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ISSUES – Contribution from Serbia****- Session IV -**

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More documentation related to this discussion can be found at: [oe.cd/mktcomp](http://oe.cd/mktcomp).

Please contact Mr. James Mancini [E-mail: [James.Mancini@oecd.org](mailto:James.Mancini@oecd.org)], if you have any questions regarding this document

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## *Using market studies to tackle emerging competition issues*

### **- Contribution from the Republic of Serbia<sup>1</sup> -**

#### **1. Introduction**

1. Market studies are generally considered a useful tool which competition authorities can use to obtain a greater understanding of the functioning of a certain market or its segment. Not only do they provide a snapshot of the market in question at a certain period in time, but they can also illustrate the dynamics of development of competition over the years. In such a way, they can furnish competition authorities with indications of qualitative drivers behind competition (or its lack thereof) in a market, in addition to securing a robust statistical backbone. In light of the fact that sometimes significant distortions of competition can be due to reasons other than the existence of restrictive agreements or other prohibited practices by market participants, their value cannot be disputed. This argument is further reinforced in case of competition authorities which are relatively new and may lack the relevant enforcement experience.

The extent and form of market studies varies between jurisdictions. Depending on the particular legal framework and its practical enforcement, market studies conducted by competition authorities around the world may range from simple fact-finding exercises over studies of analyses of competition to multi-year sector inquiries. They can be stand-alone research projects or form part of a particular case analysis. While the presumption is that competition authorities perform them in-house, they can also be outsourced (in part or entirely). Outsourcing can have additional benefits in terms of reception of additional expertise in a certain field, while at the same time reducing the burden on competition authorities in terms of engagement of their own resources. However, outsourcing may also diminish the utility of market studies as a tool by way of which the competition authorities can develop the skills of their own staff, which may be astutely important for understanding the market, leading to overall better enforcement. Thus, performing market studies in jurisdictions, which have the legal powers to perform them, is always a balancing exercise between different important factors, such as time, human resources, objectives to be achieved and the expected outcomes.

2. According to the Market Studies Project Report, prepared by the ICN Advocacy Working Group and published by the ICN in June 2009, *'worldwide at least 40 competition authorities (out of the 100 plus ICN members that enforce some kind of competition law) use market studies as part of their portfolio of tools'*<sup>2</sup>. If we know that in 2009, there were

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<sup>1</sup> Prepared by **Ms. Nina Vasić**, LL.M., Senior Adviser within the Division for Legal Affairs, Domestic and International Cooperation and **Ms. Jelena Popović Markopoulos**, MSc, Senior Adviser within the Division for Economic Analyses, Commission for Protection of Competition of the Republic of Serbia. The findings, interpretations, and conclusions expressed in this paper are those of the authors and do not necessarily reflect the views of the Commission for the Protection of Competition of Republic of Serbia.

<sup>2</sup> ICN Report available online at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG\\_MktStudiesReport2009.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_MktStudiesReport2009.pdf), page 3, Section 1.2.

around 195 countries in the world and that 129 countries<sup>3</sup> had competition laws, it follows that around 2/3 of countries of the world had competition laws in place in that year and that competition authorities of around 1/3 of those countries were empowered to carry out market studies. While these statistics do not speak of qualitative factors, such as the enforcement of competition laws or the capacities of bodies entitled to enforce them, they provide a sense of the spread of competition laws and the use of market studies by competition authorities around the world. However, bearing in mind the time which has lapsed since the publication of the aforementioned ICN report and the changes in global markets which have since ensued, we can assume that the number of competition authorities empowered to carry out market studies has grown in the meantime.

## 2. Market studies as conducted by the Serbian competition authority

3. In the Republic of Serbia, the national competition authority – Commission for Protection of Competition (hereinafter the **CPC**) has been in existence since 2006. While the Law on Protection of Competition (“Official Gazette of the Republic of Serbia”, no. 79/2005), which established the CPC as an independent and autonomous organization dates back to 2005, the CPC became operational in 2006 with the first convocation of its Council. The competences of the authority were prescribed in Article 35 of this Law. Among them was the delegated power of the CPC to *‘monitor and analyse the conditions of competition in individual markets and individual sectors’* (Art. 35, par 1.(4)). The same competency of the CPC exists in **the current Law on Protection of Competition (“Official Gazette of the Republic of Serbia”, no. 51/2009 and 95/2013, hereinafter the Law), in Article 21, paragraph 1(6)**. However, the current Law also contains **other important** provisions regarding this field of competency of the Commission and expands it in significant ways.

4. Namely, according to Article 47 of the Law, the CPC may analyse the state of competition in a particular sector of the economy or certain categories of agreements in different economic sectors, i.e. launch **sector inquiries**, when the price movements or other circumstances indicate the possibility of restriction or distortion of competition. For purposes of carrying out sector inquiries, the CPC can request undertakings to submit all the necessary information or documents (including agreements, decisions or notifications in regard of concerted practices) and can conduct all the necessary searches. Undertakings which receive a request of the CPC for the provision of information are obliged to respond to such request. In case they fail to comply with it, they may be subject to procedural penalties, prescribed by Article 70 of the Law. The threat of such sanction, which can range from 500 to 5.000 EUR per day<sup>4</sup> of failure to comply with the request for information of the CPC, seems to be a very valuable addition to CPC’s related competencies, as there is a high level of compliance of undertakings in the context of performance of sector inquiries.

<sup>3</sup> Anu Bradford, Adam S. Chilton, Chris Megaw & Nathaniel Sokol, Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets, JOURNAL OF EMPIRICAL LEGAL STUDIES, VOL. 16, P. 411, 2019 (2018), p.1. Available at: [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3518&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3518&context=faculty_scholarship).

<sup>4</sup> In any case, the procedural penalty may not exceed 10% of the total annual revenue of the relevant undertaking(s) calculated in accordance with Article 7 of the Law.

5. Article 47 of the Law also obliges the CPC to publish a report on the sector inquiry ‘in an appropriate manner’ and in particular on its website. The CPC may also invite undertakings to provide their comments on the published report and it does so in practice, in order to receive feedback on the findings of the CPC from the pertinent inquiry.

6. In practical terms, in order to be able to exercise all its legal competencies listed above, the CPC has established a special division in 2010, dedicated to the performance of economic analyses- **Division for Economic Analyses**. It comprises only economists and has been strengthened over the years, in order to provide more robust economic research for the CPC, in line with the development of its needs and overall enforcement record. The progress in that regard has also been noted by the representatives of the European Commission during meetings of the Subcommittee on Internal Market and Trade, held as part of the process of monitoring the fulfilment of obligations from the Stabilisation and Association Agreement, signed between the EU and Serbia.

7. The Division for Economic Analyses of the CPC nowadays conducts sector inquiries, as comprehensive in-depth research projects and inquiries into conditions of competition in a (certain) market, as more flexible and smaller-scale research tasks. It also provides valuable case-specific economic analyses for the needs of the case-handling divisions of the CPC. In line with these, the CPC is also engaged in developing internal guidelines for conducting sector inquiries and continuous monitoring of international best practices in the field.

8. Since its formal establishment, the CPC has completed 17 sector inquiries and 6 inquiries into conditions of competition in a variety of markets. Currently, 4 sector inquiries are underway. In the practice of the CPC, the decision on the choice of the particular market is made by balancing different criteria. Such a decision is never an easy one; however, given that the conditions from Article 47 of the Law are met, priority amongst different criteria is often given to the importance of a particular market for the overall economy, its impact on other markets and consumer benefits, together with the urgency of the issue in question. The alignment with government’s strategic priorities and objectives is also taken into account, because such alignment increases the likelihood that the recommendations issued will be implemented by the relevant stakeholders. Furthermore, it is important to evaluate the adequacy of a market study to address the issue under consideration. Market studies take time and engage valuable human resources, which is why it is important to ensure that they are the most appropriate tool to identify and remove possible restrictions of competition.

9. During the selection process, all publicly available quantitative and qualitative indicators are analysed. Given the results of such preliminary research, the priority might be given to markets in which a certain type of state influence is present, markets that have recently gone through liberalization or markets where major changes are taking place and which are developing rapidly. In its practice so far, the CPC has also focused on markets where competition infringements have already occurred in the past and/or markets in which it received a number of requests for individual exemption of restrictive agreements.

### 3. Emerging competition issues from the perspective of the CPC

10. In the Background note of the OECD Secretariat on the topic of *Using market studies to tackle emerging competition issues*, published on October 9, 2020, various scenarios for and types of emerging competition issues have been identified. The types range from structural to regulatory and public policy issues. Although several of those emerging issue types have appeared in the practice of the CPC in the past years, herein we will focus on the most recent such experience.

11. Namely, in July 2020, the CPC has, in cooperation with the World Bank, completed a sector inquiry into the rail freight transport market in the Republic of Serbia, launched in 2019. The research was conducted within the framework of the World Bank Serbia Investment Climate Project, a part of which was dedicated to the provision of technical support to the Commission for Protection of Competition. The project was aimed at reducing the existing administrative burden faced by companies and promoting market opening by removing restrictions of competition in selected sectors of the economy. The prioritisation and identification of sectors to be scrutinized was performed based on the World Bank's Markets and Competition Policy Assessment Tool (MCPAT).

12. Beside undoubtful historical importance of this market sector for economic development, the particular sector was chosen for the market study due to the fact that modern, efficient and competitive railway is considered of utmost relevance for the future integration of the Serbian rail market into the European Union internal market for rail. The issues related to this market came to be considered emerging due to an important regulatory change in the Serbian rail market, which was introduced in 2015 and aimed at its liberalization, as well as due to the recent CPC enforcement experience on this market, which resulted in its further opening. Namely, in 2016, the CPC terminated competition infringement proceedings with commitments, against company Serbian Railways for the alleged abuse of dominance in the railway infrastructure management market. As a result of these proceedings and the commitments which the Serbian Railways implemented by September 2017, the access to and use of railway infrastructure were enabled also for other economic entities interested in the provision of rail freight services. This was an additional step forward in establishing effective competition in the relevant market.

13. The pertinent sector inquiry and its results will be presented in further detail below. Nonetheless, what remains to be emphasised in connection with emerging competition issues is that it is expected the CPC will consider the analysis of e-commerce in Serbia in the coming years and focus on the digitalisation of markets, especially the use of pricing algorithms. The latter is owing to the fact that global economic flows and way of doing business reflect strongly upon a small economy such as the Serbian one. This trend is expected to have an even greater bearing in the future, since Serbia and many other smaller countries will have to increase their rate of digitalization in order to be more competitive on the global market.

#### 4. Sector inquiry into the rail freight transport market

14. The sector inquiry into the Serbian rail freight market, which was recently completed and published on the CPC's website<sup>5</sup>, is a product of a joint effort of the consortium composed of one of the world's leading economic consulting firms and a Serbian law firm active in the field of competition, on one side, and the CPC, on the other side. It also included the active involvement of the Ministry of Construction, Transport and Infrastructure and the Directorate for Railways. The data were collected through detailed questionnaires sent to all registered rail freight carriers, as well as to selected logistics and freight forwarding companies, 27 in total.

15. Railways are considered to be an efficient and environmentally friendly transport system, well organised and market oriented. So far, the EU has focused its efforts in the railway sector on three mutually reinforcing pillars: opening up of national markets and liberalising rail services, creating an integrated European railway area, through harmonisation and development of technical interoperability, and separating infrastructure management from the provision of services<sup>6</sup>. Given that the Republic of Serbia is located at the intersection of the main pan-European transport corridors VII (Danube River) and X (road and rail) and as such has a strategic position on the railway market of Southeast Europe, the investment in railway, its recovery and development, are considered of utmost importance for the future full integration of the Serbian railway market into the European Union internal market for rail.

16. In addition to the aforementioned reasons, the importance of conducting an inquiry into this particular sector was further augmented by the fact that the Republic of Serbia has relatively recently opened its railway sector to competition. A comprehensive railway reform started in 2015, with the aim of improving operational and financial performance of the railway sector in Serbia. Until that time, the former vertically integrated state-owned company Serbian Railways had a legal monopoly over all rail transport services. As a result of the restructuring process, three new legal entities have been created, through separation of activities and creation of new state-owned companies: Serbian Railways Infrastructure (for infrastructure management), Serbia Train (for passenger transport) and Serbia Cargo (for freight operations). The aim of the restructuring was to make the newly created railway companies profitable, economically responsible, efficient and competitive in the long run, under the conditions of liberalised railway transport market in Serbia. Soon after liberalisation in 2016, the first private carrier entered the market.

17. Nevertheless, the rail freight market remained very concentrated, with the dominant player Serbian Cargo, which held approximately 85% of the market in 2019, and a relatively small number of other carriers when compared to the EU member states. Thus, despite the undertaken reform, based on regional comparison, Serbia still continued to lag behind its neighbours with similar geographical and demographic characteristics. In view of such facts, the main objectives of the sector inquiry were twofold:

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<sup>5</sup> The report is available online on the CPC's website at the following link <https://www.kzk.gov.rs/istrazivanje-trzista-prevoza-robe-u-ze> and an English summary is available here: <http://www.kzk.gov.rs/en/istrazivanje-trzista-prevoza-robe-u-ze>.

<sup>6</sup> United Nations Economic Commission for Europe (UNECE) report "Railway Reform in the ECE region" available online at [https://www.unece.org/fileadmin/DAM/trans/main/sc2/2018-Railway\\_Reform\\_in\\_the\\_ECE\\_Region.pdf](https://www.unece.org/fileadmin/DAM/trans/main/sc2/2018-Railway_Reform_in_the_ECE_Region.pdf), p. vi.

- to understand the factors which, despite liberalisation, limit effective competition in the rail freight market in Serbia and the ways in which state intervention and actions of market participants affect the incentives for competition and investment;
- to issue recommendations, based on the outcome of the inquiry, on how to eliminate or redesign existing state intervention and create more effective policies that will promote market competition.

18. In the course of the sector inquiry, no elements were found that indicated distortion of competition by individual market participants and/or by their coordinated action. Therefore, no enforcement action has followed. This was one of the most important findings of the study and it proved once again that challenges to effective competition do not come solely from anti-competitive behaviour. Furthermore, the existing legal framework was found to be sufficiently harmonised with the relevant EU acquis, and the railway traffic in Serbia did not appear to be excessively regulated, according to the OECD assessment methodology based on the so-called Product Market Regulation (PMR) indicator. Last but not least, the study acknowledged that relevant authorities have so far effectively addressed the challenges of market liberalisation in this sector.

19. However, the study has identified three main reasons for the underdevelopment of the Serbian rail freight market – low quality of infrastructure, recent market opening and price regulation. Given that the rail freight market in Serbia is still at an early stage of development, outdated route allocation procedure, the absence of intermodal terminals and fixed tariffs for domestic transport (approved by the government and charged by the state owned railway carrier Serbia Cargo), were cited by most market participants as the biggest obstacles to market entry and expansion.

20. Since the EU member states have gradually liberalised their railway markets in accordance with the principles of "railway packages", the analysis also looked into many of the problems which were faced by European and national regulatory authorities during the liberalisation process. As a result of this, recommendations were carefully designed to offer solutions applicable to the railway market in Serbia, based on the experience of EU member states. In particular, it was acknowledged that an effective competition policy framework should be based on three aspects: encouraging the drafting of regulations and state interventions that promote competition, guaranteeing competitive neutrality and adequate enforcement of competition rules throughout the market.

21. Bearing in mind the main findings of the study and the applicable international benchmarks, recommendations were clustered and issued to be implemented (jointly) by the relevant authorities in charge of the market in question and state-owned enterprises active on that market– the Ministry of Construction, Transport and infrastructure, the Directorate for Railways and the Serbian Railways Infrastructure.

22. The first group of recommendations was related to continuous and persistent investment in infrastructure, as the improvement of railway infrastructure boosts the demand for services where economies of scale are less pronounced. This, in turn, contributes to the creation of a pro-competitive environment and leads to the elimination of barriers to entry and to the development of effective competition in the rail freight market.

23. The second group of recommendations addressed the importance of modernisation of the route allocation system, through the application of route allocation software and the introduction of new intelligent operating procedures, which provide more flexibility to railway undertakings, improve traffic planning and enable significant time savings.

24. Additionally, two important factors have been urged as the most appropriate means to increase competition on local routes and improve allocative efficiency: the liberalisation of fixed tariffs for domestic rail freight transport and a gradual increase of railway infrastructure access fees up to the level of expenditures. In respect of the tariff regulation, the study has advised phasing out in a way that in the first stage, the Serbian Cargo would be allowed to offer market tariffs on routes where there is sustainable competition, while in the second stage the determination of tariffs should be left in its entirety to market competition.

25. Finally, the study has emphasized the fact that encouraging the development of competition in a market in which a dominant company is present requires monitoring of that market on a regular basis. Therefore, joint market monitoring activities by the relevant competition authority (CPC) and the sector regulator (Directorate for Railways) have been recommended in order to identify existing and potential problems in terms of both institutional gaps and market imperfections.

## 5. Concluding remarks

26. Market studies can be a very useful tool for competition authorities in addressing competition concerns in various markets or their segments. Depending on the particular concern an authority may have, market studies can provide very valuable information about the functioning and dynamics of the market against the backdrop of the relevant regulatory environment. This is particularly true in cases where competition authorities have the possibility to cooperate with sector regulators and other relevant state institutions, in carrying out the concrete market study, as such cooperation can contribute to its depth and completeness. The rail freight transport sector inquiry described above represents a good example of such cooperation, and we believe that the findings of the inquiry, together with its recommendations, will contribute to further development of a sustainable market-oriented railway in Serbia.

27. Despite the general benefits of sector inquiries, however, their use is not without limitations. Namely, since fully-fledged market studies take time and require the engagement of significant human resources on the part of competition authorities, the latter may speak against their use in some jurisdictions. Also, in case of emerging issues which carry a sense of urgency or are connected to rapidly changing markets or ensuing government intervention, market studies may not always be the best tool to address such issues and the rate at which they evolve. For those reasons, competition authorities must develop a good practice of balancing various interests while maintaining a sufficient degree of flexibility in applying the right economic approach to competition issues before them. Exposure to international practice and exchange of experiences between competition authorities in that regard can certainly prove useful.