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ACCO's contribution to the DIGITAL SERVICE ACT workshop

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CORE IDEAS IN 30 SECONDS:

"We like the benefits of digital platforms"

However, competition, taxes and the labour market are not yet designed according to this new digital reality that presents not just benefits but also negative aspects that need to be corrected.

"Guaranteeing market access: The key that opens the door to competition "

It would be a good idea here to define the criteria for determining when a digital platform becomes a Gatekeeper and what structural measure(s) would be the most appropriate for guaranteeing market access. This Gatekeeper definition can even change according to the product or geographical market, so the applicable measures may differ in each case.

"The need for having powers to manage glocal regulation."

Therefore, whether for the purposes of implementing and supervising structural measures imposed on digital platforms or of overseeing sectoral regulation, the ACCO considers it appropriate for a future digital regulator to be structured independently of governments and at various territorial levels (with the consequent delegation of powers), so that an intervention can be made not just at the European level but at state and regional levels too.

"The competition authorities are in the best position to guarantee an appropriate application of the digital regulation."

Digital platforms, then, ought to be regulated by a cross-cutting authority, such as the competition authorities, which also enjoys independence in its actions.

DEVELOPMENT OF CORE IDEAS IN 30 SECONDS:

"We like the benefits of digital platforms"

From the point of view of competition, the digital revolution is having many positive effects. The Catalan Competition Authority (ACCO) already highlighted these effects in a 2014 study entitled "Transactions between equals and competition"¹. This study was mentioned by the U.S. Federal Trade Commission two years later and supplemented with another study by the ACCO entitled "Transactions between equals and competition. A step forward"².

Ultimately, the main benefits to consumers of the digital revolution come from a significant reduction in transaction costs. Thanks to digital platforms, supply and demand are much closer, and entry barriers are, in theory, lower than ever before. Consumers have therefore experienced a higher number of higher-quality options with better prices.

The COVID-19 crisis has accelerated the implementation of digital platforms even more. We have all seen how many companies have been forced to change from the traditional business model to the digital or on-line model and how Amazon, for example, has been currently experiencing extraordinary numbers. Regulators have unfortunately not adapted to the new reality so quickly. For example, ACCO has recently called on the Catalan and Spanish governments to change regulation and allow the online supply of drugs, to reduce consumer and pharmacist exposure to COVID-19.

Besides the emergence of digital platforms, there is another significant change caused by the "digital revolution". From a material point of view, it is a particular feature of the digital revolution that some physical services are becoming virtual services, meaning that data are replacing physical products. There are numerous examples: newspapers are already digital, music and films are being distributed online rather than on CDs or DVDs, books are coming out in digital formats, etc. With the mass advent of 3D printers over the next few years, this trend will be consolidated and the most relevant component of a transaction will be data rather than the product.

However, competition, taxes and the labour market are not yet designed according to this new digital reality that presents not just benefits but also negative aspects that need to be corrected.

"Guaranteeing market access: The key that opens the door to competition "

¹http://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/ES_7_2014_TRANSACCIONS_ENTRE_IGUALS_-_I_COMPETENCIA_CAT.pdf

²http://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/P2P-Un-pas-endavant_DEF.pdf

From the competition perspective there is one factor that is considered particularly decisive, such as enabling access to the operator market. And that is because market access is a necessary condition for the very existence of competition and, therefore, for consumers and suppliers to be able to enjoy efficiency in reducing transaction costs, as discussed above.

That is why competition authorities take care to ensure that no regulatory entry barriers are imposed and go after every type of operator behaviour that has attempted to restrict access to the competitor's market, often by abusing their dominant position.

Digital platforms constitute a particular case of operators as they generally act as intermediates between suppliers (other operators) and end consumers. Platforms, then, are set up as a channel connecting the market (end consumers) with potential offerors. The main risk in terms of competition is the concentration of digital platform markets, where one or a few platforms have most of the market at their disposal owing to the well-known network effects, and therefore that digital platforms become "gatekeepers" (or guardians of the gateways giving access to the markets). And that is because a gatekeeper may prove capable of having an adverse effect on competition conditions even where its market share fails to make it a dominant operator (being an operator with a significant market share will be enough).

A textbook case of this risk can be seen where the gatekeeper also operates at the offeror level. So, for example, where a large operator not only manages the intermediation platform but also offers its own products, the intermediation platform's management will likely be neutral and discriminate in favour of its own products against those of other competitors, thereby making effective competition (access to a neutral market) harder for the other small operators.

That is why ACCO considers it appropriate for gatekeepers to be regulated, to minimize the possibility of private operators having an undue influence on a factor as crucial as market access. The measures proposed so far, from less to more interventionist, are:

- Establishing interoperability obligations and open APIs, to ensure third-party access to data and "socialised" network effects.
- Having all acquisitions scrutinised, to prevent "killer acquisitions".
- Establishing accounting-separation and economic-independence obligations, to guarantee the independent economic behaviour of two business units and avoid cross-financing and financial leverage.
- Structural separation and limitation of cross-ownership.

It would be a good idea here to define the criteria for determining when a digital platform becomes a gatekeeper and what structural measure(s) would be the most appropriate for guaranteeing market access. This gatekeeper definition can even

change according to the product or geographical market, so the applicable measures may differ in each case.

“The need for having powers to manage glocal regulation.”

There is debate over determining when a digital platform is a digital intermediation service or when the platform is also a service provider that is offered to end users and, therefore, whether the sectoral regulations for the service that is offered apply. The European Court of Justice (ECJ) has been creating case law on this matter³ and, generally speaking, it may be determined that where a platform sets the price and conditions of the services it offers, it becomes a service provider and is therefore responsible for that service. This aspect is important because governments at all levels launch sectoral regulations to manage negative externalities that economic activity can generate.

Contrary to what some claim, digital platforms are not examples of unregulated environments. Digital platforms present important aspects in quality regulation such as: information on the service, guarantees, complaint systems, classification and reputation systems and, in some cases, even price fixing. It is therefore important for a general framework to be established for digital platforms with obligations in the matter of transparency, non-discrimination, and portability of reputation. The EU Regulation on Platform-To-Business Relations (P2B), which was approved in June last year⁴, is a good initiative for establishing a harmonised framework at European level.

Therefore, when it comes to sectoral regulation, governments should no longer focus on regulating quality but should focus instead on regulating negative externalities such as safety, pollution, occupation of the public domain, etc. It is evident that such sectoral regulation may differ locally, according to the realities of each case (city, region, state), but in any case it ought to follow not just the principles of necessity, proportionality, minimal distortion and non-discrimination of every good regulation but also certain criteria, to guarantee market unity at European level. In general, it is the competition authorities that have the powers to exercise control over governments over the compliance of these good-regulation criteria.

In conclusion, interventions from an area such as the European Union will enable a degree of harmonisation in how to approach the digital platforms that act as

³ JCJEU of 19 December 2019, Case C-390/18 (Airbnb) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=221791&pageIndex=0&doclang=ES&mode=lst&dir=&cc=first&part=1&cid=10581348> | JCJEU of 20 December 2017, Case C-434/15 (Uber) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198047&pageIndex=0&doclang=ES&mode=req&dir=&occ=first&part=1>.

⁴ <https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:32019R1150&from=EN>

"gatekeepers" and the negative externalities that they can generate. Even so, we must not forget that the digital sphere also presents different realities according to the sector, product or geographic market and that governments at various levels need to regulate.

It is therefore to be expected that both the very functioning of gatekeepers and their actions with regard to each of the various sectors of activity will be subject to cross-cutting regulation. Such circumstances will require a body that exercises effective control over the activity of gatekeepers, whether by ensuring that the structural measures affecting them properly apply to them or by determining the suitability of limiting their sectoral activity owing to possible externalities.

Therefore, whether for the purposes of implementing and supervising structural measures imposed on digital platforms or of overseeing sectoral regulation, the ACCO considers it appropriate for a future digital regulator to be structured independently of governments and at various territorial levels (with the consequent delegation of powers), so that an intervention can be made not just at the European level but at state and regional levels too.

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Finally, the effectiveness of the regulation crucially rests not just on its own design (what it applies to) and territoriality (where it applies) but also on "how" it applies.

Digital regulation is a cross-sectional regulation insofar as it affects many different areas of activity. But that is because, as much of the need for regulating the digital environment has pointed out, the ultimate goal behind the regulation itself is none other than to ensure that markets, in this area too, are competitive. And the more competitive the markets are, the greater the expected well-being for consumers and users.

Digital platforms, then, should ideally be regulated and supervised by a cross-cutting authority, such as the competition authorities, which also enjoys independence in its actions, a particularly appreciable insofar as its intervention is especially key to the functioning of the economy and should always be guided by exclusively technical criteria.