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**MARKET STUDIES**

**Scoping Paper by the Secretariat**

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## MARKET STUDIES

### Scoping Paper

#### 1. Introduction

1. At the October 2015 meeting of the Competition Committee, the Secretariat was asked to prepare a short scoping note on a possible long-term project on “Market Studies”. This note will support the Committee’s discussion in June 2016 on this strategic topic.

2. Delegates have expressed strong interest in continuing to build on recent work on market studies in the Competition Committee. To date, discussions in the Committee and other fora have recognised that market studies are a valuable tool for competition authorities, but that there are significant differences in the nature of these studies across jurisdictions, including in terms of purpose, methodology and procedural arrangements. This note will set out the context for these discussions and provide suggestions for areas of further work.

#### 2. Background

3. When markets are not functioning efficiently, they fail to maximise societal welfare. Standard competition enforcement tools may not be sufficient in such cases, given that they address specific market participant behaviour but not broader concerns relating to market structures or regulatory frameworks. Competition authorities may instead (or additionally) use market studies to (i) carry out in-depth assessments of market structures or of the economic and competitive conditions in a given sector; (ii) identify market failures or inefficiencies (even when these do not necessarily amount to an infringement of the competition law but are nevertheless detrimental to competition in the market); and, finally, (iii) address them through recommendations to pursue advocacy and/or other initiatives (e.g. measures related to business self-regulation or consumer-focused remedies).

4. Although some agencies find market studies valuable and already make extensive use of them, market studies are a relatively recent tool for many jurisdictions and there is no common definition of what a market study is. Further, there are considerable differences in terms of scope, legal powers and procedures, implementation, association with enforcement actions and constraints. Discussion among competition authorities in these areas is crucial to identify practices that contribute to enhancing the efficiency and effectiveness of market studies.

5. Policy debates on market studies are not new at the OECD. The Competition Committee first discussed the topic in a roundtable at its June 2008 meeting, during which the identification of best practices for carrying out market studies was determined to be a worthwhile future area of work.<sup>1</sup> More recently, at the February 2015 meeting of the CC, the Competition Committee decided to launch a Survey on Market Studies (the “Survey”), with the purpose of obtaining initial information from competition authorities on some key features of market studies. The Survey was circulated in June 2015 and the

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<sup>1</sup> See <http://www.oecd.org/regreform/sectors/41721965.pdf>.

responses provided the basis for a Secretariat Paper on Market Studies ([DAF/COMP\(2015\)7](#)), which was discussed by the Committee in October 2015. The Survey revealed areas worth exploring further in order to enhance understanding, and identified beneficial practices for agencies to carry out market studies.

6. The preliminary findings from the recent Committee work finds confirmation in the in-country work of the OECD Secretariat. Since April 2014, the OECD and the UK have worked on a project to provide support to Chile, Colombia, Costa Rica, Mexico, Panama and Peru in their use of market studies as an important competition tool. The objective was to run an in-depth analysis of methodologies in place, analyse best practices in some OECD countries and provide these countries with advice on how to improve their current legal framework and practices. Through a detailed questionnaire and missions to these countries, the OECD collected information on their legal powers, the process for selecting markets to study, the methodology used, the results obtained and how these are evaluated. From the project, it emerged clearly that market studies are used for a variety of purposes (advocacy, pre-enforcement, market intelligence) and that powers that agencies enjoy in this area and the procedures that they are required to follow can differ significantly from country to country.

### 3. Potential areas for future work

7. The results of the Survey recently conducted by the Competition Committee points to several areas of interest which could be pursued through further work on Market Studies.

#### 3.1 *Overview of market study characteristics and legal frameworks across jurisdictions*

8. Further Committee work would be useful to **clarify the objectives and distinctive characteristics of activities which may be referred to as “market studies”** by agencies across a wide array of activities (ranging from workshops to collect and exchange information on certain markets to detailed and sophisticated quantitative analyses leading to recommendations) and terminologies (market analysis, sector inquiries, fact-finding inquiries, among others). Questions of interest would include (i) what are the minimum features that comprise a market study; (ii) what are the primary objectives of market studies; (iii) whether market studies must follow certain sets of procedures; and (iv) what would be the required analyses or procedures for a certain activity to qualify as a market study.

9. The Committee could also undertake a **review of domestic legal frameworks for undertaking market studies**. In jurisdictions where competition authorities are granted specific powers to carry out market studies, there is significant variation in the nature of these powers, including their breadth, the conditions for exercising them and whether they are shared with, or subject to, the power of other parts of the government. A comparative review of these features would allow competition authorities to enhance their understanding of the implications of different legal frameworks and to identify aspects that contribute to the success of market studies.

10. In addition, the Committee could discuss the **nature of legal powers to request information in the course of market studies**. The vast majority of competition authorities hold legal powers to request information in the course of a market study from both governmental bodies and/or private entities. However, remain significant differences in the content of these powers across jurisdictions. Future work should (i) identify the nature and extent of powers granted to each authority; (ii) determine whether there are any differences between powers to request information from private stakeholders relative to public stakeholders; and, finally, (iii) conduct a comparative analysis about the efficacy of each of the powers based on the experience of competition authorities. The latter exercise would allow the Committee to determine the trade-offs of, and justifications for, different types of information collection powers. Where competition authorities are entitled to impose sanctions on stakeholders for non-compliance with requests

to provide information, it would be also valuable to determine the nature and extent of sanctions, as well as their effectiveness.

11. An overall stock-taking exercise would shed light on the characteristics and powers that should be covered in legal frameworks to enable effective market studies.

### **3.2 Selection and prioritisation of industries or sectors for market studies**

12. Research could **also identify how markets of interest are selected, and how different markets are prioritised for study**. For instance, the OECD could consider whether authorities should focus on regulated industries and sectors, and whether authorities should align market study selection with government priorities or if they should select industries based on their own strategic objectives. Should for example regulated markets be prioritised? More generally, the ability of a competition authority to select and prioritise markets for study independently of government is worth further exploring. Research in this area would require an analysis of the powers that other governmental bodies have to influence the selection of market studies conducted by competition authorities, the extent to which the latter hold a final word in such selection and the implications of these features.

### **3.3 Remedies and further investigations resulting from market studies**

13. The Committee could also identify **remedies which are pursued as a result of market studies** in the event that competition concerns are identified. This review could **compare remedies employed in market studies with those of market investigations**, which are a tool that so far exists in only three OECD jurisdictions (Iceland, Mexico and the UK). Market investigations allow agencies to impose structural or behavioural remedies that can directly address the concerns identified by the competition authority.

14. Market investigations often follow market studies, although a market study is not a necessary condition for a market investigation. In view of the complementarities between the two instruments, several issues could be discussed: (i) the relationship between the two tools, including when to resort to one or the other; (ii) the strengths and weaknesses of each instrument; (iii) the levels of interaction between the two; (iv) the potential outcomes and effects of both instruments; (v) whether they should be both included in domestic competition regimes; (vi) what are the differences in the use of market investigations across jurisdictions; and (vii) the array of remedies available in a market investigation.

### **3.4 Methodologies for carrying out market studies**

15. There is no single methodology that agencies use when conducting market studies. Rather, methodologies used vary considerably depending on the markets examined and the purpose of the study. These methodologies can include quantitative and qualitative analyses, questionnaires and surveys to obtain information on markets and sectors. Rather than develop an exhaustive list of potential methodologies, the Secretariat proposes to focus on the **identification of common techniques and associated best practices**. Discussions at the OECD regarding the practical experience of agencies with various methodologies and the applicability of different methodologies to particular sectors could be beneficial for this purpose. These discussions could be held mostly through roundtables supported by contributions from delegations, while lessons drawn from sectoral roundtables could be assessed for their applicability to other industries and sectors.

16. This work could also lead the Committee to **develop common principles and methodologies** to assist authorities in the selection and prioritisation of market studies in general. This would allow focussing resources on studies with a higher likelihood of leading to positive effects on competition.

### 3.5 *Relationship with stakeholders and other government bodies*

17. Several considerations regarding the relationship of authorities with stakeholders and other government bodies could also be reviewed by the Committee.

18. In particular, the Committee could explore the issue of **data protection in the context of market studies**. The data relevant for performing market studies is often privately owned, rather than publicly available. As a result, it is necessary to provide minimum safeguards to information holders and to create incentives for them to co-operate with the agency during the course of a market study. Incentives can be created by adopting rules for the protection of information provided by such stakeholders. The vast majority of OECD jurisdictions already offer some form of protection of confidential information, and about a third also protect non-confidential information. However, the nature, extent and features of the protection granted across jurisdictions varies significantly. As such, the Committee could examine the benefits and drawbacks of different levels of data protection. Questions worth addressing might include: (i) Should the competition authority or the information holders have the final word in classifying information as confidential? (ii) Should the information obtained in the course of market studies be used automatically in subsequent authority initiatives? (iii) To what extent and under which conditions could confidential information be disclosed, if at all, upon requests from third parties? The purpose of examining these questions would be to determine the balance to be struck between the need to obtain information relevant for market studies and providing stakeholders with appropriate safeguards.

19. The OECD could also discuss **how the principle of procedural fairness should apply to market studies**. This could include the determination of the most effective safeguards to protect the rights of stakeholders and the integrity of procedures for carrying out market studies. Transparency is crucial in this regard, as it allows stakeholders to anticipate all procedural steps and contributes to building trust in how market studies are conducted and in their outcomes.

20. Additionally, the **level of stakeholder involvement in market studies** could also be explored by the Committee. Specifically, communication and interaction with other government bodies or agencies as well as the role of market stakeholder relationships in delivering effective market studies could be reviewed.

21. Another important consideration with respect to the involvement of stakeholders in market studies is the **institutional setting in which market studies are undertaken**. Few authorities resort to external experts or to collaborative work with other governmental bodies when carrying out market studies. A number of competition authorities have an internal department dedicated to market studies set apart from enforcement units. This is partially motivated by the intention to signal stakeholders that market studies are not carried out with a premeditated aim of initiating enforcement actions. It is still to be determined whether this institutional setting is effective, both in terms of i) creating additional incentives for stakeholders to provide relevant information and evidence to support market studies and ii) potential gains or losses of synergy and resources resulting from a total or partial isolation from other departments of the agency. It would be useful to seek the feedback from competition authorities on benefits and challenges arising from different institutional settings, **to identify potential models to enhance the efficient use of the agency's resources**.

### 3.6 *Ex-post evaluation of market studies*

22. Very few authorities have in place mechanisms to **evaluate ex post the effectiveness of market studies**. Such an exercise would allow agencies to identify practices that have led to positive results and practices that should be adjusted. A dynamic review of outcomes would provide authorities with an

opportunity to contrast the actual effects of market studies against the originally intended goals of such studies.

23. Questions that could be addressed are (i) whether recommendations from market studies have been followed by effective implementation; (ii) what challenges and constraints have competition authorities faced when their recommendations were not followed by the addressee(s); (iii) whether alternative recommendations could have led to the desired outcomes; (iv) whether constraints could be addressed by supplementary initiatives; and (v) what measures could be adopted to prevent similar issues in the future. More generally, these questions would enable the Committee to assess whether market studies add value to competition authorities, whether authorities should be encouraged to do more market studies, and whether there are enforcement implications associated with market studies.

#### 4. Possible outputs

24. A possible output from this line of work could include **best practices guidelines** focusing on legal principles, institutional settings, legal rules and procedures that could help competition authorities enhance effectiveness of market studies. Participants of the 2008 OECD Roundtable on Market Studies have already expressed a common interest in the development of such guidelines.

25. Another useful outcome would be a **manual** on how to perform market studies, which would allow authorities to train their staff on related procedures, data collection and analysis.

26. Both the Best Practice Guidelines and the Manual could offer the opportunity for joint work with ICN whose Working Group on Advocacy has an ongoing project on market studies. Other opportunities to identify synergies with ICN work in this area could be explored.

#### 5. Methods of work

27. The Project on Market Studies would last for a period of over 2 years (2017-2018), during which the following methods are envisaged to foster knowledge and exchange experiences.

28. **Roundtables and hearings** would allow delegates and external experts to fully contribute to this work stream. *Roundtables* would be suitable for some of the topics where practices are more widely implemented, whereas *hearings* would allow experienced authorities and external experts to address issues on market studies that may still be embryonic and/or have been encountered by relatively few jurisdictions.

29. Debates could be carried out not only during the OECD meetings but also between meetings, to enable issues to be fully addressed on a timely manner and enhance the significance of outcomes produced through more focused discussions. For example, a **one-day workshop** (or a series of workshops) designed to explore specific topics of interest and relevance for competition authorities on market studies could prove an efficient way to serve such purposes. Participation of experts from the private sector, government and academia would provide different perspectives on key issues and promote dialogue towards convergent solutions.

#### 6. Proposed Work Plan (2016-2018)

30. In the Table below, the topics proposed in this scoping note have been assigned suggested formats and meeting dates.

Table – Work Plan

Topic	Format	Date
Market studies: minimum content, procedures, main purposes and legal frameworks	Roundtable	November 2016
Selection and prioritisation of sectors or industries for market studies	Workshop	February /March 2017
Methodologies for market studies	Roundtable	June 2017
Managing relationships with stakeholders and other government bodies during market studies (data protection, stakeholder involvement, institutional setting)	Roundtable	November 2017
Ex-post evaluations of market studies	Hearing	November 2017
Market study remedies and market investigations	Workshop	February/March 2018
Discussion of feasibility of a Best Practice Guideline on Market Studies	Roundtable	June 2018
Discussion of feasibility of a Manual on Market Studies	Roundtable	November 2018