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11
Uber Global Wealth Chains

Duncan Wigan

11.1 Introduction

Information asymmetries between regulators, suppliers, and clients in global wealth chains are extenuated by conceptual uncertainty and legal indeterminacy. This chapter explores the impact of this uncertainty and indeterminacy in the digital economy where a concept-regulation-corporate form gap obstructs tax traction.[1] Firms such as Amazon, Airbnb, Facebook, Google, and Uber operate platforms to host services enabling consumers and businesses to connect and exchange. The chapter examines the platform economy as it intersects with urban transport to impact on fiscal sustainability. It focuses on business models where regulatory arbitrage is integral (see Chapter 3 for more on regulatory arbitrage). The immediate fiscal impact arises from a growth strategy that systematically generates tax assets, a mode of service delivery that circumvents the sales tax and an employment relation that removes social security obligations for the platform based multinational company. Regulatory contestation of the new corporate form is on-going, where widespread legal adjudication that Uber is a transport company and its drivers, employees would confound growth strategy, levy sales tax on the service and bestow a range of employment rights on drivers.

Despite recognition of the significance of the digital economy and the wealth it generates, measurement is rife with uncertainty (Bukht and Heeks 2017). 'There are no agreed definitions of digital sector, products or transactions, let alone the digital economy' with incomplete coverage of online platforms (such as Google), and platform enabled services (such as Uber) not explicitly covered in the International Standard Industrial Classification and Central Product Classification (IMF 2018, p. 7). Delineating a 'digital economy' from other sectors meets the challenge that digitalization is integrated across sectors. Discussion of the impact of digitalization on productivity and gross domestic product continues, with the question of whether mismeasurement of digital assets and activities can explain significant drops in output and productivity levels since the global

[1] The concept-regulation-corporate form (C-R-C) gaps denotes when corporate organization and business model escapes regulatory traction because regulation builds on a conceptual apparatus inadequate to that organization and model.

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financial crisis debated (Ahmad et al. 2017. Fundamental conceptual issues point to the wider disruptive content of the digital economy. While digital business models have radically impacted on mature markets and market incumbents, the digital economy has disrupted regulatory apparatuses built for an economy revolving around atoms not bites.

The analysis here follows this process of disruption tracking the conflict between new corporate forms in the digital economy and underlying principles guiding the design of tax systems, and demonstrating how this conflict plays out in policy incoherence. The chapter then focuses on the urban transport sector and Uber. Taxing the digital economy has raised issues of extenuated profit shifting on the back of the strategic instrumentalization of intangible assets (Bryan et al. 2017). Further issues are raised by corporations providing platform enabled services. Firms such as Uber are positioned to utilize the mismatch between an intangible economy and tax systems designed for less mobile and material forms of capital, and so allocate income streams in 'tax optimal' ways. This possibility, however, has not yet been central to the competitive advantage of Uber. Despite its high valuation and rapid expansion Uber has to date not posted a profit. Ostensibly, Uber is not yet of interest for tax researchers. The firm does not generate profits on which tax authorities are able to make a claim. The business model does, however, raise significant tax issues. First, Uber can be conceptualized as a tax asset generator. An aggressive market and revenue maximization strategy converts to assets held against future tax bills. Second, the business model relies on 'gig economy' employment that shifts risks and burdens onto the state and in turn alternate taxpayers. Third, that Uber upholds it provides an information economy, not transport, service, and drivers are independent contractors, not employees, removes the activity from sales tax. Average earnings place driver income below sales tax thresholds. Consequently, no sales tax revenue is generated either from Uber or its 'independent contractors'.

The global wealth chains (GWC) framework captures a turn to law, finance and accounting in corporate strategy (Seabrooke and Wigan 2014, 2017). Firms providing platform enabled services sit at the forefront of this turn. This chapter's title points to an 'uber wealth chain', where 'uber' denotes an outstanding example of a kind. Uber's business model is essentially a legal artefact. It does not own cars, it purports not to provide transport services, and it does not have employees. On the face of it, Uber is not involved in the value creating provision of a service. Instead it provides a matching service, bringing together customers in search of a ride and drivers positioned to provide one. Legally, Uber could hardly be further removed from the value creating service it indirectly furnishes. The distance between value and wealth here creates ample opportunity space for legal arbitrage. The business model and sharp legal differentiation of Uber from regulated taxi providers allows for a novel employment relation, an advantaged tax position, and competitive differentiation. If the task of global wealth chain analysis is tracking

where capital is most experimental and ingenious, and pointing to where it is heading, then the analysis of firms that have fleeting relationships to the territories and value creating process from which wealth is sourced is paramount. At the same time, as this book promotes an evolutionary perspective on the development of the tax ecosystem (Chapter 2), a GWC analysis of the platform economy provides a window on a destabilization of the ecosystem, where agents and structure are in flux.

The chapter is structured as follows. Section 11.2 addresses the issues that have driven rising controversy over the decreasing tax footprints of multinational corporations in the digital economy. Here the concept-regulation-corporate form gap is central. A mismatch between the rise of a 'knowledge economy' with firms composed of large volumes of intangible assets and tax systems designed for an earlier era where capital was less liquid and less internationalized sits at the forefront of this gap. The gap is evident across global economic activity but acute in the digital economy. Section 11.3 outlines the Uber growth model, highlighting a path to market domination that eschews profitability in favour of rapid expansion on the back of largescale borrowing and funding. Section 11.4 explores Uber's approach to human resources. The question of whether or not Uber drivers are workers, employees or self-employed is of critical importance to the success of the firm. To the degree that national regulators determine that Uber drivers fall into the second category the source of Uber's market domination is eroded, and the promise of future profits cast into doubt. To the degree that Uber is able to maintain the status of Uber drivers as contractors or self-employed the burden of welfare funding embodied in social security contributions falls on the driver, and if that fails, the state. As far as Uber is able to maintain that it merely provides a booking service for third party drivers, it is not liable to sales taxes. It may be that platform economy firms such as Uber rely less on cutting edge and socially useful innovation than 'fiscal burden shirking and shifting'.

11.2 Taxing the Digital Economy

The OECD's Base Erosion and Profit Shifting (BEPS) initiative arose in part as a result of recognition that forms of international corporate capital had evolved so that the purchase of national tax systems had been undermined. The first OECD BEPS report, 'Addressing BEPS' points to a conflict between domestic rules and international standards and norms established in an era of lower levels of global economic integration, and a situation, 'characterized by the increasing importance of IP as a value driver and by constant developments of information and communication technologies' (OECD 2013a, p. 5). The report emphasized 'fundamental questions as to how enterprises in the digital economy add value and make their profits, and how the digital economy relates to concepts of source and

residence or the characterization of income for tax purposes' (OECD 2013b, p. 10). The proposal for a Council Directive on a digital services tax provided this rationale for legislation:

> policy makers are currently struggling to find solutions which can ensure a fair and effective taxation as the digital transformation of the economy accelerates, given that existing corporate taxation rules are outdated and do not capture this evolution. In particular, the current rules no longer fit the present context where online trading across borders with no physical presence has been facilitated, where businesses largely rely on hard-to-value intangible assets, and where user generated content and date collection have become core activities for the value creation of digital business. (European Commission 2018, p. 1)

A foundational concept in internationally shared tax rules is a country's right to tax activity considered to take to take place within its borders. This concept assumes a geographic symmetry between the state and the economic activity. The concept has been transcended. Digital products and services can be delivered at distance. Servers hosting markets, generating product or delivering services can be located strategically so the activity assumed to underlie value creation is located in low or no tax jurisdictions, while revenue that produces (mobile) profits arises in high tax jurisdictions. Tax jurisdiction is determined according to the OECD's Model Tax Convention, legalized in bi-lateral tax treaties dividing taxing rights between home and host states on the basis of concepts of source and residence (Rixen 2011). Residence denotes investing entity home country. Source denotes where economic activity is considered to take place or sales made. The division of taxing rights between residence and source is partly determined on the basis of the concept of permanent residence, or the substantive physical presence of the tax paying entity. Given that companies operating highly digitalized business models often do not require substantive physical presence to sell product in a country, this principle is under considerable strain. Digital firms have structured sales activities in source countries as auxiliary and preparatory so that these activities do not trigger permanent establishment status. In the United Kingdom, Amazon argued in court that its UK subsidiary operated fulfilment centres, as a result of direction by a Luxembourg resident Amazon company, did not meet the criteria to be a permanent establishment (Quentin 2017, pp. 24–6).

The digital economy is undermining the geographical conceptions of economic activity that inform tax regulation. In consequence firms enjoy the tax benefits of operating at 'scale without mass'. The digital economy is also subverting the rationale underlying conceptions of value production that inform taxing rights (Henfridsson et al. 2018). This rationale depicts an economic process running from production to delivery through retail to final consumption, with each stage in the process distinct. Producers are conceived as the source of value creation.

Consumers at the receiving end make choices based on an informed calculation of the marginal utility embodied in a range of consumption choices. In the digital economy a clear demarcation between production and consumption collapses. Firms in the digital economy sell advertising on the basis of information garnered from user search history and search patterns. Content, for example details of everyday lives made available on platforms such as Facebook, Instagram or Snapchat, is uploaded by consumers. User participation in data production obscures the location of value creation, even while the network effects of user participation are capitalized in burgeoning market valuations. Numerous countries have reacted in piecemeal fashion variously proposing and implementing taxes on multinational corporations, or digital firms in particular, based on revenue generated within a jurisdiction or sales. These ad hoc reactions threaten the integrity of concepts of value creation which undergird extant tax norms and law.

The taxation of intangible assets (such as goodwill, brands, patents, trademarks, and copyrights) poses substantial challenges and manifests similar concept–regulation–corporate form mismatches. For many high-tech firms intangible capital now represents more than 90 per cent of firm value and in some countries, such as the United States and the United Kingdom, investment in intangibles has long outstripped investment in tangible assets (Corrado et al. 2012). Given the recognized significance of intangible capital to economic growth and performance, the challenge of measuring intangible assets is urgent and on-going (Bryan et al. 2017). Despite urgency, the System of National Accounts (SNA) has been updated only incrementally and partially. Products of research and development consumed internally and not produced for transfer are not recognized by the SNA, just as assets such as organizational capital and brands remain outside of national accounts (Uppenberg 2009). At the level of the firm, the International Accounting Standards Board and the US Financial Accounting Standards Board threw in the towel some time ago, giving up on efforts to incorporate intangibles in measures of firm value (IASB 2007). The OECD concluded in 2006 'that there was only limited possibility to recognize intangible capital in the financial accounts' and that the recording of intangible assets 'best be dealt with through narrative financial reporting' (OECD 2006, p. 5). When intangible capital can't be measured, it is hard to assess for regulatory purposes.

Where the majority of world trade occurs within multinational corporations opportunities for profit shifting are extenuated. Intangible assets are not only difficult to value, providing space for opportunistic valuations, they are easy to move. While machinery can only be in one place at one time, intangible assets can in one jurisdiction for legal protection purposes, another to register revenue streams and another for tax purposes. Transfer pricing, despite efforts at the OECD to update pricing methodologies, remains governed by the Arms Length Principle (ALP). Stipulating that internal prices for transfers within the

multinational corporation should mirror 'uncontrolled comparable' prices paid between unrelated entities, the ALP proceeds on the often mythical basis that there exists a market price for intangible assets, and, where this is not easily identified, a market price might be easily construed. For this reason, firms that are dominant in the digital economy have been at the forefront in exploiting legal geography for the purposes of profit shifting (Bryan et al. 2017; Grubert 2012).

In functional terms, double taxation and double non-taxation means tax as an issue in global economic governance is likely to be characterized by high levels of cooperation and convergence (Hearson and Prichard 2018). This is notwithstanding apparent incentives for small states to defect on shared norms and international agreements. Recent policy developments have confounded this likelihood as numerous and varied policy solutions have been debated and adopted. Absent policy coordination is symptomatic of the incompatibility of current regulation with corporate form, an incompatibility that is a measure of the concept-regulation-corporate form gap in the digital economy. While the OECD's BEPS process is complete, with conclusions on action points made in 2015, the issue of taxing the digital economy remains unresolved. In the lieu of consensus, the final report on Action 1 on the digital economy concluded unenthusiastically, 'Countries could, however, introduce any of the options (to create a significant economic presence test, withholding tax, or equalization levy) in their domestic law as a further safeguard against BEPS…' (OECD 2015).

The OECD's Task Force on the Digital Economy continues to work with final recommendations due to be delivered in early 2020. Delay reflects the fundamental challenge to the extant conceptual framework. Divergent national policies reflect this. The United Kingdom's Diverted Profit Tax has since 2015 levied a 25 per cent tax on profits considered to have been artificially diverted out of the country (Cockfield 2018, p. 1337). Hungary and France have imposed taxes on advertising sales. India since 2016 has levied an equalization tax on business-to-business advertising services. Other countries have expanded their definition of royalties subject to withholding tax. Greece and the Philippines include payments for software in this expansion, and Malaysia payments for 'visual images or sounds' (Cockfield 2018, pp. 1335–7). Spain, following the faltering of the European Commission proposal for a Directive on the taxation of digital services, imposes a 3 per cent tax on digital services that rely on user generated data for firms with turnover above a €750 million threshold (Squire Patton and Boggs 2018, p. 7).

Uncoordinated responses to tax challenges that arise from the operations of the digital economy demonstrate that the legal framework used to guide the taxation of multinational companies has been transcended. While attention has understandably focused on profit shifting in the digital economy, both because it is pronounced and because it is symptomatic of a fundamental tension between national tax systems and multinational corporations more broadly, there is

another side to the tax implications of the digital economy that remains relatively neglected. The ride-hailing firm provides a window on this, showing the links between tax, digital business model, competition, labour relations, and corporate form.

11.3 Grow Fast, Fix It Later

Founded in 2009 by Travis Kalanick, Oscar Salazar, and Garret Camp, Uber set out to disrupt the urban transport market. With a forecasted market value on the eve of its 2019 Initial Public Offering (IPO) of $100–120 billion it was then the largest privately held start up in the world. Founded as Uber Technologies Inc. in 2009 the firm initially provided a luxury black-car service. By 2012, the success of Lyft's peer-to-peer ride-hailing service led Uber to expand and provide taxi services in various jurisdictions. Within three years there were around half as many Uber and Lyft drivers as taxi and limo drivers in the US (Cramer and Krueger 2016; Zwick 2018). As part of the sharing economy the business rests on the provision of car rides by self-employed drivers using their own vehicles. The Uber app allows consumers to submit a request for a ride that is routed to, and crowd sourced from third party drivers. Full fares are paid to Uber BV in the Netherlands with the company retaining approximately 25 per cent of each fare.

Uber competes successfully with existing taxi services on the basis of lower prices. It has in consequence experienced meteoric growth. The San Francisco headquartered firm operates in 65 countries worldwide. Three million people are engaged as Uber drivers, 750 000 of whom are in the United States. As of March 2018, Uber had 41.8 million users in the United States and 75 million in the rest of the world. The second biggest market is Brazil with 17 million users and the biggest in Europe is London with 3.5 million users. In India there were five million weekly riders as of August 2017; 15 million Uber trips are completed each day and more than 5 billion trips have been completed worldwide (Iqbal 2019). Beyond ride-hailing, Uber also operates meal-delivery service Uber Eats and shipping service Uber Freight.

Uber is dominant worldwide. Its nearest rival is the Chinese company Didi which controls 90 per cent of the Chinese market, and claims it has 21 million drivers worldwide, 505 million users, and 30 million daily rides. Uber exited the Chinese market in 2016 with the sale of its Chinese business to Didi for $35 billion and a stake in the company. The sale put an end to a subsidy war between the firms which had generated losses on both sides. Since, Didi has begun to look for opportunities outside China, expanding to Japan and Latin America. In Southeast Asia Uber's main rival is Grab, with 36 million riders, 2.6 million drivers and 4 million rides per day. Uber struck a deal with Grab in March 2018, selling its Southeast Asian business to the Singapore-based firm for an undisclosed sum and

a 27.5 per cent share in the company. Uber and Lyft operate a virtual duopoly in the United States. Founded in 2012, Lyft operate in over 300 Unites States cities and two Canadian. Lyft has 23 million issuers and 1.4 million drivers who account for one million rides a day (Carson 2018; Iqbal 2019). The firm executed its IPO in April 2019 with a market valuation of $24 billion and a share price of $72. Within two weeks Lyft's share price has slid 11 per cent to $60.12 (Franklin and Randall 2019). Comparison between Lyft and Uber demonstrates the extent of Uber's market dominance. IPO filings (Uber filed in April 2019 quick on the heels of its rival) show Uber operates in more than 700 cities globally. Lyft operates in more than 300 in Canada and the United States. Booking revenue from ride hailing for 2018 stands at $41.5 billion (Uber) and $8.1 billion (Lyft), users in the same year stood at 91 million and 30.7, drivers at 3.9 million and 1.9 and total rides at 5.2 billion and 619 million (Abril 2019).

Uber's rapid expansion relies on its capacity to raise large volumes of private funding. Figure 11.1 shows that up to its IPO Uber had raised $25 billion in private markets. This is without having shown a profit. In so far as Uber is able to establish a dominant position in the urban transport market, on the basis of this

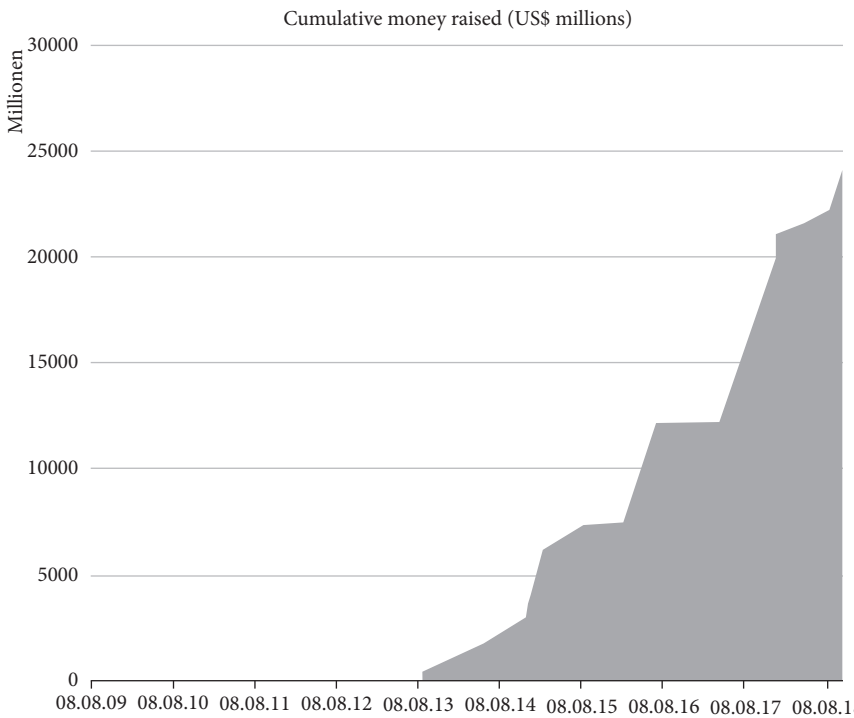

Figure 11.1 Cumulative money raised by Uber.
Source: Author-made based on Crunchbase Pro data.

dominance it may be able to increase prices and generate profits. Uber can exploit the network effects associated with two sided markets. In a two-sided marketplace, each additional user on the supply side makes the product more valuable on the demand side, and vice versa. Ebay increases market share on the basis of both buyers and sellers enjoying increased efficiencies as far as the number of buyers and sellers using the site increases. However, for Uber, adding more drivers after a point may decrease network effects for drivers who will attract fewer customers. Both customers and drivers are easily able to switch to an alternative by using more than one app. The advantage for customers of adding more drivers diminishes if being picked up after three minutes rather than four is of marginal benefit. Scaling the business on the back of ample funding so that Uber is everywhere and integral to urban transport systems is a core strategy. The tolerance of consistent and large losses enables Uber to expand and undercut competition so consumer utility may make it 'too big to ban' (Wohlsen 2014).

The strategy of scale before profit generates a significant impact on the urban transport market. Certify provides analysis of the business travel market in the United States. In 2014, when Certify began monitoring the market, Uber accounted for 26 per cent of business expenses on ground transportation with taxis accounting for 74 per cent and Lyft for less than 1 per cent. According to Certify's 2018 year in review, the figures now stand at 8 per cent for taxis, 19 per cent for Lyft and 73 per cent for Uber (SpendSmart 2018). In New York, the home of the iconic yellow taxi, Uber became the most popular form of private hire transport in terms of rides per day in September 2017. As of August 2018, 436,000 Uber rides took place per day, compared to 275,000 taxi rides, and 122,000 Lyft rides. One reason Uber is able to command this lead is the considerably larger size of its fleet. Around 63,000 Uber vehicles were available to New Yorkers in August 2018, compared to 34,000 Lyft vehicles and 16,000 yellow cabs (Iqbal 2019). Date drawn from the New York City Taxi and Limousine Commission shows that ride hailing apps accounted for 701,180 rides per day in comparison with yellow taxis 263,609 (Schneider 2019).

Soaring revenues and consistent large operating losses have accompanied meteoric growth. Net losses are more volatile as one-off divestitures will dent operating losses. Operating losses provide a more reliable picture of the firm's cumulative economic health. Net losses provide a more reliable picture of the firm's year-end tax position. Uber posted a positive net income in 2018. The company noted that $3.2 billion was gained from divestiture in 2018. Absent the sale of Russian and Southeast Asian businesses to Yandex and Grab, the company would have posted a net loss of $2.2 billion, a 45 per cent improvement from the year prior, but still not near profitability (Dowling et al. 2019)

The data for 2016–18 draws from figures provided by Uber in their recently filed S-1 form in preparation for an IPO. Pre-2016 figures have not been issued by Uber, but are based on comments, leaks and estimates reported in news sources

such as Business Insider, Business Insider Nordic, Fortune, The Information and Tech Crunch. These sources often do not fully specify the exact metric reported, and how it was reached. Triangulation suggests the figures are reasonable. Dashed lines divide the data according to confidence levels.

Figures 11.2 and 11.3 suggest Uber is a heavily loss-making firm. Losses translate into tax assets. 'Loss carry forward' is an accounting technique whereby operating losses accrued in one year are set against taxes on gains and income in the following years, sometimes indefinitely or until the loss is exhausted. In theory perfect intertemporal loss offsets are a condition for the neutrality of corporate taxation across investment projects with different risk profiles. Mine exploration and construction will incur large upfront losses, some business models will be more prone to cyclical supply and demand conditions than others. As such loss carry forward reflects the economic continuum that firms are subject to as opposed to the artificial divisions imposed by reporting periods. In economic theory indefinite and unlimited loss carry forwards indexed to inflation provide for a symmetric tax system where corporate taxation is neutral as to investment decision choices. National rules pertaining to the treatment of loss carry forwards differ. In the United States losses can be carried forward for twenty years. In 26 of 34 (mainly OECD) countries surveyed in 2015, eight did not provide for indefinite loss carry forwards. Limits to the deduction of losses in the same group of countries range from 50 per cent of taxable income per year to 100 per cent

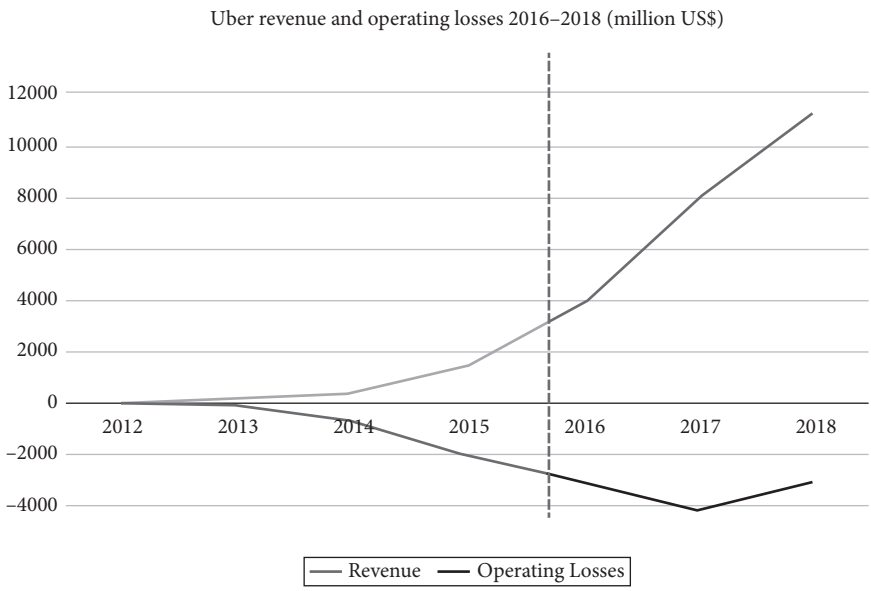

Figure 11.2 Uber revenue and operating losses 2016–2018 (in million US$).

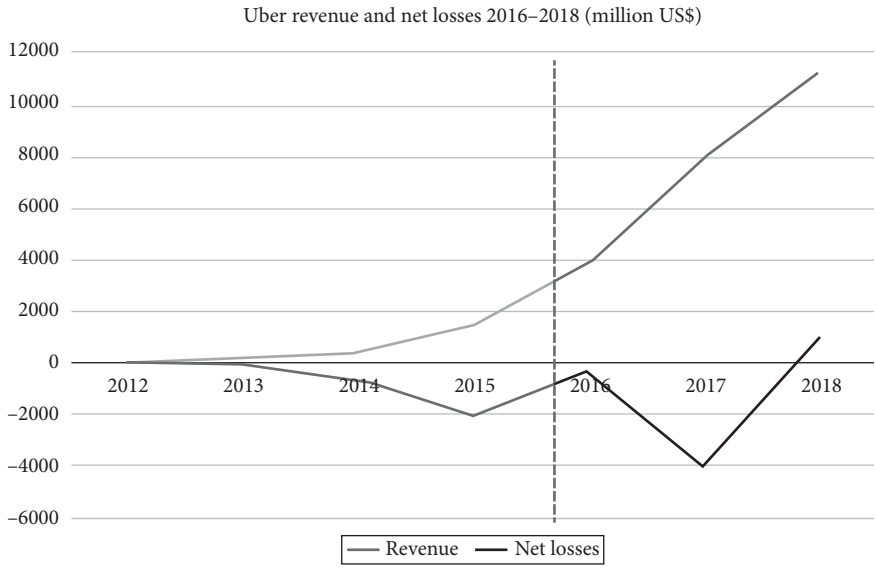

Figure 11.3 Uber revenue and net losses 2016–2018 (in million US$).

Sources: 2016–2018 Uber IPA S-1, pre-2016 various news sources, including Business Insider, Business Insider Nordic, Fortune, The Information and Tech Crunch.

(Hanappi 2018, p. 16). There is national variation between rules governing the deployment of loss carry forwards.

Uber reported total deferred tax assets, gross, of $2.24 billion as of 31 December 2018. The total net deferred tax asset, allowing for a valuation allowance reflecting a heavy discount, stood at $1.294 billion. Notes to the table state less than clearly, 'Based on available evidence, management believes it is not more-likely-than-not that the net U.S., Singapore, India, and Netherlands deferred tax assets will be fully realizable. In these jurisdictions, the Company has recorded a valuation allowance against net deferred tax assets. The Company regularly reviews the deferred tax assets for recoverability based on historical taxable income, projected future taxable income, the expected timing of the reversals of existing taxable temporary differences and tax planning strategies by jurisdiction' (Uber S-1 2019: F-24). 'As of December 31, 2018, we had net operating loss carry forwards for U.S. federal income tax purposes and state income tax purposes of $5.1 billion and $4.4 billion, respectively, available to offset future taxable income' (Uber S-1 2019, p. 51). Placing these assets in tax preferred jurisdictions (those in this case where taxes are high and future profits made) relies on tax effective transfer pricing or the formation of a fiscal unity. For the Netherlands Deloitte report, 'Provided certain conditions are satisfied, a parent company may form a fiscal unity with one or more of its subsidiaries, under which the losses of one company may be offset against the profits of another company and fixed assets of one company may be

transferred to another company without corporate income tax consequences. To qualify for fiscal unity status, the parent company must have at least 95 per cent of the economic and legal ownership of the shares of the subsidiary and the parent company and the subsidiaries must have the same financial year. In certain cases, a Dutch PE of a foreign company may be included in a fiscal unity' (2020, p. 3).

The accumulation of large and on-going operational losses is crucial to the strategy of 'scale without mass'. In turn, the stock piling of large deferred tax assets buttresses Uber's strategy of rapid revenue growth and market penetration ('grow fast, fix it later'). Many analyses of the tax implications of the digital economy focus on the relationship between profit shifting and intangible capital and business infrastructures. Uber's (profit) tax structure is reasonably straightforward in the United States. Internationally, it is more complex and opaque. This complexity and opacity is the norm for multinational firms, the subsidiaries of which often run into the thousands and are used to organize economic activity, optimize internal credit allocation, manage liability, and reduce net tax exposures. Taxes are allocated to where the firm is subject to low or no tax and costs and losses to high tax jurisdictions. Transfer prices, credit relations, and royalty payments are often the mechanisms creating this distributive effect.

In May 2013, Uber established a Dutch holding company, Uber International C.V. which took on ownership of many of the firm's international subsidiaries and shared ownership with the United States parent of the firm's intellectual property. The holding company has no employees and is headquartered in Bermuda. A second Dutch subsidiary, Uber B.V collects 100 per cent of the ride fare received by its drivers, sending 80 per cent back the drivers and retaining 20 per cent. An intellectual property licensing agreement between the B.V. and the C.V. means that 99 per cent of the revenue (minus costs) from drivers is passed onto the C.V. as royalty payments. Royalty payments are not taxable in Holland. For the United States Internal Revenue Service Uber C.V. is a Dutch business, even if it is a subsidiary of a US company. For the Dutch, Uber C.V. is a U.S. controlled company headquartered in Bermuda, where there is no corporation tax. For Uber an intellectual property cost sharing agreement is placed between Uber C.V in the Netherlands and Uber Technologies, Inc. in the US ensuring that any future profits will be shielded from US taxation via a double Dutch through which profits ultimately flow to no corporate tax Bermuda (O'Keefe and Jones 2015).

This structure has become untenable in the face of regulatory upgrading from the Organization for Economic Cooperation and Development and the European Union that requires multinational companies to justify the business purpose of offshore operations, with low tax countries such as Ireland, Singapore and the Netherlands now preferred to no tax Caribbean havens such as Bermuda. Prior to its May 2019 IPO Uber revalued upward its intellectual property and shifted it between its subsidiaries. When an intangible asset increases in value so too do the

deductions that come with its use over time. Uber's creation a $6.1billion tax deduction means the company will not pay taxes on profits for the foreseeable future (Browning and Newcomer 2019).

The analysis here suggests focus on the scaffolding for a business model that relies on large amounts of private funding, growing revenue fast and exponentially, consistently posting losses and becoming 'too big to ban'. Attention has been drawn to the strategic creation of 'tax asset war chests' to guard against incoming fiscal liabilities. Section 11.4 below outlines how Uber removes urban transport activities from the sales tax net and shifts the burden of welfare provision onto drivers, and ultimately the state. This is a strategy of fiscal risk shirking and shifting.

11.4 No Sales, No Employees

In the digital economy locational and related legal ambiguity is readily available to be instrumentalized for a variety of purposes. One such purpose is the workforce relation. Maintaining the status of Uber drivers as independent contractors is critical for business success. The recent S-I filing notes as a risk factor that, 'Our business would be adversely affected if drivers were classified as employees instead of independent contractors' (Uber S-1 2019, p. 29). Spending on employee benefits and taxes pushes back prospects of profitability. Uber insists that its drivers are freelancers for whom the company provides the chargeable service of connecting to customers. Uber users in hailing a ride through the app agree that:

> The Services constitute a technology platform that enables users of Uber's mobile applications or websites provided as part of the Services (each, an 'Application') to arrange and schedule transportation and/or logistics services with third party providers of such services, including independent third party transportation providers and third party logistics providers under agreement with Uber or certain of Uber's affiliates ('Third Party Providers'). Unless otherwise agreed by Uber in a separate written agreement with you, the Services are made available solely for your personal, non-commercial use. You acknowledge that Uber does not provide transportation or logistics services or function as a transportation carrier . . . Uber's services may be used by you to request and schedule transportation, goods, or logistics services with third party providers, but you agree that Uber has no liability to you related to any transportation, good or logistics services provided to you by third party providers . . . .

Driver income is subject to taxation in the country of operation though whether due tax is collected depends on accurate reporting by drivers. That Uber's drivers are independent contractors means that Uber is not subject to costs associated

with maintaining the workforce. For instance, drivers should self-insure against sickness, there is no holiday pay, and drivers, so far as they are deemed independent contractors, do not qualify for minimum wage protection. More significantly, the company is not bound to make social security contributions on behalf of its workforce. The replacement of a company with employees by a platform using a self-employed workforce results in much lower or even no income from social security payments and removes the company's obligations in collecting these taxes. The asymmetry between self-employed social security payments and those of the employed is usually not mirrored in an equivalent asymmetry in terms of rights to benefits. In consequence the rise of the gig economy shifts costs and reduces fiscal capacity to meet them.

With 50,000 drivers in the UK this cost shifting places a significant burden on the UK exchequer. In November 2010, a London tribunal upheld an earlier ruling that Uber drivers were 'workers' on the basis that the company exercised sufficient control over the drivers for this relationship to be held to be in place. 'The ET ultimately ruled that: (1) Any driver who (i) had the Uber App switched on; (ii) was within the territory in which he was authorized to work; and (iii) was able and willing to accept assignments, was, for so long as those conditions were satisfied, a worker' (OPBP 2017, p. 11). The decision means that Uber drivers can access worker rights such as minimum pay. It is under appeal. In Ontario, and in contrast, the Supreme Court rejected a class action lawsuit against Uber seeking minimum wages, overtime and vacation pay. The rejection was on the basis that the arbitration clause found in Uber drivers' contracts, which declares that all employment disputes are to be arbitrated in the Netherlands, does not breach the province's Employment Standards Act. The employment lawyer representing drivers commented, 'There is a real risk now that Ontario's workers' fundamental rights as provided by the Employment Standards Act can be completely bypassed. It would be virtually impossible for most drivers in Ontario to pursue their rights 6,000 km away in the Netherlands. If other companies follow suit, any employer in the province can decide to bind an employee to an arbitration in any part of the world they choose. This means that employee rights in this province are a thing of the past.

The 2017 Oxford Pro Bono Publico survey lists numerous duties that a determination that Uber drivers are employees might, depending on jurisdiction, impose on the employer. These include payment of wage and sometimes a minimum wage; working time rules; leave; holiday pay; flexible working; non-discrimination; health and safety at work; tax and security obligations; maternity, paternity and parental leave; protection from unfair dismissal; rules regarding transfer of undertakings; collective labour law obligation. There is variation between national employment law with some jurisdictions, such as Switzerland, generous and others, such as Texas, less. As far as Uber is able to maintain the position of its drivers as self-employed or independent contractors the costs

associated with the benefits listed fall directly on the driver and the state. This points to the firm's role in risk shifting and the centrality of risk shifting to its ability to out compete incumbent taxi companies. Risk shifting and shirking is equally evident in terms of sales taxation.

In the United States 84 per cent of Uber drivers earn less than $500 per month, with mean earnings at $364 and median earnings at $155 (Ernest 2017). The thresholds at which traders must pay sales tax vary by country. In the United Kingdom the threshold is $119,167, Australia $50,951, Belgium $37,457, Canada $23,976, France $103,913, Finland $11,062, Portugal $16,886. The OECD average threshold is $51,151 (OECD 2018). Ernest reports that only 2 per cent of US Uber drivers earn between $1500 and $1,7999, with 0 per cent earning above $2,000. In the United States sales tax is set at the state level and in most states sales tax does not apply to services, which taxi rides fall under. However, traditional taxi firms will pay medallion or hack licence fees. Some states have witnessed legal action on the sales tax issue. For the vast majority of Uber drivers low monthly earnings put them below the sales tax threshold. Whereas traditional taxi firms would levy sales tax on rides, substituting self-employed Uber drivers for taxi firm employees shifts the service out of the sales tax net.

Jolyon Maugham, UK barrister and Director of the Good Law Project, is pursuing legal action against Uber for the right to claim a receipt for value added tax payments (the UK sales tax). The case centres on an Uber journey Maugham took in March 2017, which cost £6 and 34 pence. He pursues a court declaration that Uber should give him a VAT invoice for £1 and 6 pence for the journey. The invoice would allow him to reclaim the sales tax as the trip was for business purposes. Anyone registered for VAT who receives services that VAT is charged on has a legal right to claim a VAT invoice. Uber could owe as much as $1.3 billion if the case is successful and be liable for $261 million per year. Uber holds the position that as a technology platform it is not liable for sales tax on the rides provided by its independent contractor drivers. Maugham's case rests on the 2016 employment tribunal judgement and a recent decision at the European Court of Justice (OPBP 2017). That the tribunal defined Uber drivers as workers rather than self-employed implies the Uber is liable to sales tax as the provider of the service (Maugham 2016). Maugham's ability to pursue the case has been hampered by the rejection of an application to limit his costs if he loses the case. Margaret Hodge, former Chair of the UK Public Accounts Committee, commented on the case, 'It's plain common sense that HMRC should be investigating the VAT issue and other tax issues in relation to Uber. If Uber fails to pay its proper VAT bill, that only means other taxpayers have to pay more or more public services have to face even deeper cuts' (Marriage and Murgia 2017). The UK currently implements its VAT laws based on the 28-member EU bloc's VAT Directive, which sets the standard rate of VAT at 15 per cent and requires UK courts and tribunals to apply VAT in accordance with the directive and EU case

law. If Uber loses its case in the UK, it may face similar claims from other member EU states.

Uber began operating in Taiwan in 2013. In mid-2016, the government said that Uber had to pay sales tax amounting to $6.4 million. 'Uber has not previously been liable for sales tax since it set up shop in Taiwan in 2013. But the government is overhauling the tax regime it imposes on global online service providers, arguing Uber owes back taxes. "As long as they provide services in Taiwan, they have to pay sales taxes," said Wu Ting-yang, auditor of the National Taxation Bureau of Taipei' (Reuters 2016). In 2017, a case brought by the Directorate-General of Highways (DGH) regarding a ban on unlicensed operators of transportation services led to Uber shutting down operations for two months. Coinciding with the halting of Uber's services in Taiwan, a new cross-border e-commerce VAT bill was introduced. It required foreign companies to register and pay a 5 per cent value added tax on digital services and products sold in Taiwan. A Partner at PwC Taiwan commented, 'Before Taiwan revises more tax laws, which are applied to foreign cross-border e-commerce firms, to deal with sales and income taxes issues, Uber will have to set up a local taxi company here and pay all kinds of taxes in accordance with the existing laws, if it wants to stay' (Bloomberg 2017). Uber in 2018 returned to Taiwan with a new business model. This involved partnering with car rental companies and using licensed commercial drivers working for these car rental companies, rather than private drivers.

In Australia, most businesses register to pay sales tax of 10 per cent only when they earn more than A$75,000. However, taxi drivers pay sales tax no matter how much they earn. The arrangement is designed to avoid distortions that would otherwise arise if only some drivers paid the tax. Uber launched proceedings against the Australian Tax Office in 2015 seeking to distinguish its 'driver partners' from drivers of taxis. Uber noted that its drivers' vehicles aren't identified as taxis, don't have 'for hire' signs, aren't painted in specified colours, don't wait at pre-selected spots and don't have a taximeter fitted. The Federal Court ruled that Uber provides a taxi service and all its drivers must therefore register to pay goods and services taxes (Hurst 2015).

This selection of disputes over Uber's liability to sales tax goes to the heart of the firm's business strategy. In essence, Uber is a legal entrepreneur at the interface between finance, employment and taxation. It seeks to penetrate markets and undercut incumbents on the basis of legally differentiating itself from regulated taxi services. As a technology platform Uber is able to leverage locational ambiguity and argue that national subsidiaries avoid permanent establishment status, merely fulfilling auxiliary and preparatory functions. As far as Uber is able to maintain its status as a technology platform it serves as a booking agent for the independent contractors that use its app. As such, it is not liable for social security payments on behalf of Uber drivers, it skirts employment law, and avoids obligations city and national regulators place on regulated taxi services such as vehicle

checks and driver background checks. The firm's ability to continue to operate in this way is uncertain.

A Spanish taxi drivers' association (Asociación Profesional Élite Taxi) argued that Uber represented unfair competition, claiming it was a transport service company that did not comply with regulations, in particular in terms of chauffeurs' licences. The case was referred to the Luxembourg-based European Court of Justice by a Spanish judge. He asked whether Uber should be considered as a transport service, which would require 'prior administrative authorization' to operate, or an information society service, which would release the firm from the obligation to comply with varied regulations across Europe. To be regulated under the directive on electronic commerce or the directive on services in the internal market Uber must be defined as an 'information society service'. The directive allows for the freedom to provide services across European member states, without national obstacle or local restriction. The case was decided at the European Court of Justice in December 2017. On the basis that the Uber app is indispensable for both drivers and customers, and that Uber exercises decisive influence over the conditions under which drivers provide the service, the Court found 'that intermediation service must be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as an "information society service" but as "a service in the field of transport"' (ECJ 2017). In September 2019, Californian legislators approved a bill that requires companies like Uber to treat its independent contractors as employees. It is estimated that doing so will raise costs by 20 to 30 per cent (Conger and Scheiber 2019).

11.5 Conclusion

Uber's economic performance relies heavily on a series of legal ambiguities, the contestation of which is on-going. Expectations of Uber's market capitalization before its IPO ranged between $100 and $120 billion. Uber priced its IPO at $45, a market capitalization of $82.4 billion. On 9 October 2019 Uber's shares traded at $29.28, with a market capitalization of $49.78 billion. To date Uber had not posted a profit. It maintains a vision of the firm as an asset light digital platform. Legal ambiguity as to the employment status of 'partners' troubles this vision. In so far as partners are deemed workers or employees room for manoeuvre on tax, employer obligations, industry regulation, and worker rights is restricted. The firm's relationship to drivers is potentially an anchor on its growth and profit strategies. The heavy reliance of firms on fragile legal contingencies renders them vulnerable and unstable and in consequence, an issue of concern.

The vulnerability of the firm however should not detract attention from the longer term significance of the digital economy, platform enabled services, and

multinational corporate form for research focused on fiscal sustainability. Digital economic processes are confounding extant tax rules and norms pointing to a profound concept-regulation-corporate form gap, where the conceptual architecture informing the design of tax systems has been transcended by developments in corporate form. In consequence of the increasing digitalization of corporate capital, multinationals are increasingly able to escape the fiscal net, or heavily reduce its purchase upon them. This chapter addresses these issues but explores in greater depth parts of the digital economy where profits, and therefore profit taxes, are not in immediate play. In the platform economy, rapid market expansion aiming at market dominance generates outsized operating losses and a war chest against future tax obligations in the eventuality of the firm reaching profitability. Eventual profitability in turn relies in large part on the capacity to maintain a workforce that is independent of the firm and an industrial classification that maintains the firm operates in the information service economy. That independence and classification reduces the fiscal burden facing the firm and allows it to undercut market incumbents.

11.6 References

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