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On January 14, 2021, Paraguay's National Competition Commission (Comisión Nacional de la Competencia, "CONACOM") published OPINION/RD N° 01/2021, related to the *regulation of personal transport services in vehicles hired through digital apps*, looking to provide both municipal and national legislators, as well as the public at large, some recommendations regarding the need of regulating this new "phenomenon," considering its peculiar characteristics, with free competition criteria in mind.

In this article we will briefly go over the document, presenting its main conclusions while evaluating its possible repercussions for Paraguay's legislative dynamics.

As the *Opinion* itself points out, it "[...] *has its background in the publicly known events brought about by the launch of mobile applications, MUV during the first semester of 2018, UBER by the end of that year, and more recently BOLT; in the protests that the taxi unions have been staging with increasing frequency and intensity ever since the announcement of the international app's arrival in the country; in legal actions promoted by interested parties; and in the various legislative initiatives with national and municipal scope meant to regulate the activities carried out by said companies.*"

The facts presented in the background are essentially the same that those seen in other

jurisdictions, which have motivated intervention in various forms by other competition authorities, generally speaking, after UBER's arrival in their countries.

The *Opinion* begins by pointing out that, within their own scope of action, various municipalities have regulated individual public transportation services under the "*taxis and chauffeured cars*" modality through Ordinances, which are judicial norms generally applicable and mandatory within each Municipality's territory.

Here, through its *Opinion*, Paraguay's Competition authority seeks, first, to determine whether both modalities of individual transportation service (Taxis and Chauffeured cars on one hand and those that are hired through mobile apps on the other hand) are identical services or not; and, second, to determine whether the personal transportation services in private vehicles hired through digital apps should be regulated or not, and if so, whether existing regulation applicable to the taxi and chauffeured car services is sufficient and applicable to this new modality, or whether it requires its own regulation, while keeping in mind the principles of free competition in the market.

In this context, as further background, the document analyzes the characteristics of "traditional" personal transport in private vehicles (taxis and chauffeured vehicles), and the norms applicable to them. It also,

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separately, analyzes the concept of collaborative economy and its impact on the transport sector, pointing out the advantages offered by transport services in private vehicles hired through digital applications, when compared to traditional services: (i) knowing the availability of drivers and waiting times in real time, (ii) knowing the identity of the driver and car details ahead of time, (iii) planning the travel route ahead of time, therefore knowing the price for the service before boarding, allowing these prices to be compared with the one offered on similar platforms or even by taxi drive, and eventually benefitting from lower prices thanks to the dynamics pricing used, (iv) guaranteeing delivery of a legal receipt or invoice for the service, sent directly to the user's e-mail account, and (v) evaluating drivers and passengers, so measures can be taken to address those who do not meet the required and desired standards.

Regarding the legal nature of personal transportation service in vehicles hired through digital applications, in consideration of its peculiar characteristics and after reviewing and comparing doctrines and jurisprudence, the Opinion concludes that this does constitute a new mode of transportation, different from the traditional Taxi and chauffeured vehicle services. Their differences also lead to the conclusion that pre-existing regulation related to taxis and chauffeured cars cannot simply be applied directly.

Moreover, as the Opinion points out, “[...] *the absence of applicable regulations or a disparity in the criteria over which regulation corresponds appears to have one unavoidable conclusion: legal uncertainty [...] Furthermore, faced with*

these legal vacuums, it is not at all outrageous to think that the competent authorities may end up applying uneven legal criteria that noticeably undermine the agents involved in the new activities in question.”

Quoting Geradin (2015),² the *Opinion* points out that authorities have two options: to resist market entry by these new services and face years of lawsuits, which are likely to result in favorable decisions allowing them to operate legally; or, the more preferable choice, to embrace technological development and the appearance of these new economic models, and adopt regulatory frameworks allowing these digital apps entrance to the market and making them possible to compete with taxis and chauffeured cars. Therefore, it concludes, this new modality of transport in vehicles hired through digital applications must be regulated only in order to correct its own market's failures and protect the rights of consumers and third parties by establishing the rules of the game for service providers and their competitors.

Well, what are the principles that should be considered when a regulation is chosen as an option? First, the regulation must respect the rights enshrined in the Constitution, particularly the right all persons have to engage in the legal economic activity they prefer within a context of equal opportunity (free concurrence), and the regulator's obligation to guarantee free competition in the markets, and not allow the creation of monopolies, to ensure that under no circumstances should private interests prevail over common interests and to remove the obstacles or factors that may create or lead to discrimination and weaken the equal rights of all persons, including the right to legal

² Geradin, D. (2005) Should Uber Be Allowed to Compete in Europe? And If so How?, CPI Europe Column, <https://www.competitionpolicyinternational.com/should-UBER-be-allowed-to-compete-in-europe-and-if-so-how/>.

employment, chosen freely and under fair conditions.

Considering these constitutional principles, regulation should also respect the principles of efficient economic regulation, meaning it must be (i) **necessary**, that is to say, it should be directed towards mitigating or correcting market failures that jeopardize the common interest, (ii) **proportionate**, in that no other measures or alternative dispositions exist that would cause fewer distortions in the market, and (iii) **non-discriminatory**, as it must not favor any group of competitors or impose unnecessary burdens that restrict entry and participation in the market, or that imply unnecessary or excessive costs for drivers, platforms or users, especially when considering that service providers on these platforms are private individuals.

The regulatory response towards new business models in the collaborative economy should follow the common interest, and not the routine, allegedly acquired rights or particular interests of certain groups of economic agents, whether incumbents or new entrants.

Regarding this point, the *Opinion* highlights the proposal for a Municipal Ordinance from Ciudad del Este, the second largest municipality in the country. In their presentation of motives, Councilmembers warn that, faced with the “[...] *problems caused [...] by the arrival of the passenger transportation system through digital platforms, [...] it becomes necessary and perentory to regulate this new modality of labor that has impetuously blossomed in this new era of the digital world [...] in order to safeguard the rights acquired by taxi services who have worked in the sector for years [...]*,” a justification that stands against free competition as presented in the document.

Considering the principles mentioned above, the *Opinion* dives into a critical analysis of current municipal ordinances in the city of Asunción (the country’s capital) and of the ordinance projects in the municipalities of Ciudad del Este and San Lorenzo, where certain proposals restricting competition were identified such as: a prohibition on picking up passengers within 100 meters of a taxi stand; limiting the number of licenses per person, with the clear goal of preventing the formation of fleets; the prohibition on a single vehicle being used by more than one permit-holder, or only allowing the vehicle’s owner themselves to drive said vehicle; the requirement for a special license, years of prior experience and minimum age requirements in order to become a service-providing driver; maximum limits on the age of vehicles; and rates that are to be regulated by the municipal authority.

A separate mention should be made of the tax inequity claimed by the local company in this sector, *MUV*, inequity that allegedly exists between competing national apps and those established abroad, such as *UBER* and *Bolt*. In theory, the lower applicable tax burden and invoicing systems used by foreign companies and the drivers that provide their services (who only issue invoices “upon request” from the user in every case) would give them a competitive advantage by allowing their costs structure to be lower than that of local companies, allowing the price of their services to be lower and therefore skewing the playing field in this market due to a factor that depends directly on the State, that is, the tax system.

Now, *CONACOM* has found that, stemming from a recently issued resolution by the Under-Secretary of State for Taxation (“*SET*”), part of the Ministry of Finance (General Resolution N°

76 from December 28, 2020), expressly determining the way in which foreign companies must present their Value Added Tax (“VAT”) and Income Business Tax (“IRNE”) statements and payments, considering the price of commissions earned for every trip hired and completed through their apps, the country’s Tax Authority is looking to level the playing field regarding the tax obligations of both national and foreign companies.

The above, without prejudice to recognize that these dispositions would not force foreign companies to implement the same internal platform-driver billing system by the local company, and there’s a chance that the level of oversight is not optimal. Regardless, CONACOM recognized that the SET had taken important steps in trying to ensure that taxation does not become a factor that distorts or prevents free and fair competition in the market, providing artificial competitive advantages for one sector among other.

Otherwise, the *Opinion* concludes with the following recommendations:

i. With the understanding that we are faced with a new modality of transport, different from the traditional (taxi) forms, that must be regulated according to its peculiar characteristics, the competent authorities must establish their own regulatory frameworks for this type of business model in order to, through the use of clear rules, eliminate legal insecurity and uncertainty in order to incentivize the entry and participation of new agents in the market for passenger transport, and to protect users;

ii. Regulation frameworks must not favor a group of competitors or impose unnecessary regulatory burdens on others. They must be based only on the common interest, not on routine, allegedly acquired rights, or the particular interests of specific groups of economic agents, whether incumbents or new entrants, or on their nationality;

iii. Regulations must be made within a framework of respect for the right to free competition, employment, and equality among the inhabitants, establishing only those requirements that are necessary for correcting market failures and negative externalities and to protect users; that is, it should consider that regulation is neither a goal or an end, but an instrument; therefore, it must respond to the principles of necessity, proportionality and non-discrimination. Following this, any regulation imposed:

- Must not establish a limited number of licenses per municipality.
- Must not establish limits on licenses (*numerus clausus*) per person.
- Must not establish territorial (municipal) boundaries for providing services.
- Must not establish prohibitions on picking up passengers in specific areas, near to *taxi* stands or other highly foot-traffic areas within the same municipality.
- Must not establish limits relating to the age of vehicles, leaving the

question up to their ability to pass a technical vehicle inspection.

- Should establish mandatory insurance with minimum coverage that adequately insures the user and any third party of eventual indemnity for all damages and injuries that may result from the service being provided.
- Must not require special driving licenses or permits, but only licenses that correspond to the kind of vehicle that will be used to provide the service.
- Must not require driving licenses from a particular municipality. Any license properly issued by any municipality in the country must be accepted.
- Minimum experience should not be required.
- Must not demand a minimum age to become a service-providing driver if above the age required for obtaining a driver's license.
- Must not regulate rates charged.
- Must not establish mandatory schedules or minimum work-days. The determination of maximum work-days should obey technical criteria related to safety.

- Must not prohibit one vehicle being exploited or used by more than one person.
- Must not impose an obligation for the driver to also be the owner of the vehicle.

Finally, CONACOM's board of Directors, acknowledging the difficulties to analyze the impact of regulations and the formulation of public policy when evidence and data are practically non-existent, highlighted the need to gather data and information that will allow regulators and public policy-makers to have more tools for making decisions and a more accurate view of reality, and encouraging the elaboration of technical studies prior to the issuing of rules that may affect several constitutional rights, as mentioned.

Before we conclude, we should point out that, following the publication of the *Opinion*, the Mayor of Ciudad del Este vetoed the Municipal Ordinance project whose positions, as pointed out, go against the recommendations of the Competition Authority. Additionally, the Municipal Council was unable to obtain the number of votes needed to overturn the Executive's veto. This could definitively be seen as the first positive sign in favor of creating regulation that closely follows the constitutional and legal principles of free competition, taking into account CONACOM's technical recommendation