



**HEARINGS ON
COMPETITION AND
CONSUMER PROTECTION
IN THE 21st CENTURY**

Federal Trade Commission

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1. THE CATALAN COMPETITION AUTHORITY

1.1. Who we are

The Catalan Competition Authority (ACCO) is an independent body aimed to guarantee, improve and promote competition in Catalonia, ensuring that the benefits of the competitive functioning of the market extend to society as a whole.

The ACCO was created by the Catalan Parliament and regulated by Law 1/2009 dated 12 February 2009 on the Catalan Competition Authority (the ACCO Act).

The ACCO enforces competition regulation when the effects of the infringements do not extend beyond Catalonia's geographical area.

Catalonia has a population of 7.5 million people and a GDP of EUR 223.629 billion (valued at current prices). Therefore, it is an important economy within the EU, on par with the economy of some of its member states.

1.2. Advocacy

Regarding our advocacy activities, they cover two main spheres of action. On the one hand, the ACCO analyses Catalan regulations ex ante (before being in force) or ex post (after being in force) and publicly issues its opinions in view of competition and better regulatory principles. The ACCO has issued its opinions in relation to different fields of activity, including commercial services, tourism, industrial security and taxi services.

On the other hand, the ACCO also produces studies on those fields of economic activity that are presumably not working properly from a competition point of view and suggests the reasons behind this malfunctioning and what should be modified.

In fact, lately the ACCO has been especially focused on providing responses to new phenomena that may have a relevant impact on consumers, such as the following documents on:

BIG DATA

[The Data-driven Economy. Challenges for Economy](#)¹.

SHARING ECONOMY

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



[Peer-to-Peer \(P2P\) Transactions and Competition](#)²

This paper was mentioned several times on the 2016 FTC Sharing Economy report³.

[P2P Transactions and Competition and Peer-to-Peer Transactions \(P2P\) - A Step Forward](#)⁴.

URBANISM AND TOURISM

[A Dynamic Regulation in the Field of Tourist Accommodations and Note on the Initial Approval of the Special Town Planning Regulation on Tourist Accommodations \(PEUAT\) in Barcelona](#)⁵.

ELECTRICITY

[Electricity Self-consumption and Competition and Relevant Aspects from the Competition Perspective in Relation to 'Smart-meter Electricity Consumption Data Access and Usage'](#)⁶.

PAYMENT SERVICES

[Report on the Prior Public Consultation for the Draft Bill on Payment Services in the Internal Market and Payment Systems](#)⁷.

2. DISCLAIMER

All these contributions are only preliminary considerations on areas of research and, therefore, are on continuous development. So, they are not showing the Catalan Competition Authority view on such issues, but only the work of an internal think tank⁸.

² http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/ES_7_2014_TRANSACTIONS_BETWEEN_EQUAL_S_AND_COMPETITION_ENG.pdf

³ https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf

⁴ http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/P2P-Transactions-and-competition-a-step-forward.pdf

⁵ http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/Observacions-26-2016-PEUAT-Barcelona-versio-angles.pdf

⁶ http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/20170419_CONCLUSIONS-ON-ELECTRICITY-CONSUMPTION-DATA-ACCESS.pdf

⁷ http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/20171120_es_16_2017_03_eng.pdf

⁸ This document is authored by Mr. Xavier Puig who has been assisted by Mr. Jaume Martí.

3. CONTRIBUTION: THE COMPETITION GOAL AND THE BEST STRATEGY TO REACH IT

3.1. The competition goal

We have worked hard on trying to decipher what the real competition goal currently is to afterwards consider whether such construction should and could be altered.

The Spanish Act in its preamble establishes that "*Section 38 of the Constitution sets forth freedom of enterprise in the framework of a market economy and that the public authorities will safeguard and protect it, taking into consideration general economic requirements and, as the case may be, planning. The existence of effective competition between companies is one of the defining elements of the market economy, disciplines the company's behaviour and reassigns productive resources in favour of the companies and techniques that are most efficient. This productive efficiency will be translated to consumers in the form of lower prices or an increase in terms of the quantity of products offered and their variety and quality with the corresponding increase in overall social wellbeing.*"⁹

In our view this excerpt shows what the key elements to be considered in-depth are: freedom of enterprise, effective competition, efficiency, consumer wellbeing (lower prices or more quantity, variety and quality) and overall social wellbeing. But these key elements ought to be split as some are related to the competition goal and others to the strategy to reach it.

What are relevant in relation to the competition goal discussion are some "logical" assumptions that could, at least under some circumstances, be successfully challenged. What the excerpt shows is that:

(more freedom of enterprise & more competition) -> more efficiency -> more consumer wellbeing -> more overall wellbeing

However, more efficiency may not always have positive effects on consumer wellbeing, particularly if such a notion is broad.

For example, if consumer wellbeing is positively correlated with variety (either because consumers value having multiple purchasing options available or because - with a more dynamic approach - concentrated markets mean more influence for big firms that could even make it possible to interfere in legislation or in how the public authorities control such firms) and variety can be put at risk because one firm may by its own merits become more efficient

⁹ El artículo 38 de la Constitución reconoce la libertad de empresa en el marco de una economía de mercado y la garantía y protección de la misma por los poderes públicos, de acuerdo con las exigencias de la economía en general y, en su caso, de la planificación. La existencia de una competencia efectiva entre las empresas constituye uno de los elementos definitorios de la economía de mercado, disciplina la actuación de las empresas y reasigna los recursos productivos en favor de los operadores o las técnicas más eficientes. Esta eficiencia productiva se traslada al consumidor en la forma de menores precios o de un aumento de la cantidad ofrecida de los productos, de su variedad y calidad, con el consiguiente incremento del bienestar del conjunto de la sociedad.



in the market and "take it all", then just seeking efficiency can - at least sometimes - reduce consumer wellbeing.

Furthermore, if we analyse the second leap (more consumer wellbeing -> more overall wellbeing) it is not consistent under all circumstances. While it is true that consumer wellbeing is part of overall wellbeing and consequently an increase in consumer wellbeing would undoubtedly also produce an increase in overall wellbeing, to pursue the maximisation of consumer wellbeing (if it is to be perceived broadly as explained in the previous paragraph) may even conflict with pursuing overall wellbeing.

For example, if the goal was to have more variety in the market and market contestability to benefit the broad consumer wellbeing notion, this would entail very specific activity by antitrust agencies to react to any action by dominant players that would endanger such a level playing field (or even advocate a break up of these dominant players) even though this intervention could in the short term reduce overall wellbeing (as it would affect the more efficient market allocation of resources).

The same applies when the notion of essential facility is widened as it may distort the functioning of the dominant enterprise and so negatively affect - at least in the short term - overall wellbeing all in the name of increasing consumer wellbeing from a dynamic and structural point of view.

The Google Shopping case¹⁰ and Android case¹¹ are good examples of how the notion of essential facility has been widened in the name of improving consumer wellbeing from a dynamic point of view. Such intervention is usually explained as an attempt to level the playing field between competitors and increase market contestability¹² (i.e. reinforce competition) which supposedly would in the long run benefit consumers.

Finally, to pursue more efficiency would purportedly be equal to focusing on maximising overall wellbeing in a short-term approach. But it is less clear whether in the long run maximising efficiency at a given moment (if it changes market structure and it becomes a winner take all scenario) would undermine future development and innovation and so be counterproductive for a long-term overall wellbeing approach. This was highlighted by Louis Brandeis:¹³

"He was convinced that monopolies and trusts were 'neither inevitable nor desirable'. [...] Brandeis furthermore denied that large trusts were more efficient than the smaller firms which were driven out of business. He argued the opposite was often true, that monopolistic enterprises became 'less innovative' because, he

¹⁰ http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740

¹¹ http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099

¹² Although it is difficult to consider Google as "essential" (competitors could access their potential users through their own website or app) there is no dispute about the fact that having neutral access to Google is "key" for many enterprises (such as comparison services) and so competition capabilities would be hindered in the event that such neutral access is not guaranteed.

¹³ https://en.wikipedia.org/wiki/Louis_Brandeis



wrote, their 'secure positions freed them from the necessity which has always been the mother of invention.' [...] Brandeis was aware of economies of scale and the initially lower prices offered by growing companies, but he noted that once a large company drove out its competition, 'the quality of its products tended to decline while the prices charged for them tended to go up'."

So, under the cover of the apparent compatibility of the goals of efficiency, consumer wellbeing and overall wellbeing, we believe there are contradictions and that this makes it essential to choose between them.

Therefore, with the aim of solving the dilemma between efficiency and overall wellbeing, we would opt for maximising overall wellbeing in the long run and so pursue efficiency only to the extent that it has positive consequences for overall wellbeing in this timeframe. In other words, we believe efficiency is only a mechanism to achieve a positive goal for society: maximizing welfare.

Hence the final decision is between consumer wellbeing and overall wellbeing as anticipated.

Some economists may support the idea of maximising overall wellbeing and eventually *ex post* distributing overall wellbeing so that all society gets a fair slice of it. Theoretically it allows society to reach maximum wellbeing capacity.

However, we believe **excessive market and economic concentration may significantly endanger the possibility of such *ex post* intervention**. So we suggest - once again - taking the broader approach in terms of the time scope to be considered and **opting for consumer wellbeing as the competition end goal, which will only be positively correlated with an efficiency gain up to a certain point (i.e. as long as it does not substantially concentrate market structure which would negatively affect variety and – in the long run - quality)**.

3.2. The best strategy. Different scenarios: different antitrust approaches

Consistent with suggesting a broad perspective, we consider that the best strategy for maximising consumer wellbeing will be dependent on the circumstances, as one solution may not fit significantly different scenarios.

- Big number of suppliers (craftsmen world). *Ex post* reaction.

Classic economic theory explains that there is an optimal production quantity for every single firm, because their cost structure initially declines up to a point where it tends to rise again. Therefore, one of the classical goals of competition is to lead firms on the path to efficiency so that they reach that quantity point - and so increasing supply - and as a consequence of reducing their marginal cost, reduce their price. This characterisation prevails provided that some assumptions are not altered. The main one is that there should be a significant number



of companies so that competition between them may have the expected effects described. Or, in other words, that demand in the market is enough for a big number of undertakings.

Consequently, in a world full of craftsmen (eighteenth century) and so the times of Adam Smith, to focus on sufficient competition between them would clearly be the best approach possible (besides, the existence of so many craftsmen made it utterly unnecessary to worry about other aspects such as variety).

Hence in a **market with very low risk of turning into a "winner takes all" structure** and where there are significant **potential gains in terms of cost efficiency, competition policy should be focused** on ensuring that such entrepreneurs **effectively compete**.

- Reduced number of suppliers.

With the industrial revolution the landscape changed drastically. Particularly, the number of suppliers was reduced. There were far fewer factories than craftsmen. Therefore, the Sherman Act was a response to that new situation and mainly focused on structure: against trusts (big companies) and thus preserve some degree of variety which was threatened by the economies of scale of these big companies.

Besides, some may say that in a market with few suppliers an *ex post* approach would be utterly insufficient since the probability of anticompetitive agreements would be relatively high (compared to a situation of more suppliers) and the probability of detection combined with an always difficult deterrent effect of sanctions (always after a long procedure) would be low.

Therefore, when there are **few companies in a market, competition policy should not rely exclusively on an *ex post* reaction and turn its attention also to preserving a minimum level of variety** in the market and also **being alert to the possible negative consequences** of this - already concentrated - scenario (for example, **corruption**).

- Reduced number of suppliers. A special scenario: natural monopoly. Regulation.

There is a specific case of a reduced number of suppliers; a **natural monopoly**. In these cases competition is not possible. Consequently, the only room for competition is to work on competition advocacy and to be **attentive to the possibility that the company running it does not benefit itself** and to introduce **regulation so that this economic circumstance does not affect connected markets** and thus preserve competition in these markets.

- The tragedy of the commons. When demand exceeds supply. Regulation.



This particular situation (that may well correspond to tourist accommodation in touristic cities,¹⁴ scooters,¹⁵ bikes¹⁶ or even perhaps taxis¹⁷ on the roads or natural resource exploitation) contradicts one of the foundations of classical competition goals – to try to increase supply – since supply is exogenously limited (limited public domain).

So taking this limitation into account, the only role left for competition is to work on competition advocacy and to focus on the **“entry” and dynamics of such market**. In other words, guaranteeing that there is real competition to enter the market and that such competition for the market is periodically guaranteed. If possible, the **recommendation should also try to ensure that at any given time there are a number of providers offering the service**, so that consumers also have different options available and companies in the market have some competition.

- The digital economy. When marginal cost tends to 0.

As explained earlier in this section, one of the classic goals of competition was to guarantee competition so that undertakings became more efficient and could produce more and lower their prices. This approach becomes outdated when confronted with the new digital economy reality.

The marginal cost for Spotify of having a new user is close to 0. The same goes for Google and for the vast majority of digital services (especially those that work as intermediaries). Consequently, their production quantity is already “limitless” and their prices can easily be 0 (in fact many of them have a monetary price of 0) and their incomes come from advertising based on the collected data.

Another classic competition goal would be quality. However, in the digital environment ordinary users find quality much more difficult to perceive (it is very difficult for users to assess Google ranking value).¹⁸

So in this scenario there is only one factor left from those mentioned by the Spanish Competition Act: variety. And this one is also threatened because of network effects which make it much more likely that a specific market is dominated by a single undertaking.

We do not mean to suggest that potential entry may not be a force in terms of competition, which in fact could also benefit from the reverse (negative) network effects that the incumbent would experience. But even when not denying such degree of competition, we believe that it

¹⁴ Barcelona Special Tourist Accommodation Plan <http://ajuntament.barcelona.cat/pla-allotjaments-turistic/en/>

¹⁵ Regulating San Francisco's Electric Scooter Problem <http://www.thedrive.com/tech/20950/regulating-san-franciscos-electric-scooter-problem>

¹⁶ Dockless Bike-Sharing Is Reshaping Cities – But We're Not Sure How Yet <http://thecityfix.com/blog/dockless-bike-sharing-is-reshaping-cities-but-were-not-sure-how-yet-luca-lo-re/>

¹⁷ Sao Paulo's Innovative Proposal to Regulate Shared Mobility by Pricing Vehicle Use

<http://blogs.worldbank.org/transport/sao-paulo-s-innovative-proposal-regulate-shared-mobility-pricing-vehicle-use>

¹⁸ The Anatomy of a Large-Scale Hypertextual Web Search Engine. Appendix 8. <http://infolab.stanford.edu/~backrub/google.html>



is very difficult for different reasons to compare this potential threat with the presence in the market of different competitors.

First of all potential entrants will lack an essential element to compete; data that only the incumbent has and which gives it a very relevant competitive advantage. And even if the potential entrant was capable of creating a better service due to the information asymmetries described above, it would be difficult for users to take the decision to change the service (if the advantage is not clearly perceived, users will stay with the predefined option irrespective of switching costs). And we could also mention economies of scope since many of these companies are present in many different markets and this gives them an advantage over their rivals; there are already some Amazon issues regarding possible beneficial treatment for products sold directly by it¹⁹ or the Google Shopping case,²⁰ just to name two very well-known ones.

In conclusion, **the digital economy may require competition authorities to focus more on market structure and hence be flexible in terms of the essential facility doctrine.** The EU Commission has already adopted this approach with the significant Decision on the Google Shopping case and Android case - both precisely related to the digital economy. But these actions are not isolated. The EU Commission is assessing the possibility of preserving accessibility to data from connected cars.²¹ It would level the playing field at least as to the basic elements required to compete effectively.

Along with this measure, it could be advisable to **help users perceive quality in the digital environment.**

And finally, it would require **being very aware of possible infringements** (which are per se **very difficult to detect**). So it would be necessary to **invest very heavily in detection and also in the technicians that work on the administration process** to be able to deal with such allegations and to correct the market situation as fast as possible (**a reconsideration of the interim measures to make them more easily awarded** would be advisable).

Furthermore, **in the event that** this traditional possibility of **opening up an antitrust case is seen** somehow to be **inefficient**, the **possibility of structural intervention should be considered** so as to prevent possible conflicts of interests (for example Amazon could be either the merchant or the seller, not both. Google could be a search engine, but not a shopping comparison tool that depends on Google's organic ranking). In fact, taking this approach **would also diminish the political influence that these companies may exert which is a future risk in terms of fair competition.**

¹⁹ <https://www.technologyreview.com/s/602442/amazons-algorithms-dont-find-you-the-best-deals/>

²⁰ http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740

²¹ <https://trustinip.com/do-data-generated-by-connected-cars-raise-antitrust-risks/>



3.3. Conclusions on the strategy to maximise consumer wellbeing

There are at least two different strategies to supposedly increase consumer wellbeing (both mentioned by the Spanish Competition Act): more freedom of enterprise and more competition.

More competition is the obvious one and the main reason why this whole discipline exists. However, as has been noted, promoting competition could in the short run damage efficiency. In such a trade-off we believe competition should be the goal as it will in the future also provide more efficiency.

Put differently, if in the very first moment we opted for the efficiency option it could change the market structure and lead to a monopoly which would put at risk future developments as, in our opinion, a monopoly is less prone to innovate and invest in efficiency gains due to the lack of competitive pressure.

The scenarios described of (i) low number of suppliers, (ii) exogenous limit on supply and (iii) the digital economy are steadily gaining in importance in 21st century society. And these scenarios require, in our opinion, a more structural approach that guarantees real freedom of enterprise which has a relatively average probability of being successful in any given market. It is to be highlighted that a structural approach helps to preserve the mere existence of an abuse of dominant position, an infringement that in specific markets is not even temporarily socially acceptable (for example, a situation could be envisaged where there was only one internet service provider and it used this position to abuse users). Finally, it is noticeable that the Sherman Antitrust Act (1890) also took the structural approach as trust means "big businesses".