

English - Or. English

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

Working Party No. 3 on Co-operation and Enforcement

Methodologies for Conducting Market Studies – Note by BIAC

20 June 2017

This document reproduces a written contribution from BIAC submitted for Item 2 of the 125th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 20 June 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/market-study-methodologies-for-competition-authorities.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

JT03415591

Business and Industry Advisory Committee (BIAC)

1. The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee meeting for its session on methodologies for carrying out market studies.

1. Introduction

2. BIAC has submitted several papers on market studies and market investigations¹. In those papers BIAC has expressed several concerns in relation to the carrying out of such studies by competition authorities and described the burden they place on industry. This paper will focus on those methodologies used by competition authorities when gathering information, particularly those that most affect industry players such as requests for information and surveys where industry input is key. BIAC has sought to provide practical and pragmatic suggestions to improve the way such methodologies are used.

2. Market Studies in General

There are substantial differences in the powers and the scope that competition authorities have when carrying out market studies, so finding a common definition of market studies is somewhat difficult. A good start is the definition in the International Competition Network’s Good Practice Handbook (‘Handbook’) which describes them as ‘research projects conducted to gain an in-depth understanding of how sectors, markets, or market practices are working’. This captures most types of market studies². The Handbook contains a good description of why market studies are conducted and what their output might be:

“Market studies are conducted primarily in relation to concerns about the functioning of markets arising from one or more of the following: (i) firm behaviour; (ii) market structure; (iii) information failure; (iv) consumer conduct; (v) public sector intervention in markets (whether by way of policy or regulation, or direct participation in the supply or demand side of markets); and (vii) other factors which may give rise to consumer detriment.”

“The output of a market study is a report containing findings based on the research. This may find that the market is working satisfactorily or set out the problems found. Where problems are found, the market study report can include: (i) recommendations for actions by others, such as legislatures, government departments or agencies, regulators in business or consumer bodies; and/or (ii) commitments by the competition (or competition consumer) authority itself to take advocacy and/or enforcement action”.

¹ BIAC. (2016). Market studies as a tool to promote competition. DAF/COMP/GF/WD(2016)79.; and BIAC. (2008). Market Studies. [DAF/COMP\(2008\)34](#), p.197-205.

² In this context, it should be noted that the term ‘market’ should not be interpreted to have the same meaning as ‘relevant market’ under competition law.

3. To carry out a market study and to produce such reports, competition authorities must gather and analyse a substantial amount of data. The agencies use several different methodologies and while there is not a single preferred methodology (as much will depend from the type of study carried out), from a business perspective, the methodologies listed below should be considered ‘best practice’. For example, competition authorities might design and issue questionnaires; they could conduct workshops or meetings or interviews; they could carry out consultations; they could target information requests to individual market participants; or they could carry out large customer surveys.

4. Once the data has been gathered, analysis of that data, including economic analysis, is carried out by the authority itself or outsourced to competent third parties. The rigor of the methodology applied in undertaking studies is critical. For example, where only a small sample size of market participants is surveyed and/or only one part of the market is surveyed, the sample becomes a non-representative, limiting conclusions that can be drawn from the results. Using appropriate methodologies and testing assumptions and properly analyzing the data gathered will lead to a more valid result. Studies that are confirmatory, rather than exploratory, bring with them certain policy limitations and will impact how far an authority can extrapolate policy conclusion.³

5. One important point from a business perspective is that, as recognised by the OECD⁴ and the ICN, agencies should start off by looking at what they already know or information they already have access to. When envisaging a market study, they should carry out detailed ‘desk research’ to ensure the agency obtains and benefits to the maximum extent possible from existing information sources, including information publicly available, such as published reports by other relevant agencies and regulators, as well as government statistics or researches in the public domain. The involvement of external stakeholders is then just to verify or supplement what the agency has gathered. Not only this is more efficient for an authority but it also considerably reduces the burden on external stakeholders. Only once such desk research has been done, can the agency then move on to define the scope of the information they still require and then to establish, where practicable in consultation with market participants, where best to obtain it.

3. Involvement of market participants (sellers, customers, and any other stakeholders)

6. A market study cannot be carried out in isolation or without involvement of appropriate stakeholders, especially if the authority wants to understand the market dynamics thoroughly. In some countries, consultation with stakeholders is commonplace, yet market studies in other countries are carried out without an apparent consultation involving stakeholders. The lack of such consultation might result in an academic exercise where the outcome will be of limited value. Experience

³ For example, the methodological approach adopted by the US FTC in its 2016 patent assertion study and statistical limitations thereof was criticized by a number of academics. See Layne-Farrar, Anne (2016). “What Can the FTC’s

§6(B) PAE Study Teach Us? A Practical Review of the Study’s Methodology” and Scheuren, Fritz (2016). “Statistics and the Paperwork Reduction Act: An FTC Case Study”. Both available at SSRN.

⁴ OECD Policy RoundTable on Market studies (2008), at <http://www.oecd.org/regreform/sectors/41721965.pdf>

indicates that early stakeholder involvement can help identify pertinent questions and existing information sources, that can help to develop effective market studies. This seems to be supported by most authorities. In the European Union, DG Competition has stated that it values dialogue with stakeholders over both scope and process. In the UK, the CMA generally writes to a range of stakeholders who are associated with the market to seek both factual information and views.

4. Powers for gathering of data and other information for the study

7. If information needs to be gathered, the powers and processes vary from jurisdiction to jurisdiction. In some countries, competition authorities can use the powers of investigation they have in order to obtain data and other information from market participants. In other countries, the authority can only employ voluntary gathering of data. Some authorities are more intrusive in their methods and more demanding in terms of the information. The EC, for example, has used a mixture of "dawn raids" i.e. unannounced on-site inspections and wide-ranging questionnaires (information requests) and the FTC has subpoena and civil investigative demand powers in conducting market studies under section 6(b) of the FTC Act. Given that such studies are basically fact-finding activities rather than investigations of suspected anti-competitive behaviour BIAAC believes that the use of dawn raids or fines would seem to be disproportionate and inappropriate.

5. Methodologies for gathering of data from market participants

8. Market studies require the collection of a considerable amount of data. Most of the time such data is in the hands of undertakings that operate in the market which is being examined. Such data could be pre-existing documentary evidence such as corporate strategy documents, planning documents, new documents prepared for the purpose of the study, descriptive evidence of the functioning of the market, as well as expert evidence including industry and economic expert analysis and testimony. To gain access to that data, a competition authority might send questionnaire or information requests to the market participants, request meetings, hold workshops, or interview experts.

5.1. Information requests

9. While conducting a market study, competition authorities usually request documents from or send questionnaires to market participants. Such requests are sometimes quite burdensome for industry, so a competition authority should take a proportionate approach and always ask itself why the information is needed, if it is already available within the authority or publicly (as we suggested before), what is the burden on industry and if there is a different way to gather the information (for example a face to face meeting rather than a lengthy questionnaire). The more targeted the information request is, the more likely it is that market participants will respond fully; this will result in more complete and comprehensive data for the market study.

10. Authorities should consider the time and resources needed for stakeholders in answering information requests. Some authorities also have the power to impose penalties if parties do not answer. As noted above, in our view cooperation should be sought at all times in order not to place respondents under undue pressure to respond

to extensive requests and penalties should not be used unless they are really necessary.

11. BIAC welcomes the section on information requests in the ICN Handbook mentioned before which states that, “when making an information request, it is good practice for an authority to make clear what information is being sought, why the information is being sought, how the information is to be submitted, the timeframe for submission, the consequences if any of not supplying the information, any protection to confidential information submitted, a contact point for questions about the information request”.

12. It has to be said that sometimes business has the perception that authorities believe, erroneously, that undertakings can get information internally just by ‘clicking a button’. That is rarely the reality and many times internal collection of documents is extremely burdensome, either because the information is not routinely kept, or because it is scattered in different locations, or because it is not kept in the format requested by the authority. It may be particularly difficult to provide historic information when IT systems have changed and the authority should consider how many months or years of data is actually necessary and proportionate and be prepared to discuss particular difficulties faced by parties. In addition, most business people see this as an intrusion into their daily job and might not be as cooperative as one would wish in providing the data to the in-house internal team collecting it.

13. In order to reduce such burden (but also to assist the authority with a more efficient targeted request), in our view, prior to launching a market study, the authority should consider how they plan to engage with business. For example – and that happens in many cases – a discussion with certain stakeholders could assist to determine the focus, content and scope of information requests or questionnaires. Stakeholders might be given the opportunity to highlight that maybe data is not available in the format sought by the authority or that it would take too much time to provide it. Stakeholders might suggest other data that might be useful instead. The dialogue may also lead to more targeted information requests and data which is readily available. In BIAC’s view, consultation with stakeholders on the scope and range of information requests, the timeframe for responding and the format in which the information is to be supplied should be common practice and would be beneficial for the authority itself.

5.2. Stakeholders’ engagement in other stages of the process

14. A market study initially focuses on gathering information from stakeholders. But involvement of stakeholders might be essential not only at the information gathering stage but also throughout the course of the whole process, for example by commenting on any provisional document or thinking of the authority. Such engagement will significantly assist the agency in ensuring a better outcome.

15. Along those lines, BIAC welcomes the suggestion in the current consultation document issued by the UK CMA⁵. Although the document deals with market investigation, the principles can be extended to market studies. The CMA proposes to

⁵ Consultation document on ‘Updated guidance on the CMA’s approach to market investigations’, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/596665/consultation-document-market-investigations-updated-guidance.pdf

“increase the opportunities given to parties to input into our analysis and inform decision-making at an earlier stage in the Market Investigation. This will involve different forms of engagement with parties at an early stage of in the investigation, allowing for greater scrutiny and discussion of evidence analysis and potential remedies”.

5.3. Meetings with or interviews of market participants

16. Amongst the CMA’s suggestions in the consultation document, an important one relates to holding hearings with parties. These meetings could be extremely useful and they are usually welcomed by business people, as it allows them to express their views on the market being studied and to correct any misunderstanding the authority might have on the functioning of that market. BIAC supports this suggestion.

17. Meetings could be especially useful in very complex matters and in gathering expert evidence either industry specific or economic. Of course, all evidence presented should be recorded, confirmed for accuracy with whoever provided it and tested for reliability through the process.

18. There are advantages in conducting interviews over the phone or in person. Oral interviews from market participants can provide input from a large number of market participants in a short amount of time, usually with relatively little burden for all involved. In addition, oral interviews can be a useful tool as an initial contact with third parties to help identify issues for further investigation.

19. In any event, all market participants should be given the equal opportunity to contribute, with no distinction based on nationality or ownership or size, although it has to be recognised that some will be more active and able to dedicate additional resources to the study.

5.4. Analysis of data

20. Complete and accurate information is a crucial component of any effective market study. Yet gathering information is only one aspect of the process. Even if reliable, the data has to be evaluated, analysed and assessed. This can be a major and complex task. Therefore competition authorities should avoid setting questions that result in excessive data demands, as the internal team within the competition authority that will need to analyse all the information provided.

6. Use of confidential information

21. Confidential information and business secrets are highly sensitive for companies. In the course of a study, companies might be asked to provide such information, especially if the authority has the power to compel production and impose fines for non-compliance. BIAC is keen to ensure that authorities have very good internal processes and safeguards in place by which they can ensure that confidentiality is protected during the course of market studies, similar to the protections that should be in place in formal investigations. In addition, there should be a proper process for the authority to review any confidential information they receive before publishing or disclosing details of the study or their findings, so that any necessary permission can be sought and obtained and confidential information excluded.

22. BIAC is also concerned with the possibility that confidential information obtained in the course of market studies, without a proper process, is used as evidence for subsequent enforcement action; this approach diminishes incentives for stakeholders to cooperate in market studies. There is also a concern that appropriate safeguards are put in place, in those cases in which third parties are used by the authority to assist them in the market studies (see below), in order to prevent such third parties from gaining access to confidential information.

23. In the last few years, we have seen a considerable increase of cyber-attacks, so any business information provided to an authority should be protected and authorities should have a state of the art cyber security protection in their systems. In light of recent events, it is BIAC's view that agencies should have adequate and enhanced resources and expertise in this area.

7. Use of third parties in carrying out of market studies

24. Once information and data has been gathered, the competition authority will have to analyse that data. In many instances that will be done internally (when the authority has the capability and has internal economists) but in some cases agencies lack specific expertise or internal economists. External economist experts might be essential in many instances. But BIAC has two concerns in relation to this. The first is that, if consultants are used, undertakings which have provided confidential information should be given all possible assurances and safeguards that their confidential information is protected. The second is that appropriate care should be taken in selecting the experts to ensure they have the appropriate experience to carry out the tasks they need to do. If industry expertise is important (such as in regulated industries), the consultant should have experience in that industry. The agency should however be aware of any potential conflict of interests and any potential bias (or appearance thereof) would need to be addressed in an appropriate manner.

25. In the case of external economists, the input of stakeholders on their views might be important to ensure that the economic analysis is robust and consistent with basic economic theory and that methodologies which might be improper or unsound are not used, or that assumptions inconsistent with other evidence or with demonstrable economic reality of a market are not made. If external economists are utilised, stakeholders should be given the opportunity to confront and question their methods and conclusions.

8. Conclusion

26. BIAC welcomes the OECD WP3 efforts to identify and optimise methodologies to reduce this burden and cost without unduly impeding the effectiveness of market studies undertaken. BIAC believes that market studies should be carried out (if at all) after careful consideration by a competition authority. Market studies can be a very resource intensive exercise which might lead to undue burden and costs for business. Market studies require the gathering of substantial amount of data, usually in the hands of market participants. A good dialogue and engagement with stakeholders at all stages of the study would be beneficial for the agency and the stakeholders themselves.