Canadian Journal of Law and Technology

Volume 18 | Number 2 Article 4

11-2020

Horizontal Collusions Organized by Uber: Time for a Change in Canada

Thanh Phan
University of Victoria, Faculty of Engineering

Horizontal Collusions Organized by Uber: Time for a Change in Canada

Thanh Phan[*]

On 27 November 2018, the Court of Appeal for Ontario concluded that the arbitration clause in the driver service contract between Uber Technologies Inc. (Uber) and its drivers was invalid, paving the way for Uber drivers in Ontario to seek a declaration that they are Uber's employees.[1] The final decision of the drivers' legal action has yet to be made, but treating drivers as employees may be a solution for Uber to avoid possible antitrust lawsuits, which could result in severe sanctions.

Uber provides on-demand transportation technology connecting riders and drivers. When a rider makes a ride request by confirming the pickup location and destination, Uber's platform will share the ride request to nearby drivers and only one driver can accept the request. The rider then pays the driver a fare pre-arranged by Uber.[2]

Several studies have concluded that Uber's platform is a price-fixing cartel whereby Uber is the organizer and drivers are members, but these analyses have four problems.[3] First, the literature assumes that there is only one cartel among Uber and its drivers, a perspective which is undermined by the counterargument that it is unlikely for there to be the same set of drivers available on Uber at a given time in a geographic area.[4] Second, the authors do not clarify if there are horizontal collusions among drivers. Third, they do not examine if the agreements are naked or ancillary restraints. Fourth, the literature only

---

* Postdoctoral Researcher and Instructor in Engineering Law at the University of Victoria Faculty of Engineering, Canadian Queen Elizabeth II Diamond Jubilee Advanced Scholar (outbound). Acknowledgement: I would like to send my sincere thanks to Professor Damian Daniela (Faculty of Engineering, University of Victoria), Professor Victor V. Ramraj (Centre for Asia-Pacific Initiatives, University of Victoria), the Canadian Queen Elizabeth II Diamond Jubilee Scholarships-Advanced Scholars program, and Centre for Global Studies of the University of Victoria for your great supports. I also would like to thank the anonymous reviewers for their suggestions and comments.

1 *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (Ont. C.A.) at para. 74, affirmed 2020 CarswellOnt 8828, 2020 CarswellOnt 8829 (S.C.C.).

2 Uber, "How to use the Uber app" online: *Uber* <https://www.uber.com/ca/en/about/how-does-uber-work/>.

3 See e.g. Max Huffman, "The Sharing Economy Meets the Sherman Act: Is Uber a Firm, a Cartel, or Something in Between?," *Columbia Journal of Business Law* 859 (2017): 862 [*Huffman*]; See also Julian Nowag, "The UBER-Cartel? UBER between Labour and Competition Law" (2016), online: *Lund Student EU Law Review*, vol. 3: 4, <http://dx.doi.org/10.2139/ssrn.2826652> [*Nowag*].

4 See e.g. *Spencer Meyer v. Uber Technologies, Inc.*, [2020] 01-18-0002-1956 at 6 [*Meyer*].

focuses on price-fixing cartels, but no other possible collusions among Uber and its drivers are explored.

This paper argues that Uber's ordinary operation should be characterized as organizing horizontal cartels among drivers that not only fix the fares of ride-hailing services using its platform but also allocate customers. Uber-led cartels, therefore, violate section 45(1) of the *Competition Act*[5] of Canada. In doing so, this paper analyzes the relationships between Uber and drivers and argues that (i) Uber is the organizer of price-fixing and market allocation collusions among drivers, (ii) the collusions are horizontal, and (iii) they are per se illegal.

The first section discusses the general structure of peer-to-peer markets. The second section examines factors indicating the illegality of cartels organized by Uber under the *Competition Act* of Canada. The last section will provide some legal and technical solutions that may help Uber to remedy the anti-competitiveness of its platform.

1. PEER-TO-PEER MARKETS

A peer-to-peer market refers to an online platform that makes it easier for large numbers of fragmented sellers and buyers to trade goods or services in exchange for money,[6] for example, Uber, Airbnb,[7] TaskRabbit,[8] and SkipTheDishes.[9] This section discusses the structure of peer-to-peer markets and how market players interact and benefit from the platforms.

Peer-to-peer platforms help sellers find matching buyers more efficiently and thus reduce costs, especially for individuals and small businesses.[10] For example, Airbnb hosts only need to sign up for an account to have access to the client

---

5 *Competition Act*, RSC 1985, c. C-34 [*Competition Act*].

6 Liran Einav, Chiara Farronato, and Jonathan Levin, "Peer-to-Peer Markets," Working Paper 21496 (Cambridge, MA: National Bureau of Economic Research, 2015) [*Einav*]: 1; See also *The Sharing Economy Framework* (2018), The Ministry of Finance of Ontario at 3.

7 Airbnb is an online marketplace that enables hosts to publish their host services on the Airbnb Platform and to communicate and transact directly with consumers seeking to book such host services. See Airbnb "Terms of Service" (2019), online: *Airbnb* <https://www.airbnb.ca/terms> at Section 1 [*Airbnb*].

8 The TaskRabbit Platform enables connections between consumers demanding short-term task services and providers seeking to perform those tasks. See TaskRabbit Inc. "Terms of Service" (2019), online: *TaskRabbit Inc* <https://www.taskrabbit.com/terms> > at Section 1 [*TaskRabbit Inc.*].

9 SkipTheDishes is a platform allowing consumers to order food and drinks offered by restaurants and store owners through the platform and the delivery of such orders through independently contracted couriers who are also users of the platform. See SkipTheDishes "Skip Platform Terms of Service" (2019), online: SkipTheDishes Restaurant Services Inc <https://www.skipthedishes.com/terms-of-service> > at Section I.2 [*SkipTheDishes*].

10 *The "Sharing" Economy: Issues Facing Platforms, Participants & Regulators* (2016), Federal Trade Commission at 23.

database and find matching consumers.[11] In addition, many participants merely sell or rent their underutilized property, goods, or services and sellers can choose when to provide services. For example, a host can list a room on Airbnb whenever it is not used for household purposes.[12] Also, Uber's platform helps drivers bypass strict regulations on taxis, for example, taxi quotas, fares, certificates and licenses, insurance, and inspections.[13] This advantage allows Uber to offer riders lower fares than a taxi for the same trip in a normal market condition.[14]

A peer-to-peer market consists of a platform owner, buyers, and sellers. The platform owner operates a technology-based marketplace that matches sellers and buyers. The owner also sets out rules regulating the transactions between sellers and buyers, providing solutions for situations in which either a request is not confirmed by the seller, the seller does not provide a confirmed service, or either party cancels the order.[15]

A buyer is a registered user using the platform to search for and buy services offered by registered sellers.[16] A buyer on some platforms must meet minimum legal requirements to enter into a contractual relationship; for example, the buyer must be an individual at least 18 years old or a duly organized legal entity.[17] Someone who wants to purchase a product or service must sign up for an account on the platform, provide the platform owner with their identity including credit card information, and comply with terms and conditions set forth by the platform owner.[18]

---

[11] Airbnb "Rent out Your House, Apartment or Room on Airbnb" online: *Airbnb* <https://www.airbnb.ca/host/homes?af=43720035&c=.-pi0.pk44926042052_285101405920_c_264072127560&sem_position=1t1&sem_target=kwd-264072127560&location_of_interest=&location_physical=9001606&campaign_id=751030283&gclid=EAIaIQobChMI77vD3p6c5QIVWyCtBh2iMg8-gEAAYASAAEgLuWfD_BwE>.

[12] *Airbnb, supra* note 7, s 1.

[13] *Taxi, Ride-Sourcing and Ride-Sharing Services* (2018), OECD, DAF/COMP/WP2(2018)1 at 11.

[14] See an example of fare comparison in Competition Bureau Canada, "Modernizing Regulation in the Canadian taxi industry" (26 November 2015), online: *Competition Bureau Canada*, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04007.html> section 2,. The comparison refers to prices in a normal market condition because when demand exceeds supply, Uber will practice surge pricing. For more on Uber's surge pricing, see section 2(b) of this paper.

[15] See, for example, *SkipTheDishes*, *supra* note 9 at section II.3; *TaskRabbit Inc.*, *supra* note 8 at s. 4; Airbnb, *supra* note 7 at s. 9; and Uber, *Uber B.V. Terms and Conditions for Riders* (2017) at s. 4 [*Uber*].

[16] See e.g. *Airbnb, supra* note 7 at s. 1.1; *Uber*, *supra* note 15 at s. 4; and TaskRabbit Inc., *supra* note 8 at s. 1.

[17] See e.g. *Airbnb, supra* note 7 at s. 2; *Uber, supra* note 15 at s. 4; and *TaskRabbit Inc.*, *supra* note 8 at Preamble.

[18] See e.g. *SkipTheDishes*, *supra* note 9 at s. I.3; *TaskRabbit Inc.*, *supra* note 8 at Preamble; *Airbnb*, *supra* note 7 at s. 4; and *Uber*, *supra* note 15 at s. 4.

A seller in a peer-to-peer market is a registered member who owns assets for rent or sale. A seller must also sign up for an account on the platform and provide the platform owner with their identity, license, and proof showing that the seller meets with all legal requirements for providing services, for example, car insurance and driver's license.[19] Similar to buyers, sellers have to comply with the platform owner's terms and conditions, which considers sellers to be independent third-party providers.

In peer-to-peer markets, sellers—but not the platform owners—are liable for the quality of services provided to buyers. Platform owners generally make clear statements in their terms of services that they are not a party in any contractual relationship between sellers and buyers, nor are they brokers or service insurers. Most platform owners also emphasize that sellers are not their employees, partners, representatives, agents, joint venturers, independent contractors, or franchisees.[20]

To enhance the quality of sellers' services and the platform's reliability, platform owners allow buyers to review and rate sellers.[21] At a general level, the reviewing and rating system enables buyers to select reliable sellers, encourages sellers to improve their services, and helps platform owners screen out problematic sellers and buyers.[22] For example, Uber reserves the right to not allow a driver to access its app and services if the driver fails to increase his or her average rating above a minimum average rating within a certain period of time.[23]

Although sellers transact directly with buyers when selling services, payments are made through platform owners or payment service providers appointed by the platform owners.[24] Some owners clearly state in their terms of service that they act as an agent of sellers solely for the purpose of collecting buyers' payments.[25]

In sum, in a peer-to-peer market, buyers and sellers are registered users of a platform and are bound by terms and conditions set out by the platform owner. Sellers transact directly with buyers, and buyers are required to examine the seller's reputation and service quality before entering into a transaction.

---

19 See e.g. Uber, *Technology Services Agreement* (2015) at Section 2.2 [*Uber Agreement*]; *TaskRabbit Inc., supra* note 8 at s. 2; and *SkipTheDishes*, *supra* note 9 at s. I.1.c.

20 See e.g. *SkipTheDishes*, *supra* note 9 at s. 4.2; *Uber*, *supra* note 15 at s. 2; *TaskRabbit Inc.*, *supra* note 8 at s. 1; and *Airbnb*, *supra* note 7 at s. 1.2.

21 See e.g. *Uber, supra* note 15 at s. 4; *TaskRabbit Inc.*, *supra* note 8 at s. 6; *Airbnb*, *supra* note 7 at s. 10; and *SkipTheDishes*, *supra* note 9 at s. I.4.

22 *Einav*, *supra* note 6 at 10.

23 *Uber Agreement*, *supra* note 19 at s. 2.5.2.

24 See e.g. *SkipTheDishes*, *supra* note 9 at s. II.5; Airbnb, *Payments Terms of Service* (2019) at s. 7.1; *Uber*, *supra* note 15 at s. 5; and *TaskRabbit Inc.*, *supra* note 8 at s. 2 (User Representations and Warranties).

25 See e.g. *Uber, supra* note 15 at s. 5; *Uber Agreement*, *supra* note 19 at s. 13.1; *TaskRabbit Inc.*, *supra* note 8 at s. 3; *Airbnb*, *supra* note 24 at s. 9.

Payments are collected by platform owners or their authorized payment service providers.

Uber's platform, however, is distinguished from other peer-to-peer markets in that it facilitates cartels that are per se unlawful under section 45(1) of the *Competition Act*. The following sections will discuss the details of these cartels.

2. COLLUSIONS ORGANIZED BY UBER UNDER THE COMPETITION ACT OF CANADA

Hard-core cartels are per se illegal under the *Competition Act* of Canada regardless of the members' aggregate market power and how they lessen or prevent competition. Section 45(1) of the *Competition Act* provides that:

Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

> (a) to fix, maintain, increase or control the price for supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.[26]

The following subsections will examine factors indicating that Uber's platform facilitates arrangements mentioned in paragraphs 45(1)(a) and (b) of the *Competition Act*.

(a) Competitors with Respect to a Product

Section 45(8) of the *Competition Act* defines a competitor as ". . .a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy."[27] According to Uber's technology service agreement, drivers are providers of transportation services to riders.[28] A ride request made via Uber's platform will appear on nearby drivers' screens. The drivers have twenty seconds to be the first to accept the request by touching their device's screen when it flashes with a sound, and only one can be the service provider.[29] Uber drivers are, therefore, rivals competing with one another to provide transportation services to riders as defined in section 45(8) of the *Competition Act*.

---

26 *Competition Act*, *supra* note 5 at s. 45(1).

27 *Ibid*, s. 45(8).

28 *Uber Agreement*, *supra* note 19 at s. 1.12.

29 See Uber "How will I know when I'm getting a ride request? How do I accept?, Frequently Asked Questions Before Your First Trip" online: *Uber*, <https://www.uber.com/drive/new-orleans/resources/prefirst-trip-faqs/> [*Uber FAQ*].

While drivers participate in the Uber-led cartels as competing parties, Uber plays the role of a non-competing party. The Canadian Competition Bureau indicates in its guidelines that the competing parties may be prosecuted as cartel members under section 45 of the *Competition Act* while non-competing parties may also be prosecuted under section 45 as aiding and abetting parties.[30] These guidelines suggest that Uber may not be exempted from being characterized as a cartel participant under section 45(1) of the *Competition Act* of Canada. The next subsections examine in detail the collusions' content, the role of drivers and Uber, whether there is an agreement among them, and the illegality of the conspiracies.

(b) Cartels that Allocate Markets and Fix the Price of Transportation Services

The previous subsection suggests that, as providers of transportation services, drivers are supposed to compete for riders. The Uber platform nonetheless eliminates this competition, which results in effectively arranging cartels among them. This subsection argues that the cartels exist to allocate customers and fix prices. Although this subsection mentions conspiracies, collusions, cartels, and agreements when referring to Uber's arrangements with drivers, it focuses only on the content of the conspiracies while subsection 2(c) will examine why they are horizontal agreements and subsection 2(d) will argue that they are naked restraints.

i) Allocating Customers

A peer-to-peer market is generally a place where a buyer can find a range of sellers and transact with the most competitive one. When booking accommodations on Airbnb, for example, a guest can access a number of hosts with their detailed listings and select one that best suits his or her needs.[31] Similarly, TaskRabbit allows a client to search and view service providers and prices available in his or her area[32] while a customer can select foods and drinks from a list of vendors on SkipTheDishes.[33]

Uber, in contrast, does not provide riders with the ability to select drivers. Instead, Uber only allows riders to make a ride request, which is then shared with available drivers nearby. The drivers have to touch their device's screen within twenty seconds to be the only service provider.[34] According to the Competition

---

30 Competition Bureau Canada, "Competitor Collaboration Guidelines" (23 December 2009), online: *Competition Bureau Canada*, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html> at s. 2.3a [*Competition Bureau Canada]*.

31 Airbnb, "How do I Search for a Place to Stay?"online: *Airbnb Help Centre* <https://www.airbnb.ca/help/article/252/how-do-i-search-for-a-place-to-stay>.

32 Taskrabbit Inc.,"How Do I Hire a Tasker?" (15 November 2019), online: TaskRabbit Support <http://support.taskrabbit.com/hc/en-ca/articles/210861763-How-Do-I-Hire-a-Tasker->.

33 *SkipTheDishes*, *supra* note 9 at s. II.3.

Bureau, paragraph 45(1)(b) proscribes all forms of agreements that allocate markets including collusions ". . .to not compete with respect to specific customers, groups or types of customer, in certain regions or market segments, or in respect of certain types of transactions or products."[35] By making a request via Uber, a rider creates a market segment that has one customer in demand of supplies from Uber drivers. This market is only available for nearby drivers that are active on the Uber platform and match the rider's options (these are called "eligible drivers").[36] The Uber platform functions as a cartel among Uber and eligible drivers, allocating the customer to the driver who touches the screen quickly enough to occupy the market. Once the market is occupied by one driver, others will not compete no matter how competitive they are (see Diagram 1, below). If the Uber platform did not facilitate market allocation cartels, all eligible drivers that match a rider's options could show up so that riders could select the most competitive driver.

Therefore, Uber and its drivers allocate the customer of each ride request. Drivers do not have to compete for riders by price or service quality. Their competition is only to be the first driver to touch his or her screen to accept a request. Allocating markets not only deprives riders of freedom of choice, but also allows Uber and drivers to control and raise prices. The following section will discuss how Uber and drivers control and increase fares through a system, which functions differently from many other peer-to-peer platforms.

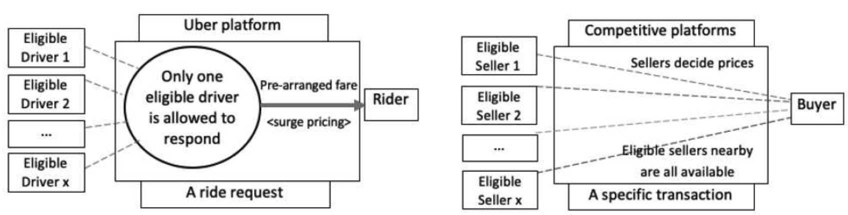

Diagram 1: Comparing the availability of providers in response to a buyer's need on Uber's platform (left) and a competitive peer-to-peer platform (right).

34 See *Uber FAQ*, *supra* note 29 at "How will I know when I'm getting a ride request? How do I accept?".

35 *Competition Bureau Canada*, *supra* note 30, s. 2.4.3.

36 Uber allows riders to select options for preferred drivers or vehicles; for example, when a rider requests a seven-seat car or a five-star driver, the platform will send the request to only eligible drivers. In this analysis, filtering vehicles and drivers in response to a rider's options is not anticompetitive.

(ii) Fixing Fares

Peer-to-peer platforms are generally marketplaces where prices are decided by sellers. Airbnb, for example, sets out in its terms of service that the hosts ". . . are solely responsible for setting a price."[37] Similarly, the prices of foods and drinks provided through the SkipTheDishes platform are listed by food vendors[38] and the prices of tasks provided on TaskRabbit are decided by sellers in negotiation with buyers.[39] On these markets, platform owners neither set the price of services nor intervene in sellers' pricing decisions. To attract more users, platform owners may provide users with gift cards and promotional codes for buying the products and services with certain conditions.[40]

Uber, however, pre-arranges the price of rides using its platform. When dealing with riders, ". . .Uber reserves the right to establish, remove and/or revise charges for any or all services or goods obtained through the use of the services at any time in Uber's sole discretion."[41] Drivers are required to base their fare on a pre-arranged fare calculated by the platform's algorithms, which can be changed any time at Uber's discretion.[42] This agreement between Uber and its drivers violates section 45(1)(a) of the *Competition Act*, which prohibits agreements between competitors in respect of a product ". . .to fix, maintain, increase or control the price for the supply of the product."[43] According to The Competition Bureau, this paragraph prohibits ". . .agreements to fix prices at a predetermined level, to eliminate or reduce discounts, [and] to increase prices."[44]

Pre-arranged fares, in essence, are the result of cartels that fix the price of each ride at a predetermined level, eliminating price competition among drivers to exploit riders. Although Uber has committed to ". . .respond accordingly to any request from a [driver] to modify the charges for a particular service or good,"[45] riders cannot practically enjoy a lower fare for two reasons. Firstly, because the driver who accepts a request is the sole provider for that particular request and he or she can only know about the length of a trip when it ends, the driver has no incentive to reduce the fare. Secondly, Uber's app lacks features allowing riders and drivers to reduce a trip's price while a guide to Uber instructs that when a rider makes a ride request, it is understood that the rider has accepted the price shown in the app.[46] Similarly, the drivers' "Frequently Asked Questions" do not explain how drivers can negotiate prices with riders.[47]

---

37 *Airbnb*, *supra* note 7 at s. 7.1.2.

38 *SkipTheDishes*, *supra* note 9 at s. 6.

39 *TaskRabbit Inc*., *supra* note 8 at s. 4.

40 See e.g. *TaskRabbit Inc., ibid*, s. 5; and *SkipTheDishes, supra* note 9 at s. III.

41 *Uber*, *supra* note 15 at s. 5.

42 *Uber Agreement*, *supra* note 19 at ss. 4.1 and 4.2.

43 *Competition Act*, S.C., 2015, c. 3 2017 at para. 45(1)(a).

44 *Competition Bureau of Canada*, *supra* note 30 at para. 2.4.1.

45 *Uber*, *supra* note 15 at s. 4.

In addition to fixing prices at a predetermined level, Uber-led cartels control ride fares. Instead of having a feature facilitating negotiations for lower prices, Uber's surge pricing mechanism serves to increase the pre-arranged fares whenever demand exceeds supply, making the price higher. When demand for rides in a specific area is high, the platform will multiply the basic fare with a surge multiplier of, for example, 1.3 or 2.1 times.[48] Surge prices are based on demand in real-time. Uber explains that in some situations, such as bad weather or rush hour, the number of requests exceeds the number of cars available on the road. Those who can afford a higher price can use the service immediately while those who cannot pay surge prices must wait until the fares go back down to normal.[49] Although Uber explains that surge pricing serves to ". . .make sure those who need a ride can get one,"[50] it tends to equate "need" with having to pay a higher price in a harsh condition.

One may argue that Uber's price arrangements are "maximum resale price maintenance," which is not illegal per se.[51] Maximum resale price maintenance refers to a practice whereby a supplier requires its retailers to sell products no higher than a ceiling price. Uber, however, clearly states in its agreements with both drivers and riders that ". . .no joint venture, partnership, or agency relationship exists between" Uber and drivers.[52] This means drivers are not the retailers of Uber or in any vertical relationship with Uber regarding the provision of services to riders. Fares pre-arranged by Uber, therefore, should not be considered maximum resale price maintenance but collusions that fix prices.

In sum, Uber's technology service agreements serve to allocate customers and fix the fares. The next subsection will examine whether there are agreements among drivers.

(c) Horizontal Conspiracies Among Drivers and the Role of Uber

Section 45(3) of the *Competition Act* provides that:

---

46 Uber, "Accepting a Trip Price and How Fares Are Calculated" online: *Uber* <https://help.uber.com/riders/section/a-guide-to-uber>.

47 *Uber FAQ*, *supra* note 29.

48 "How Surge Pricing Works," Uber, https://www.uber.com/ca/en/drive/partner-app/how-surge-works/.

49 *Ibid.*

50 Uber, "What Is Surge?" online: *Uber* <https://help.uber.com/partners/article/what-is-surge>.

51 Maximum resale price maintenance, which refers to vertical restraints, was deemed per se illegal in the U.S. in *Albrecht v. Herald Co*., 390 U.S. 145 (1968), 153, but the U.S. Supreme Court overruled this decision and applied the rule of reason when examining this practice in *State Oil Co. v. Khan*, 522 U.S. 3 (1997). In Canada, resale price maintenance is also not illegal per se. For more on resale price maintenance, see Larry Markowitz, "Price Maintenance: The View from Canada" (March 2010), *Distribution Law Commission Newsletter*, no. 1: 4.

52 *Uber Agreement*, *supra* note 19 at s. 13.1; and *Uber*, *supra* note 15 at s. 7.

[T]he court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.[53]

The Competition Bureau determines the existence of an agreement by examining whether the parties reached a "meeting of the minds" when participating in the alleged conspiracy.[54] According to the Bureau, parallel business practices in response to market trends and competitors' behaviour is insufficient to prove an agreement among conspirators.[55] However, parallel conduct in combination with practices such as sharing information may help to prove the existence of an agreement under section 45(1). The Competition Bureau acknowledges in a discussion paper that competitors can reach a cartel agreement ". . .through deliberate collective use of an algorithm meant to reduce competition," for example, ". . .a 'hub-and-spoke' agreement between competitors to use the same algorithm in maintaining prices for a large array of products."[56] The Bureau, however, neither defines hub-and spoke collusions nor explains how to determine an agreement among competitors in these conspiracies, leaving these questions open with a note that reads:

[I]t is difficult to predict the ways in which [big data and algorithms] may facilitate, or indicate the existence of, anti-competitive agreements or arrangements. Each situation is case-specific and will depend on the particular facts. Nonetheless, businesses face risks when they engage in facilitating practices that lead to outcomes that mirror those that would be achieved through a hard-core cartel.[57]

Hub-and-spoke conspiracies refer to cartels ". . .in which a firm (the hub) organizes collusion (the rim of the wheel or the rim) among upstream or downstream firms (the spokes) through vertical restraints."[58] Some scholars consider conspiracies arranged by Uber hub-and-spoke collusions, but they have not pointed out why Uber's collusions with drivers are horizontal agreements.[59] Unlike other conspiracies, the hub and rim of a hub-and-spoke arrangement connect and coordinate collusions among spokes and thus the spokes may not need to involve in direct communication with one another.[60] Since Canadian

---

53 *Competition Act*, *supra* note 5 at s. 45(3).

54 *Competition Bureau of Canada*, *supra* note 30 at 6.

55 *Ibid* at 7.

56 "Big data and Innovation: Implications for Competition Policy in Canada" (14 February 2018), Competition Bureau of Canada, (Innovation, Science and Economic Development Canada, 2017): 10 [*Big Data*].

57 *Ibid* at 11—12.

58 Barak Orbach, "Hub-and-Spoke Conspiracies," Discussion Paper No. 16-11 (2016), Arizona Legal Studies: 1.

59 See, for example, *Huffman*, *supra* note 3 at 862; See also *Nowag*, *supra* note 3 at 4.

jurisprudence lacks precedents for hub-and-spoke collusions, this subsection relies on section 45 and the technology service agreement between Uber and drivers to argue that the drivers' decisions are not parallel conduct but agreements orchestrated by Uber.

While conscious parallelism refers to unilateral business decisions of competitors as the result of market observations, Uber drivers can neither observe market trends and the reaction of competitors nor make pricing decisions.[61] Therefore, the provisions of their services are not parallel practices but business decisions orchestrated by Uber and regulated by the same set of rules.[62] Two factors indicate that drivers reach the "meeting of the minds" when participating in Uber-led conspiracies.

Firstly, by participating in the platform and complying with Uber's rules, drivers accept that ". . .Uber [reserves] the right to establish, remove and/or revise charges for any or all services or goods obtained through the use of the services at any time in Uber's sole discretion."[63] Drivers also agree that they will not decide the price of their services, but base their fare on a pre-arranged fare calculated by Uber's algorithms.[64] Uber, therefore, circulates an agreement to the drivers so that they indirectly agree with one another that (i) Uber is the party that sets and controls the price of their services, and (ii) only the one who first accepts a ride request will be the service provider.

Secondly, Uber's algorithms provide drivers with confidence that other spokes are acting the same on the rim and that Uber can protect them from being cheated. Drivers can only know about the details of a ride request after accepting it and the platform lacks features for fare negotiations.[65] Riders are also not allowed to request any specific driver. Therefore, the spokes have peace of mind when participating in the collusions organized by Uber.

One may argue that drivers should not be considered co-conspirators because they are not required to be available on the platform permanently and they spread throughout a country and even across countries.[66] Two levels of collusion among drivers and Uber should be analyzed. As previously discussed, there is a collusion for each ride request so that only one among nearby drivers is

---

[60] For e.g. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) at 221; *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928 (7th Cir., 2000) at 936; and *United States of America v. Apple Inc. et al*, [2015] No. 13—3741—cv (L) at 58—59.

[61] For more on parallel conduct, see *Big Data*, *supra* note 56 at 10.

[62] The U.S. Supreme Court, for example, defined an illegal horizontal cartel as "a conscious commitment to a common scheme designed to achieve an unlawful objective." See *Monsanto Co. v. Spray-Rite Svc Corp.*, 465 US 752 (1984) at 764.

[63] *Uber*, *supra* note 15 at s. 5.

[64] *Uber Agreement*, *supra* note 19 at s. 4.1 and 4.2.

[65] *Ibid*, s. 2.2.

[66] See e.g. the arbitrator's opinion in the arbitration case brought by the rider Spencer Meyer against Uber Technologies Inc. to the American Arbitration Association in *Meyer*, *supra* note 4 at 6.

allowed to respond to the rider's request and the price is controlled by Uber no matter who accepts the ride. For a given ride, the collusion does not involve all drivers on the platform but only those who match the rider's options. Ride-specific collusions, however, derive from a uniform arrangement between drivers and Uber when they entered into the technology service agreement, which is a hub-and-spoke arrangement mentioned above. Drivers subscribing to the hub-and-spoke arrangement are not required to be permanently active on the platform, but whenever they are available for a ride request, they must act in accordance with the hub-and-spoke arrangement.

The analysis of hub-and-spoke arrangements suggests that there are agreements among drivers which are orchestrated by Uber. However, it is possible that Uber drivers' behavior is not illegal unless these agreements are naked restraints. The next subsection will discuss the illegality of these collusions under the *Competition Act*.

(d) Uber-led Cartels are Naked Restraints

Cartels that fix prices and allocate markets are per se illegal under section 45(1) of the *Competition Act* of Canada unless they are ". . .directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate" legitimate agreement or arrangement carried out by the same parties. [67] The Competition Bureau generally considers the following agreements ancillary restraints:

> A non-compete clause found in an employment agreement, or an agreement for the sale of assets or shares between parties;
>
> An agreement among competitors to charge a common price in a blanket license agreement for artistic works;
>
> An agreement to abstain from making material changes to a business pending the consummation of a merger; and
>
> A non-compete obligation between the parent undertakings and a joint venture where such obligations correspond only to the products, services and territories covered by the joint venture agreement.[68]

Uber, however, emphasizes in its agreement on using the platform that drivers are not in any employment, joint venture, partnership, or agency relationship with Uber.[69] Uber-led cartels are, therefore, not ancillary restraints described above. The next discussion examines whether the collusions are ancillary to technology services agreements between Uber and drivers.

---

67 *Competition Act*, *supra* note 5 at s. 45(4).

68 *Competition Bureau of Canada*, *supra* note 30 at s. 2.5.

69 *Uber Agreement*, *supra* note 19 at s. 13.1; and *Uber*, *supra* note 15 at s. 7.

The function of Uber's platform is to ". . .enable an authorized transportation provider to seek, receive and fulfill requests for transportation services from an authorized user of Uber's mobile applications"[70] and Uber ". . . does not and shall not be deemed to direct or control" drivers.[71] Uber-led collusions are not ancillary to technology services agreements because limiting the number of drivers available for a ride request and fixing fares are functionally unnecessary and inconsistent with the purpose of the broader agreements between Uber and drivers. Other peer-to-peer markets such as Airbnb and TaskRabbit are still functional without depriving sellers of the right to set prices or limiting the number of available service providers.

In addition, while the fundamental function of a peer-to-peer market is to allow sellers to match with buyers faster and at lower costs and to let market forces decide the price of services or products,[72] Uber's collusions make the transportation services market less transparent so as to control and raise prices whenever possible. The lack of features allowing riders and drivers to negotiate fares indicates an intention to fix the price. Uber's surge pricing mechanism aims to exploit consumers in the absence of competition. Without Uber's algorithms, drivers could not figure out when demand exceeds supply, the extent to which they should increase fares and for how long. By pre-arranging the fares, Uber imposes its view of proper pricing and deprives the market of an ability to adjust prices. Uber-led collusions are, therefore, not directly related to and reasonably necessary for giving effect to the technology services agreements between Uber and drivers.

3. SOME SOLUTIONS FOR THE UBER PLATFORM

In conclusion, in the author's view, Uber organizes collusions among drivers, allocating markets and fixing the fare of rides requested through its peer-to-peer platform. These horizontal collusions are not ancillary restraints of any kind and are thus illegal per se under the Canadian *Competition Act*. Uber can change its legal relationship with drivers, apply technical solutions, or do both to eliminate the illegality of its platform.

(a) Changing Legal Relationships

Given that Section 45(1) of the *Competition Act* only proscribes agreements among competitors, the arrangements allocating markets and fixing fares would not be considered cartels if Uber treated its drivers as employees. By treating drivers as employees, Uber would be deemed a transportation services company and would therefore be subject to the strict rules of the transportation industry. The company would have to comply with employers' obligations to drivers,

---

70 *Ibid* at 25.

71 *Ibid*, s. 2.4.

72 See discussion about peer-to-peer markets in section 1 of this paper.

which may increase the cost of business and result in higher fares but would provide drivers with employee benefits such as employment insurance.

(b) Technical Changes

Apart from considering drivers as employees, certain technical solutions may help Uber to avoid antitrust lawsuits. The illegality of Uber's platform lies in its features that limit the number of available drivers for each ride request and prevent riders and drivers from negotiating prices.

Uber, therefore, should allow more than one eligible driver to accept a ride request. The rider could then view the accepting drivers with their number of stars and average ratings and select a driver of their choice from among those who accepted. Uber should also allow riders and drivers to adjust offered fares by increasing or decreasing a suggested fare, perhaps by pre-determined percentages. A rider requesting a short ride or a ride during rush hour or at night could offer a price which is higher than the suggested fare to incentivize drivers while new drivers who have a low number of stars and average ratings could offer lower prices to gain more reputation. Having more drivers available, riders can choose drivers based on whether they prioritize lower prices, better ratings, or some balance of the two.

Uber should also provide drivers with the destination of ride requests before accepting. This would make it easier for drivers and riders to negotiate prices. In addition, it would increase efficiency by allowing drivers to accept rides in a direction they are already headed. In practice, some drivers accept short trips that take them out of their way and thus make losses, which then decrease their service quality.[73] One may argue that providing drivers with a trip's destination would allow drivers to cherry-pick longer rides, but cherry-picking is only a problem when fares are pre-arranged. Drivers would not ignore a short trip if it was on their way or if riders could incentivize them with appropriate fares.

Allowing drivers and riders to negotiate prices could also eliminate Uber's surge pricing mechanism. By making drivers compete on prices and service quality and allowing riders to offer better prices, market forces will decide when fares should increase and decrease.

---

73 See e.g. Indeed, "Uber Partner Drivers Employee Reviews" online: *Indeed* <https://ca.indeed.com/cmp/Uber-Partner-Drivers/reviews>.