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Session III: Practical approaches to assessing digital platform markets for competition law enforcement

Challenges for the Ecuadorian competition authority in analysing digital platforms: the case of commercial land passenger transport applications

– Contribution from Ecuador¹ –

1. Introduction

1. The benefits of healthy and effective competition in markets, as one of the cornerstones of competition law and the backbone of all policies implemented by market regulatory authorities worldwide, lie in the attainment of consumer benefits that translate into lower prices, better products, innovation and, more broadly, greater efficiency than would be obtained under monopoly conditions (Whish and Bailey, 2012, p. 3).
2. The technological innovation inherent to economic development in markets and the exponential growth in the population's access to the Internet has encouraged the emergence and consolidation of new modalities that facilitate the supply and demand of goods and services – primarily through digital platforms. In many cases, these have disrupted the competition conditions in “traditional” markets.
3. These platforms have their genesis in the accelerated digitalisation of the global economy, which has brought about new systems of production and consumption of goods and services, following major technological advances in telecommunications, and which have a close relationship with what is known as the “sharing economy”, a concept linked to the “peer-to-peer economy”. This concept can be applied to organisations emerging around the peer-to-peer business model, in which platforms are used to rent, sell, lend or share goods, as distinct from traditionally established business models such as shops, banks, agencies and so on (Alfonso Sánchez, 2016, p. 235).
4. Faced with this reality, governments have taken on new responsibilities in relation to its citizens, who, until these technologies emerged, were forbidden or restricted from participating in the various segments of the value chain that they can now access from the palm of their hand.
5. Against this background, the aim of this contribution is, in brief, to explain the situation, its challenges, and the perspective from which Ecuador's market power authority could focus its analysis of the impact of digital platforms, particularly in relation to the commercial land passenger transport market.

¹ This contribution was prepared by Jorge Duque and Francisco Dávila. Liability disclaimer: The nature of this article is purely academic, in so far as it represents a personal opinion of its authors and in no way suggests the expression of an institutional position by Ecuador's market power authority. Consequently, the contents of this document should not be used for private interests.

2. Competition in the sharing economy

6. Wallsten (2015, p. 3) defines the sharing economy² as the phenomenon of converting the unused or under-used assets owned by individuals into productive resources. This paradigm is exemplified by how collaborative platforms make it possible to utilise vehicles' idle time, so that, instead of simply sitting parked, they can provide transport services. Thus, the sharing economy generates benefits by facilitating connection between under-used assets and consumers willing to pay for services that those assets could provide.

7. Platforms based on peer-to-peer networks, such as those for commercial land passenger transport services, augment the benefits of the sharing economy, in particular by eliminating two barriers to performing the same commercial activity within the context of a traditional market, namely:

- (1) Transaction costs, which in this market refer to the reduction in the costs of establishing appropriate mechanisms for verifying contractual conditions, particularly driver reliability, prices, route and safety.
- (2) The information asymmetry that directly affects the quality of the services offered and can even cause, as Akerlof pointed out (1970, pp. 488-500), a phenomenon of adverse selection that ultimately causes the deterioration or collapse of the market. Such a situation is in no way exaggerated if one observes the position of Ecuadorian consumers in their use of the standard taxi service, where a deficient service and perceived lack of safety causes demand to decrease and, correlatively, the market to become smaller.³

8. In this regard, as Domenech (2016, p. 69) points out with reference to the Uber platform:

“The advances [...] make it possible for any urbanite who possesses a mobile phone to be able, with a simple ‘click’, to easily and quickly contact, at practically any time and in any place, another person willing to transport them by means of a private car for a price fixed in advance. Electronic payment mechanisms eliminate the risks and inconveniences associated with cash payments for both parties. And the fact that users can very easily find out how the services provided by a particular driver have been rated by many other users, and vice versa, largely neutralises information asymmetries between the two.”

9. It is therefore clear that, for the time being, consumers can derive various benefits from the use of digital platforms; however, the crucial point for determining any competitive effect is what rules can be produced to regulate their operation in each of the markets where their presence has an impact.

10. This is because uncertainty around the rules applicable to each commercial activity that can be catalogued as “new” by virtue of its assumed business model can lead to contradictory administrative and judicial decisions. This fact would mean stagnation in the development of sharing economy systems beneficial to society, by making more risky –

² Also referred to as the peer-to-peer economy, mesh economy, collaborative economy or collaborative consumption.

³ See El Comercio: “Users’ bad experiences when travelling by taxi”. Available at: <https://www.elcomercio.com/actualidad/quito/malos-ratos-que-pasan-usuarios.html>.

and therefore more expensive – the investments needed to create, establish and refine them (Domenech, 2016, p. 71).

11. In addition, the “*regulatory neutrality*”⁴ that currently confronts the interface between suppliers operating within digital platforms and traditional companies prevents the normal and efficient exercise of competition in the market, given that sharing economy operators – due to their disparate business models – tend to evade the regulations that standardise the functioning of the traditional markets they break into. This gives them significant advantages over the companies that must, by contrast, observe a series of requirements in order to gain a place in the market.

12. This neutrality due to the lack of regulation of new economies is the result of the speed with which sharing economy platforms have developed, as well as a lack of understanding of their operational particularities in comparison with traditional services. This has overwhelmed the capacity of regulatory bodies to enforce the current regulations, with the result that digital platforms can evade compliance with regulations that, in principle, do not apply to them.

13. This in no way implies that this “*regulatory neutrality*”⁵ should be remedied with identical regulations, but that these should be adapted to the reality of each service or product offered, prioritising effective competition in the market and consumer welfare.

14. Generally speaking, it is conceivable that the lack of legal certainty governing the behaviour of each operator in the transport market could have the effect of strengthening traditional businesses’ incentives to engage in anticompetitive conduct to maintain market share, for example, by colluding over sharing particular markets, or engaging in exclusive dealing in certain lines of business or routes, designed to restrict any potential driver to operating only within the traditional parameters (ACCC, 2015, p. 22).

15. In this same context, the lack of regulation that expressly delimits the rights and obligations of each economic operator in the market may lead to an abuse of rights, through the unjustified use of legal actions that aim to, or have the effect of, restricting access to the market, or the continued presence in the market of current or potential competitors, initiated against collaborative platforms by traditional companies or their representatives (Ghuman, 2017, pp. 2-7).

16. In Ecuador, these collaborative applications emerged in the middle of this decade and, in recent years, have gained ground in the markets, as well as recognition, acceptance and loyalty by users. This means that their competitive effects are still unclear.

17. What does seem to be clear – at least from preliminary analysis – is users’ growing preference for using them, due to their more favourable perception of the quality of service they provide compared with their traditional sector equivalent (Wallsten, 2015, p. 3); this

⁴ The term *regulatory neutrality* is used in the context of competition law to define when government-owned companies are exposed to the same regulatory environment as private companies, in order to maintain competitive neutrality between them. In this case, we are adopting the concept to refer to a regulatory comparison of collaborative digital platforms with those of economic agents present in traditional markets.

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is why Ecuador now faces a debate between the need to regulate such platforms and the need to deregulate traditional services, in order to promote effective competition between the two.

3. Commercial land passenger transport market in Ecuador: a description of the current situation

18. Traditional markets have successfully established themselves on the basis of regulations that establish strict compliance parameters allowing the performance a specific economic activity. This is precisely the case for the commercial land passenger transport market, which, like many others, tends to be heavily regulated in a way that limits access by new competitors.

19. The implementation of new technologies through platforms based on peer-to-peer⁶ networks, i.e. those that enable supply and demand between equals, allows any person to be a potential provider of transport services, without requiring compliance with all the requirements demanded of traditional providers.

20. From consumers' point of view, this technological phenomenon has been widely accepted worldwide, due to the benefits their use brings them, which include: efficient allocation of resources, safety, better prices, better quality in the provision of the service and reduction in the information asymmetry that exists when the market is monopolised by a single type of service provider, which can impose conditions on users, such as the "night tariff".⁷

21. The dilemma (encompassing mobility, competition, labour, etc.) that is being discussed at length between authorities and providers that have traditionally worked in the affected markets, focuses on the need to regulate, or in more extreme cases eliminate, the application of new technologies for the provision of passenger transport services.

22. Ecuador has not been immune to these technological advances, and has witnessed the arrival of new collaborative platforms, from their first appearance in the domestic market with the Easy Taxi application (now absorbed by Cabify), which allowed users to link up with a traditional or yellow taxi driver, followed by the market entry of the Cabify and Uber applications, which increased their market share in a short time. Currently, users also have access to the services provided by the inDriver transport application, which uses a real-time supply model.

23. The arrival of these platforms has generated controversy and assertions of all kinds from traditional providers of commercial land passenger transport services. An example of this was a recent protest by the taxi drivers' union right across the country, which took place on 17 July 2019, leading several agreements being signed by the Government of

⁶ Facilitates connections between citizens (peers) who need to travel and other citizens (peers) who own cars with unused seats and offer peer-to-peer transport services.

⁷ In Ecuador, this is a price-setting method based, in principle, on the distance travelled, and is arbitrarily set by traditional transport service providers – taxis. This results in unpredictable price fluctuation for the user, i.e. assigning different conditions for the same service. For example, whereas a trip in the morning costs between USD 1.50 and USD 2.00, the same trip can cost between USD 4 and USD 6, on average, at night. Added to this, myriad other empirical factors can make the service more expensive, such as the nationality of the user, due to ignorance of the national transport system.

Ecuador. In relation to these digital platforms, the government committed the Ministry of Transport and Public Works and the Ministry of Telecommunications to “*analysing the possibility of suspending these platforms through the radio spectrum*”,⁸ by virtue of rejecting the lack of regulation under which digital transport platforms operate in Ecuador, with the corresponding reduction in their revenue.

24. In the light of these events, Ecuador’s Competition Authority – the Superintendencia for the Control of Market Power – as the enforcement authority for the Organic Law for the Regulation and Control of Market Power (*Ley Orgánica de Regulación y Control del Poder de Mercado*), whose aim, as set forth in its Article 1, is “*efficiency in markets, fair trade and the general welfare of consumers and users, for the establishment of a social, supportive and sustainable economic system*”, in a letter addressed to public-sector organisations and entities, as well as to economic operators of land transport and digital mobility platforms, took the view that, within the scope of its responsibilities, “*any decision in this regard should promote the existence of competitive and efficient markets, geared towards removing burdens, barriers and distortion, preserving consumer welfare and consumers’ right to access high quality services*”.

25. That being the case, it should be noted that the debate has, in fact, now gone beyond the need to protect the particular interests of a sector of the commercial land passenger transport market towards the viability of regulating or deregulating that market, in order to secure effective competition, with consumer welfare and consumers’ right to access goods and services of the highest quality, as well as to make free and informed choices, as its ultimate goal.

3.1. Characteristics of the commercial land passenger transport market

26. As a reference point for delineating the structure of the commercial land passenger transport service market in Ecuador, we will use the data available for the city of Quito, information that will allow us to gain a rough idea of the scenario in the rest of the country.

27. According to the latest estimates from Quito City Council, Ecuador’s capital is currently the city with the highest population density in the country, and has around 16 024 vehicles that provide a taxi service, distributed into 126 cooperatives (Mobility Commission, 2017). This situation enables us to deduce the bargaining power, regarding the terms and conditions for the provision of commercial land passenger transport services, that the taxi drivers’ union has regarding the municipal regulatory authorities in the setting of minimum transfer tariffs.

28. Comparing the number of units that provide the services relevant to this study, Quito has a statistic of 61.5 units for every 10 000 inhabitants. This is lower than those of cities such as Buenos Aires (120), Mexico City (156), Bogotá (62) and Lima (74), but above those of Santiago de Chile (40) and Rio de Janeiro (33) (Quito City Council, 2017).

29. An important and continuing aspect of the taxi market in Ecuador – particularly in Quito – is the informality in the provision of this service, given that it is offered both by individuals who do not satisfy the requirements and municipal permits or any affiliation

⁸ El Universo: “Taxi drivers and Government agree on regulatory aspects for digital transport platforms”. Available at: <https://www.eluniverso.com/noticias/2019/07/17/nota/7429551/taxistas-gobierno-acuerdan-puntos-regulacion-control-plataformas>.

with a registered cooperative,⁹ even prior to the arrival of digital platforms on the market. This market condition is combined with bureaucratic and economic barriers imposed on the provision of this service, together with the country's socio-economic reality, mainly influenced by the increase in its unemployment rate.

30. Although there are no confirmed data, due to the informal nature of these providers, it is estimated that, in Quito, there are some 13 300 informal taxi operators, representing around 45% of the total number of vehicles dedicated to transporting people in the city of Quito (2017). Many of these informal operators have switched to providing their services through collaborative digital platforms.

31. According to the same statistics processed by Quito City Council (2017), it is estimated that around 226 352 taxi journeys are made per day, where the average waiting time for the arrival of a vehicle ranges between 5 and 10 minutes, creating an unsatisfied demand in the provision of this service.

32. It is precisely this unsatisfied demand, in terms of supply, quality and price, that creates an incentive for new operators to enter and compete in the market. As mentioned above, since 2015, new providers of commercial land passenger transport services have emerged in Ecuador, through the use of peer-to-peer platforms in a sharing economy context.

33. The companies Cabify (2016), Uber (2017) and inDriver (2018), whose core business involves connecting private drivers with users who require transport services, have become competitors that have contributed to positive externalities in the population, due to the setting of competitive¹⁰ tariffs based solely on distance criteria, through the implementation of algorithms. This differs from traditional taxis, which follow two parameters when setting their prices, namely time and distance.

34. Andrade (2019) states that digital transport platforms provide greater reliability in terms of transport safety to users, who use them for their availability, in contrast to taxi services, in respect of which customers say that the service is acceptable or poor.

35. In order to corroborate the negative evaluations that are commonly voiced against taxi services, Quito's City Council (2017) conducted passenger surveys. These identified that 22% of passengers had had experiences where taxis did not use the taximeter – the only source of information for establishing the fare – a situation that results in charging higher prices than those prescribed by regulation.

36. The facts described above have led to the commercial success of multinational peer-to-peer transport applications in the Ecuadorian market, generating competitive pressures not only between platforms, but also for traditional providers of commercial land passenger transport services.

37. However, it is worth mentioning that the platforms are a service not included in the regulations established for traditional transport service providers, so the latter attempt to leverage unrestricted implementation of those regulations to restrict and impede market access by collaborative technology initiatives.

⁹ See, for instance, El Comercio: “USD 47 for each taxi driver for 19 fares per day”. Available at: <https://www.elcomercio.com/actualidad/taxista-recaudacion-taxis-carreras-economia.html>.

¹⁰ Minimum average tariff is 1.5 for Uber and 1.99 for Cabify.

4. Barriers to entry into the traditional land passenger transport market.

38. The traditional business model for commercial land passenger transport in Ecuador is based on the use of taxis,¹¹ whose argument of greater preponderance that has formed the basis on which the complaints have been levied against the digital platforms offering this type of services assumes that their lack of fulfilment of the minimum requirements to be catalogued as such constitutes unfair competition.¹² For example, there is reference to the expenditure needed for a taxi unit to be recognised, namely: taximeter, radio frequency, colour of the vehicle and vehicle adaptations (FEDOTAXIS, 2012).

39. However, far from creating efficiencies in the transport market, such regulations and technical requirements¹³ have consolidated an unyielding commercial land transport system that can encourage acts of corruption due to the limitations imposed on the borrowers' vehicle fleet, through the granting of quotas controlled by each decentralised autonomous government in Ecuador. The granting or resale of such quotas have proved to be a lucrative business in connection with which former members of the Council of the Metropolitan District of Quito are currently being investigated¹⁴ for alleged criminal conspiracy, extortion and unjustified private enrichment.

40. The suitability of the current regulation on the commercial land transportation of passengers in Ecuador has therefore been demonstrated to be obsolete, given that, as well as having been the precursor to the consolidation of a single source of service provision in the market analysed, with the consent of the public administration, it has incompatibilities with Article 394 of Constitution of the Republic of Ecuador, which expressly states that “[t]he State shall guarantee the **freedom** of overland, air, sea and river **transportation**

¹¹ Up to five passengers, pursuant to Article 62(2) of the Regulation on the Organic Law on Land Transportation, Transit and Road Safety.

¹² Article 27(9) of the Organic Law for the Regulation and Control of Market Power. 9. Violation of rules: It is considered unfair to prevail in the market by means of a significant advantage acquired as a result of abuse of judicial or administrative processes or the breach of a legal rule, such as an infringement of environmental, advertising, tax, labour, social security, consumer or other rules, without prejudice to the provisions and penalties that would be applicable according to the rule infringed.

Competition in the market without the corresponding legal authorisations constitutes an unfair practice when the competitive advantage obtained is significant.

¹³ Organic Law on Land Transport, Transit and Road Safety and its Regulations, Regulations for the Qualification, Acquisition, Installation, Technical Support and Use of Mobile Applications for Fleet Dispatch, through GPS Navigator Global Positioning and Telecommunications in the Vehicle Units provided by the Commercial Transport Service in Executive and Conventional Taxis (*Ley Orgánica de Transporte Terrestre, Tránsito y Seguridad Vial y su Reglamento, Reglamento para la Calificación, Adquisición, Instalación, Soporte Técnico y Uso de Aplicativos Móviles para el Despacho de Flota, a través del Posicionamiento Global GPS Navegador y Telecomunicaciones en la Unidades Vehiculares que prestas el Servicio de Transporte Comercial en Taxi Ejecutivo y Convencional*).

¹⁴ According to the information gathered in the prosecutor's investigation of the case, by Pichincha public prosecutor's office, those implicated allegedly handled around USD 80 million, charging around USD 2 000 to 5 000 for each taxi quota. Plan V. “City of Quito shaken by complaints about penalties”. Available at: <https://www.planv.com.ec/historias/pol%C3%ADtica/el-municipio-de-quito-sacudido-por-denuncias-sobre-coimas>.

within the national territory, ***without privileges of any kind***” (emphasis added), as well as the relevant law on this matter, whose guiding principles are set out in Article 2, as follows:

*“This law is based on the following general principles: the ***right*** to life, ***free transit and mobility***, the formalisation of the sector, combating corruption, ***improving the quality of life of citizens***, preserving the environment, de-concentration and de-centralisation, interculturality and the inclusion of people with disabilities.*

*In the area of land transport, transit and road safety, it is based on ***equity*** and social welfare, ***persons’ right to mobility*** [...]” (emphasis added).*

41. It is therefore clear how barriers to entry, mostly generated through the current regulations, represent substantial damage for the consumer, since they are tied to predetermined government choices that unjustifiably favour a single type of provider of these services.

42. Naturally, the extensive discussion that needs to take place in order to standardise access by new competitors to the commercial land passenger transport market in Ecuador should undoubtedly be aimed at determining whether the services provided by some (taxis) and by others (Uber) are substitutes or if they are operating in the same services market, taking into account the particular characteristics of each, in order subsequently to propose regulations that promote competition and benefit consumers.

5. Conclusions

43. Market movements in response to the unsatisfied needs of consumers have promoted the emergence of new deregulated economic operators. These contrast with the rigidity that prevails in traditional markets and compels anyone who wants to provide a particular service to comply with technical and regulatory requirements, as licenses for operating within an established structure that, for various reasons, has proven obsolete.

44. In Ecuador, regulations and the affirmations of some authorities show a tendency to adopt measures prone to maintaining the status quo of traditional operators of commercial land passenger transport services, without taking into account the effects of the sharing economy, digital platforms, their technical specifications, or the positive effects they generate for consumers.

45. It is therefore envisaged that, in the short term, as has happened in other countries, economic operators that have traditionally operated in such markets will begin to bring a series of complaints with various authorities aimed at diminishing the presence of digital platforms in the domestic market.

46. Consequently, we believe that the current rules for the regulation of commercial land passenger transport services do not take into account the current characteristics of that market or the effects of the arrival of collaborative platforms, but rather tend to restrict the entry of new competitors, to the detriment of consumers.

47. In the light of the information presented, Ecuador’s market power authority is making the necessary efforts to generate analysis instruments that can gain a clearer picture of the structure of the commercial land passenger transport market, in order to propose its regulation or deregulation, in the face of the robust incursion by digital platforms into Ecuador’s traditional markets.

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