

Sleeping with the Enemy? The Role of Competition Advocacy in the Surveillance of Public Administration

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Agenda

1. Introduction
2. Restrictions caused by public administration
3. Role of competition advocacy
4. Actions carried out by ACCO
5. Concluding remarks

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Introduction (1)

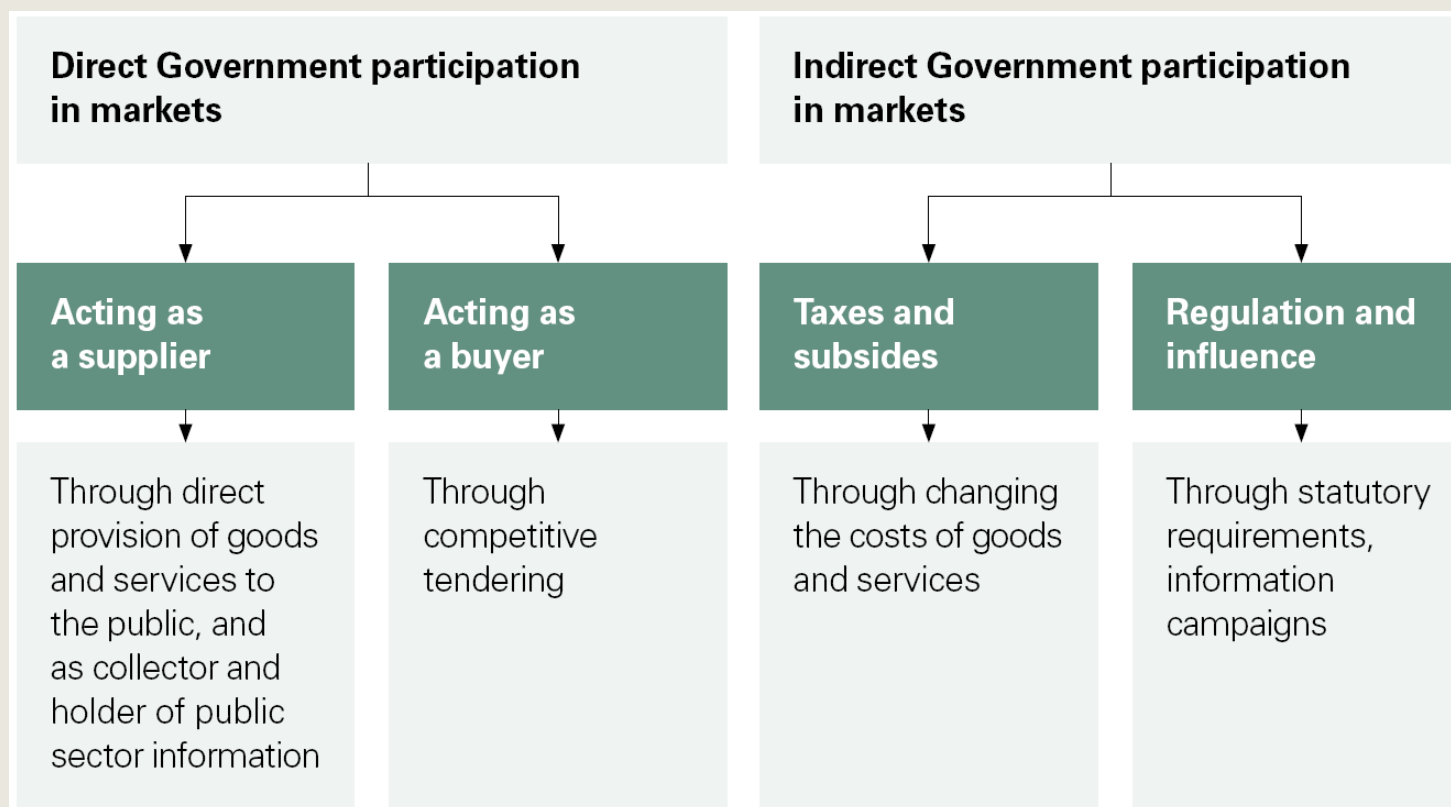
- The Spanish Competition Law (15/2007) assigns competition authorities the task of **combating and monitoring anticompetitive practices in order to promote effective competition** on the markets.
- The **public sector intervenes in markets** directly, acting as a buyer or as a seller, and indirectly, through taxes, subsidies, regulation and public policies.
- Competition may not only be hindered by private anticompetitive conducts but also by public regulatory intervention and rulemaking. In fact, public administration intervention may **go beyond the strictly necessary and may impede effective competition.**

Introduction (2)

- **Private anticompetitive practices can be often facilitated by public authorities** intervention since it may give rise to rent-seeking behaviour by interest groups (lobbying) and regulatory capture.
- The mandate of competition authorities extends **beyond merely enforcing the competition law and must act proactively** to bring about public policies that lower barriers to entry, promote liberalization and minimize or even avoid unnecessary intervention.
- The Catalan Competition Authority (ACCO) monitors and tries to influence interventions of public administration by means of three main tools:
 - **Sector and market studies**
 - **Regulation reports**
 - **Guides and recommendations**

Restrictions caused by public administration (1)

- Ways in which public administration intervenes on markets:



Source: OFT.

Restrictions caused by public administration (2)

- Without intervention, markets with certain characteristics (economies of scale, externalities...) may fail to provide minimal levels of public interest services and authorities can intervene to **safeguard legitimate social interests**.
- However, public administration must ensure that **appropriate tools** are selected in order to achieve the intended policy objectives with **minimal effect on competition**.
- Types of public administration intervention on markets:

	Traditional instruments	Market-based approaches
Providing public services	Direct provisions	Competitive tendering User choice
Influencing private markets	Regulation Tax and subsidy	Trading schemes Self-regulation

Source: OFT.

Restrictions caused by public administration (3)

Objective	Reason for intervention	Instruments	Risks to competition
Changing consumer behaviour	Some features of consumers' behaviour may have adverse effects on society (for example, alcohol misuse or obesity).	Education Minimum standards Information Tax Regulation Setting prices Restrict supply	Restricting the supply of particular goods or setting prices can significantly dampen competition and raise prices for all consumers. Consumers are heterogeneous, consuming and behaving differently from each other whereas supply-side and price-setting interventions can be blunt and have an impact on everyone.
Supporting specific markets, locations or products	Government may wish to develop specific markets or products to take advantage of long-term shifts in the economy and changes in consumer trends. Without intervention these markets and products may not exist (for example, low carbon technology).	Subsidies Regulation Targets Policy announcements	Risks from 'picking winners'. Competition may be distorted if Government support has differential effects across firms or creates barriers from entry by giving advantage to existing firms. Government support may distort the allocation of resources across the economy. The economy may end up producing goods that are not demanded by consumers. Private markets are better for allocating resources.

Source: OFT.

Restrictions caused by public administration (4)

Objective	Reason for intervention	Instruments	Risks to competition
Restructuring industry	<p>Orderly restructuring aims to reduce the negative impacts of disturbances to the economy, economic downturns or changes in trends.</p> <p>Necessary to help firms survive, preserve jobs and prevent the loss of skills.</p>	<p>Regulation</p> <p>Market creation</p> <p>Subsidies</p> <p>Tax breaks</p>	<p>Support to industries via subsidies may allow inefficient firms to remain in the market and does not reward financially sound firms. May dampen incentives to innovate. Blocks normal entry and exit to market, which is a key part of the process of competition.</p> <p>Facilitating mergers has a potentially large negative long-run impact on competition.</p>
Security of supply	<p>Ensure the security of particular supply chain considered essential for the functioning of modern industrialised economy.</p>	<p>Subsidies</p> <p>Tax breaks</p> <p>Regulation</p>	<p>Creating monopoly suppliers, facilitating mergers, and /or protecting existing firms from competition can have a significant impact on consumers and the rest of the economy.</p> <p>Many of these markets are inputs into other products. This will drive up prices and reduce innovation.</p>

Source: OFT.

Restrictions caused by public administration (5)

- In conclusion, public sector intervention may **create barriers to entry** into markets, **distort the conditions** under which market players compete, **prevent competitive markets** from developing and even **take markets or sectors outside the scope of competition scrutiny** altogether.
- Examples of sectors whose interventions and regulations may restrict competition:
 - retail distribution
 - professional services
 - public procurement
 - transports
 - pharmaceuticals
 - funeral services
 - management of public infrastructures
 - public radio / TV broadcasting

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Role of competition advocacy (1)

- Competition advocacy: those activities related to the promotion of a competitive environment by means of **non-enforcement mechanisms** (ICN). It implies establishing a competition culture:
 - **Persuading public administration to abstain from adopting unjustified anticompetitive measures** and help them to delineate the boundaries of economic regulation
 - **Increasing awareness of the role that competition policy** plays in promoting and protecting welfare enhancing competition among **public authorities**, economic agents, the judicial system and the general public
- **Enforcement and advocacy are complementary** and mutually reinforce each other.

Role of competition advocacy (2)

- With these purposes, competition authorities may:
 - assist **authorities** in considering the relative impact on competition when choosing among policies
 - provide technical expertise regarding particular industries or markets to **policy makers**
 - avoid difficult or uncertain conflicts between competition law and other bodies of law or **regulation**
 - increase awareness of how applying competition policy in **regulatory design** can promote consumer benefits
- Competition authorities may **identify relevant competition advocacy issues** on their own initiative while conducting enforcement activities.

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Role of competition advocacy (3)

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- The implementation of the advocacy activity may include:
 - written **guidelines and reports** (which may be public)
 - **training** of public administration officials
 - **recommendations** to public administration
- The effectiveness of advocacy activities depends on:
 - **timing** of the consultation or action
 - whether consultations are **mandatory** or discretionary
 - whether opinions are **binding** or not for the policy maker
 - whether advocacy initiatives are made **public** or not

Actions carried out by the ACCO (1)

- As a competition agency, one of the objectives of ACCO is to **promote competition** in sectors in which there exist restrictions as a result of regulation or other public authorities interventions.
- ACCO mainly uses **three advocacy tools** in order to promote competition in these markets:
 - **Sector and market studies**
 - **Regulation reports**
 - **Guides and recommendations**
- **Sector and market studies** analyse the causes of why particular markets are not working well. They take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour.

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Actions carried out by the ACCO (2)

- Market studies can also examine restrictions on competition that can arise through public administration **regulation** or other **policy** issues in markets in which public sector bodies operate as **suppliers** or act as a **customer**.
- Where the market is found not to be working well, the study looks at its **effects**, the **causes** of those effects, and considers how those causes may be best addressed.
- There are a number of **ways to address** the causes, such as making recommendations to authorities, change regulations or public policies or taking competition law enforcement actions.

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Actions carried out by the ACCO (3)

- Ex: *Extension of the concessions for intercity transport of passengers by bus in Catalonia*



http://www20.gencat.cat/docs/economia/ACC/O/Documents/Arxius/Actuacions/ES%2003-2010%20concessions%20transport_cast.pdf

- The study analyses the duration of concessions due to the application of extensions by the Catalan government
- The conclusion is that in most cases, markets have been closed to competition for unjustified extremely long periods
- The Catalan omnibus law draft (in line with the Regulation (EC) No. 1370/2007 and the Spanish Law on Sustainable Economy) reduces the maximum duration and allows short extensions only under specific circumstances.

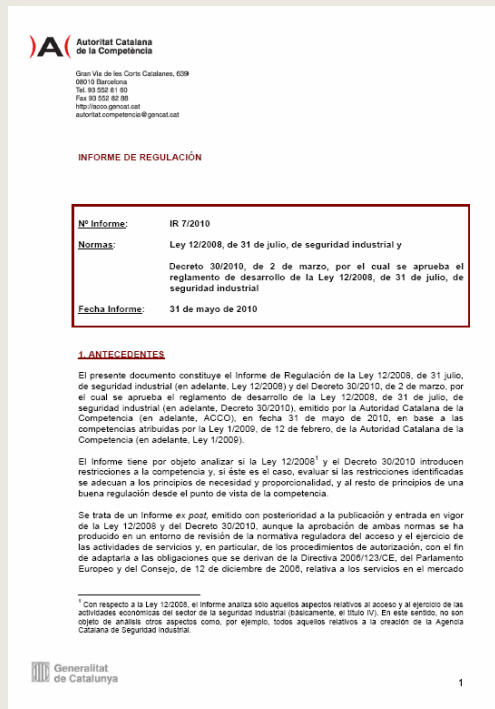
Actions carried out by the ACCO (4)

- **Regulation reports** are public *ex ante* (or *ex post*) assessment of competition implications about regulatory issues.
- It will be evaluated in terms of whether it will introduce **restrictions on competition** that are not **justified** (unnecessary and/or disproportionate) by the objectives pursued or which could be mitigated by using other regulatory **alternative**.
- It will **not only** analyze **laws and decrees** but also other rules such as orders, resolutions and administrative acts.
- When significant powers have been decentralized, this type of analysis can be done at **all levels of government action**.

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Actions carried out by the ACCO (5)

- Ex: *Industrial safety standards regulations in Catalonia*



http://www20.gencat.cat/docs/economia/ACCO/Documents/Arxius/Actuacions/IR_07_2010_SegInd_esp.pdf

- The report evaluates if these regulations introduce restrictions on competition that are unnecessary and/or disproportionate or could be mitigated by using other regulatory alternative.
- It concludes that there are clear unjustified restrictions on competition that, at the same time, do not accomplish European Service Directive and the Spanish 17/2009 Law.
- The Catalan omnibus law draft modifies the Catalan 12/2008 Law in order to remove these restrictions.

Actions carried out by the ACCO (6)

- **Guides** try to promote competition culture by means of increasing awareness of the role of competition policy and persuading authorities not to adopt anticompetitive measures and helping them to design pro-competitive regulations and policies.
- Ex: *Guide on public procurement*

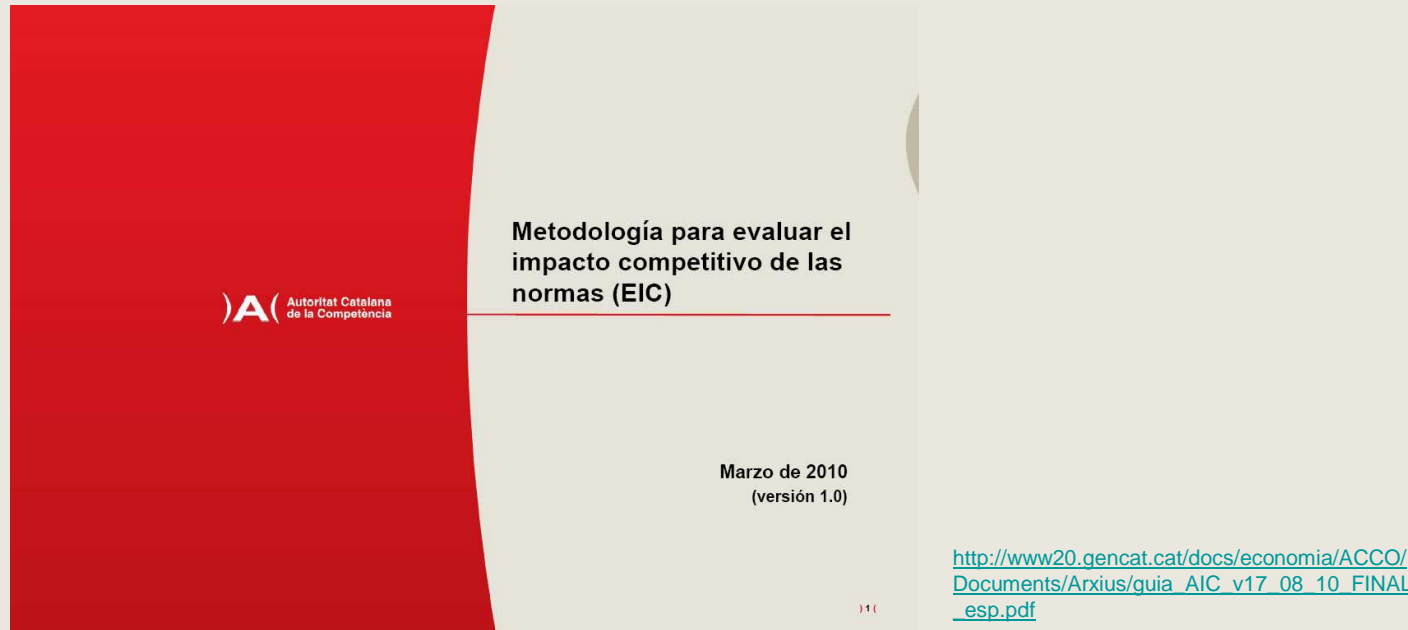


- This guide pretends to foster effective competition in public procurement procedures through recommendations to public authorities.
- It tries to avoid the introduction of unjustified constraints on competition due to the design, development and execution of public tendering processes and to prevent bid rigging.

http://www20.gencat.cat/docs/economia/ACCO/Documents/Arxius/guia_prev_det_colusio_contractacio_publica_esp.pdf

Actions carried out by the ACCO (7)

- Ex: *Competition impact assessment methodology for regulations*



- This guide tries to avoid that public administration introduces restrictions on competition through the approval of regulations or through their own acts.
- This guide presents a methodology that ACCO uses in its competition impact assessment of regulation and public acts. Moreover, this guide can be useful for departments when they evaluate and design regulatory measures.

Concluding remarks (1)

- **Public sector intervenes on markets** directly, acting as a buyer or as a seller, and indirectly, through taxes, subsidies, regulation and public policies and **may go beyond the strictly necessary** and distort competition.
- The purpose of competition authorities through advocacy activities is to **promote a competitive environment** by means of **non-enforcement mechanisms**.
- ACCO mainly uses **three advocacy tools** in order to monitor and influence interventions of public administration and promote competition:
 - **Sector and market studies**
 - **Regulation reports**
 - **Guides and recommendations**

Concluding remarks (2)

- In order to **reinforce the role of advocacy in the surveillance of public administration**, the following issues should be taken into account:
 - training activities to public administration officials could be increased
 - consultations could be *ex ante* and mandatory
 - in some cases, competition authorities recommendations could be binding
 - advocacy activities could be evaluated

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