

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

**THE ROLE OF MARKET STUDIES AS A TOOL TO PROMOTE
COMPETITION**

- Summary of Discussion -

1-2 December 2016

The attached document is a summary of the discussion held during Session II of the 15th meeting of the Global Forum on Competition on 1-2 December 2016.

More documents related to this discussion can be found at:
<http://www.oecd.org/competition/globalforum/the-role-of-market-studies-as-a-tool-to-promote-competition.htm>.

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Summary of Discussion

By the Secretariat

Introduction

1. The Chair of the Roundtable, Mr. Devender Kumar Sikri, opened the session on *The Role of Market Studies as Tool to Promote Competition*. He explained that this session would discuss the findings of the 2016 Market Studies Survey, and share experiences of competition authorities. The session was organised into three broad topics: the pros and cons of the different approaches of market studies; their possible outcomes; and the legal powers that the competition authorities have to undertake them.
2. The Chair noted that competition authorities are knowledgeable about market studies and that they have come to form an integral part of the work of competition agencies. Market studies can be used for advocacy purposes; to pursue enforcement actions; to assess the effects decisions; and, more generally, to gather information about the market.

2016 Market Studies Survey: Key Findings

3. The Chair introduced Ms. Lynn Robertson who explained the key findings of the Survey as summarised in the background note for the session.

- 62 national authorities replied the Survey, representing 59 separate jurisdictions.
- Market studies are an important tool for assessing competition beyond the individual behaviour of firms, covering both structural and behavioural aspects of entire markets and sectors.
- These are a relatively new tool for competition authorities, and there's still little understanding of the many variations and implications also from a comparative perspectives.
- Most authorities use market study for multiple goals: advocacy, pre-enforcement, enforcement information gathering, ex-post assessment, and other goals such as public policy.
- 70% of respondents reported using market studies when a sector is not working well for consumers but more investigation is needed to decide whether or not there has actually been a violation.
- 68% of surveyed competition authorities that conduct market studies enjoy specific powers for that purpose. Only 26% perform market studies under their general powers to protect and foster competition which they interpret as including powers to undertake market studies. In several jurisdictions other bodies such as sector regulators may also undertake market studies.

And 3% do not have powers to perform market studies at all.

- Most competition authorities reported having standard procedures to protect confidential information. Same protection for confidential information is provided by most jurisdictions whether obtained for market studies or for enforcement actions. A majority of authorities, 63%, allow the use of confidential information obtained in market studies in subsequent enforcement actions. Most authorities are legally authorised to request information, whether confidential or non-confidential for the purposes of market studies.
- 96% of the replies revealed that when authorities are granted specific powers to request information in market studies, they also enjoy the powers to impose sanctions.
- Well defined purposes and goals for market studies maximise the use of resources and lower costs for both the authorities and stakeholders. A high degree of involvement of stakeholders facilitates access to information and the implementation of recommendations. Clear and concise recommendations increase the probability of their implementation.
- Market studies are resource intensive, both in human resources and financial resources.

Frequency of market studies

4. Market studies can be carried out either as a one-off project when there appears to be specific concerns about competition in a market or at regular intervals to follow the evolution of a market.

5. **Malta** undertook a one-time intensive study of the market for bank loans to SMEs which represent 99% of the total enterprises in Malta. The purpose of the market study was to identify competition concerns relating to interest rates charged by commercial banks on loans to SMEs; and propose recommendations to enhance competition in the market. Malta noted that the market remains highly concentrated relative to other EU banking sectors and other industries in general. New entrants and small banks have found it difficult to penetrate the market and expand their market shares. In fact, profitability indicators of Malta's core domestic banks are persistently higher than those of the EU average. Thus, in spite of the 2 percentage point reduction in recent years in the banks' lending rates the Office of Competition noted that there may have been room for further reduction. After the investigation, the Office made a number of recommendations directed to the core banks, government, and the SMEs to enhance competition in the market. The government has taken steps to address the recommendations addressed to them.

6. **Croatia** conducted a regular annual study in the grocery distribution and retail sector. As a result, Croatia has developed a wealth of knowledge about the sector which will form a good base for merger analysis. Furthermore, the experience and the knowledge gathered through regular retail studies have helped the authority when designing a new act on unfair trade in the food supply chain. Croatia mentioned that the authority has an on-going study related to taxi services in particular, airport taxi services and Uber.

Relations with stakeholders

7. Interventions by delegates noted the importance of effective communications with stakeholders whether government bodies, private firms or consumers: to provide a platform for disparate groups of stakeholders; or to dispel misconceptions which can lead to litigation. The concerns of the private sector, as expressed by BIAC, are wide-ranging, however, BIAC also provided suggestions on how to alleviate these concerns.

8. **Spain** invited delegates to consult their market studies methodology which is available online in Spanish and English. Once the terms of reference of the study are defined, for example the scope, objectives, key issues, Spain will identify the relevant stakeholders, dividing them into three groups which will determine how the authority will communicate with them. Spain will communicate directly with stakeholders it considers as crucial for the study relying, for example, on meetings and teleconferences. The second group which tends to be very large is comprised of stakeholders that can provide general information on the market but are not specific to the market study. To reach this group, the authority will use more general communications tools, such as online questionnaires. The last group of stakeholders are those that are not relevant to the market study. Spain has identified several challenges with these stakeholders, including: determining if there are any hidden agendas; identifying bias in information provided; and, connecting with marginalised or less well-organised groups such as SMEs and individual consumers Spain makes a concerted effort to engage these groups in the study, keep them on-board and give them a voice.

9. Co-operation with stakeholders is facilitated for the **EU Commission** because, apart from relying on the voluntary cooperation from stakeholders, it can also use its normal enforcement powers to obtain the required data and information. In practice, the EC can send mandatory requests for information. The delegate highlighted that information gathered during the sector inquiry and that might be used later on to start a case investigation needs to be identified and separated from the rest of the sector enquiry data, also in view of access to file for the company later.

10. **Colombia** is undertaking a large number of market studies and found it necessary to change the way it communicates with the private sector. Firms viewed the authority's markets studies as "witch hunts" thus undermining any potential for effective co-operation. This is also a concern raised by BIAC during its intervention. Colombia has gone to great efforts to explain that market studies are not necessarily related to potential violations of the competition law, but are in fact more about the authority's efforts to understand how a market functions. As a result, collaboration with the private sector has improved thus underscoring the importance of clear communication.

11. **El Salvador** considers market assessments as an important tool to ensure markets are functioning. The authority uses them to understand sectors of key interest to consumers and the economy. As with many jurisdictions, El Salvador has faced challenges in its relations with the private sector, including a judicial process in the attempt to block a market study. In its market studies, El Salvador will also be vigilant for other forms of anticompetitive practices that may impede competition even if not part of the initial objectives of the study. For example, through its market studies the authority has identified and addressed certain anticompetitive laws.

12. **Israel** explained that since 2014, the Israeli Antitrust Authority (IAA) has the legal power to conduct market studies. When conducting a market study, the IAA can request information from private entities and impose sanctions on them in case of non-

compliance. However, information held by governmental bodies can be acquired only through voluntary co-operation. In the agency's experience, conducting market studies includes three aspects: first, the selection process of market studies; second, the process of carrying out market studies; and last, the possible outcomes of market studies. Market studies may be initiated by the authority following enforcement work which indicated a generalised malfunctioning of a market or as a basis for an economic analysis related to enforcement. Other government entities may signal to the authority markets that merit a study. Other market studies are the outcome of co-operation between the IAA and other governmental entities, ministries and governmental agencies, often in the framework of inter-ministerial committees. Israel suggested that the ability to collect information on a market in other ways is a critical factor for agencies without powers to request information. Empirical data and information can be gathered from public sources such as government published statistics, government reports, and financial reports of public firms etc. Governmental agencies particularly regulators in sectors such as, communications, energy and transportation, can be another good source of information. The IAA has collected confidential data and information from governmental bodies thanks to cooperative relationships. A last source of information can be the private sector. Co-operation can be most difficult in the absence of powers, and its success will depend on the interests of the individual market player.

13. In **Canada**, the Competition Act does not contain specific powers to conduct market studies, nor does it provide the agency with formal information gathering powers for these studies. In 2008, a comprehensive competition policy review panel noted this gap in the legislation and recommended the creation of an independent Canadian competitiveness council separating the advocacy work from the enforcement agency. This new council would ensure the sustained competitiveness of the Canadian economy as a key priority of the Canadian government. More recently, in 2015, the OECD issued a report on Canada's economy highlighting the continued existence of regulatory barriers. The report called on Canada to strengthen its competition framework with enhanced advocacy powers including market study powers. Currently, the Competition Act under the general authority given to the Commissioner to enforce and administer the Act, the agency can conduct voluntary market studies. While several studies have been undertaken, the agency is very dependent on voluntary cooperation from the private sector, and as a result the quality of the data and findings may not be robust enough to base regulatory changes. The agency is undertaking a study of the FinTech market to help determine how regulations should be adapted to facilitate the entry of the digital technology. The Competition Act does allow the agency to intervene before regulators. Regarding the telecommunications sector, the agency has made a number of submissions to the regulator. Currently, the advocacy function is under evaluation and the findings are expected to be made public in 2017. Potential areas of improvement will address how the agency conducts market studies, such as creating an external advisory committee that would assist it with the identification and planning of projects including benchmarks to determine the effectiveness of the market studies.

14. For **Zambia**, carrying out market studies is one of the main functions of the competition authority. Even though the Commission does not have powers to impose sanctions for non-compliance with information requests, it has managed to complete successfully several market studies thanks to the voluntary cooperation that the Commission received from stakeholders. However, the general information requests or gathering powers have not always yielded positive results for the authority, as sufficient stakeholder co-operation was not always forthcoming. To address this challenge, the

Commission has tried to initiate investigations in sectors identified as priority by the Government.

15. **BIAC's** intervention provided a comprehensive overview of its members concerns while also noting the positive role that market studies can play in ensuring that markets function. Market studies can be very resource intensive, and lead to limited results. They may divert scarce resources away from the agency's main focus on anticompetitive behaviour, in particular for less well-resourced or new agencies or agencies in developing countries. Companies also may face significant cost when involved in a market study. As also mentioned during the intervention of Colombia, BIAC expressed concern about market studies as a possible precursor to enforcement: a sort of "fishing expedition" where there is no or insufficient evidence to open an investigation. Market studies do not have the same procedural safeguards, such as the right against incrimination that would be available in enforcement cases. BIAC's written contribution provides suggestions about specific safeguards, for example, thresholds before initiating a market study, gathering of data, involvement of market participants, the need for transparency, timetables, and use of confidential information. In three situations, market studies can often have a particularly useful purpose as an advocacy tool, especially towards government. First, market studies can provide an indication of the impact of laws and regulation on competition and consumers. Second, they are a useful tool for regulatory and legislative reform, including the rolling back of regulation. Third, they also have an important function by refuting claims of anticompetitive conduct when, for example, prices rise as a result of supply disruption and not because of anticompetitive conduct, for example, price increases in petrol. In these situations, market studies can have an important impact by preventing unnecessary government interventions.

Using market studies for multiple objectives and different audiences

16. **Peru's** guidance on market studies is the result of an OECD project with Peru and five other Latin American countries: Mexico, Chile, Columbia, Costa Rica and Panama. The Guidance was officially launched by INDECOPI, the Peruvian Competition Agency and OSIPTEL the Peruvian Telecoms Regulatory Agency in June, 2016, to promote a competitive environment for economic activities while following best international practices. The guidance explains in detail the goal and the specific features of market studies. The main objective of a market study is to help the stakeholders, for example businesses, trade associations, consumers, consumer associations and public entities, including ministries, independent regulators and all other public bodies, to understand what market studies are, what they intend to achieve, how they are performed and what are their outcomes. The guidance explains how stakeholders can contribute to market studies and why they should collaborate. The guidance is an easily accessible tool that enhances the understanding of the objectives of INDECOPI's competition advocacy initiatives and provides a framework for thinking about public policy issues from a competition perspective. The Peruvian Guidance on market studies is available on INDECOPI's website.

17. **CUTS'** toolkit called Framework for Competition Reforms assists practitioners and competition agencies in analysing markets and links competition reforms to consumer and producer welfare. Using the toolkit, CUTS carried out projects in Ghana and Zambia which called for competition reforms in key markets aimed at improving

social and economic welfare. The toolkit helps identify and engage stakeholders even before the market study begins.

18. **France** discussed the key audiences for their market studies. Studies can be directed to relevant policymakers who can implement recommendations. In general, recommendations that propose turnkey reforms, which are budget neutral and create a new market and/or are meant to improve the situation of marginalised consumers, are the type of recommendations which are more likely to be implemented. A second key audience is the private sector who can be receptive to a market study if firms see that it creates an avenue for voluntary compliance and the prevention of litigation. Judges can also support the objectives of a market study when it can inform their decision-making processes.

19. The Competition Act of 2010 gave the **Pakistan** Competition Commission the power to conduct market studies for the purposes of enforcement and advocacy to both the private sector and the government. Pakistan provided three examples of advocacy efforts directed towards the government. In each case, the Commission issued policy notes convincing the government to change anticompetitive practices and ensure a level playing field. In the first case, the Commission addressed the Minister of Telecommunications who had issued a directive stating that dominant players should establish a cartel in the market for international calls. The second case relates to a lack of competitive neutrality regarding government-owned construction companies who benefitted from an exemption from the requirement to provide guarantee bonds in tendering processes in order to reduce their operational costs. The third case examined electricity generation and distribution in the public procurement sector where only a limited number of companies were permitted to participate in the bidding process.

20. The **United Kingdom** performs market studies to understand whether a market is working well and if it could be made to work better. These studies may result in recommendations for improvements to several stakeholders: the government, regulators and the industry. For example, a current report on legal services provides recommendations to the sector self-regulation body, to the oversight public regulator, and potentially to the government as well as to the law firms themselves. A market study may also result in a referral for phase two, that is, a market investigation. A market investigation is a lengthy investigation, typically 18 months with the possibility of extension. The CMA has powers to impose remedies at the end of the investigation, which are subject to judicial review by the Competition Appeal Tribunal. The United Kingdom has finished two major market investigations, the first on energy, which originated as a market study with the energy regulator; and another on banking. Market investigations can have a significant impact. Both the energy and banking market enquiries have led to very complex sets of remedies. In the case of energy, over 30 separate remedies, some of which are addressed to government, while others to the regulators and further more to companies. For example, remedies called upon companies to make consumer data available, in a form that it would make it easier for rivals to bid for customers. Market studies and market investigations can help to dispel misconceptions about competition in a market. In the energy market, there have been ongoing concerns about competition in regards to vertical integration and the dispatch process. However, the market study revealed these concerns to be unfounded but other competition issues emerged. In the banking sector, the investigation indicated better ways to enhance consumer welfare. The United Kingdom also discussed a market investigation which led to the break-up of the combined ownership of three London airports by British Airports Authority resulting in a much more open, competitive market and much better services for passengers through London airports.

21. **Kazakhstan** has the right to address opinions to relevant branches of government. In 2015, the competition authority issued 16 recommendations some of which addressed legislative amendments, to, for example, the Ministry of Investment and Development, Ministry of Energy, National Bank and others. The authority carried out 75 market studies of commodity markets during 2015 - 2016, that revealed the presence of barriers to new market entrants. Of note, the government has supported the authority's initiative to review in 2017 sectoral legislation in order to identify anti-competitive regulations and standards.

22. The **European Union** explained that EU sector enquiries aim to gain insights into the functioning of markets, possibly either leading to advocacy activities *vis à vis* national governments or to justify possible enforcement activities. In general, there are four stages to the sector enquiries: 1) the selection process, which identifies the focus of the investigation; 2) information gathering and analysis of the data; 3) identification of a concerns and the issuing of a report with the preliminary findings and subsequent consultation with stakeholders; and, 4) the publication of a report and possible follow-up actions. The EU commented on the on-going sector enquiry in the E-commerce, which is currently in the third stage. It is expected that the Commission will issue the final report in the second quarter of 2017.

23. For **Croatia**, market studies provide information and insight in the functioning of markets which may provide the basis for opening formal infringement proceedings. They can also motivate companies in a market to verify that their behaviour conforms to competition rules. In 2014, a mandatory third party motor insurers market study resulted in significant drop in insurance prices, in increased competition and it ensured regularisation of the motor insurance sector. Croatia's main challenges are the lack of human resources within the agency to conduct these studies and the fact that only public information is available to the agency.

24. **Lithuania** mentioned that the law specifically allows the authority to use information gathered for a market study for the purposes of other investigations. As a result, the authority has to be extremely cautious not to abuse of this power would place a high administrative burden on firms if addressed with frequent and unjustified requests for information. This would make it difficult for the authority to carry out market investigations.

25. The delegate from Sweden spoke as the co-Chair of the Advocacy Working Group (AWG) of the **International Competition Network (ICN)**. Market studies have been an important part of work of the AWG since 2008. The ICN has also produced a Handbook of good practices for market studies which gives practical guidance for the planning, selecting and carrying out of market studies. A key feature of the Handbook, revised in April 2016, is that agencies should be able to find tools to apply irrespective of the legal framework and the procedural rules that apply in their jurisdiction. The AWG has also produced a market studies online catalogue with information on over 600 market studies carried out by ICN member agencies categorised by jurisdiction and by sector. Agencies should be able to see which other agencies have looked at similar markets, to share experiences and results. Currently, the AWG is elaborating guiding principles for selecting and conducting market studies which will be based on this revised market studies good practice handbook. The principles will be published in the form of a short booklet to provide agencies with easily accessible reference material complementing the practices contained within the handbook.

26. The Chair concluded that this session proved to be a very useful opportunity for agencies to learn from one another. Before closing the roundtable he thanked all country representatives, representatives of BIAC, CUTS, ICN, and the Secretariat for their excellent work.