

Consumer Rights
in China

Legal and Regulatory Challenges of the Sharing Economy

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Policy Brief

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This policy brief summarizes a report presented at the 9th Research Partnership Platform (RPP) meeting during the annual United Nations Conference on Trade and Development (UNCTAD) events between 9 and 13 July, 2018. The research is being conducted as part of the Oxford University Consumer Rights Beyond Boundaries programme in the Oxford Law Faculty. It is an ongoing project supported by UNCTAD. We welcome comments and suggestions; please contact hui.xue@sydney.edu.au or alex.chung@ucl.ac.uk.

Executive Summary

This policy brief aims to address the following issues:

- Clarify the terms 'sharing economy' and 'platform economy' from a regulatory perspective;
- Highlight the regulatory challenges arising from the conflicting interests of governments, corporations, labour, and consumers, and to situate this within the UK's actively regulated digital economy as compared to China's digital market, which is currently the largest in the world;
- Identify the most contested regulatory areas as illustrated through the case studies of Uber in the UK and Didi in China, ranging from consumer protection to labour and employment, and from competition to data protection;
- Sketch a landscape of cross-sectoral complexities related to the many services that a single given technology-enabled service provider can provide, with a focus on the lacklustre manner with which existing or newly proposed laws and policies are being implemented;
- Provide evidence for the above based on case studies from various corporate services across geographic regions.

Legal and Regulatory Challenges of the Sharing Economy

Introduction

The sharing economy poses tremendous challenges for regulators in a wide array of sectors, such as transportation, employment, consumer protection, and digital economy. It is of particular concern for those responsible for the regulation of transportation, since it gives rise to a host of new challenges that endanger public safety, such as threats to the jobs of traditional operators, and the unfair use of consumers' personal data. The rapid expansion and diversification of the sharing economy's transportation sector requires carefully crafted measures that can be implemented by existing regulatory bodies or by new and alternative forms of regulators. Here, our analysis focuses on the most problematic transportation sector — namely, the ride-hailing and sharing online platforms Uber and Didi Chuxing (Didi hereafter) — from a comparative perspective.

In the digital society, policymakers and regulators are often faced with the challenge of having to identify where exactly the regulatory space is, which party should assume liability and on what ground, and which law should thus apply. With regards to the issue of regulatory space, a primary reason for the obscurity it creates is the complexity generated by the conflicting interests of governments, corporations, and consumers. The ever-expanding information asymmetry makes the balancing of interests more and more difficult between government departments, multinational corporates and their business partners, and vulnerable consumers. Yet, these concerns only capture the attention of regulators when problems become so severe that they lead to adverse consequences — which our case studies will show. The preliminary findings from our research highlight the main regulatory issues and shed light on emerging regulatory and governance models.

The peer-to-peer nature of the sharing economy and the platform economy

The term 'sharing economy', to begin with, is not helpful for regulators because it does not capture the essence of the contemporary economy which many societies had not experienced until recently. The early scholarly debate on the terminology includes *communal consumption*, and later, *collaborative consumption* (Hamari et al. 2016). Both of these mainly refer to peer-to-peer assistance rather than single-sided platforms in the marketplace that share goods and services or enable transactions through community-based online services. But the term has become readily accepted by the public due to its association with services like Uber and Didi, making it a common household term.

Further confounding this concept are the specific activities related to this term, which encompass four broad categories: 1) recirculation of goods, 2) increased utilization of idle assets, 3) exchange of services, 4) sharing of productive assets (Schor 2014).

Some research further suggests categorizing the sharing economy into two distinct groups: '*labour platforms*' and '*capital platforms*'.¹ The former serves to allocate labour resources to allow freelance or contingent workers to interact with consumers to complete tasks or projects; the latter facilitates individuals to share their goods or properties for financial gain.² Uber and Didi fall under the first category.

Similarly, 'platform economy' is a problematic term due to the multiple infrastructural dimensions it embodies. For the regulator, there are at least three dimensions to consider when implementing rules: technological infrastructure which facilitates

information transmission and distribution between different service providers, consumers, drivers, and other participants; economic infrastructure that enables logistic resources or finances to be transacted in a certain way, and thus develop sustainable business models; and cultural infrastructure which refers to different stakeholders or actors who may or may not share economic interests but which generate cultural and social norms in the course of the communal exchange and interaction. When examining any given type of sharing economy or platform economy from these perspectives, it helps to consider three questions that are central concerns for the regulator: Who is involved?; in what way are resources allocated and redistributed?; and which law and policies apply under a certain set of circumstances?

Regulatory issues: Uber in the UK and Didi in China

Although they operate within two very different markets and regulatory systems, cases involving serious crimes of assault, murder, and rape have plagued both Uber and Didi over the past few years. For instance, there have been fourteen separate cases in which female passengers have been sexually assaulted by Didi drivers in China (Tsoi 2018); Uber is also facing a class action lawsuit from nine women in the US (O'Brien 2018). Activists have created websites to protest and expose the dark side of an under-regulated Uber operating environment that leads to consumer protection and public safety concerns, as well as precarious working conditions that are tantamount to exploitation of the drivers. Furthermore, using data for operational purposes has potential consequences for digital justice and fairness in the long term.

In the following two cases, our discussion explores three issues:

- Roles of the service provider and the consumer;
- Main regulatory issues these two cases have in common;
- Principles for emerging regulatory and governance models according to the characters of each service.

Uber in the British regulatory environment

The UK government's stated ambition is to make the UK the 'global centre for the sharing economy' (DBIS 2014). But at what cost, one might ask? Numerous mass protests have been staged in London by non-Uber cab drivers accusing Uber of abusing their market dominance, which has dramatically driven the price downwards as the number of available drivers has increased. Aside from Uber's anti-competitive practices, they are also known for a general lack of due care of the precarious working conditions of its drivers. In addition, there are numerous recent examples of serious physical assault perpetrated against both taxi drivers and consumers.

When Uber was first launched in the UK, black cabs pressured Transport for London to take Uber to court over their alleged illegal use of the Uber app, which they considered to be the equivalent of a taximeter. Although the court ruled in Uber's favour, there were other complaints from the industry about Uber's business practice and unfair treatment of drivers. These include conditions of employment that lead to job uncertainty, insecurity, and general precariousness, mainly through the power asymmetry that allows Uber to exercise control over pricing, how drivers should work, and how the service should be run.

Two of the drivers, James Farrar and Yaseen Aslam, took Uber to court in 2016 in a bid to become recognized as Uber employees or workers under UK employment law, rather than as independent contractors or self-employed (*Aslam and Others v Uber BV and Others*). The court decided that they should be characterized as workers. This meant that Uber drivers can receive some but not all of the benefits and job security of regular employees. In its justification, the court has generally rejected Uber's use of multiple corporate personalities to circumvent the relevant UK employment and competition laws (OPBP 2017: 6).

A licence ban to prevent Uber from operating in London resulted from this court decision in 2016, but Uber was allowed to keep operating while it appealed the decision. In June 2018, a London court

granted a contrite Uber a temporary fifteen-month licence. This was granted under a clear set of conditions which the Transport for London authorities will closely monitor and enforce (Smut 2018). Uber agreed to take on more corporate responsibility in the soft form of voluntary and self-regulation. For instance, Uber has implemented a twenty-four-hour customer complaints hotline, direct crime reporting to the police, mandatory work breaks, and more stringent rules for drivers' backgrounds and medical checks.

A collaborative way of implementing regulations sometimes results from an effort to reach common ground between platforms and regulators, as the UK example shows. Although the authorities have now finally decided to take a harder regulatory stance against Uber, it too often occurs only after great costs have been incurred — both in terms of the financial cost of legal battles and harm to the society at large.

These are not issues that can be quickly or easily resolved by regulators and the courts alone. Not least, this is due to the disruptive nature of the innovative technologies that test and stretch legal and regulatory boundaries. Uber's business model renders many of the traditional rules and laws inapplicable to the services they provide. Some of these services inherently raise concerns relating to consumer protection and public safety. Yet, the very idea of whether to regulate them has been met with reluctance from government and industry, due to the apparent benefits offered to consumers and concerns about stifling innovation. Further, as most of the cases against Uber are settled via private arbitration before reaching the courts, they avoid public scrutiny, which would otherwise prompt calls for new regulations.

More needs to be done to create clear definitions for the sharing economy and reduce legal grey areas. Best practice needs to be considered on a case-by-case basis rather than a one-size-fits-all regulatory approach, depending on the service in question. This is especially important given the rapid expansion and diversification of the transportation sector, which is further demonstrated in the following case of Didi in China.

Didi in the Chinese regulatory environment

To maintain an advantageous position in the competitive technological world, these ride-hailing service providers are racing to harvest bigger sets of data. Extensive analysis of data through machine-learning improves demand and supply to multiple parties, and precisely predicts the online and offline activities of consumers and drivers, potential commercial opportunities, and profitable future business models.

In the case of Didi, we examine the above from the perspective of data protection for individual consumers. The following analysis explains how data harvesting changes the market structure, current regulatory issues, and possible regulatory implications for protecting consumer data in the business world, where power imbalances are increasing.

In China, the sharing economy has grown dramatically in recent years, where the amount of financing has reached US \$32.54 billion in 2017 (NIC 2018: 1). With a growing population that leads to high competition for resources, the transportation sector contributed most, in proportion to the non-financing category of the sharing economy; Didi ranks first in this sector. It has become the largest ride-hailing market in the world, with over 14 million private drivers and 300 million active users as of summer 2016 (Sundararajan 2016). By comparison, Uber has 50 million registered passengers (NIC 2017). Didi achieved this through fierce competition in Mainland China, including its purchasing of Uber in 2016 (Newcomer and Wang 2016).

Didi became the first large mobile app-based transportation service provider in China after the merger of Didi dache and Kuaidi dache in 2015 (Shih 2015). Chinese internet giants Tencent and Alibaba provided investment backing for them. Didi further attracted international investors, including SoftBank of Japan, amounting to \$4 billion in 2017, to boost its competitive advantage in artificial intelligence (AI) and new technologies (SoftBank 2017). Its globalization has accelerated as a result of its investment in South East Asia, Australia, Mexico, and Brazil (Zhu and Wu 2018). The overseas market

expansion is preparing for a viable data platform to record registered users' profiles, travel routines, payments, and other online and offline activities, which would help Didi to utilize data and AI to further build digital infrastructures for smart and green cities (Ge et al. 2017).

The introduction of venture capitalists into this space has changed the dynamics of sharing enterprises (Schor 2014). Its services have developed alongside market expansion, from ride-hailing services to mobility solutions providers, and most recently as a travel-oriented all-in-one platform. However, in attempting to use data obtained from a global platform, Didi now has to cautiously manage trust-building with three key stakeholders: governments, drivers, and consumers.

In response to these changes, regulations have evolved accordingly, from the regulators struggling to understand the new services facilitated by digital technologies operating in a state of non-regulation in 2013, to a fragmented regulatory landscape in 2016 that partially addresses relations and trust-building between the three primary stakeholders. Since the national regulation Interim Measures for the Administration of Online Taxi Booking Business Operations and Services was enacted on 1 November 2016 (MIIT 2016), forty-two cities across China have adopted this regulation and adapted it in accordance with their own local administrative rules (MOT 2017). However, the fragmented nature of these disparate administrative rules means that some of the more prominent issues raised by different Didi services remain hard to resolve.

In a recent case, a flight attendant was murdered while using Didi Hitch services (Jiang 2018). The incident generated a heated debate on social media, temporarily halted the services, and led to more stringent self-regulation rules concerning identity checks of the drivers, based on the comments and profiles of passengers and drivers.

There is a regulatory dilemma regarding the legal status of Didi in this case: Didi claims its Hitch services arm should not be regulated as a traditional transport service but only as a contract-based trade. According to Didi, its Hitch service is a voluntary one

that provides information for both drivers and passengers to facilitate the matching of their needs (e.g., road travel towards the same destination) and the sharing of costs between passengers. Didi claims that its intention to promote this voluntary service is to reduce congestion. According to Didi's user agreement, if any accidents or incidents occur during the ride, drivers are obliged to take full responsibility for any harm sustained by passengers; Didi itself, however, is exempt from any joint liability.³

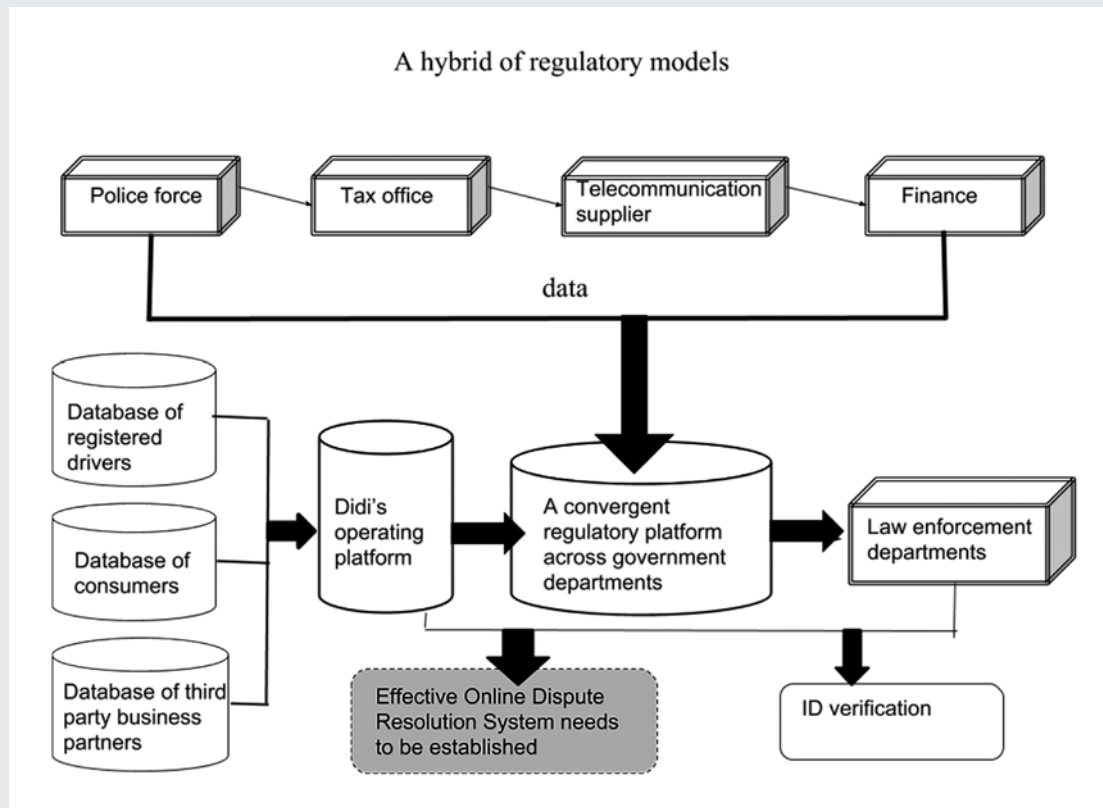
Some scholars argue that although the act of providing the platform does not imply an employment relationship, the platform itself should still assume joint liability, even if it is only an intermediary. This argument makes sense in the case at hand because Didi's business growth is dependent on passengers' trust in the platform rather than on in-kind exchange, as Didi proclaims. Didi aims to incorporate a technological design that promotes interaction through their proprietary social media feature. This tool helps to increase both the loyalty of their active users and their rider clientele base. The case of Didi Hitch shows that, without mechanisms to ensure the fair use of passenger profiles and comments, user data may be subject to abuse. Such abuse would undermine consumer trust as well as government trust.

Figure 1 (overleaf) shows one approach of co-regulation that intends to ensure that the bona fides of drivers and passengers are verified during each ride. When users order ride services online, Didi regulates information to match the needs between drivers and passengers and handles riding complaints on its operating platform. This process, particularly with regard to the verification of the driver's identity, is completed in conjunction with the regulator platforms. Didi's regulatory platform facilitates the collaboration of several primary departments, such as police forces, tax offices, telecommunication suppliers, and finance agencies — including mobile payment suppliers — to share data and ensure safe riding.

Regulatory implications for emerging regulatory and governance models

In modern society, regulators face the dilemma of having to decide whether to apply existing law and

Figure 1: One example of a hybrid of regulatory models



Source: Authors' own compilation based on sources referenced in the text (MIIT 2016; MOT 2017).

policy to emerging issues or to propose new rules for particular regulatory purposes according to the sector's needs. The former might not easily apply to new issues created by technology-enabled services, while the latter might create new grey areas and barriers that stifle innovation. The above two cases reveal that most of the existing law and policies can be adapted to function in a way that is fit for purpose, but it does require extra due care on the part of the regulator to discern the nature of the services and joint liability in question for all parties involved. There are no easy solutions, as regulators will need to constantly play catch-up, given the ever evolving nature of the sharing economy. Nevertheless, the above cases show the need for further empirical investigation and comprehensive study into several research gaps that require immediate attention.

These areas include the need to understand whether current rules and laws may be overstretched in their application to the sharing economy, or whether it would be more appropriate to create new, tailored

rules for particular regulatory purposes according to the sector's needs. Operational guidelines to implement key definitions in a variety of services will help platforms improve their daily services and reduce uncertainty at an early stage.

Other questions that need to be explored include the following: how do the above distinctions apply to variations of the platform and technology that involve similar types of service within the sector in question or across sectors? What factors should be considered in determining which type of laws and regulations ought to be applied? As the above case of Didi Hitch illustrates, in this service, Didi takes a primary role as information intermediary. Therefore, when a rape or murder is committed during the service, the joint liability of Didi would shift the focus of the investigation to the verification process for driver eligibility and driver and vehicle registration. By contrast, in other services like Didi's ride-hailing (as opposed to Didi's voluntary service), its joint liability might be different. The same applies to Uber.

Moreover, with regard to data governance, regulators need to clarify whether service providers should be subject to joint liability in the case of data breach, data misuse, data verification, data standardization, and data sharing with business partners, including internet service providers and mobile payment suppliers. For example, questions such as whether the platform should bear joint liability if the passenger's life is at risk due to inaccuracy of driver identity information, or even due to failure to identify a fraudulent driver's licence, need to be addressed.

Finally, data sharing between governmental regulators and service providers in the name of the public good may undermine data justice and do a disservice to the public interest. Didi's sharing of data with government departments blurs the line in that in doing so, it is arguably assuming a quasi-

regulatory role, thereby subrogating government institutions. This could have negative implications for consumer protection, given that an effective and functioning online dispute platform has yet to be established. Monopoly service providers may also apply algorithms that not only lead to the manipulation of information through unfair pricing for consumers, but also the manipulation of information to avoid stringent regulation imposed by the government. Therefore, data sharing between monopoly service providers with external business partners may lead to unfair competition, as it could increase entry barriers for newcomers with no access to data where that access is exclusively the preserve of the big players. Relatedly, data sharing between the same monopoly service providers and public sectors may cause concern for start-ups that have less means to access the public administrative system.

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Notes

- ¹ See further explanations on this distinction by Farrell & Ereig in Elizabeth J. Kennedy, 'Employed by an Algorithm: Labor Right in the On-Demand Economy', 40 SEATTLE U. L. REV. 987, 992 (2017); or FTC, 'The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators A Federal Trade Commission Workshop', <https://www.ftc.gov/system/files/attachments/press-releases/ftc-examine-competition-consumer-protection-economic-issues-raised-sharing-economy-june-workshop/150416economyworkshop.pdf>; or FTC, 'The "Sharing" Economy Issues Facing Platforms, Participants & Regulators: An FTC Staff Report', https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf
- ² Given the space constraints of this policy brief, we limit our discussion on the wider sharing economy and focus instead on its transportation sector. We provide a more extensive discussion in our chapter which is due to appear in a joint-authored book, *Law and the Digital Society* (forthcoming). For more information, please contact the corresponding author: hui.xue@sydney.edu.au.
- ³ See further explanations of the joint liability by Xiaojukeji, <http://static.xiaojukeji.com/didialift/hybrid/pages/protocol/Carpool.html>. Xiaojukeji (Xiaoju Technology) is operating the platform that provides information services on behalf of Didi.



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