
Webinar Recap: Digital Ex-Ante Regulation Goes Global

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Below we provide an overview of a recent webinar titled “Digital Ex-Ante Regulation Goes Global” which focused on recent ex-ante legislative and regulatory efforts in digital markets in Canada, Brazil, and Mexico. Amadeu Ribeiro (DLA Piper) moderated the webinar with panelists Commissioner Brenda Gisela Hernandez-Ramirez (COFECE, Mexico), Natalia Caroprese (Uber, Mexico and LATAM), Barbara Luvizotto (iFood, Brazil), and Niki Iatrou (McCarthy Tétrault, Canada).

As the program highlighted, regulators have become increasingly focused on the rise in market power and the growing influence of large digital platforms in the economy. These concerns include economic aspects such as whether these companies are preventing competition, as well as data privacy issues and the speed at which these companies move.¹

Most of these companies operate at a global scale, but regulation is often local and tailored to the local economic landscape. On February 22, the Media and Technology Committee introduced the first of a webinar series that focuses on digital regulation in countries beyond the U.S. and Europe. The series aims to shed light on the unique challenges and opportunities that these countries face in regulating digital platforms and explores how different jurisdictions are adapting and collaborating to face the rapid growth of digital platforms and their impact on competition, consumer protection, and privacy.

The discussion between the panelists centered around the complexities associated with implementing regulation on digital platforms, including:

- The current state and challenges of regulation to digital platforms in the region
- The institutional interplay between competition authorities and other regulatory agencies
- Future challenges in competition enforcement for digital platforms

The current state and challenges of regulation to digital platforms in the region

Mexico

Mr. Ribeiro first turned to Commissioner Hernandez to give her opening remarks. Commissioner Hernandez focused her exposition on the efforts that COFECE (the main competition authority in Mexico) has taken to foster competition while promoting the notion that regulation does not limit innovation, the creation of new business models, or the adoption of new technologies, especially in the context of the rapid development and expansion of the digital economy in Mexico.

Commissioner Hernandez highlighted the importance of active monitoring and regulatory analyses, often conducted as an ex-ante effort, to provide recommendations on legislative efforts and encourage regulating activities in the digital economy. In 2015, COFECE recommended that other government entities recognize transport apps (such as Uber, Cabify, and others) as a new mode of transportation and, hence, regulate them separately from current modes of transportation and limit regulation to the defense of essential public goals, such as security and user protection.²

In 2017, COFECE recommended lawmakers to consider competition principles when drafting a new law to rule FinTech institutions. These principles included neutrality and non-discrimination, proportionality, and flexibility.³ Neutrality and non-discrimination to ensure that activities are equally regulated. Proportionality to ensure that regulation fits the complexity, risk, and business models operating in the market. Flexibility to allow the adoption of new business models and avoid restrictions on innovation. Relatedly, in 2022, COFECE found that in the FinTech laws, there were limits on competition for electronic wallets. They also made recommendations to foster competition while keeping funds managed according to international standards and consumer data protected.⁴

Commissioner Hernandez pointed out that the Commission also focuses on matters related to digital markets which might not be entirely related to competition. The matters include cyber security, personal data protection, the use of big data, and the implications of artificial intelligence for digital markets. She indicated that the commission has worked closely with other Mexican associations and collaborated with international institutions. Together, they have prepared regulatory analysis, held workshops and working sessions, and prepared research reports.

Finally, Commissioner Hernandez highlighted potential new challenges from the digital economy on competition laws and anticompetitive behavior. On this point, Commissioner Hernandez mentioned a 2018 research paper in which COFECE discusses new forms of anticompetitive behavior aided by the use of big data and algorithms.⁵ In the paper, COFECE discusses how these tools may increase the speed of price changes communication, which may facilitate, among other conducts, price discrimination and collusion.

Next, Mr. Ribeiro turned to Ms. Caroprese, Senior Regulatory, Mexico, and Antitrust Counsel, Latin America, at Uber, for comments on her perspective on the current regulatory landscape in the region. Ms. Caroprese clarified that all her opinions are personal, and pointed out that COFECE's 2015 regulatory analysis clarified that the new business models, such as Uber's ride sharing service, were different than the services provided by traditional transport providers, and consequently, these sorts of services should be regulated differently. The analysis conducted by COFECE paved the way for subsequent similar analyses issued by competition authorities in other Latin American countries.

Ms. Caroprese mentioned that in terms of cybersecurity, data protection, and artificial intelligence, there has been work by regulators towards providing recommendations, but that there is nothing yet like the Digital Markets Act (DMA) in the European Union (EU). To this end, Commissioner Hernandez specified that even though Mexico lacks a single, overarching law like the EU's DMA, the Commission has already proposed regulations targeting specific areas.

These proposals focus on protecting workers' rights, particularly those in delivery services and the gig economy; user rights and safety, with regulations proposed for platform-based accommodation services; and consumer rights, with regulations proposed in e-commerce to provide transparency in online advertising, and fair practices in electronic ticket sales. Recognizing the growing importance of digital services, the Mexican government is also exploring regulations for the taxation of digital platforms like ridesharing and food delivery companies. Finally, Commissioner Hernandez mentioned ongoing discussions on developing a proposal for ethical guidelines for the use of artificial intelligence across various industries.

Commissioner Hernandez also sharing preliminary findings of a current investigation into Mexico's online retailers. Commissioner Hernandez mentioned that the investigation has identified a potential lack of healthy competition in the market due to network effects. She mentioned that two major players, Amazon Mexico and Mercado Libre, hold a significant share of the market, at around 61%, and that there are three significant obstacles hindering new competitors from entering the market, including loyalty programs, an obscure "buy-box," and specific logistic solutions that are tailored to the major players. Commissioner Hernandez then clarified that this investigation is not intended to impose sanctions. Instead, it aims to identify potential barriers to fair competition within the online retail sector.

Brazil

Next, Mr. Ribeiro turned to Ms. Luvizotto, who is Managing Counsel at iFood, to discuss the current landscape of regulation of digital services in Brazil. She started by mentioning that Brazil doesn't have a specific regulation that focuses on the specifics of large digital platforms; instead, the Brazilian regulatory environment relies upon existing antitrust legislation to regulate and monitor competition in digital markets. Moreover, Ms. Luvizotto mentioned that modifying existing legislation to specifically

target digital platforms is not necessary. To support this claim, Ms. Luvizotto looked at past merger cases involving digital markets in Brazil in which 99% of the mergers were approved by the country's competition authority ("CADE") without remedies, and that the few cases with alleged abuse of dominance were dismissed or settled.

Ms. Luvizotto then mentioned that Brazil is actively considering regulatory changes. First, in 2022, a draft bill inspired by the EU's DMA was proposed.⁶ Second, a public consultation was recently launched to collect input from industry and government stakeholders on the best path forward regarding the regulation of digital markets.⁷ The consultation aims to determine whether Brazil should follow an approach like the US, with minimal regulatory changes to the current landscape, or adopt an EU-style model with dedicated digital platform regulations.

Finally, Ms. Luvizotto pointed out that Brazil has other laws that impact and regulate the behavior of digital platforms in Brazil that, alongside the existing antitrust law, contribute to the overall regulatory picture for digital platforms in Brazil. Some of these regulations are the data protection legislation that governs the handling of digital personal data and the Brazilian civil rights framework for the internet that sets regulations for the online environment.

Canada

Next, Mr. Ribeiro turned to Mr. Iatrou, who is a partner at the Toronto office of McCarthy Tétrault and a former counsel to Canada's Commissioner of Competition, to discuss the case of Canada. Mr. Iatrou started by mentioning that, in practice, Canada's Competition Bureau has been tackling regulation on digital platforms through amendments to their Competition Act instead of through specific regulations. These amendments aim to equip the Bureau with additional tools to address potential anti-competitive practices in the digital sphere.

These amendments, for example, significantly increase the maximum penalty for anti-competitive behavior from \$10 million (in Canadian dollars) to up to three percent of global revenue and allow the Bureau to subpoena local subsidiaries of global companies to produce information and records that would be in the hands of headquarters, usually located outside of Canada. This substantial increase suddenly gives the Competition Bureau more leverage when dealing with large global digital platforms.

Additionally, the Bureau has broadened the scrutiny of mergers from looking mostly at prices, market concentration, and market shares, to also including factors that would typically get triggered when looking at mergers in the digital markets space.⁸ On top of this, there is a proposal underway to extend the review period from non-notified mergers to three years. This would allow the Bureau to go back and look at acquisitions that perhaps it might have missed within the current one-year framework.

The region

Next, Mr. Ribeiro turned back to Commissioner Hernandez to discuss her general view on developments happening in the region. Commissioner Hernandez highlighted regulatory examples from other Latin American countries and shed light on the evolving regulatory landscape for digital platforms across Mexico and Latin America. In 2022, Chile implemented a law for digital platforms that guarantees worker rights.⁹ In 2023, Chile also implemented a separate FinTech law aimed at fostering competition in financial markets.¹⁰ Additionally, Colombia and Costa Rica have regulations specific to tourism and transportation services,^{11,12} while Brazil focuses on regulating financial technology companies.¹³

The institutional interplay between competition authorities and other regulatory agencies

The discussion led Mr. Ribeiro to reflect on the current state of the legal framework in these countries how it impacts digital platforms and affects competition without being exclusively focused on competition. Mr. Ribeiro then turned back to Ms. Luvizotto to start a discussion around how competition enforcement agencies in the region collaborate and align objectives with other regulatory bodies in their jurisdictions.

Brazil

Ms. Luvizotto mentioned examples in which there is active interplay between different government agencies in Brazil. The first one involves a collaboration between CADE and Brazil's data protection agency (ANPD), in which they both entered into a memorandum of understanding to establish official cooperation between them. The first output of this collaboration was to issue an opinion regarding a change in the privacy policy in Brazil by Meta's messaging app, WhatsApp.¹⁴

Moreover, the current draft bill regarding the regulation of digital markets in Brazil proposes that the Brazilian agency that regulates the telecom market (ANATEL) should also be responsible for regulating the market for digital platforms.¹⁵ The proposal may lead to an interplay between the telecom agency and the Brazilian competition authority (CADE) on topics related to antitrust and competition in digital markets if the draft bill is approved and enacted.

Canada

Mr. Iatrou mentioned that Canada is not really pursuing ex-ante regulations within its competition law but that there are regulations within other agencies that impact competitions, being implemented alongside amendments to the Competition Act but outside its framework. Mr. Iatrou offered examples of regulations that have been pursued by other agencies but that affect competition in the digital space. He discussed the case of a digital services tax on companies with a global turnover of more than 750 million euros,¹⁶ and the case of an open banking law that would allow consumers' data portability between financial institutions.¹⁷

Regarding collaborations between agencies, Mr. Iatrou said that there is a clear overlap between agencies in that each agency has its own ability to investigate separately, and they often do so from different points of view. Some agencies have created formal opportunities to share information, such as the Digital Regulators Forum between the privacy and telecom commissioners,¹⁸ but often those formal arrangements do not exist, and it would be better than they do. In this regard, the Competition Bureau has shown leadership in trying to coordinate, creating instances such as an annual summit in which different agencies within the federal government can meet to discuss.

Mexico and Colombia

Ms. Caroprese then spoke about the current state of collaboration between federal agencies in Mexico and Colombia. Ms. Caroprese mentioned that in Mexico there is a division of authority between COFECE, which oversees competition in most sectors, and the Federal Institute of Telecommunications (IFT), responsible for the telecom sector. This distinction became relevant in the Uber-Cornershop merger case, in which both agencies were looking into the matter, but a specialized court gave the right to COFECE on the grounds that neither of the two entities were true telecom providers, establishing a precedent for similar situations.¹⁹

Ms. Caroprese then compared the Mexican case with the Colombian one, in which one agency, the Superintendence of Industry and Commerce (SIC), holds a wider range of responsibilities compared to Mexican agencies. The SIC acts as the competition authority, consumer protection agency, data protection authority, and handles trademarks, patents, and measurements. Additionally, some sections within the SIC function as courts.

Future challenges in competition enforcement for digital platforms

To conclude the discussion, Mr. Ribeiro turned to the future and asked the panel to give their thoughts about the future challenges that competition enforcement for digital platforms will face and how the panel predicts regulation will adapt to them.

Mexico

Commissioner Hernandez started by discussing the challenges in Mexico. She argued that a comprehensive approach that considers aspects like privacy, consumer protection, and fair competition is needed. She believes that even though it is possible to get a comprehensive law, it is not imminent.

Commissioner Hernandez then commented that Mexico is expecting and watching other jurisdictions that have already decided to build a comprehensive law. In the meantime, authorities will keep relying on existing legal tools and analyzing specific cases, such as mergers (e.g., Uber-Cornershop, as mentioned by Ms. Caroprese) and

potential anti-competitive practices (e.g., the investigation into the online retail markets discussed previously). On this note, Ms. Caroprese added that current local regulations already have tools that can be used before entering into a trend of amending regulations, as these amendments may potentially impact investment and innovation.

Canada

Mr. Iatrou then mentioned that Canada's approach to digital regulation is to focus on existing tools rather than creating new regulations. For example, he mentioned a current proposal to impose stricter merger limitations, but not specifically for digital companies.

However, Mr. Iatrou concluded that regulation should be taken with a grain of salt in the countries of the region and should consider the response that large digital players (e.g., Google and Meta) will have to them, especially considering the smaller size of the countries in the region relative to the rest of the world. As an example, he mentioned the case of the Online News Act, which requires large digital players to pay for the distribution of news published by local news providers.²⁰ In response to it, Google decided to negotiate a fund of a hundred million dollars to cover these fees,²¹ but Meta decided to exit the market and block Canadians from accessing news-related content.²²

Brazil

On Brazil, Ms. Luvizotto agreed with Mr. Iatrou about cautions in small and developing economies and that regulation should consider the completely different landmarks that the economies in the region have with respect to the EU and the United States. She mentioned that the EU probably has a first-mover advantage as they were able to set a footprint first. Finally, she mentioned that regulation should also consider "local champions" that will face competition from global digital platforms.

Endnotes

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