

# Uber in London

## A battle between public and private regulation

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### I. Introduction

Cabs have been regulated in London since the 17<sup>th</sup> century and the current system has been in place since the 19<sup>th</sup> century,<sup>2</sup> although most of the current applicable provisions date back from 1934. In 2017, the taxi and private hire (“PH”) market in London represented ca. 150,000 drivers, i.e. nearly 40 % of the overall 356,000 licenced drivers on the English market. Only a few years before, in 2011, there were only 77,000 taxis and PH drivers throughout England.<sup>3</sup> The market has more than quadrupled in six years as new technology and new actors (Uber, Gett, mytaxi (formerly Hailo), Addison Lee, Kabbee etc.) have deeply changed how taxis and PH are used in London and in England as anywhere else in the world.

However, London is not just any place in the world. Among its distinctive features, stand its iconic black cabs and its regulatory system stands out. Indeed, very few aspects of the market are regulated. The quality of taxi drivers, the standards of vehicles and fares are subject to regulation mainly. However, the number of taxis is not limited, and taxis have no monopoly: besides taxis, PH has been operating since the 1960s and regulated since 1998. Therefore, the market is left largely unregulated regarding the outcomes themselves.

Digital platforms such as Uber are often presented as a “disruption” of the old business models.<sup>4</sup> Fears are expressed that an “unregulated market”<sup>5</sup> would ensue which would cause security problems for its users. In 2017, the saga around the renewal of Uber’s licence in London has however shown that Uber does not escape regulation. The stakes of these

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<sup>2</sup> Starting with the *London Hackney Carriage Act* 1831. See L. Butcher, *Taxi and private hire vehicle licensing in England and Wales*, (House of Commons Library, SNO2005, 14 December 2017), p. 5.

<sup>3</sup> DfT, *Taxis and private hire vehicles – Statistics*, 2011.

<sup>4</sup> Butcher, above (2) p. 39; London Assembly Transport Committee, *Future proof: Taxi and private hire services in London*, 16 December 2014, 3.17; House of Lords, *Gig economy: Introduction*, 21 November 2017, p. 8.

<sup>5</sup> <https://www.theguardian.com/commentisfree/2014/jun/13/uber-cabbie-protest-sharing-economy>.

tensions are of a different nature. Uber and similar digital platforms foster “*regulatory brands*”:<sup>6</sup> They require their drivers to comply with a range of their own requirements, so that they develop a private regulation of the market. For instance, they can determine fares through their own algorithm instead of a taximeter applying publicly regulated tariffs; they may seek to compel drivers to drive below their actual costs or accept pooled journeys etc. Hence tensions between London and Uber.

The war<sup>7</sup> between London and Uber is only starting: a range of changes – such as the deregulation of taxis or the capping of PH licences – are called by some actors and resisted by other ones at the highest level.<sup>8</sup> However, by 2017, the major pillars of the regulatory system in London have remained in place. Only marginal changes (e.g. tweaking existing regulations<sup>9</sup> or reinterpreting legal concepts) have been carried out and the enforcement of existing regulation has been enhanced. Most of these changes have been justified by the need to raise the standards in the PH industry, improve safety and enhance customers’ convenience.<sup>10</sup>

This paper is structured as follow. The second section examines the legal framework in place to regulate taxis and PH services in London. The third section analyses which legal questions Uber made arise in relation to the transport of individuals,<sup>11</sup> as intermediated by digital platforms when it arrived in London. The fourth section briefly mentions the situation in England outside London. The fifth section then overviews the main changes under consideration in England. Finally, the conclusion suggests that the disruption caused by Uber is not so much of a regulatory nature than of a social and financial nature. The reader will find in appendix statistics helping to better grasp the scope of the changes on the market of taxis and PH services in London and England between 2011 and 2017.

## II. The legal framework: taxis and PH in London

**Origins.** Dating back from the mi-19<sup>th</sup> century, two distinct types of legislation regulate taxis in England: one exclusively applicable to London and one applicable to the rest of England.<sup>12</sup> When it comes to London, the first relevant Acts were passed in 1847<sup>13</sup> and 1869.<sup>14</sup> At around the same time appeared the Knowledge test, the test that taxi drivers have to succeed to obtain their licence. In the course of the following years, legislation was amended a few times; the most structural change being the *London Cab Order* 1934. Finally, PH developed

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<sup>6</sup> K. Niemietz and D. Zuluaga, *Hire authority - Turning statutory regulation into private regulation for the UK’s taxi industry*, Discussion Paper No.76, Institute of Economic Affairs, October 2016, p. 9.

<sup>7</sup> See the title from a 2017 Financial Times article: “How Uber and London ended up in a taxi war” (September 28, 2017).

<sup>8</sup> E.g.: Prime Minister Theresa May (Conservative) and London Mayor Sadiq Khan (Labour) disagree on Uber (see e.g. <https://www.theguardian.com/technology/2017/sep/28/uber-licence-withdrawal-disproportionate-says-theresa-may>).

<sup>9</sup> The main recent changes since 2016 are listed on TfL website (<https://tfl.gov.uk/info-for/taxis-and-private-hire/new-private-hire-regulations>).

<sup>10</sup> <https://tfl.gov.uk/info-for/taxis-and-private-hire/new-private-hire-regulation>.

<sup>11</sup> Further referred as ‘customers’ when discussing the relationship with the drivers or ‘users’ when discussing the relationship with the platform.

<sup>12</sup> Scotland, Wales and Northern Ireland all have different regulatory frameworks. In Wales, the same system applies as in England but a differentiated system is possible since the *Wales Act* 2017 (s 28). In Northern Ireland, the *Taxis Act (Northern Ireland)* 2008 applies. In Scotland, the *Civic Government (Scotland) Act* 1982, part II applies (<http://www.gov.scot/Topics/Justice/law/Licensing/taxiphc>).

<sup>13</sup> *Town Police Clauses Act* 1847.

<sup>14</sup> *Metropolitan Carriage Act* 1869.

in London in the 1960s and was regulated by the Private Hire Vehicles (London) Act 1998 (PHV Act).

This section describes the two-tier system in place in London (2.1), the licensing discretion in assessing the “fit and proper person” test (2.2), other regulatory powers enjoyed by the London licencing authority (2.3) and the enforcement system (2.4). It then recaps the main differences between taxis and PH in London (2.5).

## **1.1. A two-tier system: the devil is in the detail**

**2.1.1 London Mayor.** In London, the legislation provides that the Mayor has a specific duty regarding transport,<sup>15</sup> adopting for instance an overall transport strategy<sup>16</sup> and a policy relating to taxis and PH. The Mayor can thus determine his/her priorities regarding mobility, public space,<sup>17</sup> taxis and PH.<sup>18</sup> For instance, Mayor Sadiq Khan emphasises as key priorities safety in the sector as well as the development of the “greenest taxi fleet in the world”.<sup>19</sup> This comes within the background of major pollution issues in London, where EU emissions levels are regularly breached.<sup>20</sup>

**Transport for London.** The major actor of the transport policy in London is Transport for London (“TfL”),<sup>21</sup> chaired by the London Mayor. It runs most of London public transport services (Underground, buses, the Docklands Light Railway, Overground, London trams, London River Services, London Dial-a-Ride, etc). It has thus an oversight over the different transport modes and seeks to ensure mobility in London, preventing congestion and traffic jam. TfL is a very well equipped and resourced body, including over 27.000 staff<sup>22</sup> and a £10,2bn budget (for 2017-18).<sup>23</sup> It is in particular in charge of major infrastructure projects such as Crossrail (a key development of the London underground), which is currently one of the largest infrastructures in Europe with a budget of £14,8 bn.<sup>24</sup>

TfL (more precisely, a unit known as “London Taxi and Private Hire”) exercises licensing functions for taxis and PH, working as a two-tier system, which means that there is no taxi monopoly. This system works as follows.

**2.1.2 Taxis (also known as “hackney carriages” or “black cabs”) – Definitions.** Technically, the legislation regulates “hackney carriages”. The *Metropolitan Carriage Act 1869* defines them as “any carriage for the conveyance of passengers which plies for hire

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<sup>15</sup> S 141 *Greater London Authority Act 1999*: “(1)The Mayor shall develop and implement policies for the promotion and encouragement of safe, integrated, efficient and economic transport facilities and services to, from and within Greater London.”

<sup>16</sup> S 142 *Greater London Authority Act 1999*; Mayor of London, *Draft mayor's transport strategy*, 2017 (<https://tfl.gov.uk/corporate/about-tfl/how-we-work/planning-for-the-future/the-mayors-transport-strategy>).

<sup>17</sup> E.g.: Mayor of London and TfL, *Healthy streets for London – Prioritising walking, cycling and public transport to create a healthy city*, 2017.

<sup>18</sup> E.g.: Mayor of London and TfL, *Taxi and private hire action plan*, 2016.

<sup>19</sup> *Ibid.*, esp. p. 11. See also former Mayor Johnson policy priorities in *The Queen on the Application of Core Issues Trust Ltd v. TfL and The Mayor of London* [2014] EWHC 2628 (Admin).

<sup>20</sup> European Commission, “Commission warns Germany, France, Spain, Italy and United Kingdom of continued air pollution breaches”, Press Release IP/17/238, 15 February 2017; European Commission, “February infringement package: key decisions”, Fact Sheet, 15 February 2017, Memo/17/234.

<sup>21</sup> On TfL, see s 154 sq *Greater London Authority Act 1999*.

<sup>22</sup> TfL, *Annual workforce monitoring report*, 2015/16.

<sup>23</sup> TfL, *Budget 2017-18*, p. 6.

<sup>24</sup> <http://www.crossrail.co.uk/news/crossrail-in-numbers> .

*within the limits of this Act, and is neither a stage carriage nor a tramcar*".<sup>25</sup> The first Act to mention "taxi" was the *Transport Act 1980*, that defined them by reference to vehicles licensed under the *Metropolitan Carriage Act 1869*. In 2014, the Law Commission recommended to streamline the use of taxi throughout the whole legislation as the term 'hackney carriages' bears no relevance today.<sup>26</sup> Concretely, the legislation requires two licences: one for the taxi driver and one for the taxi vehicle.

**Taxi driver's licence.** To be licensed as a taxi driver, the applicant needs to meet the following conditions. The person needs to be at least 21 years-old. S/he needs to have a driving licence (from the UK or a European Economic Area country). S/he needs to have the right to work in the UK. S/he needs to be a person of good character, which is assessed in physical and mental terms (see below section 2.2.). S/he needs to succeed in the Knowledge test. This test is famous for its toughness: it requires the driver to be able to name all the streets along 320 different routes in London and the main features within a quarter of miles of the drop points on these different routes. Usually a candidate spends three to four years scouring London streets to be able to succeed in this feat.<sup>27</sup> This test is a way to hold low the number of taxi licences<sup>28</sup> and to make access to the license time-consuming or at least not straightforward. It however features a range of other aspects, such as ensuring that taxi drivers are making the city more personalized, with a good knowledge of loopholes, dead-ends and other complicated small streets and back street systems that makes accessibility of places remain impenetrable to GPS systems.<sup>29</sup>

Barriers to entry in the trade are not quantitative but qualitative (by the imposition of the Knowledge test especially). There is no capping in the number of taxi licences available at any point in time. Any person who meets these conditions is licensed by TfL upon following the licensing procedure. The taxi driver licence is valid for three years.<sup>30</sup> In 2017, the fees for a taxi licence amount to a little less than £1,000 plus the fee for the medical test (GP visit).<sup>31</sup> As such, the license has no monetary value.<sup>32</sup> It can only be transferred in very specific cases, when the license holder passes away.<sup>33</sup>

**Vehicles licence.** Vehicles need to meet the following conditions. First, by 1<sup>st</sup> January 2018, the vehicle needs to be « zero emissions capable » (prior to that a lower standard was set). This aligns with TfL's general plan to introduce a « ultra low emission zone » by April 2019. From there on, most vehicles in London will need to either meet exhaust emission standards or pay a daily charge when travelling in central London.<sup>34</sup> Secondly, the vehicle needs to have design features that make it fit to be a taxi (including wheelchair accessibility,

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<sup>25</sup> S 4.

<sup>26</sup> Law Commission, *Taxi and private hire services* (Law Com n° 347), Cm 8864, 2014, p. 24.

<sup>27</sup> <https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/learn-the-knowledge-of-london>.

<sup>28</sup> Niemietz and Zuluaga, above (6) p. 8.

<sup>29</sup> TfL, *The Knowledge of London Examination System*, April 2017.

<sup>30</sup> *Greater London Authority Act 1999* Sch 20 s 5.

<sup>31</sup> Initial application: £120; DBS paper application: £58.85 or DBS online application: £56.85; Post office check and send: £7.15; Knowledge of London written examination (All London only) £200; Knowledge of London appearance (One off payment): £400; Issue of licence fee: £180.

<https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/apply-for-a-taxi-driver-licence#on-this-page-3>

<sup>32</sup> See for a taxi driver license outside London: *Cherwell and Anwar* [2011] EWHC 2943 (Admin) at [15].

<sup>33</sup> *Greater London Authority Act 1999* Sch 20 s 5.

<sup>34</sup> Butcher, above (2) p. 14.

ventilation, taxi signs etc.).<sup>35</sup> Thirdly, taxis must be fitted with a taximeter. Fourthly, they need to have a facility to accept card and contactless payment (with the ability to produce a printed receipt). Finally, taxis need to be presented to inspection (cost: £110). A taxi vehicle license is valid for one year.<sup>36</sup>

The purchase of a suitable vehicle, meeting all these technical conditions, represents a significant investment. A London Taxi International TX4 (the current London taxi) is advertised new at a price between £62,400 and £64,800 depending on the model.<sup>37</sup> In view of the stricter emission standards set for taxis from January 2018, a taxi de-licensing scheme has been set up for diesel taxis aged between 10 and 15 years: the taxi vehicle license and plate can be surrendered to TfL which pays the taxi owner a small amount in return.<sup>38</sup>

**Legal consequences.** Once these licensing conditions are met, legal consequences intertwining closely obligations, rights and “fair privileges”<sup>39</sup> follow for taxi drivers. Firstly, only licensed taxi drivers can ply for hire. Plying for hire without a licence is an offense.<sup>40</sup> Secondly, a taxi standing at a rank or stationary in a public place, and which is not already hired, is under an obligation to accept a trip (within 12 miles radius of the location (20 from Heathrow) or 1 hour duration) unless it has a reasonable excuse. Thirdly, only taxis are allowed to use taxi ranks and priority bus lanes. Finally, taxi fares are regulated:<sup>41</sup> they are calculated automatically and made visible to the passenger as the journey progresses, through taximeters approved by TfL as complying with strict regulations<sup>42</sup> in accordance with the EU directive on measuring instruments.<sup>43</sup> For instance, taximeters can only be fitted by approved installers.<sup>44</sup> This obligation is connected to the regulation of route fares. Journeys are calculated in time (minutes) when the taxi is idling (because stuck in traffic jam for instance) and in distance (miles) when the taxi is moving. Taxi users are free to challenge the fare at the end of the journey if they disagree with the fare and so to refuse to pay. It also means that only taxi drivers can use taximeters to vouch for their compliance with the fare regulations.

**2.1.3 PH (also known as “minicabs”) - System.** Three licences need to be distinguished: a licence for the PH operator; a licence for the PH driver; and a licence for the PH vehicle.<sup>45</sup> This system has been progressively introduced between 2001 and 2004,<sup>46</sup> with the aim to

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<sup>35</sup> TfL, *Construction and licensing of motor taxis for use in London – Condition of fitness*, January 2007 (updated version 9).

<sup>36</sup> *Greater London Authority Act* Sch 20 s 5.

<sup>37</sup> <http://www.levc.com/technology/tx-price-specification/> (before taking into account options and accessories).

<sup>38</sup> Depending on the age of the vehicle, payment will be between £1,200 and £5,000.

<sup>39</sup> Mayor of London and TfL, *Taxi and private hire action plan*, 2016, p. 4.

<sup>40</sup> *Town Police Clauses Act* 1847, s 45. The penalty is a penalty not exceeding level 3 on the standard scale (i.e. £1,000). (*Greater London Authority Act* 1999 schedule 20 section 5).

<sup>41</sup> See below under section 2.3.

<sup>42</sup> *Transport for London v Uber London Ltd* [2015] EWHC 2918 at [28]; TfL, *Taximeter specification - Specification for a taximeter to be approved for the use in a London taxi*, 2017.

<sup>43</sup> Directive 2014/32/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of measuring instruments (recast), Annex IX.

<sup>44</sup> The full list can be found at <http://content.tfl.gov.uk/taximeter-installation-service-centres.pdf>.

<sup>45</sup> The vehicle is defined as “vehicle constructed or adapted to seat fewer than nine passengers which is made available with a driver for hire for the purpose of carrying passengers, other than a licensed taxi or a public service vehicle” (PHV Act 1998 section 1 (a)). We leave out the conditions for the vehicle. However, we need to note that vehicle emission standards apply. (*Private Hire Vehicles (London PHV Licenses) (Amendment) Regulations* 2011). It is difficult to specify how much purchasing a suitable vehicle would cost as different models and brands are available. The costs are however lower than for the purchase of a taxi vehicle.

<sup>46</sup> Butcher, above (2) p. 13.

ensure security for the PH users and the quality of service.<sup>47</sup> Amendments to the system were brought in 2016, after public consultation, to take into account changes that Uber brought in the market.<sup>48</sup> The main objectives of these changes were twofold: raising the standards in the industry and protecting consumers.<sup>49</sup>

The PHV Act 1998 defines the PH operator as “a person who makes provision for the invitation or acceptance of, or who accepts, private hire bookings.”<sup>50</sup> The key word here is “booking”: PH services require that a booking would be done through an operator.

**PH operators.** To be licensed as a PH operator, applicants need to pass the fit and proper person test<sup>51</sup> (see below section 2.2) This means that they need to comply with a range of technical conditions, such as record-keeping of bookings, record-keeping of drivers’ details, complaint-handling procedures or lost-and found property policy.<sup>52</sup> Since 2016, PH operators have to notify TfL of any material changes that “may affect their compliance with the statutory and regulatory framework for operators or any conditions of their license.”<sup>53</sup> This allows TfL to check whether the operator remains compliant with the “fit and proper person” criterion. This change was introduced after public consultation, when 96% of respondents agree with this proposed change.<sup>54</sup>

The PH operator licence is valid for a period of five years. The costs for the licence depends on the number of vehicles operated. From 2013 to 2017, the structure distinguished only between a small operator (one or two vehicles), who paid a fee of £1,488, and a standard operator (more than 2 vehicles), who paid £2,826. However, this structure fee did not correspond to the market operators in 2017.<sup>55</sup> A consultation was thus organised in early 2017 to seek views of the market operators about possible adaptation of the fee structure.<sup>56</sup> There were around 2,400 PH operators in London, nearly 50% of them operate 10 or fewer vehicles, and only 5% in charge of fleets of more than 100 vehicles. At the time of the consultation, early 2017, only two operators operated a fleet of over 1,000 vehicles (Uber and Addison Lee) and only one operated a fleet of over 10,000 vehicles (Uber). The fee structure was thus re-organised around six categories: the minimum, a licence for 1 to 10 vehicles, costs £ 2,000 and the maximum, a licence for a fleet of more than 10,000 vehicles, costs £ 2,900,000 (payable over the five years of the license).<sup>57</sup> This effectively means that the larger operator pays 1,000 more in 2017 than previously. These new fees are meant to finance TfL’s needs to develop more resources to appropriately enforce regulations.<sup>58</sup>

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<sup>47</sup> Mayor of London and TfL, *Taxi and private hire action plan*, 2016, pp. 4-5 and esp. pp. 8-9 (on public safety).

<sup>48</sup> The legal challenges brought by Uber are discussed below in sections 3.1.1 (hotline); 3.2.4 (English language test) and 3.2.5 (Insurance).

<sup>49</sup> TfL, Press release, *TfL Board approves new plan to modernise London’s private hire industry*, 18 March 2016.

<sup>50</sup> S 1 (1) (b).

<sup>51</sup> S 3 (3).

<sup>52</sup> TfL, *A guide for applicants who are applying for a London private hire operator’s licence*, sd. The guide is frequently updated and advice applicants to “frequently visit [www.tfl.gov.uk/tph](http://www.tfl.gov.uk/tph) for regular updates.” (see p. 4).

<sup>53</sup> *The Private Hire Vehicles (London) (Operators’ Licences) (Amendment) (n°2) Regulation 2016*.

<sup>54</sup> Mayor of London, *Private hire regulations review - Consultation report*, September 2015, p. 9.

<sup>55</sup> <https://tfl.gov.uk/info-for/media/press-releases/2017/september/tfl-confirms-changes-to-private-hire-operator-licence-fe> .

<sup>56</sup> <https://consultations.tfl.gov.uk/tph/private-hire-proposals/> .

<sup>57</sup> <https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/private-hire-operator-licence>.

<sup>58</sup> See below under section 2.4.

**PH drivers.** To be licensed as a PH driver, the following conditions apply. The person needs to be at least 21 years–old. S/he needs to have a driving license (from the UK or an European Economic Area country). S/he needs to have the right to work in the UK. S/he needs to be a “fit and proper person”, (see below section 2.2). S/he needs to succeed in a test on topographical skills. A PH driver license is valid for three years. The fees for a PH driver licence amount to ca. £400 plus the fee for the medical test (GP visit).<sup>59</sup> The main difference with the fees for taxi licences comes from the fee related to the Knowledge test.

**Changes.** Two recent changes need to be mentioned here in connection with the increasing numbers of the PH driver licences in London. The first change relates to the reform of the test on topographical skills in 2016. Since then, only assessment centres that are recognised by TfL can organize the assessment and a TfL’s assessor is required to be present in the premise of the assessment centre.<sup>60</sup> This proof of topical skills is not as demanding as the Knowledge test. It aims to test “*the [driver’s] ability to use maps of different scales*”, so that the driver has to demonstrate her/his ability to read and use maps, select routes in a local area, within London and outside London as well as a general geography of London and its major roads.<sup>61</sup> The second change, introduced also in 2016, relates to the introduction of an English test that aims to demonstrate that the driver has a B2 level in English (European Common Frame of Reference for Languages).<sup>62</sup> The changes were introduced after public consultation. 99% of the respondents agreed on the need to introduce an English test.<sup>63</sup>

**Exemptions.** Taxi drivers are exempted from licensing as a PH driver.<sup>64</sup> In London, there is no dual licence: taxi drivers can work as PH driver without the need of any further license.

**Consequences.** Once licensed, PH drivers need to be pre-booked through a PH operator. They cannot ply for hire, use taxi ranks or bus lanes. They cannot use taximeters. Since 2016, PH operators have to provide an estimated fare prior to the commencement of the journey.<sup>65</sup>

## **1.2. Licensing: discretion to assess the fitness test**

**General.** Licensing authorities have the duty to assess if the applicant is a “fit and proper person”. This test is commonly found in a range of licencing matters in England. Examples are found in the *Dangerous Dogs Act 1991*, which requires the justice and sheriff to consider whether the owner is a person fit and proper to be in charge of the dog “*when deciding*

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<sup>59</sup> Application fee: £124; Grant of license fee: £186; DBS online application £56.85 or DBS paper application: £58.85; Post office check and send: £7.15 (<https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/private-hire-driver-licence#on-this-page-3>).

<sup>60</sup> <https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/topographical-assessment?intcmp=356>

<sup>61</sup> TfL, *London private hire driver licensing - A reference guide to becoming a private hire driver*, PHV/201, p. 4.

<sup>62</sup> *The Private Hire Vehicles (London PHV Driver’s Licenses) (Amendments) (n°2) Regulation 2017* and *The Private Hire Vehicles (London PHV Driver’s Licences) (Amendments) (n°2) Regulation 2016*. On the link with Uber and the debates about this requirement, see below section 3.1.3.

<sup>63</sup> Mayor of London, *Private hire regulations review - Consultation report*, September 2015, p. 9.

<sup>64</sup> TfL, *London private hire driver licensing - A reference guide to becoming a private hire driver*, PHV/201, p. 1.

<sup>65</sup> TfL, Press release, *TfL Board approves new plan to modernise London’s private hire industry*, 18 March 2016.

whether the dog constitutes a danger for public safety”<sup>66</sup> and in the financial services where regulated persons also need to pass the fit and proper test.<sup>67</sup>

**Applications on taxi and PH.** In relation to taxi drivers, PH operators and PH drivers, this test is also required in more or less similar words: either directly a “fit and proper person”<sup>68</sup> or a similar expression (such as to be of “good character and fit to act as a cab-driver” for London taxi drivers<sup>69</sup>). Licensing authorities have a broad discretion in setting the exact standards and applying the “fit and proper person” test to the local conditions.<sup>70</sup> However, case law requires that the licensing authority gives careful considerations to the elements (e.g. criminal convictions) that are relevant to the licensing matter,<sup>71</sup> i.e. the safety of the public. This means that a DBS (Disclosure & Barring Service) check needs to be undertaken, which will return any criminal convictions that the applicant may have. Normally, DBS checks are carried out by the employer who needs to ask recognised bodies to formally check criminal records. A list of recognised bodies is maintained by the DBS at the Home Office.<sup>72</sup> Criminal conviction will not automatically exclude the applicant from being licensed. Licensing authorities have to assess whether these criminal convictions make the applicant unfit and proper to be licensed as a taxi driver, PH operator or PH driver. Often, they will have guidelines on this matter.

Licensing authorities can only take into account relevant elements when deciding on granting the licence. This means that personal circumstances, such as the need to provide for one’s family, are excluded of the considerations to be taken into account and should not prevail over the safety of the public that the licensing authority has the duty to protect.<sup>73</sup> The same reasoning applies when a licensing authority suspends a licence<sup>74</sup> or when it renews it.<sup>75</sup> Throughout the case law, this overarching purpose of protecting the public in general and the users of licensed vehicles in particular is prominent:<sup>76</sup>

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<sup>66</sup> S 4B 2A. For case law, see e.g. *Webb v Chief Constable of Avon and Somerset* [2017] EWHC 3311 (Admin).

<sup>67</sup> E.g. S 5 Sch 6 *Threshold Conditions – Financial Services and Markets Act 2000*; s 2E *Markets Act 2000 (Threshold Conditions) Order 2013/555* (which lists how “fit and proper” should be assessed in this specific context); for an example, see e.g. *Larksway Investments Limited v The Financial Conduct Authority* [2017] UKUT 422 (TCC).

<sup>68</sup> As provided in primary legislation: PHV Act 1998, s 13(2) (“*The licensing authority shall grant a London PHV driver’s licence to an applicant if the authority is satisfied that [...] the applicant [...] is a fit and proper person to hold a London PHV driver’s licence [...]*”) and PHV Act 1998 s 3 (“*The licensing authority shall grant a London PHV operator’s licence to the applicant if the authority is satisfied that (a) the applicant is a fit and proper person to hold a London PHV operator’s licence [...]*”).

<sup>69</sup> As provided in secondary legislation: *London Cab Order 1934*, para 25 (“*[T]L may in [its] discretion refuse to grant a cab-driver’s licence (a) if the applicant fails to satisfy him that he is of good character and fit to act as a cab-driver, [...]*”).

<sup>70</sup> Law Commission, above (26), para 5.25.

<sup>71</sup> *Adamson v. Waveney District Council* [1997] 2 All E.R. 898 (QBD).

<sup>72</sup> <https://www.gov.uk/guidance/responsible-organisations> .

<sup>73</sup> *Cherwell and Anwar* [2011] EWHC 2943 (Admin); *Leeds City Council v Hussain* [2002] EWHC 1145 (Admin); [2003] R.T.R. 13 (QBD (Admin)).

<sup>74</sup> *Leeds City Council v Hussain* [2002] EWHC 1145 (Admin); [2003] R.T.R. 13 (QBD (Admin)).

<sup>75</sup> *Cherwell and Anwar* [2011] EWHC 2943 (Admin).

<sup>76</sup> *McCool v Rushcliffe BC* [1998] 3 All E.R. 889 (QBD) per L. Bingham at [23]: “*But the local authority [...], are not permitted to grant the licence unless they are satisfied that the applicant is fit and proper. They may fail to be satisfied because adequate information of character and record is not forthcoming, [...]; or they might fail to be satisfied for any other good reason. It is in my view impossible to be prescriptive as to what might amount to a good reason. What will be (or may be) a good reason will vary from case to case and vary according to the context in which those words appear. [...] it is appropriate for the local authority or justices to regard as a good reason anything which a reasonable and fair-minded decision maker, acting in good faith and with proper regard to the interests both of the public and the applicant, could properly think it right to rely on.*”

*“the objectives of this licensing regime which is plainly intended, among other things, to ensure so far as possible that those licensed to drive private hire vehicles are suitable persons to do so, namely that they are safe drivers with good driving records and adequate experience, sober, mentally and physically fit, honest, and not persons who would take advantage of their employment to abuse or assault passengers.”<sup>77</sup>*

From the Law Commission’s consultation on taxis and PH, it appeared that flexibility in adapting the test over time to local circumstances was also of importance.<sup>78</sup> Recent scandals involving taxi drivers have highlighted the importance for licensing authorities to pay special attention to the risks that drivers may represent for customers.<sup>79</sup>

In London, the “fit and proper person” test has been spelled out in various guidance over time for taxi drivers, PH operators and PH drivers. In relation to taxi drivers, the “fit and proper person” test is expressed as a person being of “good character”. It is accepted that TfL is responsible for ensuring that the person is indeed well a fit and proper person.<sup>80</sup> Regarding PH drivers, the guidance mentions mental and physical fitness and the “fit and proper test” that is interpreted as being of “good character”.<sup>81</sup> Regarding PH operators, the criteria to be considered as a “fit and proper person” are divided into two categories: administrative rules and operating centre inspection. Under the administrative rules aspect, the applicant needs to demonstrate that it complies with “*legal requirements connected with running a business*” (including bankruptcy, company directorship, health and safety, accounts, planning permissions etc.).<sup>82</sup> Under the operating centre inspection aspects, the applicant needs to “*required to demonstrate that [s/he is] aware of the responsibilities of a licensed operator by showing*” that a range of record-keeping processes and similar procedures are in place.<sup>83</sup> For PH operators, TfL now considers that the operator is the person who is responsible to ensure that the drivers are “fit and proper”.<sup>84</sup> On its website, TfL explains that the failure to do so, “*may raise questions about an operator's fitness to hold a license*”.<sup>85</sup>

### **1.3. Regulatory powers**

Next to its licensing powers, TfL exercises regulatory powers on the taxis and PH industry in London, especially the setting and reviewing of taxi fares and tariffs and the regulation of taxi ranks. The overall objectives of these regulatory powers are public safety, fair competition and green mobility.<sup>86</sup>

***Taxis fares and tariffs.*** TfL is responsible for setting and reviewing taxi fares and tariffs. Fares are regulated by duration of the journey, distance and broken down in three tariffs

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<sup>77</sup> *McCool v Rushcliffe BC* [1998] 3 All E.R. 889 (QBD) per L. Bingham at [7].

<sup>78</sup> Law Commission, above (26), para 5.33.

<sup>79</sup> L. Casey, *Report of inspection of Rotherham Metropolitan Borough Council* (2015 HC 1050).

<sup>80</sup> Butcher, above (2) p. 12 (based on article 25 *London Cab Order* 1934).

<sup>81</sup> “*TfL will only approve applications under this criterion if they are satisfied that the applicant is of good character*”. To determine “good character” each applicant will be expected to: - provide evidence of their driving history (i.e. a copy of their current driving licence) - declare any Mental Health/Sexual Offence Orders - request an enhanced Criminal Records Bureau (CRB) disclosure [...]” (TfL, *London private hire driver licensing - A reference guide to becoming a private hire driver*, PHV/201, p. 2).

<sup>82</sup> TfL, *Aguide for applicants who are applying for a London private hire operator’s licence*, pp. 8-10.

<sup>83</sup> *Ibid.* pp.10-11.

<sup>84</sup> See the relationship with Uber, section 3.1.3.

<sup>85</sup> <https://tfl.gov.uk/info-for/taxis-and-private-hire/new-private-hire-regulations>. TfL, *London private hire driver licensing - A reference guide to becoming a private hire driver*, PHV/201, did not contain this explication.

<sup>86</sup> Mayor of London and TfL, *Taxi and private hire action plan*, 2016, *passim*.

depending on the time of the day (tariff 1: Monday to Friday 05:00-20:00; tariff 2: Monday to Friday: 20:00-22:00 and Saturday and Sunday 05:00-22:00; tariff 3: every night 22:00-05:00 and public holidays). Extra charges are also regulated (e.g. booking by phone or online, Christmas surcharge and Heathrow transfer flat fee). These fares are negotiated with the taxi industry and TravelWatch/London, a statutory watchdog representing users' interests.<sup>87</sup>

**Taxis ranks.** TfL regulates taxi ranks: taxi ranks help ensure that taxi services can meet passenger demands.<sup>88</sup> Specific regulations are made to identify where ranks can be held without disturbing traffic and neighbourhood. Over ranking can be problematic for local business and residents and can lead to traffic congestions or delay buses. For these reasons, only taxis can use taxis ranks: PH vehicles cannot do so as they would prevent taxis from using the ranks.

**Waiting time?** TfL also sought to regulate the waiting time that PH vehicles had to wait between the pre-booking and the start of a trip: in 2015, it sought to impose a five-minute wait, on the ground that this amounted to an electronic form of hailing. The idea was to maintain the distinction between taxis (that can be hailed from the street and start the journey on the spot) and PH vehicles (that need to be pre-booked and cannot wait in a public space waiting to be approached). According to TfL, the use of digital platforms such as Uber made this distinction blurred and booking an Uber driver through the app and take the trip right away was an electronic form of hailing. However, this suggestion triggered a backlash as a petition in support of Uber received a wide public backing.<sup>89</sup> The idea was not pursued.<sup>90</sup>

#### **1.4. Enforcement**

**General.** The approach to enforcement taken by different licensing authorities varies considerably as it is for each authority to determine how its enforcement policy is to be applied. One key element is however that licensing and its enforcement need to protect the public and its security. In case users experience problems with taxis or private hire drivers, they can turn to TfL to complain. This matter is heavily influenced by scandals that have surfaced in the taxi and PH industry in England. For instance, in the early 1990's, gangs of PH in Birmingham had been found to participate in child abuses, which caused a massive uproar especially when it was finally unveiled more than 20 years later.<sup>91</sup> Another scandal involving sexual harassment by a taxi driver in London had also made TfL extremely sensitive to this problem.<sup>92</sup>

**Enforcement powers.** The legislation grants powers for licensing authorities, such as power of inspection to identify potential breaches of the law and enable targeted action to be taken; power to inspect vehicles;<sup>93</sup> power to suspend or revoke licences;<sup>94</sup> or power to refuse to renew them. Licensing authorities can bring criminal charges against a suspected offender.

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<sup>87</sup> Butcher, above (2) p. 12.

<sup>88</sup> TfL, *London taxi ranks*, 2016, 52 p.

<sup>89</sup> <http://www.telegraph.co.uk/technology/news/11900871/Thousands-sign-Uber-petition-against-London-plans-to-ban-key-features.html>.

<sup>90</sup> Mayor of London, *Private hire regulations review – Consultation report*, September 2015, p. 6.

<sup>91</sup> <http://www.birminghammail.co.uk/news/midlands-news/birmingham-city-council-hid-links-8131813>

<sup>92</sup> The matter has been reopened with the recent parole board's decision to release the person. See: <http://www.bbc.com/news/uk-england-london-42789810>.

<sup>93</sup> E.g. *Greater London Authority Act 1999*, Sch 20 s 3; *PHV Act 1998* s 8 and 9.

<sup>94</sup> *Greater London Authority Act 1999*, Sch 20 s 5; *PHV Act 1998* s 16.

**Practical aspects.** The overall cost of enforcing taxis and PH regulation between 2017 and 2022 has been estimated to £30 million, up from a previous estimate of £4m.<sup>95</sup> TfL directly funds 68 dedicated police cab enforcement officers, and has 250 additional staff hired in September 2017,<sup>96</sup> following the 2016 *Taxi and private hire action plan*.<sup>97</sup> To give an idea of the work involved, enforcement staff has made 171 arrests between April 2016 and February 2017, of which 58 were for touting offences, and 28 for plying for hire offences.<sup>98</sup> Statistics also reveal that criminal charges were brought against 25 drivers (13 Uber drivers, 12 non-Uber PH drivers): 12 (5 Uber drivers) were convicted, 8 (5 Uber drivers) not convicted, 5 (3 Uber drivers) await outcome.<sup>99</sup> Quarterly meetings are held with taxis<sup>100</sup> representatives and PH<sup>101</sup> representatives to inform them of the enforcement actions taken and discuss pending issues of enforcement. Detailed statistics of the compliance among the industry are made available during these engagement exercises.<sup>102</sup>

### **1.5. Taxis and PH: two different worlds?**

Overall there are three main differences between taxis and PH in London: regarding licensing conditions, legal consequences and overall regulation.

**Licensing conditions.** The licensing conditions, and thus the “barrier to entry” in the trade are different, with the Knowledge test representing a more demanding exercise to entry in the taxi trade than the topographical test and the English test being only imposed to be licensed as PH drivers. The assessment of the “barrier to entry” is also different as the entity assessing the “fit and proper person” test also tends to differ. TfL is responsible for this assessment when it comes to taxi drivers. However, TfL seeks to displace this responsibility onto PH operators when it comes to assessing the “fit and proper person” test for PH drivers. In turn, if the PH operators were not carrying this assessment rigorously, they could be deemed as not being a “fit and proper person” to hold a PH operator license. This kind of displacement of responsibility may make sense in view of the practical enforcement on the ground: could TfL be expected to carry out the test for all the new applications to PH driver licenses (approximately 300 a week)? However, this displacement may result in unintended consequences. For instance, it is unclear how PH operators carry out this test in practice, which can request them to screen more closely their drivers. Would it also be possible that PH operators use this test to pressurise drivers who would be willing to join unions? How could PH (candidate) drivers challenge this operator’s decision? Could we see here a form of substitution of public regulation and oversight by one of a private nature?

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<sup>95</sup> <https://tfl.gov.uk/info-for/media/press-releases/2017/september/tfl-confirms-changes-to-private-hire-operator-licence-fe> .

<sup>96</sup> <https://tfl.gov.uk/corporate/safety-and-security/security-on-the-network/cab-enforcement> .

<sup>97</sup> Mayor of London and TfL, *Taxi and private hire action plan*, 2016, p. 8.

<sup>98</sup> <https://tfl.gov.uk/info-for/taxis-and-private-hire/compliance-and-enforcement?intcmp=30451#on-this-page-3>. An engagement policy (April 2017) has been issued with the stated aims of “*Identifying and addressing issues of concerns affecting drivers; Devising and implementing taxi policy and changes to fares; Working in partnership to maintain and further enhance the world renowned status of London’s iconic taxi service.*” (available: <http://content.tfl.gov.uk/taxi-engagement-policy-april-2017.pdf>).

<sup>99</sup> <https://tfl.gov.uk/corporate/safety-and-security/security-on-the-network/tph-related-sexual-offences>.

<sup>100</sup> <https://tfl.gov.uk/info-for/taxis-and-private-hire/taxi-meetings?intcmp=48644> (no engagement policy is available on-line).

<sup>101</sup> <https://tfl.gov.uk/info-for/taxis-and-private-hire/private-hire-meetings?intcmp=48647> .

<sup>102</sup> E.g.: <http://content.tfl.gov.uk/taxi-operational-performance-meeting-october-2017-slides.pdf> and <http://content.tfl.gov.uk/phv-licensing-compliance-and-enforcement-october-2017.pdf>.

**Consequences.** Only taxis can ply for hire and have some privileges regarding road usage (taxi ranks, priority lanes), while PH drivers need to be pre-booked. Taxis however cannot refuse to take a ride unless they have reasonable grounds to do so.

**Fares.** Fares are differently structured in the taxi and the PH industry. On the one hand, taxi fares are regulated and only London taxis must be fitted with taximeters. Taximeters operate an impartial and objective fare determination. Customers can challenge the taxi fare at the end of the journey if they disagree. On the other hand, the user is required to receive an estimate of the journey costs when s/he does the PH booking. S/he can then negotiate the price if they so wish.

**Overall.** For the CJEU, some of these differences (including the obligation to take a customer, the Knowledge test, wheelchair accessibility, and taximeters) justify that the taxi industry and the PH industry are two different industries, so that advantages granted to the ones do not constitute a selective advantage and thus an illegal state aid.<sup>103</sup> This means that taxi and PH are not in comparable situations, despite performing similar functions (i.e. transporting somebody from one place to another against a fee). The following section details how the distinction and boundaries between taxi and PH industry have been tested when Uber arrived in London.

### III. Uber<sup>104</sup> and its legal challenges

Uber first arrived in London in 2012, just on time for the Olympics.<sup>105</sup> When Uber launched in the British capital, it was expanding globally at a fast pace, but its technology was not a major disruptor in London. This is witnessed, e.g., by the fact that Uber did not attract the younger drivers, as Uber demographics show that drivers are older than other providers of the gig-economy.<sup>106</sup> In addition, the ride-hailing platform Hailo had already capitalized on a network of nearly 10,000 taxis.<sup>107</sup> Despite a fierce competition with ride hailing platforms Hailo and Addison Lee, Uber has overall been able to develop its activities legally.<sup>108</sup> Soon, Lyft will also enter the PH market,<sup>109</sup> which might overhaul the sector once again.

Although Uber did not bring per se technological innovation in London, it largely contributed to expand the PH digital platforms there and competed on the existing market by driving its pricing down. For instance, Uber developed a specific algorithm for the pooling of journeys to decrease the cost for users. Uber did not only constitute a bargain for PH users, but it was perceived as a threat for taxi drivers. Indeed, as witnessed by bankruptcy cases, the taxi sector suffered<sup>110</sup> and the risk for abuse of Uber's dominant position was also felt by the

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<sup>103</sup> CJEU, *Eventech v. The parking adjudicator*, [2015] 14 January 2015 C-518/13, at §61.

<sup>104</sup> Unless otherwise stated, when referring to "Uber" here, we mean UberX/Uber Black, not other services provided by Uber such as UberEats or UberPop. Indeed, UberPop was not offered in London, while UberEats is not a service to transport people but a food delivery service, falling outside the scope of this report.

<sup>105</sup> The initial license was granted on May 31<sup>st</sup>, 2012. (TfL, FOI-1669-1718, especially file called "docs 2218\_s40(2)").

<sup>106</sup> House of Lords, *Gig Economy*, Library briefing, 21<sup>st</sup> November 2017.

<sup>107</sup> <https://www.theguardian.com/technology/2016/apr/27/how-uber-conquered-london>

<sup>108</sup> <http://www.telegraph.co.uk/finance/newsbysector/transport/11822711/Since-Uber-launched-there-are-26pc-more-cabs-in-London.html>

<sup>109</sup> See: <http://www.telegraph.co.uk/technology/2017/09/23/uber-arch-rival-lyft-holds-talks-transport-london-plots-global/>

<sup>110</sup> *Stephen Paul Grand, Anthony Malcolm Cork v. Ronald Charles Henry Baker* [2016] EWHC 1782 (Ch), 18 July 2016.

Competition and Market Authority, which took measures to ensure that drivers could enrol on several ride-hailing platforms at the same time (i.e. “*multihoming*”).<sup>111</sup>

When entering the London market in 2012, Uber attempted to mitigate any legal risks: it did not start its popular UberPop practice but only its licensed drivers’ services. In 2015, Uber launched its service UberPool after long discussions with TfL: it was indeed willing to abide by the rules.<sup>112</sup>

Although Uber sought to abide by the rules, its development led to disapproval in many respects. Although Uber was initially licensed in London, recent debates led to criticisms and judicial challenges regarding the licensing system in London<sup>113</sup> (3.1). Furthermore, drivers face an increasing number of conditions to meet to carry out their activity (3.2). Last but not least, Uber relationship with its own drivers has come under fire (3.3).

## **1.6. The regulatory status of Uber in London**

As already explained above, London’s stance on mobility and especially non-public means of transportation favoured the early development of PH operators. Uber initially sought to comply with the local regulations. It did not try to avoid being considered as a taxi company but rather chose to apply to TfL for a PH operator license.<sup>114</sup> It was at first licensed as a PH operator on 31<sup>st</sup> May 2012. Its relationship with TfL became more contentious in the course of this licence on the following four accounts: first, Uber challenged a new requirement introduced by TfL in the licensing system, namely hotlines (3.1.1); secondly, Uber faced compliance issues (3.1.2); thirdly, TfL refused to renew Uber’s licence (3.1.3); finally, special attention needs to be given to Uber’s deceptive data collection, a specific ground levelled by TfL to refuse renewing Uber’ licence (3.1.4).

**3.1.1 Licensing process: hotline.** As discussed above (section 2.1.3), TfL sought to adapt the licensing system to the new market situation in 2016. It added new requirements for licensing operators following extended consultation with stakeholders. Some of these requirements<sup>115</sup> were challenged by Uber, including the licensing condition relating to the operation of a “hotline” (sensu lato), namely that “[a]t all times during the operator’s hours of business and at all times during the journey, the operator shall ensure that the passenger for whom the booking was made is able to speak to someone at the operating centre if they want to make any complaint or discuss any other matter either carrying out of the booking”.<sup>116</sup> Uber judicially challenged this telephone availability requirement.<sup>117</sup> The requirement was amended in 2017 (before the judgement on the judicial review was delivered) as to allow call centres outside the business premises to receive complaints from users.

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<sup>111</sup> CMA Chairman, David Currie, at the Concurrences Innovation Economics Conference, King’s College London, 3 February 2017, <https://www.gov.uk/government/speeches/david-currie-on-the-role-of-competition-in-stimulating-innovation>

<sup>112</sup> Information Commissioner Office, FOI decision notice nr FS50641222, 4 January 2017.

<sup>113</sup> All appeals against taxi and private hire licensing authorities go before a magistrate’s court, except the refusal of a new hackney carriage proprietor license and the refusal of license renewal, which go to a Crown Court, See *R (on the application of Shanks) v Northumberland County Council* [2012] EWHC 1539 (Admin).

<sup>114</sup> See TfL, FOI-1669-1718, especially file called “docs 2218\_s40(2)”.

<sup>115</sup> The other changes challenged were the English test and the insurance requirement (see below sections 3.2.4 and 3.2.5).

<sup>116</sup> *The Private Hire Vehicles (London) (Operator’s Licence)(Amendment) Regulations 2016*, s 4(1) amending *the Private Hire Vehicles (London) (Operator’s Licence) Regulations 2000*, s 9(11).

<sup>117</sup> *R. on the Application of Uber London Limited, Mr Sandor Balogh, Mr Nikolay Dimitrov, Mr Imran Khan v Transport for London*, CO/4130/2016, 3 March 2017, 2017 EWHC 435 (Admin) by Mitting J.

The requirement, as challenged by Uber, is not limited to emergencies (what would be called a ‘hotline’ *sensu stricto*), but needs to answer to any kind of complaints, even not urgent. This requirement implies enormous costs: it is estimated that it might be just under the threshold of £ 1 million if done from an India-based call-centre, significantly more if done from Europe. According to Uber, its algorithmic treatment of complaints helped identify urgent matters, which were responded to immediately. Furthermore, it argued that it suspended drivers involved in critical incidents for the time of the investigation.<sup>118</sup> Although Mitting J accepted TfL’s argument that having someone on the phone in case of emergency can be very reassuring, he quashed the regulation because of its too large scope and that other less costly means were available. In addition, users of an app-based transport facilitation service might also be expected to have a smaller need for phone contacts. Mitting J nevertheless kept the door open for a new regulation involving a “hotline” in case of emergencies.<sup>119</sup>

**3.1.2 Compliance.** Between 2012 and 2017, TfL carried out ten routine inspections at Uber’s facilities.<sup>120</sup> Two of the inspections concluded to non-compliance. In April 2015, Uber matched the majority of licensing requirements with a few minor discrepancies (category of outcome n°2). The non-compliance resulted from issues with drivers’ insurances. Consequently, TfL brought a case against Uber for despatching work to drivers without insurance.<sup>121</sup> In August 2016, Uber did not meet the PH license requirements, without serious non-compliance issues (category of outcome n°6). The inspection had been triggered by drivers showing up on the app, while their license had been revoked by TfL. Thereafter, Uber took all the reasonable steps to mitigate this case of non-compliance and TfL did not take any further action.

**3.1.3 Licence renewal.** In 2017, Uber’s five-year licence expired so that it had to apply for renewal. As part of this process, TfL had to consider whether Uber was a ‘fit and proper’ business to hold a PH operator licence. While TfL did not disclose the full decision,<sup>122</sup> the press release reads as follows:

*“TfL considers that Uber’s approach and conduct demonstrate a lack of corporate responsibility in relation to a number of issues which have potential public safety and security implications. These include:*

- *Its approach to reporting serious criminal offences.*
- *Its approach to how medical certificates are obtained.*
- *Its approach to how Enhanced Disclosure and Barring Service (DBS) checks are obtained.*
- *Its approach to explaining the use of Greyball in London - software that could be used to block regulatory bodies from gaining full access to the app and prevent officials from undertaking regulatory or law enforcement duties.”<sup>123</sup>*

As a result, Uber’s licence was not renewed and Uber’s development is thus in jeopardy in London. However, Uber still works because it keeps the right to operate during the appeal process.<sup>124</sup> The hearing is planned to take place in April 2018.<sup>125</sup> Simultaneously, Uber

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<sup>118</sup> 2017 EWHC 435 (Admin), at [34].

<sup>119</sup> 2017 EWHC 435 (Admin), at [45].

<sup>120</sup> TfL, FOI-2636-1617, 12 October 2017.

<sup>121</sup> See cases n°01140145717 & 011401736305, as referred to in the TfL, FOI-2190-1718, 11 December 2017.

<sup>122</sup> See, for instance, TfL, FOI-1589-1718, 17 November 2017.

<sup>123</sup> TfL, “Licensing decision on Uber London Limited”, 22 September 2017, Press Release, <http://bit.do/TfL-Uber-Ban>.

<sup>124</sup> See *Local Government Act 1976* s 77.

<sup>125</sup> <http://bit.do/uber-appeal>

committed to improve its internal governance and decided to negotiate specific conditions of exploitation with TfL. Citizens launched a petition supporting Uber, which gathered over 500,000 signatures under a week after its announcement.<sup>126</sup>

As far as criminal offences are reported, this licensing issue finds its origins in the need to verify the records of drivers to support their honesty as a ‘fit and proper person’. In early 2017, a Metropolitan police inspector made public statements and wrote an open letter to TfL, arguing that Uber failed to report offences committed by its drivers in a timely manner. This behaviour led to reoffending which could have been avoided.<sup>127</sup> As far as medical and DBS checks are concerned, Uber argued that the fault was on TfL, which had an exclusive agreement with a private firm for carrying out such research.<sup>128</sup> Therefore, it blamed TfL’s choice of the DBS handler and considered that its role in the verification process is completely passive as it could not even choose the provider.

**3.1.4 Deceptive data collection.** Uber’s practices with regards to data collection and use have raised concerns in London, as in England and at the global level. Firstly, Greyball’s use was first discovered in the United States but had in fact a worldwide scope.<sup>129</sup> Its purpose was created to identify customers who had an illegitimate (in Uber’s eyes) use of the application, and to give them a truncated vision of the localization of drivers on the map, as to protect them.<sup>130</sup> It was, admittedly, used to avoid law enforcement in cities where Uber was prohibited and therefore offered drivers a certain degree of confidence in the platform that they would not be prosecuted.<sup>131</sup> As a consequence, this software was explicitly mentioned in the 2017 license renewal refusal, as it demonstrates a lack of corporate responsibility, which might be assumed to be required to constitute a ‘fit and proper’ business.

Secondly, Uber covered up for a massive data breach which occurred in October 2016. It failed to report it in due time and by adequate means to the competent English authorities (Information Commissioner, the National Cyber Security Centre and the UK government). Hackers accessed the personal data of over 2,5 million people during this security breach in the United Kingdom alone.<sup>132</sup> This supported an increase in the maximum amount of the fines for businesses failing to comply with data protection rules, which were already under review at the time.<sup>133</sup> Labour MP Kevin Brennan also underlined the ambiguity of Uber during oral questions to Matt Hancock, Minister for Digital: Uber did not hesitate to call for signing the petition supporting the renewal of the licence, with a general email to its users, but refused to send out an email to all its (affected) English users apologizing and giving

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<sup>126</sup> <http://www.telegraph.co.uk/news/2017/09/23/uber-petition-reverse-ban-london-hits-500000-signatures-backlash/>; the petition is accessible at <https://www.change.org/p/save-your-uber-in-london-saveyouruber>.

<sup>127</sup> The full letter written on 12 April 2017 by N. Billany (Met Police Inspector) and addressed to Helen Chapman (TfL) is accessible on <http://bit.do/uber-crimes>.

<sup>128</sup> See, e.g., <http://bit.do/uber-dbs>.

<sup>129</sup> <https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html>. See also <http://bit.do/uber-greyball>.

<sup>130</sup> Joe Sullivan, Chief Security Officer at Uber, "An update on "greyballing", 8 March 2017, <https://www.uber.com/newsroom/an-update-on-greyballing/>

<sup>131</sup> Uber however contends that it never used *Greyball* to dodge the law in the United Kingdom. See <http://www.walesonline.co.uk/news/local-news/cardiff-uber-licence-operate-london-13658730>.

<sup>132</sup> James Dipple-Johnstone (ICO Deputy Commissioner), ICO Statement on Uber Data breach, 29 November 2017, <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2017/11/latest-ico-statement-on-uber-data-breach/>.

<sup>133</sup> Data Protection Bill [HL] 2017-19. Uber’s data breach is part of most discussions after it was first revealed in November 2017.

them notice of the data breach!<sup>134</sup> Such lack of responsiveness/promptness in reporting the data breach was not assessed in the September 2017 licence refusal by TfL (but could still be part of the negotiations going on with TfL). This argument was nevertheless used subsequently by other city councils in later applications to refuse to consider that Uber is a ‘fit and proper’ business to operate in the PH sector (see below, section 4).

### **1.7. The regulatory status of Uber drivers**

Once Uber obtained its initial PH operator license in 2012, most drivers started applying for PH vehicles licenses. In addition, Uber *also* offers booking and dispatching services to black cabs, which are already licensed as taxis. Four issues arose in respects to Uber PHV licensed drivers: Firstly, only taxi-licensed cars can be equipped with a taximeter (3.2.1). Secondly, only taxi-licensed cars can use priority lanes (3.2.2). Thirdly, the distinction between pre-booking and instant hailing on the one hand and pick-up areas and taxi ranks on the other hand has been tested (3.2.3). Fourthly, Uber drivers need to show that they have a sufficient knowledge of English language (3.2.4). Fifthly, insurance matters have arisen (3.2.5).

**3.2.1 Prohibition of taximeters.** Section 11 PHV Act prohibits private hire cars to be equipped with a taximeter. The *ratio legis* of this section is that taximeters in PHV could give the impression to customers that the fare is regulated. However, the License Taxi Drivers Association (LTDA) and Licensed Private Hire Car Association (LPHCA) privately prosecuted Uber on the claim that Uber app amounted to a taximeter. The case was adjourned. However, a civil test case involving TfL and Uber ensued (*Transport for London v Uber London Ltd*).<sup>135</sup>

A distant server rather than the drivers’ smartphone carries out the fare calculation of the base and additional fares. The smartphone uses its enabled GPS and clock data to merely records basic features of the journey, such as time and location. The smartphone and the app do not perform any computation. Data for the base fare (e.g. the kind of vehicle used) and for the additional fare (e.g. time idling in traffic) are gathered by the smartphone, which sends them to an US based server. Taking into account information specific to journeys as well as general information about London (e.g. the London-fare algorithm (which is a trade secret), potential surge pricing), the server determines the final price of the ride (at [11]-[15]). At no point during the journey, neither the driver nor the customer have access to the amount to be paid. While an estimate fare is given at pick-up, the exact amount is only communicated at the end of the journey. Besides, the phones equip the *driver* rather than the mini-cab itself.

LTDA and LPHCA claimed that the application generates the expectation of “objectivity in calculation, authority and reliability” (at [25]). Ouseley J found instead that no language preventing such mechanisms is to be found the legislation (at [26]). Disregarding the social and economic reality, Ouseley J considered that no confusion could happen between an Uber and an official black cab (at [29]). He therefore rejected the argument (at [26]). Ultimately, the Act does not regulate technologies and rather attempts to organize the business model of taxis and minicabs (at [28] and [34]). Indeed, smartphones do not work as taximeters as they do not compute themselves the fare, but merely record useful information. As the price to be paid is not shown ‘live’ to users, Ouseley J found that a smartphone does not function as a taximeter (at [49]).

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<sup>134</sup> Hansard, Debates, HC, 23 November 2017, vol. 631, col 1179-1183.

<sup>135</sup> *Transport for London v Uber London Ltd* [2015] EWHC 2918 (Admin) (16 October 2015).

Noteworthy is that taxi-licensed drivers need to be equipped with a taximeter and have to use it even when working for Uber. Hence, they have to tap into the application the amount on the taximeter screen and this amount will be billed to the customer (at [13]). In this limited hypothesis, the fares are regulated just as for taxis, but in other circumstances where Uber calculates the fares through its server, the fare is left unregulated.

**3.2.2 Prohibition of priority lanes use.** The issue of using priority lanes has raised concerns from a competition law perspective when Uber started in London. Indeed, Eventech, a subsidiary company of Addison Lee, renting cars to drivers of the latter, challenged before the Parking Adjudicator<sup>136</sup> two penalty charge notices for two of their cars using priority bus lanes without being adequately licensed. The case was eventually referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling on the claim that the priority bus lane policy created a state aid in favour of taxis.

On the one hand, Advocate General Wahl directly correlates this issue with the development of app-based PH companies. Smartphones based facilitation had indeed created fierce competition.<sup>137</sup> Advocate General Wahl considered that the bus lane policy did *not* constitute a state aid on the grounds that there was no transfer of State resources, taxis and PH vehicles are not in legally and factually comparable situations, and it is not unreasonable to make such distinction in any case. On the other hand, the CJEU was not that settled and considered merely that such measure “does not appear” to constitute a selective State aid, although it is for the referring court to ultimately decide.<sup>138</sup> The English courts had, by then, also considered that the priority lane policy did not constitute a State aid.<sup>139</sup>

**3.2.3 Pre-booking and taxi ranks.** According to Arnold J, “the essential distinction between a London taxi and a PH vehicle is that a taxi may be hired from a rank or on the street, but a PH vehicle must be pre-booked. This distinction has been somewhat eroded, however, since the advent of apps like Hailo and GetTaxi (which are primarily for taxis) and Uber (which is primarily for PH vehicles)”.<sup>140</sup> Equally, the CJEU accepts that the taxi industry and the PH industry are not comparable as it pointed out the counterpart of “instant booking” for taxi customers, namely that it implies for taxi drivers to accept rides to any destination, while this is not a case for black cabs.<sup>141</sup>

TfL seeks to maintain a difference between taxis and PH. For instance, an issue related to the construction of pre-booking arose when the O2 Arena (which is part of the same group as AEG) put up signs reading “Uber pick-up area” on the parking of the Arena near the place where PH vehicles could pick-up and set down their customers after AEG and Uber entered into a partnership. This did not please TfL because it created an unfair competition between Uber drivers and other PH drivers. Firstly, the advertising deterred Uber’s competitors from

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<sup>136</sup> S. 81 *Traffic Management Act* 2004 provides with a judicial office allowed to hear appeals for penalty charge notices issued by enforcement authorities for alleged contraventions to traffic regulations.

<sup>137</sup> AG Wahl, Opinion, *Eventech Ltd contre Parking Adjudicator* [2015] ECLI:EU:C:2014:2239 (24 September 2014) C-518/13, at §2.

<sup>138</sup> CJEU, *Eventech v. The parking adjudicator* [2015] ECLI:EU:C:2015:9 (14 January 2015), C-518/13, at §63.

<sup>139</sup> *Eventech v. The parking adjudicator* [2012] EWHC 1903.

<sup>140</sup> *London Taxi Corp Ltd (t/a London Taxi Co) v Fraser-Nash Research Ltd*, 20 January 2016, [2016] EWHC 52 (Ch), [2016] E.T.M.R. 18 by Arnold J (at 72, p. 331-332). Arnold J implicitly refers to PHV Act 1998; the *London Hackney Carriages Acts* of 1831, 1843, 1850 and 1853; the *London Cab Order* 1934 (as amended, in particular by the Greater London Authority Act 1999); the *Metropolitan Public Carriage Act* 1869; the *London Cab and State Carriage Act* 1907.

<sup>141</sup> ECJ, *Eventech v. The Parking Adjudicator* [2015] ECLI:EU:C:2015:9 (14 January 2015) C-518/13, at §7.

entering the zone, as it seemed to be reserved to Uber cars. Secondly, Uber cars started to wait for customers coming from the arena to be dispatched to them, which, in turned prevented other PHV companies to enter in the pick-up area despite having proper bookings. Uber recognized the lack of diplomacy of such ad, and had it finally removed.<sup>142</sup> This illustrates how TfL construes the notion of ‘instant booking’ against ‘hailing’, despite the lack of an overarching conceptualization. It also shows how TfL seeks to maintain its own taxi rank policy (justified on the ground of public safety and mobility) and does not welcome attempts by Uber to develop strategies that lead to a form of taxi rank, all but in name and public endorsement.

**3.2.4 English language.** In 2016, TfL adopted a new policy requiring PH operators to test the English proficiency skills of drivers. Indeed, three quarters of Uber’s drivers in London are coming from countries where English is not the native language.<sup>143</sup> TfL introduced this test because it feared that PH drivers would not be able to understand queries by passengers, regulatory changes or even traffic tickets. As a result, PH drivers need to show a knowledge of English at B1 level according to the European Common Frame of Reference for Language tests. This language level, the third level on a scale of six, requires a person to understand complex situations in a familiar environment, such as one’s work. Among others, it includes an essay which is not so directly targeted for drivers, but courts have accepted it to be the less restrictive means to achieve an acceptable objective of public interest. Although the testing has been judicially challenged by foreign Uber drivers, courts have maintained it so far.<sup>144</sup> However, Uber has appealed this decision.<sup>145</sup>

This test has raised concerns for several reasons. Firstly, it has widespread adverse effects of such policy on foreign drivers, which might be refrained from continuing their activity because they lack language skills and because Uber provide financially for many non-English speaking individuals.<sup>146</sup> Secondly, it creates a barrier to entry on the market, as those English tests, as well as the optional but useful preparatory courses, are expensive.<sup>147</sup> Thirdly, the London Assembly adopted in March 2017 a motion calling on the Mayor to limit the assessment to a *speaking* test, excluding therefore a *written* test.<sup>148</sup>

**3.2.5 Insurance.** In 2016, TfL introduced a new paragraph 1 in schedule 11 and a condition 14 in schedule 2 of the Private Hire Vehicles (London Private Hire Vehicles Licences), Regulation 2004 making it compulsory to have an insurance covering the use of the vehicle for hire or reward and to display the proof of such insurance in order to ensure a full coverage to the passengers, carried for reward or without intent of profit. However, Uber challenged this requirement as being unnecessary. Indeed, the case *Bristol Alliance Limited Partnership v Williams*<sup>149</sup> decided in 2012 allows car victims to claim their damages whatever the scope of the insurance was. It is then for the insurer to prove that the driver was not using its vehicle under the conditions of coverage of the insurance policy. Therefore, the insurer

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<sup>142</sup> TfL, FOI-1590-1718, 11 December 2017.

<sup>143</sup> House of Lords Briefing above (nr 99), p.11.

<sup>144</sup> *R. on the Application of Uber London Limited, Mr Sandor Balogh, Mr Nikolay Dimitrov, Mr Imran Khan v Transport for London*, CO/4130/2016, 3 March 2017, 2017 EWHC 435 (Admin) by Mitting J.

<sup>145</sup> <http://www.bbc.com/news/uk-england-london-40427983>.

<sup>146</sup> *R. on the Application of Uber London Limited, Mr Sandor Balogh, Mr Nikolay Dimitrov, Mr Imran Khan v Transport for London*, CO/4130/2016, 3 March 2017, 2017 EWHC 435 (Admin).

<sup>147</sup> An applicant would have to pay £300, [www.capstar.co/training/](http://www.capstar.co/training/); [www.trinitycollege.com/site/?id=3640](http://www.trinitycollege.com/site/?id=3640).

<sup>148</sup> <https://www.london.gov.uk/press-releases/assembly/english-speaking-should-be-private-hire-test>. Other licencing authorities have lower English language requirements: [https://consultations.tfl.gov.uk/tpH/private-hire-regulations-review/supporting\\_documents/English%20language%20Reqts.pdf](https://consultations.tfl.gov.uk/tpH/private-hire-regulations-review/supporting_documents/English%20language%20Reqts.pdf).

<sup>149</sup> [2012] EWCA Civ. 1267; [2013] QB 826.

(rather than the victim) has to recover the money from the driver. TfL became aware of this construction during the judicial challenge of the requirement (on its lawyers' advice) and hence decided subsequently to waive it.<sup>150</sup>

### **1.8. Contractual relationship between Uber and its drivers: contractor or worker?**

From a contractual perspective, the legal characterization of the relationship between Uber and its drivers has been a centre of attention throughout the world. In England, the landmark decision *Uber v. Aslam* from October 2016,<sup>151</sup> characterized Uber drivers as “workers”. While Uber always considered its drivers to be independent contractors, Aslam and twenty other drivers claimed that they qualified at least as “workers”, an intermediary status between employee and independent contractor. They argue that they were instructed, managed and controlled by the platform. Therefore they invoked a right to minimal wage and paid leave against Uber.<sup>152</sup> Conversely, Uber argued that it was merely preserving the integrity of the platform without directing the drivers themselves. The decision followed the claimants.

The way had been paved to this solution by the UK Supreme Court which had already characterized sham ‘independent’ contracts of parking valets as labour agreements. Indeed, in *Autoclenz Ltd v Belcher*,<sup>153</sup> Sedley LJ and Clark LJ preferred a purposive interpretation of the contract and considered that the practice of the parties rather than the language of contract solely had to be examined.<sup>154</sup> Building on such methodology in *Uber v. Aslam*, Snelson J examined the factual relationship between Uber and its drivers. Indeed, the vocabulary used in the contracts show much twisted language in favour of the platform. Hence, it makes it difficult to really interpret the contract and there is a need to give more attention to the economic reality between the parties. Snelson J identified eleven elements (e.g.: impossibility to negotiate standard terms; Uber acts as a transport business rather than as an intermediary; impossibility for drivers to “grow” their business, except by working more hours) contradicting the characterisation as “independent” and assimilating drivers to workers (at [87]-[102]).<sup>155</sup> Uber appealed.

On Appeal, Eady J developed more on this methodology. She found, for instance, that Uber emits an invoice on behalf of the drivers to customers at the end of the journey. However, in practice, the invoices consist rather in receipts for drivers than in a formal request to pay the fare to drivers, as these invoices are not even transferred to the users. Similarly, when Uber started operating in London, it guaranteed an income for new drivers to attract them. Despite this not being the case later on, this does not necessarily show a change in the relationship with drivers. Indeed, other elements still show that drivers are in a position similar to workers. For instance, Uber accepts the burden of the risks when the application is used fraudulently, leading to the cancellation of the credit card charge and does not pass this loss to drivers. In addition, the performance of the contract is not transferable. Furthermore, drivers accept to be subject to a penalty system when refusing to take trips three times in a row. Finally, drivers and passengers do not agree on the terms of the ride, but the platform

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<sup>150</sup> *R. on the Application of Uber London Limited, Mr Sandor Balogh, Mr Nikolay Dimitrov, Mr Imran Khan v. Transport for London*, CO/4130/2016, 3 March 2017, [2017] EWHC 435 (Admin) by Mitting J at [44].

<sup>151</sup> *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET) (28 October 2016).

<sup>152</sup> See *Employment Rights Act 1996* s230(3)(b).

<sup>153</sup> [2011] UKSC 41.

<sup>154</sup> On using the ‘economic reality test’ and ‘control test’, see e.g. L. Ratti, “Online Platforms and Crowdwork in Europe: A Two-Step Approach to Expanding Agency Work Provisions”, (2017) 38 *Comp. Lab. L. & Pol’y J.* 477.

<sup>155</sup> *Aslam & Ors v Uber BV & Ors* [2016] EW Misc B68 (ET) (28 October 2016).

sets its own conditions. Therefore, Eady J found that Uber controls the drivers. She thus confirmed the Employment Tribunal decision.<sup>156</sup>

In response to these decisions, Uber claimed that the flexibility enjoyed by drivers in its business model was at risk, while proponents of the decisions found that it only threatened Uber's profits, rather than the freedom of the drivers.<sup>157</sup> While Uber also asserted that the decision only concerned the two drivers having initiated the proceedings and not the overall float, legal scholars pointed out that such understanding would constitute a deep misconception of the common law principle of precedent.<sup>158</sup>

This case was much expected.<sup>159</sup> It led to much literature on labour relations in the gig economy, often in a prospective regulation manner.<sup>160</sup> Following a strict interpretation of the case, drivers are to be classified as workers. Some authors argue however that Uber drivers could fall easily in the class of "employee" (rather than the intermediary class of "workers") because all the required elements could be found in the judgment,<sup>161</sup> notwithstanding the practical hurdles to apply such a broad protection in the digital world.<sup>162</sup>

This decision impacts both individual<sup>163</sup> and collective labour law.<sup>164</sup> Some authors have examined specific work circumstances such as the possibility of working while being engaged in peripheral tasks (i.e. it includes waiting periods and not merely 'core production') as there is a need for a quick response from workers switching from a stand-by position to actually providing the service.<sup>165</sup> Similarly, authors have noted large-scale outsourcing of a specific form of skilled labour to participate of a new definition of a labour relationship.<sup>166</sup> In addition, this case has been used to contrast the prohibition to unionize for *Deliveroo* drivers (a food delivery service also belonging to the gig economy).<sup>167</sup>

Moving forward, the legislator and scholarship need to take into account several hurdles showing the importance of the issues and the difficulty to tackle them.

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<sup>156</sup> *Uber BV v Aslam & Ors* [2017] UKEAT (0056\_17\_1011) (10 November 2017), [2017] WLR(D) 809.

<sup>157</sup> E. Rubin, "Independent Contractors or Employees: Why Mediation Should Be Utilized by Uber and Its Drivers to Solve the Mystery of How to Define Working Individuals in a Sharing Economy Model", (2017) 19 *Cardozo J. Conflict Resol.* 163, 168.

<sup>158</sup> E. Rubin above n (157) at 169. See also E. McGaughey, "Uber Fraud, Mutuality and the Taylor Review", *Industrial Law Journal*, *forthcoming*. Available at [ssrn.com/abstract=3018516](https://ssrn.com/abstract=3018516), at 3.

<sup>159</sup> See e.g. M. Freedland and J. Prassl, "Employees, Workers and the 'Sharing Economy': changing practices and changing concepts in the United Kingdom" (2017) *Oxford legal research paper Series*, Paper No 19/2017, March 2017, available at [ssrn.com/abstract=2932757](https://ssrn.com/abstract=2932757), at 9.

<sup>160</sup> E. J. Kennedy, "Employed by an Algorithm: Labor Rights in the On-Demand Economy", (2017) 40 *Seattle U. L. Rev.* 990. See also R. Calo and A. Rosenblat, "The Taking Economy: Uber, Information and Power", (2017) 117 *Columbia Law Review* 1647.

<sup>161</sup> E. McGaughey, "Uber Fraud, Mutuality and the Taylor Review", *Industrial Law Journal*, *forthcoming*. Available at [ssrn.com/abstract=3018516](https://ssrn.com/abstract=3018516), p.7.

<sup>162</sup> A. Todolli-Signes, "The 'gig-economy': employee, self-employed or the need for a special employment regulation?", (2017) 23 *Transfer: European Review of Labour and Research* 200.

<sup>163</sup> See generally J. Prassl, "Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who is a Worker?", (2017) 33 *Law Quarterly Review* 366-72.

<sup>164</sup> See generally M. Freedland and N. Kountouris, "Some reflections on the 'Personal Scope' of Collective Labour Law", (2017) 46 *Industrial Law Journal* 52-71.

<sup>165</sup> Anne C.L. Davies, "Getting More than You bargained for? Rethinking the meaning of 'Work' in Employment Law", (2017) *Industrial Law Journal*, *forthcoming*, p. 26 of 31 (advanced access version).

<sup>166</sup> V. Hatzopoulos and S. Roma, "Caring for Sharing? The collaborative economy under EU law", (2017) 54 *CMLR* 118. See also D. Morgan, "Employment status: flexibility or security – what's the best gig?", (2017) *Emp. L.B.* 139, at §6.

<sup>167</sup> C. Forde, M. Stuart et al., "The social protection of Workers in the Platform Economy", Study for the EMPL Committee, November 2017, 91 (available at [europarl.europa.eu/supporting-analyses](https://europarl.europa.eu/supporting-analyses)).

Firstly, the Uber case is not an isolated decision. For instance, in *Lange & Others v. Addison Lee*, drivers claimed minimum wage and paid leave. In September 2017, Pearl J held on grounds similar to the findings in *Aslam v. Uber* that the drivers were also ‘workers’ rather than self-employed and could therefore benefit from more social protection.<sup>168</sup> Secondly, the Opinion of Advocate General Tanchev in a case referred to the CJEU for preliminary ruling by the British Employment Tribunal<sup>169</sup> creates an argument suggesting that gig-workers who did not take their paid leave are still entitled to be paid for them because they thought they were independent, while normally the money is only paid upon their use.<sup>170</sup> Thirdly, facing these regulatory issues of the employment relation in the gig-economy, the British government called a review on modern employment practices (‘The Taylor Review’). This review recommended to organise the work of ‘dependent contractors’, rather than employees or workers.<sup>171</sup> However, the implementation of such proposal sounds rather uncertain because the Prime Minister did not want to commit to follow the recommendations.<sup>172</sup> Fourthly, the House of Commons has also looked into the gig economy. Their report suggests adapting self-employed contributions to the social security system, to distinguish true flexibility from profit-making and establish a legal presumption that individual work in an employment relationship rather than as independent contractors.<sup>173</sup>

An important insight for further policy is that Uber offers now a sickness and injury insurance for drivers having carried out more than 500 rides for £2 per week.<sup>174</sup> This new development illustrates Uber’s willingness towards respecting minimal labour conditions in London.

#### IV. Uber outside London

Outside London, the England-wide legislation<sup>175</sup> makes licensing primarily the responsibility of local authorities for both taxis and PH. It sets a general framework (e.g. the “fit and proper person” test to hold a license,<sup>176</sup> see above section 2.2), within which local authorities have discretion to tailor their regulation to their preferences or specificities. For instance, councils can lay down licensing policies. They can also determine the application procedure and the circumstances in which a license may or may not be granted. Most of the times, they do not regulate taximeters outside London. This means that licensing authorities have the choice to let PH drivers use taximeters. The Department for Transport issues non-binding ‘best practice’ guidance to help bring consistency across licensing authorities.<sup>177</sup> For instance, it clarifies the legal possibility for local authorities to set quantity restrictions on taxi licenses

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<sup>168</sup> The decision is accessible at <https://www.gov.uk/employment-tribunal-decisions/mr-m-lange-and-others-v-addison-lee-ltd-2208029-2016-others>.

<sup>169</sup> CJEU, *King v The Sash WW* [2017] ECLI:EU:C:2017:914 (29 November 2017) C-214/16 and AG Tanchev, opinion, *King v The Sash WW* [2017] ECLI:EU:C:2017:439 (8 June 2017) C-214/16, esp. §3.

<sup>170</sup> C. Pigott, “Advocate General drops holiday pay bombshell”, *New Law Journal*, 28 July 2017, p. 16.

<sup>171</sup> M. Taylor, “Good Work: The Taylor Review of Modern Working Practices”, July 2017, page 9, action 2 and 3, available at [www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices](http://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices).

<sup>172</sup> [www.independent.co.uk/news/uk/politics/theresa-may-taylor-review-gig-economy-workplace-practices-exploitation-gathering-gust-a7835276.html](http://www.independent.co.uk/news/uk/politics/theresa-may-taylor-review-gig-economy-workplace-practices-exploitation-gathering-gust-a7835276.html)

<sup>173</sup> Work and Pensions Committee, *Self-employment and the Gig Economy* (2016-17 HC 847), p 4.

<sup>174</sup> House of Lords, *Gig Economy*, Library briefing, 21<sup>st</sup> November 2017.

<sup>175</sup> *The Town Police Clauses Act 1847* supplemented by the *Local Government (Miscellaneous Provisions) Act 1976* provides the principal framework governing the licensing and regulation of ‘taxis’.

<sup>176</sup> S 51 (1) (a) *Local Government (Miscellaneous Provisions) Act 1976*.

<sup>177</sup> DfT, *Taxi and private hire vehicle licensing: Best practice guidance*, 2010. <https://www.gov.uk/government/publications/taxi-and-private-hire-vehicle-licensing-best-practice-guidance>.

outside London,<sup>178</sup> emphasizing that this is only possible when no significant demand is unmet and that this may need to be demonstrated in court if the local authority's decision is challenged.<sup>179</sup> However since a Office of Fair Trading report issued in 2003,<sup>180</sup> few local authorities set quantitative limits to taxi and PH drivers licenses in England and even when they have done so, judicial control is open: licensing authorities then have to prove that there is no significant demand for the services of hackney carriages in the area which is unmet.<sup>181</sup>

Although this contribution focuses on the situation in London, the diversity of positions of transport authorities in other parts of the United Kingdom deserve some attention. Indeed, Uber is required under the *Local Government Act 1976* to be licensed in the same local area where its drivers and fleet are licensed to operate and despatch them.<sup>182</sup> However, Uber's licensing process has not been without struggles or opposition outside of London. For instance, in Edinburgh<sup>183</sup> and Glasgow<sup>184</sup> (Scotland), Uber is fully licensed despite calls for policy change by competing operators. The City Council of Cambridge is currently reviewing Uber's licence renewal application,<sup>185</sup> while Brighton City Council considered that it could only deliver a six-month license, pending further requests for information.<sup>186</sup> Sheffield City Council threatened to suspend – for purely administrative errors - Uber's licence.<sup>187</sup> Besides these hurdles, Uber failed twice to renew its license in 2017 outside of London.

The town of Swansea (Wales) refused on 8<sup>th</sup> September 2017 to renew Uber's license because Uber refused to set structured shifts for its drivers.<sup>188</sup> Uber enjoys there a loophole however, as the close cities of Cardiff and Newport have licensed Uber. In the name of free movement, Uber continues its activities in Swansea with licenses for its drivers and vehicles from these two neighbouring cities.<sup>189</sup> Indeed, only one requirement exists as to the territorial scope of taxi and PH licensing: the driver, the vehicle and the despatcher/operator need to receive the licence from the same entity. Pre-booked journeys can however start and finish outside the licencing entity without any limits, a problem well known in London as well.<sup>190</sup>

On 12<sup>th</sup> December 2017, the City Council of York (England) had also to decide whether Uber was a “fit and proper business” that was worthy of being awarded a licence.<sup>191</sup> In order to renew the licence, the City Council needed to assess Uber's business practices. Accordingly, they could either fully accept the application, grant the licence on a temporary basis or refuse it. After long discussions, the Council decided that the data breach and the large number of

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<sup>178</sup> S 16 *Transport Act 1985*.

<sup>179</sup> DfT, *Taxi and private hire vehicle licensing: Best practice guidance*, 2010, para 45-51.

<sup>180</sup> OFT, *The regulation of licensed taxi and PHV services in the UK*, 2003.

<sup>181</sup> *Cross on Local Government Law*, Chapter 29 - Miscellaneous Powers, Duties and Services, para 29-57, Hackney carriages.

<sup>182</sup> See Mayor of London and TfL, *Taxi and private hire action plan*, 2016, Action 26 (first bullet point).

<sup>183</sup> [www.scotsman.com/news/taxi-drivers-fears-over-rise-in-edinburgh-uber-applications-1-4530462](http://www.scotsman.com/news/taxi-drivers-fears-over-rise-in-edinburgh-uber-applications-1-4530462).

<sup>184</sup> <http://www.glasgowlive.co.uk/news/glasgow-news/scotlands-largest-taxi-firm-calls-13681245>.

<sup>185</sup> [www.theweek.co.uk/business/90347/cambridge-reviews-uber-licence-following-london-sheffield-suspensions](http://www.theweek.co.uk/business/90347/cambridge-reviews-uber-licence-following-london-sheffield-suspensions).

<sup>186</sup> [www.independent.co.uk/news/business/news/brighton-uber-licence-renew-six-months-london-ban-ride-sharing-app-taxis-a8033751.html](http://www.independent.co.uk/news/business/news/brighton-uber-licence-renew-six-months-london-ban-ride-sharing-app-taxis-a8033751.html).

<sup>187</sup> <https://www.engadget.com/2017/12/08/uber-sheffield-operating-licence-suspended/>.

<sup>188</sup> <http://www.walesonline.co.uk/news/wales-news/uber-been-rejected-license-operate-13976914>. See also <http://www.bbc.com/news/uk-wales-politics-41609352>.

<sup>189</sup> <http://www.walesonline.co.uk/news/wales-news/uber-been-rejected-license-operate-13976914>.

<sup>190</sup> See Mayor of London and TfL, *Taxi and private hire action plan*, 2016, Action 26 (first bullet point).

<sup>191</sup> <http://www.independent.co.uk/news/business/news/uber-york-ban-taxi-licence-public-safety-security-tfl-london-ride-hailing-app-a8107006.html>.

complaints received against Uber constituted specific motives justifying a refusal of the renewal.<sup>192</sup> Besides, during the discussions, the Councillors argued that the impossible physical interaction with Uber staff, the lack of standards of the service provided (e.g. the lack of knowledge of the drivers and of the town) as well as the overall waiving of liability for the transport service offered meant an overarching lack of confidence in the operator. One important point which could not be considered in the final decision was the high level of complaints against drivers licensed in other towns and having activities in York.<sup>193</sup> Uber decided to appeal the refusal.<sup>194</sup>

## V. Pending responses to digital innovation in England

The previous sections have discussed the battle between licensing authorities, as keeper of public safety (such as TfL) and the bearers of innovative technologies and business models (such as Uber). However, a range of further legal changes are under consideration.

**Overarching legal changes.** The Law Commission has made a range of recommendations in relation to the taxi and PH sector.<sup>195</sup> Having gained new powers in relation to this matter, the Welsh government carried out in 2017 a consultation about reforming the system on the basis of the Law Commission recommendations.<sup>196</sup> The outcome of this consultation remains to be decided at the time of writing.

**Changes for taxis.** Uber's supporters call for changes in the taxi regulation, especially in London. They seek to put licensed taxis and licensed PH drivers on a level playing field, giving them the same business opportunities (e.g. priority lanes).

**Addressing coordination issues.** Uber's opponents flag up two key issues: firstly, capping PH drivers' licenses and secondly, cross-boundary transportation. Changes to grant the London Mayor powers to cap the number of PH drivers have been called by the All parliamentary group on taxis<sup>197</sup> and the Mayor of London itself.<sup>198</sup> When it comes to cross-boundary issues (i.e. when one licensing authority license Uber as PH and not the bordering authority), this question is not really new. In a 2011 report, the issue had already been raised.<sup>199</sup> However, digital platforms have given a new urgency to the matter. Now, London<sup>200</sup> and the All party parliamentary group are calling for a national intervention on this matter.

**Changes related to the sharing economy.** Digital innovation scholars pushed towards more participation to the sharing economy, especially under the influence of Rachel Botsman

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<sup>192</sup> Most complaints against Uber drivers came from York taxi companies, who justify this finding in claiming that they are "experts" of the taxi regulations: they are most likely to flag misbehaviors because they spend more time on the road than the users. See <https://www.yorkmix.com/news/83-complaints-uber-came-york-taxi-firms-drivers-reveal-reason/>.

<sup>193</sup> A video of the meeting is also available at <https://www.youtube.com/watch?v=u-gD9sRIjQY>.

<sup>194</sup> <https://www.yorkmix.com/news/uber-appeal-yorks-decision-deny-licence/>.

<sup>195</sup> Law Commission see above ( 26).

<sup>196</sup> Welsh Government, *Consultation document – Taxi and private hire – licensing in Wales*, 2017, <https://consultations.gov.wales/consultations/taxi-and-private-hire-vehicle-licensing-wales>

<sup>197</sup> All parliamentary group on taxis, *Lessons from London: The future of the UK taxi trade*, 2017. This is a parliamentary group representing the interests of the taxi industry in Westminster.

<sup>198</sup> Mayor of London and TfL, *Taxi and private hire action plan*, 2016, p. 12-13.

<sup>199</sup> Transport Committee, *Taxis and private hire vehicles: the road to reform* (2010-12 HL 720), p. 6.

<sup>200</sup> Mayor of London and TfL, *Taxi and private hire action plan*, 2016, p. 12.

(based in Oxford Saïd Business School). Under the liberal approach to innovation in England, the sharing economy needed few adjustments to develop, except in its dimension of the provision of services (rather than the sharing of goods) from one to another (often referred to as ‘the gig-economy’, the ‘on-demand’ digital economy, the ‘Mesh’). However, the social and economic impact of such innovation increases the scale of small phenomena which could evade legal regulation. The systemic risks created require to revisit the phenomenon from a legislative perspective to protect the weakest groups in the community. Hence, the need to promote the protection of gig-workers (as proposed in the Taylor Review) is increasingly expressed and broader changes related to the sharing economy are being discussed, including at Westminster.<sup>201</sup>

## **VI. Flexible regulation as a response to changing mobility services**

Dating back from the mid-19<sup>th</sup> century, the regulatory framework applicable to taxis in London has adapted to the emergence of the PH industry in regulating it in 1998: two systems, taxis and PH, co-exist alongside each other. Their co-existence and complementarity was based on the fact that the two sectors had different features: immediate availability on street and taxi ranks, taximeters, deepened knowledge of the street intricacies in London for the taxi drivers on the one hand; no plying for hire but pre-booking for the PH sector on the other hand. The pillar of the regulation of each sector was similar: licences for vehicles and drivers in each case, with more demanding entry requirements for taxi drivers (in terms of knowledge and investment) and a licence for PH operators. The main test to be passed was the test of being a “fit and proper person” to be licensed. No quantitative limits to licences exist in London for neither industry. The major concern behind these two regulatory systems is to ensure the safety of the public first and foremost.

Digital technology is challenging the basic premises of this two-tier system as digital tools render detailed personal knowledge of the street system in London less crucial (according to some at least) and direct bookings and algorithms may become the new electronic hailing systems and electronic taximeters. This means that digital technology might render the distinction between two different industries and two different regulatory systems obsolete.

However digital technology does not happen in a void. Other changes or pressures are also increasingly present in regulators’ mind. London is especially facing specific challenges: first congestion and traffic jam; secondly, poor air quality; thirdly, an ever growing need to be an inclusive society ensuring that disabled people can share in the general social life; fourthly, security threat and the need to monitor illegal work. This leads London authorities to develop a policy where cars (any cars: personal cars, taxis and PH services) are not necessarily seen only as positive assets that contribute to helping people to move from one point to another. Cars are also part of major problems in the living together in London. The sharp increase of PH vehicles since 2012 can be regarded as contributing to this collective problem more than as providing for the personal comfort of individual users. Therefore, London authorities address cars as a private incursion making extensive use of the public space: they try to limit their numbers and their emissions, to develop an interconnected efficient network of public transport (even at night) and to foster a more holistic approach to transportation within a green city. All these contextual changes may lead to suggest that they transform the concept of physical transportation from one point to the other in the shortest time or journey into a more qualitative notion of mobility as a service with features relating to the immediate

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<sup>201</sup> See e.g. Work and Pensions Committee, *Self-employment and the gig economy* (2016-17 HC 847).

beneficiary of the service as well as the community where this service is delivered. The regulatory changes which are currently made and discussed in London and in England do not back up entirely this suggestion yet as many aspects are still under discussion.<sup>202</sup> However, a quick recap of the regulatory changes carried out in relation to Uber so far shows that little has changed when it comes to the structuration of the regulatory system. What has changed belongs to the remit of tweaking.

Firstly, changes have been mostly introduced in the conditions set for licensing PH operators and drivers (especially the English language) in London. Other changes such as the topographic test for PH drivers built on conditions that existed previously but the system has been adapted to make it less prone to abuse. The most far reaching changes in the licensing of PH operators in London relates to the dramatic increase of the licensing fees for large fleets of vehicles (from the previous £2,836 to the current £2,900,000). However, this is not a regulatory change but a mere financial adaptation to the market changes and its financial implication in terms of monitoring compliance. Furthermore, inside and outside London, licensing authorities have always enjoyed a wide discretion in carrying out the trustworthiness and reliability test of the “fit and proper person” and to attach conditions to licences, conditions that are required by local circumstances. This licensing principle did not change. The modalities that the licensing authorities give to this test may be adapting, responding to the changes in the context within which they have to make their licensing decisions however.

Secondly, indirect changes may bear a loose relationship with Uber. At a social level, strict requirements in terms of wheelchair access or strict emphasis on a general policy geared towards green mobility have a long history in England. At a technological level, the strengthening of data protection had been on the agenda for a long time, and Uber misbehaviour only confirmed the emergency in updating the right to privacy for the digital age. These requirements may constraint the development of Uber or at least channel some parts of its services, but need to be assessed in their wider context than merely as spurred by Uber.

Thirdly, judges side-lined the impact of technology on the law while duly considering the economic and social impact of changing behaviours. On the one hand, English judges did not fear to eliminate from arguments submitted to them the narrative that the technological development should be protected for the sake of innovation. On the other hand, judges stood up for the examination of the economic relationship between providers and the platform in *Aslam v. Uber* (favouring workers), the social relationship between users and the platform in *TfL and Uber v. LTDA/LPHCA* (favouring Uber) and balanced the public interest in *R. (Uber) v. TfL* (by limiting the ‘hotline requirement’ (favouring Uber / keeping the ‘public interest’ focused on ‘emergencies’) but upholding the ‘language requirement’ (disfavouring Uber and Uber drivers / favouring the public interest). In a nutshell, the judges have a technology-neutral approach when applying the law to the activities that Uber carries.

Overall therefore, mobility in a large city like London is a collective good that has been so far regulated by public authorities, taking increasingly into account a more holistic approach of the factors pertaining to devising such a mobility policy. TfL is setting key standards of safety for the public, reliability of taximeters, environmental friendly vehicles, all pointing

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<sup>202</sup> See e.g. the pending inquiry in the HC on Mobility as a Service inquiry (<https://www.parliament.uk/business/committees/committees-a-z/commons-select/transport-committee/inquiries/parliament-2017/mobility-as-a-service-17-19/>).

towards a qualitative way of living. TfL sets the regulatory framework and the trend. It does that in including a wide range of actors in its regular consultations on all sides of its mobility policy. With this in mind, PH operators have to seek to align their own practices and own standards that they seek to enforce on their drivers. For instance, the ‘fit and proper person’ test has been delegated to PH operators, while kept within the authority of TfL when assessing the good character of taxi drivers. This creates risks of discrepancies. Is Uber staff going to assess each driver individually? Or is an algorithm going to do so? In any case, the standard could either be very lax or could integrate very specific features to assess the “mental” or “physical” ability of its driver. Is the behaviour of an (occasional) driver who refuses too many journeys, who has a poor *rating*, who participates in *collective actions* of boycott against the low level of protection offered by Uber or who is not active enough be used against him/her to consider him “unfit” for the job? Or is this criterion assessed only from a purely economic standpoint of *efficiency* of the driver to bring customers from a point A to a point B with the most profit? Under the assessment delegation, much leeway is left to the platform or the PH operator. Each action undertaken by the driver is appraised. Delegating so much power could backlash against the drivers if too strict or against customers if too lax. Although the incentive to adapt to the same standard as TfL uses is high, the temptation to punish drivers who are *multihoming* or expressing concerns about the functioning of the platform could be high. This draws the attention on the censorship power of the PH operators on the service providers. The stakes in this debate are similar to the private censorship power of Internet intermediaries complying with duties to eliminate hate speech or material infringing copyrights uploaded onto their servers: the platform also has also a wide incentive to disrespect the freedom of expression of its users.<sup>203</sup>

Therefore, the debate on the development of mobility as a service is not one of PH services as full substitute to taxis or the ability for individual users to choose which among taxis or PH services better fit their preferences or needs. The main battle that is illustrated with the advent of Uber in London bears on the political, economic and legal arguments to be made in favour of public or private regulation when it comes to decide the quality of life in a city, including the mobility it offers to its residents and visitors. The question is not whether digital innovation disrupts social practices but how digital innovation may be best used to serve the complex socio-economic and environmental challenges London faces. Can we trust the holder of digital innovation to make this use in the interest of the collectivity, through private regulation and from a location very little connected to the place where the effects of their regulation are felt on the ground? Or do we trust the regulatory authority that has an historical memory of the city, its specificities, embedded natural rhythms and peculiarities? Or should we entrust the community itself by empowering citizens to make use of the technology to express their will in the legislative process (at the expense of a long-standing tradition of political compromise) and to enforce their choice by a wider scope of action under private enforcement regimes (at the expense of the right to non-discrimination)? To answer these questions, mobility as a service will require a smart balancing of public and private regulation in the years to come!

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<sup>203</sup> See e.g. D. Koukiadis, *Reconstructing Internet normativity: the role of state, private actors, global online community in the production of legal norms*, Germany, Hart-Nomos, 2015, pp. 91-99; T.J. McIntyre and C. Scott, “Internet Filtering: Rhetoric, Legitimacy, Accountability and Responsibility”, in R. Brownsword and K. Yeung (eds.), in *Regulating Technologies*, Oxford, Hart Publishing, 2008, pp. 109-125.

## VII. Appendix

**Table 1: Summary of 2017 taxi and private hire vehicle licensing figures compared with 2015**

	London		England outside London		England	
	March 2017 figure in thousands and change compared to March 2015					
<b>Total licensed vehicles</b>	<b>108.7</b> ↑	<b>27.5%</b>	<b>172.3</b> ↑	<b>9.7%</b>	<b>281.0</b> ↑	<b>16.0%</b>
Taxis	21.3	-5.3%	54.2	1.3%	75.5	-0.7%
wheelchair accessible taxis	21.3	-5.3%	22.2	1.4%	43.5	-2.0%
Private Hire Vehicles (PHVs)	87.4	39.3%	118.1	14.1%	205.5	23.6%
<b>Licensed PHV operators</b>	<b>2.4</b> ↓	<b>-19.2%</b>	<b>12.1</b> ↑	<b>2.9%</b>	<b>14.6</b> ↓	<b>-1.6%</b>
<b>Total licensed drivers</b>	<b>142.2</b> ↑	<b>36.8%</b>	<b>214.1</b> ↑	<b>10.7%</b>	<b>356.3</b> ↑	<b>19.9%</b>
Taxi-only licences	24.5	-3.0%	35.8	-1.7%	60.3	-2.2%
PHV-only licences	117.7	49.6%	99.3	16.2%	217.0	32.2%
Dual licences	0.0	0.0%	78.9	10.6%	78.9	10.6%

Source: National Statistics, [Taxi and private hire vehicles statistics, England: 2017 report](#)<sup>204</sup>

**Figure 2: Summary of 2015 taxi and private hire vehicle licensing figures compared with 2013**

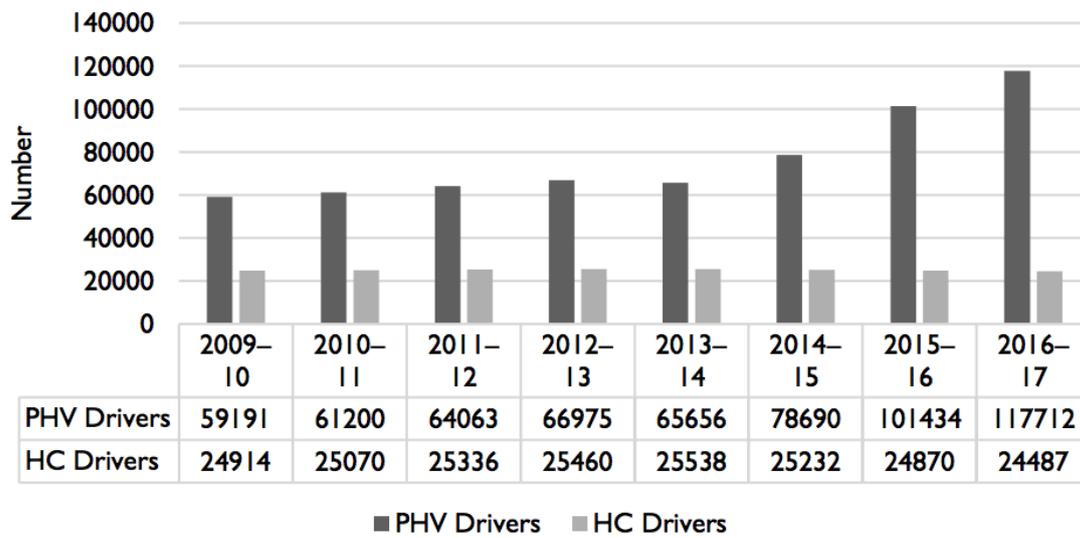
	London		England outside London		England	
	March 2015 figure in thousands and change compared to March 2013					
<b>Total licensed vehicles</b>	<b>85.3</b> ↑	<b>18.4%</b>	<b>156.9</b> ↑	<b>4.9%</b>	<b>242.2</b> ↑	<b>9.3%</b>
Taxis	22.5	1.5%	53.6	5.3%	76.1	4.2%
wheelchair accessible taxis	22.5	1.5%	21.9	0.5%	44.4	1.0%
Private Hire Vehicles (PHVs)	62.8	25.9%	103.4	4.7%	166.1	11.8%
<b>Licensed PHV operators</b>	<b>3.0</b> ↓	<b>-4.8%</b>	<b>11.8</b> ↓	<b>-3.3%</b>	<b>14.8</b> ↓	<b>-3.6%</b>
<b>Total licensed drivers</b>	<b>103.9</b> ↑	<b>12.3%</b>	<b>193.7</b> ↑	<b>0.5%</b>	<b>297.6</b> ↑	<b>4.3%</b>
Taxi-only licences	25.2	-1.3%	36.5	-0.6%	61.7	-0.9%
PHV-only licences	78.7	17.5%	85.4	-2.0%	164.1	6.5%
Dual licences	0.0	0.0%	71.8	4.3%	71.8	4.3%

Source: National Statistics, [Taxi and private hire vehicles statistics, England: 2015 report](#)<sup>205</sup>

<sup>204</sup> <https://www.gov.uk/government/statistics/taxi-and-private-hire-vehicles-statistics-england-2017>.

<sup>205</sup> <https://www.gov.uk/government/statistics/taxi-and-private-hire-vehicles-statistics-england-2015>.

**Table 3: Licensed PHV and Hackney carriage (HC) Drivers in London (2009-17)**



Source: House of Lords, *Gig Economy: Introduction*, 21 November 2017