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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

**Session I: Disruptive innovation in Latin America and the Caribbean:
Competition enforcement challenges and advocacy opportunities**

-- Contribution from Portugal --

12-13 April 2016, Mexico City, Mexico

The attached document from Portugal is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



14th Latin American and Caribbean Competition Forum 12-13 APRIL 2016, Mexico City, Mexico

Session I: Disruptive innovation in Latin America and the Caribbean: Competition enforcement challenges and advocacy opportunities

-- CONTRIBUTION FROM PORTUGAL* --

1. Disruptive Innovation: challenges for regulation and competition policy

1. Disruptive innovations raise important challenges for competition law enforcement. By definition, they stir the *status quo* in sometimes otherwise mature markets, and may foster competition, open avenues for achieving efficiencies and deliver welfare gains to consumers. Disruptive innovation has an impact in competition analysis, from the early stages of market definition - as disruptive innovations frequently reshape the competition arena and blur market boundaries -, to the competitive assessment, where account must be made of likely market dynamics.

2. The disruption in the market environment and the threat to long-standing market positions may also trigger reactions by incumbents, who may seek to hinder innovation in an attempt to protect their future stream of profits (see De Streel & Larouche, 2015). Incumbents' strategic reaction to disruptive innovation may encompass M&A activity or even anticompetitive behaviour. In these instances, competition enforcement is key to remove barriers to innovation and competition, both through merger control and antitrust enforcement.

3. When disruptive innovation takes place in a highly regulated market, further challenges emerge. If the regulatory framework is made obsolete by disruptive innovation and fails to keep pace with the dynamics of the market, regulatory provisions may distort competition in the marketplace. They can favour incumbents, if raising unjustified barriers to entry (*e.g.*, *numerus clausus* restrictions), but they can also unevenly impose unnecessary burdens on established firms (*e.g.*, licensing obligations), compromising their strategic reaction towards innovators. Obsolete regulatory provisions may thus hinder the level-playing field between "traditional" players and innovators.

* Contribution by the Portuguese Competition Authority.

4. To that respect, competition agencies can play an important role in collaborating with policy makers and sector regulators, in the discussion of the impact of the current regulatory standing as well as of potential new regulatory approaches.

2. The boom of the sharing economy

5. Even if not all sharing economy activities can be labelled as disruptive innovations, the sharing economy boom is very much related with disruptive innovation. In many cases, the disruptive effect of the sharing economy does not arise from significant innovation in the product or service that is being provided but, rather, from new ways in distributing a given product or service. This is the case of online platforms and mobile applications connecting consumers and providers of accommodation services (*e.g.*, Airbnb) and transport services (*e.g.*, Uber). These activities thus stand as a paradigmatic illustration of the challenges brought about by disruptive innovation to regulation and competition policy.

6. The sharing economy has been at the forefront of international policy debates, as authorities strive to fully understand its particularities, dynamics and impact. Legislators, regulators and competition authorities are faced with the challenge of ensuring that the playing field is levelled, tackling barriers to entry and regulation which may restrict competition and dully accounting for the complex specificities of the sharing economy, as well as consumer protection and safety considerations. These regulatory challenges need to be addressed without favouring one business model over another.

7. The link between the sharing economy and market liberalization is evident. In that respect, the contrasting experiences between countries where the sectors exposed to disruptive innovation had been (fully or partially) liberalised and countries where they remained highly regulated are persuasive.

8. The sharing economy also raises the discussion on whether regulation applicable to “traditional” business models needs to be reformed, or if the new business models require specific legislation. In Portugal, a specific legislation was approved on the so-called “local lodging” in 2014¹. This encompasses Airbnb platforms, for instance. The policy choice was to design specific legislation, allowing for flexibility in the provision of lodging services, but ensuring that firms abide fire regulations and fiscal obligations. So far, this legislation seems to be delivering the required regulatory framework for informal types of lodging.

3. The sharing economy and passenger transport

9. The “sharing economy” involves new forms of production, transaction (mostly spot transactions) and consumption. The “sharing economy” competes with long-established means of producing, distributing and consuming goods and services, through the use of technological innovations such as smartphones, digital content and online distribution.

10. While the labelling might not be consensual, passenger transport platforms, such as Uber, may be regarded as an example of “disruptive innovation”. Through the use of technological innovation, Uber became a competitor to traditional taxi services.

¹ Decree-Law No. 128/2014, of 29 August.

3.1 *Uber in Portugal: facts, challenges and developments*

11. Uber started operating in Portugal in July 2014². As in many other jurisdictions, such as the USA, Spain, France, Germany, UK, Brazil, Mexico, or Colombia, in Portugal, Uber has been highly contested by traditional taxi services, mostly under claims of unfair competition and Uber's failure to comply with the existing regulatory framework.

12. The current regulatory provisions in Portugal regarding taxi services are comprehensive, encompassing market entry control (through the definition of *numerus clausus* per administrative region) and the specification of conditions for service provision, including setting taxi fares. IMT, one of the administrative bodies with regulatory duties in the sector, has stated in different occasions that Uber services violated specific national transport legislation^{3,4}.

13. Following a request lodged by one of the two main associations representing taxi owners, a Lisbon Court banned Uber's activities as an interim measure in April 2015. An appeal by Uber of this decision to a higher court is still pending.

14. The controversy surrounding Uber is still ongoing in Portugal. Uber Portugal claims it is not bound by the June 2015 Court Ruling, because the decision was addressed to Uber Technologies Inc., in San Francisco and not to Uber BV and Uber International BV, both headquartered in the Netherlands, which are the sole owners of Uber Portugal. As a result, Uber is still operating in Portugal.

15. In this context, Uber commissioned a study on the perception of Portuguese consumers concerning Uber services⁵. The findings of the consumer survey carried out show a marked divergence in the perceptions of Uber users *versus* Uber non-users. In particular, Uber users are found to have a positive perception regarding Uber quality of service and to value prior knowledge of the price range and the convenience of service. For non-Uber users, however, the findings show a less positive perception on Uber quality of service.

16. The Uber debate seems rather widespread. Court Rulings over Uber's activities in several jurisdictions invariably point to existing regulation on passenger transport provided by vehicles with driver, and to Uber's potentially unfair competition practices *vis à vis* incumbent taxi services. By contrast, the emergence of Uber-like operators in jurisdictions where taxi services had already been partly or fully liberalised was much less controversial, and markets were able to smoothly adapt to innovation.

² In Portugal, Uber is providing the services Uber Black and Uber Black. In March 2016, Uber Portugal also launched a new service, UberGreen, which is operated by 100% electric vehicles, free of CO2 emissions. This is a three-month pilot project restricted to Lisbon and Porto, and with tariff system similar to that charged by UberX.

³ Instituto da Mobilidade e Transportes. The former transport regulatory framework was recently subject to a legislative overhaul. There are now two administrative authorities with regulatory duties in the sector, AMT and IMT. The AMT (the Portuguese acronym for Autoridade da Mobilidade e dos Transportes) is a sector regulator, responsible for the economic regulation and the promotion of competition in land, inland waterways and maritime transports. On the other hand, the IMT is mostly a supervisory body, mainly in what concerns technical regulations, licensing, coordination, monitoring and planning in the sector. The IMT is also in charge of managing the concession contracts granted by the State in those, as well as in other, sectors, as for example in air transport and airport infrastructure.

⁴ *Vide* Parliamentary hearing N° 201-CEOP-XII; of April 15, 2015 at <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheAudicao.aspx?BID=99957>.

⁵ Study from “*Centro de Estudos Aplicados da Católica Lisbon – School of Business and Economics*” based on the outcome of a survey to a 600 consumer sample, in July 2015, evenly split in Uber users and non-users.

17. This ongoing discussion coupled with concerns regarding the potential consumer welfare loss from failing to embrace innovation signal the need to revisit the existing long-standing regulation, as it probably fails to address these new business paradigms.

18. Most recently, in March 2016, the media conveyed news regarding the public announcement of a draft package of measures for the modernization of taxi services⁶. According to the press, the implementation of these measures would focus on “*improving the sector’s image, environmental performance and efficiency as well as promoting the introduction of innovation in the provision of taxi services*”. The announced measures also foresee “*a process of bilateral talks with the aim of harmonizing regulation and access to taxi services*”⁷.

3.2 The Portuguese Competition Authority’s advocacy activity

19. The Portuguese Competition Authority (PCA) has been endeavouring advocacy efforts towards the need to reconcile regulatory provisions with innovation and competition principles. The PCA has urged the legislator and the sector regulatory authorities to revisit the current regulatory framework, in order to ensure a level playing field and the removal of unjustified barriers to innovation. It is also important to ensure that traditional taxi services are not unevenly bound to disproportionate regulatory obligations that may potentially limit their ability to compete with innovators. The PCA has also expressed its full availability to work together with the relevant authorities throughout the process of a potential regulatory review, to ensure that competition principles are safeguarded.

20. To be able to actively collaborate in the discussion of the regulatory framework, the PCA is analysing the necessity and proportionality of the current regulatory provisions, taking into account potential market failures that may justify regulatory intervention. This assessment includes the potential impact of disruptive innovations emerging from Uber-like-service in easing market failures. The main focus of the assessment is to understand whether current regulations are necessary for the well-functioning of the market and the potential gains from relaxing regulatory provisions (*e.g.*, in allowing supply to better adjust to demand).

21. In this analysis, the PCA is following international developments on Uber-like services and drawing lessons from deregulation experiences/studies in other jurisdictions.

4. Final remarks

22. The sharing economy brings challenges to regulation and competition that must be embraced within a framework of collaboration which engages competition agencies, sector regulators and policy makers. In addition, at the EU level, an innovation friendly environment can only be achieved if we succeed in avoiding the creation of a patchy regulatory framework that may entail substantial welfare losses for consumers and the society as a whole. The complexity of the task is greatly amplified by the time pressure exerted by fast evolving markets.

⁶ <http://www.dn.pt/sociedade/interior/ministerio-do-ambiente-abre-caminho-a-legalizacao-da-uber-5081245.html>.

⁷ *Idem*.