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Udin Silalahi

*Faculty of Law Universitas Pelita Harapan, [udin.silalahi@uph.edu](mailto:udin.silalahi@uph.edu)*

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## COMPETITION POLICY ON ONLINE TAXI IN INDONESIA

Udin Silalahi \*

\* Lecturer Competition Law Faculty of Law Universitas Pelita Harapan, Karawaci, Tangerang  
Korespondensi: udin.silalahi@uph.edu  
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### Abstract

*The presence of application-based taxis such as Grabcar and Gocar is a challenge for conventional taxis. Its existence can be reduced to conventional taxi company turnover. On March 22, 2016 thousands of conventional taxi drivers held a demonstration against the existence of online taxis, because online taxis were declared in violation of the Traffic Law and consequently the streets in Jakarta were chaotic. The existence of online taxis cannot be avoided any more, due to technological developments. Online taxis provide benefits and convenience for passengers in ordering and the rates are cheaper than conventional taxi rates. Anyone who has a cellphone and downloads the application, can order the online taxi and pick him up at the place where the passenger booked it. Therefore, the Government through the Ministry of Transportation issued Ministerial Regulation No. 32/2016 which recognizes the existence of online taxis in Indonesia and this Ministerial Regulation is revised through Ministerial Regulation No. 26/2017 and revised again to become Ministerial Regulation No. 108/2017.*

*Keywords: competition law, disruptive innovation, online taxi, conventional taxi*

### Abstrak

Hadirnya taksi berbasis aplikasi seperti Grabcar dan Gocar menjadi suatu tantangan bagi taksi konvensional. Keberadaannya ditengarai dapat mengurangi omset perusahaan taksi konvensional. Pada tanggal 22 Maret 2016 ribuan sopir taksi konvensional mengadakan demonstrasi menentang keberadaan taksi online tersebut, karena taksi online dinyatakan melanggar Undang-undang Lalu Lintas dan akibatnya jalan-jalan di Jakarta *chaos*. Keberadaan taksi online tidak dapat dihindari, karena perkembangan teknologi. Taksi online memberikan manfaat dan kemudahan bagi penumpang dalam mengordernya dan tarifnya lebih murah daripada tarif taksi konvensional. Siapapun yang mempunyai handphone dan mendownload aplikasinya, maka dia dapat memesan taksi online tersebut dan menjemputnya ditempat dimana penumpang memesannya. Oleh karena itu, Pemerintah melalui Kementerian Perhubungan mengeluarkan Peraturan Menteri No. 32/2016 yang mengakui keberadaan taksi online di Indonesia dan yang telah direvisi menjadi Peraturan Menteri No. 26/2017 dan direvisi lagi menjadi Peraturan Menteri No. 108/2017.

Kata Kunci: persaingan usaha, inovasi disruptif, taksi online, taksi konvensional

## I. INTRODUCTION

GrabCar entered in the mids of 2014,<sup>1</sup> Uber in August 2014<sup>2</sup> and Gocar in 2016 into the Jakarta market (further called online taxi) with growing usage of smartphones. Online taxi is depeloved through application basis. Everyone can order online taxi who has android and has its application. The price of online taxis is relatively cheap compared to the conventional taxi, and it actually helps people. Many people like online taxi, because it is esier to order and the people who order online taxi will be picked up where the ordered people is. The people is getting more convenient than conventional taxi. The ordering time is relatively quick because the online taxi driver will accept the order when he is at that time near by the place of ordered people. The existence of online taxi gives much benefit to the driver and to the people who used the services of online taxi. The online taxi drivers earn much money than the conventional taxi driver. The conventional taxi drivers decreased their income since the online taxi entering the market. On 9 November 2015 Minister of Transportation prohibited online taxi and Gojek based on application system. The prohibition based on Letter No. UM.3012/1/21/Phb/2015 signed by Transportation Minister, Ignatius Jonan. The reason was because online taxi and Gojek did not meet the requirements of public transportation as regulated in Law No. 22 of 2009 concerning Road Traffic and Transportation and Government Regulation No. 74 of 2014 concerning Road Transportation. Online taxi and Gojek are not public motorized vehicle. Public motorized vehicle shall mean each vehicle used for goods and/or person transportation with charge. But the decision of Minister of Transportation to prohibit online taxi and Gojek based on application system become controverse in the society. Not only the Gojek driver and online taxi drivers rejected the decision of the Minister of Transportation but the people who use the gojek and online taxi. The President of Republic of Indonesia, Joko Widodo took over the issue and said that Gojek, and Online taxi are allowed to serve the people as a public transportation. The regulation shall not hindern the innovation that created by the young people like Gojek application system.

However, the conventional taxi driver is remain against the online taxi, because their income day by day was decreased and they said that online taxi is illegal because it has not license as a public transportation. Then, on 22 March 2016 the conventional taxi drivers striked and demonstrations against the existence of online taxi. Thousands of them have caused traffic chaos in Jakarta. They asked the government to stop online taxi in Indonesia. To response the strike the Government of Republic of Indonesia has enacted the Minister Transportation Regulation No. 32 of 2016 on Vehicle Tranportation People Without Route which came into enforce on 28 September 2016 and replaced by Minister Transportation Regulation No. 26 of 2017 and this regulation replaced again by Minister Regulation No. 108 of 2017 (further called Ministerial Regulation No. 108 of 2017). This regulation acknowledges

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<sup>1</sup><http://tekno.kompas.com/read/2014/06/07/1159117/Aplikasi.Pesan.Taksi.GrabTaxi.Masuk.Indonesia> accessed on 17 February 2017

<sup>2</sup> <http://www.cnnindonesia.com/teknologi/20150707192338-185-65040/tak-cuma-berkantor-uber-akan-bikin-pt-di-indonesia/> accessed on 17 February 2017

the existence of online taxi and treats online taxi as public transportation. Meaning that online taxi must fulfill the requirements of public transportation. Even though the government has already issued a regulation for online taxi, in some cities the driver of public transportation struck against the online taxi, for example in Tangerang city, Bogor, Bandung, Malang, Medan and Makassar. The driver of public transportation asked the local government to prohibit online taxi and online ojek in Tangerang<sup>3</sup>, in Bandung, during a massive strike of public minivan drivers, an angry mob attacked a vehicle it suspected of being a taxi used by the ride-hailing application Uber<sup>4</sup> and in Malang public minivan drivers asked the local government to stop online taxi<sup>5</sup>, because their income day by day decreased.

Once the Government of Republic of Indonesia accepted online taxi as a public transportation, the government must regulate in details the duty of application provider and taxi driver and or car provider including the price. As we know customers choose online taxi because it gives more advantages than conventional taxi, for example the price is cheaper and easier to order. Customer will be picked up where he is and will be bring to the certain destination where he will go. It is more convenient to the customer to use online taxi than conventional taxi. In fact, the existence of online taxi decreased the market share of conventional taxi. The drivers of conventional taxi said that they earned less money monthly than before the entering of online taxi into the market. The entering of online taxi into the market is interesting to do research regarding competition between online taxi and conventional taxi whether online taxi and the conventional taxi are being in the same relevant market? And how KPPU will analyse the competition between of them in term of competition law?

These questions will be discussed and elaborated in this paper. To elaborate these questions the paper will be divided into 4 (four) sections. Section 1 is introduction that consist of the background and the formulation of issues, Section 2 will describe digital economy itself as a basis of online business and including online taxi system, and online taxi regulation in some countries, and Section 3 how does the legal framework of online taxi regulate in some countries and including in Indonesia and discussed on the competition policy of online taxi in Indonesia, namely how shall the Indonesian competition agency apply the Indonesian competition law into online taxi market and Section 4 conclusion and recommendation.

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<sup>3</sup> Sopir Angkot di Tangerang Demo Tolak Online Angkot, <https://news.detik.com/berita/d-3441158/sopir-angkot-di-tangerang-demo-tolak-angkutan-online> accessed on 11 March 2017

<sup>4</sup> Vandalism taints massive strike of public minivan drivers in Bandung, <http://www.thejakartapost.com/news/2017/03/09/vandalism-taints-massive-strike-of-public-minivan-drivers-in-bandung-1489064791.html> accessed on 11 March 2017

<sup>5</sup> Demo Angkutan Online di Malarang Ricuh, <http://news.okezone.com/read/2017/03/08/519/1637181/demo-angkutan-online-di-malang-ricuh> accessed on 11 March 2017

## II. DIGITAL ECONOMY

Digital economy is developing rapidly worldwide. New digital opportunities create new business opportunities. The digital economy has a big influence to develop economic growth of a certain country. For example, the digital economy in the United Kingdom is a success story: the British economy has the highest percentage of gross domestic product attributed to the digital economy of all European nations; UK digital industries grew two and a half times as fast as the economy as a whole between 2003 and 2013; and the United Kingdom has the highest percentage of individual internet usage of any G7 economy.<sup>6</sup> What is digital economy? The digital economy refers to both the digital access of goods and services, and the use of digital technology to help businesses. Digital economy is a term that is often used to cover this activity, but it is hard to define. Whereas there has been none of an authoritative definition of the digital economy. But there are some definitions that given by scholar and institutions. According to Mark Knickrehm, Bruno Berthon and Paul Daugherty, digital economy is the share of total economic output derived from a number of broad “digital” inputs. These digital inputs include digital skills, digital equipment (hardware, software and communications equipment) and the intermediate digital goods and services used in production.<sup>7</sup> They said that such broad measures reflect the foundations of the digital economy. In addition, the Organisation of Economic Cooperation Development (OECD) provides corresponding opinion as regards digital economy.

The digital economy is comprised of markets based on digital technologies that facilitate the trade of goods and services through e-commerce. The expansion of the digital sector has been a key driver of economic growth in recent years, and the shift towards a digital world has had effects on society that extend far beyond the digital technology context alone.<sup>8</sup> We have received evidence about various aspects of the digital economy, including: digital aspects of disruptive technology, an innovation that disrupts an existing market; the sharing economy, a model that relies on the sharing of goods, intellectual resources, labour, and property using a digital platform; and flourishing digital sectors, including Fintech (financial services whose business model relies on software and an algorithm-based approach to assessing risk) and the gaming industry. It would be said that the digital economy is unique in a number of ways.

The digital economy is an umbrella term used to describe markets that focus on digital technologies. These typically involve the trade of information goods or services through electronic commerce. It operates on a layered basis, with separate segments for data transportation and applications. Conventionally, data transportation was considered to be a natural monopoly, while applications were assumed to be a very competitive segment. Also, digital economy is apart of technology development, namely through the development of information

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<sup>6</sup> House of Commons Business, Innovation and Skills Committee. *The Digital Economy. Second Report of Session 2016-17*. Published on 18 July 2016 by the House of Commons, p. 3

<sup>7</sup> Mark Knickrehm, Bruno Berthon, and Paul Daugherty, *Digital disruption: The growth multiplier. Optimizing digital investments to realize higher productivity and growth*, Accenture, 2016, p. 2

<sup>8</sup> OECD. *Hearings. The Digital Economy 2012*, p. 5

technology. The digital economy is the part of an economy that enables and conducts the trade of goods and services through electronic commerce on the Internet. Furthermore, digital economy is business transactions on the Internet: the marketplace that exists on the Internet. The digitalised economy is based on digital technologies that can be summarised as communication and data processing. It is also referred to as the internet economy or the online economy, because many digital service providers use the internet to deliver a service to end-users including taxi online. Online taxi business is based on internet platform or relies on internet. The passenger who needs transportation that will bring him to a certain place must have a smartphone and has an application system of it, then he can order online taxi. And we can say that online taxi is an online business that provided by application provider and connecting with the passenger.

### **1. Online Taxis Business and Uber as disruptive innovation transport sector**

There are two online taxi right now in Indonesia, after Grabcar acquired all the assets of Uber in South East Asia namely, Grabcar and Go-Car that compete one each other in Indonesia. But in this section will be elaborate Uber as an example in the field of online taxi which is as the first online taxi in the world. The history of Uber inspired the other business actors to establish the same online taxi in another country like in Malaysia which is established GrabTaxi (GrabCar) and in Indonesia established Go-Car as well.

Originally, one of the online taxis is Uber. Uber was founded in San Francisco (Silicon Valley) and quickly expanded: currently operating in 53 countries, according to Uber's website. Depending upon the country of operation, Uber provides wide variant of services.<sup>9</sup> Another online taxis, is GrabCar that originally established in Malaysia that offers wide range of ride-hailing and logistics services through its app in Southeast Asia, specifically in Malaysia, the Phillippine, Singapore, Thailand, Vietnam and Indonesia. Equally important, in order to understand the idea of digital economy, it is necessarily important to grasp the meaning of 'disruptive innovation'. According to Christensen 'disruptive innovation' refers to:

"a process by which a product or service takes root initially in simple applications at the bottom of a market and then relentlessly moves up market, eventually displacing established competitors."<sup>10</sup> According to OECD legal

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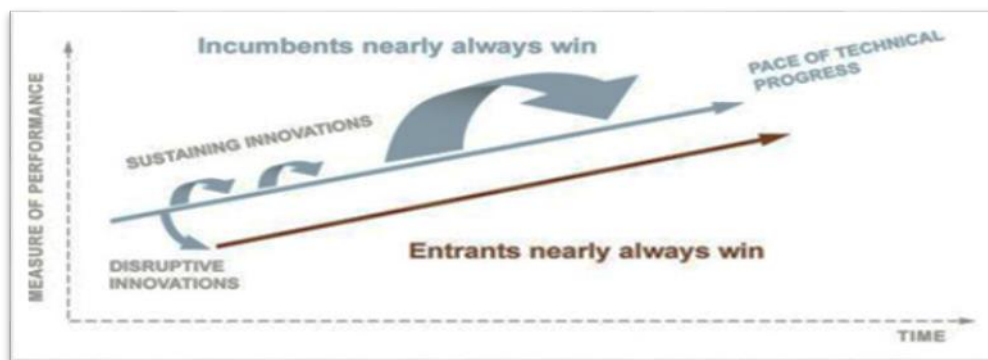
<sup>9</sup> In the Netherlands, three Uber services are offered in the four major cities:

1. UberBlack: Drivers and clients connect with each other via the app. These services are provided by drivers who adhere to the legal requirements. The drivers decide when they want to work by logging on to the app. Payment also occurs via the app; Uber receives 20% of the trip price, with the rest for the driver.
2. UberLux: The same conditions apply for this service. The cars are more luxurious and the fares higher.
3. UberPOP: Hereby the drivers and customers also connect with each other via the app. Private drivers are hired and paid for their services. The drivers do not adhere to the legal regulations. The standards pertaining to the cars are also lower, hence the service is less luxurious than UberBlack. The fares one pays are also substantially lower than those of regular taxi rides.

<sup>10</sup> Bower, J. L., and C. M. Christensen. *Disruptive Technologies: Catching the Wave*. Harvard Business Review 73, no. 1 (January–February 1995), p. 43–53

opinion, the operation of Uber largely corresponds to the prevailing of so-called “the disruptive innovation” and “the sharing economy”. As regards Uber, the concept of disruptive innovation plays a considerable significance.

In sum, the notion of ‘disruptive innovation’ can be illustrated as follows:<sup>11</sup>



According to Gesley Uber operates on the basis of:

*“a technology platform that enables users of Uber’s mobile applications or websites provided as part of the Services to arrange and schedule transportation and/or logistics services with third party providers of such services....” The customer registers for a user account with Uber and payment of the services is made through Uber to the third party providing services. Every user of the services has the opportunities to rate the experience and leave additional feedback.*<sup>12</sup>

In contrast to existing ‘traditional’ taxi operators, Uber disrupts the urban transport businesses by offering unique advantages: Firstly, the reduction of transaction costs both for taxi operators and consumers. Secondly, the improvement of resources allocation. Thirdly, considerable increases of efficiency, reputation and accountability.<sup>13</sup> In a more elaborative view, according to Schneider, Uber provides following distinctive benefits for its customers, which can be described in the following table.<sup>14</sup>

Service Aspects	Uber	Conventional Taxis
Level of service	Provides wide variety of services	Provides only standard and regulated service

<sup>11</sup> Stein, *Disruptive Innovation in BIM – Building Information Modeling*, <http://steinvox.com/blog/disruptive-innovation-in-bim-building-information-modeling/#ixzz4aBXeyrCC>, accessed on 01.03.2017

<sup>12</sup> Gesley, Legal Challenges for Uber in the European Union and in Germany (Germany, 2016) in <https://blogs.loc.gov/law/2016/03/legal-challenges-for-uber-in-the-european-union-and-in-germany/>, accessed on 01.03.2016

<sup>13</sup> Edelman & Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?* (Forthcoming, Stanford Technology Law Review, 24 November 2015), p. 5-ff.

<sup>14</sup> Schneider, *Creative Destruction and Sharing Economy: Uber as Disruptive Innovation* (EE Publishing, London: 2017), p. 54- 56

<i>Pricing</i>	More efficient prices and dynamic prices based on market situations	High, static and capped prices based on regulation
<i>Tipping</i>	No tippings allowed	Tippings around 10-20%
<i>Ease of payments</i>	Accepts only credit card	Accept cash payment and card
<i>Price estimations</i>	Provides price estimation prior to ride	Do not provide price estimation beforehand
<i>Qualtiy and cleanness</i>	Important criteria for ratings, so drivers provides more clean seats	Provides standard of cleanness based on regulation
<i>Profesionalism of drivers</i>	Important criteria for evaluation, so drivers are more friendly	Drivers are professional, but does not mean friendly
<i>Drivers feedback and complaints</i>	Provides quick feedbacks and rapid complaints even to the drivers personally	Time consuming and do not have automated rapid complaint mechanism
<i>Details of ride</i>	Customers can know before the arrival time, location of meet, and type and numbers of cars	Do not prvide complete information about the drivers or the cars
<i>Business accounts and loyalty programm</i>	Provides business accounts and loyalty programms, such bonus for its customers	Provides none of accounts and loyalty programms for customers

From the table above can be seen that Uber provides more easiness than conventional taxis to the customer.

## 2. Business Operating of Uber (Online Taxis)

Basically Uber operates its business through digital platforms, such as androids application (smartphone apps). According to Sorensen, business operating method of Uber could be depicted as follows:<sup>15</sup> First, Uber and drivers enter into a contract, which regulates among others that the drivers are not allowed to charge customer more than the price stipulated and ask for tipping. Second, Uber subsequently checks personal background of driver suitability and also the cars physical conditions including the respective insurance. Third, only passenger (customer) who are at least 18 years old are able to sign up for riding with Uber. Afterward, the customer can reserve for rides through Uber apps. Fourth, after the reservation, the customer will be informed about estimated prices, duration of rides and personal information

<sup>15</sup> Marie Jull Sørensen, Private Law Perspectives on Platform Services: Uber – a business model in search of a new contractual legal frame? (EuCML 2016, 15, beck-online).



about a driver. As to the price estimation, Uber deploy dynamic pricing using its algorithm based on current demand-supply situation. For example, Uber can charges prices 10 (ten) times higher than of normal prices to certain destination. Fifth, after arrival at destination, customer pays the ride by using credit card, no cash payment allowed. Afterwards, customer is able to give ratings to the drivers and services provided. Besides, drivers will receive commission fees to certain percentage of payments.

Furthermore, it can be understood, that there are two type of contracts in those transactions. Firstly, Business to Business (B2B) contract, whereas Uber concludes contract for providing transportation services with owners of private cars. Secondly, customer enters into Business to Consumers (B2C) contract with Uber.<sup>16</sup> In other word, this contract is subject to the vast amount of consumer protection requirements and guarantee of contractual freedom. In term of mechanism of online taxi, either Grabcar or Gocar, is working like Uber mechanism as mentioned above.

We can say that online taxi is a taxi service that provided by an application based transportation service providers in which car is belong to a certain people (willing driver) and make an agreement with transportation service providers as partner to serve and bring the passenger to certain destination. Originally, this business started with business transaction in general in internet or online economy, because many digital service providers use the internet to deliver a service to end-users. In many countries online economy is rapidly growing like in United Sate, United Kingdom, European Union<sup>17</sup> and etc. Thus, there are three parties that involved in this business, namely firstly, internet provider like google and Mozilla firefox, secondly application provider who has license to run the online taxi and thirdly taxi owner or drivers. Everybody has access to internet.

### III. THE LEGAL STATUS OF ONLINE TAXIS IN INDONESIA

Mostly in the beginning, in every country online taxi is operated without license. In around the world, private car hire services are fighting legal and regulatory battles. Uber drivers are being attacked by angry taxi drivers in several countries such as Australia, Costa Rica and Mexico and GrabCar drivers as well asin Indonesia. The conventional taxi drivers asked that online taxi has no legal basis, because it does not comply with the transportation regulation. In some countries online taxis are already regulated. For example in the United States (US) jurisdiction, Uber has been legally considered as the so-called "Transportation Network Companies (TNCs)". This concept refers to "An organization whether a corporation, partnership, sole proprietor or other form operating in California that provides pre arranged transportation services for compensation using an online-enabled application (app) or platform to connect

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<sup>16</sup> *Ibid.*

<sup>17</sup> Even Jean-Claude Junker suggested to establish a Digital Single Market for Europe, because according to him, digital market will improve access e-commerce, create the best business environment and drive growth and jobs. Jean-Claude Junker, State of the Union Address, European Parliament, 14 September 2016, European Commission

passengers with drivers using their personal vehicles".<sup>18</sup> On the other hand, the Guideline to Law Enforcement stipulates: "Uber is a technology company that has developed an app that connects users (riders) with driver partners who provide transportation to the user. Uber is not a transportation carrier, and does not employ any drivers. Users can use the Uber App to request transportation via their smartphone, the web, or via SMS. Uber users can choose from a variety of drivers available in his or her location, including but not limited to: [...] UberX, XL, UberPool: drivers whose their own personal cars [...]".<sup>19</sup> In Indonesia there are three online taxis, namely Uber, GrabCar and GoCar.

The entrance of online taxis into the relevant market was rejected by conventional taxi drivers in some countries like in France, Hungary, Indonesia and etc. But now it is accepted and regulated in some countries like in United State including in Indonesia. In the beginning the Ministry of Transportation, Ignatius Jonan prohibited online taxi in Indonesia, because it is not in line with transportation regulations and is not registered as public transportation.<sup>20</sup> Further Jonan said that if online taxi is used as public transportation and then must be met the Law No. 22 of 2009 which is regulated that the car must be registered and registered not by personal but by legal entity.<sup>21</sup> Online taxi management of GrabCar, Uber and Gojek rejected the ban and online taxi drivers striked and asked to revoke the ban. The existence of online taxi became controverse in Indonesia. Even President Republic of Indonesia, Joko Widodo responded to that issue through his spokesman, Johan Budi. He said that online taxi and conventional taxi should be accepted and should be issued any regulation to accomodate such online taxi.<sup>22</sup> As Nowag said that Uber as disruptive innovator has a strategy entering a market first and only then dealing with legal compliance issues. With this strategy Uber has faced many obstacles in many countries, e.g. France, Germany, Spain, Canada and India.<sup>23</sup> This strategy has succeeded in Indonesia. Then the Transportation Ministry issued Ministerial Regulation No. 32 of 2016 on Non-route Passenger Transportation Services to facilitate application-based transportation service providers, such as GrabCar, Uber and Go-Car. This is to provide legal certainty of online taxi in Indonesia, and it will be valid six months since enacted date, 1 April 2016, means will be valid from on 1 October 2016. This regulation is issued because Law No. 22 of 2009 on Transportation on Road and Government Regulation No. 74 of 2014 on Transportation do not cover online taxi matters. With issuing of Ministerial Regulation No. 32 of 2016, the government of Republic of Indonesia has accepted the existence of online taxi in Indonesia, eventhough in some cities, it is still rejected by conventional taxi drivers, like in Tangerang City, Bogor, Malang and Bandung recently. This Ministerial Regulation is

<sup>18</sup> Federico Lubian, How can Law understand and communicate with the Sharing Economy and the Technological Apps world? The case of Uber (Fribourg: 2015), p. 23-29

<sup>19</sup> *Ibid.*

<sup>20</sup> <https://m.tempo.co/read/news/2016/03/22/090755867/soal-taksi-online-jonan-ini-ilegal-harus-dihentikan-dulu> accessed on Monday 20 March 2017

<sup>21</sup> <http://news.detik.com/berita/3172407/presiden-ingin-akomodir-taksi-konvensional-dan-online-sebagai-jalan-tengah> accessed on Monday 20 March 2017

<sup>22</sup> <http://news.detik.com/berita/3172407/presiden-ingin-akomodir-taksi-konvensional-dan-online-sebagai-jalan-tengah> accessed on Monday 20 March 2017

<sup>23</sup> Julian Nowag, (2016)., *Uber Between Labour and Competition Law*, Vol. 3 LSEU, p.

revised twice by the Transportation Ministry with Ministerial Regulation No. 26 of 2017 because some of its provision revoked by Supreme Court especially regarding tariff determination by the government. Then, the Ministry of Transportation revised the Ministerial Regulation No. 26 of 2017 with Ministerial Regulation No. 108 of 2017 regarding Non-route Passenger Transportation Services (Ministerial Regulation No. 108 of 2017). Meaning that online taxi is legally valid in Indonesia.

Article 1 point 2 of Law No. 22/2009 stipulates that traffic is a movement of vehicles and people in the inland traffic. Article 1 point 3 of the same regulation stipulates transportation is the transfer of people and/or goods from one place to another by using the vehicle on the inland. The implementation of traffic and inland transportation in direct service to the community activities is conducted by the government, local government, legal entities, and/or public.<sup>24</sup> Pursuant to Government Regulation No. 74/2014, there are two types of vehicle used on Inland transportation, namely motor vehicle and non-motor vehicle. Motor vehicle is any vehicle that used mechanical equipment to operate such as engine other than railways vehicle, in this case may be a motor public vehicle which is any paid motor vehicle used to transport goods and/or people. Whilst the non-motor vehicle is a vehicle which is operated by human and/or animal, by means not using any mechanical equipment support. The implementation of public transportation is basically conducted by the government and/or local government to the relevant areas as in attempt to fulfill the transportation needs of people and/or goods that is safe, secure, convenient, and affordable.<sup>25</sup> It means public transportation shall be provided by the Government, but the Government and the local governments may include the participation of the private sector.<sup>26</sup> This is as a legal basis to the private sector to establish taxis company or private public transportation like public minivan transportation and including online taxis as specific transportation with ordering based on information technologie application.<sup>27</sup>

### **1. Operating of Online Taxis based on Minsiterial Regulation No. 108 of 2017**

According to the Ministerial Regulation No. 108 of 2017 passenger car is motor vehicle transport people who have seating a maximum of 8 (eight), including for the driver or that weighs no more than 3,500 (three thousand five hundred) pounds.<sup>28</sup> The passenger is a person who was in a vehicle in addition to the driver and crew of the vehicle. The understanding of the transport of people with public motor vehicle non route as follows: "Transport of people with public motor vehicle no route is a transport that served by car public transportation or public buses in urban areas and or a specific region or from one place to another place, has its origin and destination but do not have the track and the certain time".<sup>29</sup> This should be carried out by the public transport

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<sup>24</sup> Article 7 paragraph (1) Law No. 22 of 2009

<sup>25</sup> Article 17 Government Regulation No. 74 of 2014

<sup>26</sup> Article 19 Government Regulation No. 74 of 2014

<sup>27</sup> Article 26 paragraph (1) of Ministerial Regulation No. 108 of 2017

<sup>28</sup> Article 1 number 8 of Ministerial Regulation No. 108 of 2017

<sup>29</sup> Article 1 number 3 of Ministerial Regulation No. 108 of 2017

company. Public transport company is a legal entity that provides services of Transport of people and/or goods with motor vehicles. Article 37 paragraph (1) of Ministerial Regulation No. 108 of 2017 said that non route passenger transportation services must in a form of legal entity. The legal entity as mentioned in Article 37 paragraph (2) is in a form of: a. State own enterprises; b. Regional own enterprises; c. Limited Liability Company; and d. Cooperative. It means that individual can not to be a partner of apps provider, but in fact most of the partner of apps provider is individuals. After issuing this Regulation the possibility of individual/driver to be online taxi services is to joint himself with a cooperative or some of them may establish a cooperative. To establish cooperative is more easier than to establish limited liability company. After establishing of legal entity and getting license, the drivers may operate their car as online taxi, and the company must fullfill the following requirements:<sup>30</sup> a. Has minimum 5 (five) cars that has a certificate of motor vehicle number in the name of company and passed regular motor vehicle test; b. Has a storage of motor vehicle; c. has a workshop that can provide vehicle maintenance or cooperation with others; and d. employ drivers who has driving licences which is not the case in online taxi. The License is issued by the Ministry of Transportation through **selection or tender** according to the statutory regulation. New Licenses are issued through auction, in accordance with demand for transportation. The application-based public transportation service is aimed at simplifying the ordering process.<sup>31</sup> This service can be performed independently by the licensed public transportation company or through collaboration with a third party (an information technology based application service provider in the form of an Indonesian legal entity).<sup>32</sup> However, a transportation app service provider is **not** allowed to provide public transportation,<sup>33</sup> unless it has obtained the necessary license and fulfilled the requirements to be treated as a company licensed to provide public transportation services.<sup>34</sup> Only such a company is allowed to determine and collect fares from passengers, hire drivers, and determine the salary of drivers.

Then, according to the Ministerial Regulation No. 108 of 2017, the scheme of online taxi in Indonesia consist of public transportation company that has minimum 5 (five) cars, and app service provider company and as well taxi drivers. Both of them makes a cooperation in a form of contract. Based on that the driver has a contract with app service provider company. People/customer who has smartphone and downloaded a certain app service from provider company can order online taxi concerned. If the driver accepted the order of customer, the driver will pick up the customer where the customer the online taxi booked. After the driver brought the customer to his destination, the customer will pay the cost either cash to the driver or through credit card or electronic money if available.

Mostly the taxi drivers are against to change their car to become company car. It does not make sense if private car becomes a company car. The online

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<sup>30</sup> Article 38 of Ministerial Regulation No. 108 of 2017

<sup>31</sup> Article 63 paragraph (1) of Ministerial Regulation No. 108 of 2017

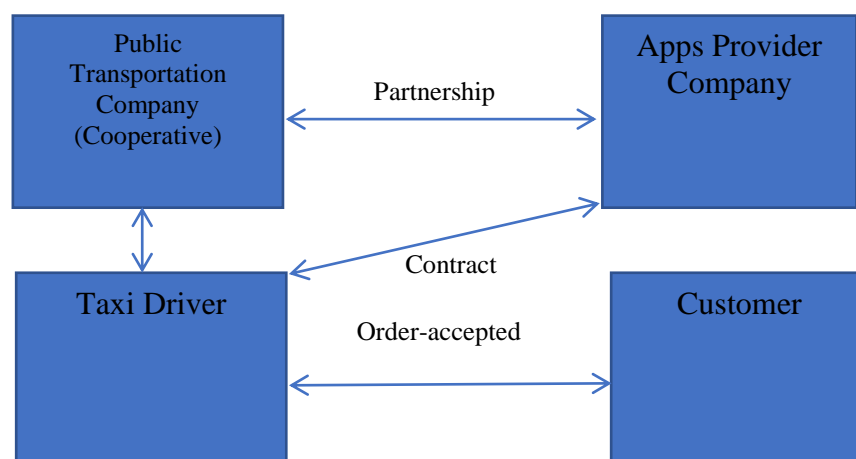
<sup>32</sup> Article 63 paragraph (2) and Article 33 paragraph (1) of Ministerial Regulation No. 108 of 2017

<sup>33</sup> Article 65 paragraph (2) of Ministerial Regulation No. 108 of 2017

<sup>34</sup> Article 66 of Ministerial Regulation No. 108 of 2017

taxi is unique. Mostly the car is belong to the drivers not to the company. That is why app provider company said that the driver is his partner who work for himself.<sup>35</sup> In the certain case the app provider provides a car to the driver with leasing system. The car will be belong to the driver in 5 (five) years after the total cost of the car had been paid by the driver. This system is not covered in the PM No. 108 of 2017. How does the online taxi work in Indonesia according to the Ministerial Regulation can be seen in following diagram (see: the diagram of the scheme online taxi in Indonesia).

### Scheme Online Taxi in Indonesia



## 2. Competition Policy on Online Taxi in Indonesia

### 2.1. Indonesian Competition Law

Competition law has become increasingly prevalent and necessary in many countries. In ASEAN countries, nine of ASEAN member States have enacted their own competition law. Indonesia has enacted his Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Law No. 5/1999) on 5 March 1999. Law No. 5 of 1999 is enacted to ensure all the business actors, small, medium and big enterprises, in doing their business in Indonesia. And competition law itself protects the competition so that every business actor can do their business in a fair way and in a condusive market situation. Every contry has the goal of his competition law. In some countries the objective of their competition law is explicitly stated in the law, for example emphasize on efficiency or consumer welfare and in some countries not stated, but it might be stated in the guideline of the law.<sup>36</sup>

The objective of Law No. 5/1999 stated in Article 3. The purposes of enacting this law shall be as follows:

<sup>35</sup> <https://www.grab.com/id/about/> accessed on 14 September 2018

<sup>36</sup> Cassey Lee, the Objective of Competition Law, ERIA Discussion Paper Series, ERIA-DP-2015-54, p. 2-3

- a. safeguard the public interest and enhance the efficiency of the national economy as one of the endeavors aimed at improving the people's welfare;
- b. create a conducive business climate by regulating fair business competition in order to ensure certainty in equal business opportunities for large-, middle- as well as small-scale business actors;
- c. prevent monopolistic practices and or unfair business competition caused by business actors; and
- d. creating effectiveness and efficiency in business activities.

Based on Article 3 the objective of Law No. 5 of 1999 can be classified into 2 (two) categories; *firstly* to improve the welfare of people, *secondly* economic efficiency that will be achieved through creating a conducive business climate and ensuring of certainty of law in equal business opportunities for large-, middle- as well as small-scale business actors and preventing monopolistic practices and or unfair business competition caused by business actors. The welfare of people and economic efficiency shall be achieved together in the implementation of competition law in Indonesia. To create a conducive business climate and to prevent a monopolistic practices and or unfair business competition in this law regulated prohibited agreements<sup>37</sup>, prohibited activities<sup>38</sup> and dominant position,<sup>39</sup> and as well as merger and acquisition.<sup>40</sup> To oversee business actors in conducting their business activities in order to ensure that they do not conduct monopolistic practices and or unfair business competition is formed a Commission for the Supervision of Business Competition (KPPU).

The KPPU as a competition agency oversees all the behavior of business actors in doing business either in the conventional marketplace or in the digital market place. The KPPU has more than hundred cases already decided. In contrary KPPU has not ever decided digital economy case yet. As abovementioned that the digital economy is comprised of markets based on digital technologies that facilitate the trade of goods and services through e-commerce. One of the issues of digital economy is online taxis which serve the customer directly through an apps.

Online taxi system becomes controverse in Indonesia. As abovementioned the government has already acknowledged the existence of online taxis. But either conventional taxis drivers and public minivan transportation drivers are against the existence of online taxi system, because the income of the conventional taxis drivers and public minivan transportation drivers increasingly decreased. The question is, is online taxi system subject to the competition law and how it should be implemented in Indonesia? These will be elaborate in the following section.

## 2.2. Online Taxi Subject to Competition Law

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<sup>37</sup> Prohibited agreements regulated in Article 4 – Article 16 of Law No. 5/1999

<sup>38</sup> Prohibited activities regulated in Article 17 – Article 24 of Law No. 5/1999

<sup>39</sup> Dominant Position including interlocking directorate and share cross ownership regulated in Article 25 – Article 27 of Law No. 5/1999

<sup>40</sup> Merger and Acquisition regulated in Article 28 – Article 29 of Law No. 5 of 1999

Digital economy changes fundamentally our economy, our business and our daily lives. People may order everything through internet right now. And many business actors offer their products or services through internet, including taxi to the customers. That is why it is important for antitrust policymakers, law enforcers, and intellectuals to engage in a serious examination of market power and structure, and the proper role for antitrust enforcement in digital economy.<sup>41</sup> As Hatch said that some degree of antitrust enforcement is important to protecting our free market system and the consumers that system meant to benefit.<sup>42</sup> He emphasized that proper antitrust enforcement plays an important role in protecting free market.<sup>43</sup> Meaning that every business actor can not be hindered to establish his business or doing business. Competition law ensures certainty in equal business opportunities for large-, middle- as well as small-scale business actors. Online taxi has also the same right to offer his services to the customers. Online taxi is one of the fruits of the competition. Competition drives business actors to be creative, innovative and efficient to offer his products or services at competitive prices. In digital economy what ever created by business actors can not be hindered, but must be supported by the government. The government shall accomodate and issue a new regulation to acknowledge and to protect the new business model in the relevant market.

The main problem why online taxi is rejected by conventional taxi and public minivan transportation drivers, because online taxi can offer lower tariff than conventional taxi. To arrange that discrepancy the Government of Republic of Indonesia plans to fix the tariff of online taxi with fixing of tariff limit up and tariff limit down. Online taxi managements are against this planning.<sup>44</sup>

As abovementioned according to the Ministerial Regulation No. 108 of 2017 there are two defferent contracts in online taxi system, *firstly* contract between public transportation company with App service provider company in term of partnership, *secondly* contract between taxi drivers with app service provider company in order to business or as employee? In other word, are GrabCar and GoCar an app provider or taxi service? Is a driver as an employee or a partner? The working relationship between online taxi drivers and apps provider is very important to determine how should KPPU apply the competition law to the online taxi. From the perspective of apps provider that taxi driver is as a partner not as employee, because the driver has his own car and determine his working hour. However the driver must achieve a certain point that determined by apps provider.

To get license as a public tranportation company from the government, company has to have 5 (five) minimum cars and then this company makes a contract with app service provider company as a partner. But to operate a car as online taxi, is every driver who makes a contract with apps provider company. For example a driver, after getting as a member of an company (legal entity),

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<sup>41</sup> Hon. Orrin G. Hatch, Antitrust in the Digital Age in Competition, Innovation and the Microsft Monopoly: Antitrust in Digital Marketplace, edited by Jeffrey A. Eisenach and Thomas M. Lanrd, Boston, Kluwer Academic Publishers, 1998, p. 19

<sup>42</sup> *Ibid*, p. 20

<sup>43</sup> *Ibid*

<sup>44</sup> <https://news.detik.com/berita/d-3446817/ini-11-poin-aturan-taksi-online-dalam-revisi-pm-322016> accessed on 20 March 2017

make a contract with GrabCar to get software or apps and all its attributes.<sup>45</sup> GrabCar explicitly announced that this company is a technology company that not offer transportation services and is not transportation provider but application provider. A driver is independently to determine his working hour and his income. Based on this contract both parties, driver and apps provider company are constituted equally. But GrabCar determines the tariff that must be paid by the customer and including surcharge prices for the drivers. Customer can choose to pay tariff with cash or with credit card or debit card if available.

In United States in the case of *Uber vs Berwick CGC-15-546378* Court decided that contractual relationship between Uber and the drivers is employee-employer, because Uber provided Berwick iPhone application which was essential to the work and Uber can control it.<sup>46</sup> But according to Nowag the contractual relationship between Uber and the drivers constituted equally parties contract. This means, the contractual relationship is not employee-employer one.<sup>47</sup> Accordingly, Kupcik also supported the argument of Nowag by stating as follows:

“... the Uber drivers are independent actors on the market that are not employed or controlled by Uber because they are free to decide whether and when they will provide their services. There are requirements on an Uber car, but it is owned by each driver, as well as the drivers being responsible for their own profits. ... As they operate in the business of personal transport, each of the drivers represent one undertaking.”<sup>48</sup>

While Uber lost a similar case in Florida and appealed both the California and Florida cases, it was successful in claiming that drivers are independent contractors in Georgia, Pennsylvania and Texas. Where drivers of UBER are considered to be workers, the competition law provisions do not apply. In the EU that is by reason of the Court of Justice’s (“CJ”) *Poucet et Pistre* decision. In this decision the Court held that workers cannot be considered undertakings and hence the arrangements between the workers and UBER are not subjected to the competition regime. In the US the situation is similar, there competition provisions do not apply due to Section 6 of the Clayton Act which specifies that ‘antitrust laws [are] not applicable to labor organization[s].’<sup>49</sup> According to Nowag is that the important element in this context is that UBER’s business model relies currently on the prices that are not set freely by the drivers.<sup>50</sup> It means that online taxi is subject to the competition law.

Until now KPPU does not take action to investigate online taxi in Indonesia. According to the Head of KPPU, Muhammad Syarkawi Rauf, KPPU is still studying the structure cost of online taxi and supposed that online taxi did predatory pricing.<sup>51</sup> According to Article 20 of Law No. 5 of 1999 predatroy pricing is defined as follow: “Business actors shall be prohibited from

<sup>45</sup> <https://www.grab.com/id/terms/> accessed on 26 March 2017

<sup>46</sup> The case of *Uber vs Berwick CGC-15-546378*, p.9-10

<sup>47</sup> Julian Nowag, Op. Cit., p. 98

<sup>48</sup> Jan Kupcik, *Why Uber violates European Competition Law* (ECLR, Issues 11, Thomson Reuters: London, 2016), p. 470-1.

<sup>49</sup> Julian Nowag, Op. Cit, p.99

<sup>50</sup> *Ibid.*

<sup>51</sup> [https://inet.detik.com/law-and-policy/d-3456699/kppu-kaji-dugaan-tarif-predator-taksi-online?\\_ga=1.92600925.1718281846.1483343656](https://inet.detik.com/law-and-policy/d-3456699/kppu-kaji-dugaan-tarif-predator-taksi-online?_ga=1.92600925.1718281846.1483343656) accessed on 25 March 2017



supplying goods and or services at a price below cost or by setting extremely low prices with the aim of eliminating or ruining the business of their competitors in the relevant market which may cause monopolistic practices and or unfair business competition”.

The problem of why the tariff of online taxi will be regulated in Indonesia because its tariff is very cheap in comparison with conventional taxi tariff. The question is why online taxi can offer lower tariff, is it because of efficiency or predatory pricing?

This question can not be answered yet, because KPPU has not done an investigation to the online taxi company. Article 5 paragraph (1) Law No. 5 of 1999 says that “Business actors shall be prohibited from entering into agreements with their business competitors to fix the price of certain goods and or services which must be paid by consumers or customers in the same relevant market”. To see that conventional taxi and online taxi compete each other first of all must be determined the relevant market of taxi in Indonesia. Is conventional taxi and online taxi in the same relevant market? From the perspective of customer or demand side is yes. The customer has flexibility to choose either conventional taxi or online taxi. Meaning that online taxi can be as substituted to the conventional taxi as regulated in Article 1 Number 10 of Law 5 of 1999.<sup>52</sup>

Lesson learned from Uber’s US antitrust case that “on the 31th of March 2016, Judge Jed S Rakoff of the United States District Court for the Southern District of New York granted to motion and set the trial date for November 2016 to hear an antitrust price fixing case against UBER. The claim that the Court had to decide on alleged that UBER had orchestrated and facilitated a price-fixing cartel. In particular, it alleged that UBER, while claiming to be a transportation company, had conspired with its drivers to restrict pricing competition amongst the drivers by means of Uber’s computer based algorithm. This conspiracy was also supported by the fact that Uber had organised meetings between the drivers”.<sup>53</sup> According to Nowag that Uber profits from the fixing of the driver’s prices because its fees are depended on the rate charged by the drivers.<sup>54</sup>

Principally, the fixation of prices by Uber must be seen as ‘hard core’ cartel within the meaning of Indonesian Competition Law above mentioned. According to International Competition Network and further supported by Kupcik, price fixing and other types of cartels, namely: output restrictions, market allocation and bid riggings are hard core cartels.<sup>55</sup> Thus, price fixing is subject to *per – se illegal* rule, which means the Competition Authority does not have to scrutinize the relevant market respectively. According, to Khemani and Shapiro from the Organisation for Economic Co-operation and Development (OECD) provide, as follows: “per se illegal approach declares that every contractual agreement or business conduct as illegal, without further necessity

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<sup>52</sup> Article 1 number 10 of Law No. 5 of 1999 said that the relevant market shall be the market related to a certain marketing scope or area by business actors for goods and or services of the same or similar type or substitutes for such goods and or services.

<sup>53</sup> Julian Nowag, p. 100-101

<sup>54</sup> *Ibid.*, p. 100

<sup>55</sup> ICN, *Defining Hard Core Cartel Conduct Effective Institutions Effective Penalties* (Bonn, 2005), p. 10-12

to prove as to the subsequent impacts of the contractual agreement and/or business conducts. Business conducts which are deemed as illegal encompass among others a collusive price fixing and resale price maintenance.<sup>56</sup>

Which Article shall be implemented by KPPU to the online taxi market either Article 20 or Article 5 paragraph (1)? Article 20 is about predatory pricing which is used *rule of reason* approach while Article 5 paragraph (1) is regarding price fixing which is used *per se* approach. KPPU is supervising the behaviour of online taxi market in Indonesia. The cartel analysis of online taxis will be difference because the Ministerial Regulation No. 18 of 2017 regulates regarding tariff limit up and tariff limit down that will be regulated further by local government which is against competition law principles. Accordingly, in Indonesian competition law the “hard core cartels” are regulate in Article 5 regarding price fixing, Article 9 regarding market allocation and Article 11 regarding cartel of Law No. 5 of 1999. However, Article 11 of the Law Number 5/1999 is, at present, the most applicable to catch cartel practices occurring in the online taxi market. Article 11 prescribes:

“Business actors shall be prohibited from entering into agreements with their business competitors, with the intention of influencing prices by arranging the production and or marketing of certain goods and or services, which may cause monopolistic practices and or unfair business competition.”<sup>57</sup> Based on Uber case abovementioned that cartel is occurring between apps provider with the driver. The Apps provider set the price to the driver that must be paid by customer which is actually as resale price maintenance that can be applied Article 8 of Law No. 5/1999.<sup>58</sup> The apps provider as hub spoke fix the price to the drivers. The contract between the apps provider and the drivers had already done from the beginning when they will make a contract as a partner. Thus, the application of Law No. 5 of 1999 shall be prudent which article shall be applied into online taxi market. KPPU shall do deepest research to find out it. Nevertheless, Article 11 must be applied in conjunctions with the KPPU (Indonesian Commission for Business Competition Supervision) Regulation Number 04 of 2010 concerning Cartel Guidelines.<sup>59</sup>

#### IV. CONCLUSION

Online taxi business is based on internet platform or relies on internet already existing in Indonesia. The existence of online taxis cannot be avoided any more, due to technological developments. The Government of Republic of Indonesia had enacted Ministerial Regulation No. 108 of 2017 on Vehicle Transportation People Without Route to acknowledge the existence of online taxi in Indonesia. Legally online taxi business is valid. The competition between online taxi and conventional taxi unavoidable. They are in the same relevant market especially from the demand side or from the customer

<sup>56</sup> Khemani and Shapiro, OECD Glossary of Statistical Term (Paris, 2002), p. 51.

<sup>57</sup> Article 11 Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition

<sup>58</sup> Article 8 Law No. 5 of 1999 said that business actors shall be prohibited from entering into agreements with other business actors setting forth the condition that parties receiving goods and or services shall not sell or resupply goods and or services received by them, at a price lower than the contracted price, potentially causing unfair business competition.

<sup>59</sup> See <http://www.kppu.go.id/id/produk-hukum/peraturan-kppu/>, accessed on 07.09.2018

perspective. If any one wants to travel to certain place he or she can choose whether online taxi or conventional taxi, one each other is substituted. The tariff of online taxi is more cheaper than the tariff of conventional taxi. From the competition law perspective online taxi market is subject to competition law. But KPPU is still overseeing the online taxi market. KPPU as overseeing of competition in Indonesia shall apply the Law No. 5 of 1999 to the business actors that doing monopolistic practices and or unfair business competition in Indonesia including online taxis. The KPPU supposed that online taxis did predatory pricing. But KPPU shall apply Article 11 of Law No. 5 of 1999 concerning cartel that the apps provider fix the price to the drivers that must be paid by customers. Cartel in online taxi market supposed is occurring between apps provider and the drivers.

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