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**Market Studies and other Market Analysis Tools for Competition Authorities – Note by
Poland**

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1. Introduction: New Competition Tool

1.1. General Remarks

1. In this contribution prepared by the Polish Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów - UOKiK), we share our current considerations on the role and value of market studies.
2. In the recent years in the EU there has been an increased interest in more flexible tools, such as ex ante approaches (e.g. Digital Markets Act - DMA) or targeted interventions through market investigations e.g. New Competition Tool (NCT) to enhance competition enforcement. Recently, these discussions have intensified in the context of the interplay between competition and industrial policy goals.
3. In 2020, European Commission (EC) considered the introduction of NCT - a market investigation instrument designed to address structural competition problems in certain markets.¹
4. Although EC did not ultimately put forward a legislative proposal, such a power has since received more attention by competition authorities and was even supported by Mario Draghi in his report *''The future of European competitiveness''*.²
5. The competence would allow competition authorities to carry out in-depth market studies and design and impose remedies to address failures in specific markets that could not be addressed by competition law. Proponents of market investigation tools such as NCT often point to markets where there is an apparent market failure, but no cartel violation or abuse of dominance.
6. For sake of clarity, this paper shall refer to “market studies” as regular powers of agencies to conduct market studies that are usually followed by non-binding recommendations. Reference to “market investigation” tools, such as in the description of this session, means an “enhanced” NCT-like competence to investigate markets in order to correct them through remedial measures in case no competition law infringements can be identified.

1.2. Enhancing competition law through market investigations: challenges

7. Although market investigation tools are already available to competition authorities in some jurisdictions (e.g. UK, Germany, Greece, Iceland, Mexico, or South Africa) it still remains a subject of heated debate among enforcers and legal practitioners as to whether it is a desirable competence for competition agencies.
8. There are challenges related to market investigation tools, and its use remains somewhat uncertain for the reasons outlined next. First of all, such a power should be approached with caution given that it would arguably constitute a transition from

¹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-Single-Market-new-complementary-tool-to-strengthen-competition-enforcement_en

² Mario Draghi, The future of European competitiveness Part B | In-depth analysis and recommendations https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en

competition law enforcement to market regulation. A competition authority usually assesses market ex post, by identifying and addressing anti-competitive behavior after it occurs, rather than intervening preventively or shaping market structures through regulatory means.

9. This is not to say that such a transition should not be possible for competition agencies – only to highlight that a power to correct markets would significantly deviate from the usual mode of intervention of competition agencies. Agencies, thus, would have to adjust their intervention logic and competences in designing effective remedies that would neither be too weak nor too strong for the identified market failure.

10. Secondly, market investigation tool could cause legal uncertainty for both businesses and for agencies. Businesses would have little means of anticipating agency intervention due to the fact that the scope and type of such intervention could by design be very broad.

11. For authorities, regulating the market with this much discretion would be challenging with regard to the court proceedings. Unless the provision is very well designed, including precise scope of intervention and of remedy, the agency could have difficulties in defending its choices before courts. Yet, defining the scope of such tool too narrowly could also impact its usefulness.

12. What is more, court proceedings are usually lengthy, while markets are dynamic and the identified failures could change significantly during that time. In case the provision would be designed so that remedies were immediately enforceable, this would raise concerns about the potential irreversibility of their effects in the event that the decision is later annulled by the court.

13. If the remedies imposed by the decision were to become enforceable only after the court judgment, the argument concerning the length of judicial proceedings becomes even more relevant. Given that court cases may take several years to conclude, by the time a final judgment is delivered, market conditions may have already evolved substantially, and the identified market failures might no longer exist or may have changed in nature. As a result, the remedies imposed could turn out to be outdated or no longer appropriate, undermining the effectiveness of the intervention.

14. Last but not least, in case of the European Union (and arguably also beyond), regulating markets individually by each competition authority, based on different provision could potentially lead to even greater market fragmentation. If each EU Member State was to develop its own version of a market investigation tool, this could result in significant burden for companies having to deal with multiple legal frameworks. Moreover, in cases of market failures of transnational nature, there could be the risk of multiple types of remedies. This could run counter to the current effort in strengthening the Single Market and removing barriers.

15. The above mentioned doubts in our view warrant a strong reflection whether adopting new powers of market investigation, particularly in the EU are advisable. As national context nevertheless play a very important role in these considerations, it seems that for the time being existing provisions concerning market studies are sufficient.

2. The case of market studies

2.1. The role of market studies

16. Competition agencies are already equipped with a range of tools and mechanisms that can be leveraged to promote innovation, support sustainable growth, and contribute to the development of industrial policy. Market studies are a prime example of such instruments, providing valuable insights into how markets function and enabling a broader understanding of their dynamics.

17. Competition authorities have the ability to develop an in-depth understanding of how markets operate, where inefficiencies may arise, and where barriers to entry exist. Indeed, based on this very ability and experience with analyzing competition in markets, authorities may also be able to provide robust suggestions on how to address identified issues to increase level playing field in markets.

18. For this reason, competition authorities play an important advisory role to legislators on how to design policies in a competition-friendly manner, thus increasing their effectiveness in contributing to competitiveness.

19. Competition authorities already do this to a large extent. Market studies are followed with specific recommendations to policy makers on how to change sectoral regulations in order to fix competition in the markets. The fact is, however, that such recommendations are not always taken up and implemented by legislators for various reasons. This very fact may to a certain extent explain competition agency's appetite for market investigation tools.

20. Nevertheless, from a broader perspective, it is worth appreciating the current system. Policy makers are responsible for regulating markets and they have a clear mandate to do so based on wider priorities and policies as well as expert inputs such as those from competition agencies. Taking into consideration that policy-making reality is often too complex to have another market regulator, some competition agencies may be more effective remaining within their traditional remits.

21. In Poland, UOKiK conducts market studies, in particular to determine the structure of the market, its level of competition and degree of concentration. The publication of information on the results of these investigations is part of the UOKiK's mission to pursue an active policy of promoting competition.³ With this role, the agency considers that it can effectively contribute to supporting sound policies and supporting policy-makers.

22. In 2015, special guidelines outlining the principles of publishing market research results by UOKiK have been presented on the authority's website⁴. The guidelines stipulate that the results of studies may differ depending on the various types of market study, topics and goals. As a result, the authority may adjust the form of the presentation of the results in a way that suits the public best.

23. It is worth investing into increasing the effectiveness of market studies by competition authorities. The benefits achieved by market studies largely depend on how they will be conducted. In other words, their actual effectiveness will be determined by factors such as how many entities will be interviewed, if and what recommendations will they include etc.

³ <https://uokik.gov.pl/badania-rynku>

⁴ <https://uokik.gov.pl/download/16307>

2.2. Benefits and drawbacks of market studies

24. Among the main benefits of market studies carried out by UOKiK (especially pertaining to in-house analyses based in OSINT (Open-Source Intelligence) and paid sector reports by professional market research agencies) is the fact that they are carried out as part of an administrative proceeding, This makes it possible to gather data from market players themselves, including trade secrets (market participants are legally obliged to provide UOKiK with requested information, where a failure to comply may result in a penalty). Market information procured in this way is credible, which enables it to be used in a broad variety of tasks carried out by UOKiK, including cases pertaining to merger control (especially matters regarding the definition of relevant markets and their structure) as well as competition restricting practices (including matters of abuse of a dominant position).

25. Market inquiries themselves are also an element of market monitoring by UOKiK. They reflect a proactive approach to combating competition restricting practices and abuses of contractual advantage. It is thanks to information obtained through market studies that proceedings regarding anticompetitive practices may be initiated.

26. At the same time market inquiries make it possible to analyse competition-related issues occurring on the market (which might not always be illegal) and form the Office's stance or recommendation pertaining to those matters. Such stance or recommendation may be used later in public discourse.

27. A final feature of market inquiries is that once made public, they perform an important role in providing necessary information for market participants. In summary the main advantage of market inquiries is gaining access to credible information pertaining to the market itself as well as its participants (which may ordinarily be difficult or impossible to obtain) – such knowledge may later be used in many tasks carried out by UOKiK.

28. Certainly, market inquiries carried out by UOKiK are not without their flaws. Among the most important is their duration, which is owed to several factors. Firstly, necessary research is performed as part of formal proceedings. In order to provide answers to more complicated questions entrepreneurs require considerable amount of time. At times, information imparted by those entrepreneurs contains errors which must be corrected. Some of the survey participants, especially the smaller businesses, provide their response only on paper which necessitates manual entry into digital systems.

29. All the aforementioned issues cause market inquiries to be very time-intensive, especially when compared to own research based on OSINT data and reports purchased from professional research agencies. Further flaws of market inquiries include the fact that some of the participants are unwilling to provide an exhaustive, comprehensive answer as well as the Office's inability to publish parts of the information due to matters of confidentiality and protection of trade secrets, even when such information could be crucial to the market participants.

30. The above also cause misunderstandings when cooperating with government institutions or research/scientific institution or organisations. UOKiK may share and publish findings and diagnoses, however due to concerns of confidentiality and protection of trade secrets it may not share the detailed data or calculations with those institutions. This is at times met with poor reception outside of UOKiK.

31. This happens without taking into account that UOKiK might not be able (as mentioned above) to share or publish these findings and furthermore that the ability to obtain data and information regards only to matters of competition and consumer protection, not any and all problems which may arise in an economy.

2.3. UOKiK's strategy and experience

32. We constantly aim to identify sectors of the market that are particularly prone to collusion and other competition issues and designate them as enforcement priorities. Setting our priority to markets identified as being at greater risk allows for more focused and strategic enforcement. Four groups of studies can be distinguished differing primarily in their purpose and scope.

33. Competition studies - the main objectives of these studies, depending on the specific type of study, may include: defining the relevant market; collecting information to determine how a given market functions (e.g. identifying the market structure in terms of participants); assessing whether a dominant position exists on the market; determining whether collusion may have occurred on the market or whether the market is particularly susceptible to collusive practices. The criteria for selecting markets for study, particularly in relation to verifying potential collusion, include: (i) signals from the activities of other competition authorities (such as decisions confirming anti-competitive practices, initiation of proceedings, or inspections carried out), especially where the same companies operating in Poland have been sanctioned by other authorities for cartel involvement; (ii) complaints from domestic businesses or consumers regarding possible anti-competitive agreements; (iii) structural factors, such as market structure (e.g. oligopolistic markets), (iv) the nature of products (e.g. homogeneous products), and (v) whether the market belongs to a sector in which UOKiK has previously identified cartels (e.g. the construction materials industry). In recent years, UOKiK has conducted several market studies, particularly aimed at detecting potential collusion, including studies of the cement market and the mineral wool market.

34. Consumer studies⁵ - markets selected for study are primarily those that are significant from the consumer protection perspective, in particular, the financial market. The purpose of such studies is to analyze issues arising in these markets that may negatively affect consumer rights. In this regard, we conduct studies concerning shaping of products rebates (promotions) on products sold in retail chains or law firms representing their customers in disputes with financial institutions.

35. Regulation studies – this type of study focuses primarily on markets where existing or planned legal regulations affect or may affect competition, potentially leading to its distortion. In recent years, particular attention has been given to markets undergoing significant regulatory changes, especially where these changes are accompanied by major economic trends. Recently these include markets related to environmental protection and the energy sector. The main objective of such studies is to analyse the impact of regulation on competition and, where appropriate, provide recommendations. In recent years, UOKiK has conducted several regulatory studies, including studies of the medical waste market and the railway market. Currently, market studies are being conducted in the book markets.

36. Market studies on agricultural and food markets⁶ – while these studies do examine market structure, the position of individual undertakings, and the intensity of competition, the main emphasis is placed on supplier-buyer relationships in the context of the Act on Counteracting Unfair Use of Contractual Advantage in Trade of Agricultural and Food Products.

⁵ Since 1996 UOKiK joins competition and consumer issues under one roof, allowing it to pursue both consumer protection cases and competition cases.

⁶ Since 2017 UOKiK is also responsible for conducting administrative proceedings concerning practices that unfairly exploit contractual advantage.

37. The main reasons for initiating such studies, similarly to other types, include complaints submitted to UOKiK by entrepreneurs or suppliers of agricultural and food products, monitoring of the agri-food market with regard to the abuse of contractual advantage by major players, as well as a lack of knowledge about the actual functioning of a given market and the nature of relationships between its participants.

38. The objectives of these studies include assessing the level of competition in the market, gathering information on its functioning, and identifying behaviours that may raise concerns under the Act on Counteracting Unfair Use of Contractual Advantage in Trade of Agricultural and Food Products. Currently, we conduct market studies in the market for apples, and recently we closed a market study concerning promotional brochures provided by retail chains. These study results can be applied not only to contractual advantage issues but also in competition law cases.

2.4. Market Studies: Specific examples

39. It should be emphasized that, market studies can be particularly impactful, as they can result in both indications of anticompetitive behaviour but also in formulating legislative recommendations to address the market problems that were identified during the study. The section below presents examples of studies which led to such legislative recommendations.

2.4.1. Waste Management

40. With regard to amendments or policy changes, a good example would be the UOKiK's Report which analyzes the Waste Market in Poland from 2014–2019. Specific objectives of the market study were to assess the competitive landscape of the waste processing market, focusing on Regional Waste Processing Installations (RIPOKs), to analyze the ownership structure of these installations, including the balance between public and private operators, to identify the key factors driving the increase in prices for waste processing services, to evaluate the impact of regulatory changes on the market, and to propose recommendations for improving market efficiency and reducing costs for households.

41. It is worth noting that during the preparation of the report, regulations regarding Regional Municipal Waste Treatment Installations (RIPOKs) changed. Until September 2019, each installation could only serve a designated area (Regional Municipal Waste Management Region – RGOK. After changes, the regional system was abolished, RIPOKs were replaced by municipal installations, and waste collection companies gained the right to transport waste over greater distances). As a consequence of these changes the competition on the market was improved⁷.

42. As another example, in 2024, we published Market Research For Services Related To Medical Waste Management (2018-2023).⁸ The overall objective of the study was to collect and organize information on all domestic markets for medical waste management services. The specific objectives, on the other hand, concerned among others: identifying the specific causes of problems in the market; and formulating recommendations, including legislative demands.

43. We observed that the industry showed great potential for developing competition, improving efficiency and optimizing the system, so that hospitals and, indirectly, health

⁷ It is noteworthy that these changes were in fact introduced while the report was being written.

⁸ <https://uokik.gov.pl/badania-ryнку>

premium payers could pay less for medical waste. However, the conditions for this have to be created. Therefore, we recommended various changes including systematic and legislative ones (e.g. abolishing the requirement to dispose of infectious waste in the province of its generation, that is, increasing the area where this waste can be managed, allowing selected alternative methods of infectious waste disposal).

2.4.2. Rail passenger transport

44. Another most recently published market study concerns rail passenger transport sector. UOKiK has examined the characteristics, relationships, and state of competition in the Polish rail passenger transport sector. Polish passenger rail is divided into regional markets dominated by a single carrier, with over 90% of services operated under public service contracts.

45. Among its recommendations, UOKiK calls for simplifying the procedures for granting open access and for better tailoring tenders to the operating conditions of rail carrier.

46. Data collected by UOKiK show that in 2023 more than 373 million passengers travelled on Polish trains, with the vast majority of journeys (over 93%) made under public service contracts. Despite the large number of operating companies (sixteen in total offering passenger services), genuine competition remains rare on Polish tracks. Many regions are served almost exclusively by the local government carrier, while PKP Intercity dominates long-distance routes.

47. We conducted this study to explain why, despite the presence of many operators on the Polish railway market, there is still no real competition. We examined, among others, the organisation of tenders and the procedures for granting open access. We also looked at the factors limiting the development of rail operators' services, as well as the practices prevailing on the most popular routes, such as those from Warsaw to Wrocław, Poznań, and Tricity.

48. The analysis indicates that an increase in genuine competition could benefit both passengers and incumbent operators. In other European Union countries, such as the Czech Republic and Germany, the development of commercial services alongside carefully organised public service tenders has led to more connections, lower ticket prices, a rise in total passenger numbers, and higher profits for incumbent operators.

49. For a similar scenario to take place in Poland, UOKiK highlights the need to facilitate market access, including through:

- allowing longer periods to prepare offers and commence services in tenders;
- introducing measurable evaluation criteria in procedures for granting open access;
- strict adherence to deadlines in administrative proceedings;
- dividing transport ordered by organisers into smaller packages that combine popular and less profitable routes;
- providing more transparent transport plans, enabling operators to better plan investments in rolling stock and network development.⁹

⁹ <https://uokik.gov.pl/en/time-to-change-tracks-uokik-report-on-rail-passenger-transport>

3. Changes in methodology of market studies conducted by UOKiK

50. The changing environment and ongoing digitalization are influencing the methodology of studies conducted by UOKiK. While the core study methods, such as surveys or secondary source analysis, have not undergone radical changes, notable developments can be observed in the scope and organization of these studies. Two key aspects worth highlighting are:

51. The increasing amount and scope of data collected from businesses, and the use of digital methods for analysis. The digitalization of business operations means that an increasing amount of data reflecting the economic activity of surveyed entities is collected and stored in structured databases. As a result, UOKiK can relatively easily obtain these large datasets without disrupting the operations of businesses or imposing additional burdens, such as preparing data from paper documents or scattered digital files. Moreover, UOKiK now has significantly greater capabilities for analyzing such large datasets, which translates into higher quality outcomes of the studies conducted.

52. Digitalization of the survey process. UOKiK is working on gradually replacing paper-based or file-based surveys with online questionnaires completed directly via UOKiK's website. External testing of this system is currently underway on selected parts of ongoing studies.

4. Expanding the Impact: Leveraging Lessons from Market Studies

53. Taking above into consideration, it becomes evident that the ability to conduct market studies equips competition authorities both the necessary skills and analytical tools to obtain an in-depth understanding of markets. Market studies may both indicate anticompetitive behaviour to be further addressed in competition investigations but may also provide the opportunity to develop concrete legislative recommendations.

54. As noted above, correcting the markets by competition agencies based on market investigation is ridden with challenges.

55. However, in order to leverage recommendations formulated based on market studies, agencies may need to invest more into advocacy efforts. Indeed, often competition is not robust enough not because of anticompetitive conduct, but due to regulatory frameworks or lack of intervention by policy. Given the available knowledge at disposal of agencies, it is important to strengthen the voice of competition authorities not just in the market but also among the government and legislators to be able to leverage their insights.

56. Thus, competition authorities should be more involved in legislative procedures in order to be able to effectively advise in making policies as competition-friendly as possible.

57. Equipping agencies with more resources to undertake advocacy could result in not only the uptake of punctual recommendations resulting from concrete market studies. It could also lead to a broader education of actors on competition principles and sensitization to solutions that ensure fair level playing field and prevent anticompetitive regulations.

58. More competition advocacy by competition authorities during legislative processes could also lower information asymmetries between lawmakers and market actors, with the latter often more oriented towards "pro-business" lobbying rather than "pro-market" lobbying that ultimately benefits consumers and citizens.

59. Moreover, for external actors, understanding competition interventions is complex enough. Intervening by correcting markets could further contribute to difficulty in understanding competition interventions.

60. Based on the above, there are reasons to believe that competition authorities should leverage the existing tools at their disposal, rather than engage with tools that may lead to uncharted waters.

61. While we remain open to discussing the effectiveness of new solutions such as market investigation tools, for the time being we appreciate the value of existing tools and find them appropriate and fit for purpose. Promoting the principles of competition is at the core of our mission, and conducting market studies combined with active advocacy is an appropriate way to achieve this goal.