

ACCO IS COMMITTED TO THE IMPLEMENTATION OF CHANGES IN THE COMPETITION POLICY WHICH WILL MAKE 'GREEN COMPETITION' POSSIBLE

BACKGROUND

The Catalan Competition Authority (hereinafter, 'ACCO') has received information about the public consultation¹ related to the 'Competition policy supporting the Green Deal', promoted by DG Competition.

Within the framework of this public consultation, ACCO considers it appropriate to formulate contributions in terms of assisting in the identification of changes in the discipline of competition that would enable a positive impact on the environmental objectives set out in the 'European Green Deal'².

The consultation³ identifies three different areas for which contributions have been requested: (i) state aid control, (ii) antitrust rules, and (iii) merger control.

However, the present contribution is structured with the first section of a more general nature on the need to emphasise the aspects of market operations that make 'green competition' possible and, then, focus on the more specific changes that target the existing tools of the competition policy, in order ensure that intervention in terms of competition is fully in line with the environmental objectives. These changes are included in these four sections: antitrust rules, merger control, state aid control and advocacy.

ACCO IS COMMITTED TO MAKING GREEN COMPETITION POSSIBLE

In the consultation, it is indicated that the competition policy is not the most suitable tool for meeting the ecological challenges, and regulation or tax instruments are more appropriate mechanisms.

In a certain way, the consultation's approach itself seems to be leaning towards the need to find mechanisms that ensure the competition policy action does not interfere in the environmental policy objectives. In other words, it seems to transpire from the consultation that the competition policy could be conceived as an impediment for the adoption of behaviours or actions that may potentially have a positive effect in environmental terms (e.g. agreements between economic operators to share pioneer technologies at low emissions or state aids that tend to favour a particular clean industry) and which, therefore, the main objective of the consultation would only be to point out ways that the discipline of competition does not become an obstacle for the attainment of the environmental objectives.

¹https://ec.europa.eu/competition/information/green_deal/index_en.html

²https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en

³https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf

Although ACCO agrees that it is necessary to ensure that the competition authorities do not interfere with the related environmental purposes, a situation that is analysed in the following sections of this same contribution, it is considered appropriate to propose, as a main contribution, a change in terms of analysing not only that the discipline of competition must not be a hindrance for these objectives but that competition can be an engine in itself for also driving towards the achievement of the environmental purposes.

In order to convert competition into an engine to achieve the climate objectives established, it is considered that, mainly, it is necessary to make the environmental impact associated with the different products or services transparent.

The competition between products or services is only the confrontation between economic operators (their respective products or services) so that consumers/users choose what they are offering.

The key to competition consists then, ultimately, in the consumption decisions adopted by consumers and users.

It is therefore essential that the discipline of competition ensures that consumers and users can make their decisions without any type of undue distortion. Accordingly, any element that affects and disturbs the free choice by consumers and users would only generate individual harm to that specific consumer and user and also in the market as a whole, as it would undermine competition given the product or service chosen might not have been victorious based only on its business merits.

That is why some competition authorities have notified, for example, about the need for transparency if a particular 'influencer' has received a reward for recommending a specific product⁴.

The reality is that the decision of consumption can hinge on multiple factors or characteristics.

Thus, even though the 'price' factor is usually considered to be the most significant factor that guides the consumption decisions of consumers and users, it is not the only thing that can tilt the competition in favour of one or another product or service.

In other words, consumers and users usually evaluate different aspects when deciding to buy one product or another. In a general sense and by way of example are the following such aspects: (i) recommendations/social support, (ii) appearance, (iii) guarantees, (iv) technical characteristics, (v) durability, etc.

However, for any of these aspects to become a real factor of competition, it has to be 'noticeable' and recognised by the consumer/user. Otherwise, their decision will not be influenced by this characteristic.

For example, if a consumer goes to buy fruit and cannot distinguish between the products that are 'ecological' or not, their decision of consumption will not be able to take this variable into account at all.

⁴ <https://competitionandmarkets.blog.gov.uk/2019/04/30/influencer-marketing-what-you-need-to-know/> <https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers>

This opacity will move to the market of offerings in such a way that no economic operator will commit to organic agriculture if he or she cannot reveal it to the customer in such a way that it will also be considered when making the decision to buy it or not.

Therefore, the first thing necessary to promote organic agriculture consisted in creating mechanisms/certificates so that consumers and users could notice this factor and, in this way, it would become another element of competition.

And as is apparent in this example, the possibility that the consumer/user is informed about a determined aspect is essential for this factor becoming an element of competition between companies. By contract, it can without a doubt be affirmed that what is not noticeable by the consumer/users cannot be a competition factor (in economic terms, it is a market failure due to information asymmetry).

When an element cannot be known by the consumers and users and is therefore excluded from the competition, this is a dichotomy. It is necessary to choose whether to work towards making this factor transparent in the eyes of the consumer and user so that it becomes an element of competition, or to resign ourselves to it being an opaque element and possibly establishing a minimum standard of quality in the regulations.

In other words, in absence of government intervention on the aspect of opacity, it can be expected that the market failure consisting in the consumer or user's lack of perception drives a potentially socially undesirable 'race to the bottom', as higher quality products may even be excluded from the market and only products of lower quality will be exchanged in terms of the aspects that are difficult to verify.

ACCO is committed, in a general sense, to having transparency for the maximum number of competition factors (prices, quality, sustainability...), in such a way that they become elements of competition between the economic operators. A commitment which, by the way, should be increasingly more feasible with the advent of IoT. IoT portrays a scenario in which objects have a greater capacity to transmit information either between them or also in relation to the potential consumers and users. So, it will probably become a common occurrence that when we are in a shop deciding to buy a particular product, information will appear on our mobile device about this same product, and it will be more feasible to include additional information such as the environmental impact of this product.

And the fact that a particular factor that was initially imperceptible to consumers/users becomes an element of competition has an especially favourable effect in terms of competition in so far as it opens up a new dimension of competition and the market itself will most likely offer a wide range of possibilities so that the consumer can choose the one that suits him or her best. Moreover, from a dynamic point of view, the fact that it is a factor of competition means that the companies can work to innovate and improve it: competition that drives the improvement of that qualitative element/factor ('race to the top').

Alternatively, opting for a regulatory approach involves establishing a fixed level of quality, in such a way that the consumers and users will have to be compliant with the corresponding legislation and, in dynamic terms, it is not expected that the economic operators will work to innovate or to improve an imperceptible factor for the consumers and users, provided that the product exceeds the regulatory threshold. So, a certain stagnation would be expected in the

innovation which would only be forced with regulatory jolts (every time that the standard of quality was increased as part of regulations).

Based on the above, it is considered appropriate to promote measures that allow the environmental impact of the different products or services to be transparent, so that the consumer and user has this information, in a clear and understandable way (for example, with a traffic light system), prior to making the decision to buy it or not⁵.

For example, entities could be promoted that certify, based on homogeneously established criteria, how a particular product has been produced and the distance travelled⁶, etc. Similarly, this 'certified' information should include the physical or 'digital' label itself of the product.

Therefore, the potential consumers and users with higher environmental awareness could be guided by this display of the ecological impact when making consumption decisions (on the understanding the all the options open to them would have met the minimum standards in terms of the environment).

However, the effort to make the environmental impact transparent does not have to be limited to analysing the impact that has already been made when manufacturing the product but it has to include a global vision of the life of the product in question. In this sense, it should be pointed out that conduct related to planned obsolescence (currently not only in physical terms but also through incompatibility between software and devices) is particularly damaging, both for competition and for the environment.

On one hand, this conduct diminishes the transparency in a key factor of consumption decisions such as the longevity of a product and, on the other hand, the intentional reduction of the useful life of products has a serious impact on the environment, as it will require a new production process with every thing that this implies, starting with the use of new natural resources.

In the same vein, it should also be made transparent as to how suitable the products are for future repairs⁷.

Basically, ACCO considers it essential to work intensely so that competition intensified to achieve the aspects that are positive for the environment, and to make this possible, transparency of factors including the following is necessary: (i) the environmental impact of the production of goods or materialisation of services, (ii) pollution associated with their use, (iii) the durability and (iv) the possibility to repair the goods.

⁵ OECD (2020), Sustainability and Competition, OECD Competition Committee Discussion Paper, <http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>

⁶ Even though ACCO is aware of the notion of the European Single Market, it considers it appropriate that the products internalise the environmental cost included in their transport. In any case, if the internalisation of this factor was not viable in relation to the transport in the area of the European Union for legal reasons, at least the possibility that this factor was taken into account in relation to the imports of products from outside the European Economic Space could be studied. In short, it would be a matter of displaying the CO₂ footprint of a particular product or service.

⁷ In some places, the right for goods to be repaired is contemplated by Law; a right that should be preserved in spite of the digitisation and computerisation of many products like cars by guaranteeing access to the data of the vehicles.

<https://securityboulevard.com/2020/11/new-massachusetts-law-requires-vehicle-data-be-made-accessible/>

In short, ACCO suggests a restatement of approach through this brief contribution⁸ in the sense that the discipline of competition is recognised as a suitable means (and therefore, part of the solution) to attain the objectives set down in the 'Green Deal' (some have called it a maximalist approach of the objectives⁹).

For the discipline of competition to effectively be an engine to achieve these objectives, it is necessary that people work to make the environmental qualities of the products and services transparent.

That is the only way the economic operators will have the incentives to innovate and to be leaders in respect to the environment ('race to the top'), a situation which, tied to an increasing civic awareness, can make 'Green Competition' truly possible¹⁰.

GUARANTEEING THAT COMPETITION POLICY DOES NOT INTERFERE IN THE OBJECTIVES TO PROTECT THE ENVIRONMENT

The commitment of ACCO to make competition an engine to achieve the environmental objectives does not change the fact that it is also a good idea to guarantee that it is also necessary to ensure that the implementation of the competition policy does not interfere with the achievement of the aforementioned objectives.

Different aspects are analysed below that should be considered/modulated for achieving this objective which consists of aligning the competition policy (in a general sense and, in particular, the instruments that shape it) with the environmental objectives.

Broad interpretation of the concept of consumer well-being

In a general sense, the implementation of the competition policy by the competition authorities will not constitute an impediment in relation to the environmental objectives (or in any case this would be minor) if the discipline of competition could integrate this same objective itself.

In this sense, it is necessary to take into account that competition policy has the proper functioning of the markets to the benefit of consumers and users (well-being) as a priority objective.

So, even though it does not directly include the environmental objectives amongst its objectives, a broad interpretation of the concept of well-being and of the citizens can indeed

⁸ Climate change, sustainability, and competition law. Simon Holmes. 13 April 2020. Journal of Antitrust Enforcement <https://academic.oup.com/antitrust/article/8/2/354/5819564>. 'the most urgent change needed is to how we think about competition and economics; to get away from a range of arcane, technocratic and unhelpful concepts (such as a narrow focus on short-term price effects); and to get back to what our treaties (and their equivalents in other jurisdictions) actually say'.

⁹ Climate change, sustainability, and competition law. Simon Holmes. 13 April 2020. Journal of Antitrust Enforcement <https://academic.oup.com/antitrust/article/8/2/354/5819564>. 'Cyril Ritter's paper discusses whether competition law should merely avoid conflicts with other EU policies (a "minimalist view") rather than be interpreted in a way that maximizes the objectives of those other EU policies

('the maximalist view') [...] In my view, the constitutional provisions of the treaty requires us to take the "maximalist view".

¹⁰ Climate change, sustainability, and competition law. Simon Holmes. 13 April 2020. Journal of Antitrust Enforcement <https://academic.oup.com/antitrust/article/8/2/354/5819564>. 'If well designed and applied, the relationship between sustainability and competition policy can be mutually beneficial'.

be incorporated into the fight against climate change¹¹. Accordingly, it is an existential objective and, therefore, a necessary condition for any other notion of welfare or well-being of a more material nature.

ACCO considers that it would be positive to opt for this broad interpretation of the notion of well-being of the consumer in so far as it is possible and that it would allow the objectives of competition to be lined up with the environmental objectives, something which, as will be shown below, would irradiate the different elements that form the competition policy (antitrust rules – Art. 101.3 TFEU-, merger control, state aid control and advocacy). Moreover, it should be pointed out that, far from being a minor change, it implies a paradigm shift, which was already the subject of a specific contribution by ACCO in relation to the public consultation on a new competition tool¹².

Antitrust rules

In the application of competition rules within the framework of a penalty procedure, it would be necessary to incorporate the environmental factor as a parameter to be considered.

In particular, the TFEU itself already contemplates, in Art. 101.3 TFEU, that efficiency factors related to production or distribution or which foster technical or economic progress are taken into account and which, under certain circumstances, allow for fines not to be issued for prohibited agreements between companies or associations.

It is therefore considered it would be appropriate that, amongst these factors to be considered, the environmental factor should be included in such a way that particular horizontal agreements may not be considered to be prohibited if they involve a significant environmental benefit.

In fact, the application of this Article 101.3 TFEU (in its current version) was analysed in detail by the Dutch Competition Authority for a matter for animal welfare, not directly linked to protecting the environment¹³. It is considered to be a particularly appropriate case for analysis, as the application of the foreseen exception was rejected in this precept, which proves the need to introduce a modification or different form of application¹⁴ of competition rules if it is considered that the exception contemplated in Art. 101.3 TFEU should be used in a more generalised way.

Similarly, and analysing this factor of possible exemption in more detail, it would be appropriate to explore the possibility of preparing and publicising a communication of cooperation guidelines among companies for green projects. This regulatory tool would offer legal certainty, acting as safe port for the economic operators, in such a way that these types of agreements

¹¹ Climate change, sustainability, and competition law. Simon Holmes. 13 April 2020. Journal of Antitrust Enforcement <https://academic.oup.com/antitrust/article/8/2/354/5819564>. 'A quick google of the meaning of the term "welfare" tells us that welfare is about "the health, happiness and futures of a person or group". Amongst other things it is synonymous with "well-being and good health" ("bonheur"; "Comfort"; "bien-être"). It is not just about "profit" or "fortune".[...]'

¹² Feedback for the public consultation on a new competition tool. Suggestion for a paradigm change. June 2020. Catalan Competition Authority. http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/20200707_FEEDBACK-ON-NEW-COMPETITION-TOOL-CONSULTATION-DEF.pdf

¹³ This article analyses the valuation procedure of this matter by the Dutch Competition Authority: <http://competitionlawblog.kluwercompetitionlaw.com/2015/02/18/valuing-sustainability-the-acms-analysis-of-chicken-for-tomorrow-under-art-1013/>

¹⁴ Climate change, sustainability, and competition law. Simon Holmes. 13 April 2020. Journal of Antitrust Enforcement <https://academic.oup.com/antitrust/article/8/2/354/5819564>. See 'The exemption route: Article 101 (3)' p. 371 – 383.

could be encouraged; then they would be exempt from the application of the competition rules. Otherwise, the risk that their conduct could potentially be considered restrictive of competition to homogenise their offers, for example, could result in an obstacle to the signing of agreements that would be positive in terms of the environment¹⁵.

Even though it is often analysed which modifications should be introduced into the area of antitrust rules in order to prevent their application obstructing the attainment of the environment objectives being pursued, it still has to be pointed out that it is a good idea to assess whether or not a modification of the competition regulation should also be contemplated as an additional factor to devalue a restrictive behaviour of competition when this action entails environmental damage. For example, collusion between operators to limit the competition in the durability of their products or, in the case of a vehicle, the volume of polluting emissions, could merit a more substantial response than if the same practice is carried out in relation to any other parameter of quality.

In essence, a detailed analysis is considered to be appropriate if restrictive conduct of competition that prevents the environmental 'race to the top' or 'Green Competition' requires a higher penalty response given the critical area affected of the environment.

Merger control

The analysis of merger control involves a prospective valuation of the impact that the related operation will represent for the competitive functioning of the market and, ultimately, for the well-being of the consumers.

It would be appropriate to include its positive or negative impact in terms of the green policy as factors to be taken into account.

In particular, a merger could be validated in spite of a certain risk of competition if the merger was expected to make a significantly positive environmental impact. And, by contract, it could be decided to prohibit mergers that present a relatively low degree of incidence in terms of competition but could generate a risk of reducing innovation, for example, in the area of green technology.

This possibility would require, in the merger analysis, an evaluation of the 'risk to reduce the green technological innovation' or the 'environmental impacts' as effects to be combated, so that it can be subject to conditions or even prohibit the merger in order to preserve the green technological innovation or the environmental policies.

State aid control

Of the different tools that the competition regulations place at the disposal of the competition authorities, the state aid control – in the opinion of ACCO – is the mechanism that could most significantly distort the possibility of achieving the objectives set out in the 'Green Deal'.

¹⁵ Recently, the U.S. DOJ analysed the conduct between different manufacturers of vehicles and the State of California consisting of agreeing on a stricter limit of emissions (lower) than the one required at Federal level. However, after making a preliminary assessment, the DOJ closed the matter and therefore ruled out that the conduct constituted an offence on the subject of antitrust rules. <https://www.nytimes.com/2020/02/07/climate/trump-california-automakers-antitrust.html>

State aid control is linked to the subsidy policy of the different governments, a policy that presents two key elements for achieving any objective: (i) impact, so aid constitutes the most direct form of benefiting a particular business initiative and (ii) discretionary nature in the determination of the criteria linked to it being granted.

For example, state aid can, among other things:

- (i) Make projects materialise that have special environmental interest that could not be attained only through the private initiative.
- (ii) Foster the activity of companies that show a positive climate impact: batteries, clean energy, self-consumption of electricity, etc.
- (iii) Not award aid to companies linked to significantly polluting activities.
- (iv) In general, introduce environmental impact as one of the default parameters in the process for determining which operator will receive state aid, so that operators that have made an effort to be more respectful with the environment have a better chance of receiving aid. Similarly, this parameter should have significant weight in relation to the rest of the criteria that guide the decision on who will receive the aid.

The discipline of competition usually acts as a counterweight in the capacity of governments to intervene in the markets through the subsidies, given precisely the two factors indicated (a certain discretionary nature and, especially, capacity of impact).

So, the function of counterweight and of control assigned by the competition policy in relation to the lines of aid to the economic operators could be limited in circumstances where the concession of state aid essentially meets environmental criteria. In this regard, it is considered appropriate to study the possibility that the regulation of the state aid control task incorporates, among the factors to be taken into consideration, the fact that the corresponding aid is linked to an environmental purpose, so that the control in that case is minor. We consider that the express inclusion of this aspect in the regulation about how the state aid control policy is exercised could contribute to providing a higher level of legal certainty to the administrations and to the market operators themselves.

In other words, and from an eminently practical perspective, it should be possible that concerning the legal asset of 'environmental preservation', the governments implement these aid mechanisms, even when it could imply a certain imbalance in the competitive playing field.

Advocacy

Lastly, it is also necessary to take into account that one of the tools of competition policy is advocacy.

In general, when this type of analysis is carried out, it is already taken into account whether or not the regulation is necessary for correcting a market failure, such as negative externalities.

Pollution and the impact that the economic activity represents for the environment is probably the paradigmatic negative externality.

So, following the usual parameters of advocacy, it is very likely that the competition authorities can already recognise the need for these regulations whose purpose is to preserve the environment.

Similarly, it is very likely that the competition authorities will validate a regulation that drives the operators to internalise the costs that their activity generates (e.g. Pigovian tax).

As a matter of fact, the introduction of these taxes can be desirable in terms of competition to avoid 'environmental dumping' practices consisting, for example, of producing goods and services in countries where the environmental duties are not nearly as high and then these products come into the European market at much lower prices, thereby competing at unequal cost structures that are motivated by a much more diverse level in their respect for the environment. In more general terms, it is important that the regulation contributes to ensuring the competitive neutrality between goods and services.

Therefore, the competition policy can be especially permissive in relation to a regulation that affects environmental aspects in particular.

In short, it is considered appropriate to align the competition policy and the environmental objectives, which rests essentially on a broad interpretation of the notion of 'consumer well-being'. Thus, the analysis that is made within the framework of antitrust rules, merger control, state aid control and advocacy should also contemplate the environmental factor as a specification of general interest to be preserved or fostered by the Competition Authorities. With this objective, it would be appropriate to evaluate the possibility that the competition policy toolkit expressly includes this public objective to be achieved, so that the application of the competition rules never become a hindrance or an obstacle to the attainment of this environmental public objective.