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Mind The Gap: Assessing Ride-hailing Apps in Latin America and the Caribbean

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Introduction

Ride-hailing apps are present practically in every country from Latin America and the Caribbean (LAC). In places like Colombia and Brazil, they entered the market as early as 2013 – 2014 respectively, according to research authored by Resende and Lima. Apps like Uber, Cabify and Didi have emerged and generated pressure on the traditional private transport market. Using the data of Brazilian municipalities between 2014 – 2016, Resende and Lima found that "*Uber's entry into the market resulted in an average reduction of 56.8 percent in the number of rides from [the other] cab-hailing apps in the cities where the platform operates*".

On one hand, ride-hailing apps can contribute to addressing market failures like information asymmetries (for example, passengers usually don't know the exact price of a ride, whereas the app can show the exact price before the ride) as well as the absence of coordination (v. gr. passengers usually don't know the exact locations where they can get a taxi, while the app facilitates the meeting between driver and passenger). These efficiencies are usually transferred to consumers, in line with the findings of the Mexican competition authority's recent opinion on ride-hailing apps.

On the other hand, ride-hailing apps have been criticized because of their lack of regulation and due to the regulatory asymmetry with respect to traditional means of transport, especially taxis. In other words, there are no requirements imposed on ride-hailing apps concerning professional licences or price and security regulations, which are currently applicable to taxis. In recent years, taxi drivers have presented complaints and suits before competition authorities accusing ride-hailing apps of price-fixing or taking recourse to unfair competition.

This blog post examines how LAC competition agencies have assessed ride-hailing apps in the context of antitrust and unfair competition proceedings, as well as concerning their advocacy activities. The text surveys key case law and opinions on regulatory proposals associated with ride-hailing apps issued in Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Paraguay, and Uruguay. The database of competition cases and reports in digital markets in Latin America that was used to write this blog post can be accessed here.

Unfair competition cases

In December 2019, Colombia's SIC upheld that Uber incurred in *unfair competition methods* against taxi drivers, by operating as a public transport service without the legal requirements, suspending the app in Colombia. However, the SIC's ruling was overruled in the appeal.

In Chile, the Competition Tribunal (TDLC) rejected a lawsuit presented by taxi drivers against Uber, Cabify and Easy Taxi claiming ride-hailing apps took recourse to unfair competition, predatory pricing, and abuse of dominant position through their activities. In general, the complaint related to whether those infringements of private transport regulation could constitute an unfair competition method in the sense of the Chilean competition regime. In this regard, the evidence showed that the ride-hailing app activity was not regulated, apart from the obligation of registration on the Ministry of Transport. At the same time, there was not any declaration by the regulator that would have declared an infringement. Therefore, no competitive advantages by apps would have been derived from the alleged conduct. This ruling was upheld by the Chilean Supreme Court.

It is worth mentioning that in Colombia, the unfair competition regime is regulated by a separate body of laws that are not part of the antitrust law regime. Unfair competition lawsuits are adjudicated by judges and by the SIC through judicial proceedings that follow civil law procedures, while antitrust conducts are investigated and sanctioned by an agency that follows administrative law procedures. In contrast, in Chile, the tort and competition law regimes coexist. In the case of the latter, the competition regime kicks in when the conduct can obtain, increase, or maintain a dominant position in the market.

Antitrust analysis: Case law and competition advocacy assessments

LAC competition authorities have addressed competition concerns related to ride-hailing apps and have concluded that the lack of regulation does not necessarily imply that the operation of these mobile applications constitutes anti-competitive conduct.

In Brazil, the *Conselho Administrativo de Defensa Econômica* (CADE), held that competition authorities are not allowed to address the legality of applicable regulations. Similarly, the Uruguayan competition authority, *Comisión de Promoción y Defensa de la Competencia (CPDC)*, also held that it was not competent to enforce regulatory infractions.

Nevertheless, the most common competition assessment of digital markets conducted by LAC agencies addressed regulatory proposals that aimed at regulating the operation of ride-hailing apps or simply prohibiting these apps. The agencies have addressed regulatory asymmetries between taxis and ride-hailing apps and whether such asymmetries could generate unfair competitive advantages in favour of apps. At this point, it is worth noting that calls for regulation usually have exceeded "pure" competition issues, including other topics like taxation differences, the classification of drivers as workers, and the obligation to comply with local transport regulations, i.e., professional licences, mandatory insurances, among others.

From an antitrust perspective, the Brazilian competition authority held that Uber did not incur price-fixing when interacting with their drivers, because the drivers between themselves are not direct competitors in the market. CADE concluded that Uber's activities did not take the form of *hub-and-spoke* conduct either, because the app did not allow the exchange of information between

drivers. The only situation in which anti-competitive conduct could take place, according to the agency, would consist of a direct agreement among Uber drivers to alter the pricing algorithm. No evidence was submitted to the agency to prove that this was the case. Moreover, the Brazilian antitrust agency held that the app effectively eliminated price competition between its drivers by standardising the means for setting prices with the algorithm. However, this ancillary restriction could improve consumer welfare by reducing the total price in the market charged to the consumer. In parallel, the existence of multi-homing between apps in cases of price increases could enhance consumer welfare, too.

Additionally, LAC competition authorities have analysed potential entry barriers for actual and potential ride-hailing apps operating in the market. According to the Ecuadorian competition agency in a recent report on these apps, *Superintendencia de Control del Poder de Mercado* (SCPM), the regulation established a requirement according to which the taxi mobile apps could only operate if they are approved as a "*locally legally established*" transport operator, and the requirement to use taximeter could create entry barriers to current ride-hailing apps. However, in a subsequent opinion, the SCPM concluded that Uber, Cabify and Easy Taxi should comply with the same legal standards that are applicable to taxis. Moreover, the SCPM suggested reforms to the rules that required taxi apps to be developed in Ecuador.

Is there a need for (de)regulation?

Regarding the need for new and specific regulations directed at ride-hailing apps, CADE acknowledged in two separate working documents (find here and here) that some of the market failures suffered in the traditional taxi market were eliminated precisely by the business model of ride-hailing apps. Therefore, the agency claimed that there should be fewer regulatory requirements for these apps to enter the market in relation to the burden that traditional taxis bear with them. More recently, the competition authority criticized a legislative proposal that froze the percentage of these ride-hailing apps' fees during the COVID-19 crisis.

In Costa Rica, the *Comisión para Promover la Competencia* (COPROCOM) concluded that regulation should only attend to those market failures that were not resolved by the ride-hailing app business model. At the same time, some competition authorities have recommended the introduction of specific regulations for ride-hailing apps. Additionally, COPROCOM suggested the introduction of regulation to establish security standards and neutrality regarding the use of information on these apps. According to the agency, information, namely commercial and personal data, can constitute an essential facility for operating in the market.

In Paraguay, the *Comisión Nacional de Competencia* (CONACOM) also recommended that new regulation should only include those necessary requirements that can correct market failures. In this line, the agency suggested that certain types of regulations should be avoided, such as limits to the number of licenses, geographical limits, and direct price regulation.

In Mexico, COFECE recommended a new category of transport service to be created in the regulatory realm which would apply to apps, along with special regulations for car licences and the obligation to publicise the calculation method of the app's price imposed to the final user.

In Ecuador, after a series of protests organized by the cab drivers' trade unions which called for regulating ride-hailing apps, the SCPM published a public statement recommending that any

decision on the regulation of platforms should "*promote the existence of competitive and efficient markets, oriented towards the elimination of burdens, barriers and distortions, preserving the welfare of consumers and their right to access to quality services*".

Finally, the TDLC held in the ruling that this kind of innovation should be addressed by both legislation as well as sectoral regulation. The court considered ride-hailing apps as a "disruptive technology" that could restructure or create new markets, among others, because some companies could leverage network effects to obtain rapid rates of growth.

Conclusions

Competition law agencies in LAC jurisdictions have analysed ride-hailing apps, addressing issues such as the irruption of innovation, their efficiencies compared to taxis and whether there should be applicable regulation of traditional markets to a digital environment. In this context, it seems fair to say that the common response by LAC competition authorities has been to support the introduction of the regulation that allows the transference of efficiencies to consumers while establishing minimum requirements applicable upon ride-hailing apps as it would upon any private transport with the limitation that those requirements do not amount to significant barriers to entry to the market.

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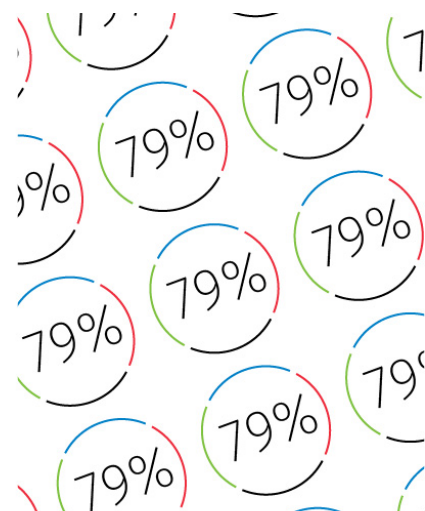
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