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China's regulatory approach to the sharing economy: A perspective on ride-hailing

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CHINA'S REGULATORY APPROACH TO THE SHARING ECONOMY: A PERSPECTIVE ON RIDE-HAILING

Huiqin Jiang[†]
Heng Wang^{††}

Abstract

While the sharing economy brings significant social benefits in China, it comes with regulatory challenges that are novel and unpredictable. How should regulators handle these challenges? This paper offers fresh insights into the regulatory approach to the ride-hailing industry, the most comprehensively regulated sharing industry in China. A historical review identifies three regulatory approaches deployed to date: self-regulation, market-based regulation and government regulation. Self-regulation relies on the platforms with incentive to provide better service for greater profit, and to deal with sharing-specific challenges. Market-based regulation invites rivals to keep a watchful eye on other players, in order to enhance their market position by outperforming the competition. Both approaches are capable of delivering quick, and often innovative, responses to new challenges. Government regulation, on the other hand, came late and plays a neutral role. The rules there are mostly of the “old wine in a new bottle” kind; in other words, applying existing (old) rules to the new sharing economy. Those rules could contribute to a level playing field for traditional and sharing-market players if managed properly. This article argues that government regulations are inadequate for solving sharing-specific challenges such as the legal status of the participants, the challenges of uncertain externalities, and new forms of competition. Instead, regulators should in the future give more affirmative value to self-regulation and

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market-based regulation. These complementary approaches are capable of yielding innovative and sharing-specific regulatory responses, from which the government regulators can glean and evaluate before codifying them.

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I. INTRODUCTION

China's sharing economy has experienced explosively rapid development in recent years. Its market size reached a staggering RMB 2.94 trillion in 2018, a 41.6% increase from the previous year, and is expecting a 30% growth in the next three years.¹ By the end of 2018, it had embraced half of China's population of 1.4 billion, either as consumers or as providers of labor.² In this context, we have witnessed the rapid rise of massively successful sharing business giants, for instance, the ride-sharing start-up *Didi Chuxing* (China's version of *Uber*) has provided more than 10 billion rides in the single year of 2018.³

While innovations in China's sharing economy "helps to fuel China's economic development,"⁴ one should not underestimate the legal issues that come with them. For instance, the report of a *Didi* driver having raped and murdered a female passenger—the second such killing in 2018—raised sizable

1. Research Branch of the Sharing Economy of the State Information Center of China, REPORT ON CHINA'S SHARING ECONOMY DEVELOPMENT 2019 1 (2019).

2. *Id.*

3. *Id.* at 39.

4. Joelyn Chan, *The Next Big Challenge in China's Sharing Economy*, ASEAN TODAY (Oct. 3, 2017), <http://www.aseantoday.com/2017/10/the-next-big-challenge-in-chinas-sharing-economy>.

public anger.⁵ The bankruptcy of bicycle-sharing companies due to fierce competition has already resulted in thousands of bicycles being abandoned as waste rather than being disposed of properly.⁶ Accordingly, the government has had to increase expenditure on a workforce for managing the bicycles discarded on roads and other public areas.⁷ And riders have suffered deposit loss, as these companies are unable to return their deposits.⁸ Clearly, these legal issues in the sharing economy should command regulators' attention.

Previous research has shown that success and failure in the sharing business depend largely on the legal environment.⁹ For instance, in San Francisco, unexpected changes in the legal environment and public opinion, have resulted in the active delisting of *Airbnb* in 2017 to avoid significant financial penalties under the newly-introduced taxation system.¹⁰ Therefore, regulators should be cautious when they lay out schemes for managing the sharing economy. In the case of China, if the regulatory schemes are too stringent, start-ups may go to other countries, which may affect the development of the Chinese sharing economy; if the regulation is too lenient, these start-ups may cause concerns in Chinese society about issues such as the safety of passengers using ride-hailing services, and negatively impact the development of the Chinese sharing economy. Further, if China's regulatory approach is not consistent, then establishing sharing businesses will struggle with the regulation, and China's sharing economy will probably shrink. Clearly, an appropriate and predictable legal environment promotes the development of sharing businesses, and vice versa.

Selecting ride-hailing (or online taxi booking) as the exemplar, this article aims to provide some indications of the possible future of China's regulatory approach to the sharing economy. The regulation of the ride-hailing industry, unlike that of other sharing industries,¹¹ represents what is arguably the most comprehensive and developed regulatory approach in China. It is a combination of government regulation, self-regulation, and market-based regulation. This paper will analyze each. The ride-hailing industry's regulatory approach is likely to be applicable, to or to be used as a kind of reference, in the regulation of other sharing industries in China.

This paper proceeds in six parts, including the Introduction. Part two provides a provisional definition of the sharing economy. That definition

5. Sui-Lee Wee, *Didi Suspends Carpooling Service in China After 2nd Passenger Is Killed*, N.Y. TIMES (Aug. 26, 2018), <https://www.nytimes.com/2018/08/26/business/didi-chuxing-murder-rape-women.html>.

6. Benjamin Haas, *Chinese Bike Share Graveyard a Monument to Industry's "Arrogance,"* THE GUARDIAN (Nov. 24, 2017), <https://www.theguardian.com/uk-news/2017/nov/25/chinas-bike-share-graveyard-a-monument-to-industrys-arrogance>.

7. *See id.* (describing the vast amount of bicycle's that have been abandoned).

8. Emily Feng, *Deposits Lost in Spate of Chinese Bike-Share Failures*, FIN. TIMES (Dec. 19, 2017), <https://www.ft.com/content/5c1f5fcc-e47b-11e7-97e2-916d4fbac0da>.

9. *See* Karl Täuscher & Jan Kietzmann, *Learning from Failures in the Sharing Economy*, 16 MGMT. INFO. SYS. Q. EXECUTIVE 253, 259 (2017) (describing how unexpected changes in the legal environment can cause failure).

10. *Id.*

11. For instance, China has only promulgated "guiding opinions" in its regulation of the bicycle-sharing industry. MINISTRY OF TRANSPORT ET AL., GUIDING OPINIONS ON ENCOURAGING AND REGULATING THE DEVELOPMENT OF INTERNET BICYCLE RENTAL (2017).

highlights its own uniqueness in Chinese regulatory practice, and may generate China-specific challenges. Part three reviews the initial stage of China's sharing economy, and its regulatory approaches. It also explores the different rationales behind each regulatory approach. It argues that regulatory approach at this early stage was laissez-faire, due to the small size of the sharing platforms. Later on, China began to explore regulatory approaches to ride-hailing, and diversity across the regions became apparent, with some regions banning ride-hailing entirely. In 2016, a nationwide regulation was published, followed by a series of local implementation regulations.¹² Part four examines the nationwide and local regulations issued since 2016, which reflect the current overarching regulatory approach to the ride-hailing services. It argues that Chinese regulators are adopting the "neutral" regulatory approach, that is, relying heavily on existing rules or paths in the regulation of the sharing economy ("old wine in a new bottle"). Regulators appear to make use also of complementary approaches, such as self-regulation and market-based regulation, to meet the legal challenges they face. This development leads to the anticipation of China's tentative future regulation of this area, which is examined in Part five. That is, China's regulators will in all likelihood continue to take into account the complementary approaches, as no single approach can solve all the problems without leaning on the others. The paper, however, considers the neutral regulatory approach questionable, inasmuch as it can hardly address all the sharing-specific challenges. The integral facets of these challenges concern the participants themselves, the players from traditional and innovative markets, and the uncertainty of the range of externalities. Part six concludes that it is advisable to rely more on self-regulation in the Chinese sharing economy, with government regulation working in the background to review operations, and prepare to codify the regulations after as the platforms' practice matures.

II. CHINA'S VEERED DEFINITION OF THE SHARING ECONOMY: A COMPARATIVE REVIEW

Before the analysis of the sharing economy,¹³ it is important to understand its definition. A tentative comparison of that economy in China with those in

12. Wei Huang, Bei Yin & Wen Zhou, *The Competition and Regulation Issues of the Sharing Economy – An Analysis Based on China's Ride-hailing Service Regulations*, COMPETITION POL'Y INT'L (Apr., 2017), <https://dev.competitionpolicyinternational.com/wp-content/uploads/2017/04/Asia-Column-April-Full-1.pdf> (describing regulations developed in China for ride-sharing).

13. The sharing economy is also considered as the alias of "collaborative economy," "collaborate consumption," "peer-production economy," "peer-to-peer economy," "gig economy," "access economy," "mesh," and "relationship economy." RACHEL BOTSMAN & ROO ROGERS, *WHAT'S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION 1* (HarperBusiness, 2010); Juho Hamari, Mimmi Sjöklint & Antti Ukkonen, *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67 J. OF THE ASS'N FOR INFO. SCI. & TECH. 2047, 2047 (2016); Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 1 (2012); Rachel Botsman, *The Sharing Economy Lacks A Shared Definition*, FAST COMPANY (Nov. 21, 2013), <https://www.fastcompany.com/3022028/the-sharing-economy-lacks-a-shared-definition>; Kathleen Stokes et. al, *Making Sense of the UK Collaborative Economy*, NESTA & COLLABORATIVE LAB 9–10 (Sept. 2014), https://media.nesta.org.uk/documents/making_sense_of_the_uk_collaborative_economy_14.pdf.

other states suggests the singularity of that definition in the Chinese regulations, and that indicates the presence of China-specific challenges and regulatory approaches.

A. *International Experience*

It is difficult to pin down the exact meaning of “sharing economy,” as it lacks a *shared* (universally accepted) definition.¹⁴ However, there exist some commonly-held understandings of the sharing economy, including its features as technology-based, and peer-to-peer-based (P2P-based) activities. In particular, many commentators consider the sharing economy as a P2P exchange of *underutilized* capacity (i.e., property, time, skill, and space) through online platforms.¹⁵

The above mentioned understanding reveals that the sharing economy has four major elements: (1) sharing for access not for ownership;¹⁶ (2) sharing via online platforms not offline;¹⁷ (3) sharing existing but underutilized or idle assets not acquiring/producing new assets for sharing;¹⁸ and (4) P2P based economic activities.¹⁹ The first quality is not unique. Indeed, similar services have long existed in society, such as transportation and accommodation services.

It is the second quality that makes it innovative, and thus differentiates it from existing services. The sharing economy relies on new technologies, which usually includes the Internet, GPS, and other information and communication technologies,²⁰ and more recently artificial intelligence (e.g., machine learning).²¹ It thus “enable[s] new kinds of sharing arrangements that, due to

14. Christopher Koopman, Matthew Mitchell & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: the Case for Policy Change*, 8 J. BUS., ENTREPRENEURSHIP & L. 529, 531 (2015); BOTSMAN, *supra* note 13; Juliet Schor, *Debating the Sharing Economy*, GREAT TRANSITION INITIATIVE 2 (Oct. 2014), http://www.academia.edu/13505766/Debating_the_Sharing_Economy.

15. See Koopman et al., *supra* note 14, at 531; Deniel E. Rauch & David Schleicher, *Like Uber, but for Local Governmental Policy- the Future of Local Regulation of the “Sharing Economy,”* 15 GEO. MASON U. L. AND ECON. RES. PAPER SERIES 1, 11 (2016) (explaining how the sharing economy has different functions); Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L. J. 31, 32, n.2 (2017) (explaining how peer-to-peer sharing helps people profit “from their excess capacity”); Georgios Zervas, Davide Proserpio & John Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, 54 J. OF MARKETING RES. 687, 687 (2017); Andrés Boix-Palop, *Competitive Risks in the Sharing Economy and European Union Market Regulation*, SSRN 1 (Oct. 15, 2016), <https://ssrn.com/abstract=2863032> (describing the many definitions of the sharing economy); Debbie Wosskow, *Unlocking Sharing Economy: An Independent Review*, NESTA 7, 13 (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf.

16. Stokes et al., *supra* note 13, at 7.

17. See Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L. J. 1068, 1070–1073 (2015) (explaining how most sharing platforms “operate” through websites or an app).

18. Stemler, *supra* note 15, at 65; Zervas et al., *supra* note 15, at 2; Boix-Palop, *supra* note 15, at 1; Wosskow, *supra* note 15, at 7, 13; Koopman et al., *supra* note 14, at 531.

19. Zervas et al., *supra* note 15, at 2; Stemler, *supra* note 15, at 32 n.2.

20. Arun Sundararajan, *Peer-to-Peer Businesses and the Sharing (Collaborative) Economy: Overview, Economic Effects and Regulatory Issues*, 82 U. CHI. L. REV. ONLINE 1, 3–4 (2017).

21. Anna Kilmenko, *Three Ways Sharing Economy Leaders Personalize Customer Experience with Machine Learning and AI*, AI THORITY (Sept. 17, 2018), <https://www.aiauthority.com/representation-reasoning/search/three-ways-sharing-economy-leaders-personalize-customer-experience-with-machine-learning-and-ai/>; Smriti Srivastava, *A Sharing Economy Entrusting Its Core to AI and Biometrics Technologies*, ANALYTICS INSIGHT (Apr. 30, 2019), analyticsinsight.net/sharing-economy-entrusting-core-ai-biometrics-technologies/.

transaction costs, were previously too difficult to implement.”²² The reliance on these technologies suggests that information could be collected, which also leads to concerns regarding privacy protection and information asymmetries between regulators and the platforms.²³

There has been considerable debate of the third quality. Some commentators prefer not to confine the sharing economy to the exploitation of excess or “underutilized” capacity.²⁴ For instance, they broadly define the sharing economy as “an umbrella concept . . . [that] . . . endorse[s] sharing the consumption of goods and services through online platforms.”²⁵ They consider “underutilized” a “fickle” and “fluid” concept, “especially as more and more users of sharing economy platforms are putting new assets online.”²⁶ Uber, a symbolic sharing company, provides the best illustration. Instead of utilizing the excess capacity of Uber drivers’ own cars, it is “helping drivers to rent, lease, and buy new cars.”²⁷ Others view the sharing of “underutilized” assets as a critical hallmark of the sharing economy.²⁸ They consider the view of “idle assets as an untapped resource” an important driver of the emergence of the sharing economy.²⁹ Thus, the sharing economy is in pursuit of the creation of value out of idle assets.³⁰

Regarding the fourth quality, the supply-side of the sharing economy, are the micro-entrepreneurs³¹ running micro-businesses.³² The element implied in this is that the service providers are sometimes not professionals.³³ They provide services such as transportations and accommodation, but may lack the “incentive or knowledge to anticipate future risks.”³⁴ Also implied in this is the possible lack of trust among actors (i.e., the supply-side and the demand-side), and such trust has to be established in the new technological context.³⁵

22. Jordan M. Barry & Paul L. Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 69, 70 (2015).

23. Sofia Ranchordás, *Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation*, 55 JURIMETRICS 201, 205–206 (2015); Cristiano Codagnone, Federico Biagi, & Fabienne Abadie, “The Passions and the Interests: Unpacking the ‘Sharing Economy’” 10 (JRC Science for Policy Report 2016).

24. For instance, Hamari et al., *supra* note 13, at 2047; Heather Scheiwe Kulp & Amanda L. Kool, *You Help Me, He Helps You: Dispute Systems Design in the Sharing Economy*, 48 WASH. U. J. L. & POL’Y, 179, 181–82 (2015).

25. Hamari et al., *supra* note 13, at 2047.

26. Stemler, *supra* note 15, at 62–63.

27. Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L. J. 197, 211 (2017).

28. Stokes et. al, *supra* note 13, at 17.

29. *Id.*

30. *Id.*

31. Woskcow, *supra* note 15, at 7, 13.

32. Stemler, *supra* note 15, at 39.

33. Erez Aloni, *Pluralizing the Sharing Economy*, 91 WASH. L. REV. 1397, 1419 (2016); Kellen Zale, *When Everything Is Small: The Regulatory Challenge of Scale in the Sharing Economy*, 53 SAN DIEGO L. REV. 949, 983 (2016).

34. Aloni, *supra* note 33, at 1419.

35. See e.g., Diego Zuluaga, *Regulatory Approaches to the Sharing Economy*, INST. OF ECON. AFF. (2016) (noting that establishing trust between parties to a transaction is a key feature of the sharing economy).

B. *China's Shift Towards a Broader Definition*

The definition of the sharing economy in China does not meet all the key elements which are obvious in other nations. Put differently, the third and fourth elements have been removed during the development of China's sharing economy. Thus, the current understanding of the sharing economy in China "has veered sharply away from how the term was originally defined" by other nations.³⁶

Initially, evidence of the Chinese government's understandings of the concept "sharing economy" was rarely seen in its strategic documents, although it had declared its supportive attitude toward the sharing economy in various situations.³⁷ With the growing need to regulate the sharing economy, a number of more recent documents started to reveal the Chinese government's understanding of the sharing-economy concept.³⁸

China's early definition of "sharing economy" seemed to emphasize the "idle or underutilized resources" element of it. A position suggested by a departmental regulation, the *Guidelines Promoting Green Consumption* (issued jointly by ten ministries under the State Council in February 2016, and having nationwide application) was that the sharing economy is a way to pursue green and sustainable development. It clearly stated that the government would "support the development of the sharing economy, encourage the efficient use of the *idle resources* of individuals, and regulate online ride-booking, the letting of own-vehicles, and of home-stays, and the exchange of used goods" [*emphasis added*].³⁹ This statement indicates that China's sharing economy is recognized as an attempt to make full use of "idle" or underutilized resources.

However, China's recent definition of the sharing-economy concept has been broadened by removing the "idle resources" prerequisite of its definition.⁴⁰ In a landmark document (or policy), the *Guiding Opinions on Promoting the Development of the Sharing Economy* (the Guiding Opinions) issued in July 2017, the government's position finally became clear.⁴¹ Here, "sharing economy" is understood as "a new economic modality which optimizes the *allocation of scattered resources* by making use of network information technology through the internet platform" [*emphasis added*].⁴²

In brief, China's current understanding of the sharing economy is essentially that it is an innovative internet-based platform of economic activities that achieves the integration of *scattered (and unnecessarily left idle)* resources.

36. Brook Larmer, *China's Revealing Spin on the "Sharing Economy,"* N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/magazine/chinas-revealing-spin-on-the-sharing-economy.html>.

37. The State Council of the People's Republic of China, REP. ON THE WORK OF THE GOV'T (2016); OUTLINE OF THE 13TH FIVE-YEAR PLAN FOR NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT OF THE PEOPLE'S REPUBLIC OF CHINA (2016), http://www.gov.cn/xinwen/2016-03/17/content_5054992.htm.

38. For instance, National Development and Reform Commission et al., GUIDELINES PROMOTING GREEN CONSUMPTION, effective Feb. 17, 2016 (China).

39. *Id.*

40. National Development and Reform Commission et al., GUIDING OPINIONS ON PROMOTING THE DEVELOPMENT OF THE SHARING ECONOMY, effective July 3, 2017 (China).

41. *Id.*

42. *Id.*

It has broadened the concept of “sharing economy” dramatically to include almost any online access-sharing of a product or service activated by smartphone. The lack of requirements on idle resources and P2P operation thus sharply reduces the differences between the sharing economy and the traditional economy. That position informs the employment of the first *laissez-faire*, and then neutral and multi-party regulatory approaches outlined and observed in Parts three to four.

Before we turn to Part three to review the historical development of regulating the sharing economy in China, it is useful to review the potential challenges of the regulation of the sharing economy. These challenges include the uncertainty of the participants’ legal status, liability allocation, disruption of the level playing field due to competition issues, and the unclear scope of the negative externalities. Despite the fact that these challenges are arguably similar to those in other countries, Chinese regulators have a different response.

III. THE LAISSEZ-FAIRE REGULATORY APPROACH UNTIL 2015

Ride-hailing companies enter the taxi service market with a completely different legal design from those of the traditional taxi companies. Essentially, the provision of traditional taxi services in China is subject to market-entry regulations⁴³ that require taxi companies, cars and taxi drivers to respectively obtain licenses or permits from the transportation regulatory agencies at the county level.⁴⁴ To obtain the necessary licenses or permits, they should “meet certain criteria in relation to insurance and car repair, as well as take examinations. And these licenses are subject to cities’ transportation planning.”⁴⁵ Comparatively, ride-hailing companies legally circumvent the above-mentioned license requirements through, for instance, a four-party arrangement (discussed below). In order to understand the regulatory development, an analysis of its components (self-regulation, market-based regulation, and government regulation) is needed.

A. *Self-Regulation*

Upon the emergence of ride-hailing activities in 2010, a four-party arrangement was introduced to commercialize private cars while circumventing the license requirement.⁴⁶ The four parties are the platform company, a car rental company, a labor dispatch company, and the driver. The arrangement is

43. *See generally*, General Office of the State Council, PROVISIONS ON THE ADMINISTRATION OF CRUISING TAXI OPERATING SERVICES, effective Jan. 1, 2015, as amended on Aug. 26, 2016, arts. 11, 15 (China) (stating two permits are required when providing cruising service, that is, Road Transport Business License and Road Transport Certificates).

44. Huang et al., *supra* note 12, at 3.

45. *Id.*

46. Wenquan Yuan & Xinpeng Xu, *Legal Regulation of Concealed Employment from The Perspective of Shared Economy*, 36(1) TRIB. POL. SCI. & L. 119, 124 (2018); Denghua Hou et al., *Legitimacy and Supervision System of Internet Private Hire Vehicles*, 316 Beijing Keji Daxue Xuebao (Shehui Kexue Ban) [J. U. SCI. & TECH. BEIJING (SOC. SCI. EDITION)] 96, 98 (2015).

so designed that the platform company rents a private car from a car rental company, and recruits a driver through a labor dispatch company; the recruited driver is in fact the owner of the private car leased to the car rental company.⁴⁷ Since the renting of private cars is permitted in China, the four-party arrangement can circumvent all existing regulations, for none of the four parties needs any license incumbent upon players in the taxi industry.⁴⁸

It is clear that this stage relies on self-regulation (i.e., on contracts among four parties). This is an extreme *laissez-faire* approach to regulation, which in fact leaves the ride-hailing platforms barely regulated. The risk in this self-regulatory approach is that the innovative platform places itself into a position where the duties and liabilities are undefined. For instance, one clause of *Didi's* Terms of Use defines *Didi* as an “information provider,” which provides rental vehicles and labor dispatch companies.⁴⁹ It further clarifies that the car rental services are provided by car rental companies, and the driving services are provided by the labor dispatch company.⁵⁰ Therefore, the passenger is the lessee who is responsible for damage to the vehicle if the car-rental company is not at fault; the passenger is also an employer who is responsible for damage caused to third parties, and to the driver, if the driver is not at fault.⁵¹ This clause thus imposes all duties and responsibilities, except for the platform, on the passengers, the car rental companies, and the labor dispatch company.

Another example is Uber in China, which considers itself an intermediary party.⁵² This is the position that Uber holds in other countries. However, Uber's operation internationally suggests that it is actively involved in transactions by determining prices and conditions of the transactions, and providing minimal quality control of service providers; it thus deviates from its neutral standing as a passive web portal.⁵³ Research on the regulation of Uber internationally has shown that Uber chooses to take the intermediary-party position to reduce its regulatory burdens, such as those related to labor and employment laws.⁵⁴

To sum up: self-regulation may esteem the platforms' benefits as more important than those of other players, such as the drivers and passengers. The risks in this have to be moderated by government regulation, and that regulation should take the public interest into account, and that regulation should seek to balance the benefits of all stakeholders.

47. Yuan & Xu, *supra* note 46; Hou et al., *supra* note 46.

48. Jing Wang, *Regulatory Quandary and Its Solutions of Internet Chauffeured Car in China*, 2 ADMIN. L. REV. 49, 50 (2016).

49. Denghua Hou et al., *Sifang Xieyi Xia Wangyueche De Jingying Moshi Jiqi Jianguan Lujing [The Supervision Under Quartet Agreement Operating Mode of Internet Private Hire Vehicles]*, 12 FAXUE ZAZHI [L. SCI. MAG.] 68, 71 (2016).

50. *Id.*

51. *Id.*

52. *Id.*

53. Margherita Colangelo & Mariateresa Maggolino, *Uber: A New Challenge for Regulation and Competition Law?*, 12 MKT & COMPETITION L. REV. 47, 48 (2017).

54. Stemler, *supra* note 15, at 58.

B. Market-Based Regulation

There has been limited market-based regulation at this stage. The market-based regulation can arguably be illustrated in the interaction between *Didi Dache* and *Kuaidi Dache*, two of China's leading ride-hailing platforms.⁵⁵ They competed fiercely to "corner the massive Chinese market" by initiating a price war in late 2014.⁵⁶ Their tactics were the following: the two companies provided passengers with vouchers to pay their fares, and "red packets" if they had waited for more than 60 seconds to hail a vehicle over the App.⁵⁷ The two companies also provided drivers with vouchers in certain other situations.⁵⁸ For instance, if a passenger waited for a longer period than specified, then the first driver to take that passenger's order would be subsidized.⁵⁹ The "bitter" price war was at the expense of the investors' interests, who finally decided to merge the two companies in February 2015. After the merger, the two companies agreed to "operate independently under separate brands."⁶⁰

In sum, market-based regulation helps balance the benefits of stakeholders, partly by attending to passengers' interests. In other words, those regulations pass the platforms' (or the investors') interests to the passengers. However, investors have the power to make strategic decisions (such as merger decisions) to reduce competition among the different platforms, so the effect of market-based regulation wears off. Therefore, market-based regulation may well help reach the pursued balance only for a limited time.

C. Government Regulation

The disordered sharing market was regulated by unfair self-regulations,⁶¹ and minimum market-based regulation triggered the government's regulatory response. In China, some municipalities chose to strictly prohibit ride-hailing.⁶² For instance, in the second half of 2014, Beijing, Shenyang, Nanjing and Guangzhou separately issued circulars that strictly prohibited private car-owners from offering ride-hailing services via the Internet or mobile phones, with any breach of this prohibition inviting severe penalties.⁶³ This regulatory approach indicated that local Chinese regulators were probably immature in the practice

55. Gerry Shih, *China Taxi Apps Didi Dache and Kuaidi Dache Announce \$6 Billion Tie-up*, REUTERS (Feb. 13, 2015), <https://www.reuters.com/article/us-china-taxi-merger/china-taxi-apps-didi-dache-and-kuaidi-dache-announce-6-billion-tie-up-idUSKBN0LI04420150214>; Dache Ruanjian Butie Dazhan Shengji, Didi Kuaidi Gaojia Qiangren Shuimaidan [*The Upgraded Ride-Hailing Competition: Who Pays for the Competition between Didi and Kuaidi?*] (hereinafter "*The Upgraded Ride-Hailing Competition*"), PEOPLE (Jan. 21, 2015), <http://media.people.com.cn/n/2015/0121/c40606-26420710.html>.

56. Shih, *supra* note 55; *The Upgraded Ride-Hailing Competition*, *supra* note 55.

57. *The Upgraded Ride-Hailing Competition*, *supra* note 55.

58. *Id.*

59. *Id.*

60. Shih, *supra* note 55. However, one may also argue that it is a kind of market competition.

61. The circumvention of the license requirement became ride-sharing companies' competitive advantage over the traditional taxi industry.

62. Hou et al., *supra* note 49, at 98.

63. *Id.*

of regulating sharing activities.⁶⁴ In particular, they chose to *prohibit* these innovative activities because there was no appropriate way of regulating them. This approach saved the regulators from the need to handle difficult situations, but it may easily stifle innovation by simply prohibiting the innovative sharing economy. The Airbnb case mentioned in the Introduction provides a good illustration of the negative impact of government regulation.⁶⁵

IV. THE NEUTRAL AND MULTI-PARTY REGULATORY APPROACH SINCE 2016

China's Ministry of Transport, the central government branch in charge of road transportation regulations, began to seek suggestions in June 2015 on the reform of the taxi industry, and on the regulation of the ride-hailing services.⁶⁶ This move, together with the steps to be discussed shortly, led to the issuance in July 2016 of the policy—*Opinions on the Deepening of Reform to Promote the Healthy Development of the Taxi Industry* (the 2016 Opinions)—with effect from November 2016.⁶⁷ Government regulation thus appears to be taking shape, as will be discussed further below.

The previous discussion of regulatory approaches suggests that China's government regulation has come very late to the regulation of its sharing economy, which is probably due to the lack of a government position on the sharing economy before 2016. From 2016 on, that position becomes clearer by the issuance of the Guiding Opinions.⁶⁸ As analyzed in Part two, China's understanding of the sharing economy has substantially broadened the scope of its sharing economy and minimized its differences from the traditional economy.⁶⁹ That position informs the employment of the neutral and multi-party regulatory approaches outlined and observed in the following sections.

A. Government Regulation

With the increase in the number of internet companies that have entered the ride-hailing market, more legal issues have emerged. For instance, the legal status and responsibilities of participants are unclear; the safety and legal rights of passengers are not well protected; and the unfair competition to the taxi market is not addressed.⁷⁰ In particular, the involvement of vehicles that are not

64. *Id.*

65. Täuscher & Kietzmann, *supra* note 9.

66. See *China Hails New Taxi Regulations*, XINHUA (Nov. 10, 2015), http://english.gov.cn/state_council/ministries/2015/11/10/content_281475232239996.htm (discussing briefly the government soliciting opinions from the public on the matter).

67. General Office of the State Council, GUIDING OPINIONS ON DEEPENING THE REFORM AND PROMOTING THE HEALTHY DEVELOPMENT OF THE TAXI INDUSTRY, effective July 26, 2016 (CHINA).

68. *Id.*

69. National Development and Reform Commission et al., GUIDING OPINIONS ON PROMOTING THE DEVELOPMENT OF THE SHARING ECONOMY, *supra* note 40.

70. Ministry of Transport, Wangluo Yuyue Chuzu Qieche Jingying Fuwu Guanli Zaxing Banfa (Zhengqiu Yijiangao) De Youguan Qingkuang [Information Concerning the Interim Measures for the Administration of Online Taxi Booking Business Operations and Services (Draft for Comments)], MINISTRY OF TRANSPORT OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 10, 2015), http://www.mot.gov.cn/2015wangshangzhibo/2015zhuantif6/zhibozhaiyao/201512/t20151222_1955509.html.

permitted to seek commercial-purpose use has introduced disorder into the traditional taxi market, which is also a point of concern for regulators.⁷¹

In October 2015, China's transport authorities decided to step in to help the traditional taxi industry, which had come under pressure from app-based ride-hailing services.⁷² This suggests that Chinese regulators have adopted a reactive approach to the regulating of sharing activities. That is, they step in only after traditional industries are unfairly challenged by the invading "sharing" enterprises.⁷³

In July 2016, the General Office of the State Council issued the 2016 Opinions, which legalizes ride-hailing services, and positions ride-hailing services as a taxi service.⁷⁴ For those who are not familiar with China's legal system, the 2016 Opinions is a policy document that provides guidance and background on the regulation of ride-hailing services. It is useful in clarifying relevant regulations when there is misunderstanding, and in predicting the possible future regulations.

The 2016 Opinions specify five principles in regulating the taxi-industry. They are: (1) ensuring passengers' safety; (2) insisting on reform and innovation; (3) coordinating the benefits of the different stakeholders; (4) adhering to the rule of law; and (5) recommending local autonomy.⁷⁵ It encourages the transition of traditional taxi companies into ride-hailing service providers, and reliance on multiple parties (including local government and platforms) to attend to the different stakeholders.⁷⁶ But it does not touch upon specific issues such as whether ride-hailing companies, drivers, or cars should obtain a license, which are the requirements imposed on the traditional taxi industry, before they may provide ride-hailing services.⁷⁷

Those license requirements were imposed in the *Interim Measures for the Administration of Online Taxi Booking Business Operations and Services* ("the

71. *Id.*

72. Ministry of Transport, Wangluo Yuyue Chuzu Qiche Jingying Fuwu Guanli Zanxing Banfa (Zhengqiu Yijiangao) De Youguan Qingkuang [*Information concerning the Interim Measures for the Administration of Online Taxi Booking Business Operations and Services (Draft for Comments)*], MINISTRY OF TRANSPORT OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 10, 2015), http://www.mot.gov.cn/2015wangshangzhibo/2015zhuantif6/zhibozhaiyao/201512/t20151222_1955509.html. Though not stated in the 2016 Opinions, market players, led by Tencent, also influenced the government's final move. For instance, the Tencent Research Institute spent more than half a year interviewing relevant companies for their opinions on the sharing economy, and finally launched its Report on the Trends of China's Sharing Economy in 2016, interpreting the origin, status quo, impact, challenges and trends of China's sharing economy. Xiaorong Zhang and Yi Sun, Ma Huateng Lianghui Weihe Gan Liting Fenxiang Jingji [*Why Did Ma Huateng Dare to Support the Sharing Economy?*], SOHU (March 5 2016), http://www.sohu.com/a/61970603_115207 (China) (identifying Mr. Ma Huateng as the CEO of Tencent).

73. Ministry of Transport, *supra* note 70.

74. General Office of the State Council, GUIDING OPINIONS ON DEEPENING THE REFORM AND PROMOTING THE HEALTHY DEVELOPMENT OF THE TAXI INDUSTRY, *supra* note 67.

75. *Id.*

76. *Id.*

77. *Id.*

Interim Measures”), which became effective in November 2016.⁷⁸ This is a departmental regulation jointly issued by several ministries, and it has nationwide application in China.⁷⁹ It is more detailed than the 2016 Opinions. For instance, the 2016 Opinions provides five principles on the regulation of the ride-hailing operation. In comparison, the *Interim Measures* sets specific rules on the rights and duties of the platforms, the vehicles, the drivers, and the operating activities.⁸⁰

The *Interim Measures* limits the type of service that online taxi-booking can provide to a “non-cruising online taxi booking” service, while the traditional taxi service provides “cruising” services.⁸¹ The *Interim Measures* sets requirements for ride-hailing, including permits/licenses requirements, accountability structures, and tax regulation. As the details suggest, the Chinese government is regulating the innovative ride-hailing service by referring to its counterpart, that is, the traditional taxi industry.

The first prime illustration of the regulatory approach is that the online taxi-booking service (or ride-hailing service) is also required to obtain licenses or permits before entering the market, which is similar to the regulation of traditional taxi services.⁸² The online taxi-booking-platform company has to meet technical, security and payment requirements before obtaining an “Online Taxi Booking Business Permit”; the car needs to obtain the “Online Taxi Booking Transport Certificate”; and the driver is required to obtain the “Online Taxi Booking Driver’s License.”⁸³

In the *Interim Measures*, there is also further clarification of the detailed prerequisites for obtaining a license from the local government. The reliance on local regulations is a “salient feature” of China’s legal system.⁸⁴ That is, the central-level regulations are usually “framed in general terms” and rely on local rules to set more detailed rules.⁸⁵ This approach leaves the local government with the authority to issue implementation rules that fit their own situations.⁸⁶ Largely, these local rules are in line with the *Interim Measures*, but they bring more detailed criteria in the setting of the entry threshold. For instance, Shanghai Municipality requires that ride-hailing drivers meet the following conditions:

- (1) He or she is a permanent resident of this municipality;
- (2) Within one year of the date of application, he or she has no more than five violations of road traffic safety laws when driving a vehicle;

78. Ministry of Transport, et al., INTERIM MEASURES FOR THE ADMINISTRATION OF ONLINE TAXI BOOKING BUSINESS OPERATIONS AND SERVICES, art. 18 (effective Nov. 1, 2016, amended on Dec. 28, 2019) (China).

79. *Id.*

80. *Id.*

81. *Id.* art. 2.

82. *Id.* arts. 6, 10, 13, 15.

83. *Id.* art. 8.

84. Mimi Zou, *The Regulatory Challenges of Uberization in China: Classifying Ride-Hailing Drivers*, 33 INT’L J. COMP. LAB. L. & INDUS. REL. 269, 287 (2017).

85. *Id.* at 288.

86. Ministry of Transport et al., *supra* note 70, art. 40 (China).

(3) Within five years before the date of application, he or she has no records of the revocation of the taxi-qualification certificate;

(4) As of the date of application, he or she has no more than five cases of failure to accept punishment within the time limit for violations of road traffic laws.⁸⁷

The above household requirement is identical to Shanghai's local regulation of the traditional taxi industry.⁸⁸ This requirement, however, has been criticized for excessively restricting the sharing economy.⁸⁹

Second, the *Interim Measures* clarify that the platforms need to conclude employment contracts or other agreements with drivers that specify the rights and obligations of both parties.⁹⁰ This requirement is mostly the same as the requirement in the traditional taxi industry. Traditional taxi companies are required to enter into employment agreements with taxi drivers.⁹¹ Differently, a provision in the *Interim Measures* gives the platform the flexibility to conclude "various forms," or different types, of agreements by referring to "working time, service frequency, and other particularities." The differences between the two will be discussed in Part Four.⁹²

Essentially, the entry controls in the *Interim Measures* and local regulations, and the confirmation of the employment relationship in certain situations, suggest that the Chinese government regulates the innovative platform and supply-side users with reference to their counterpart, that is, the traditional business pattern, to the greatest possible extent.⁹³ To some extent, flexibility is allowed in terms of regulating the sharing economy, as can be seen in the various types of agreements that can be entered into according to the particularities.

B. Self-Regulation

Although China has opted for government regulation by the issuance of the *Interim Measures* for online taxi-booking, the *Interim Measures* have also

87. Shanghai Municipality, SEVERAL PROVISIONS OF THE SHANGHAI MUNICIPALITY ON THE ADMINISTRATION OF ONLINE CAR-HAILING BUSINESS SERVICES (effective May 27, 1997; amended Dec. 22, 2011) (China).

88. Shanghai Municipality, DECISION OF THE STANDING COMMITTEE OF THE PEOPLE'S CONGRESS OF SHANGHAI MUNICIPALITY ON AMENDING CERTAIN LOCAL REGULATIONS (effective July 1, 2014) (China).

89. Research Branch of the Sharing Economy of the State Information Center of China & Sharing Economy Working Committee of the Internet Society of China, REPORT ON CHINA'S SHARING ECONOMY DEVELOPMENT 2018, 34 (2018), <http://www.sic.gov.cn/archiver/SIC/UpFile/Files/Default/20180320144901006637.pdf>.

90. Ministry of Transport et al., *supra* note 70, art. 18 (China).

91. General Office of the State Council, CIRCULAR OF THE GENERAL OFFICE OF THE STATE COUNCIL ON FURTHER REGULATING ISSUES CONCERNING THE MANAGEMENT OF THE TAXI INDUSTRY (effective Nov. 12, 2004) (China).

92. Ministry of Transport et al., *supra* note 70, art. 18 (China); Zou, *supra* note 84, at 286.

93. General Office of the State Council, PROVISIONS ON THE ADMINISTRATION OF CRUISING TAXI OPERATING SERVICES, *supra* note 43, arts. 11, 15 (China); Hou et al., *supra* note 49, at 98.

confirmed the roles played by the reputational system, and the passenger complaint-handling system, which are considered a self-regulation approach.⁹⁴

Indeed, *Didi Chuxing* launched its reputational system months before the *Interim Measures* were promulgated.⁹⁵ Under *Didi*'s reputational system, *Didi* drivers have their own service credits based on their service in accepting orders, picking up passengers, providing service and passenger's rating after the service. This reputational system is linked with *Didi*'s order-assignment system, which assigns more orders to drivers with higher credits in similar circumstances.⁹⁶

Other examples of self-regulation include the aforementioned rape-and-murder crime in late 2018. *Didi* introduced a new safety measure: an in-car video and audio recording function, to handle safety concerns.⁹⁷ Recently, in early November 2019, *Didi* began to pilot new *Didi Hitch* safety rules in seven cities. One of the rules was the setting of unequal service time for the genders: service time for females was set at 5 AM to 8 PM, and for males, at 5 AM to 11 PM.⁹⁸ The unequal treatment, albeit for the purpose of protecting the safety of women, raised widespread objection in China to the rampant gender bias, and finally led to the change of the pilot rules, such that they respect the principle of equal treatment.⁹⁹ On June 17, 2019, *Didi* announced the first anti-fatigue driving measures in China. According to the latest measures, *Didi* drivers will be forced to be offline for 20 minutes once their service session has accumulated four hours.¹⁰⁰ All this self-regulation helps address the concerns faced by the sharing economy industry.

C. Market-Based Regulation

The Chinese government relies also on the *market* to deal with the regulation of the sharing businesses. More precisely, it relies on competition among rivals in the new ride-hailing market. For instance, *Didi Chuxing* has been competing with other taxi-hailing service providers.¹⁰¹ The competition led to its acquisition of Uber in 2016.¹⁰² It is also competing with other new taxi-hailing service providers, such as *Shouqi Yueche* and *Dida Pinche*, which

94. Ministry of Transport et al., *supra* note 78, art. 19 (China).

95. Dache Yeneng Xinyong Pingfen Le, Pingfen Gaodi Zhijie Jueding Siji Dingdan Duoshao [*Ride-Hailing Service Can Be Rated: The Score Determines the Amount of a Drisupraver's Assigned Orders*], IFENG (Sept. 8, 2016), http://js.ifeng.com/a/20160908/4953198_0.shtml.

96. *Id.*

97. *Didi's New Ride-Hailing Safety Measures Raise Privacy Concerns in China*, GBTIMES (Nov. 21, 2018), <https://gbtimes.com/new-didi-safety-measure-arouses-public-discussion-in-china>.

98. Wang Keju, *Didi Restores Equal Hitch Service Hours Due to Protest*, CHINA DAILY (Nov. 8, 2019), <https://www.chinadaily.com.cn/a/201911/08/WS5dc4a64fa310cf3e35576162.html>.

99. *Id.*

100. Di Lin, *Didi Gongbu Fangpilao Jiashi Guize: Siji Chaoshichang Jiangbei Qiangzhi Xiuxi* [*Didi Announced Anti-Fatigue Driving Rules: Drivers Will Be Forced to Rest When Timeout*], HUANQIU (June 17, 2019), <https://3w.huanqiu.com/a/c36dc8/7NzVj9qMwtW?agt=20>.

101. Kaiyin Chen, *Didi Youbu Hebing Yizhounian, Shangwubu Fanlongduan Diaocha Rengzai Jixu* [*MOFCOM: Antitrust Investigation Is Continuing a Year after the Merger between Didi and Uber*], XINHUA, July 27, 2017, http://news.xinhuanet.com/fortune/2017-07/27/c_129665237.htm. *Id.*

102. *Id.*

launched online taxi (or car-hailing) booking services in the second half of 2017.¹⁰³

Another telling example is *Meituan Dache*'s quick response to the rape-and-murder crime supposedly committed by a driver of its rival, *Didi Chuxing*. Their successive responses to the crime is also reflective of the reliance on market-based regulation or competition between businesses. On August 24, 2018, a female passenger who used the *Didi Chuxing*'s *Didi Hitch* app to hail a carpool ride was raped and murdered, a second crime of this nature in three months, which raised great public anger—*Didi Chuxing* responded by suspending its *Didi Hitch* service across the country immediately.¹⁰⁴ In comparison, its rival, *Meituan Dache*, upgraded its software in less than two weeks to ensure passengers' security. After the upgrade, the passengers' itinerary during a specific ride automatically sends a text message to his/her emergency contact.¹⁰⁵

D. Observations

In China's sharing economy, government regulation, self-regulation and market-based regulation co-exist. Self-regulation was there since the beginning of the taxi-hailing service.¹⁰⁶ That is, the constituting contracts among four parties made the ride-hailing service possible. Gradually, this self-regulation approach has arguably changed its position from one that prioritizes the platform's interest by asserting itself as an intermediary party, to another that places restrictions on the platform's interest, and values the other participants' interests by introducing new safety measures to protect passengers.¹⁰⁷ Market-based regulation (i.e., competition between ride-hailing platforms) has also accompanied the development of the innovative ride-hailing industry.¹⁰⁸

Government regulation came last. It is the unfair competition between market players (i.e., traditional or innovative market players), the government position, and public opinion arising from passengers' safety concerns that have changed the Chinese government's regulatory attitude to ride-hailing service and resulted in its stepping-in.¹⁰⁹ The government regulation of ride-hailing (or online taxi booking) in China is still at an early stage, having done no more so far than "put old wine in a new bottle," which involves confirmation of

103. Didi De Fannaο: Cong Tiaozhanzhe Dao Beitiaozhanzhe, Ruhe Yu Suoyou Diren Jingzheng [*Didi's Dilemmas: from Challenging to Being Challenged, How to Compete with All Competitors*], SINA (Dec. 18, 2017), <http://tech.sina.com.cn/i/2017-12-18/doc-ifypsqka6508106.shtml>.

104. Wee, *supra* note 5.

105. Chengche Anquan Shuangchong Baozhang: Meituan Dache Quanmian Shengji Zidong Feixiang Xingcheng Gongneng [*Dual Safety Protection! Meituan Comprehensively Upgraded Its "Automatic Sharing Itinerary" Function*], SOHU (Sept. 7, 2018), http://www.sohu.com/a/252533316_100157127.

106. See more details in Part III.A.

107. See more details in Part IV.B.

108. See more details in Parts III.B and IV.C.

109. See Yue Zhi, *Regulations on Ride-Hailing Services Justified*, CHINA.ORG.CN (Oct. 13, 2016) ("It is necessary for the government to strengthen regulations of the industry.").

employment status (to some extent), and the entry control regime mentioned above.¹¹⁰

This suggests a neutral approach when compared with the traditional taxi industry. This neutral approach has the advantage that existing rules can be expected to provide time-tested solutions to regulatory issues.¹¹¹ That is, the regulators already have a standard for handling the legal issues that sharing activities raise. For instance, in the case of *Didi's* acquisition of Uber in 2016, the Chinese Ministry of Commerce conducted a similar anti-monopoly investigation on the basis of China's established competition rules.¹¹² The neutral approach has another advantage in that it offers a level playing field for traditional and sharing-market players.¹¹³ Under this approach, the law does not "privileg[e] one form of business organization over another."¹¹⁴ Indeed, this approach can "preserv[e] incentives for business innovation that does not penalize newcomers or new forms of organization," and it does not "reduc[e] incentives for regulatory arbitrage that would do the opposite—privilege new forms of business over incumbents."¹¹⁵ Market players providing similar services have similar rights and obligations, regardless of their business type, or the technology used.¹¹⁶ In the same vein, similar risks are regulated similarly, and an appropriate risk-based regulatory approach is in place. That regulatory approach indicates realistically the possibility of anticipating a future in which China assumes a tentative regulatory approach towards its sharing economy. This is to be explored in the following part.

However, a neutral government-regulation position may also negatively affect the sharing economy. To illustrate, the license requirement is widely considered to have put an end to sharing activity.¹¹⁷ In response to the frequent occurrence in 2018 of criminal activity involving private ride-hailing passengers, the Chinese government published an urgent notice requiring local governments to conduct a comprehensive review of existing drivers in ride-hailing services, and to comprehensively remove unqualified vehicles and drivers before December 31, 2018.¹¹⁸ This meant that vehicles and drivers without licenses or permits could not provide ride-hailing services from January 1, 2019. Since the newly introduced licenses or permits system requires the ride-

110. See Rita Liao, *The End of Ride-Sharing Gig*, TECHCRUNCH (Jan. 1, 2019), <https://techcrunch.com/2019/01/01/end-of-chinas-ride-sharing-gig/> (discussing recent regulation of ride-hailing services).

111. See Eric Biber et al., *Regulating Business Innovation as Policy Disruption: from the Model T to Airbnb*, 70(5) VANDERBILT L. REV. 1561, 1608 (2017) (discussing the benefits of applying older regulations to newer industries).

112. See *Antitrust Investigation*, *supra* note 101 (determining that regulations include but are not limited to China's Anti-Monopoly Law, the Provisions of the State Council on the Standard for Declaration of Concentration of Business Operators).

113. See Biber et al., *supra* note 111 ("In an ideal world, neutrality would offer a level playing field between incumbents, the innovators of today, and the innovators of the future.").

114. *Id.* at 1566.

115. *Id.* at 1567.

116. *Id.* at 1581–82.

117. Liao, *supra* note 110.

118. Ministry of Transport and Ministry of Public Security, URGENT NOTICE ON FURTHER STRENGTHENING THE SAFETY ADMINISTRATION OF ONLINE CAR-HAILING AND PRIVATE PASSENGER CAR SHARING, effective Sept. 10, 2018 (China).

hailing vehicle to operate as a commercial one, the additional insurance and maintenance costs to drivers makes one wonder whether this is the end of the ride-sharing economy in China.¹¹⁹

V. POSSIBLE REGULATORY APPROACH IN THE FUTURE: A CRITICAL ANALYSIS

Previous discussion has shown that China's current regulatory approach has two features: one is the adoption of a multi-party regulatory approach, and the other is a neutral regulatory approach. This part critically explores the future of these two regulatory approaches.

A. *Multi-Party Regulatory Approach*

This article considers that China's existing regulatory approach is likely to continue on two bases: (1) the contextual perspective, as is shown in China's position towards the sharing economy, and (2) the international perspective, which indicates a convergence in regulatory approaches.

First, it is rather clear that China's regulators will probably continue to adopt various approaches to the regulating of the sharing economy, which is now recognized as an "accommodating and prudent principle" in an official document.¹²⁰ This principle is understood to be that there has to be a "multi-party coordinated governance mechanism jointly participated in by the government, platform enterprises, industrial associations, resource suppliers and consumers."¹²¹ For now, there is limited available information concerning this principle, so it remains to be seen how it will be applied, and how effective it will be in regulating the sharing economy.

The approach is probably reasonable because of the different legal and economic rationales behind the three regulatory approaches. This suggests that a rational approach might be the combination of the three approaches. Self-regulation may take into account the platforms' interests, and it remains to be seen whether full protection of passengers and drivers is provided. Market-based regulation helps by benefiting passengers and drivers, but its impact may be time-limited, as the platforms' responses imply. And government regulation can have a long-term impact but may not be as accommodating of innovation as is self-regulation. If properly managed, the government can serve the guidance role, and permit the platforms to introduce innovations, and thus the market returns to equilibrium, for the government is kept informed by a filing, or recordation, system. In this way, the government can adopt the trial-and-error approach, codify the rules that balance the benefits of different stakeholders, and address negative externalities.

119. Liao, *supra* note 110.

120. National Development and Reform Commission et al., GUIDING OPINIONS ON PROMOTING THE DEVELOPMENT OF THE SHARING ECONOMY, *supra* note 40.

121. *Id.*

Second, international experience suggests also that this multi-party regulatory approach is a reasonable choice. Exempting the strict prohibition of the sharing economy in some jurisdictions,¹²² the regulatory approaches of all jurisdictions involve various parties operating on different tiers. The first type of regulation to occupy the regulatory scene is the government regulations that govern the sharing activities directly.¹²³ These regulations may either apply non-sharing rules to sharing activities, or design novel rules that regulate the “platforms instead of supply-side and end-users.”¹²⁴ Applying non-sharing-specific rules may also introduce “ill-fitted” problems, such as those in China. While designing novel rules can bring multiple effects,¹²⁵ those rules may also be nothing more than “reactionary and piecemeal.”¹²⁶

The second type of regulation is self-regulation (like the self-regulation of innovators, or of the platforms). If they can manage it properly, innovators should be willing to conduct self-regulation, since “they have an incentive to look after their communities” for greater profit.¹²⁷ This approach is implemented through monitoring mechanisms such as reputational review that facilitates the establishment of trust among suppliers and consumers, and the issuance of quality products or services.¹²⁸ Reference to the “reputational review mechanism” suggests further the necessity of platform users’ (the service providers and consumers) capacity to be responsible.¹²⁹

Attitudes to self-regulation vary worldwide. A number of jurisdictions have left the regulation of the sharing economy to self-regulatory mechanisms.¹³⁰ Others have taken the middle path by cooperating with the sharing companies to find “common ground.”¹³¹ It is essential to keep in mind that the efficiency of self-regulation relies primarily on “the ability of [a self-regulation organization or a platform] to enforce its rules and regulations.”¹³²

122. Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, *supra* note 27, at 65.

123. *Id.* at 66.

124. *Id.*

125. For instance, it could prevent fraud and promote safety by “[p]lacing non-delegable responsibilities on platforms [that] will encourage platforms to better screen participants, inspect shared assets, and regulate supply-side use.” *Id.* at 66–67. It could help “[s]olv[e] the regulators’ revenue woes” by “requir[ing] the platform to collect and pay taxes.” *Id.* at 67. It would also safeguard the benefits of the sharing economy by imposing additional requirements on the platform, because imposing existing regulations on it would stifle the benefits it brings. *Id.* at 68–69.

126. *Id.* at 64–65.

127. Arvind Malhotra & Marshall Van Alstyne, *The Dark Side of the Sharing Economy...and How to Lighten It*, 57 COMM. ACM 24, 27 (2014).

128. Koopman et al., *supra* note 14, at 540–43.

129. For instance, given the consumers play an essential role in rating/reviewing the service provided, it is recommended by some scholars that consumers should avoid “[o]verly high expectation,” and “manage their expectations, treating their provider as a peer and not expecting the conditions of a traditional service alternatives.” Gemma Newlands et al., *Recommendations for the Sharing Economy: (Re-)Balancing Power*, at 4.2 (Jan. 2018), <https://www.bi.edu/globalassets/forskning/h2020/working-paper-version-for-web-power.pdf>.

130. Stokes et al., *supra* note 13, at 32; *see* Katz, *supra* note 17, at 1126 (“[R]egulators should not simply allow the sharing economy to grow in the shadow of the law. Allowing the sharing economy to self-regulate would not adequately safeguard consumers.”).

131. Stemler, *supra* note 15, at 64.

132. Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-To-Peer Sharing Economy*, 82 U. CHI. L. REV. ONLINE 116, 126 (2017).

The extent of the enforcement powers, as well as the forms to enforce their rules, require further discussion in a separate paper.

The third approach is to rely on the market, or more precisely, on the competition of rivals in the new market. It is observed that competitive firms are often quicker than government regulators to point out the substandard services of their rivals.¹³³ This is the expected outcome in well-functioning self-regulated markets that have instituted firm checks on improper behavior, since “[b]ad actors get weeded out fairly quickly through better information, reputational incentives, and aggressive community self-policing.”¹³⁴ Obviously, the market regulation depends on a mature market. The situation in different countries varies.

That notwithstanding, there are at least two issues that have not been properly dealt with in the multi-party regulatory approach. One is the unclear dividing line between government regulation, market-based regulation, and self-regulation. The other is rule fragmentation that arises from divergent local regulations. As a prime example, some rules set forth higher price requirements on ride-hailing cars than on cruising taxis.¹³⁵ Other rules have imposed requirements on the drivers’ household, which has also been criticized for restricting the sharing economy excessively.¹³⁶

B. *Neutral Regulatory Approach*

China currently adopts a neutral approach. In other words, its regulators tend to apply the existing rules of the traditional economy to new sharing activities. This tendency can be seen, for instance, in its regulatory approach to defining the legal status of participants in the online taxi-booking, and the entry-permit regime. However, it is questionable whether and to what extent the “old wine in a new bottle” approach fits the specialisms of the sharing activity in China. In other words, what are the negative effects of applying old rules to the regulation of sharing activity? Are there any sharing-specific regulatory challenges facing regulators which cannot be handled properly by these existing rules? How can China deal with these challenges when there is nothing to adopt from the regulations that govern the traditional taxi industry? Is there a chance that future technology innovations will enable sharing economy to move into “uncharted waters” with few pre-existing rules under traditional economy?

Most prominently, there is a major challenge that is not properly dealt with under the current regulatory regime. How should the regulators maintain a proper balance between regulation and innovation? Sharing activity (such as ride-hailing) is an innovative business in China. It is different from the traditional taxi industry because the supply-side of the sharing economy consists

133. Koopman et al., *supra* note 14, at 543.

134. *Id.*

135. Huang et al., *supra* note 12, at 8.

136. Report on China’s Sharing Economy Development 2018, *supra* note 89, at 34.

of micro-entrepreneurs¹³⁷ running “micro-businesses.”¹³⁸ The implicit element here is that the service providers are sometimes not professionals.¹³⁹ However, China’s current regulations treat professionals and non-professionals in much the same way.¹⁴⁰ In particular, ride-hailing drivers and cars are required to obtain licenses or permits, just like the drivers of the traditional taxi industry.¹⁴¹ This constitutes an additional cost for sharing activities, which might not be supportive of innovative industry.¹⁴² Take as a germane example the requirements imposed on cars by the Shanghai Municipality: to obtain the necessary car license, the driver must absorb the additional cost of car insurance, which entails the purchase of three types of insurance: (i) that required for commercial cars as compulsory traffic-accident liability coverage; (ii) that required for commercial motor vehicles as third-party liability insurance; and (iii) that required for passengers’ accidental injury.¹⁴³

Second, there exists much uncertainty in sharing economy actors’ legal status, and that is a major challenge faced by regulators. The full gamut of legal problems that this will raise are not anticipated by the traditional legal framework. Previous research has suggested that the involvement of the platforms in transactions blurs the lines between the traditional relationships,¹⁴⁴ which creates uncertainty in the determination of liabilities in almost every category of relationship (e.g., employment, tax, and civil rights).¹⁴⁵

Such uncertainties exist in major regulatory documents. As discussed earlier, the *Interim Measures* require that the platform companies enter into employment contracts, or *other agreements*, with the drivers. However, it is still uncertain as to whether the labor contracts or agreements specify the legal status of the platform and the drivers.¹⁴⁶ A provision of the *Interim Measures* gives the platform the flexibility to determine “various forms,” or different types, of employment contracts, by referring to “working time, service frequency, and other particularities.”¹⁴⁷ This is reasonable, as providers of this “labor-driven” platform vary in regards to “personal circumstances” such as “intensity, level of

137. Woskko, *supra* note 15, at 7, 13.

138. Stemler, *supra* note 15, at 41.

139. Aloni, *supra* note 33, at 1419; Zale, *supra* note 33, at 983.

140. General Office of the State Council, GUIDING OPINIONS ON DEEPENING THE REFORM AND PROMOTING THE HEALTHY DEVELOPMENT OF THE TAXI INDUSTRY, *supra* note 67.

141. *Id.*; General Office of the State Council, PROVISIONS ON THE ADMINISTRATION OF CRUISING TAXI OPERATING SERVICES, *supra* note 43.

142. Liao, *supra* note 110.

143. SEVERAL PROVISIONS OF THE SHANGHAI MUNICIPALITY ON THE ADMINISTRATION OF ONLINE CAR-HAILING BUSINESS SERVICES, *supra* note 68, art. 8 (China). However, there is also an argument that innovation and public safety should “go hand in hand” in the development of the sharing economy. For instance, Andrew Duffy and Meghan Hurley, *The Uber Effect: How the “Sharing Economy” Has Shaken Ottawa’s Taxi Industry*, OTTAWA CITIZEN (May 29, 2015), <https://ottawacitizen.com/news/local-news/the-uber-effect-how-the-sharing-economy-has-shaken-ottawas-taxi-industry>.

144. Gabriel Doménech-Pascual, *Sharing Economy and Regulatory Strategies Towards Legal Change*, 7(4) EUR. J. RISK REG. 717, 717–18 (2016).

145. Katz, *supra* note 17, at 1092.

146. See generally Zou, *supra* note 84 (discussing difficulty of labor relationship classification of ride-share drivers).

147. INTERIM MEASURES FOR THE ADMINISTRATION OF ONLINE TAXI BOOKING BUSINESS OPERATIONS AND SERVICES, *supra* note 61, art. 18 (China); Zou, *supra* note 84, at 286.

control, and location.”¹⁴⁸ So logically, the different types of labor contracts result in different legal statuses, rights, obligations, and liabilities for both contracting parties. For instance, fixed-term and dispatch labor arrangements “tended to be associated with a lower degree of employment protection”¹⁴⁹ in comparison with non-fixed-term agreements. The forms of these labor contracts, and the understanding of these particularities by the courts that hear disputes with regard to them, are yet to be seen.¹⁵⁰ Government regulation could be strengthened in this regard, in order to reach a balance between drivers and platforms. However, this does not mean the platform (self-regulation) or the market (market regulation) is absent from the regulations.

Third, the sharing economy has introduced a wider range of externalities being impacted by the sharing economy. The negative consequences of those externalities involve the community, the market, the environment, the economy, and existing market players, just to name a few. The challenge is to determine whether and when there are substantial negative impacts that pertain to specific sharing activities. A legitimate concern, for instance, is the negative impact on traffic congestion, and on the environment.¹⁵¹ However, there is yet no systematic body of information from which conclusions about these matters might be drawn.

VI. CONCLUDING REMARKS

The booming of China’s sharing economy will in all likelihood continue if everything goes smoothly.¹⁵² Understanding China’s regulatory approach to the sharing businesses would benefit not only existing sharing businesses but also

148. Newlands et al., *supra* note 129, recommendation 4.2.

149. Zou, *supra* note 84, at 286.

150. *Id.*

151. According to the statement of Zhengyu Zhou (the director of Beijing Municipal Transportation Committee) in 2016, the online-taxi hailing industry has partly resulted in intensified traffic congestion in Beijing in 2015. However, there are also opponents of this statement. They argue that the analysis leading to the statement is unjustified. *See, e.g.,* Hexun Mingjia, *Yongdu Jiaju Yu Wangyueche Chuxian Shijian Wenhe, Zhende Shi Zheyang Ma [Coincidence Between Intensified Congestion and The Emergency of Online-Taxi Hailing: Is This True?]*, HEXUN (Oct. 10, 2016), <http://news.hexun.com/2016-10-10/186347537.html>; Hao Ni and Shasha Yang, *Wangluo Yueche Beizhi Jiaju Beijing Chengshi Yongdu, Didi Laozong Hanyuan [Online-Taxi Hailing Being Accused of Exacerbating the Congestion in Beijing: CEO of Didi Considered It as a Misunderstanding]*, GLOBAL TIMES (Jan. 27, 2016), <http://finance.china.com.cn/industry/kj/20160127/3565194.shtml>.

152. There are three major reasons. First, it is in line with China’s crucial, albeit slow, economic transition from a manufacturing-reliant economy to one focusing more on (IT FEELS LIKE A WORD IS MISSING HERE). Hugh Harsono, *Embracing the Sharing Economy for Growth in China*, TECH CRUNCH (Apr. 10, 2016), <https://techcrunch.com/2016/04/10/embracing-the-sharing-economy-for-growth-in-china/>. The same opinion can be seen in Emily Rauhala, *Forget Car-Sharing. In China, You Can Rent Umbrellas, Basketballs, Washers—For a Fee*, WASH. POST (Aug. 18, 2017), https://www.washingtonpost.com/world/asia_pacific/forget-car-sharing-chinese-companies-peddling-shared-umbrellas-and-basketballs/2017/08/17/b716c4c8-830b-11e7-82a4-920da1aeb507_story.html?utm_term=.68830ca717ad. Second, the Chinese government relies on the service sector to provide employment-intensive occupations that absorb workers shed off by heavy-manufacturing industries. James Yan, *China’s Booming Sharing Economy*, FOREIGN AFFAIRS (Nov. 9, 2017), <https://www.foreignaffairs.com/articles/china/2017-11-09/chinas-booming-sharing-economy>. Third, China has the largest population of smartphone and scan-and-pay app users, and that is a huge facilitator of the sharing economy. SHANGBANNIAN ZHONGGUO ZHINENG SHOUJI SHICHANG YANJIU BAOGAO [CHINA’S SMARTPHONE MARKET RESEARCH REPORT FOR THE FIRST HALF OF 2017], IIMEDIA (2017), <http://www.iimedia.cn/56041.html>.

those seeking to enter the Chinese market. The spirit of China's regulatory approach is visible in its approach to the regulation of online taxi-booking services, a typical and frequently used service in China's sharing economy. An analysis of China's regulatory approach to the ride-hailing industry shows that it has adopted multi-party regulation and the neutral approach.

First, although China's regulatory response relies largely on government regulation, one should not overlook the complementary approaches, that is, self-regulation and market-based regulation. This response further shows that China has already started to apply the principles of accommodation and prudence in regulating the sharing economy, in that it relies on multiple parties to perform the governance role. That said, a dividing line between government regulation and complementary regulation is not available yet. Second, China adopts a neutral approach, in that it tends to apply the existing rules of the traditional economy to new sharing activities. This tendency reveals itself, for instance, in its regulatory approach to defining the legal status of participants in the sharing economy, and in regulating the market in terms of promoting competition.

However, applying "old rules" to the "innovative industry," as is the case in China, can hardly deal with all the sharing-specific challenges. A telling example is the similar entry permit requirement which has resulted in an additional cost to sharing activities, which might not be supportive of the sharing economy. It is necessary to further clarify the legal status of participants themselves, and to unify the criteria and practice in defining the employment relationship. Moreover, there is a need to initiate an in-depth empirical and systematic analysis of the negative externalities of the sharing economy.

This article argues that the platform providers and the market could play a positive role in dealing with these sharing-specific challenge for at least two reasons. One reason is that the platform providers have the incentive to enhance their marketplace by surpassing their rivals. A more reasonably defined employment relationship would attract more drivers to use their platform and accordingly, more passengers in the long run. However, government regulation should not be absent from the process. It needs to work with market regulation, and with self-regulation, to allow innovation while addressing the negative externality. Additionally, government regulation needs to address the "loopholes" and "overregulated issues" in self-regulation and market regulation. To illustrate: In the regulation of labor, the role of the government should be strengthened, as self-regulation and market regulation may not be efficient in this area. Another example lies in the leverage capacity of the platforms,¹⁵³ which may use their capacity to pursue dominant positions, and to create barriers (such as entry requirements) to other participants. Government regulations should address such over-regulated issues to deter potential oligopolistic behaviors, and to encourage innovation.

The other reason is that the platforms can respond to the market more quickly than the government, as was shown by the quick response to the safety concerns of *Didi* and *Meituan*. However, self-regulation and market regulation

153. Boix-Palop, *supra* note 15.

would be improved by taking public opinion into account in a more efficient way. Taking the most recent *Didi Hitch* safety rules as an example, the more effective collection is needed of public opinion on the rules. Beside the enforcement of self-regulation, market regulation and government regulation require further attention,¹⁵⁴ because the enforcement powers, and their means of enforcing rules, are not yet formalized.

Recalling the unclear dividing line between government regulation and self-regulation, self-regulations are capable of yielding quick, innovative and sharing-specific regulatory responses, from which government regulators can review and evaluate the nature and operational impact regularly. Also, government regulators could pilot and evaluate these rules in a specified period. For instance, they may adopt a sunset clause and experimental regulations to pilot these rules. Both regulatory instruments are temporary ones, with the evaluation process left to the aftermath stage: a sunset clause can be renewed if the final evaluation verifies the existence of an exceptional circumstance, and experimental regulation also comes with an evaluation before becoming a permanent regulation.¹⁵⁵ In any case, the approach throws the regulators into a dynamic learning and evaluation process, which would finally result in keeping pace with innovation.¹⁵⁶ And the regulators can issue government regulations until these challenges are properly handled by the innovative service providers.

154. See Cohen & Sundararajan, *supra* note 132, at 126 (explaining that the efficiency of self-regulation relies primarily on “the ability of [a self-regulation organization or a platform] to enforce its rules and regulations.”).

155. Ranchordás, *supra* note 23, at 205–206 (2015).

156. *Id.* at 206.