

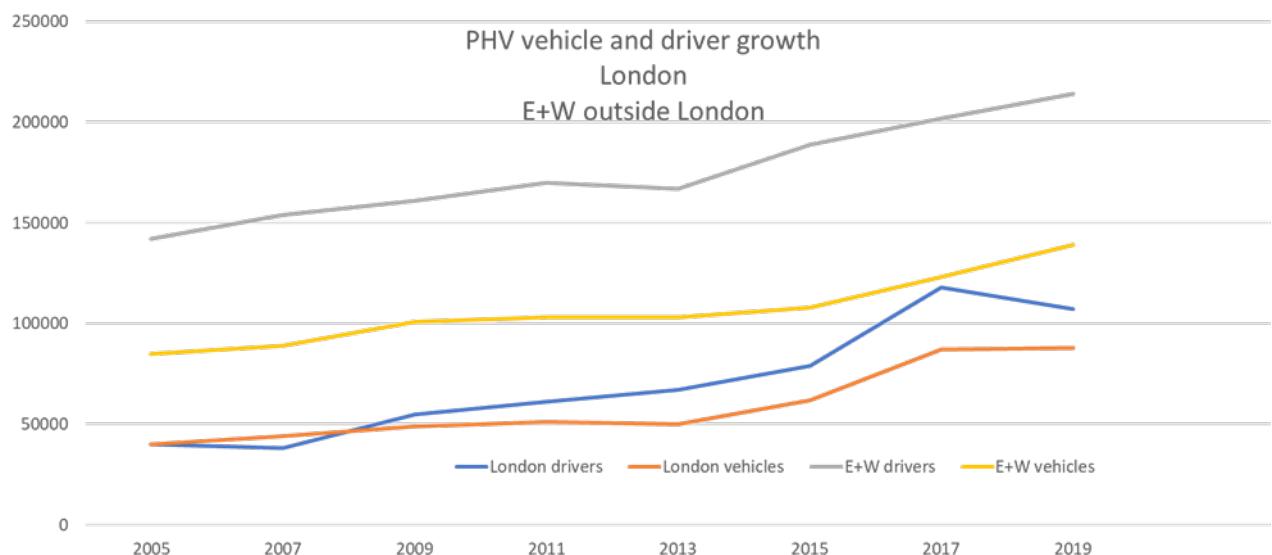
Beyond regulation: controlling app-based private hire operators

Philip Kolvin QC, 11 KBW

Market disruptors

In former times, if you wanted to build a business empire, you needed bricks, mortar and time. It took twenty years for Marks and Spencer to move from their first covered market in Leeds to their first shop. No more. You can run the world's largest holiday lettings company without owning a hotel, or the largest book retailer in the world without a bookshop, and you can revolutionise the global taxi industry without owning a car. And it all happens at a dizzying pace. The question arises whether these commercial leviathans can be regulated and if so how.

The UK private hire industry has been revolutionised by app-based providers. The reasons for this are not hard to discern. The use of apps extends the reach of the service to a wide base of customers, supported by global branding. Engaging self-employed labour greatly reduces costs. And the right to roam granted by outdated PHV legislation enables operators to cherry pick where they are licensed. All of this has fuelled a huge growth in both PHVs and drivers.



Such growth is unsustainable without a corresponding growth in customer demand. And there is no question but that app-based services are very popular, for good reasons: ease of booking, familiarity, lower wait times, cost, transparency of charging being just a few. Also, app-based vehicles are perceptibly safer because journeys can be tracked by friends or loved ones, drivers are identified and rated and the passenger is riding with a largely trusted brand.

Nonetheless, app-based operators still provoke a welter of concerns such as: tax avoidance; forum shopping (where operators seek licences in low standard areas and then provide services in high standard ones); unstaffed offices or no offices; failure to report complaints or breaches; cross-bordering (driving outside the area in which the driver is licensed); road congestion; plying for hire; driver status, pay and conditions linked to driver hours and exhaustion, and lack of language skills. And the story of app-based growth has barely begun. Operators do not disguise but trumpet their desire to run driverless PHV networks, dispensing with their “partner drivers” at the first opportunity, and competing for custom with public transport systems.

On the whole, as we shall see, past attempts to tame the beast with litigation have generally failed, although regulatory efforts have been more successful. I will set out various further avenues which authorities may consider to regulate this burgeoning sector, if they wish to. I shall end with wider considerations, beyond regulation, by which these operations may be made to conduce to the public good.

Regulatory responses

In recent years, the public and third sectors have geared up their efforts to improve regulation of the PHV industry, driven principally by the appalling abuses uncovered in Rotherham and other places. The Local Government Association’s *Taxi and PHV Licensing Handbook for Councillors* is an indispensable tool. The Institute of Licensing’s publication “*Safe and Suitable*” has achieved national recognition for its guidance on assessing the suitability of applicants. The Local Government Association’s National Register (NR3) has made a signal contribution in preventing miscreant driver and operators sliding under the radar by moving across borders. And, of course, the long awaited *Statutory Taxi and Private Hire Standards* represent a key intervention by elevating safeguarding to its rightful role at the heart of regulation.

Authorities have also taken more or less effective steps to ensure proper conduct by drivers operating outside the district which licensed them, by permitting their own officers to conduct compliance functions extra-territorially, delegating functions to officers in other districts and imposing reporting obligations on operators. All this represents a proportionate response to the challenges of operations conducted untethered from their licensed home.

On the whole, though, litigious attempts to control the industry have been markedly less successful. In *Reading BC v Ali* (2018), a Council’s allegation that an Uber driver was plying for hire by dint of the display of a marker of his location on a passenger app was dismissed by the High Court, with an audacious private prosecution to similar effect by the trade body the Licensed Taxi Drivers Association euthanased by the Director of Public Prosecutions. An authority’s attempt to control cross-bordering by requiring drivers to pledge to drive “predominantly” in the borough came to a sticky end when its policy was quashed by the High Court in *R (Delta and Uber) v Knowsley MBC* (2018), while another attack on the app-based

industry foundered when the High Court ruled that an operator could sub-contract to itself across borders in *Milton Keynes Council v Skyline* (2017). And in *Uber v Brighton and Hove CC* (2018) a District Judge held that an authority could not exact as the price of an operator's licence a condition that the operator would not allow its drivers to cross-border into the district.

If these cases have reinforced the sense that authorities are powerless to check the unconstrained growth of the industry, they shouldn't, as I shall demonstrate. Well-targeted action by authorities has forced the industry into social responsibility measures for the good of passengers and the public alike. To take one example, in 2018, Uber London Limited, in an attempt to recover its licence following TFL's refusal to renew it, submitted to a raft of licence conditions which were the basis of its successful appeal before the Chief Magistrate.¹ These included conditions dealing with:

- Corporate governance, placing responsibility for compliance squarely with the board.
- Independent assurance procedures to validate the effectiveness of Uber's systems, policies, procedures and oversight mechanisms for promoting compliance with its obligations as a licensed operator, and provision of copies of audits to the licensing authority.
- Notification to TFL of material changes to operating model, systems or processes including data handling and bookings systems.
- Reporting data breaches to TFL.
- Reporting criminal allegations to the Police.

But for TFL's actions, it is at least doubtful that these conditions would have been proffered, but all serve the ends of public protection. At the same time, Uber agreed to regionalise its operation, so that drivers could not take bookings outside their "home" region. While some regions are very large indeed, it represents an improvement over the former position.

Further controls

For authorities which wish to exert greater control over the app-based industry, there is a raft of unexplored controls available to them. These are briefly described here.

(i) The absent operator

The app-based provider may well seek to minimise their local administrative presence, e.g. by having no office, or few if any staff in it, and no server accepting bookings. These throw focus on what it is to "operate" because it is only operators who require licences. It is right to say that PHV legislation outside London does not require an actual operating centre. All that is required is that a person "makes provision" for the invitation or acceptance of bookings.² Two matters flow from this.

¹ <http://content.tfl.gov.uk/uber-licensing-appeal-final-judgment.pdf>

² Section 80 Local Government (Miscellaneous Provisions) Act 1976

First, if an authority believes for proper regulatory reasons that an operator should have an office in the district, it can require it by condition. For example, it might consider that there needs to be a place for customers to retrieve lost property or for drivers to be trained, or for the operator to meet their regulator.

Second, if it is right that bricks and mortar are not required by the Act, then what of the driver sitting in his/her cab who in fact accepts bookings? It is difficult to see why, by turning on the app, inviting bookings by displaying an (albeit anonymised) presence on the customer's device and accepting the customer's booking request, s/he is not in fact operating, so requiring a licence. Not all app-based drivers in fact accept bookings: in some cases bookings are accepted by the operator and allocated to the drivers. But where they do accept bookings there is a strong argument that they are operators.

(ii) The wandering driver

What of the driver who is licensed in Area A but plies their trade in Area B? This has caused some authorities deep concern. There are two arguable solutions.

First, in *Knowsley* (above), Mr Justice Kerr floated the idea that a condition could be attached to a driver's licence curtailing the right to roam. Fair to say, section 51 of the Local Government (Miscellaneous Provisions) Act 1976 confers a wide discretion to add conditions, and case law colours this in by allowing authorities to exercise their powers for purposes relevant to the objects of the legislation. It is strongly arguable that one such object is to strengthen local control. That being so, a condition could be added. The condition should not be to drive predominantly in the licensed district, since that would create uncertainties of measurement. But it could require the driver to be based there, which could be considered by reference to where the vehicle is kept and where it starts and finishes its days.

Second, as is stated above, where drivers are themselves accepting bookings, it may well be that they are operating. Where they have no licence to do so, it follows that they would be acting unlawfully. This would need to be tested, but appears to raise valid arguments. The legislative system was designed for bookings to be accepted in offices: whether it permits them to be accepted in peripatetic vehicle remains to be seen.

(iii) The national app

One of the defining features of modern apps is that they are disengaged from the areas in which vehicles are operated. Authorities complain that they exercise no licensing control, because the operators and their drivers are licensed elsewhere. A solution may present itself.

In *Blue Line v Newcastle City Council* (2012) an operator already licensed elsewhere sought a licence in Newcastle. The Council, wanting it to be a discrete, local business, imposed a condition that the operator maintain a dedicated, exclusive telephone line. The operator breached the condition, the Council revoked the licence and the whole argument ended up in

the High Court. The operator cried interference with its commercial freedom, to no avail. According to the High Court, the hallmark of the scheme is localism, and in imposing the condition the Council was pursuing a legitimate aim.

Law proceeds by analogy, principle and degrees. That being so, it is more than arguable that a local licensing authority could lawfully set its face against licensing a national app. It could rationally impose a condition that the customer should book through an app dedicated to the local operation. As it is, the customer asks for a driver and is allocated a driver who could be licensed anywhere. There is nothing local about it. If the argument is correct, authorities could stamp that out at a stroke.

(iv) Period of operating licence

The default licence period is five years, according to section 55 of the 1976 Act. A shorter period may be granted if the authority thinks it appropriate. In what is a fast-moving and developing sector, an authority may well regard it appropriate to grant shorter licences, to enable more frequent reviews of the business.

(v) Licence fees

It has been a regrettable feature of the PHV system that risks, be they data breaches, driver misconduct or systems changes, have come to the attention of licensing authorities later than they might have done. It is often as though stretched authorities have focussed their attention at street level when they might have directed it at the control centre. There is no reason why authorities should not utilise their powers under section 70 of the Act to set fees to enable them to take a much more proactive role in supervising those they licence. Once these are divided into the millions of journeys conducted as a result of the licence, the cost per passenger is minuscule. It is a small price for public protection.

(vi) Conditions

It is in the field of conditions that authorities have the greatest potential to direct operators along the path of control and public protection. Some authorities have grasped this: none has scraped the barrel. An excellent comparator is the gambling industry upon which the Gambling Commission has placed far-reaching requirements to ensure that player protection and other legitimate objectives are pursued at both a systems and granular level.

First, corporate systems. Public protection should rest with the board. Cascading from the board should be high level risk assessments, for example concerning safeguarding, ride-sharing and driver hours and exhaustion, with documented control measures and periodic reviews of effectiveness. There should be requirements for compliance teams with defined roles, and independent audits of compliance supplied to the regulator. There should be systems for recording of complaints and reporting to the Police and/or the licensing authority which licenses the driver and in whose area the conduct arose. There should be a requirement to report key events as defined, e.g. systems changes or faults, offences, suspensions, data breaches and investigations by other operators. In short, much of the job done by regulators

conducting spot checks can be performed at its own expense by the operator, utilising its own highly evolved data systems.

Second, standardisation. It remains a mystery why authorities sub-regionally or even regionally impose different sets of conditions. Standardisation produces a level playing field, prevents forum shopping and equalises consumer protection. Certainly, there is a strong argument for standardised conditions imposed on the larger operators who are best-placed, when needing licences, to light on the authorities with the most relaxed approach to conditions.

Thirdly, detailed licensing controls. These might go beyond simply customer safety. They might also go to other legitimate aims such as congestion and air pollution. A small sample of examples may include:

- Wheelchair accessibility.
- 24 hour emergency phone lines.
- Office in district.
- Local booking systems.
- Prohibition of “national” booking system: see *Blue Line*.
- Supply of trip, geographic and hotspot data to regulator.
- Clean air plans.
- Restriction of driver hours.
- Risk assessment of drivers, e.g. as to whether they are simultaneously working in other jobs.
- Supply of data on driver hourly/weekly earnings.
- Ability for passengers to register concerns about those with whom they have ride-shared.
- Setting apps to prevent drivers rat-running along residential streets.
- As technology develops, driver verification: biometric or face-recognition log-on technology.

In all of these ways, authorities can work to redress what some see as a fairly obvious imbalance between business and regulator.

Beyond regulation

The rise of app-based providers has raised stark questions going well beyond licensing, concerning employment practices, taxation, urban governance and use of public space.

As to the first, litigation both in the UK and around the world has underlined the dependence of providers on the gig economy and their ability to capitalise on the precariousness of labour. At the time of writing, a judgment of the Supreme Court on the topic is awaited. But all of this simply falls away when it is appreciated that the end-game for providers is no drivers at all. As to the second, and linked, is the ability of providers to undercut local rivals by treating

themselves as data companies based elsewhere altogether rather than employers and transport providers based in the UK, so avoiding tax within the jurisdiction. As to the third, it is problematic that PHV licensing authorities have no control whatsoever about how many PHVs are driving locally, competing not only with local businesses but with public transport networks which rely on custom to continue with the service they provide.

As to the fourth, the business of app-based providers is deriving profit from the use of local roads paid for with public money. Detractors would say that this adds to harmful emissions (as much from tyres as engines), reduces road safety and competes for space which could be put to better uses, particularly as focus turns to creating improved passageways for pedestrians and cyclists. It is also incontestable that the prevalence of sat navs has greatly increased traffic on secondary, mostly residential, roads, which app-based providers use to generate global profit, usually untaxed here.

Good arguments may be made why they should be permitted to, or even have the right to, do all of this. However, there is a democratic question: who decides?

In this article, I have studiously avoided the question of legislative intervention, not least because Parliament's radar will be directed at other issues for years to come. There is, however, one matter, beyond licensing regulation, which is worthy of consideration.

Local authorities should be able to decide for themselves how many PHVs drive on their roads, according to local need, environmental considerations and achievement of the correct balance between public transport and commercial hire. They, and through them local people, should benefit from the profits earned from private use of public space. Accordingly, authorities at local, sub-regional or regional level should be able to tender the right to operate a set number of PHVs to one, two or as many companies as they see fit, with bids evaluated based on economic benefit and other criteria such as social responsibility. In this way, local authorities will regain control while deriving economic profit from permitting public space to be used for private gain.

A counter-argument might run that local authorities don't have power to decide how many delivery drivers or private vehicles use their roads either. However, a clear difference is that app-operators claim to be part of the transport network serving urban spaces, and compete with financially stretched public transport systems, but do not pay for the privilege. This creates an economic imbalance and an environmental challenge, which could be redressed at a stroke of a legislative pen.

Conclusion

In this article, I have shown how licensing authorities have a wide range of powers to exert over private hire app-based operators, should they wish to. They should also have the power to limit numbers and tender the right to operate PHVs locally, in the same manner as the Government tenders rail franchises. The control of numbers and the sharing of profit will ensure that providers continue to serve the public good as their business and its underlying technology continues to evolve.