

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

Summary of the workshop on the selection and prioritisation of sectors for market studies

9 March 2017

This document prepared by the OECD Secretariat is a detailed summary of the workshop on the selection and prioritisation of sectors for market studies held in Paris on 9 March 2017.

More documents related to this workshop can be found at www.oecd.org/daf/competition/market-studies-workshop-on-selection-prioritisation-of-sectors-industries.htm.

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Workshop on the selection and prioritisation of sectors for market studies

Summary

The OECD Secretariat held a Workshop on the selection and prioritisation of sectors (or industries) for market studies on 9 March 2017. The workshop was chaired by Professor Frédéric Jenny (Chair of the OECD Competition Committee) and focused on four key aspects of market study selection and prioritisation, as set out below:

1. How market study objectives will influence the types of sectors selected;
2. How strategic considerations, including government priorities and potential market changes, can be applied to sector selection;
3. How indicators that competition is not functioning well can be used to select and prioritise sectors for market studies; and
4. How to determine the scope of a market study.

The Workshop benefitted from the participation of 58 delegations (50 where connected remotely) and the insights of three panellists:

- **Amelia Fletcher**, Professor of Competition Policy at the Centre for Competition Policy of the University of East Anglia. Professor Fletcher is also a non-Executive Director at the UK's Financial Conduct Authority, and was previously the Chief Economist at the UK Office of Fair Trading.
- **Miguel de la Mano**, Executive Vice President at the Brussels office of Compass Lexicon, and formerly head of Economic Analysis and Evaluation at the European Commission's DG Internal Market.
- **Thibaud Vergé**, a researcher at the Centre de Recherche en Économie et Statistique in Paris and a Professor of Economics at the École Nationale de la Statistique et de l'Administration Économique. Professor Vergé was the Chief Economist of the Autorité de la concurrence in France from 2010 to 2013.

Part I: How market study objectives can influence the selection of sectors

The first part of the workshop focused on the link between the objectives of market studies and the types of sectors that are selected. Sector selection can vary significantly based on whether a market study can ultimately lead to broader public advocacy measures (including advocating for regulatory reforms and responding to public concerns), inform potential enforcement actions, or examine market failures underlying regulatory interventions in the market. For example, public advocacy-focused market studies may be more common in consumer goods sectors, whereas studies that assess market failures are often focused on highly regulated sectors.

Participants discussed the importance of defining some preliminary objectives at the outset of a market study, using hypotheses about competition problems to guide sector prioritisation and the market study process. This can help ensure that a market study is the appropriate tool for addressing the potential competition problem at hand. For instance, one participant noted that market studies are best used to examine market-wide problems

in a specific set of circumstances, the analysis of which could benefit from formal information collection powers. In contrast, general background research or firm-specific problems may best be addressed with other tools. However, it was noted that all potential competition issues may not be identified at the outset of a study, and therefore that flexibility is important in order to adapt the focus of the market study as it progresses and avoid any biases in the analysis.

Several participants emphasised that competition authorities bring a unique perspective to market failures and other policy issues, which could be missed if the analysis of a sector is left exclusively to regulators that do not focus on competition problems in markets. In other words, competition authorities can use market studies to proactively encourage the consideration of competition issues that would likely otherwise be overlooked. To this point, participants noted the range of measures available to competition authorities conducting market studies in many jurisdictions that extend beyond direct enforcement action. These include, for example, identifying and addressing consumer behavioural biases with public information campaigns, and the identification of market failures to use as the basis for regulatory reform proposals.

Market studies can be undertaken to respond to public concerns that focus on a particular sector or industry. For example, a market study can be a method for a competition authority to address public pressure to intervene in a given sector when the authority has not identified concerns that would lead to enforcement action. These studies can result in a “clean bill of health” for a sector to dispel concerns, a campaign to improve public knowledge of how the sector functions, or the identification of competition problems not associated with misconduct, such as regulatory distortions.

However, using market studies to address public concerns with respect to a sector does involve challenges. Some participants noted that there may be public pressure for a market study to result in an enforcement action, and that it can be challenging to explain when such action would not be relevant. Further, the expenditure of resources for a market study that concludes in a “clean bill of health” can be called into question, and therefore could require an effective communications strategy at the conclusion of the study.

Part II: How strategic considerations affect the choice of sectors or industries for market studies

Next, participants discussed the strategic considerations that can be applied to selecting sectors for market studies.

- ***Government priority sectors*** are a common strategic choice for competition authorities to conduct market studies. Such studies can help inform the policy process, for example preventing the adoption of new measures with unnecessarily negative competitive impacts or identifying opportunities for regulatory reform. Study recommendations regarding government priority sectors may also be more likely to be adopted relative to recommendations for sectors that are not a focus of policymaker attention. One challenge reported by participants with respect to preparing studies for government priority sectors is timing: an authority can be challenged to anticipate sectors that will be priorities by the time the market study is complete (often between 6-12 months from the selection of the sector).
- ***Sectors undergoing significant change*** can also offer strategic opportunities for competition authorities to conduct market studies. In particular, market changes

can give rise to potential future enforcement concerns, lead to regulatory challenges or result in mergers for which an authority may wish to acquire some expertise. Market studies focusing on these changes can clarify for market participants the types of conduct that the authority considers anticompetitive, and may also give rise to follow-up studies on new issues that are uncovered. Some participants highlighted the risk of intervening too early in changing sectors, however, which could have unintended consequences.

- ***Sectors in which there have been numerous antitrust cases*** can also be good candidates for market studies. A study could uncover factors that contribute to these competition problems, such as conduct that facilitates collusion or a lack of clarity regarding whether a given type of conduct is permitted by competition law. Sectors that have been studied in other jurisdictions can similarly be an effective area for competition authorities to focus on, although some participants noted there is a risk of herding if competition authorities do not sufficiently consider unique circumstances in their own jurisdictions.

Part III: How indicators that sectors are not functioning well can be used to select and prioritise market studies

The discussion then turned to the use of indicators to identify sectors in which competition is not functioning well. A range of approaches were discussed, and several participants expressed the view that while no single indicator can be relied on to automatically select sectors, some indicators can provide helpful insights as part of a broader selection process. Both “top-down” and “bottom-up” indicators were discussed.

Top-down indicators – aggregate statistics that could point to sector-wide competition problems – have been considered by several competition authorities but are not widely relied upon. Some participants did, however, report considering these types of indicators as a secondary factor in sector selection and prioritisation, including: government involvement in a sector (via regulation or ownership), price increases (or relatively high prices compared to other jurisdictions), increased concentration, a lack of market entry, market share stability, entry and exit barriers and trends in innovation. It was observed that these indicators tend to be more helpful for flagging competition concerns than consumer protection issues.

Participants discussed a series of studies commissioned by the Office of Fair Trading in the UK (one of the predecessor entities to the Competition and Markets Authority), including two which sought to predict cartel probability in industries using a top-down approach with a range of variables (including variability of per firm growth, economies of scale and per employee costs).¹ While these studies were subject to several methodological challenges, their output did identify as high risk some sectors with frequent cartel offenses. Other studies discussed by participants examined the linkage between productivity growth and competition problems,² or matched industry data with merger review data identifying dominant firms (although the latter is in its early stages).

Bottom-up approaches rely on observations from market participants, case handlers and stakeholders. Participants discussed the need for competition authorities to develop a

1 Paul Grout and Silvia Sonderegger (2005) "Predicting Cartels", Office of Fair Trading; and NERA (2004) "Empirical indicators for Market Investigations", Office of Fair Trading.

2 "Productivity and Competition – and OFT perspective on the productivity debate" (OFT, 2007).

“funnel” of candidate sectors using a wide range of bottom-up sources, including information gathered during merger reviews and informal internal consultations as well as more formal requests from other government entities. Trends in consumer complaints, feedback from academics and think tanks, and research on trends in innovation were also identified. Some participants highlighted the need for a competition authority to have a staff member responsible for gathering bottom-up information to identify candidate sectors.

Once candidate sectors have been identified, participants discussed the use of certain indicators to help prioritise them, in conjunction with the strategic considerations described above. These indicators include the relative importance of a sector for the broader economy in terms of output, employment, weight in consumer baskets, research and development spending and total investment, as well as the extent of interrelationships with other sectors of the economy and social considerations (e.g. the relative weight of a sector in the consumption of a low-income household).

Part IV: Market study scoping

Finally, participants discussed some considerations relevant to the scoping of market studies (the selection of the breadth and depth of issues to be analysed).

Participants noted the importance of ensuring that the study is sufficiently broad to respond to the original concerns that led to the selection of the sector, while ensuring resource expenditure is appropriate. This could require the definition of clear market study objectives and potential outcomes while allowing for flexibility as the study progresses. However, several participants recognised that new markets without significant pre-existing information can make defining clear objectives particularly difficult.

Participants also noted that market study scoping can influence the prioritisation of sectors for market studies. In particular, scoping will help a competition authority estimate the required resources for the study. Resource expenditure should be weighed against the potential benefits of addressing competition issues in a sector, potentially using some of the indicators discussed above. Limitations to market study budgets mean that the selection of one sector may influence other studies selected for a given year: for example, an authority may choose to conduct several small preliminary studies or one large comprehensive study in a given year.

External consultation in the scoping process was deemed by some participants to be essential. This would ensure the study sufficiently captures stakeholder concerns and is representative of the sector from the perspective of market participants.

Conclusion

At the conclusion of the Workshop, the Chair summarised the discussion by noting that it is clear there is no “one size fits all” approach to sector selection and prioritisation. The specific context and legal powers in a jurisdiction will have a significant effect on this process.

Because market studies are a holistic instrument that allows competition authorities to go beyond the narrow constraints of merger control and antitrust cases, they allow a great deal of flexibility in terms of outcomes. They can play an important role in a wide range of goals, including competition authority advocacy (e.g. input to regulatory reforms or responding to public concerns), institutional learning and identifying broad competition

problems in markets. The selection and prioritisation process should be informed by these goals to ensure a focused market study, but flexibility should be encouraged as well.

The Chair noted that the discussion pointed to the need for competition authorities to take a holistic perspective when applying selection criteria – namely a mix of top-down and bottom-up indicators as well as an awareness of strategic issues (such as responding to public pressure to engage in enforcement actions, or taking advantage of windows of opportunity in policy). Thus, there does not appear to be a single objective factor that can be used to dictate sector selection and prioritisation.

Finally, the Chair noted the importance of transparency, as emphasised in the discussion. This includes external consultations during the market study selection and prioritisation process, to ensure that the market study responds to stakeholder concerns and accurately reflects market realities.