land transport system.<sup>2</sup> The legislation governing the metered taxi industry has been promulgated by all three spheres of government.<sup>3</sup> Generally, each sphere is tasked with the responsibility of monitoring and overseeing the

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<sup>1</sup> Act 5 Of 2009.

<sup>2</sup> Section 2(a) of the National Land Transport Act.

<sup>3</sup> Section 11 of the Act.

transport system in so far as land transport activities are concerned.<sup>4</sup> A transport regulatory structure must be established by the authorised arm of government to ensure that each Province, or municipality discharges its functions in accordance and within the confines of the legislation.<sup>5</sup>

Ultimately, the functions of all three spheres of government in relation to land transport regulation are interrelated. Some functions can be jointly exercised by one or more municipalities together with a Province in accordance with an agreement; however such powers may be subjected by the Constitution.<sup>6</sup>

(a) Regulatory pillars

Metered taxi regulations centres on three fundamental aspects: the regulation of quantity (the number of motor vehicles which operate on the roads); the regulation of quality (ensuring that the required standards and measures are met and complied with by the driver); and the regulation of fares (the prices which can be charged).<sup>7</sup>

Quantity restrictions speak to the number of vehicles which can participate within the metered taxi services market. This element unequivocally aims to control the supply of vehicles within the market.<sup>8</sup> In other words, the regulators undertake to limit the number of vehicles that can enter the market through some form of licensing framework deployed to ensure that applicants meet a certain criteria, usually at the regulator's discretion.<sup>9</sup>

In order for one to compete vigorously, there exists a strong temptation to decrease costs and the level of services provided in effort to capture a larger portion of the market share. As such, quality standards must be observed not only to ensure the safety of passengers but, to guarantee the service provided meets the minimum quality standards.<sup>10</sup> These standards encompass those which apply to the driver – whether he/she is found to be fit and proper, and

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<sup>4</sup> Section 11(1)(a) read with section 20(1); section 21(1) (a); section 11(1)(a) read with section 20(1); section 21(1)(a); section 11(1)(a) read with section 20(1); section 11(1)(b) read with section 23(1); section 24(1)(a) of the Act

<sup>5</sup> Section 24(1)(b); Section 11(c); section 17 and 18(1) of the Act.

<sup>6</sup> Section 12 of the Act.

<sup>7</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 2017. 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 1 March 2017.

<sup>8</sup> Metered Taxi Rationalization Strategy *ibid* at 26.

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

<sup>10</sup> OECD *op cit* note 7 at 20.

whether the quality of the vehicle meets the mandatory standards.<sup>11</sup> It follows that all mandatory standards should be applied against an objective criteria upon an equal assessment to ensure consistency and transparency when conducting such an inquiry.

Pricing information should be made easily accessible to customers. The regulation of taxi fares can take various forms of maximum, minimum or a fixed charge per kilometre and may also depend on the time or distance travelled.<sup>12</sup> The existence of such regulation will limit the incumbent firms from charging a monopoly price they wouldn't otherwise charge in a competitive market.<sup>13</sup>

### III UBER: A DISRUPTIVE BUSINESS MODEL

#### (a) Disruptive innovators

Disruptive innovators introduce unpredictable and drastic changes in the market which inevitably affects the manner in which incumbent firms compete. Such innovators have a tendency of obliterating market shares of incumbent firms. Theoretically, they possess the ability to completely alter the competitive climate within a market.<sup>14</sup> Apart from the above, disruptive innovators also introduce new business models, products or manufacturing processes. These completely enhance the manner in which these products are produced, appear and are provided to consumers.<sup>15</sup> A key characteristic of disruptive innovators is the ability to engage a particular market and identify areas where costs can be ameliorated thus abolishing any inefficiencies associated with the provision of particular products or services.<sup>16</sup> The introduction of Uber into the South African metered taxi industry in early 2013 is case in point.

#### (b) Uber Business Model

Uber is an online-based mobile transport application (app) that allows users to connect with drivers in order to request a trip to a desired destination. How it operates, is that users select a location from where they can be picked up, and the app then sends a request notification to a driver located in the nearest vicinity of that pick-up site. In addition, users have an option to choose a class of vehicle that they prefer to travel in, whether an UberX, UberBlack or an

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<sup>11</sup> See Regulation 14(3) of the National Land Transportation Regulations, 17 December 2009. Also see OECD op cit note 7 at 20.

<sup>12</sup> Metered Taxi Rationalization Strategy op cit note 7 at 27.

<sup>13</sup> OECD op cit note 7 at 20.

<sup>14</sup> Ibid at 2.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid at 7.

UberVan – the latter catering for a party of more than four persons per single trip. Each class of car comprises of a different fare rate.<sup>17</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 app's built-in GPS system. Upon completion of the trip, users can either pay in cash (which was recently introduced) or use the cashless payment method by loading credit/debit card details upon activating ones Uber account. Thereafter, users are given the option of rating the services of their driver through a five star rating system. In turn, 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.

From the outset, Uber's business model clutches at convenience and certainty, of which there is a large deficit in the traditional meter-taxi industry. Instead of attempting to find the contact details of a metered taxi service or calling one without the certainty of its arrival or availability, Uber certainly grants users a transport system that is more predictable, certain and transparent.

Apart from the above, Uber grants its users numerous advantages, chief amongst them being the user-friendly interface which permits users to freely order their preferred vehicles within a reduced time frame, thus decreasing associated transaction costs.<sup>18</sup> Secondly, and arguably the most recognised advantage, is the pricing of trips which are immensely lower than traditional metered taxis.<sup>19</sup> Uber's pricing mechanism comprises of time and distance factors which is entirely determined by Uber. A study in South Africa revealed that in fact, Uber charges significantly lower fares than regular metered taxis, whose premiums peak at 265% higher than Uber's services.<sup>20</sup> This is indicative that consumers of metered taxis services would most likely switch to a more affordable mode of transportation. The pricing advantages are, however, not completely isolated from the quality and certainty advantages of using the app. Cumulatively, these factors would motivate customers to switch from the regular metered taxi

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<sup>17</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>18</sup> Geradin op cit note 7 at 5.

<sup>19</sup> G 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 2017.

<sup>20</sup> SC 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 25 March 2017.

services to Uber. Thirdly, the app primarily allows for electronic payment through the use of credit/debit card facilities which reduces the apprehension associated with carrying cash. These vary from whether one has enough cash or whether one is carrying the accurate amount needed in case the driver does not have change. Lastly, the ability to rate the driver's service through the five star rating system ensures that mandatory quality standards are upheld and that the driver's reputation is maintained.<sup>21</sup>

In view of the above, it is fairly evident that the introduction of Uber into the metered taxi industry provides an alternative, and certainly a more convenient means of travelling. Its user friendly features are attractive to consumers and are time saving. Not only are prices relative to traditional metered taxis far cheaper, Uber allows for users to select a category of vehicles where they may assess the fares charged for that vehicle type. It goes without saying that Uber's business model is reasonably transparent, which is attractive to consumers.

#### (c) Anti-competitiveness and Unfair Competition

Uber's entrance into the metered taxi market has sparked wide-spread conflicts in many jurisdictions around the world. Violence has ensued between Uber and drivers of metered taxis, putting the former's lives and livelihood at acute risk. Uber has indeed confronted a number of regulatory issues in all three major South African cities in which it operates, and some provincial authorities have taken action. In 2015, Cape Town officials impounded over 200 Uber cars as they were not appropriately registered for metered taxi licenses from the Western Cape's Department of Transport.<sup>22</sup> Violence has quickly become the order of the day in Johannesburg<sup>23</sup> and Pretoria<sup>24</sup> as multiple Uber drivers are being brutally attacked by metered taxis drivers as their hostility and rage towards the online based operator escalates. Some metered taxi drivers claim that they have indeed appealed to the transport authorities about Uber's alleged illegal activity however, their appeals remain unanswered.<sup>25</sup>

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<sup>21</sup> Geradin op cit note 7 at 5.

<sup>22</sup> G van Zyl 'Cape Town impounds over 200 Uber cars in 2015' *Fin24* (2015) available at, <http://www.fin24.com/Tech/News/Cape-Town-impounds-over-200-Uber-cars-in-2015-20150630>, accessed 3 June 2017.

<sup>23</sup> See further LM Khoza (ed) 'Police to monitor Sandton area following fresh attacks on Uber operators' *EWN* (2017) available at, <http://ewn.co.za/2017/04/23/police-to-monitor-sandton-area-following-fresh-attacks-on-uber-operators>, accessed 5 May 2017.

<sup>24</sup> See further T Melville 'Uber driver suffers burns when car is set alight, now fighting for his life in hospital' *Timeslive* (2017) available at <https://www.timeslive.co.za/news/south-africa/2017-06-13-uber-driver-suffers-burns-when-car-is-set-alight-now-fighting-for-his-life-in-hospital/>, accessed 28 June 2017.

<sup>25</sup> L Tandwa 'Uber is killing us – protesting metered taxi driver' *News24* (2017), available at <http://www.news24.com/SouthAfrica/News/uber-is-killing-us-protesting-metered-taxi-driver-20170310>, accessed 10 April 2017.

What has been gathered from a wide spectrum of news reports and issued statements from government,<sup>26</sup> is the patently clear view that Uber has caused immense disruption in the metered taxi industry and has swiftly triggered incumbents to retaliate in various lawful and unlawful ways. In 2016, the Competition Commission of South Africa (the Commission) received a complaint filed by the Meter Taxi Industry against Uber, alleging, *inter alia*, that the latter operates unfairly as it does not comply with the mandatory licensing public transport regulations. Furthermore, the allegations eluded to the idea that Uber also engages in predatory pricing (charging prices below costs). Upon concluding its investigation, the Commission took the view that the allegations advanced by the complainant did not contravene the Competition Act.<sup>27</sup> The nature of the above complaints and the subsequent findings by the Commission are by no means unique to South Africa, seeing that similar trends can be identified in a number of jurisdictions.

In Uruguay for instance, the Uruguayan Antitrust Commission found against the Taxi Owners Union allegations. It found that Uber's business model is not anticompetitive in nature and therefore does not infringe on any laws or regulations falling under the Uruguayan Antitrust Commission's jurisdiction.<sup>28</sup>

In India, Uber was accused by an incumbent metered taxi operator, Meru Cabs, for engaging in predatory pricing and abusing its dominant position in the market.<sup>29</sup> When answering to these allegations, Uber was of the view, and correctly so, that it does not occupy a dominant position in the metered taxi market, unlike Microsoft in its respective market and line of business.<sup>30</sup> It is truly incomprehensible and rather inexplicable how a new entrant (presumably with a low market share) in a regulated market, and with a fair number of players can be said to be dominant. Nonetheless, the Competition Commission of India (CCI) is yet to make a finding.

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<sup>26</sup> Media Statement 'Gauteng Transport on Uber's competitive threat to metered taxis' *South African Government* (2015) available at, <http://www.gov.za/speeches/gauteng-mec-roads-and-transport-uber-mt-statement-10-jul-2015-0000>, accessed 29 June 2017; See also Media Statement 'Parliament on Uber transport' *South African Government* (2016), available at <http://www.gov.za/speeches/transport-committee-concerned-conflicts-where-uber-operates-6-jun-2016-0000>, accessed 29 June 2017.

<sup>27</sup> Media Statement 'Statements on the decisions of the Competition Commission' *Competition Commission* (2016), available at <http://www.compcom.co.za/wp-content/uploads/2016/01/Commission-Statement-20-October-2016-Final.pdf>, accessed 1 June 2017. In accordance with the Competition Act, the Meter Taxi Industry was afforded 20 business days to refer its complaint to the Competition Tribunal however, it did not exercise its right to do so.

<sup>28</sup> See CPI 'Uruguay: Huge Anti-Trust Win for Uber' *CPI* (2016), available at <https://www.competitionpolicyinternational.com/uruguay-huge-antitrust-win-for-uber/>, accessed 4 May 2017.

<sup>29</sup> See S Rautray 'Uber denies charged of abuse of dominance position' *Economic Times* (2017), available at <http://economictimes.indiatimes.com/small-biz/startups/uber-denies-merus-charges-of-abuse-of-dominant-position/articleshow/57424607.cms>, accessed on 18 April 2017.

<sup>30</sup> *Ibid.*

Despite the above findings, Uber has not had much luck in defending allegations of anticompetitive conduct in numerous Member States of the EU,<sup>31</sup> the USA,<sup>32</sup> Argentina,<sup>33</sup> and South Korea.<sup>34</sup> In the United States particularly, Uber's pricing algorithm has raised antitrust concerns. The foundation on which these concerns arise is that the pricing algorithm precludes drivers from setting their own respective prices. Drivers are therefore compelled to accept an imposed single pricing structure set by Uber. It is alleged that this conduct amounts to price fixing, which violates the Sherman Act. This allegation was in part advanced by one Mr Spencer Mayer in the case of *Meyer v Kalanick*.<sup>35</sup> Therein, Mr Spencer further alleged that because of the pricing algorithm, drivers are not acting independently and thus implicitly agree to participate in a conspiracy amongst themselves as they assent to the terms of Uber's agreement. Despite Uber's arguments to the contrary, the District Court found in favour of Mr Meyer because he advanced a case that plausibly alleges a conspiracy by drivers to reach an agreement to Uber's pricing algorithm, thus benefiting from reduced price competition.<sup>36</sup> The Court further equated such conduct to that of a 'hub and spoke' agreement.<sup>37</sup>

In totality, it would seem that a multitude of cases launched against Uber are grounded either on allegations of price fixing, abuse of dominance or predatory pricing. The latter conduct is rather cumbersome to prove for the reason that a mere allegation of a firm charging too low a price will not suffice.<sup>38</sup> To only perceive Uber's business model as one that aims to decrease prices in effort to drive out metered taxis out the market simply ignores the presence of new competitors such as Lyft, Taxify or Zebra cabs on the online-based transportation platform.

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<sup>31</sup> Advocate General's Opinion in Case C-434/15. *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*.

<sup>32</sup> C Said 'US: Flywheel Taxi sues Uber for Antitrust violations' *SF Gate* (2016), available at, <http://www.sfgate.com/business/article/Flywheel-Taxi-sues-Uber-for-antitrust-violations-10488784.php>, accessed 5 June 2017.

<sup>33</sup> H Bronstein 'Argentina judge orders Uber blocked, declines detention' *Reuters* (2017), available at <http://www.reuters.com/article/us-argentina-uber-tech-idUSKBN15E25J>, accessed 12 June 2017.

<sup>34</sup> 'South Korea rejects Uber proposal, vows crackdown' *Fin24tech* (2015), available at, <http://za.b2.mk/news/?newsid=L8m> accessed 9 June 2017.

<sup>35</sup> 2016 WL 4073071 (S.D.N.Y. July 29, 2016).

<sup>36</sup> *Ibid* at 13.

<sup>37</sup> *Ibid* at 12.

<sup>38</sup> See Said op cit note 32.

#### IV REGULATORY SOLUTION: WHERE TO FROM HERE?

(a) The role of competition agencies?

On one hand, it is no secret that Uber faces a copious amount of regulatory challenges in many jurisdictions. On the other hand, it is fairly understood and generally accepted that disruptive innovators such as Uber are crucial to competition as they potentially drive growth within an industry.<sup>39</sup> Since allegations of potential anticompetitive conduct have been raised and rejected by some competition authorities, what exactly is the role of competition agencies in this debacle?

Well, 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 market inquiry into the land transportation industry. This would allow the competition authorities, ideally the Commission, to obtain a detailed and informed idea of how the market has been affected by the entrance of Uber. The above approach is pragmatic, and a rather substantial task that requires extensive research and a great deal of time. As attractive as market inquiries are, they need not be the sole solution.<sup>40</sup> Advocacy for raising better awareness on the potential effects of denying or allowing Uber to operate is an option which the Commission can explore. An approach whereby the competition agencies purely seek to enforce anticompetitive restrictions and regulations is undoubtedly to the detriment of firms that aim to innovatively disrupt the status *quo*. Such an approach will harm the interest of consumers.<sup>41</sup> In the same vein, competition agencies must be seen to interject when certain regulations are imposed that could potentially cause harm to competition.<sup>42</sup> In summation, competition agencies must play an active role in thoroughly investigating allegations raised by incumbents. However, these allegations may be self-serving and must be observed with a great deal of caution. Creating awareness on issues surrounding disruptive innovation through

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<sup>39</sup> HF Wei ‘Does Disruptive Innovation “Disrupt” Competition Law Enforcement? – The Review and Reflection’ (2016) at 11, available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0ahUKEwiVtaGl-eXUAhVCxxQKHQWRCmUQFgg1MAM&url=http%3A%2F%2Fweb.cjcu.edu.tw%2Fconference\\_abstract%2F2016\\_07\\_01\\_11\\_47\\_01.222.docx&usg=AFQjCNHcahurPO7pNloFn7wVYvBCyIHbrQ](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0ahUKEwiVtaGl-eXUAhVCxxQKHQWRCmUQFgg1MAM&url=http%3A%2F%2Fweb.cjcu.edu.tw%2Fconference_abstract%2F2016_07_01_11_47_01.222.docx&usg=AFQjCNHcahurPO7pNloFn7wVYvBCyIHbrQ) , accessed 19 June 2017.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.



advocacy is not only for the benefit of competition authorities but also for the benefit of consumers.

In other jurisdictions, competition agencies have engaged the legislature directly. The Antitrust Commission of Uruguay has approached Congress directly and presented non-binding recommendations. These recommendations seek pro-competitive regulation in various regulatory frameworks that intercept with the metered taxi industry. They further aim to ensure fair and equal treatment of all interested parties and that regulations do not impede the development of innovative business models such as Uber.<sup>43</sup>

*(b) The role of regulators*

The South African transport regulatory authorities did not anticipate nor foresee the advent of an online-based transportation platform such as Uber to enter the transport industry. The regulatory response to Uber's entrance into the market has been glacial and following the increased ferocity against it, transport regulators are faced with a difficult task which is becoming less easy to manage. Well, where to from here? The solution is not an outright ban on Uber. Rather, it should be regulated. This is a fate Uber cannot escape. The EU, it seems, is headed towards this direction. The non-binding opinion of the Advocate General in a case which has been brought before the European Court of Justice, states that Uber's operations should be classified as a service in the field of transport. Uber's operations would then fall within the scope of shared competence of the European Union and the Member States.<sup>44</sup> Should the ECJ's decision lean towards the opinion of the Advocate General, it is most likely that Uber will be subjected to each Member States transportation services regulatory framework. Whether the ECJ's decision will fundamentally change the manner in which Uber operates in each Member State is yet to be seen given the dissimilar approaches followed by each Member State.

Even though it might seem as if Uber has been able to totally circumvent transport regulations, they have however, been forced to comply with transport regulation in a rather piecemeal fashion. Be that as it may, the national government, amongst its many other endeavours, has chosen to take action. In response to the issues that Uber raises, the National Land Transport Amendment Bill<sup>45</sup> ("the Amendment Bill") aims to amend certain provisions of the Act to include electronic hailing (e-hailing) apps (i.e. online based transport apps) or

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<sup>43</sup> CPI op cit note 28.

<sup>44</sup> Opinion of Advocate General op cit note 31 para 71 ff.

<sup>45</sup> Amendment Bill [B7-2016].

similar technologies under the definition of metered taxi services. Effectively, Uber shall be subjected to identical licensing and regulatory requirements as metered taxis.<sup>46</sup> Should any metered taxi vehicle operate without an operating licence<sup>47</sup>, the driver of such 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>48</sup>

As to when the Amendment Bill shall be promulgated, it is uncertain. It further remains unclear what shall be the consequences of Uber operators whom do not possess the required operating licence under the Amendment Act. 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 licences?

## V CONCLUSION

Although it is generally understood that disruptive innovation is essential for growth, it is also imperative that regulatory frameworks within various industries should not unjustifiably curtail disruptive entrants. Innovation should be the catalyst for development and push incumbents to innovate. The display of violent and destructive behaviour should not be tolerated and must be punished accordingly. In an ever changing digital economy, it is important for competition agencies and regulators to react swiftly in efforts to ameliorate any adverse effects or complications that may arise due to the inadequacy of regulations to cater for new technologies. I believe Uber and other online based mobile transportation platforms have an important role to play in the metered taxi industry. To suppress or completely shun them out would be a grave disadvantage to innovation, competition and growth.

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<sup>46</sup> See further section 1(d) and section 38 (c) of the Amendment Bill.

<sup>47</sup> Section 50 of the Act.

<sup>48</sup> Section 90(2)(a) of the Act.

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