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

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Using market studies to tackle emerging competition issues

- Contribution from Spain -

1. The CNMC works to promote and preserve effective competition among economic operators in the markets. This competition generates gains in efficiency, enabling consumers and users, businesses and the public sector itself to benefit from efficient prices, a greater variety and quality of products and services, and greater innovation in the market.
2. The Law 3/2013, of 4 June, on the creation of Spain's National Authority for Markets and Competition (LCNMC) proposes a series of instruments that allows the CNMC to fight restrictions on free competition. Under the provisions of the Article 5.1 of Law 3/2013, the CNMC's functions include promoting effective competition in the markets through market studies on competition issues.
3. Market studies are assigned to a specialised unit: The Market Studies and Reports Unit under the Competition Advocacy Department, which reports directly to the President, and is separate from the Competition Enforcement Division of the CNMC. This organisational structure of the CNMC facilitates an independent opinion and safeguards general interest in the development of market studies.
4. This contribution addresses the use of market studies to tackle emerging competition issues, a topic that will be discussed in a roundtable at the forthcoming OECD Global Forum on Competition in December 2020. For that purpose, this note is structured as follows. The first part describes the main features of CNMC's market studies. Section 2 explains the main priorities for CNMC in the field of market studies. Section 3 analyses the pros and cons of using market studies to address emerging issues. The final section concludes.

1. What is a market study?

5. Advocacy is a top priority at the CNMC and market studies are one of the most powerful advocacy tools and a fundamental part of the CNMC advocacy activity. A market study consists of a comprehensive economic and regulatory analysis that studies, in depth, the dynamics of competition in a market, identifying the existing restrictions, which may hinder or prevent competition and an efficient resource allocation.
6. CNMC Market Studies analyse the situation of a market or economic activity from the perspective of competition and efficient economic regulation. This scrutiny allows us to identify why markets are not working properly and the reasons behind this malfunctioning, such as: market structure issues, regulatory problems or competition concerns.
7. Their purpose is threefold: 1) to increase the CNMC's knowledge of the markets (build expertise), 2) to disseminate this knowledge and carry out advocacy work with the general public, with the aim to maximize the social impact and increase competition culture (market studies are not academic documents, they are intended to be understandable to all citizens), and 3) to guide the competent administrations on how to deal with the problems identified. To that end, market studies include a number of recommendations to public

administrations and stakeholders operating within the market. The aim is to encourage competition and achieve efficient economic outcomes, which are in line with the general interest, and benefit consumers, businesses and public administrations.

8. During the elaboration of market studies, the CNMC is able to request information to market participants. In particular, and under the provisions of art. 28 of the Law 3/2013 on the creation of the CNMC:

“Any natural or legal person and bodies and agencies of any public administration are subject to the duty of collaboration with Spain's National Authority for Markets and Competition in the exercise of protecting free competition and are required to provide, at its request and on time, all kinds of data and information available to them which may be necessary for the development of the functions of the Commission.”

9. Non-compliance with the duties of collaboration may be subject to coercive fines of up to 12,000 euros per day of non-compliance. Every stakeholder, institution or operator is therefore obliged to cooperate and answer to requests for information sent by the CNMC.

10. It is important to note that market studies are part of the advisory function of the CNMC and, as such, their recommendations are not binding; therefore, the decision on whether to follow or implement our recommendations fully relies on market operators or public administrations. Furthermore, the CNMC cannot impose remedies on the market, unlike other jurisdictions.

11. However, market studies are highly valuable documents for the authority as they establish the position of the CNMC Council on the functioning of a given market and are frequently used in subsequent reports or proceedings.

2. CNMC priorities in the field of market studies

12. The CNMC's priorities in the field of market studies (among others) are included annually in the Action Plan of the CNMC¹. During the last years, these priorities have revolved around three axes:

1. Market studies on sectors with a special impact on the well-being of citizens (especially the most vulnerable). In the field of consumer welfare, the following market studies have been elaborated, or are currently being conducted: Passenger Rail Services², Urban Water and Wastewater Services³, Intercity Coach Services⁴, or Distribution of Medicines⁵.

¹ <https://www.cnmc.es/sobre-la-cnmc/plan-de-actuacion>

² https://www.cnmc.es/sites/default/files/2741457_0.pdf

³ https://www.cnmc.es/sites/default/files/3035785_2.pdf

⁴ https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2019/20191216_NP%20Inicio%20Estudio%20Autobuses_EN.pdf

⁵ https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2017/20170317_NP_Estudio_Medicamentos_eng.pdf

2. Market studies on sectors with significant impact on the market competitiveness of the Spanish economy. As regards competitiveness, the Advocacy Department has recently issued two market studies, one on Air Traffic Services⁶, and a second one on Unmanned Petrol Stations⁷, and is currently conducting a market study on Port Services⁸.
3. Market studies on new sectors arising from digitisation or those sectors where new digital technologies have disrupted traditional business models. Over the last years, the main emerging issues the CNMC is facing as regards market studies are observed precisely in the digital sphere

13. Indeed, the CNMC early understood that the digital economy was having a huge impact on some markets, rapidly changing the market rules and facilitating both pro-competitive and anti-competitive behaviors. For that reason, the study of the impact of digitization in the market place has been a priority for the Advocacy Department for more than 6 years, during which considerable efforts have been made to understand how digitization is changing the economy and affecting traditional ways of providing services.

14. The Advocacy Department started its thorough analysis of the digital phenomenon in 2015, by launching a public consultation on the sharing economy⁹. The main objective was to better understand some markets where the traditional distinction between consumers and suppliers had become distorted because of digitization, being the ultimate goal to understand if potential welfare gains of digitization were at risk because of non-efficient regulation. The public consultation led to different advocacy activities to promote competition in the field of tourist accommodation and transport, including market studies¹⁰. These sectors showed common market failures such as: asymmetric information, externalities, and market power. Traditionally these market failures have been addressed through regulation. While the analysis revealed that digitization could help to solve some of those failures and boost competition by enabling new market players and new services, digitization may also bring new risks that regulation should face, i.e. large network externalities and big data concerns.

15. Following this analysis, the CNMC studied the impact of digitization in the financial field, publishing a market study on Fintech in 2018, in which we emphasized the importance of access to data by new entrants (always with the consent of users) and the principles of data portability and interoperability¹¹.

⁶ https://www.cnmc.es/sites/default/files/2528075_0.pdf

⁷ https://www.cnmc.es/sites/default/files/2740296_1.pdf

⁸ <https://www.cnmc.es/node/374460>

⁹ <https://www.cnmc.es/ambitos-de-actuacion/promocion-de-la-competencia/mejora-regulatoria/consultas-publicas/economia-colaborativa>

¹⁰ https://www.cnmc.es/sites/default/files/2133063_3.pdf

¹¹ https://www.cnmc.es/sites/default/files/2218346_1.pdf

16. In addition, we are currently preparing a market study on online advertising¹², which is the source of funding for the main free internet services that consumers use, and where many of the emerging issues that are being debated at the international level are present, *inter alia*: the role of data, the relationship between competition policy and consumers' privacy, the predisposition to horizontal and vertical concentration of digital markets, and the role of large platforms.

3. Pros and cons of using market studies to address emerging issues

17. Market studies allow Competition Authorities to conduct deep analysis on specific markets and to acquire a profound understanding of the functioning of those markets, which is key to identify market distortions and address them from a competition advocacy, or enforcement, point of view. This is especially true in the digital markets, due to their complexity and the lack of expertise of many Competition Authorities in this field.

18. However, the use of market studies also entails some challenges. Its main drawback is that they are substantially time and resource consuming. For this reason, it is of utmost importance to understand that market studies are only one of the advocacy tools that Authorities could use to approach markets. In some instances, to conduct a market study can be a first step to approach new markets from which little or no information is available. Later on, and depending on the conclusions that can be drawn from the study, it may be necessary to complement the investigation with other advocacy, or even enforcement, tools.

19. In other words, for some particular market issues, the Authorities could use (i) either a market study, or (ii) a market study along with other complementary advocacy tools, which could be more targeted (or focused).

20. In this sense, the CNMC's advocacy toolbox includes a number of *ex ante* and *ex post* instruments that has been consistently used in the field of competition advocacy. The toolbox includes consultative, non-enforcement instruments (such as market studies, guides¹³, economic reports¹⁴, public reports on draft or in force regulation¹⁵ and

¹² https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2019/20190425_NP%20Inicio%20Estudio%20Publicidad%20Online_EN.pdf

¹³ Guides, or Guidance Manuals, are addressed to public administrations, consumers and market operators, and cover a broad spectrum of activities, such as public procurement, business associations, and efficient economic market regulation.

¹⁴ The economic Reports to Courts are elaborated to quantify the economic impact of the restrictions to competition existing in the markets, or to support the judiciary lawsuits presented by the CNMC within the framework of the active legal capacity mechanisms that the CNMC has as its disposal.

¹⁵ Reports on Draft Regulation (called IPNs), in which at the request of the drafting authority, or *ex officio* (at its own initiative), the CNMC identifies potential restrictions existing in the Spanish legislative or regulatory proposals which are still at the drafting stage. In these reports, the CNMC makes proposals to amend or modify restrictive legal provisions and make them more favorable to competition.

administrative acts¹⁶, and State Aid reports¹⁷) and, quasi-enforcement mechanisms (such as active legal capacity¹⁸ to challenge regulations and administrative acts before Spanish Courts).

21. All toolbox instruments have been used both in an integrated approach, or in isolation. If one advocacy tool could not fully tackle the potential competition concerns identified in a given market, other advocacy instruments could be used to complete the 'story' and maximize the impact of our advocacy activities and recommendations on this market.

22. This is the case of private hire vehicles and the tourist housing markets, in which the CNMC has not only conducted market studies, but has also issued numerous reports on draft regulations¹⁹ to guide public administrations when regulating these activities. In these two markets, the CNMC has also resorted to challenging before court a number of regulations that restricted competition²⁰. These challenges were often complemented with economic reports²¹, where the damage of the anticompetitive regulations on consumer welfare was quantified. In many of these instances, the knowledge gathered during the

¹⁶ The CNMC also carries out reports on other, non-legislative, activities in the public sector (these reports are called INF). Those reports serve as a guide to the issuing entity for achieving more effective and competitive activities.

¹⁷ Law 15/2007, of 3 July on the Defense of Competition, consolidated and deepened the functions of the Spanish competition authority as regards of public aid, by allowing the CNMC to issue reports with respect to public aid schemes, including recommendations to the public authorities to preserve effective competition in the markets. Likewise, the CNMC issues an annual report on public aid granted in Spain, which is of a public nature.

¹⁸ The CNMC has *locus standi* to challenge uncompetitive administrative acts and regulations from which obstacles to the maintenance of effective competition in the market are derived from before national Courts. This represents an advanced command that not many jurisdictions enjoy but that has nonetheless proved to be highly effective in the fight for a more competitive and efficient economic regulation. The legal provisions under which the active legal capacity is granted can be found in [Article 5.4 of Law 3/2013 of 4 June 2013, of creation of the CNMC](#), and [Article 27 of Law 20/2013 of 9 December 2013 guaranteeing the single market](#). Under these two active legal capacity instruments the CNMC may, of its own motion (5.4 and 27) or at the request of an economic operator (27), challenge administrative acts and rules which:

- i. Introduce obstacles to effective competition in the markets (5.4) or
- ii. Are inconsistent with effective economic regulation and the principles of necessity and proportionality, especially those that fragment the market (27).

¹⁹ Among others :

<https://www.cnmc.es/expedientes/ipncnmc00219>

<https://www.cnmc.es/expedientes/procnmc00318>

<https://www.cnmc.es/expedientes/ipncnmc02019>

<https://www.cnmc.es/expedientes/ipncnmc01919-0>

²⁰ Among others:

<https://www.cnmc.es/expedientes/la032015>

<https://www.cnmc.es/expedientes/la012018>

²¹ Among others:

https://www.cnmc.es/sites/default/files/1487914_28.pdf

https://www.cnmc.es/sites/default/files/2314260_8.pdf

elaboration of market studies helped the CNMC to effectively challenge these regulations and to attain a positive ruling by the Courts, who have often ruled in favor of our arguments²².

23. Another market in which the production of a market study helped the CNMC understand emerging issues and potential risks to competition is the financial sector. Indeed, the market study on Fintech published in 2018 enabled the authority to better understand the changes that the market was experiencing due to digitization and the implications of new regulatory development, such as PSD2. Following the publication of this market study, the CNMC has been in contact with different financial regulators, with the purpose of following the implementation of the measures included in PSD2.

24. Finally, current work on digital advertising is helping the CNMC understand many of the challenges posed by digitization and participate in the international debate on how best to address the concentration of market power in digital markets.

4. Conclusions

25. As follows from the above, market studies certainly play a prominent role in understanding new and disruptive markets, as they allow not only to gather information and knowledge for the Authority, but also to provide guidance to regulators/legislators on how to address the competition problems identified in these markets.

26. Over the years, the CNMC has gathered a significant amount of experience regarding the use market studies. It has gained a thorough understanding of this tool, as well as it has also learned from its successes and mistakes. The main key findings as regards the use of market studies as a competition advocacy tool could be summarize as follows.

27. First, market studies allow the Authorities to understand in depth the functioning of the markets, which could serve as a basis for new actions, both from an advocacy and an enforcement point of view.

28. Second, the efficacy of a well-designed Competition Advocacy Policy depends on using the appropriate tools, at the right moment, to address the competition issues identified. In this sense, market studies are both time and resource consuming, and consequently, depending on the objective the Authority aims to achieve, a market study will be the most appropriate advocacy tool to use, or not.

29. Third, it is key that the Authority has the ability to early identify the emerging issues in order to start studying them as soon as possible. Anticipating new issues, and planning the Authority advocacy actions accordingly, is crucial to the success of the Advocacy work.

²² Among others:

https://www.cnmc.es/sites/default/files/2961141_5.pdf

https://www.cnmc.es/sites/default/files/3002534_2.pdf