Uber and Cabify in Mexico: New market, New service… same anticompetitive conduct?

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A lot has been said over the last few months about Mexico's new Transport Network Enterprises (TNE), that is, Uber and Cabify. In terms of competition policy, there is still no unanimous opinion on how these services should be regulated. On the one hand, several European countries and Brazil's major cities have banned the service. On the other, the United States has left regulation up to locals, avoiding as much as possible any interference with the development of these platforms. The European Commission is even conducting a study into the matter, hoping to find a solution that will not limit or impede the development of technology which brings with it these new industries, combining virtual businesses with traditional companies with physical assets (the so-called "brick and mortar" kind.)

There is more agreement on the positive aspects brought by these platforms to the passenger transport market. Among others, they correct market failures such as asymmetrical information and, in Mexico's case, improve security, hygiene and rate transparency. For these and other reasons, Mexico's Federal Competition Commission (COFECE) has decided to issue a formal opinion about the need to regulate this new market, without imposing undue barriers to entry or expansion.

So far we have the same regulatory issue faced by the majority of countries where these companies operate: How to integrate private and public passenger transport services, and how to integrate virtual businesses with tangible or physical ones during an important technological shift.

Little has been written, however, on some possible monopolistic practices that could be taking place within these markets, at least in the terms understood by Mexico's competition law (Ley Federal de Competencia Económica, LFCE).

From the start, Uber and Cabify have had to defend themselves from continuing allegations of failures to comply with labor, fiscal and administrative policies, etc. In answer to these accusations it's not uncommon to hear Uber spokespersons argue that the vehicles, which provide the service, are Uber's "Partners" rather than employees working for the company. It has been said many times that Uber is a platform that connects drivers with potential passengers. In labor terms, this description can be particularly useful in avoiding some duties to their drivers. However, as we shall see, in terms of competition this policy can bring about certain conducts that could be seen as detrimental to competition, and which the competition authorities have, so far, failed to clarify.

In fiscal terms, in Mexico, any time the service is used the customer can request a fiscally valid receipt. Of course, the agent issuing the receipt is not Uber, but rather a different service provider on each journey. This supports the idea that drivers are individual service providers “partnered” with Uber.

If we accept that Uber is simply a platform with partners instead of workers, no matter what legal definition we use to define their relationship, we should think of Uber as an association, with drivers as members regulated by that associations’ statutes and policies. Something like a 21st Century Virtual Association. While this definition is debatable, this article will take it at face value.

This is where problems first crop up in terms of competition policy. What we have is a company/association which is, basically, coordinating all of it’s “partners” and setting prices for their services. While these rates may be competitive, if we stick to a literal interpretation of Mexico’s law on absolute monopolistic practices, the fixing of prices among competitors is itself against competition, whether by design or effect.

Uber’s “partners” are obviously competing with one another. They operate in the same market, serve the same customers and one “partner”’s service places a competitive pressure on the others. Regarding an agreement, it’s clear that all partners must, in order to become one, accept a set of conditions and fulfill certain requirements, so we can say that there is an accord to set rates. As well as rates for mileage and time, a flat minimum rate is applied to each trip. In this case, the setting of a minimum rate could be considered not just a “Hard” monopolistic behavior, which is the subject at hand, but also as a minimum resale price, should we analyze the market through a Relative monopolistic perspective.

Price-setting is one of the service’s basic features, precisely allowing greater transparency. However, the fact that we think these prices are adequate should not distract us from the fact that they are in fact fixed prices, set not by a public policy but by the orders of a private company. We mustn’t forget that Uber receives a small percentage of each trip, and therefore the placing of a minimum rate has no purpose other than to increase everyone’s profits, both for the drivers and for Uber. If this weren’t enough, Uber didn’t use to charge a minimum rate, and yet the company was highly profitable, for itself and for its drivers. The act of setting a minimum rate, therefore, has only succeeded in artificially raising prices (and slightly calming the rage of taxi drivers serving the less wealthy customers.)

In its opinion on TNEs, COFECE recommends that rate schemes are not established by any new regulations and, although it doesn't explain why, it's likely because these could act as a barrier to competition. So, if a public policy regulating rates is not desirable, why should it be more so when the private company itself imposes on its drivers, who compete with one another, the rates they are to charge?

COFECE itself seems to give more legitimacy to Uber's price setting than it does for traditional taxi's public rates, if only because the former's fluctuate according to supply and demand. While it's true that Uber's rates vary according to supply and demand, these are always above, never below, their set minimum rate. Why shouldn't a driver be allowed to accept a lower rate, if he wishes? Better yet, why not create more competition among drivers and have them bid on the lowest rate, even below the minimum rate, if he needs to make more trips that day?

In this sense, and to look at some examples of similar platforms that allow greater price flexibility, we can turn to *Airbnb* or to *Booking.com*. These two platforms allow people or businesses to advertise their available rooms, with total freedom to set any price they want. Neither Airbnb nor Booking.com apply a uniform or minimum rate. They simply charge a percentage on the total value of the reservation.

Uber and Cabify, besides charging a small percentage for each trip made by their partners, have decided to implement minimum rates. This way, they know the minimum earnings from each trip, regardless of supply and demand, the time of day or season.

Moreover, Booking.com has recently tried to reduce this freedom in pricing by invoking *Most-favored nation* clauses. These clauses, imposed by the platform, basically limit a business' ability to offer a lower price outside the platform than that offered through it. In other words, Booking.com will not allow a company which advertises through their platform to offer better rates on other platforms, or on their own websites. Booking.com is trying to insure it will always be able to match the lowest price in any other site. Even if these clauses are looking to keep a lower price, they create competition problems by limiting business owners' ability to offer special rates and discounts without having to pay Booking.com. While they may operate different platforms and markets, the situation is not too different from Uber's refusal to allow its drivers to offer better rates.

Anyway, in order to determine whether this price-fixing is anti-competitive we will have to wait for authorities to determine whether companies such as Uber and Cabify should be classed as forming a single legal/economic entity along with their partners, or whether they are merely platforms, with no connection to partners and users.

We may not have to wait too long before finding another anti-competitive issue. Last week Cabify, hoping to be more competitive, brought down its mileage and time rates. While this is undoubtedly positive for consumers, in my opinion the most significant part of this was its reduction of the minimum price per trip, which went from 55 to 40 pesos, matching Uber.

At the moment we're all happy with the change, as it will increase competition between the platforms. But what happens when this minimum rate climbs from 40 pesos to 45? Will we feel the same way? Coordination, oligopoly and price transparency. Perhaps technological progress only brings us new services, with the same old traditional practices.