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Catalan Competition Authority Contributions on the antitrust changes in view of the digital economy

Preliminary

The Catalan Competition Authority has been very active in studying possible modifications to the antitrust discipline.

This line of work started several years ago. In particular, right after “*The data-driven economy. Challenges for competition*”¹ was published in 2016, which took place just a few months after we published another meaningful document “*Transactions between peers (P2P). A step forward*”². Those two documents lead us to the conclusion that we were effectively facing a different scenario than the one was in place the moment current antitrust regulation was passed. Consequently, it was more than possible that there was a mismatch between current reality and antitrust regulation.

In view of the need to innovate, we contacted Mr. Ferran Adrià (famous innovative cooker who turned his job into explaining and sharing his methodology to innovate – so called Sàpiens Methodology -). Led by him, we started scrutinizing different elements of the antitrust doctrine and we ended up with a document on a number of possible changes.

At the beginning of this 2020 we organized a series of conferences³ with a number international attendees all related to the need of rethinking competition regulation and update how such bodies should work.

More recently, the Catalan Competition Authority submitted – jointly with the Spanish Competition Authority – a contribution on the consultation on the White Paper on AI⁴.

And by the end of June, the Catalan Competition Authority also sent its “feedback”⁵ in relation to the consultation on a new competition tool⁶.

We have also just produced a response both to the new competition tool consultation and to the Digital Services Act Package consultation.

By means of this document, we aim to summarize the most relevant ideas the Catalan Competition Authority has produced in relation to the need of rethinking competition.

¹ http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/Eco-Dades-i-Competencia-ACCO-angles.pdf

² http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/P2P-Transactions-and-competition-a-step-forward.pdf. We even produced a cartoon explanatory video https://www.youtube.com/watch?v=XzmxEqM86o&feature=emb_logo

³ http://acco.gencat.cat/ca/detall/article/20200115_cicle_conferencies_palau_macaya

⁴ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12270-White-Paper-on-Artificial-Intelligence-a-European-Approach/public-consultation>

⁵ http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/20200707_FEEDBACK-ON-NEW-COMPETITION-TOOL-CONSULTATION-DEF.pdf

⁶ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool/public-consultation>

NEW SITUATION – NEW PARADIGM

Economy is now quite different than how it was traditionally characterized.

Currently most services experience the so-called 0 marginal cost production and at least a number of them are sold at 0 pricing; consequently, it is not to be expected a higher price should there be a dominant undertaking willing to take the benefit of such situation. On the contrary, should there be an abuse of such power it may not affect the price dimension of the service but its quality (strategy that also takes the benefit of the information asymmetry that users experience⁷).

There is another characteristic particularly relevant in the digital or data economy, which is the speed at which it evolves and the difficult of restoring competition once the market has tipped.

Just these two characteristics (even though there are some more such as “price transparency”, hyper personalization, etc.) show that there is not only a need to have a new set of tools (for example to address quality infringements that could take the form of user’s privacy demotion), but also to set a new paradigm that allows for a quicker intervention. In other words, it is not possible to condition the reaction of an antitrust body to have evidence of direct harm on users/consumers. It is required to act before such damage takes place and so the basis of the intervention must shift from the “theory of harm [to final users]” to the “theory of harm to the market functioning”.

NEW MARKET (“DIGITAL”) & NEW BARRIERS TO ENTRY

It is clear that an increasing percentage of the economic activity now takes place in the digital environment.

Antitrust authorities have traditionally work to eliminate barriers to entry. Now, this same task has to be directed towards those barriers to entry to that digital environment.

That digital environment has at least two main characteristics: (i) it is key to be able to make use of new technologies and, particularly, of AI and (ii) there are platforms that put in contact supply and demand and that may even turn into “gatekeepers”.

It is crucial to compete on equal terms in the digital environment to be able to use digital capabilities. First of all, to serve content through the internet (all the discussions on net neutrality), but also to be able to make use of the AI (which in turn requires data, cloud computing, etc.).

And it is also of utmost relevance that those platforms that become gatekeepers (i.e. even though there may not be considered dominant, are key for suppliers to reach a significant percentage of its potential demand – they have significant market power-) restrain from incurring in antitrust infringements. It is important to stress that to be a gatekeeper it is not necessary to be an essential facility, but merely a relevant door to access to a significant amount of potential demand.

⁷ See Appendix A <http://infolab.stanford.edu/~backrub/google.html>.

EX ANTE ACTIVITY TO PRESERVE COMPETITION

The *ex ante* activity are all those actions carried out by regulators and competition bodies to ensure that competition is possible in the market.

We believe it implies two main lines of action. The first one, just mentioned, to guarantee access to the market / contestability and the second one, to prevent antitrust infringement that would hinder competition in the market.

We understand that to guarantee contestability means making it possible that the undertaking leading a market may be substituted for another company (already operating in the market or a new entrant).

Such change is only possible if both supply and demand sides are working properly. As per the supply, competitors should have a chance to become better than the undertaking leading the market and, as per the demand side (i.e. final users) the change of the service providers should be possible (no relevant switching costs) and users should be able to appreciate the quality of such products / services (should have an incentive to make the change from one service provider to another).

This simple description gets quite complex in digital markets. As per the supply side, network effects (besides economies of scale and economies of scope) are particularly present. Network effects make the markets tend to a “winner takes it all situation” and contestability gets particularly difficult as, at least in some cases, data accumulation provides an advantage to those services based on AI (more data makes it possible a better algorithm learning) that is difficult to get reduced by a potential new entrant to the market that does not have such previous accumulation of data (perhaps this is the reason why Google is paying a vast amount of money to be the default search engine for example on IOS devices). In view of this situation, it becomes key that data ownership and control remains in the hands of the users⁸, so that they could decide to give access to all past data extracted from them to new competitors.

In relation to the demand side, things are also particularly complex in the digital environment. The main reason is that there is a significant information asymmetry that makes it especially difficult for users to assess the quality of a given service. So, it is not a question whether “Competition is just a click away” (and so no relevant switching costs) but more on whether users may have the incentives to change. For example, if they do not perceive that the quality of the service is diminishing in terms of their privacy rights they may not even consider a change. Besides, even though competition may effectively be just a click away and so

⁸ We believe the best mechanism to be the one suggested by the EDPS: Personal Information Management System (PIMS): [Opinion 9/2016. "EDPS Opinion on Personal Information Management Systems. Towards more user empowerment in managing and processing personal data"](#)

there may not be relevant switching costs as were traditionally conceived, it should also be taken into account that the existence of network effects may also make it difficult such change (for example, if I am using whatsapp and all my family and friends are using it, to change to a different messaging service would entail not being able to be in touch with them). So, to make it really possible changes from the demand side, first of all it is necessary that users perceive the quality and, secondly, there is service interoperability in place so that there are no switching costs related to networks effects.

Ex ante intervention, is also aimed at preventing competition restrictions from taking place. This *ex ante* intervention should encompass the following actions (at least to be considered):

- To scrutinize all mergers carried out by relevant undertakings to avoid the so-called “killer acquisitions”. There is a higher risk of such “killing acquisitions” since some digitally relevant undertakings have more information on future competitors than relevant undertakings have in the offline world.

The study of such digital mergers should also be different. First of all the risk in terms of competition that digital merger poses are superior than offline mergers. As already explained, we believe those digital undertakings experience strong network effects and markets tend to a winner takes it all structure. Therefore, we believe it is advisable to reverse the burden of proof. In fact, we suggested it 4 years ago⁹.

This suggestion have also positive implications when we are facing mergers explained by the data acquisition it entails. Data can be used in many different markets and, consequently, it is nearly impossible for antitrust authorities to foresee all possible future markets affected. It would make more sense that the undertakings interested in the merge explained what are the intended future usage of such data and the merger being only eventually approved in relation to the market described by the merging parties.

- It is also quite common that competition is hampered by relevant undertakings through subsidizing one particularly unit of its big structure. We believe a “fair play” code of conduct (like in soccer) so that units should be always financially independent.
- Another infringing behaviours in digital markets are those dubbed as “self-preferencing”, when a relevant platform (gatekeeper) tends to favour its own subsidiary that also is selling products or offering services through the same platform. To reduce the risk of this behaviour taking place, it could be eventually even considered the possibility to impose a structural separation.

⁹ http://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/Eco-Dades-i-Competencia-ACCO-angles.pdf

ANTITRUST AUTHORITIES EX POST REACTION TO ANTITRUST INFRINGEMENTS

Preliminary it has to be noted that in the digital markets, antitrust infringement are more difficult to be detected. Therefore, it is crucial that antitrust bodies have a privileged access to data (so that we would not be facing anti-scraping techniques) and all human and material resources to make use of such data and AI techniques to sharpen our detection capabilities in relation to the digital market.

It could also be studied the possibility to reward those claimants that file a claim that finally leads to a final judgement stating the existence of a competition infringement.

Taking into account how difficult it is to detect such infringements it is more than possible that there is some delay between the infringement taking place and the antitrust authority knowing it.

So, this circumstance coupled with the fact that digital markets evolve rapidly (and the risk that the market tips) requires a quick reaction by antitrust authorities.

Unfortunately, not even interim measures make it possible the quick reaction that is needed. Applying them requires not only the *fumus boni iuris* but also the *periculum in mora* notion, which is so strict that it means it is non-applicable to most of the matters. Perhaps this strict interpretation should be much more flexible precisely taking into account that digital markets evolve particularly fast and that there are network effects and the possibility that a market tips that would be extremely difficult to reverse.

Also paired with the difficulty of detection described and the potential damages a competition infringement may cause in the digital markets, the amount of fines to be imposed should be revisited to make them higher. Otherwise it will not be possible to achieve a minimum deterrence effect. The probability of infringement detection should be inversely correlated to determine the sum of the fine.

ANTITRUST AUTHORITIES: A NEW WAY OF WORKING

Competition authorities should strengthen their permeability.

Digital markets pose a magnificent challenge that requires that competition authorities receive all possible help from each other, but also from the whole society (for example, universities) and, obviously from other administrative bodies that are particularly relevant in the digital scenario, such as data protection authorities.

The former EDPS Mr. Buttarelli and his team, started the Digital Clearinghouse initiative which is precisely a forum to strengthen cooperation between data protection, consumer protection and competition authorities¹⁰. In the framework of one of the Digital Clearinghouse sessions we submitted a brief paper on the possibility that some data protection infringements could also be antitrust infringements so that the

¹⁰ https://edps.europa.eu/data-protection/our-work/subjects/big-data-digital-clearinghouse_en

cooperation could not only be restricted to providing and receiving assistance but also have material implications¹¹.

It has also been suggested the possibility to create a Digital Regulator (in the UK, Digital Markets Unit) to execute all *ex ante* activity. However, we believe that antitrust authorities are particularly well suited for assuming such task as Digital regulation will have a primarily goal which is precisely to preserve the proper functioning of markets in terms of competition. Besides, a digital regulation would be a transversal regulation such as competition, and competition authorities enjoy also independence which is also a requirement a Digital Regulator should necessary fulfil.

Finally, in terms of geographical tasks distributions, we consider that the response should include all layers (from European dimension, to state, to regional). Main reason is that the digital activity is not harmless for the brick and mortar world. On the contrary, we are all well aware that some accommodation or hail service platforms do produce significant effects in our cities.

In fact, we believe that regulation¹² should address such externalities and should be GLOBAL (i.e. establish a common framework/approach but at the same offering the possibility to regional/local administrations to fine tune such general approach in view of their specific situation). Externalities may greatly differ between different cities.

Therefore, to monitor the implementation of such regulation, it would be advisable the intervention at different geographical levels which necessary would include regional/local ones.

¹¹ http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/20180130_Long-Term-Impact-of-Big-Tech-Sector-Mergers-2.pdf

¹² Regulation should also make use of the technological capabilities. It should be, as Mr. Xavier Puig (one of our employee's put it) "modern". Regulation should be tailored in different dimensions including time and space.
http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/20180622-Modern-Regulation-Xavier-Puig-2nd-submission.pdf