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

**Global Forum on Competition**

**USING MARKET STUDIES TO TACKLE EMERGING COMPETITION ISSUES**

**Summary of Discussion**

**10 December 2020**

This document is a summary of the discussion held during Session IV of the 19th meeting of the Global Forum on Competition on 7 – 10 December 2020.

More documents related to this discussion can be found at [oe.cd/mstei](https://oe.cd/mstei).

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## *Summary of Discussion*

*By the Secretariat*

### 1. Introduction by the Chair

1. The **Chair** recalled that the Global Forum on Competition had held a session on market studies in 2016. The 2020 roundtable had the specific objective of discussing market studies as a tool to tackle emerging issues due to technological change, innovation, or public policy intervention which could threaten the competitive process. Twenty-eight written contributions had been received, split roughly equally between OECD members and non-members.
2. The roundtable would cover three sub-topics:
  - the advantages and limitations of market studies as a tool to tackle emerging competition issues
  - co-operation between competition authorities and other government agencies in delivering such studies, and
  - challenges and benefits in conducting market studies in emerging and dynamic markets such as the digital sector.
3. The invited speakers, several of whom also had video presentations on the Forum website, were:
  - **Andrea Coscelli**, Chief Executive, Competition and Markets Authority (CMA), United Kingdom;
  - **Luis A. Gomez** (representing Business at OECD), Partner, Baker McKenzie's LLP;
  - **Alejandra Palacios Prieto**, Chairwoman, Board of Commissioners, Federal Economic Competition Commission (COFECE), Mexico;
  - **Hardin Ratshisusu**, Deputy Commissioner, Competition Commission South Africa (CCSA);
  - **Ana Sofia Rodrigues**, Chief Economist, Portuguese Competition Authority (AdC);
  - **Sangeeta Verma**, Member, Competition Commission of India (CCI).

### 2. Background paper by the Secretariat

4. **Patricia Bascunana-Ambros** took up three points from the background note to the roundtable. The term emerging competition issues meant scenarios where new market characteristics or changes in the conduct of firms creates a threat to competition. Such change might be due to new technology, business innovation, new public sector interventions, or exogenous shocks such as the current pandemic.

5. Faced with such issues, competition authorities may lack experience or detailed understanding. Market studies can help them identify and diagnose emerging issues and clarify the options available to tackle them, whether competition enforcement, competition policy, regulation, or other policy.

6. Market studies can be holistic and forward-looking, allowing the authority to be proactive in preventing emerging competition issues from becoming widespread and causing harm to consumers that might be hard to reverse. They can help prepare authorities for enforcement action, lead to recommendations that influence market behaviour, or identify areas for proposed legislative change.

7. On the other hand they are subject to limitations. They can be resource-intensive and time-consuming, and their recommendations or proposals may take time to implement or enact. This is an issue when markets are dynamic and technological change is rapid.

8. The background note highlights the importance of co-operation across government agencies and competition authorities within a jurisdiction, and between jurisdictions when emerging competition issues arise in global markets. Cross-border co-operation can help in sharing best practice and developing a common approach to common issues.

### 3. Market studies as a tool to tackle emerging competition issues

9. **Andrea Coscelli** described the market study regime in the UK, where they have been in use by the Competition and Markets Authority (CMA) and its predecessors for over 20 years. He explained that there are two types of market inquiry in the UK system: a “market study” is essentially sector inquiry, while a “market investigation reference” is a more formal regime that allows the CMA to impose remedies.

10. Market studies (in the UK-specific sense) are a flexible and effective tool by which the CMA can inform its own activities and work in partnership with government and other regulators to produce recommendations and propose legislative change. For example, a study of the legal services market was carried out with sector regulators and government with a view to changes in legislation. A newly launched market study is looking at electric charging for vehicles and will help government consider how to set up charging points on motorways and elsewhere to support the adoption of electric vehicles in the UK. A study on residential care homes concluded with recommendations to government, but also led to several consumer protection enforcement cases by the CMA. A recent study on online advertising, focusing mainly on Google and Facebook and their business models, led to conclusions recommending legislation but also identified interim alternatives such as direct action through competition or consumer policy enforcement.

11. The second type of study, market investigation references, are treated both by the CMA and affected companies as essentially an enforcement process. They have led to extensive litigation and are more costly than market studies, but potentially also more beneficial because they enable the CMA to implement remedies. This tool was used, for example, to break up a monopoly operator of airports.

12. **Luis Gomez** gave a business perspective on market studies on behalf of **Business at OECD**. He said that business broadly welcomes market studies, since they can shed light on markets in a holistic way, unlike other competition policy tools. This helps businesses understand their markets and enhances compliance. Market studies also allow business to engage proactively with agencies and regulators in a relatively non-adversarial context. Business naturally prefers market studies to enforcement action, which tends to be narrowly focused and backward looking.

13. Mr Gomez also voiced concerns about the use of market studies. First, they should have a clearly articulated justification, objectives and scope, and should not be used to explore speculative theories of harm. Secondly, because of their market-wide scope, the problem of predicting the future is even more difficult in market studies than in, for example, merger control. Finally, the output of market studies should be limited to advocacy, and should not extend to the imposition of remedies. Mr Gomez felt that the power to impose remedies in the absence of a violation of law was akin to ex ante regulation and market engineering.

14. **Denmark** described the use of market studies by the Danish Competition and Consumer Authority (DCCA) to address emerging competition issues. Two main areas recently are narrow oligopolies in financial markets, and digital platforms. The DCCA turns to market studies in instances where competition problems are expected to be of a structural or regulatory nature rather than caused by a violation of competition law. It views market studies as a key tool for promoting competitive functioning of markets at an early stage, by providing recommendations for action or remedies. A limitation of the tool is that the DCCA does not have the power to impose remedies or oblige relevant authorities to act.

15. **Ukraine** described how two market studies by the Antimonopoly Committee of Ukraine (AMCU) led to soft-law action in response to disruption caused by the COVID-19 pandemic. The first was a 2018 study of the supply of chicken meat, which was found to be dominated by a single domestic producer. In 2020 the AMCU requested that the producer maintain its domestic supply and not reorient its products for export in order to profit from increased demand and panic buying abroad. In March, the AMCU also began market monitoring the price of essential foodstuffs and pharmaceuticals, and successfully persuaded retailers not to inflate their margins. It also engaged with pharmaceutical retailers to prevent the advertising of unproven medicines. The delegate acknowledged that these were not “textbook” competition policy interventions, but they had been a rapid and effective tool.

16. **Brazil** described a market study by the country’s competition authority, the Administrative Council for Economic Defence (CADE), into the allocation of airport slots and the possible reallocation of slots held by the country’s fourth largest airline, which was facing bankruptcy. The airline formulated a plan to avoid bankruptcy by reallocating slots to its rivals, which would have led to a significant increase in market concentration. CADE proactively simulated the transaction and warned the parties that the transaction might not be approved. It also recommended changes to the default rules for slot allocation to preserve competition.

17. **Finland** gave examples of market studies conducted both ex ante to propose regulatory change and ex post to assess the effects of such change. The delegate also explained that the Finnish Competition and Consumer Authority (FCCA) is shifting from market studies based on literature surveys, economic reasoning and surveys of users, to the use of large data sets.

18. Taxi markets in Finland were liberalised in 2018 following a small study. Since then prices have risen and quality appears to have deteriorated in some respects. The FCCA is now launching a much larger study to understand what went wrong and to give a fuller understanding of the market.

19. The FCCA is also undertaking a major study of the pharmacy sector, which is currently heavily regulated. It has secured a large data sets of financial information and order from pharmaceutical wholesalers for all Finnish pharmacies. The study will review whether regulation of the pharmacy sector should be changed.

20. The **United States** gave an example of an initial study leading to the exercise of formal investigative powers. The US Federal Trade Commission (FTC) held a series of “Hearings on Competition and Consumer Protection in the 21st Century” in 2018-19 to review and, if necessary, update its thinking in these areas. Among many topics covered, the question of acquisitions by digital platforms of nascent competitors raised concerns about the maintenance of monopoly power and the potential effect on innovation. This prompted a formal FTC market study of certain major platforms under so-called 6(b) Orders, by which the FTC can compel companies to file certain information – in this case on non-reportable acquisitions over a 10-year period. The aim of the ongoing study is to assess whether US antitrust authorities are receiving adequate notice of transactions that might eliminate or limit competition, and to examine the structure of such transactions and the performance of firms after their acquisition. The delegate explained that 6(b) powers are a resource-intensive but highly effective policy and research tool for gathering non-public information that would not otherwise be made available to the FTC.

21. **Romania** discussed the use of market studies and sector inquiries into the digital economy by the Romanian Competition Council (RCC). As in other jurisdictions, the RCC uses market studies to gather information about markets for advocacy purposes, to inform subsequent enforcement action, or to assess the effects of its decisions *ex post*. Sectoral inquiries are a formal enforcement tool that permits the imposition of remedies.

22. The RCC has conducted several studies to examine emerging issues related to digital technology. One outcome of a recent market study on big data platforms and technologies was a recommendation that the RCC should increase its big data analytical capacity in order to “fight fire with fire”. Already in a previous study of online platforms the RCC used crawlers to collect daily prices from online platforms for a year.

23. **Spain** explained the role of market studies as advocacy tools used by the National Authority for Markets and Competition (CNMC). Market studies are often paired with other *ex ante* and *ex post* instruments. *Ex ante* instruments include consultative, non-enforcing instruments such as guidance to market participants and reports on proposed or current regulation. *Ex post* instruments include an active legal capacity to challenge regulations and administrative acts before the courts if they harm effective competition.

24. Two examples are the private hire sector and the tourist housing market, in which the CNMC has not only conducted market studies but has also issued reports on draft regulations and challenged a number of regulations that restricted competition. These challenges were complemented by economic reports quantifying the damage to consumers, and were successful in several instances.

25. **Hardin Ratshisusu** discussed the experience of the Competition Commission of **South Africa** (CCSA). He began by observing that market inquiries in South Africa are conducted within a formal enforcement framework. Market studies outside of an enforcement framework, he said, were a form of research that South Africa as a developing country did not have the luxury of conducting.

26. Legislative provisions for market inquiries were introduced in 2013 and enhanced in 2018. Previous studies such as an investigation into the banking sector in 2006 were conducted under other provisions. The CCSA has the power to conduct market inquiries into the general state of competition in any industrial market, without targeting any single firm. Five inquiries have been completed to date, addressing banking, liquid petroleum, private healthcare, mobile data and grocery retail.

27. The private healthcare market inquiry found that the market was characterised by high and escalating prices due to highly concentrated funders and facilities, disempowered and uninformed consumers, a general absence of value-based purchasing, under-regulated practitioners, and failures of accountability at many levels. It recommended regulatory reforms to promote a more competitive private healthcare market and hence better value for money for consumers and innovation in the delivery and funding of healthcare.

28. Market inquiries also led to stakeholders accepting the CCSA's recommendations and led to reductions in mobile data prices and the elimination of exclusive practices in grocery retail. Mr Ratshisusu considered that these outcomes were greater than enforcement would have achieved. He also noted that the CCSA has released a draft digital strategy and is considering launching a market inquiry into digital markets in South Africa.

29. Concluding the first part of the roundtable, the Chair asked **Andrea Coscelli** to respond to the view expressed by Mr Gomez that market investigations should not lead to the imposition of remedies. Dr Coscelli said that in a democracy, parliament can decide to legislate in markets directly or delegate powers to an independent regulator. Ultimately what matters are outcomes for consumers and citizens in the medium to long term. Currently in the UK the CMA has powers to intervene, but the courts have affirmed that the bar for direct intervention is high, particularly in the case of structural remedies, since these interfere with property rights in situations where companies have not breached competition law.

#### 4. Co-operation between competition authorities and other government agencies in market studies

30. **Singapore** began the second part of the roundtable by describing how the Competition and Consumer Commission of Singapore (CCCS) collaborates with other government bodies on market studies. The CCCS regularly conducts market studies, either on its own initiative, in response to complaints or feedback where there is a lack of evidence of specific anti-competitive activities in the first instance, or as follow-up to investigations that have not resulted in an infringement decision. Market studies allow the CCCS to better understand how markets operate (especially emerging markets), to identify the causes of ineffective competition, and to ascertain whether a particular anti-competitive market practice overseas is also occurring domestically. The CCCS has powers to require companies to provide information, but not to impose remedies directly in response to the findings. Market studies may be followed by actions to seek regulatory change or the launch of enforcement investigations.

31. The Singapore written contribution sets out the recent experience of the CCCS in carrying out market studies with other local agencies, such as the Infocomm Media Development Authority, the Intellectual Property Office of Singapore, and the Personal Data Protection Commission. The delegate noted three benefits of collaboration with other agencies. First, it enables agencies with different remits to work out a coordinated response, as exemplified by a three-way joint study of the implications of big data for competition, IP rights and personal data protection. Secondly, coordinated positions enable industry players to understand the agencies' thinking on emerging issues at a whole-government level. Thirdly, collaboration gives faster and better access to knowledge and data residing in other parts of government, and to market players within the relevant sector. This was the case with a market study that shaped the first set of regulations relating to third-party taxi booking apps, conducted jointly with the transport regulator.

32. Potentially the main challenge of collaboration is coming to an agreement on the causes of competition issues and on recommendations to deal with them. The CCCS might decide to undertake a market study on its own in some cases.

33. **Serbia** discussed a sector inquiry completed in 2020 with World Bank participation and addressing competition issues arising after the liberalisation of rail freight transport in 2016. The delegate referred participants to the written contribution for background and details of the study. The World Bank involvement was part of technical assistance to Serbia's Commission for Protection of Competition (CPC) under a wider project. It was undertaken by a consortium between a leading international economics consultancy and a Serbian law firm, on the one hand, and by the CPC in co-operation with several Serbian institutions on the other. The delegate reported that the quality of co-operation between the CPC and the rail regulator was outstanding and extended throughout the study, from designing the questionnaire to market participants, to the final recommendations. Knowledge shared by the rail regulator proved crucial.

34. **Austria** discussed collaboration between the Federal Competition Authority (BWB) and other government agencies. The BWB is free to determine in which markets it conducts studies but will sometimes do so in response to approaches from other government agencies. This was the case with an analysis of the regulation of ATM fees and more recently a study on taxis and ride-hailing services. In addition, digitalisation raises not only competition issues but also issues of data protection and sector-specific regulation, which creates synergies between the BWB and other bodies. A task force has been formed jointly with the telecommunications regulator to monitor online platforms and proactively analyse potential competition problems.

35. The **Caribbean Community (CARICOM)** described a multilateral study underway into the air travel sector in the light of the COVID-19 pandemic. The pandemic and resulting border restrictions have had an unprecedented adverse effect on CARICOM member states, many of which are reliant on tourism. This includes regional passenger airlines, some of whom have had to turn to freight transport, while others have suffered financial distress.

36. The CARICOM Competition Commission (CCC) has recently initiated a market study on scheduled air passenger transportation services, motivated by concerns that post-pandemic prices might rise to excessive levels. The study will assess the robustness of competition in the relevant markets and make recommendations where necessary. It is also looking at passenger rights in response to consumer complaints about refunds. A consumer survey covers these experiences as well as the drivers of consumers' choice of airline for regional travel. Information is also being gathered from airlines, travel agents and airport authorities.

37. The work is made possible by collaboration of the national competition and consumer authorities in the region. As a small agency with limited financial resources but a wide geographical spread, the CCC has formed a steering committee to coordinate feedback on the design of the study and its implementation on the ground.

## 5. Challenges and benefits of market studies in emerging and dynamic markets

38. **Ana Sofia Rodrigues of Portugal** shared several takeaways from two market studies by the Portuguese Competition Authority (AdC), one on digital ecosystems and the other on fintech services. Competition advocacy is a major activity for the AdC, which has issued over 50 opinions and recommendations and published four market studies since 2018.

39. With regard to digital platforms, the first lesson was the importance of getting to the heart of how digital tools function. The AdC digital market study included a detailed examination of pricing algorithms and their use by vendors in actual marketplaces. The algorithms provide options for undercutting, matching or pricing above competitors, detecting what the algorithms themselves label as price wars, and reacting to price wars by, for example, shutting down pricing reactions. Recalling Amelia Fletcher's presentation on consumer behavioural biases on Day 2 of the Global Forum, the delegate said that examination of pricing algorithms showed how consumer inertia could be exploited, for example by options to set a price premium if the product is in the buy box. In their advertising, developers of algorithms emphasise these features and sometimes advise clients not to follow certain strategies such as undercutting. On public fora and social media the AdC also found explicit calls for collusion between vendors by means of algorithms.

40. The fintech services market study illustrated a second lesson, which was the importance of extensive contact with stakeholders. The AdC held 35 formal meetings with stakeholders as diverse as sector regulators, business associations, incumbents, entrants and potential entrants. In a follow-up on market developments two years later it sent a survey to 139 national and international fintech companies. In total this advocacy initiative entailed over 800 written and oral interactions with over 150 stakeholders.

41. The third point was that a one-shot advocacy effort is often not sufficient when markets are complex and rapidly evolving. The follow-up work on fintech has enabled the AdC to identify topics for further advocacy efforts, opinions, recommendations and contributions to the legislative process.

42. A challenge for the AdC is the lower rate of questionnaire response achieved from firms established outside Portugal or whose presence is mainly online, which is often the case with firms in the digital sector.

43. **Mexico** discussed the use of market studies and market investigations by the Federal Economic Competition Commission (COFECE). Market studies are also carried out by the Federal Telecommunications Institute (IFT).

44. COFECE selects markets for market studies on a case-by-case basis. They may focus on emerging competition issues or long-established concentrated markets. Examples include several studies of the energy sector in the context of market liberalisation; a comprehensive market study of the financial sector commissioned by Congress as part of the 2014 financial reforms; and a study of the market for expired patent drugs that arose from joint work with the National Institute of Public Health on procurement issues.

45. Market studies have three main benefits. They equip the agency with in-depth market knowledge that may be used in enforcement matters. Secondly, they can lead to recommendations that are eventually implemented. Thirdly, they may identify specific anti-competitive conduct leading to enforcement investigations.

46. Like some other jurisdictions, COFECE also has a separate type of study, market investigations, that are a formal enforcement tool in which the remedies are binding. These investigations are used to analyse barriers to competition with a view to structural remedies, or to determine the existence of essential facilities with a view to regulation of access. COFECE has opened seven market investigations since 2014. A lesson from this experience is that where the main barrier to competition derives from a regulatory norm, the analysis is best approached via a market study instead, since COFECE cannot compel another government body to regulate a market in a certain way. Finally, COFECE expects market investigations to be a powerful tool in dealing with emerging digital markets.

47. **Sangeeta Verma** explained that the Competition Commission of **India** (CCI) is making increasing use of market studies, especially in response to changing competitive landscapes due to technological advances and digitisation of markets. This includes a recent study of e-commerce markets designed to give a holistic understanding of developments and emerging competition barriers in the market to inform enforcement and advocacy priorities. There was no a priori hypothesis of harm to competition that the study intended to test.

48. The study uncovered competition issues that in specific circumstances would violate the law. These issues concerned the lack of neutrality of e-commerce platforms and unfair contracts between platforms and their business users such as price parity clauses. As a guide to stakeholders, the CCI articulated the analytical framework it would apply to each of these issues under its enforcement mandate.

49. The study also found that the underlying cause of these emerging issues was the imbalance in bargaining power and information asymmetry between platforms and their business users, and concluded that this should be addressed through new non-enforcement tools. Accordingly, under its advocacy mandate, the CCI urged e-commerce platforms to take self-regulatory measures to improve transparency over certain areas, such as search ranking, collection, use and sharing of data, user review mechanisms, revision of contract terms and discount policy. Based on this advisory measure, the CCI may in future consider a code of conduct requiring compliance from industry.

50. The CCI has also found market studies useful in considering other emerging issues, such as common ownership of firms in the same industry by private equity investors, which will inform both antitrust and merger enforcement. It has also just concluded a study in the telecom sector addressing competition concerns raised by increased market concentration and technology-led vertical convergence.

51. **Japan** described a recent market study (known in its jurisdiction as a fact-finding survey) on cashless payments with QR codes and barcodes, which had the aim of identifying competition concerns in the relationship between bank and non-banks and considering whether certain trade practices are problematic under competition law. The Japan Fair Trade Commission (JFTC) chose a fact-finding survey in order to collect information from the entire industry using a voluntary approach, and to provide a flexible basis for seeking to prevent violations in advance.

52. The study found that banks could be in breach of competition law if they sought to exclude non-bank code payment providers from the market by refusing to enter into contracts with them to effect payments from users' bank accounts to merchants. It also found disadvantages for non-banks in the system of disbursing money to merchants since non-banks do not have direct access to the interbank fund transfer system.

53. The survey led to recommendations by the JFTC to create a level playing field between banks and non-banks in the market. These recommendations also informed government policy, which aims to enhance cashless payments and encourage entry by nonbank fintech companies.

54. **Kenya** described the outcome of a market inquiry by the Competition Authority of Kenya on competition issues in mobile money. Digital credit has significantly deepened financial inclusion and access to credit in Kenya. Overall access to formal financial services has increased to 83% in 2019. There are now over 60 lenders on mobile and digital platforms, and 88% of the adult population has access to mobile money accounts such as M-Pesa.

55. The specific focus of the inquiry was whether the pricing and conditions of USSD platform access offered by mobile network operators (MNOs) to providers of mobile financial services were constraining competition in financial services. USSD is a text-driven technology allowing mobile phone users to interact with applications on the network via a menu. The inquiry found that the dominant MNO's pricing of USSD was excessive and discriminatory in such a way as to harm the ability of downstream firms such as mobile money service providers and banks to offer competitive services.

56. The Authority chose to use soft enforcement whereby in lieu of an investigation the dominant MNO accepted a commitment to reduce its USSD costs and apply them uniformly to all players. The MNO was also compelled to publish and maintain on its website an updated schedule of standard offer prices for USSD services. The outcome was achieved in collaboration with the telecom regulator and central bank.

57. The Chair gave the floor to **Luis Gomez**, who referred participants to the section of the Business at OECD contribution concerning remedies. He said that while specific views might vary, there was consensus among businesses that market studies are beneficial and that remedies should be via acquiescence. He noted that the presentations by Ukraine, Spain and others had demonstrated that it was possible to modify business behaviour through advocacy and persuasion. If remedies are necessary, the position of Business at OECD would be that they should come from government through consultation, or from the legislature through public debate.

58. **Hardin Ratshisusu** remarked that the willingness of business in South Africa to embrace recommendations arising from market inquiries had enabled markets to be reformed without carrying through the threat of enforcement.

59. The **Chair** thanked participants and closed the session.