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

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

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1. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to make this written contribution to the roundtable on Experiences with Market Studies and Other Market Analysis Tools. Market studies, often referred to as sector inquiries or fact-finding surveys in various jurisdictions, are tools utilized to analyze market dynamics and identify potential competition concerns. While generally understood as one of several tools available to competition authorities, there is no singular common model with substantial differences across jurisdictions in both substance and form.

2. This submission builds on BIAC’s prior input to the OECD on market studies and provides a broad assessment of current practices and emerging concerns.¹ BIAC has consistently and continues to emphasize that while market studies can be beneficial as advocacy tools, particularly to address market restrictions or distortions created by government regulations, they should not be perceived as indispensable or as a universal solution for all market concerns.² There are two primary approaches: the “study-then-enforce” pathway, where market analysis informs subsequent targeted enforcement action, which is complementary to traditional enforcement; and the “investigate-then-regulate” pathway, where authorities can impose remedies without proving specific legal infringements, which raises significant concerns about regulatory overreach. Key areas of focus include the substantial compliance burdens imposed on businesses through extensive information requests, the lack of transparency and defined timelines in many jurisdictions, concerns about confidentiality protections, and the growing trend toward cross-jurisdictional cooperation that may amplify existing procedural irregularities. BIAC advocates for market studies that incorporate recognized best practices, apply appropriate safeguards including clear initiation criteria and proportionate information gathering. In particular, market studies should maintain firm boundaries between competition enforcement and broader regulatory intervention, with the objective to optimize effectiveness and minimize unnecessary administrative burdens.

2. Overall Scope and Strategic Objectives of Market Studies

3. Market studies are one of several tools available to competition authorities and there is no universal approach as to how they are conducted, with substantial differences

¹ BIAC’s prior input to the OECD on market studies includes: OECD, Market Studies, DAF/COMP(2008)34, at 197-205 (Nov. 21, 2008), https://www.oecd.org/content/dam/oecd/en/publications/reports/2008/11/market-studies_3fd0bf50/c73ca194-en.pdf [hereinafter BIAC 2008]; OECD, The Role of Market Studies as a Tool to Promote Competition – Contribution from BIAC, DAF/COMP/GF/WD(2016)79 (Nov. 17, 2016), [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) [hereinafter BIAC 2016]; OECD, Methodologies for Conducting Market Studies – Note by BIAC, DAF/COMP/WP3/WD(2017)28 (June 8, 2017), [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) [hereinafter BIAC 2017]; OECD, Using Market Studies to Tackle Emerging Competition Issues – Contribution from BIAC, DAF/COMP/GF/WD(2020)53, (Nov. 26, 2020), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)53/en/pdf) [hereinafter BIAC 2020].

² BIAC 2016, *supra* note 1, ¶ 7; BIAC 2020, *supra* note 1, ¶ 14.

existing across jurisdictions in terms of both substance and form. Typically, these studies involve “research projects conducted to gain an in-depth understanding of how sectors, markets, or market practices are working.”³ Potential outcomes can include recommendations for actions by legislatures, government departments, agencies, regulators, or business and consumer bodies, as well as commitments by the competition authority itself to take advocacy or enforcement action.⁴

4. The main objectives of market studies, as identified by competition authorities, broadly fall into four categories: advocacy, pre-enforcement, information gathering, and ex-post assessment following competition law intervention.⁵ For emerging competition issues, key objectives include understanding new or emerging market dynamics, preventing potential breaches in competition law, and keeping up-to-date as markets evolve.⁶ Market studies are generally considered an advocacy tool to issue recommendations for changes to laws and regulations or as a pre-enforcement tool.⁷ They enable authorities to take a holistic approach to assessing market conditions, focusing on markets as a whole as opposed to the past behavior of individual firms, with the aim of promoting better competition in the future.⁸ This broader perspective is particularly well-suited for considering new business models, overlapping ecosystems of suppliers and customers, and the interplay between competition and other areas such as privacy, consumer rights, or data protection.⁹

3. Relationship between Market Studies and Other Tools (Enforcement, Market Investigations, and Regulation)

5. Market studies and enforcement actions possess certain complementarities. Enforcement cases, for instance, can focus on what may be usual business norms in that sector and which may necessitate a market study to understand the broader ramifications of such practices. Conversely, market studies might reveal specific conduct that could lead to enforcement action or highlight features conducive to anti-competitive behavior, such as laws or regulations that confer market power by raising barriers to entry. In novel areas of enforcement, a market study may offer a more appropriate path to clarifying the law and enforcement practice than direct legal action.

6. The OECD has highlighted that market studies can offer a timely response to emerging competition issues compared to lengthy enforcement cases, particularly when

³ INT’L COMPETITION NETWORK, MARKET STUDIES PROJECT REPORT 28 (2009), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_MktStudiesReport2009.pdf.

⁴ *Id.*

⁵ OECD, The Role of Market Studies as a Tool to Promote Competition – Background Note by the Secretariat, DAF/COMP/GF(2016)4, ¶ 21 (Nov. 25, 2016), [https://one.oecd.org/document/DAF/COMP/GF\(2016\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf) [hereinafter OECD 2016].

⁶ OECD, Using Market Studies to Tackle Emerging Competition Issues – Executive Summary, DAF/COMP/GF(2020)11, at 2 (June 16, 2021), [https://one.oecd.org/document/DAF/COMP/GF\(2020\)11/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2020)11/en/pdf) [hereinafter OECD 2020, Executive Summary].

⁷ OECD 2016, *supra* note 5, at 2.

⁸ OECD 2020, Executive Summary, *supra* note 6, at 2.

⁹ BIAC 2020, *supra* note 1, ¶ 5.

authorities aim to be proactive.¹⁰ They can clarify that certain behavior might infringe competition law, even if no specific instances have been identified, thereby avoiding potential anticompetitive practices in new or changing markets.

7. However, the practical application of these tools has led to a divergence in approach across jurisdictions. The approach followed by most jurisdictions is a “study-then-enforce” pathway that is also referred to generally as a market investigation, where a broad market analysis informs subsequent, targeted enforcement action against suspected infringements. This approach is generally seen as a legitimate and complementary use of market studies and related tools. A second model follows an “investigate-then-regulate” pathway, where authorities can impose remedies to alter market structures without proving a specific breach of law. This approach raises profound questions about regulatory overreach, due process, and legal certainty for businesses.

3.1. The Study-to-Enforcement Pathway

8. The most appropriate and complementary relationship between studies and enforcement is when a market analysis uncovers a specific area of potential competitive concern, which is then addressed through a formal investigation with its associated procedural safeguards and rights of defense. This sequential process ensures that powers of enforcement are appropriately deployed in a targeted manner.

9. An example of the appropriate and complementary relationship is the UK’s Competition and Markets Authority’s (CMA) online platform market study that was followed by an investigation into Google and Meta. The CMA conducted a comprehensive market study into Online Platforms and Digital Advertising, with the final report published in July 2020.¹¹ This study examined the functioning of the “ad tech stack” and highlighted Google’s significant market position at various levels of the supply chain.¹² Subsequently, in March 2022, the CMA launched a formal investigation under the Competition Act 1998 into a specific agreement between Google and Meta, internally codenamed “Jedi Blue,” which was a subject of concern identified during the market study.¹³ This sequence demonstrates the traditional application of these tools: a broad, market-wide analysis (the study) uncovered a specific area of potential concern, which was then addressed through the appropriate, targeted use of authority— a formal investigation with its associated procedural safeguards and rights of defense. The fact that this investigation was ultimately closed in March 2023 without a finding of infringement further validates the integrity of the process, showing that a study’s concerns do not and should not predetermine an enforcement outcome.¹⁴

¹⁰ OECD, Using Market Studies to Tackle Emerging Competition Issues 17 (2020), <https://web.archive.org/2021-10-31/567287-using-market-studies-to-tackle-emerging-competition-issues-2020.pdf> [hereinafter OECD 2020 Background Note].

¹¹ UK COMPETITION & MKTS. AUTH., ONLINE PLATFORMS AND DIGITAL ADVERTISING: MARKET STUDY FINAL REPORT (July 1, 2020), https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

¹² *Id.* ¶¶ 5.215-5.244.

¹³ Press Release, Competition & Mkts. Auth., CMA Investigates Google and Meta Over Ad Tech Concerns (Mar. 11, 2022), <https://www.gov.uk/government/news/cma-investigates-google-and-meta-over-ad-tech-concerns>.

¹⁴ See *Investigation into Suspected Anti-Competitive Agreement Between Google and Meta and Behaviour by Google in Relation to Header Bidding*, COMPETITION & MKTS. AUTH., <https://www.gov.uk/cma-cases/investigation-into-suspected-anti-competitive-agreement-between-google-and-meta-and-behaviour-by-google-in-relation-to-header-bidding>.

10. The European Commission’s use of sector inquiries under Article 17 of Regulation 1/2003 follows a similar approach. These inquiries allow the Commission to investigate industry sectors where it suspects competition may be restricted or distorted. While the inquiry itself does not lead to sanctions, its findings can form the basis for subsequent, specific infringement proceedings against individual companies.

11. The Commission’s long-running focus on the pharmaceuticals sector is a clear illustration. Its 2009 sector inquiry identified systemic issues such as defensive patenting strategies and “pay-for-delay” agreements designed to hinder the market entry of generic drugs.¹⁵ Informed by these findings, the Commission and National Competition Authorities (NCAs) have pursued a sustained campaign of enforcement. Between 2018 and 2022 alone, European authorities adopted 26 antitrust decisions in the pharmaceutical sector, imposing fines totaling over €780 million for conduct such as misuse of the patent system and pay-for-delay agreements.¹⁶ This demonstrates a direct and logical link between the broad analysis of a sector inquiry and years of targeted, evidence-based enforcement actions. Historically, however, only a fraction of sector inquiries has led to formal enforcement.¹⁷

3.2. The Risk of Overreach: Market Studies as “Fishing Expeditions”

12. Despite these complementarities, there are serious concerns about the potential risks associated with market studies, particularly if they are used as a “fishing expedition” when there is insufficient evidence to initiate a formal investigation. Such an approach is seen as potentially raising costs and distraction for businesses when there is no good reason for investigation other than to “look for a problem” or conversely delaying or impeding appropriate and timely enforcement action and raising questions about whether resources could be better allocated to direct enforcement activities. This concern is rooted in historical experience and grounded in legal principles of proportionality and defense rights.

13. An example of a market study devolving into a costly and unproductive exercise is the Canadian Petroleum Industry Inquiry, which ran from 1973 to 1986.¹⁸ The process, conducted by the then-Restrictive Trade Practices Commission (RTPC), lasted 13 years and imposed immense costs on both the government and the industry participants. It was widely perceived by the business community as a “politically-motivated fishing expedition” that ultimately provided “no real benefits or insights” into the functioning of the market.¹⁹ The profoundly negative experience with this protracted and burdensome

¹⁵ See *Pharmaceutical Sector Inquiry*, EUR. COMM’N, https://competition-policy.ec.europa.eu/sectors/pharmaceuticals-health-services/pharmaceutical-sector-inquiry_en.

¹⁶ *Report from the Commission to the Council and the European Parliament: Update on Competition Enforcement in the Pharmaceutical Sector (2018-2022)*, at 9 (2024), https://competition-policy.ec.europa.eu/document/download/050fc889-ad63-474d-a47c-7ab18d7d588a_en?filename=kd0223117enn_pharma_report_2018-2022_e-version_en.pdf.

¹⁷ Nicolas Petit & Miguel Rato, *From Hard to Soft Enforcement of EC Competition Law – A Bestiary of “Sunshine” Enforcement Instruments*, in *ALTERNATIVE ENFORCEMENT TECHNIQUES IN EC COMPETITION* 183, 200-201 (Charles Gheur & Nicolas Petit, eds, 2009), available at https://orbi.uliege.be/bitstream/2268/279/1/From%20hard%20to%20soft%20enforcement%20of%20EC%20competition%20law_PETIT_RATO_2.pdf.

¹⁸ *COMPETITION IN THE CANADIAN PETROLEUM INDUSTRY* (1986), available at https://publications.gc.ca/collections/collection_2022/isde-ised/rg53/RG53-1986-58-1-eng.pdf.

¹⁹ Susan Hutton & Jolly Khalil, *Canadian Competition Act Amendments: Market Study Powers*, ANTITRUST SOURCE, Feb. 2025, at 3, <https://www.americanbar.org/content/dam/aba/publications/antitrust/source/2025/february/canadian-competition-act-amendments.pdf>.

inquiry was a significant factor in the Canadian government’s decision to repeal formal market study powers when it enacted the Competition Act in 1985.²⁰ This historical legacy continues to inform the Canadian business community’s skepticism about broad, compulsory market study powers.

14. Another more contemporary example of a study plagued by procedural failings is the U.S. Federal Trade Commission’s (FTC) ongoing Section 6(b) study into Pharmacy Benefit Managers (PBMs).²¹ Launched in June 2022, the study did not produce an interim staff report until July 2024, more than two years later.²² This delay exemplifies the “drift” that can occur without firm timetables. The study also imposed an immense burden on businesses. One targeted company stated it had spent millions of dollars and tens of thousands of hours responding to the FTC’s 6(b) order, producing over 3.3 million pages of documents and 769 million lines of data.²³ Most critically, the study has faced credible allegations of politicization and a lack of analytical rigor.²⁴ A dissenting FTC Commissioner argued the interim report was “plagued by process irregularities,” failed to conduct a rigorous economic analysis, and did not address the FTC’s own 2005 study which found PBMs generated cost savings.²⁵ This dissent was echoed by external critics who described the report as “a piece of advocacy, devoid of empirics.”²⁶ The PBM study serves as a contemporary example of how a market study can devolve into a protracted, burdensome, and politically charged exercise that fails to produce credible, evidence-based insights – all the while consuming valuable business resources with little clear benefit.

²⁰ *Id.*

²¹ Press Release, Fed. Trade Comm’n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry>.

²² Press Release, Fed. Trade Comm’n, FTC Releases Interim Staff Report on Prescription Drug Middlemen (July 9, 2024), www.ftc.gov/news-events/news/press-releases/2024/07/ftc-releases-interim-staff-report-prescription-drug-middlemen [hereinafter FTC PBM Press Release].

²³ Complaint for Declaratory and Injunctive Relief ¶ 52, *Express Scripts v. Fed. Trade Comm’n*, No. 4:24-cv-01263-JSD (E.D. Mo. Sept. 17, 2024), Dkt. No. 1 (“Express Scripts devoted substantial resources to complying with the FTC’s demands, spending millions of dollars and tens of thousands of hours to respond to the FTC’s expansive 6(b) order. Express Scripts produced over 3.3 million pages of documents and more than 769 million rows of data consisting of more than 11 billion observations to the Commission, complying in full with the 6(b) order.”); *See also* CVS Health Corporation’s Petition to Quash Subpoena Ad Testificandum, *In Re* Subpoena Ad Testificandum Issued to CVS Health Corporation, FTC File No. 241-0005, https://www.ftc.gov/system/files/ftc_gov/pdf/2410005cvstpq.pdf.

²⁴ *See* Dissenting Statement of Commissioner Melissa Holyoak at 2, *In the Matter of the Pharmacy Benefit Managers Report*, FTC File No. P221200 (July 9, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Holyoak-Statement-Pharmacy-Benefit-Managers-Report.pdf; and Alden Abbott, *The FTC Takes On Pharmaceutical Benefit Managers*, FORBES (Oct. 3, 2024), <https://www.forbes.com/sites/aldenabbott/2024/10/03/the-ftc-takes-on-pharmaceutical-benefit-managers/>.

²⁵ Holyoak, *supra* note 24, at 2.

²⁶ *FTC Commissioners, Former U.S. Senator And Secretary Of State, Academics, And National Organizations Focused On Fostering Market Forces And Competition React To Flawed FTC Interim Report On PBMs*, PCMA (July 10, 2024), <https://www.pcmagnet.org/pcma-blog/ftc-commissioners-former-u-s-senator-and-secretary-of-state-academics-and-national-organizations-focused-on-fostering-market-forces-and-competition-react-to-flawed-ftc-interim-report-on-pbms/07/10/2024/>.

3.3. Market Investigations and Remedies Without Infringement Findings

15. A significant area of concern for BIAC is the distinction between market studies and market investigations, especially those that empower competition authorities to impose remedies without a finding of competition law infringement and without procedural safeguards and rights of defense.²⁷ While market studies are generally non-binding, a limited number of jurisdictions including the UK, Mexico, Iceland,²⁸ and, most recently, Germany and Italy,²⁹ grant their competition authorities the power to impose legally enforceable remedies, such as orders to market participants, regulators, or even requiring divestitures. BIAC views such powers with serious reservations, asserting that they are akin to “ex ante regulation, without the democratic legitimacy of an elected legislator” and with limited judicial oversight.³⁰ The imposition of “severe and drastic remedies” on companies that have not breached the law, potentially leading to substantial financial and commercial consequences including forced divestments, is a major concern.³¹ This approach may potentially and undesirably transform market studies into an alternative to – rather than a complement for – competition law enforcement.

16. An illustrative case study is the UK Retail Banking Market Investigation. In 2016, the CMA found an “adverse effect on competition” in retail banking, based on theories of weak customer response and barriers to switching.³² To remedy this, in 2017, the CMA imposed a package of measures, the most significant and drastic of which was the “Open Banking” initiative. This remedy required the UK’s nine largest banks to design, build, and fund an entirely new entity – the Open Banking Implementation Entity (OBIE) – tasked with creating and managing a complex system of open Application Programming Interfaces (APIs) to facilitate data sharing with third parties.³³

17. This case is a prime example of a competition authority mandating a “severe and drastic” remedy that amounts to the creation of a complex, ongoing regulatory infrastructure. A 2020 “Lessons Learned” review commissioned by the CMA delivered a candid and critical assessment, concluding that the CMA did not anticipate the scale and complexity of its remedy and “failed to foresee or manage some of the key risks inherent

²⁷ BIAC 2020, *supra* note 1, ¶¶ 16-21.

²⁸ OECD, Competition and Market Studies in Latin America: The Case of Chile, Colombia, Costa Rica, Mexico, Panama and Peru 82 (2015), <https://web-archiver.oecd.org/2015-03-18/348551-competition-and-market-studies-in-latin-america2015.pdf> [hereinafter OECD 2015].

²⁹ See Jens-Uwe Franck & Martin Peitz, *Germany’s New Competition Tool: Sector Inquiry with Remedies*, 15 J. EUR. COMPETITION L. & PRAC. 515 (2024).

³⁰ BIAC 2020, *supra* note 1, ¶ 18. BIAC has expressed concerns previously about authorities being perceived as “picking winners” or pursuing pre-determined outcomes. OECD, Optimal Design, Organization and Powers of Competition Authorities – Note by BIAC, DAF/COMP/WP3/WD(2023)47, ¶ 12 (Nov. 27, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)47/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)47/en/pdf) (“As governments expect competition authorities to be responsive to political or industrial policy priorities, it will be increasingly important for authorities to develop mechanisms to minimize the likelihood or perception that authorities are involved in ‘picking winners’ or pursuing pre-determined outcomes. This is particularly important where new tools, for example the ability to impose remedies after a market study to increase that sector’s competitiveness, may place the authority in the invidious position of straying into industrial policy that would more naturally sit with governments. To address this, authorities should consider clearly setting out their prioritization principles and engaging in a transparent process as to how these principles will be applied.”).

³¹ BIAC 2016, *supra* note 1, ¶ 8.

³² COMPETITION & MKTS. AUTH., RETAIL BANKING MARKET INVESTIGATION: FINAL REPORT § 11 (Aug. 9, 2016), <https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf>.

³³ Retail Banking Market Investigation Order 2017, https://assets.publishing.service.gov.uk/media/5ee0f1a786650c4211b12ac5/retail-banking-market-investigation-order-2017_1.pdf.

in the delivery of the project.”³⁴ The review found that the CMA had not matched the ambition of the remedy with an appropriate level of oversight or strategic risk management, leading to significant governance failures at the entity that it had brought into existence. This self-assessment highlights the immense practical difficulties, unforeseen consequences, and long-term supervisory burdens that arise when a competition authority steps beyond its core competency of enforcement and into the realm of designing and implementing complex, forward-looking regulatory solutions.

18. The practical difficulties associated with the CMA’s approach are now prompting a re-evaluation by the CMA itself of its more interventionist approach. Following significant criticism from the business community,³⁵ the CMA launched consultations for a draft new guidance for their market regime in 2024³⁶ and 2025³⁷ and in July 2025 published guidance on how the CMA will use its markets tools to hopefully unlock economic growth and build consumer confidence.³⁸ In particular, the CMA committed to “seek to act in a way that avoids creating unnecessary burdens and uncertainty for businesses in scope of our work, the vast majority of whom are seeking to do the best for their customers.”³⁹ This review signals a shift towards a more proportionate and flexible framework that is mindful of the compliance burdens placed on business, which underscore BIAC’s oft-reiterated concerns that ultimately compelled a course correction.⁴⁰

19. A stark example of the “investigate-then-regulate” model in practice is the South African Competition Commission’s (SACC) Online Intermediation Platforms Market Inquiry (OIPMI). The inquiry’s mandate was explicitly expanded beyond traditional competition concerns to include promoting firms owned by historically disadvantaged persons (HDPs) and achieving “inclusive growth.”⁴¹ The SACC’s final report in July 2023 imposed a suite of binding, non-negotiable remedies on leading platforms without any finding of a competition law infringement.⁴² For example, Google was mandated to provide

³⁴ COMPETITION & MKTS. AUTH., OPEN BANKING LESSONS LEARNED REVIEW: REPORT BY KRISTIN BAKER CBE ¶ 6 (May 27, 2022), https://assets.publishing.service.gov.uk/media/62908644d3bf7f036cbf5880/CMA_OB_Lessons_Learned_Review.pdf.

³⁵ Natalie Greenwood & Gavin Robert, *Who’s Afraid of the UK Competition & Markets Authority*, ANTITRUST, Summer 2024, <https://www.americanbar.org/content/dam/aba/publications/antitrust/magazine/2024/vol-38-issue-3/whos-afraid-uk-competition-markets-authority.pdf>.

³⁶ *Draft New Guidance for the Markets Regime in the Enterprise Act 2002*, COMPETITION & MKTS. AUTH. (Nov. 5, 2024), <https://www.gov.uk/government/consultations/draft-new-guidance-for-the-markets-regime-in-the-enterprise-act-2002>.

³⁷ *Revised Draft Markets Regime Guidance*, COMPETITION & MKTS. AUTH. (Aug. 20, 2025), <https://www.gov.uk/government/consultations/revised-draft-markets-regime-guidance>.

³⁸ COMPETITION & MKTS. AUTH., THE CMA’S APPROACH TO MARKETS WORK (July 24, 2025), https://assets.publishing.service.gov.uk/media/68b6bd2dd723ba6f74dba8ca/The_CMA_s_approach_to_markets_work.pdf [hereinafter CMA 2025].

³⁹ *Id.* ¶ 1.12.

⁴⁰ Reflecting an approach mindful of the potential compliance burden associated with potential remedies, Cofece recently opted not to intervene in the retail e-commerce platform market in Mexico. Cofece concluded that there were behavioral barriers that limit seller mobility between retail e-commerce platforms and reduce competitive rivalry in this market. Ultimately, Cofece opted not to initiative any corrective measures due to the lack of certainty as to their benefits for consumers and small to medium-sized enterprises. *See* Press Release, Cofece, Cofece Concludes Retail E-Commerce Research, Generates Evidence for Future Comprehensive Work (Sept. 12, 2025), <https://www.cofece.mx/cofeca-concluye-investigacion-en-comercio-electronico-minorista/?lang=en>.

⁴¹ S. Afr. Competition Comm’n, Online Intermediation Platforms Market Inquiry: Terms of Reference ¶ 2.9 (Apr. 9, 2021), https://www.compcom.co.za/wp-content/uploads/2021/04/44432_09-04_EconomicDevDepartment.pdf.

⁴² S. AFR. COMPETITION COMM’N, ONLINE INTERMEDIATION PLATFORMS MARKET INQUIRY: SUMMARY OF FINAL REPORT FINDINGS AND REMEDIAL ACTIONS (July 2023), https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Summary-of-Findings-and-Remedial-action.pdf.

R180 million in advertising credits and redesign its search results page to favor smaller South African platforms, while e-commerce platform Takealot was ordered to structurally separate its retail and marketplace businesses and implement a comprehensive HDP support program.⁴³ These remedies show a competition authority acting as a de facto market actor and regulator, dictating product design and mandating financial subsidies to achieve broad socio-economic goals.

20. Commentators have expressed broad concerns about South Africa’s OIPMI market inquiry, observing that “South Africa risks undermining its evolving digital economy by pursuing an approach that will deter foreign investment due to ambiguous and discretionary enforcement.”⁴⁴ They also explain that “[t]his regulatory uncertainty threatens to stifle innovation and hinder progress toward regional digital integration.”⁴⁵

21. Despite the concerns and negative consequences, this interventionist model has been the subject of recent legislative changes in Germany. The 11th Amendment to the German Competition Act, which came into force in 2023, has granted the Bundeskartellamt significant new powers.⁴⁶ Following a sector inquiry, if the authority determines that there is a “significant and permanent malfunctioning of competition,” it can impose behavioral or structural remedies on companies that have contributed to this malfunctioning.⁴⁷ Critically, these remedies can be imposed irrespective of whether the companies have committed a specific infringement of competition law.

22. Italy has recently followed a similar path. In August 2023, a law decree granted the Italian Competition Authority (ICA) new “regulatory superpowers” to impose structural or behavioral remedies following a market study, without any finding of a legal infringement.⁴⁸ The stated goal was to address structural risks to competition that traditional enforcement cannot fix. While initially prompted by concerns over airfares, the Italian Council of State confirmed in January 2024 that these powers apply to all economic sectors.⁴⁹ This gives the ICA broad discretion to impose far-reaching remedies, such as divestitures or changes to pricing policies, across the entire economy, a development that

⁴³ *Id.* at 3.

⁴⁴ Matthias Bauer & Dyuti Pandya, *Borrowed Blueprints, Unintended Consequences: South Africa and the EU’s Digital Markets Act*, AFR. ANTITRUST & COMPETITION L. NEWS & ANALYSIS (May 2, 2025), <https://africanantitrust.com/2025/05/02/borrowed-blueprints-unintended-consequences-south-africa-and-the-eus-digital-markets-act/>; see also Marianne Wagener & Candice Upfold, *Broad Public Interest Remedies In Market Inquiries*, FIN. INST. LEGAL SNAPSHOT (Aug. 30, 2023), <https://www.financialinstitutionslegalsnapshot.com/2023/08/30/broad-public-interest-remedies-in-market-inquiries/>.

⁴⁵ Bauer & Pandya, *supra* note 44.

⁴⁶ Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze [11th Amendment to the Act against Restraints of Competition], BGBl. I 2023, No. 294 (Ger.), <https://www.recht.bund.de/bgbl/1/2023/294/VO.html>.

⁴⁷ *Sector Inquiries and Remedies*, BUNDESKARTELLAMT https://www.bundeskartellamt.de/EN/Tasks/Sector_inquiries/Sector_inquiries.html.

⁴⁸ Art. 1, para. 5, Decreto Legge [Law Decree], n. 104, 10 August 2023 (It.), <https://www.gazzettaufficiale.it/eli/id/2023/10/09/23A05615/sg>; see also Enzo Marasa & Irene Picciano, *New Competition Tool: Italian Competition Authority Issues Guidelines on Application of Newly Assigned Regulatory “Superpowers,”* PORTOLANO CAVALLO (Jan. 7, 2025), <https://portolano.it/en/newsletter/portolano-cavallo-inform-digital-ip/new-competition-tool-law-decree-gives-italian-competition-authority-regulatory-superpowers>.

⁴⁹ Comunicazione relativa all’applicazione dell’articolo 1, comma 5, del decreto-legge 10 agosto 2023, n. 104, convertito con modificazioni dalla legge 9 ottobre 2023, n. 136 – AGCM provision No. 31190 of May 7, 2024, https://www.agcm.it/dotcmsdoc/normativa/concorrenza/p31190_Comunicazione_applicazione_art_1_co5_dl_104_2023.pdf.

has been criticized for being adopted without extensive public discussion and for lacking sufficient safeguards, potentially giving the ICA “*carte blanche* to intervene at will.”⁵⁰

23. BIAC strongly advocates that regulatory intervention, when needed, should be evaluated and implemented by a specialist regulatory agency with specific jurisdiction over such issues specifically designated by an appropriate legislative body.⁵¹ Any such intervention should be subject to rights of defense, delineated standards for finding conduct problematic and strong judicial review. This allows each agency to focus on its core competencies, instead of competition regulators acting as industry regulators, while providing for sound and accountable decision making. While market studies can inform policy, they are not a substitute for the robust governance and checks and balances inherent in legislative processes.

4. Competition Authorities’ Powers and Criteria Used to Initiate Market Studies

24. The legal powers and criteria for initiating market studies vary significantly across jurisdictions. While many competition authorities possess specific legal powers for this purpose, others rely on general principles to promote competition. BIAC believes that any market study should only be initiated if specific legislative thresholds are met and if there are clear and compelling arguments for their use, supported by effective checks and balances. The scope of the study should be precisely defined and limited to what is strictly necessary.

25. The tendency for low initiation thresholds and extensive powers can lead to disproportionate and overly burdensome studies. To prevent studies that are “speculative” or “fishing expeditions,” clear, ex-ante criteria for selecting markets should be in place and publicly available.⁵² These criteria should include:

- The scale and significance of potential problems or consumer detriment in the market.
- The impact on all market players.
- The market size and value.
- The existence of barriers to entry.
- The significance to productivity and economic growth.
- The prospects of obtaining evidence and identifying remedies.
- Whether it is more appropriate to utilize advocacy tools.
- Whether the likely benefits from a study would justify the possible cost and disruption to business.⁵³

26. Launching studies without a *prima facie* problem or revisiting markets without substantial changes risk undermining an authority’s credibility, wasting significant resources, and detracting businesses from vigorously competing in the market. BIAC also stresses the importance of engaging with key stakeholders in the preliminary stages to

⁵⁰ Giuseppe Colangelo, *Trendy Antitrust for Digital Markets: Are Market Investigations the New Black?*, 15 J. EUR. COMPETITION L. & PRAC. 289 (Aug. 10, 2024), available at <https://laweconcenter.org/resources/trendy-antitrust-for-digital-markets-are-market-investigations-the-new-black/>.

⁵¹ BIAC 2016, *supra* note 1, ¶ 12.

⁵² *Id.* ¶¶ 20, 33-35.

⁵³ *Id.*

refine the focus, clarify exclusions from scope, and provide transparency and reasonable timelines.

27. Regarding resources, while some agencies, like Colombia’s Superintendency of Industry and Commerce (SIC), have dedicated teams for market studies, they may still be small and benefit from increased resources.⁵⁴ However, it is not necessary to create a solely dedicated unit for market studies, as agencies can choose their preferred organizational setup.

5. Gathering of Data and Other Information for the Study

28. The process of gathering data for market studies varies greatly by jurisdiction, with some authorities employing more intrusive and demanding methods. Information requests can be exceptionally burdensome for industry participants, incurring significant external and internal costs. This raises serious questions about the cost-effectiveness of such studies, especially when compared to the market size and maturity.

29. The challenges for businesses in providing information are substantial:

- Information is often not routinely kept in the format requested or is scattered across businesses or locations. Available information may not be fit for purpose or reliable.
- Providing historic information can be particularly difficult if IT systems or business units have changed, or data is voluminous.
- Data collection is a time-consuming intrusion into people’s daily jobs that disrupts the business, leading to difficulties in providing data quickly and extensively.
- The timelines imposed by regulators are often unduly short and do not account for the complexities businesses face when trying to identify, collect, and produce responsive information.⁵⁵

30. Part of the problem lies in an asymmetry of burdens. A request that is relatively simple for an authority to issue can trigger a massive and complex internal project for the recipient company, requiring a cross-functional effort involving legal, finance, IT, and commercial teams to locate, collate, and verify the requested documents and data.

31. These burdens can be mitigated by employing several best practices:

- *Prioritize Pre-Existing Information and Desk Research* – Authorities should first exhaust all internal and publicly available sources (e.g., published reports by other agencies, government statistics, academic research, trade reports) before requesting new information from businesses. This approach is more efficient for authorities, it helps them understand the market to design better requests, and significantly reduces the burden on external stakeholders.⁵⁶
- *Proportionality and Flexibility* – Information requests must always be proportionate to the needs of the study. Authorities should ask why the information

⁵⁴ OECD 2015, *supra* note 28, at 106.

⁵⁵ OECD, Roundtable on Market Study Methodologies for Competition Authorities – Speaking Points by Paolo Palmigiano, Chairman of the Association of In-House Competition Lawyers & General Counsel, Sumitomo Electric Industries Group 2-3 (June 2017), <https://web-archive.oecd.org/2017-10-19/452789-palmigiano-points-market-studies-methodology.pdf> [hereinafter Palmigiano Speaking Points]; BIAC 2017, *supra* note 1.

⁵⁶ Palmigiano Speaking Points, *supra* note 55, at 1; BIAC 2017, *supra* note 1, ¶ 5.

is needed, if it is already available, and what the burden on industry players is, exploring more limited alternative gathering methods like face-to-face meetings instead of lengthy questionnaires.⁵⁷

- *Early Stakeholder Consultation* – A discussion with stakeholders before formal requests are sent can help determine the value, focus, content, and scope of information requests or questionnaires. This allows businesses to highlight data availability issues or time constraints, potentially leading to more targeted requests and data provided in a readily available format. The U.S. DOJ/FTC practice of holding informal calls before issuing CIDs to third parties in conduct matters is a good example.⁵⁸
- *Clarity and Quality in Requests* – Requests should clearly state what information is sought, why, how to submit it, the timeframe, consequences of non-compliance, recourse to challenge the request, and confidentiality protections. They should focus on verifiable facts rather than opinions.⁵⁹
- *Adequate Timeframes* – Sufficient time must be granted for quality responses. At the same time, the absence of fixed timetables can lead to drawn-out, ineffective investigations.⁶⁰

32. BIAC firmly believes that the use of “dawn raids” or fines in the context of market studies – which are fundamentally fact-finding activities rather than investigations of suspected anti-competitive behavior – is “wholly disproportionate and inappropriate.”⁶¹ Cooperation should always be sought first, and penalties should only be used as a last resort.⁶²

33. While useful for gathering consumer information, surveys present challenges in defining targets, methodology, and question design.⁶³ Questions must be contextual, unambiguous, non-leading, and offer appropriate response options, with piloting being essential before wide distribution. Workshops can also be useful for bringing together diverse stakeholders, but private meetings are preferable for sensitive data.

6. The Need for Transparency in Market Studies

34. Transparency is crucial for market studies. Historically, these studies have often been “opaque from a business perspective.”⁶⁴ Information requests are typically extensive and broad, making it difficult for businesses to discern the precise concerns or focus areas. Furthermore, timetables are often unspecified and prone to “drift.”⁶⁵

35. BIAC urges competition authorities to be more transparent and focused in their goals. Publication of key documents at various stages, such as scoping notices or statements of concerns, is essential. It is advisable that agencies publish guidelines for stakeholders and the general public explaining what market studies are, their powers, and possible outcomes, as well as prioritization principles for launching and conducting such sector

⁵⁷ BIAC 2017, *supra* note 1, ¶ 9.

⁵⁸ BIAC 2017, *supra* note 1, ¶ 6.

⁵⁹ Palmigiano Speaking Points, *supra* note 55, at 3.

⁶⁰ *Id.*; BIAC 2017, *supra* note 1, ¶ 11.

⁶¹ BIAC 2008, *supra* note 1, at 200.

⁶² BIAC 2017, *supra* note 1, ¶ 10.

⁶³ Palmigiano Speaking Points, *supra* note 55, at 4.

⁶⁴ BIAC 2008, *supra* note 1, at 201; BIAC 2016, *supra* note 1, ¶ 27.

⁶⁵ BIAC 2016, *supra* note 1, ¶ 27.

inquiries. Additionally, authorities should commit to publishing a press notice when launching a new market study, detailing the market(s) studied, the concerns, possible outcomes, tentative timetable, and a contact point for feedback. Engaging with market players and civil society, for example through workshops and conferences, is an important element. This increases transparency and encourages stakeholder participation.

36. Before implementing any interventions or remedies arising from market studies, agencies should consult meaningfully with the relevant industries. Such consultation helps identify potential unintended consequences and ensures that proposed measures will achieve their intended objectives without creating unnecessary market disruptions.

37. The OECD also recommends that agencies engage stakeholders in the design of recommendations and evaluate their expected costs and benefits before proposing them.⁶⁶

7. Timetables and Milestones for Completing Market Studies

38. The absence of fixed timetables for market studies can lead to protracted and ultimately ineffective inquiries, placing a significant and undue burden on management time within businesses. Some authorities, like the UK's CMA, are bound by statutory deadlines (e.g., 12 months for market studies, extendable by 6 months for market investigations).⁶⁷ Other bodies, like the European Commission, use administrative timetables, typically aiming for completion within 6 to 18 months to maintain stakeholder engagement and avoid obsolescence due to changing market conditions.⁶⁸

39. In contrast, studies without binding deadlines can become drawn-out, resource-intensive exercises. One recent example, discussed in greater detail above, is the U.S. FTC Section 6(b) study into Pharmacy Benefit Managers (PBMs). The inquiry was launched in mid-2022, but an *interim* staff report was not released until over two years later, in July 2024.⁶⁹ The delay was significant enough that an FTC Commissioner publicly noted the urgency of completing the study.⁷⁰

40. As previously noted, the Canadian Petroleum Inquiry, which lasted for 13 years, stands as powerful reminder of what can occur in the absence of appropriate deadlines, resulting in a process that was criticized for its immense cost and questionable utility.

41. Recognizing the problems associated with open-ended inquiries, some jurisdictions have built in time limits. Canada's newly reintroduced market study powers, for instance, include a statutory initial period of up to 18 months, with extensions of up to three months upon approval by the Minister of Industry.⁷¹ This reflects a legislative attempt to learn from the past and impose necessary discipline on the process from the outset.

42. BIAC therefore strongly advocates for clearly stated and understood timetables and milestones for market studies. This minimizes the risk of "drift," which further increases costs for businesses. Further timetables should include limited timelines for fact gathering by the authority to avoid the practice of authorities issuing requests for information to

⁶⁶ OECD 2015, *supra* note 28, at 108.

⁶⁷ CMA 2025, *supra* note 38, ¶ 2.2.

⁶⁸ OECD 2015, *supra* note 28, at 93.

⁶⁹ FTC [PBM Press Release](#), *supra* note 22.

⁷⁰ Concurring Statement of Commissioner Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak Regarding the Second Pharmacy Benefit Managers Interim Staff Report, FTC File No. P221200 (Jan. 14, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/pbm-6b-second-interim-staff-report-ferguson-concurrence-final.pdf.

⁷¹ Gov't of Canada, Market Studies Information Bulletin (May 20, 2025), <https://competition-bureau.canada.ca/en/how-we-foster-competition/consultations/market-studies-information-bulletin-0>.

industry participants on very short and unrealistic timelines. Effective case management is essential to achieve optimal results at minimum cost for all parties involved.

8. Use of Confidential Information

43. The handling of confidential information and business secrets is a matter of paramount importance and highly sensitivity for companies.⁷² When compelled to provide such information, businesses require robust assurance that authorities have very strong internal processes and safeguards to protect confidentiality. These safeguards should be equivalent to those in place for formal investigations. Chile's Fiscalía Nacional Económica (FNE), for instance, applies its internal protocol for investigation-related sensitive information to market studies.⁷³ Peru's INDECOPI also protects confidential information under its administrative prosecution rules.⁷⁴ Experienced agencies are noted to provide protection against public disclosure of confidential information.⁷⁵

44. BIAC is also deeply concerned about the possibility of confidential information obtained during market studies being used as evidence for subsequent enforcement actions without a proper due process.⁷⁶ This practice significantly diminishes incentives for stakeholders to cooperate voluntarily in market studies. The U.S. FTC, for example, typically avoids this to enhance cooperation.⁷⁷

45. Furthermore, with the increasing threat of cyber-attacks and authorities accessing remote data centers, BIAC believes that authorities must possess state-of-the-art cybersecurity protection systems for any business information provided to them, along with adequate and enhanced resources and expertise in this area.⁷⁸ When third parties assist in market studies, appropriate safeguards must be in place to prevent their unauthorized access to confidential information.⁷⁹

9. Cross-Jurisdictional Market Studies

46. International cooperation among competition authorities is expanding beyond traditional enforcement against cartels and mergers to now include market studies. Recent examples include the OECD's joint digital sector study in Poland, Latvia and Lithuania that is funded by the European Union,⁸⁰ the inclusion of market studies and investigations

⁷² Palmigiano Speaking Points, *supra* note 55, at 5; BIAC 2016, *supra* note 1, ¶ 29; BIAC 2017, *supra* note 1, ¶ 21; BIAC 2020, *supra* note 1, ¶ 29.

⁷³ OECD 2015, *supra* note 28, at 22.

⁷⁴ *Id.* at 71.

⁷⁵ *Id.* at 105.

⁷⁶ BIAC 2016, *supra* note 1, ¶ 29; BIAC 2017, *supra* note 1, ¶ 22.

⁷⁷ OECD 2016, *supra* note 5, ¶ 59.

⁷⁸ BIAC 2016, *supra* note 1, ¶ 30; BIAC 2017, *supra* note 1, ¶ 23.

⁷⁹ BIAC 2016, *supra* note 1, ¶¶ 29, 31; BIAC 2017, *supra* note 1, ¶ 22, 24-25; OECD 2015, *supra* note 28, at 95.

⁸⁰ *OECD Competition Market Study: Digital Sector in Poland, Latvia and Lithuania*, OECD, <https://www.oecd.org/en/about/projects/oecd-competition-market-study-digital-sector-in-poland-latvia-and-lithuania.html>.

in the UK-EU Cooperation Agreement,⁸¹ and collaborative forums like the G7's AI working group⁸² and the "Five Eyes" intelligence sharing initiative.⁸³

47. While such cooperation can offer efficiencies by reducing duplicative burdens and promoting consistent outcomes, BIAC is concerned that it may amplify existing concerns with how market studies could be conducted if not governed by robust safeguards.

48. Within the international context, BIAC recommends the following considerations to guide cross-jurisdictional market studies in conjunction with the other guidance ordinarily applicable to market studies:

- *Convergence on Highest Procedural Standards* – Cooperation must be based on a shared commitment to the highest standards of procedural fairness and rights of defense found among participating jurisdictions, including transparency and access to judicial review.⁸⁴
- *Proportionality in Joint Inquiries* – Joint information requests should be narrowly tailored after stakeholder consultation.⁸⁵
- *Confidentiality and Privilege Protections* – The exchange of non-public information must be based on voluntary, party-driven confidentiality waivers that are strictly limited in scope and use. A refusal to grant a waiver must not result in negative inferences. Critically, cooperation agreements must explicitly safeguard legal privilege by respecting the rules of the jurisdiction from which the information originates, preventing the transmission of information that is considered privileged in its source country.⁸⁶

10. Use of Third Parties in Carrying Out Market Studies

49. Competition authorities may choose to perform market studies entirely in-house or contract out parts or all of the work to consultants or academics.⁸⁷ Outsourcing can provide access to specialized knowledge or expertise that an agency may lack, potentially leading to more informed outcomes as well as free up agency resources. For instance, Mexico's COFECE has relied on academic experts for analysis in some studies.⁸⁸

50. However, BIAC raises several concerns regarding the involvement of third parties:

⁸¹ *Agreement Between the European Union and the United Kingdom of Great Britain and Northern Ireland Regarding Cooperation on the Application of Their Competition Laws*, COM(2025) 232 final ANNEX (May 19, 2025), https://eur-lex.europa.eu/resource.html?uri=cellar:27701c4b-3580-11f0-8a44-01aa75ed71a1.0019.02/DOC_2&format=PDF.

⁸² G7 Competition Authorities and Policymakers' Summit: Digital Competition Communiqué (Oct. 4, 2024), <https://en.agcm.it/dotcmsdoc/pressrelease/G7%202024%20-%20Digital%20Competition%20Communiqu%C3%A9.pdf>.

⁸³ Press Release, Austl. Competition & Consumer Comm'n, Five Eyes Competition Authorities to Focus on Collusion in International Trade (Feb. 18, 2022), www.accc.gov.au/media-release/five-eyes-competition-authorities-to-focus-on-collusion-in-international-trade.

⁸⁴ OECD, Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement, [OECD/LEGAL/0465](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465) (Oct. 6, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465>.

⁸⁵ OECD, Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings, [OECD/LEGAL/0408](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408) (Sept. 16, 2014), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408>.

⁸⁶ *Id.*

⁸⁷ OECD 2015, *supra* note 28, at 91.

⁸⁸ *Id.* at 53 n.76.

- *Confidentiality Risks* – The primary concern is ensuring that confidential information provided by undertakings is adequately protected by contractors. This requires robust assurances and safeguards.⁸⁹
- *Loss of Institutional Knowledge* – Full outsourcing may mean that acquired know-how does not remain within the agency.⁹⁰
- *Quality and Objectivity* – Care must be taken in selecting experts to ensure they possess the appropriate experience and that their analysis is rigorous, avoiding assumptions not supported by market reality. Stakeholders should have the opportunity to challenge the methods and conclusions of external economists.⁹¹
- *Conflict of Interest* – Potential conflicts of interest must be considered when selecting contractors.⁹²

11. Market Studies as Advocacy Tools

51. BIAC views market studies, while not essential to competition law enforcement, as nonetheless a helpful tool for competition advocacy, particularly when addressing government restrictions, and supports their use on a limited basis.⁹³ When properly deployed and managed, they can serve a useful purpose.

52. Their utility stems from several key aspects:

- *Identifying Regulatory Barriers* – Market studies can highlight the impact of existing laws and regulations on competition and consumers, facilitating broader action to promote competitive or consumer interests. They are effective in tackling regulatory and other government restrictions on competition, often leading to proposals for deregulation or reform of market institutions.⁹⁴
- *Legislative and Regulatory Reform* – BIAC supports using market studies to consider the rolling back of regulation and, in some instances, legislative reform.⁹⁵ Examples include the FTC’s economic reports influencing legislation in the U.S.,⁹⁶ Mexico’s COFECE’s study contributing to the Fintech Law,⁹⁷ and Peru’s INDECOPI’s study on notaries leading to deregulation recommendations.⁹⁸
- *Refuting False Claims* – Market studies can refute claims of anti-competitive conduct, for example, when price increases are due to supply disruptions rather than anti-competitive behavior. This helps avert unnecessary government intervention by providing a robust, facts-based analysis.⁹⁹

⁸⁹ BIAC 2016, *supra* note 1, ¶ 31; BIAC 2017, *supra* note 1, ¶ 24.

⁹⁰ OECD 2015, *supra* note 28, at 91.

⁹¹ BIAC 2017, *supra* note 1, ¶ 24-25.

⁹² *Id.*

⁹³ BIAC 2008, *supra* note 1, at 205; BIAC 2016, *supra* note 1, ¶ 37.

⁹⁴ BIAC 2016, *supra* note 1, ¶ 33.

⁹⁵ *Id.*

⁹⁶ OECD 2020 Background Note, *supra* note 10, at 10.

⁹⁷ OECD 2015, *supra* note 28, at 50.

⁹⁸ *Id.* at 70.

⁹⁹ BIAC 2016, *supra* note 1, ¶ 34.

- *Shaping Policy Discussions* – Market studies can significantly influence policy discussions by demonstrating whether a market is functioning efficiently or by narrowing government interventions to specific competitive problems.¹⁰⁰
- *Encouraging Voluntary Compliance* – For businesses, market studies may offer an opportunity to comply voluntarily with competition principles without necessitating formal enforcement action or legislative measures.¹⁰¹
- *Understanding New Markets or Market Dynamics* – Where competition dynamics are affected by new markets with a significant impact on an economy, or new technologies that promise significant disruption, it is important that competition authorities get a deep understanding of new technologies, market dynamics, and business incentives so that possible future enforcement actions avoid type II errors, disincentivize investment and innovation, or distort pro-competitive dynamics.¹⁰²

53. To be effective, market studies must be well-reasoned and presented with compelling data. Engaging with governments – through workshops, clear guidance, and robust data showing the costs and benefits of proposed recommendations – is crucial for successful implementation. Other stakeholders, such as industry analysts, business management academics, and trade and consumer associations, can also leverage study results to advocate for necessary changes through media or publications.

54. In the context of emerging competition issues, market studies could be particularly valuable as a forward-looking, ex-ante tool.¹⁰³ They may enable authorities to identify and diagnose potential issues before they become widespread or entrenched, especially when detailed knowledge of the market is lacking. This allows authorities to anticipate and address future market features or new forms of competition harm. They can cover a broader set of issues, focus on the dynamic process of rivalry, and promote increased competition more effectively than traditional enforcement. Furthermore, market studies can help clarify how competition principles apply to new or rapidly changing business models, shaping early development of practices to be compatible with those principles.

55. Addressing issues like information asymmetries and behavioral biases in digital markets, where products are often offered at zero price, is an area where market studies, potentially in conjunction with data protection and consumer protection tools, can achieve significant impact.¹⁰⁴ This requires authorities to delve into demand-side issues, which are often overlooked in supply-side focused enforcement. The global nature of modern technology and digital platforms also highlights the benefit of international cooperation to develop shared approaches and align regulatory environments, providing businesses with clarity and certainty.¹⁰⁵

12. Conclusion

56. BIAC reiterates that market studies, while a valuable tool, should be undertaken only after careful consideration by a competition authority. There are compelling arguments for greater clarity and adherence to specific thresholds before such studies are launched. A clear definition of scope and a greater focus on the organization and

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ OECD 2020 Executive Summary, *supra* note 6, at 3.

¹⁰⁴ OECD 2020 Background Note, *supra* note 10, at 13.

¹⁰⁵ OECD 2020 Executive Summary, *supra* note 6, at 4.

management of market studies are essential to avoid repeated errors and ensure optimal outcomes from what can be a very resource-intensive exercise for both authorities and businesses.

57. As is apparent from the experience of multiple jurisdictions, the utility of market studies is highest when they are used as an advocacy and analytical tool. However, market studies should not be used as a “fishing expedition” when evidence for a formal investigation is lacking, nor should they become a substitute for timely and effective enforcement action. Careful consideration must be given to the proportion of a competition agency’s resources allocated to market studies, given their significant cost and the more direct impact of enforcement actions.

58. BIAC’s main concerns center around the extension of market investigation powers that allow for the imposition of remedies absent any proven legal infringement. There is an emerging trend in this direction, inspired by the UK system, with similar interventionist powers having been recently introduced in Germany and Italy. This approach blurs the line between enforcement and regulation, creates profound legal and commercial uncertainty for businesses, and risks overburdening competition authorities with complex, long-term regulatory responsibilities for which they may not be equipped. It is notable that the UK’s CMA is currently reassessing its approach due to practical challenges and criticism, which is an appropriate reconsideration in BIAC’s view.

59. A principal concern for BIAC is the substantial cost and burden imposed on businesses participating in market studies and investigations, particularly when information requests are disproportionate or poorly bounded. The challenges are multifaceted: data is often not maintained in requested formats, requiring extensive internal coordination across legal, finance, IT, and commercial teams; historical data retrieval can be exceptionally difficult when systems and file formats become obsolete over time as technology evolves; and the timelines imposed are frequently inadequate given the complexity for full compliance. As demonstrated by recent examples, companies have reported spending millions of dollars and tens of thousands of hours responding to market study requests, producing millions of pages of documents and billions of data points. This asymmetry of burden – where relatively simple requests from authorities trigger massive internal projects for businesses – can be mitigated through better practices including prioritizing existing information sources, ensuring proportionality in requests, conducting early stakeholder consultations, and providing adequate timeframes for quality responses.

60. Another emerging trend is the increased use of cross-jurisdictional cooperation in market studies. While offering potential efficiencies, working across jurisdictions does present a significant risk of amplifying existing concerns related to how market studies and investigations are conducted. Without a principled framework governing such cooperation, businesses could face compounded compliance burdens, the erosion of procedural rights, and the circumvention of jurisdictional safeguards.

61. In sum, BIAC encourages competition authorities and the OECD to promote best-practices that strike a critical balance. These best practices should leverage the clear benefits of market studies for advocacy, regulatory insights, and understanding emerging markets, while simultaneously implementing robust procedural safeguards. These must include strict transparency of purpose and scope, firm timetables, and a commitment to minimizing the burdens imposed on businesses. This balanced approach will foster greater cooperation and ultimately lead to more effective and legitimate competition policy outcomes for all stakeholders.