

Unclassified

DAF/COMP/GF/WD(2016)79

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

17-Nov-2016

English - Or. English

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

## **Global Forum on Competition**

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

**Contribution from BIAC**

**-- Session II --**

**1-2 December 2016**

*This contribution is submitted by BIAC under Session II of the Global Forum on Competition to be held on 1-2 December 2016.*

*More documentation related to this discussion can be found at  
[www.oecd.org/competition/globalforum/the-role-of-market-studies-as-a-tool-to-promote-competition.htm](http://www.oecd.org/competition/globalforum/the-role-of-market-studies-as-a-tool-to-promote-competition.htm)*

Please contact Ms. Lynn Robertson if you have any questions regarding this document [phone number: +33 1 45 24 18 77 -- E-mail address: [lynn.robertson@oecd.org](mailto:lynn.robertson@oecd.org)].

**JT03405563**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/GF/WD(2016)79  
Unclassified

English - Or. English

## MARKET STUDIES AS A TOOL TO PROMOTE COMPETITION

-- BIAC --

1. The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Global Forum on Competition for its session on market studies as a tool to promote competition.

### 1. Introduction

2. Market studies are seen as one of the many tools that competition authorities might have at their disposal. There is no common model for such studies and, indeed, substantial differences between jurisdictions both in substance and form. In most cases such studies are limited to competition concerns but, in others, there is no such limitation. Sometimes the justification for the choice of markets to examine is not always clear and response to popular or political demands cannot be entirely excluded. One common feature of market studies, though, is that they are complex and difficult exercises to structure and manage. Typically they take a long time to complete and involve significant regulatory resources for any authority. Regulators therefore need to be selective and conscious of "value for money" considerations when deciding if and whether to initiate a study. Equally, these studies usually involve significant expenses on the part of companies and may be a substantial distraction for management. These costs are due to the need to use external advisers, internal advisers and lost opportunity costs as they take up time of key managers who have businesses to run. Market studies experience generally has to be described as "patchy" with limited tangible results in many instances. In some jurisdictions this has resulted in a certain polarisation of views between regulators (who welcome the freedom to examine markets as well as the opportunity to deepen their knowledge of markets which such studies provide) and the business community (who resent the time and costs involved particularly where no real issue is alleged or found). The question arises whether such broad brush studies are a justifiable use of resources for regulators given that their main focus should be on dealing with actual anti-competitive behaviour. There are, however, instances where market studies could be a useful tool: for example, if used appropriately, they can be valuable in advocating with government changes to laws or legislation which impact negatively on markets.

### 2. Market Studies in General

3. It is somewhat difficult to find a common definition of market studies as there are substantial differences in what competition authorities can do and their powers. A good start is the definition in the International Competition Network’s Good Practice Handbook (‘Handbook’) which describes them as ‘research projects conducted to gain an in-depth understanding of how sectors, markets, or market practices are working’. This captures most types of market studies<sup>1</sup>. The Handbook contains a good description of why they are conducted and what their output might be.

4. ‘Market studies are conducted primarily in relation to concerns about the functioning of markets arising from one or more of the following: (i) firm behaviour; (ii) market structure; (iii) information failure; (iv) consumer conduct; (v) public sector intervention in markets (whether by way of policy or

---

<sup>1</sup> In this context, it should be noted that the term ‘market’ should not be interpreted to have the same meaning as ‘relevant market’ under competition law.

regulation, or direct participation in the supply or demand side of markets); and (vii) other factors which may give rise to consumer detriment’.

5. ‘The output of a market study is a report containing findings based on the research. This may find that the market is working satisfactorily or set out the problems found. Where problems are found, the market study report can include: (i) recommendations for actions by others, such as legislatures, government departments or agencies, regulators in business or consumer bodies; and/or (ii) commitments by the competition (or competition consumer) authority itself to take advocacy and/or enforcement action’.

### **3. Relationship between market studies and other tools (enforcement, market investigations and regulation)**

6. Competition authorities have several tools at their disposal; while enforcement actions deal with breaches of the law by undertakings, market studies allow them to consider the structure of the market, even if there is no infringement of that law. Authorities might examine the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumers and business behaviour. BIAC recognises that certain complementarities exist. Enforcement cases could be indicative of wider concerns in the market and thus alert the authority to the need for a market study. Market studies may reveal features which might be conducive to anti-competitive conduct - e.g. laws or regulations which confer market power by raising barriers to entry.

7. BIAC however has several concerns in relation to market studies and would like to highlight that they are not an indispensable tool. In our view there is a risk that market studies could delay or impede appropriate and timely enforcement action. There is also the question of whether market studies utilise resources which might be better devoted to enforcement activities. They require considerable time and resources<sup>2</sup> and one could query particularly whether such studies ought to be a priority for less well-resourced and/or less experienced agencies, including those in countries with new or developing competition regimes, particularly where other government agencies are empowered to monitor the markets in question.

8. In addition to the power to carry out market studies, a few jurisdictions (such as Iceland, Mexico and the UK) have the power to carry out market investigations. Differently from market studies, market investigations allow a competition authority to impose severe and drastic remedies without the finding of an infringement of competition law. A company which has not breached the law could face substantial financial and commercial consequences, in some cases including forced divestments. BIAC has serious concerns about this type of tool. These investigations are not only costly in terms of time and resources “but they can also have negative impact in terms of their effects on the reputation[s]<sup>3</sup> of the companies that are being reviewed. The mere fact that a company is being investigated may cause consumers to assume that “something sinister is occurring in the market – for example, price collusion or an abuse of a dominant position”<sup>4</sup>.

<sup>2</sup> See BIAC paper on ‘Hearing on approaches to issues in Oligopoly Markets’ presented to the OECD Competition Committee on June 16, 2015, paragraphs 26 and following.

<sup>3</sup> Philip Marsden & Peter Whelan, *When Markets Are Failing, Competition Law Insight: Antitrust Law and Policy in a Global Market*, in COMPETITION L. INSIGHT 6, 8 (Jan. 16, 2007), available at [www.biiicl.org/documents/178\\_clf\\_when\\_markets\\_are\\_failing\\_part\\_1\\_marsden\\_and\\_whelan\\_2007.pdf](http://www.biiicl.org/documents/178_clf_when_markets_are_failing_part_1_marsden_and_whelan_2007.pdf).

<sup>4</sup> *Id.*

9. The UK has conducted several market investigations and serious concerns have been raised in the use of this procedure rather than its enforcement powers<sup>5</sup>. Sometimes business feels the investigation is used to impose draconian conditions to address perceived failures of competition when there is no breach of the law which the authority would be able to prosecute under its enforcement powers. BIAC would have serious concerns if such tool were to be extended to other jurisdictions.

10. There is also a fear for business that market investigations and studies may be “overused” and will become “an unrestrained alternative to enforcement of the competition law rules rather than as a valuable complement.”<sup>6</sup> “[M]arket investigations and sector inquiries should be seen as an instrument of last resort and only used in the most appropriate circumstances. Such tools are unquestionably doomed to failure if they are used in an unsuitable manner and for inappropriate reasons.”<sup>7</sup>

11. We note that some forms of market intervention in the name of market studies or attempts to address perceived market inefficiencies can resemble market regulation, which BIAC believes is not within the normal purview of competition authorities lacking the expertise of industry specialists. The inevitable result of such intervention is that price or other regulation substitutes the regulator’s judgment for the mechanisms of the free market, inevitably leading to inefficient outcomes.<sup>8</sup>

12. BIAC believes that where it is needed, regulatory intervention should be evaluated, decided and effectuated by a specialist regulatory agency charged with specific jurisdiction over such issues. Likewise, where the authority granted to a specialist regulatory agency is arguably broad enough to encompass competition concerns, the competition analysis should be ceded to the national competition authority, thereby allowing each agency to focus on its own core competencies.<sup>9</sup>

13. “Regulation imposes a particular course of conduct on an undertaking (dominant or non-dominant) on the theory that this will ensure the better development of competition. The reality of experience is that regulation becomes permanent, and that regulators may inadvertently handicap the market forces that they are trying to release. And as competition law is used in more novel and complex fields, it becomes difficult to say whether an intervention is meant to punish an identified abuse, or whether

---

<sup>5</sup> One example (but there are more that could be cited) is the saga of the UK private healthcare investigation. Referred on 4 April 2012 to the then Competition Commission, the CMA’s original 2 April 2014 report ordered HCA to sell two of its central London hospitals, and this without any finding of violation of any law, just a view by the CMA about adverse effects on competition and improving markets. HCA appealed to the Competition Appeals Tribunal which set aside the CMA findings on the basis of errors in the CMA’s statistical analysis. The CAT remitted the matter back to the CMA. Finally, after a new investigation on remittal, on 5 September 2016 the CMA confirmed it was “no longer effective and proportionate” to order any divestment - see <https://www.gov.uk/government/news/cma-publishes-final-report-on-private-healthcare-remittal>). One can only guess the costs and damage to the businesses involved can only be guessed at.

<sup>6</sup> Marsden & Whelan, *supra* note 2

<sup>7</sup> *Id.*

<sup>8</sup> OECD, Competition Comm., *Oligopoly*, DAF/CLP(99)25 (1999), at 201, available at [www.oecd.org/daf/competition/1920526.pdf](http://www.oecd.org/daf/competition/1920526.pdf) [hereinafter OECD *Oligopoly* 1999]. .

<sup>9</sup> OECD, Global Forum on Competition, *Competition Issues in Television and Broadcasting – Contribution from BIAC*, DAF/COMP/GF/WD(2013)62 (Feb. 25, 2013), at ¶ 8, available at [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2013\)62&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2013)62&docLanguage=En).

it aims instead to adjust the manner in which a market functions.”<sup>10</sup> BIAC encourages competition regulators to resist the temptation to act as an industry regulator and to take action only where competition abuses, as measured by traditional standards, warrant intervention.<sup>11</sup>

#### 4. Objectives of market studies

14. Market studies are not new but have become an increasingly widespread component of a competition authority’s portfolios. While new and young agencies have used market studies mostly as a tool to build capacity and reputation, more mature agencies have been more focused on outcomes to ensure that markets work well for the benefit of consumers.

15. Although there are different rules across jurisdictions, market studies have several functions and in particular they are used:

- As a tool for competition advocacy, where there is no violation of the law but the market does not seem to work well;
- As a precursor for enforcement, when there is a suspicion that there might be anti-competitive practices but the authority is not fully aware of what the issue might be.

16. There are of course other objectives such as preparation for intervention in the legislative process in order to advocate to minimise adverse effects on competition, build technical expertise about a market within the competition authority, consider suspected market failure that cannot be assigned to a specific actor, address public/political concerns and assess the state of competition in the market.

17. While BIAC acknowledges that in some cases market studies could be beneficial as an advocacy tool towards governments, it is concerned about the use of market studies as possible precursors to enforcement. In such instance, market studies could be used as a ‘fishing expedition’ when there is no evidence (or insufficient evidence) to open an investigation. Market studies do not have the same procedural safeguards (such as right against self-incrimination and others) that would be available in cases of proper enforcement. Being a precursor to enforcement should not be a primary purpose of such studies. Obviously, if a market study has been carried out and the authority finds evidence of wrongdoing, the authority should be able to investigate using its enforcement powers (with all the proper procedural safeguards that would entail).

#### 5. Competition authorities’ powers and criteria used to initiate market studies

18. The powers of competition authorities to initiate market studies vary and there are distinct features in different jurisdictions. In some countries, selection of market studies is determined by law while in others the competition agency has discretion to select which studies to carry out. BIAC believes that any market study should be initiated only if certain legislative thresholds are met and if there are compelling reasons. The scope of the study should be carefully defined and limited to what is necessary. One should not forget that these studies cause substantial costs to industry and should be undertaken only after careful consideration.

<sup>10</sup> Ian S. Forrester, QC, *Sector-specific price regulation or antitrust regulation – A plague on both your houses?*, in EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC 547, 565 (Claus-Dieter Ehlermann & Mel Marquis eds., 2008).

<sup>11</sup> OECD, Global Forum on Competition, *Competition Issues in Television and Broadcasting – Contribution from BIAC*, DAF/COMP/GF/WD(2013)62 (Feb. 25, 2013), at ¶ 43, available at [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2013\)62&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2013)62&docLanguage=En).

19. There is a tendency for the threshold to be very low and the powers to be very extensive. This may lead to studies that are disproportionate in scope and very burdensome. A balance has to be struck. It should be best practice for competition agencies to publish guidelines on how markets are selected and studies carried out as appropriate measurable thresholds. The criteria used by the various authorities to select and define appropriate markets to study is not always transparent to the business community. Moreover, the variety of different areas selected for study by various jurisdictions prevents business from discerning a pattern that might help to identify the criteria being applied. Fully explaining the rationale for carrying out a market study to business and to government is essential.

20. Choosing markets to study without a sound rationale or choosing markets which do not show prima facie any problem or markets that have already been examined in the past (and no substantial change has taken place since the last time a market study has been carried out) carries the danger of affecting an authority's credibility and leads to considerable waste of time and resources. As possible criteria to consider before selecting a market study, an authority should have in mind the scale and significance of the possible problems/ consumer detriment in the market; the impact on all market players; the market size and value; whether there are barriers to entry; the significance to productivity and economic growth; the prospects of obtaining evidence and identifying remedies; whether the likely benefits from a study would justify the possible cost and disruption to business. Competition authorities should be careful not to use the power to carry out market studies that are to a greater or lesser extent speculative or a fishing expedition where its narrower enforcement powers cannot be invoked.

21. As mentioned before, business must devote significant resources to each study. Business is concerned that sometimes the markets to study have not been selected sufficiently carefully. This is more obvious in those instances not only where the cost of the studies has been substantial and led to no change but also when markets have been subjects to several studies and investigations within a space of few years<sup>12</sup> absent changes to the sector.

22. It is essential for authorities to have clear from the outset the scope of the study and its possible outcome. Seeking stakeholders' input in advance of the launch of a market study on such matters as the potential issues identified and scope of a possible market study might be useful to fine tune the study. In fact, effective engagement of stakeholders at all stages is key to successful completion and could help minimise unnecessary burdens and costs. It adds more transparency to the process.

## **6. Gathering of data and other information for the study**

23. Again, the powers and processes vary from jurisdiction to jurisdiction. In some countries, competition authorities can use their powers of investigation to obtain data and other information. In other countries the authority can only employ voluntary gathering of data. Some authorities are more intrusive in their methods and more demanding in terms of the information. The EC has, for example, used a mixture of "dawn raids" and wide-ranging questionnaires (information requests). Given that such studies are basically fact finding activities rather than investigations of suspected anti-competitive behaviour BIAC believes the use of dawn raids in this context to be wholly disproportionate and inappropriate.

24. Market studies are usually document intensive and questionnaires tend to be quite burdensome. To use resources effectively, the authority's team should ask itself at all times why the information is needed, if it is already available within the authority or publicly, which are the more reliable sources, what is the burden on industry and if there is a different way to gather the information (for example a face to face meeting rather than a lengthy questionnaire). Authorities should consider the time and resources needed for stakeholders in answering information requests. Some authorities also have the power to impose penalties if parties do not answer. In our view cooperation should be sought at all times and penalties should not be used unless they are really necessary.

---

<sup>12</sup> An example is the banking sector in the UK or petrol prices in several jurisdictions.

## **7. Involvement of market participants (sellers, customers, and any other stakeholders)**

25. If the purpose of the study is only to get a basic understanding of a market, it is possible that the involvement of market participants is not necessary. However, if the purpose is to understand the market thoroughly - as would generally be the case - it will be necessary to seek the involvement of market participants. In some countries, consultation with stakeholders is commonplace, yet market studies in other countries are carried out without the apparent consultation involving stakeholders. Experience indicates that stakeholder involvement can help identify pertinent questions and information sources early in the development of market studies. This seems to be supported by most authorities. In the European Union, DG Competition has stated that it values dialogue with stakeholders over scope and process. In the UK, the CMA generally writes to a range of stakeholders who are associated with the market to seek factual information and views in the initial stages of the study.

26. Studies that exclude the participation of stakeholders are likely to affect the implementation of effective solutions that require the buy-in of stakeholders. However, when involving stakeholders, one should not forget that delays occasioned by the submission of responses from all the stakeholders inevitably affects the timetable for the study and its cost. For business, market studies may be an opportunity for explaining to the authority how the market works and make their own suggestions on how to improve and, if there are issues, consider self-regulation rather than regulatory or legislative intervention.

## **8. The need for transparency in market studies**

27. Market studies have tended to be opaque from a business perspective. Information requests are extensive and usually cover a wide spectrum of issues, making it difficult to determine what the precise concerns or focus areas of the study are. Often, the timetable is unspecified and is subject to "drift". Business would encourage competition authorities to be more transparent and focussed in their goals. Publication of key documents at various stages (such as scoping notice, statement of issue, etc.) is essential.

## **9. Timetables and milestones for completing market studies**

28. Some authorities are bound by statute (such as the UK's CMA), others merely have administrative timetables (e.g. the European Commission). The absence of a fixed timetable can lead to long drawn out examination that is ultimately ineffective. Competition authorities should always bear in mind the great burden placed on management time by such studies. A market study should have a short time frame and it should be managed carefully so that it is completed within a reasonable amount of time.

## **10. Use of confidential information**

29. Confidential information, including business secrets, is highly sensitive and valuable for companies. If companies need to provide such information, BIAC is keen to ensure that authorities have very good internal processes and safeguards by which they can ensure that confidentiality is protected. BIAC is also concerned that confidential information obtained in the course of market studies should not be used as evidence for subsequent enforcement action without a proper process; this approach diminishes incentives for stakeholders to cooperate in market studies. Finally, there is also a concern that, in those cases in which third parties are used by the authority to conduct studies (see below) and they gain access to confidential information, appropriate safeguards are in place.

30. In the last few years, we have seen a considerable increase of cyber-attack so any business information provided to an authority should be protected and authorities should have a state of the art cyber security protection in their systems. Separately, it is crucial that authorities should fully respect legal privilege when gathering information and conducting market studies.

## **11. Use of third parties in carrying out of market studies**

31. Competition authorities can carry out their study by themselves or use third party consultants. If the purpose is to merely understand (in a general nature) how certain markets operate, then contracting out is a viable option. If they are likely to be a precursor to competition law enforcement, then contracting out is less appropriate. In addition, consultants can be useful when the agencies lack specific expertise. However, if consultants are used, undertakings which have provided confidential information should be given all possible assurances and safeguards that their confidential information is protected.

## **12. Market studies as Advocacy tools**

32. BIAC has expressed in this paper its concerns about market studies being used as a precursor to enforcement. On the other hand, BIAC believes that market studies can often have a useful purpose as advocacy tools, especially vis-à-vis government.

33. Market studies can provide an indication of the impact of laws and regulations on competition and consumers and can facilitate wider action to promote competition or the consumer interest in a variety of ways. They can also be a useful tool for effecting regulatory legislative reform. BIAC supports the use of market studies to consider the rolling back of regulation and, in some cases, legislative reform.

34. Some market studies serve an important function for society by refuting claims of anti-competitive conduct when for example prices rises as a result of supply disruptions and not because of anti-competitive conduct. Absent such studies, governments may be inclined to apply anti-competitive restrictions on competition that might harm consumers and degrade future market responses to supply or demand shocks. Competition agencies in several countries have been called upon to assess whether price increases for key commodities such as gasoline or natural gas reflect market forces responding to supply or demand shocks versus anti-competitive conduct by suppliers. Market studies in these circumstances can have an important impact on policy discussions by averting government intervention if the market is functioning efficiently or by narrowing government interventions to specific competitive problems. For business market studies may provide the opportunity to comply voluntarily without enforcement action or legislative measures.

35. However, to be effective vis-a-vis stakeholders (whether that is business or government) the study has to be well reasoned and presented with compelling data. Sometime it will take time to persuade those concerned (for example government departments) of the value of implementing some recommendations of the study, but the authority should consider how to engage with government, for example the use of workshops, guidance etc. and showing the benefits and costs of proposed recommendation with robust data. In addition to the authority, other stakeholders may contribute to the debate by advocating to government or others the need to implement the necessary changes as well as referring to the results of study through media or in publications.

## **13. Conclusion**

36. BIAC believes that market studies should be carried out only after careful consideration by a competition authority. There are compelling arguments for greater clarity and thresholds to be met before such studies are launched. There is also a need for clear definition of scope and much greater focus on the organisation and management of market studies which have been prone to repeated errors which do not help to achieve the optimum outcome of what can be a very resource intensive exercise and which result in undue burdens upon the business community. These errors include "scope creep" - the failure to properly identify the objectives of the exercise at the outset which can then result in delay and inconclusive results. There are other factors which need to be right in order to achieve optimum results. If questionnaires are

used, then they should be tested and discussed with stakeholders to ensure that the right questions are being asked and that relevant information will be produced: stakeholders should be involved from the beginning. There should be sufficient flexibility to allow information to be provided in the format in which it is maintained by the relevant business to avoid the cost of having to create data in a different form. The timetable for the study needs to be clearly stated and understood to minimise the risk of drift which further increases the costs involved. All these practical factors point to the need for careful case management in order to get the best results at the minimum cost for all concerned. In this context the criteria for a successful market study might be described as a study which is completed on a timely basis, is based on clear and specific objectives, with the business community or government understanding what the competition authority is trying to achieve; and the business community and government understanding the reasons for the outcome.

37. Market studies can serve a useful purpose if properly deployed and managed. They should not be used as a fishing expedition or as a substitute for enforcement action and consideration needs to be given to what proportion of a competition agency's resources should be deployed in this way given the level of cost involved and the more direct impact of enforcement action. BIAC supports the use of market studies on this limited basis (for example to drive pro-competitive legislative change in a market) but has residual concerns about the risk that such studies might be used by competition authorities in a drive to raise their profiles through being seen to be taking proactive steps to challenge apparent consumer detriment in markets in a manner which is beyond the scope of competition principles. It is for this reason that BIAC believes that in each case clear and compelling arguments must be present for the use of such studies.