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USING MARKET STUDIES TO TACKLE EMERGING COMPETITION ISSUES – Contribution from BIAC

- Session IV -

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This contribution is submitted by BIAC under Session IV of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: oe.cd/mstei.

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Using market studies to tackle emerging competition issues

- Contribution from BIAC -

1. Introduction

1. *Business at OECD* appreciates the opportunity to submit these comments to the OECD Global Forum on Competition for its Roundtable on Using Market Studies to Tackle Emerging Competition Issues.

2. In its discussion points, *Business at OECD* will focus on four key themes. In Section II, we outline the advantages and benefits of market studies¹ as a competition policy tool. In Section III, we analyse their ability to tackle emerging competition issues. In Section IV, we critically assess the need for a power to impose remedies as part of the market studies tool. In Section V, we round off with observations on scope and process for successful, robust and fair market studies.

3. *Business at OECD* builds on its previous contributions on the role of market studies as a tool to promote competition (2016)² and the workshop and roundtable on selection and prioritisation of sectors and market studies methodologies (2017),³ culminating in the OECD *Market Studies Guide for Competition Authorities* in 2018.⁴

2. Market Studies (in the narrow sense, i.e., a tool to study markets without the power directly to impose remedies) can be a very useful tool in appropriate cases, with key benefits, and are broadly endorsed by *Business at OECD*

4. The salient benefit of market studies is their ability to adopt a broader, more holistic, approach to assessing market conditions. They are not focused on the past behavior of individual firms, but on markets as a whole, in order to promote better competition in the future. As such, they have the potential to avoid the competitive distortions that can arise when investigations are initiated and enforcement cases are brought against individual firms on different timetables, as they can tackle issues across sectors in a uniform and simultaneous way.

¹ *Business at OECD* notes that the term “market” is used loosely in the context of market studies and there will not always be a strict market definition applied. To the extent market definition is an inherent part of the study, clear and recognized methodologies should be used for defining the market and any such findings should not necessarily represent a precedent for market definition when applied in the different context of enforcement cases and merger control.

² OECD, The Role of Market Studies as a Tool to Promote Competition—Contribution from BIAC, DAF/COMP/GF/WD(2016)79 (Nov. 17, 2016), available at [https://one.oecd.org/document/DAF/COMP/GF/WD\(2016\)79/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2016)79/en/pdf).

³ OECD, Methodologies for Conducting Market Studies—Note by BIAC, DAF/COMP/WP3/WD(2017)28 (June 8, 2017), available at [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2017\)28/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)28/en/pdf).

⁴ OECD, MARKET STUDIES GUIDE FOR COMPETITION AUTHORITIES (2018), available at <https://www.oecd.org/daf/competition/OECD-Market-Studies-Guide-for-Competition-Authorities-2018.pdf>.

5. Advances in technology affect virtually every sector of the economy. Holistic yet structured assessments are therefore better suited to consider new business models, overlapping ecosystems of suppliers and customers and the resulting interplay between competition and other areas (e.g. privacy, consumer rights, data protection, etc.). One may doubt, however, if competition agencies alone are well placed to assess all these areas or their interplay. Whether and how competition agencies have oversight responsibility for those other areas, or have ready access to other regulators and their thinking, will likely influence how successful the study can be.
6. Successful market studies provide enhanced knowledge of a sector and can offer new insights into the functioning of markets that: (i) allow for targeted and better informed stand-alone interventions; (ii) allow for competition advocacy; and (iii) also allow for better understanding for businesses about the context in which they operate and hence better compliance policies and procedures.
7. By gathering input from all relevant stakeholders, market studies can also be a powerful opportunity for businesses to engage in pro-active advocacy, providing full color on business drivers and challenges.
8. For these reasons, *Business at OECD* broadly welcomes market studies as a competition tool designed to shed light and improve understanding of economic sectors. Market studies, however, are also invariably burdensome and so must be reserved for appropriate cases and incorporate safeguards, as discussed below.

3. Market Studies are not an inherently predictive tool of competition policy

9. Much has been made and is being made of the ability of market studies to tackle emerging competition issues. Whilst it is true that market studies (unlike traditional enforcement tools) avoid the narrow focus on past behavior, there is nothing inherently “predictive” in their nature.
10. In fact, experience tells us (from those regimes that have existing market or sector investigation tools) that market studies typically have tended to focus on markets with known and observable existing systemic challenges.
11. This does not mean that market studies cannot be a useful tool. Their ability to assess market factors broadly can assist with identifying and diagnosing competition issues, even emerging ones. It is key, in this regard, that candidate cases are selected wisely, with a focus on those markets where the outcome of the assessment is most likely to shed new light and make a meaningful impact on a common understanding of the issues. Case selection should consider: (i) the general economic importance of the sector; (ii) the special importance of the market for disadvantaged or vulnerable sections of the population; and (iii) perhaps most crucially, whether there are genuine knowledge gaps of how a market is functioning or is expected to function and/or clear indicators of existing or likely issues that cannot clearly and suitably be addressed by enforcement action. It is vital that such knowledge gaps or enforcement gaps be articulated when launching market studies into perceived emerging issues.
12. In any event, the tough task of projecting future market developments remains. Unlike merger control (which also involves predictions about the future), where there is ample economic literature on modelling for different scenarios (even then, their predictive powers are, predictably, limited), there is little to no economic literature on modelling future developments of entire markets and these will invariably be very fact-specific. In fact, one of the strengths of market studies (their ability to take a broad, holistic approach)

also makes the ability to project into the future all the more challenging, given the large number of variables and parameters at play.

13. Policy makers should therefore be cautious of intrusive interventions on this basis and should then proceed cautiously and proportionately, otherwise unintended harm is likely to arise. Market studies are not, and should not be, the place for creative and speculative theories of harm.

14. As such, *Business at OECD* does not consider market studies to be the tool that is a silver bullet, or panacea, for resolving emerging and future issues in markets. Properly conducted, they can inform policy and be a useful complementary tool- one that helps to identify and diagnose issues- but a careful case-by-case assessment of the specific circumstances will be required when considering the appropriate tool.

15. For example, the U.S. Federal Trade Commission (FTC) in October 2016 issued the findings of a study into Patent Assertion Entity Activity.⁵ There had been a long history of policy work on the patent system, and the study had been designed to address the competitive implications of patent assertion entity (PAE) activity, and the competitive costs and benefits. PAEs, firms that acquire patents in order to attempt to generate revenue by licensing or suing accused infringers, had attracted considerable attention in policy circles, although relatively little reliable information about the economic impact of these firms' business practices was available. The FTC study was able to overcome that "knowledge gap" problem and shed light on the business practices of these firms, by obtaining confidential business information using its powers in order to perform the market study. The study looked at two types of PAEs that use distinctly different business models. The collection of hard data and statistical evidence and the FTC analysis of the differences between two very different business models is an important and compelling aspect of the study. The FTC recognized the "important role" of patent litigation in protecting patent rights, concluding that the patent system makes important contributions to innovation, consumer welfare, and U.S. prosperity, whilst recognizing the potential harms of patent assertion activity, thus shining a light on "the good, the bad and the ugly" of the different business models. The FTC's PAE study therefore provided an empirical foundation for policy discussion, and the recommendations proposed were designed to balance the needs of patent holders with the goal of reducing nuisance litigation.

4. Market Studies with powers directly to impose remedies are unwarranted

16. The ability for a competition agency to impose remedies on businesses in the absence of any infringement of the law is an extraordinary power.⁶ It may frequently conflict with fundamental freedoms such as the right to property and freedom to contract, especially where structural remedies are concerned.

17. The belief that market forces and competition lead to better outcomes than government diktat is a fundamental pillar underpinning free market economies. Market forces and free competition, moderated of course by legal prohibitions on anticompetitive behavior, create the background for the complex balance of incentives and rewards for

⁵ See FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (Oct. 2016), available at <https://www.ftc.gov/reports/patent-assertion-entity-activity-ftc-study>.

⁶ *Business at OECD* notes that, whilst many jurisdictions have the power to conduct market studies of some form, very few (rightly so) also have the power to impose remedies off the back of such studies.

investment and successful innovation against the risks of loss and failure on which free markets depend to work well.

18. The power to impose remedies off the back of market studies, on the basis of no finding of unlawful behavior, is nothing more than a form of ex ante regulation, without the democratic legitimacy of an elected legislator. In the case of emerging competition issues, an agency would be asserting that (i) it can confidently and reliably predict what the issue will be and how it will play out in practice; (ii) it can fashion a remedy that is both effective and proportionate to the identified harm; and (iii) this can all be done confidently without causing other adverse, unintended consequences (with some legitimacy).

19. For any competition expert or agency to believe that they can improve market outcomes through market engineering interventions outside their essential remit, which is to prohibit and sanction infringements of competition law, is a bold claim.

20. One key disadvantage of market study remedies is that they are market-specific. To the extent similar issues arise in different markets, this is best addressed through other means. On balance, *Business at OECD* respectfully submits that the preferred route is for market studies to analyze, diagnose and inform, but for changes to be achieved through other means. This could include individual voluntary commitments, self-regulation by industry, such as codes of conduct, advocacy towards government departments who may be in a position to remove government led impediments and, if necessary, legislation (with the benefit of parliamentary debate and review).

21. If remedy powers are to be made available, the case for robust governance and adequate checks and balances becomes imperative. To paraphrase an antitrust maxim familiar to business- with extraordinary power comes a special responsibility.

5. Scope and Process for Market Studies

22. In light of the above, *Business at OECD* respectfully submits observations on scope and process for successful, robust and fair market studies, while respectfully disagreeing with the justification for market investigations with remedies, especially not to resolve emerging issues, which are the least clear and predictable.

5.1. Open and Transparent Process

23. Market studies can avoid the antagonistic nature of enforcement actions and the high stakes and pressured timing of deal-making (in merger control). As such, they can and ideally should- aim for broad-ranging input from all relevant stakeholders, with a proportionate burden in terms of information requests. At their best, they can avoid being adversarial and legalistic, or, alternatively, burdensome fishing expeditions.

24. This is best achieved through open and transparent procedures, where the scope, objectives and significant milestones of each particular study are set out and widely publicized.

5.2. Careful Selection of Cases and Targeted Scope from the Outset

25. *Business at OECD* acknowledges that agencies will want to be relatively unfettered in their ability to choose target markets but also believes there will be finite resources to pursue inquiries. It is therefore essential to have a clearly articulated test for when a study is warranted. *Business at OECD* respectfully questions whether vague notions of

concentration and profitability are sufficient.⁷ It is also preferable to do fewer studies and do them well, avoiding the temptation of trying to look at many market segments and/or many suspected issues at the same time.

26. When launching market studies, competition agencies should also explain how this fits with existing competition powers and why the latter are regarded as insufficient. Studies should adopt a holistic yet structured and facts-based view of a business' core elements and their competitive significance. When there is no one-size fits all, facts become key. Commercial activity driven by interrelationships may also require a multi-disciplinary approach to solving legal problems.

27. All of this militates in favor of a detailed and thorough analysis of candidate markets, on a preliminary basis, by the relevant agencies. Ideally, the exercise should avoid the risk of choices being politicized and/or subject to partisan capture by well-connected business sectors.

28. Once a candidate market is identified, the study should set out clearly its scope and objectives, avoiding mission creep. Agencies should be prepared to identify and clarify exclusions from the scope. Consultation of key stakeholders (in an open and transparent manner, to avoid the impression of bias and being captured by one side) in the preliminary stages can also help to hone in on key issues.

29. There will be a temptation to ask many questions and gather a lot of data, whether through formal powers or otherwise, which can easily turn into all-consuming exercises for business. To ensure questionnaires are targeted and seek data and information that is readily available, *Business at OECD* strongly recommends, where possible, market consultation, through preliminary inquiries or the use of draft or pilot questionnaires, which ideally should be adopted as a matter of best practice, to avoid unintended excessive burdens and also potentially business sensitive information being received by regulators which can then become publicly available through third party access requests.

5.3. Good Governance, With Appropriate Checks and Balances

30. In addition to the open and transparent procedure advocated above, agencies should consider two-step inquiries (as in the UK, with an initial, preliminary market study followed by a more in-depth market investigation) with different decision-makers (to avoid confirmation bias). *Business at OECD* also advocates for the inclusion of merits-based judicial review on the findings of any market study.

31. Whilst *Business at OECD* strenuously disagrees with the need for powers to impose remedies to be included, it would add, in any event, that if remedy powers are to be included, remedy design should be robust and fair. The focus should be on remedies that are effective and proportionate to the issues identified, avoiding remedies that are likely to chill innovation. Experience suggests that many market failings are not necessarily on the supply side, but are demand-led (procurement practices; consumer inertia) or regulatory in nature. Agencies should consider how best to unlock these issues (e.g. number portability in telecoms) and be prepared to recommend remedies that are addressed to governments.

32. Given that remedy design can be complex- and in order to avoid unforeseen consequences- best practice is to allow open consultation on remedy proposals and to include merits-based judicial review of any remedies.

⁷ See OECD, Market Concentration—Note by BIAC, DAF/COMP/WD(2018)72 (May 27, 2018), available at [https://one.oecd.org/document/DAF/COMP/WD\(2018\)72/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)72/en/pdf).

33. Legislators and agencies should also consider having structures and procedures in place to revisit remedies over time, at the instigation of affected parties as well as of the agency's own motion. This is especially important in dynamic markets and where "emerging" issues are intended to be addressed.

5.4. Acknowledge Limitations and Challenges

34. Despite careful design, there will always be limitations to and challenges with what market studies can achieve and it is healthy to acknowledge them up-front. There will, for example, always be a tension between timetables (the need/desire for speed) and the benefits of a robust analysis (including for the design and testing of remedies, if they are available). There should be careful consideration to balancing the two.

35. Some remedies will be very difficult to monitor and enforce, for agencies alone. This should not be under-estimated. Where the remedies are particularly complex, or inter-linked (i.e., one remedy does not make sense without one or more other remedies and they are directed at different actors, including government), it is likely to make more sense for these to be addressed holistically through ex ante regulation.

36. By focusing (rightly) on high-profile economic sectors, market studies may lead to unduly high expectations in respect of quick and comprehensive solutions, with the public at large and in political circles. Some market failures are difficult to remedy. Sometimes, remedies can seem insignificant, without the benefit of a full understanding of the comprehensive analysis. Moreover, the speed and scale of the impact of some remedies may not be apparent for some time. Agencies need to acknowledge these scenarios and be prepared to engage in advocacy to explain their actions so as to manage expectations.

37. Last, but certainly not least, many emerging issues, especially but not only in digital markets are—like the markets themselves—inherently global in their scope and therefore inappropriate for consideration, and certainly unsuitable for remedy, at the level of a single jurisdiction. Even a market study at a single jurisdictional level may provide only narrow insights and agencies should recognize this limitation and work towards convergence and a coordinated approach.