

# Transport for London



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Subject: **UBER**

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## UBER – OPERATING MODEL INVESTIGATION

### INTRODUCTION

1. This note is submitted jointly by Garrett Emmerson and Howard Carter and relates to the outcome of TfL's investigation into Uber's operating model.
2. Uber London Limited ('ULL') is a licensed PHV operator (licence number 7979). They have operated in London since 31 May 2012.
3. You will be aware that we have been considering the operating procedures of ULL including:
  - a. Whether ULL (or another party) can properly be said to "*make provision for the invitation or acceptance*" of PHV bookings or "*accept*" those bookings, for the purposes of section 2 of the Private Hire Vehicles (London) Act 1998 ("**the 1998 Act**"); and
  - b. Whether or not ULL PHVs are 'equipped' with a taximeter, for the purposes of section 11 of the 1998 Act.
4. This note sets out the law and our advice in respect of (a) and an update in respect of (b).

### EXECUTIVE SUMMARY

5. For the reasons set out more fully below, we consider that:
  - a. ULL (as the licensed operator) does "*make provision for the invitation or acceptance of*" bookings and also "*accepts*" PHV bookings in London.
  - b. Neither Uber BV (a related but distinct company based in the Netherlands) or Uber drivers, make provision for the invitation or acceptance of PHV bookings in London nor accept such bookings.

- c. Therefore, ULL is not in breach of its licence obligations, nor is it party to a corporate structure that facilitates other parties' breaches of ULL's licence obligations.
- d. ULL's licence should not be suspended or revoked.
- e. As a result of the decision of the Licensed Taxi Drivers Association to initiate criminal proceedings, TfL cannot now apply to the High Court for a declaration (as it had proposed to do). TfL should await further developments but need not take any action for now.

## LEGAL BACKGROUND: SECTION 2 OF THE ACT

6. Section 2 of the 1998 Act provides:

*"(1) No person shall in London make provision for the invitation or acceptance of, or accept, private hire bookings unless he is the holder of a private hire vehicle operator's licence for London (in this Act referred to as a 'London PHV operator's licence')."*

*"(2) A person who makes provision for the invitation or acceptance of private hire bookings, or who accepts such a booking, in contravention of this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale."*

7. Section 4(1) requires that the holder of a PHV operator's licence shall not accept bookings other than at an operating centre specified in his licence.
8. There is no existing case law that is directly concerned with section 2 of the 1998 Act (so far as we are aware). However, in *Kingston Upon Hull City Council v Andrew Wilson* (The Times, July 25, 1995), the Divisional Court considered a provision worded in similar terms to s. 2(2) of the 1998 Act. That case concerned a PHV driver, who had given his home telephone number as the number to call in order to make a booking. His home was not in the area for which he held a licence. Buxton J said this:

*"... I am careful to eschew... any attempt to introduce the complications or, indeed, even the simpler parts of the law of contract into this matter. It is simply a question of asking, in common sense terms, whether there has been provision made in the controlled district for invitation or acceptance of bookings..."*

9. The court held, on the facts:

*"the booking was accepted in the ordinary meaning of the word by the lady who said that the taxi would be there in less than five minutes. Whether or not that was a contract, it seems to me, is not the point."*

10. The Divisional Court held that the Defendant had made provision for the invitation and acceptance of private hire bookings in an area in which he had no licence.

11. That finding was followed in *East Staffordshire Borough Council v Alan Rendell* (The Independent, November 3, 1995). In that case, the Defendant had installed a 'forwarding system' from a telephone within the district where he held a licence to a district where he did not. The Divisional Court drew from the decision in *Wilson* that "*there could well be provision for invitation of bookings in one place and for acceptance in another*". On the facts, Simon Brown LJ (with whom Sedley J agreed) held as follows:

*"It seems to me quite impossible on a common sense approach to the provisions here in question to regard the Respondent as having done other than to make provision for the acceptance of bookings in Uttoxeter, i.e in the East Staffordshire Control district where he had no licence."*

12. Two principles follow from this case law.
13. First, the word "acceptance" is not to be given its strict contractual meaning. In the *Wilson* case, this meant that the defendant could not escape liability by saying that the person who answered the telephone was not entering into a contract with the caller. It also follows that a licensed operator who "accepts" bookings within the meaning of s. 2 may – as a matter of contract law – do so as agent for another person.
14. Secondly, the question whether a person makes provision for the invitation or acceptance of bookings is to be answered as a matter of common sense – i.e. applying the natural meaning of the words. The same must be true of the question whether a person "accepts" a booking within the meaning of s. 2.

## **FACTUAL BACKGROUND**

15. TfL has engaged in extensive correspondence with ULL in order to fully understand their business model and in particular to understand the mechanisms by which bookings are invited and accepted. On the basis of that correspondence, TfL's understanding of Uber's operating model is, in summary:
- a. ULL enlists the PHV drivers to its private hire booking service. It ensures that their paperwork, licences and insurance are properly maintained.
  - b. ULL promotes the Uber platform in London and is responsible for building up the Uber customer base. It carries out promotional and marketing activities at its own expense.
  - c. ULL provides each of the drivers with a GPS enabled smartphone (over which it retains ownership). The Uber App is installed on that smartphone. GPS data is sent from that smartphone to the ULL cloud servers. Potential passengers, using the Uber App, are shown the location of the vehicle and told the approximate time for pick-up.

- d. ULL maintains licensed premises in London (at 2<sup>nd</sup> Floor, Winchester House, 259 to 269 Old Marylebone Road, London). The staff at that site control and manage the PHV dispatch server using certain software tools. Those software tools are used to:
  - i. Control driver and vehicle profiles. ULL has the power to enlist new drivers and suspend current drivers.
  - ii. Monitor, on screen, the location, status and journey details of all vehicles using the Uber platform at any given time. ULL communicates with the drivers via the software tools (e.g. in respect of road closures and/or traffic conditions).
  - iii. Provide support services in respect of dispatching. ULL also has the capacity to amend the criteria by which a driver is selected.
  - iv. Receive the customer's request for a booking, accept the booking, and log it on the ULL system.
  - v. Transmit data to the driver about the booking and to the customer giving the driver's name, car type and registration.
  - vi. Report on the trips taken on the Uber platform.
  - vii. Determine and make refunds to customers and also credit customer accounts, as appropriate.
  - viii. Reject certain customers if their accounts are in arrears.

16. Uber BV:

- a. Licenses the Uber App to the customer, pursuant to an agreement between the parties. (The App is installed on the customer's phone and provides the means by which customers can make bookings.)
- b. Calculates the fare.
- c. Invoices the customer and collects the money owing.

**ANALYSIS**

17. Our advice, taking into account all the material identified above, is that neither ULL, Uber drivers, or Uber BV are in breach of section 2 of the 1998 Act.
18. If Uber BV made provision for the invitation or acceptance of bookings, or accepted bookings, it would be in breach of section 2 of the 1998 Act. In those circumstances, TfL would be entitled to initiate proceedings in the UK courts (against Uber BV) under section 2(2). We would also have recommended the suspension of ULL's licence on the basis that it was party to a corporate structure that facilitates Uber BV's breaches. For the reasons set out below, we do not consider that either of those steps is necessary or appropriate.

19. Certain difficulties arise in this matter as a result of technological changes since the 1998 Act was debated in Parliament. The question of servers, apps and web access platforms was not considered when the legislation was being passed. By way of example, it might be argued that ULL's cloud server (which we understand is in the USA) does 'make provision for the invitation or acceptance of bookings' or 'accepts' them: it is the cloud server that holds and communicates much of the data. We think that that cannot be correct.
20. First, the case law is clear that a 'commonsense' approach must be taken. Where, from the ordinary person's perspective, is the 'making provision' and 'accepting' taking place? We do not think that the hosting of ULL's booking and recording tools on an overseas server means that the bookings are being accepted by the 'host' and not in the ULL offices in London.
21. Secondly, many businesses use hosted technology which involves the use of servers not based in this jurisdiction. We do not think that section 2 can be read as requiring that every licensed operator uses servers based only in London.
22. It is arguable that Uber BV accepts or makes provision for the invitation and acceptance of bookings (either on its own or in conjunction with ULL). Once again, we think that is not correct.
23. Uber BV's role may be usefully compared to two other features of the private hire market: price comparison websites ('PCWs') and payment agents.
24. There are now a number of PCWs operating in the private hire market in London (such as kabbee.com or minicabit.com). They offer customers the chance to choose between a range of potential providers (at different prices) and then forward the customer's request on to the relevant provider. We consider that PCWs are not unlawful because they do not make provision for the invitation and acceptance of PHV bookings. They merely offer a platform through which other companies may do so.
25. Uber BV plays a similar role, via the Uber App. The key difference, of course, is that Uber BV only offers customers the opportunity to select between different Uber drivers in London. Nonetheless, we consider that Uber BV's role is akin to that of a PCW: it provides the platform through which ULL is able to invite and accept bookings.
26. Another analogy is with the role of a payment agent. It takes payment from the customer's registered credit/debit card and (presumably) forwards that money on to either ULL or the driver.
27. Once again, we consider that this does not mean that Uber BV is making provision for the invitation or acceptance or bookings or accepting them. A number of payment agent companies now exist (of which perhaps the best known is PayPal). Where an individual buys an item on the internet, and uses PayPal's service, they would not assume that PayPal had accepted the offer or that PayPal had made the sale available/possible.

28. In the course of our correspondence with ULL we have requested that they amend their customer Terms and Conditions to make clear the respective roles of Uber BV, ULL and the PHV drivers. We are now satisfied that their amended terms have clarified the position. The proposed amendments state that ULL accepts a booking for the purposes of section 2 of the 1998 Act. The proposed amendments also state that ULL accept bookings, as agent acting on behalf of drivers, but this is only for the purposes of drivers entering into a contract directly with passengers. We do not think that this is incompatible with section 2 for the reasons set out above.
29. In conclusion, we consider that Uber BV does not 'accept' or 'make provision for the invitation or acceptance of' PHV bookings.
30. As a result, our advice is that no regulatory action is taken in respect of ULL in connection with any alleged breaches of section 2 of the 1998 Act.

#### **PROCEDURAL UPDATE: SECTION 11 OF THE ACT**

31. As you are aware, we have engaged in correspondence with Uber, and a number of other interested parties, concerning whether or not the owners of Uber vehicles are in breach of a different provision of the 1998 Act (section 11). Section 11 precludes PHV's from being "equipped" with a "taximeter".
32. We are not setting out the legal issues on that issue in this submission. However, we wanted to update you on the procedural position.
33. As we have explained in correspondence with the parties, we consider that the legal merits are finely balanced on this question. Nonetheless, we consider that the better view is that the Uber vehicles are not 'equipped' with a 'taximeter.'
34. We wrote to the parties and advised them that we intended to start Part 8 proceedings in the High Court. We hoped to obtain a definitive declaration from the Court setting out the correct answer to this legal question. However, the Licensed Taxi Drivers Association has informed us that certain of its members have issued summonses before the Westminster Magistrates' Court against a number of Uber drivers. Those criminal proceedings allege breaches of section 11.
35. As a result, TfL can no longer initiate Part 8 proceedings before the High Court seeking an advisory declaration. This is because the High Court will refuse jurisdiction where there are extant criminal proceedings which raise the same issues of law.
36. Therefore, TfL is not in a position to take any immediate legal steps in respect of the section 11 issue. We consider it highly likely that the Magistrates' decision will be appealed by way of case stated to the High Court (whichever party is successful). TfL will need to consider, at that point, whether it wishes to intervene in the hearing before the High Court.
37. The LTDA's decision to issue criminal proceedings is likely significantly to delay the final resolution of this question.

## **DECISION**

38. Pursuant to the specific delegation given to you by the Board under TfL Standing Order 130 to discharge any function of TfL relating to private hire vehicles, and taking into account the above, you are invited to make the following decision:
- (i) Not to take steps to suspend or revoke Uber London Limited's private hire vehicle operating licence;**
  - (ii) Not to take enforcement action against Uber BV, or Uber drivers, in relation to a breach of section 2 of the 1998 Act;**
  - (iii) To note the position set out at paragraphs 31 to 37 above in relation to the issue arising under section 11 of the 1998 Act.**

**Howard Carter  
Garrett Emmerson  
2 July 2014**

