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Dear Sirs,

United Trade Action Group – Third letter

1. Further to our first letter dated 27 August 2019 and our second letter of the same date, we submit this third letter of opposition to Uber's application to renew its London PHV operator's licence, in light of TfL's decision of 24 September 2019 to grant Uber a 2 month operator's licence thereby effectively deferring until 25 November 2019 TfL's obligation to make a lawful substantive decision in respect of Uber's renewal application following a detailed consideration of all relevant matters.

2. The purpose of this third letter is not to repeat matters already addressed in our first and second letters, nor to labour points already made fully and clearly by others, but rather to assist TfL in its substantive consideration of Uber's renewal application by addressing concisely certain important points that either have not been addressed or have been insufficiently developed in the letters of opposition already lodged both by us and by others, and to address points that have arisen since we lodged our first and second letters.

3. In short, the unavoidable conclusion upon any detailed consideration of all matters relevant to Uber's renewal application must be that Uber is not "fit and proper" to hold a London PHV operator's licence, and there are no conditions that might be imposed upon such a licence that could render Uber "fit and proper".

4. It is obviously of the utmost importance that TfL should be clear about which matters are relevant to its consideration of Uber's renewal application, if TfL is to approach that task properly and lawfully. That is to say, TfL must have a clear appreciation of what is required of a company such as Uber if it is to qualify as a "fit and proper" organisation to hold a London PHV operator's licence.

5. The phrase "fit and proper" arises in many different regulatory contexts. Accordingly there can be no "one size fits all" definition of what is required for an applicant for a regulatory licence to be judged "fit and proper". What is required in any given case must depend upon the precise nature of the regulatory licence being sought, and the characteristics and qualities required of a person aspiring to hold such a licence.

6. This was the point being made by Lord Bingham of Cornhill in his speech in the House of Lords decision in *R v Crown Court at Warrington, ex p. RBNB [2002] UKHL 24* at [9]:

> "… consideration must be given to the expression 'fit and proper' person. This is a portmanteau expression, widely used in many contexts. It does not lend itself to semantic exegesis or paraphrase and takes its colour from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do."

In that case, which concerned the transfer of a justices' on-licence, the focus was on the applicant's suitability to run the particular public house. Lord Bingham said at [17] that the findings of fact made it plain that the applicant was, personally and professionally, a fit and proper person: "In other words, he could be relied on to run the licensed premises in a competent and law-abiding manner, in accordance with the conditions of any licence granted".

7. *McCool v Rushcliffe Borough Council [1998] 3 All ER 889* was concerned with whether an applicant was a "fit and proper" person to hold a licence to drive a private hire vehicle. Lord Bingham stated at 891f:

> "One must, as it seems to me, approach this case bearing in mind the objectives of this licensing regime which is plainly intended, among other things, to ensure so far as possible that those licensed to drive private hire vehicles are suitable persons to do so, namely that they are safe drivers with good driving records and adequate experience, sober, mentally and physically fit, honest, and not persons who would take advantage of their employment to abuse or assault passengers."

8. *R v Registrar of Approved Driving Instructors, ex parte Nixon [1992] COD 274* concerned a driving instructor who had been removed from the register on the basis that he was not "fit and proper" to remain following his conviction for theft and related offences concerning small amounts of money taken

from the driving school which employed him. The Secretary of State had upheld that decision on appeal, stating *inter alia* :

> "… the Secretary of State considers that high standards of fitness and propriety are necessary to safeguard the reputation of the register and to reassure the public. The Minister believes that a known lack of integrity on the part of a few approved driving instructors could undermine the profession as a whole. He believes that were the profession to lose its good reputation this would affect the standard of instructors generally, the public's confidence in them and ultimately the standard of instruction. He believes also that many members of the public see a person's name on the register as an indication not only of his instructional ability but also that the Department regard him as a person of integrity. He believes that it is in the interest of the profession that this should remain the case and that it is important that members of the public do not feel that they had been misled in this respect."

Otton J, dismissing a judicial review challenge to the Secretary of State's decision, quoted that reasoning and held that the way the task had been approached by the Secretary of State was correct and reasonable.

9. Part 4 of TfL's current Guidance for those applying for a London private hire operator's licence, sets out the criteria that TfL will apply when deciding whether an applicant is "fit and proper" to hold such a licence. Whilst it is not suggested that the stated criteria are exhaustive, their relevance and importance to TfL's decision making process is clear. They are all matters that will be relevant to TfL's consideration of Uber's renewal application, and give a clear indication of what would be required of Uber for it to qualify as a "fit and proper" organisation to hold a London PHV operator's licence.

10. Central to the TfL's stated criteria for assessing whether an applicant is "fit and proper" to hold a PHV operator's licence is the question of whether the applicant has demonstrated that it has complied and will continue to comply with all legal requirements connected with running a business. This question is obviously multi-faceted, including for example the need for TfL to be satisfied that the applicant has no significant criminal convictions, is complying with all relevant health and safety requirements with regard to both the public at large and its workforce, is complying with all relevant fiscal obligations both in terms of general taxation and VAT, is maintaining all relevant insurance cover including in respect of employers' liability, is fully complying and demonstrating compliance with all its obligations with regard to personal data pursuant to the General Data Protection Regulation ('GDPR') and the Data Protection Act 1998, is complying with all other relevant laws including UK competition law such that it is not engaging in any anti-competitive behaviour in breach of Chapters I and II of the Competition Act 1998 and the Enterprise Act 2002, and is keeping all necessary records pertaining to its business as a PHV operator including those records identified in section 4b ('operating centre inspections') of TfL's aforementioned current Guidance document.

11. In addition to the matters already addressed in our first and second letters, and those matters already made fully and clearly by others objecting to the renewal of TfL's operating licence, further points to be

made in order to assist TfL in its substantive consideration of Uber's renewal application are set out below.

12. The significance of the decision in the Court of Appeal in *Uber B.V., Uber London Limited, Uber Britannia Limited v Yaseen Aslam, James Farrar, Robert Dawson & others [2018] EWCA Civ 2748* handed down in December 2018 cannot be over-stated. Upholding the decision of the Employment Appeal Tribunal to the effect that Uber drivers are not independent contractors but persons working for Uber, the Court of Appeal explained at [95] that:

"We agree with the ET's finding at paragraph 92 that "it is not real to regard Uber as working 'for' the drivers and that the only sensible interpretation is that the relationship is the other way round. Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits.""

13. Apart from meaning that Uber will be responsible for and liable to its drivers in numerous respects that it has hitherto sought to evade, including for example ensuring that its drivers receive the statutory minimum wage, the biggest impact of the Court of Appeal's decision is likely to be in terms of Uber being obliged to honour the fiscal obligation, which it has for so long sought to avoid, in terms of paying VAT.

14. The aforementioned decision of the Court of Appeal came hard on the heels of the definitive ruling of the Court of Justice of the European Union on 20 December 2017 giving judgment in *Case C-434/15 Asociación Profesional Elite Taxi v Uber Systems Spain SL*, to the effect that despite Uber's reliance on technology it was "more than an intermediation service" for persons seeking to hail a cab, and must be classified as providing a "service in the field of transportation". In other words, Uber was not merely a technology platform that facilitated exchanges between consumers and suppliers (as Uber had long sought to maintain)but was in fact and law a direct provider of services. The Swiss canton of Geneva supported this decision on 31 October 2019 stating that Uber was subject to the applicable taxi and transport law. The Head of the Cantonal government Mauro Poggia went on to state "Uber is currently not fulfilling its legal obligations and will have to hire its drivers and pay their social benefits, such as pensions, like other taxi companies." On 14 November 2019, New Jersey's Department of Labour and Workforce Development fined Uber $523 million in unemployment and disability back taxes for misclassifying workers plus interest of $119 million.

15. Uber's motive in seeking to define itself as a technology platform that facilitated exchanges between consumers and suppliers (i.e. drivers), rather than as a direct provider of services (i.e. transport services), was to avoid its legal responsibilities to its drivers by arguing that Uber was working 'for' the drivers rather than the drivers being Uber's workforce (the issue resolved by the Court of Appeal in the *Uber v Aslam* case referred to above) and to avoid its obligation to pay VAT at 20% on all bookings made through the Uber app. Uber knew full well that its tax position was directly linked to the employment status of its drivers. If it could persuade HMRC that its drivers were independent contractors rather than workers, responsibility for paying VAT on bookings would shift to the persons directly supplying the service (i.e. the drivers). As relatively low earners, individual drivers would often not earn enough to reach the threshold for having to pay VAT at all. However, if the drivers were found

definitively to be workers and not independent contractors, then responsibility for paying VAT would rest with Uber, and would be payable on the totality of bookings made through the Uber app.

16. The falsity of Uber's contrived position has been exposed by the recent decisions of the ECJ in *Asociación Profesional v Uber* and the Court of Appeal in the *Uber v Aslam* referred to above. Accordingly, HMRC is currently pressing for Uber to account for VAT not only on an ongoing basis, but also to account retrospectively for the VAT it has avoided hitherto. That is why, in the full accounts for Uber London Limited filed on 7 October 2019[1] one finds a note on "contingent liabilities" that Uber is "involved in an ongoing dialogue with HMRC, which is seeking to classify the Uber Group as a transportation provider," which would "result in a VAT (20%) on Gross Bookings … both retroactively and prospectively." Accordingly, "The Uber Group which would bear any liability … (on behalf of Uber London Limited) has recorded a contingent liability …". The size of the contingent liability recorded by the Uber Group is not expressly stated in the accounts for Uber London Limited, but the Financial Times reported in an article by Izabella Kaminska on 10 October 2019 that "… various sources tell us the bill could be as large as £1 billion, or more."

17. The other point of interest emerging from that note on "contingent liabilities" in the full accounts for Uber London Limited, is that Uber appears by no means to be chastened by its defeats in the European Court of Justice in Luxembourg and the Court of Appeal in England and Wales, stating boldly that "The Uber Group believes that the position of HMRC and the regulators in similar disputes and audits is without merit and is defending itself vigorously."

18. Despite Uber's vigorous attempts to argue otherwise, Mrs Justice Lieven ruled only yesterday that it be lawful for HMRC to make disclosure of the fact (or otherwise) of a protective assessment [2]. Such assessments intended to protect HMRC's position by reserving their position. There being little doubt now that HMRC has assessed VAT payable by Uber. This provides a further up-to-date example of Uber trying to obfuscate its corprorate responsibilities to HMRC.

19. Uber is a corporation that has deliberately gone to great lengths to avoid complying with its fiscal obligations to the state in terms of VAT, and its financial obligations to its workers such as ensuring that its drivers are paid the statutory minimum wage. Moreover, it continues to deploy considerable resources in ongoing efforts to avoid compliance with such obligations - "defending itself vigorously" when called upon to fulfil fiscal and other financial obligations with which every other PHV operator has to comply. As aforesaid, central to the TfL's stated criteria for assessing whether an applicant is "fit and proper" to hold a PHV operator's licence is the question of whether the applicant has demonstrated that it has complied and will continue to comply with all legal requirements connected with running a business. Uber plainly and deliberately does not so comply and accordingly is not "fit and proper" to hold a PHV operator's licence.

[1] https://beta.companieshouse.gov.uk/company/08014782/filing-history
[2] Good Law Project Limited and Commissioners for HMRC [2019] EWHC 3125 (Admin)

20. As a further example of Uber's deliberate non-compliance with all legal requirements of running a business as a PHV operator, TfL will doubtless be aware that on 11 October 2019 Medway Council voted unanimously to support a prosecution of Uber for operating private hire vehicles in the Medway area without having a current operator's licence issued by Medway Council in breach of section 46(1)(d) of the Local Government (Miscellaneous Provisions) Act 1976. Uber is attempting to justify its unlawful behaviour in that regard by reference to its London PHV operator's licence, notwithstanding the fact that the Medway towns are clearly not within the Greater London area. This clear example of Uber's distain for the relevant legal requirements will be of concern to TfL, both in general terms and in particular because Uber is disingenuously seeking to justify its unlawful behaviour outside London with reference to a licence it was granted by TfL.

21. Yet another example of Uber's deliberate non-compliance with the legal requirements of running a business as a PHV operator concerns its abject failure to comply with its obligations regarding the protection of personal data pursuant to the Data Protection Act 1998. Accordingly, on 27 November 2018 the Information Commissioner's Office (ICO) fined Uber £385,000 for failing to protect customers' and drivers' personal information during a cyber attack in October and November 2016. The ICO found that a series of avoidable data security flaws by Uber had allowed the personal details of around 2.7 million UK customers to be accessed and downloaded by attackers from a cloud-based storage system operated by Uber's US parent company. This included the full names, email addresses and phone numbers of the customers. Furthermore, the records of almost 82,000 Uber drivers based in the UK were also taken during the episode.

22. The gravity of Uber's misconduct was increased considerably by the company's behaviour following the episode. Uber did not inform its customers or drivers or any authority about the episode for more than a year. Instead, Uber sought to do a deal with the persons responsible for the attack which involved Uber agreeing to pay the attackers $100,000 to destroy the data they had downloaded. As the ICO's Director of Investigations Steve Eckersley said, "This was not only a serious failure of data security on Uber's part, but a complete disregard for the customers and drivers whose personal information was stolen. At the time, no steps were taken to inform anyone affected by the breach, or to offer help and support. That left them vulnerable." It was a serious breach by Uber of principle seven of the Data Protection Act 1998 which exposed the customers and drivers affected to a greatly increased risk of fraud, and due to Uber's behaviour following the attack it did not come to light until it was reported by the media in November 2017.

23. In the S-1 document that Uber filed on 11 April 2019 as part of its Initial Public Offering ("IPO"), Uber disclosed the following: *"We have not yet achieved profitability, and even if our revenue exceeds our direct expenses over time, we may not be able to achieve or maintain profitability."* and *"We have incurred significant losses since inception, including in the United States and other major markets. We expect our operating expenses to increase significantly in the foreseeable future, and we may not achieve profitability."* Tfl will also be aware of how badly Uber appears to be faring from a financial point of view since April 2019. In an article published in the New York Times on 8 August 2019, Kate Conger

reported that for the second quarter of 2019 the Uber Group[3] had sustained an eye watering loss of $5.2 billion – that being the largest in a series of losses that the Group had sustained since it began disclosing limited financial data in 2017, which "renewed questions about the prospects for the company, the worlds biggest ride-hailing business." The article continued, "Uber has been dogged by concerns about sluggish sales and whether it can make money, worries that were compounded by a disappointing initial public offering in May."

24. On the assumptions (a) that the people behind Uber are not operating some kind of vast and elaborate 'Ponzi scheme', and (b) are not complete incompetents, the question of exactly what Uber is playing at has to be addressed – not least by any licensing authority concerned to ensure that operators' licences are only granted to "fit and proper" organisations that comply with all legal requirements connected with running a business. Corporations exist as operations designed to make money for their investors, not to lose it. Yet Uber continues to offer rides to passengers at unrealistically low prices and to sustain vast losses year after year.

25. There is only one rational explanation for what Uber is doing, and it is an explanation which must be of the utmost concern to TfL. The authority will be aware that both domestic UK and EU competition law prohibit businesses with significant market power unfairly exploiting their strong market positions. One particularly insidious form of such unfair exploitation involves so-called predatory pricing.

26. Predatory pricing involves charging very low prices, the aim being to get rid of competitors so that the supplier can charge considerably higher prices later. The predator is willing to sell or to provide services at a loss – below cost – for a period, in the hope that its rivals either go bust or decide to stop selling that product or providing those services. When competing companies have left the market, the predator pushes prices back up. In an article – 'EU Competition Practice on Predatory Pricing'– published by the European Commission, Philip Lowe wrote: "Predatory prices as such are prices deemed to be a threat to the survival or entry of efficient competitors, because they are set at a level that can only be explained by the purpose of eliminating equally or more efficient competitors or deterring their entry."

27. Uber has also engaged in and admitted to other anti-competitive practices, such as using 'ghost vehicles' that gave a false impression to both drivers and passengers. For further information on this aspect of Uber's deliberate misconduct please see the references below[4][5][6][7][8]

[3] i.e. the parent company of Uber London Limited and the company purporting to be carrying the aforementioned contingent in respect of Uber London Limited's retrospective liability to HMRC for unpaid VAT

[4] https://gizmodo.com/uber-is-faking-us-out-with-ghost-cabs-on-its-passenge-1720576619

[5] https://gizmodo.com/uber-is-faking-us-out-with-ghost-cabs-on-its-passenge-1720576619

[6]https://www.theage.com.au/national/victoria/uber-made-ghost-vehicles-paid-fines-to-overtake-taxi-industry-lawyers-20190503-p51jri.html

28. Unless and until Uber provides TfL with any alternative and lawful explanation for its practice of offering rides to passengers at unrealistically low prices whilst sustaining vast financial losses year after year, TfL is bound to proceed on the basis that Uber is engaged in a sustained campaign of unlawful predatory pricing with a view to driving its competitors out of the market, after which it will be free to further increase the size of its fleet and push its prices up to realistic levels enabling it to trade profitably in a market that it dominates entirely – that, as aforesaid, being the only rational explanation for what Uber is doing. And it is certainly not the behaviour of an organisation seeking to comply with all legal requirements connected with running a business.

29. Finally, and with yet further reference to Uber's unfitness to hold a London PHV operator's licence, we are aware of the alarmingly high numbers of (a) assault allegations both sexual and otherwise that have been made against Uber drivers, (b) instances of Uber drivers being found to be uninsured, and (c) Uber drivers being found to be operating with fake documents, in the Greater London area since 25 September 2017. The precise figures in each category will be available to TfL, in liaison with the Metropolitan and City of London police forces. It is imperative that the precise figures are clearly set out and incorporated in any substantive decision upon Uber's current application to renew its operators' licence. Uber's failure to regulate and control the unlawful behaviour of its own workers, thereby imperilling the safety of the travelling public in the Greater London area and allowing actual harm to befall many of its customers, is further clear evidence that Uber is not an organisation that seeks to comply with the legal requirements connected with running a business.

30. If we can be of any further assistance with regard to any aspect of the serious matters raised in this letter or in our previous letters both dated 27 August 2019, please do not hesitate to contact us.

Yours faithfully

Darren J Rogers

Chiltern Law

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[7] Uber cannot be successful without dominating the markets they operate in, this was the view of shareholder Bradley Tusk

[8] https://www.cnbc.com/2019/08/12/uber-stock-falls-to-all-time-low-as-investors-grow-more-skeptical.html