

OECD-GVH RCC Newsletter

Issue No. 9, July 2017

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Foreword

Dear Readers,

In this Newsletter, we would like to introduce a new instrument, the RCC Request for Information (RFI). The RFI shall serve as an additional means to foster exchange and co-operation between you, the beneficiary agencies of the RCC. It gives you an easy-to-use tool to ask for information on legal questions, investigation concepts, industry experience and more. You can find a detailed description, the rules of the tool and the templates to use in this Newsletter. The official launch will be in September 2017 and we will contact every agency directly before the launch.

Most of the articles in this Newsletter focus on a special topic: market studies. Market studies have been identified as a priority topic by the OECD Competition Committee and long-term work will be conducted. You can find all related documents here <http://www.oecd.org/daf/competition/market-studies-and-competition.htm>. Contributions were made by Spain, Russia, Georgia and Hungary. We also held a very interesting seminar on market studies in Moscow, and all of the materials from this seminar can be accessed via our website, www.oecdgvh.org. Your international relations section can provide you with the necessary log-in details.

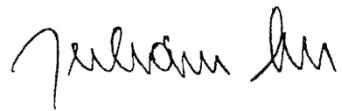
Please also do not miss our first “Literature Digest” at the end of the Newsletter. It shall provide you with some inspiration for your reading list.

As always, you will find summaries of the OECD Competition Committee meetings in June 2107, with links to all the documents you might find interesting. Use them to benefit from the work and experiences of peer competition authorities and from the work products of the OECD.

We are happy to receive your comments and contributions! If you wish to publish an article about your agency’s work, please contact Sabine Zigelski (OECD – sabine.zigelski@oecd.org) and Andrea Dalmay (RCC - dalmay.andrea@gvh.hu).



Sabine Zigelski
OECD



Miklós Juhász
President of the GVH

RCC programme 2017

February 24 – 25

Seminar on European Competition Law for National Judges: The Role of National Judges in Antitrust Litigation in the Light of the EU Damages Directive

The seminar provided the participants with the necessary tools and information to better understand the Directive's provisions and ensure a coherent and consistent application of EU law in this field by national courts. It covered the main features of the Damages Directive, such as the disclosure of evidence, the passing on defence and the quantification of harm, as well as matters related to co-operation mechanisms and preliminary reference proceedings. In addition jurisdictional issues were examined.

The seminar received funding from the Training of National Judges Programme of the European Union.



March 07 – 09

Seminar on Market Definition

The definition of a relevant product and geographic market is a necessary step in most competition cases, particularly in merger cases. We looked at basic investigatory and analytical steps and the economics of market definition. Practical case examples from OECD members were presented in order to illustrate the theoretical concepts. The participants joined the experts in hypothetical case exercises.



April 26 – 27

GVH Staff Training

Day 1 - Review of 2016 and Selected Competition Problems

After a review of the developments in EU competition law in 2016, selected competition law topics were discussed. This covered e-commerce, platform markets and big data, treatment of rebates in abuse of dominance cases and joint competition and consumer law enforcement. Experienced practitioners from competition authorities and from the Court of Justice of the EU debated the topics with the GVH staff.

Day 2 – Trainings for Special Groups of Staff

In separate sessions dedicated trainings and lectures for the merger section, the cartel section, the economics section, the consumer protection section and the Competition Council of the GVH were provided.



May 16

Heads' Meeting

Heads of the beneficiary authorities discussed their enforcement and training priorities and needs with the GVH-OECD RCC staff. New features of RCC work were presented and discussed.

May 30 – June 1

RCC – FAS Seminar in Russia – Market Studies

Market studies are research projects aimed at gaining an in-depth understanding of how sectors and markets work. A market study results in a report that sets out the problems found and issues recommendations to policy makers or leads to follow-up enforcement action. We introduced the general set-up and best practices relevant for market studies and looked at available OECD, ICN and national guidance. Experts from national competition authorities gave insights into their practical experience. Special emphasis was placed on the internet economy and markets with buyer power problems.



September 12 – 14

Outside Seminar in Bosnia and Herzegovina – Competition Assessment of Laws and Regulations

Sometimes competition problems in markets are caused by restrictive rules and regulations. The enforcement of competition rules will often not be very efficient on these markets and will not tackle the root causes of the competition problems. The OECD Competition Assessment Toolkit provides a hands-on tool for a systematic review of new and existing laws and regulations and shows ways to analyse laws, to evaluate and to suggest alternatives. We will introduce the Toolkit, give examples and show the impressive benefits from its application in a number of countries. With the help of experienced experts we will also explain the role of competition assessment in the advocacy efforts of a competition authority and how it can greatly leverage the role of a competition authority vis-à-vis its government, line ministries, regulators etc. Participants will be asked to contribute their experiences and to work on hypothetical case exercises.

October 17 – 19

Seminar on Best Practices in Cartel Procedures

Procedural laws that govern cartel cases vary from jurisdiction to jurisdiction. We can, however, identify best practices that experienced jurisdictions have developed when handling cartel cases and these will often fit different procedural frameworks. The seminar will provide insights and ideas on the preparation and execution of dawn raids, the handling of evidence, forensic IT techniques and team work in complex cartel case investigations. Experts will explore these topics together with the participants and we will illustrate the topics with hypothetical exercises.

December 12 – 14

Sector Event: Competition Rules and the Pharmaceutical Sector

This event will analyse the role of competition law in the pharmaceutical sector by looking at cases that deal with merger control, distribution agreements and pay for delay agreements. We will also examine the role of intellectual property rights and regulation and discuss relationships with the government and other regulators.

OECD Competition Committee Meetings, 19 – 23 June 2017

Hearing on Radical Innovation in the Electricity Sector¹

The OECD hosted a Hearing to explore the implications for competition agencies of radical innovation in the electricity sector. A variety of new business models are competing that will lead to significant changes in the industry. An example is the sharing economy that offers the prospect of peer-to-peer energy trading between ‘pro-sumers’ (producer-consumers) using block-chain technology (Airbnb for the electricity market).

The Hearing looked at whether regulation is keeping pace with changes, particularly regulation of the grid, and how competition agencies might advocate to help ensure that competition between different business models (both old and new) works for consumers. It also looked at the ways in which

¹<http://www.oecd.org/daf/competition/radical-innovation-in-the-electricity-sector.htm>

incumbents (distributors or utilities) might respond and how competition agencies might distinguish between pro- and anti-competitive responses when using their enforcement powers.

Roundtable on Methodologies for Conducting Market Studies²

This session explored the various information collection and analytical methodologies used in market studies, as well as some common considerations regarding their selection and application. Information gathering methodologies include preliminary background research, surveys, stakeholder consultations and formal information requests. Analytical methodologies can be

²<http://www.oecd.org/daf/competition/market-study-methodologies-for-competition-authorities.htm>

guided by an initial market structure mapping process, and include price analysis (such as price comparisons and profitability analysis), supplier-focused analyses (including an assessment of firm practices and barriers to entry), demand-focused analyses (for instance consumer preferences) and assessments of the competition impact of regulation in the sector(s).

Failing firm defence. The discussion drew on a Background Paper by the Secretariat and country submissions.

Roundtable on Competition Issues in Aftermarkets³

The Competition Committee organised a Roundtable on Competition Issues in Aftermarkets. Aftermarkets are markets for the supply of products or services needed for or in connection with the use of a relatively long-lasting piece of equipment that has already been acquired.

The roundtable offered an opportunity to compare national approaches to questions that can arise under competition law when aftermarkets are involved, such as: (i) the economic and legal theories to support competition intervention in aftermarkets; (ii) the enforcement challenges that competition authorities face in aftermarkets cases; (iii) the policy rationale for competition in aftermarkets.

Delegates discussed also whether the relevant market for the competitive analysis consists of separate markets for primary and secondary products, or whether it is a market for “systems” consisting of both primary and secondary products; when, if at all, the supplier of the primary product has market

³<http://www.oecd.org/daf/competition/aftermarkets-competition-issues.htm>

power in the aftermarket and, if it has, what pricing and non-pricing conduct may amount to an abuse of dominance prohibited by competition laws and under what conditions; and what remedies exist to aftermarket monopolisation concerns under antitrust law and beyond.

Hearing on Rethinking the Use of Traditional Antitrust Enforcement Tools in Multi-sided Markets⁴

As part of the strategic theme on Competition, Digital Economy and Innovation the Competition Committee hosted a Hearing to discuss the use of traditional antitrust enforcement tools in multi-sided markets. The Hearing looked at an important question that competition agencies face: are the tools to define markets, to assess market power, the hypothetical monopolist test, etc. sufficient to address questions in multi-sided markets?

The Secretariat invited economists from academia and Chief Economists from agencies to present and discuss methodological proposals to deal with such recurring questions for many competition agencies. All the contributions will be collected in a publication by the Secretariat.

Roundtable on Algorithms and Collusion⁵

The Roundtable on Algorithms and Collusion followed up on some of the themes that emerged in the Hearing on Big Data from December 2016. There is an increasing

⁴<http://www.oecd.org/daf/competition/rethinking-antitrust-enforcement-tools-in-multi-sided-markets.htm>

⁵<http://www.oecd.org/competition/algorithms-and-collusion.htm>

tendency from firms to use pricing algorithms that speedily react to market conditions, such as the ones used by major airlines and online retailers. While there are few cases where agencies have looked at how pricing algorithms may facilitate collusion, there is an increasing body of literature looking at how the availability of large data sets combined with artificial intelligence might change business incentives and behaviours. This literature raises the question of whether antitrust agencies should revisit traditional antitrust concepts, such as the concepts of agreement, or reconsider the boundaries

between tacit/explicit collusion, and their legality and whether any antitrust liability can be imposed on the algorithms' creators and users. The roundtable discussed how the combination of data with technologically advanced tools such as pricing algorithms, programming tools and machine learning technology may change the competitive landscape, by allowing firms to signal an attempt to coordinate strategies or to achieve collusive outcomes in novel ways that do not necessarily require formal agreements or even human interaction.

Requests for Information – Facilitating Exchange and Co-operation Between the OECD-GVH Regional Centre for Competition in Budapest’s Beneficiaries



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12 years of seminars in the framework of the OECD-GVH Regional Centre for Competition in Budapest (RCC) have significantly contributed to contacts, exchanges and mutual trust among its beneficiaries, the competition authorities of Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, FYR of Macedonia, Georgia, Kazakhstan, Kosovo⁶, Kyrgyzstan, Moldova, Montenegro, Romania, the Russian Federation, Serbia and Ukraine.

Many of the countries are neighbours and share a common history, language and culture. Their competition laws and policies are at least partly aligned and they often face similar enforcement problems. Some competition problems will have a cross-border dimension and this calls for intense co-operation with other jurisdictions.

The RCC cannot replace formal bilateral or multilateral co-operation agreements between the authorities. Its strength lies in trainings, the dissemination of best practices, the creation of contacts and networks and an informal exchange between the beneficiaries

⁶ *This designation is without prejudice to positions on status, and is in line with United Nations Security Council Resolution 1244/99 and the Advisory Opinion of the International Court of Justice on Kosovo’s declaration of independence*

and the OECD, the GVH and the OECD experts present at the seminars.

We propose a new feature of the RCC work to carry forward this informal exchange and to intensify the beneficiaries’ co-operation.

This new instrument would copy a practice that has been developed within the ECN, the “Request for Information” (RFI). The ECN RFI has been described by József Sárai, Head of the International Section of the GVH, in a recent [Newsletter article \(2/2016\)](#). He states that after a spontaneous start, the RFI has now become an established instrument and has reached a frequency of one to two requests per week. The ECN RFI has undergone a number of developments, including the introduction of a number of rules aimed at ensuring that requests do not become excessive and are handled efficiently within the authorities. As the RCC RFI can benefit from this experience, we suggest a framework of rules similar to the now more mature ECN RFI. This way the RCC RFI can bypass some of the teething problems that a new instrument inevitably faces.

Scope and basic rules of the RCC RFI

In an RFI the beneficiary countries can, for example, ask for information about the practice and experience of other beneficiary countries related to specific markets or industries, use of investigation techniques and procedural approaches, institutional setup, legislative solutions, assessment of particular behaviours, parallel proceedings, remedies or advocacy measures. As this list illustrates, the questions raised with an RFI might be case-

specific, but the plan is to share experience through this means on a much wider range of topics. Here are a couple of examples of the kind of questions that could be asked:

- Do you have any experience in examining private label products (e.g. cases, sector inquiries, market studies)? How does it affect market definition?
- In your country, have in-house lawyers been excluded from protection under legal professional privilege and how do you handle the problem in a situation such as?
- What is the market situation (i.e. market structure, level of concentration, market players) on the cash management market in your country? Have you dealt with any related competition problems?

The answers can provide the country specific experience, references to investigations, published decisions, articles and other publicly available materials.

The RCC RFI **cannot** be used to exchange confidential information or to give or request case specific enforcement advice.

It should be clear that the responding beneficiary agencies, the GVH or the OECD will have no part in the actual case handling and resolution of one of the beneficiaries. This remains the sole responsibility of the requesting agency. Answers can only be used

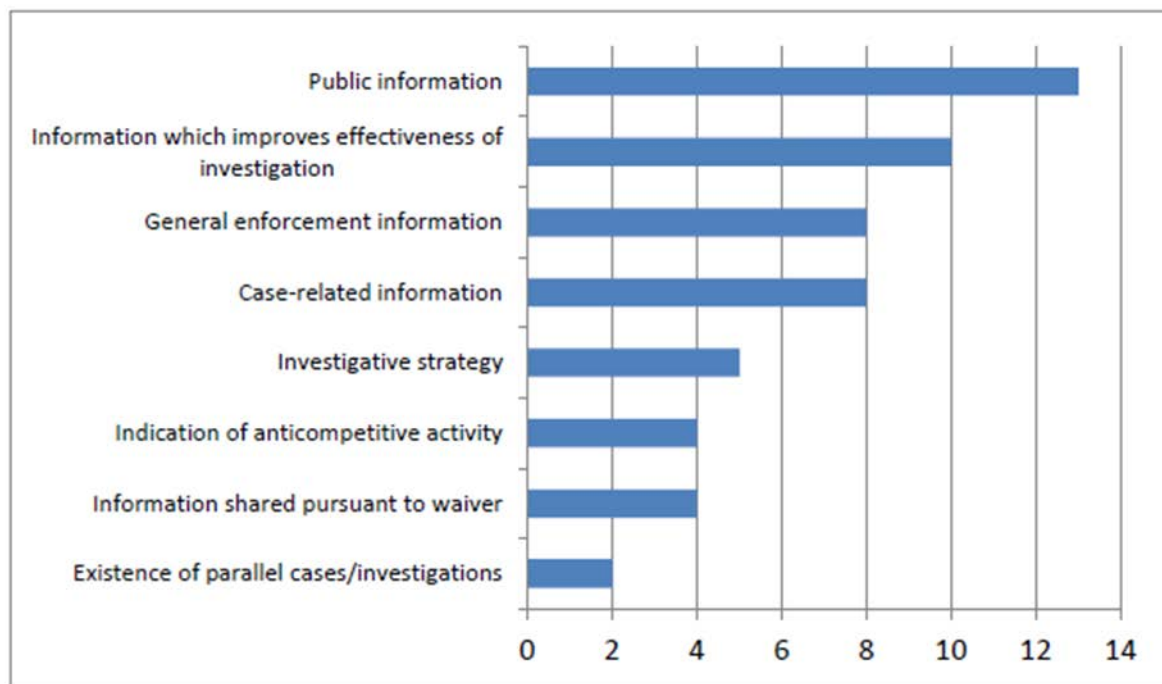
as background information on the practice and experience of other competition agencies, and cannot form the basis of an investigation or a decision in a particular case. They must not be quoted in agency decisions.

Requests and answers also cannot, under any circumstance, include business secrets and confidential information of businesses. The RCC RFI does not provide a basis for this kind of exchange, which is governed solely by the laws of the different jurisdictions. Any responsibility for the leakage of confidential information is solely borne by the sending/receiving authority. If, based on the replies, beneficiary authorities wish to start a direct exchange, they are free to do so outside the RFI framework. This exchange must respect any restrictions to the exchange of confidential information between jurisdictions and must seek to make use of appropriate legal instruments like information gateways or confidentiality waivers⁷.

Still, and in line with the OECD's work on international co-operation in competition cases, a lot of valuable information can be exchanged without violating confidentiality restrictions:

⁷ Legal instruments for the exchange of confidential information are explained here <http://www.oecd.org/daf/competition/challenges-international-coop-competition-2014.htm> and here <http://internationalcompetitionnetwork.org/uploads/library/doc1014.pdf>; on waivers <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

Table 31: Information the exchange of which is most beneficial, by number of respondents



Source: OECD 2013; International Enforcement Co-Operation

Among the listed categories, only “information shared pursuant to a waiver” will more often than not contain confidential information, based on a legal instrument. All the other information categories do not necessarily include confidential information – or only agency-internal confidential information.

It is also important to note that responses will be given on a purely voluntary basis. There is no obligation to respond to an RFI. This is also true for the GVH and the OECD Competition Division.

The RCC, the GVH and the OECD will also in no way control, review or modify the requests and answers and will assume no responsibility or liability for the quality of answers and the use of confidential information. The RCC provides only the platform for this kind of exchange.

Procedures

The procedures, timelines and a template for an RFI are all laid out in detail in the attached “Rules for the use of the RCC informal request for information (RFI)”. The RCC will establish a dedicated, password protected webpage for the RCC RFI which will be operated by a GVH coordinator for the RCC RFIs. Every requesting agency is obligated to send a compilation of the answers it received to the RCC coordinator of the GVH. The RCC coordinator will put the RFI with the answers on a password protected page of the RCC website (<http://www.oecdgvh.org/>), where they are accessible to all beneficiaries and will help to build a knowledge database and to avoid duplicative requests. For the initial test period it will not be possible to provide translations into Russian, all requests and answers need to be given in English.

Test period

It is very hard to foresee how the beneficiary agencies will use this new offer. Neither the frequency nor the quality of requests and answers can be safely predicted and there are certainly risks related to such a tool, such as misleading or bad advice, a (too) high number of requests, one-sided use of the instrument – some agencies might always request information while never providing answers, or no use at all. This is why the RCC commits to a test period of one year for which it will support this instrument. We will evaluate the use on a constant basis and will decide after a year if the RCC RFI will be continued. The results of the trial period will also be presented to the OECD Competition Committee and the Bureau. The start is foreseen for September 2017.

We believe that the RCC RFI has the potential to become a useful tool for the beneficiary agencies of the RCC to exchange experience and (non-confidential) information and may help to increase co-operation. Active use of the RCC RFI would be a major step forward for the beneficiaries in implementing the [OECD's Recommendation concerning International Co-operation on Competition Investigations and Proceedings](#).

The representatives of the beneficiary agencies discussed the RCC RFI at the bi-annual Heads' Meeting in May 2017 and agreed to enter into the test phase in September 2017.

Annex



Rules for the use of the RCC informal request for information (RFI)

The RCC informal request of information (RFI) is an instrument to inquire and exchange expertise and experience among the RCC beneficiary institutions, to intensify the beneficiaries' co-operation and their use of each other's, the OECD's and the GVH's expertise via informal co-operation.

An RCC beneficiary competition authority may address an informal RFI to its peers, the OECD and the GVH when it faces any kind of question irrespective of the nature of the problem (case related topic, legislative-type issue, advocacy, etc...).

Please respect the following basic principles for using the RCC informal RFI:

- 1. Informal questions should enquire about the past or present practice of the other authorities, rather than enquire about their opinion concerning ongoing cases or related to competition problems of a more theoretical nature.*
- 2. The informal RFI must not be used to build a case based on the answers received – these cannot be quoted to justify an authority's reasoning. The RFI is only to be used to come to a more informed and possibly differentiated opinion. The RCC, the OECD, the GVH and the responding authorities do not bear any responsibility or liability if their reply is used in any other way. In order to ensure a coherent use of the RFIs and to prevent parallel answers or requests by the same authority, the RCC beneficiary competition authorities shall nominate contact persons who will receive RFIs/send RFI requests and are responsible for the distribution within their authority. A list of the contact persons is made public on the RCC website, on the "RCC RFIs" page.*
- 3. Any RCC beneficiary may send an informal RFI using the attached template directly to the contact persons at the RCC beneficiary competition authorities and to the RCC coordinator of the GVH (rcc-rfi@gvh.hu), who will upload the document to the RCC website as received.*
- 4. Keep to the maximum of 3 questions if possible.*
- 5. Give a short explanation of the proceedings your questions are related to (not more than in 200 words).*
- 6. At least 3 weeks should be left for the elaboration and sending of replies.*

7. *Replying to informal RFIs is strictly voluntary.*
8. *Replies should be sent to the RFI coordinator at the requesting authority.*
9. ***Neither the RFI itself nor the responses to it must contain any confidential information or business secrets. The RCC does not provide a platform for this kind of exchange, which is solely regulated according to the laws of the beneficiary countries.*** Any responsibility for the leakage of confidential information is solely borne by the sending/receiving authority. If, based on the replies, beneficiary authorities wish to start a direct exchange, they are free to do so outside the RFI framework. This exchange must respect any restrictions to the exchange of confidential information between jurisdictions and must seek to make use of appropriate legal instruments like information gateways or confidentiality waivers.⁸
10. *The enquiring authority has to provide a summary of the replies received, which shall be sent to the RCC coordinator (rcc-rfi@gvh.hu) at the latest within one month after the expiry of the deadline for the responses.*
11. *The informal RFIs and the compilation of the replies are made public to the beneficiary agencies on the RCC website, on the “RCC RFIs” page in order to help the formation of an “institutional memory and knowledge” of the RCC. These summaries are password protected documents. Nevertheless, the enquiring authority bears the responsibility of compiling a summary which does not contain any confidential data or information.*
12. *The language of the co-operation (at least for a one-year test period) is English.*

⁸ Legal instruments for the exchange of confidential information are explained here <http://www.oecd.org/daf/competition/challenges-international-coop-competition-2014.htm> and here <http://internationalcompetitionnetwork.org/uploads/library/doc1014.pdf>; on waivers <http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

Template for RCC Informal Request for Information (RFI)

Date: .../.../201...

Subject: ...

Market(s): ...

FROM: ... <Name of the enquiring authority>

CONTACT PERSONS:
<name, email address, telephone no.>

TO: RCC beneficiary institutions, OECD Competition Division, GVH

CONTEXT OF THE INFORMAL REQUEST FOR INFORMATION:

QUESTIONS:

1. ?
2. ?
3. ?

DEADLINE: Thank you in advance for your replies by <dd/mm/yyyy>.

Barking Up the Right Tree: Selecting and Prioritising Sectors for Market Studies



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Competition authorities that conduct market studies are faced with a wide array of candidate sectors or issues. The decision to select one of these candidates must be made carefully, given the investment of resources and time that market studies involve.

So what factors should be considered when competition authorities make this decision? The OECD held a workshop to explore the subject in March, covering study objectives, market competition indicators and strategic considerations. This article will describe some of the key points that emerged from the discussion.

The impact of market study objectives on sector selection

The types of sectors (or conduct) examined by a competition authority for a market study will by definition depend on how the authority uses market studies, which varies significantly. Market studies are a versatile tool that can be used for purposes including (as identified by the International Competition Network⁹):

- Preparing enforcement action when a specific problem has not been identified

⁹ ICN (2016), *Market Studies Good Practice Handbook*, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1088.pdf>.

- Supporting advocacy efforts vis-à-vis policymakers to advocate, or shape proposals, for regulatory reform
- Clarifying the authority's view with respect to a specific issue or type of conduct
- Developing knowledge of a sector or type of conduct within the authority
- Identifying consumer protection issues

An OECD survey¹⁰ of 60 competition authorities illustrates the variation among authorities:

- 34 authorities (57%) reported using market studies to analyse potential legislative changes.
- 42 authorities (70%) indicated that they use market studies to determine whether enforcement action is required in a sector, with 28 (47%) indicating that market study analysis is used to directly support enforcement action.
- 36 authorities (60%) stated that they use market studies to enhance their knowledge of a sector.

So different objectives will result in different market study topics. For example, authorities that do not use market studies to propose legislative changes would not be expected to focus on sectors in which regulatory barriers

¹⁰ See OECD (2016), *Global Forum on Competition Background note by the Secretariat: The role of market studies as a tool to promote competition*, [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/gf\(2016\)4&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/gf(2016)4&doclanguage=en).

to competition are the main competition problem.

Participants in the Workshop discussed the importance of ensuring that a clear objective is defined when selecting candidates for market studies and setting priorities. This can help ensure that a market study is the appropriate tool in the first place. Such objectives could be developed through the identification of hypotheses about potential competition problems in the market, and will shape the market study approach. A competition authority may wish to prioritise market studies among, or within, different types of objectives (e.g. enforcement vs. regulatory issues).

At the same time, some participants highlighted the importance of flexibility when conducting market studies – in other words, the objectives that guided the selection of a sector should not unduly limit the identification of other potential competition problems as the study progresses.

The use of indicators to identify candidate sectors for market studies

Also discussed during the Workshop was the question of whether authorities can rely on a set of indicators to identify candidate sectors and prioritise them. Both top-down indicators (aggregate statistics that could point to sector-wide competition problems) and bottom-up methods (using observations from market participants, case handlers and stakeholders) were considered.

Top-down indicators have been explored by several competition authorities and may provide useful insights. These indicators may, however, be better suited to helping prioritise sectors, or contributing to a broader selection process, rather than being relied on as the sole mechanism for identifying candidate sectors.

The quantitative top-down indicators considered by authorities (including the European Commission, Netherlands and UK authorities) include those generated from econometric models, which seek to identify competition problems based on variables such as concentration ratios, profitability, productivity and barriers to entry, among others. Some of these indicators have produced results that are consistent with enforcement experience (e.g. suggesting competition problems in sectors in which cartel conduct is relatively more common), but there are numerous data and methodological limitations that may need to be addressed to improve reliability. There does not, to date, appear to be a single model or set of indicators that can comprehensively identify sectors experiencing competition problems.

Bottom-up methods are commonly used, and can help ensure a holistic perspective in identifying candidate sectors for market studies. For instance, case handlers are a valuable source of insight regarding potential sector-wide issues, and some participants emphasised the importance of ensuring open lines of communication between market studies teams and enforcement as well as merger review staff. Other bottom-up approaches include monitoring consumer complaints, identifying sectors with repeat offences, academic and industry research, consultations with sector regulators and reviewing market studies or broad enforcement challenges in other jurisdictions, although some indicated that undue reliance on studies in other jurisdictions could lead to “herding” in competition authority activity.

The overall objective of a bottom-up approach can be to develop a broad set of candidate sectors that is narrowed according to prioritisation criteria, including resource

availability, insight gleaned from top-down indicators, and strategic considerations.

Strategic considerations in selecting and prioritising sectors

Participants in the workshop noted that some strategic considerations can be helpful in deciding which sectors or issues to examine in a market study. In particular, applying these considerations can raise a competition authority's profile, enhance the likely impact of a market study's recommendations, and help prevent the unnecessary expenditure of resources.

First, market studies can be used as an effective public advocacy (and profile-building) tool even when competition concerns alone may not indicate the sector is a priority. For instance, when there is concern among consumers about high prices in a given sector, stakeholders may call for competition authority intervention. A market study can be an opportunity to explain what is driving price changes, to indicate whether there is any evidence that anticompetitive conduct is occurring, and to help refocus the public debate (for instance by explaining the impact of regulations in the sector). Thus, responsiveness to public concerns can be an important factor for sector prioritisation.

Second, several participants raised the importance of considering the public policy context when determining whether to begin a study with regulatory implications. In particular, the selection of a sector based on the strategic priorities of the government, its relative size in the economy, and the importance of the sector for economic wellbeing (including sectors in which competition problems could have a disproportionate impact on low-income households) were all identified as potential considerations. Timing market studies to take advantage of openings in the policy

environment (e.g. planned reviews of certain policies or regulations) can also be helpful.

Third, when prioritising sectors, competition authorities should weigh the expenditure of resources required to complete a market study with the likely impact of the study. Some workshop participants suggested there can be pressure on authorities to justify the use of resources for market studies by ensuring that the study leads to tangible benefits for consumers or competition. This will be partially dependent on the authority's powers to impose remedies, and the likely response of regulators and policymakers to recommendations relevant to them.

Also relevant to resource considerations is the question of how wide the scope of a market study should be. In particular, authorities must determine the depth of analysis and breadth of included markets (or behaviours) that are required to achieve the study's objectives, in the context of available resources. Several participants noted that preliminary consultations, or market studies of a subset of a sector, could be used as a precursor to broader market studies requiring more time and staff. Thus, hypotheses could be refined (or rejected) using a staged approach when there is uncertainty about outcomes and the use of resources for a market study in a given sector.

Conclusion

In sum, there are several considerations that must be balanced by competition authorities when selecting and prioritising sectors or issues for market studies. Evidently, the conclusions of a study will not be known at the outset, so authorities are not always guaranteed to find the competition problems they hypothesise. But such an outcome may not always be the goal of the study to begin with: sometimes sectors can be selected for market studies because there is a significant

gap in organisational knowledge (particularly for emerging sectors or products), or because public calls for action create pressure on the authority. In any event, a clear purpose, the judicious use of indicators of competition problems, and the consideration of some broad strategic factors can help authorities choose wisely – and avoid barking up the wrong tree.

More information about the OECD’s work on market studies, including the selection and prioritisation of sectors and industries, can be found at:

www.oecd.org/daf/competition/market-studies-and-competition.htm.

Methodology for Conducting Market Studies – Spanish Commission for Markets and Competition (CNMC)

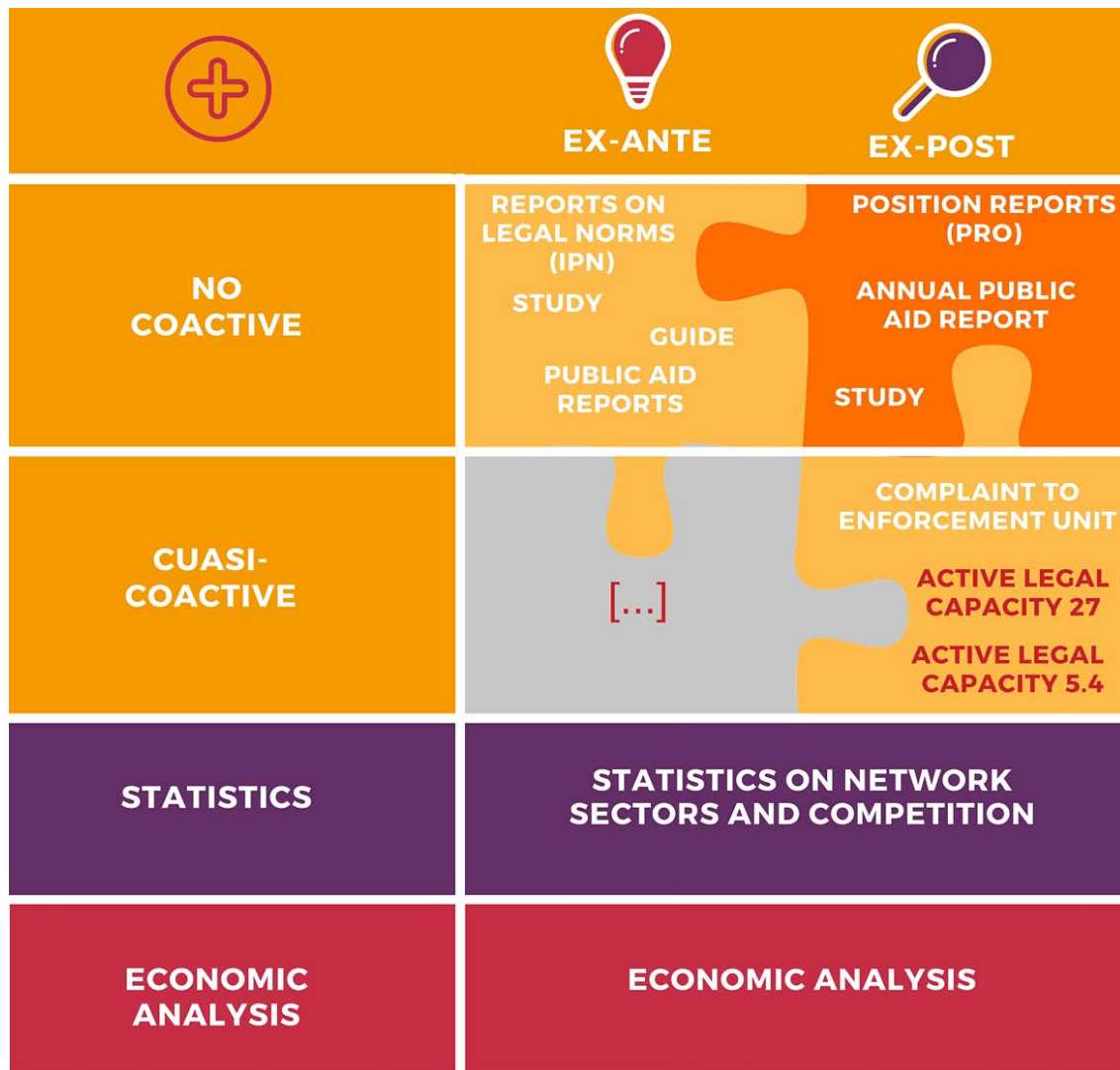


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The Spanish Commission for Markets and Competition (the “CNMC”) has a number of advocacy instruments available for exercising its *non-enforcement powers* to foster competition and efficient economic regulation in Spain.

The CNMC’s advocacy toolbox includes both *ex ante* and *ex post* instruments, which can take the form of either pure consultative or non-enforcement instruments (such as market studies and public reports on regulation or administrative acts), or quasi-enforcement mechanisms (including active legal capacity instruments to challenge administrative acts and regulations before the Spanish Courts).

We call the combination of ‘*ex ante*’ and ‘*ex post*’, non-enforcement and quasi-enforcement elements the **advocacy matrix**:



Market studies are one of the main instruments included in the formal advocacy matrix to address competition issues in the Spanish markets.

The CNMC defines market studies as in-depth economic and regulatory analyses conducted on the Spanish markets aimed at gaining a thorough understanding of how sectors, markets, or market practices are working, and at identifying existing restrictions that may hinder or prevent efficient resource allocation. They are conducted primarily in relation to concerns about the functioning of markets arising from: (i) market operators' behaviour; (ii) market structure; (iii) information failure; (iv) consumer conduct; (v) public sector

intervention, as well as (vi) other factors which may give rise to consumer harm.

For a long time, the CNMC has consistently used a common approach to undertake market studies. However, no written or public methodology on how our Agency conducted market studies existed. For that reason, in 2016 the Advocacy Department of the CNMC decided to adopt and make public our [Methodology on how to conduct Market Studies](#). The decision to carry out this methodology was prompted by the CNMC's call for transparency on its internal procedures and the desire to provide guidance to operators and the general public on how and why we conduct our market studies.

The methodology focuses on 5 main aspects, namely: 1) how the CNMC identifies and selects the markets to study; 2) the procedures for both gathering information and dealing with confidential information; 3) the relationship with stakeholders; 4) the overall structure of a market study, and 5) diffusion and ex-post analysis of the market study.

While all aspects covered by the methodology are important, we would like to shed some light on the most common challenges that our agency faces when conducting market studies.

The first challenge the CNMC encounters when planning to launch a study is how to identify and select the market to be analysed. Using a *top-down* methodology to select the markets would allow for a horizontal screening of the economy as a whole, which could give the agency a complete and exhaustive overview of the markets and their competition issues. However, the theoretical and practical difficulties in terms of resource use and performance have ruled out this strategy. For that reason, the CNMC has adopted a case by case, or *bottom-up* approach, to identify markets that display either restrictions on competition, or regulatory inefficiencies that can affect public interest.

Based on that approach, preliminary research is carried out. This preliminary research is usually based on databases and internal documents of the CNMC, as well as publicly-available and free (when possible) reports and data. It should be noted, that “*windows of opportunity*” should not be disregarded during this phase. In other words, if a market will be liberalised soon (or has been recently liberalised), a new regulation is likely to be adopted, the market will undertake structural changes, or a new market is rapidly evolving, our Agency can conduct a study on these specific markets, as there is an *opportunity* for

the recommendations of the study to be implemented in a timely fashion. In addition, the CNMC carries out a market study if this is the most suitable tool for correcting the identified restriction in the market, or if the market is strategic due to its influence on other sectors and on consumers.

The second challenge the CNMC usually faces when conducting market studies is related to **information gathering**. The CNMC uses various tools to collect information from stakeholders, institutions and market operators of the market subject to study, although the most relevant information is gathered through meetings or conference calls with stakeholders, public consultations and formal written requests for information.

Bilateral **meetings** are usually held with sectorial and trade associations, main market institutions and operators, as well as key public or private stakeholders that have a significant influence over the functioning of the sector, its regulation or its level of effective competition. Meetings are always held with each of the operators or institutions individually, without exchanges of information between competitors, and their content is not made available to other operators and/or institutions. The initiation of such meetings can arise from the stakeholders and be accepted due to interest on the part of the CNMC, or can arise from the CNMC itself.

Another important tool used for gathering information for the purposes of market studies is **Public Consultations**. The use of Public Consultations depends on various factors. In the case of a highly fragmented market, either due to demand or supply (or both), where it does not seem plausible to gather enough information through conventional means, launching a Public Consultation can be an effective method for obtaining information from market operators and stakeholders. Also, in the case of

emerging markets or those with a high component of innovation where little information exists, launching a public consultation can also be an interesting option. As an example, for the study on Sharing Economy platforms, the CNMC launched 2 public consultations: (i) one at the beginning of the process to gather information, and (ii) on the study's preliminary findings.

As regards written **requests for information**, two of the main issues encountered are the compliance with the deadline and the adequacy of the information submitted. In this sense, and pursuant to Article 67 of the Competition Act 15/2007, the CNMC can impose fines on any economic agent for not submitting the requested information. Non-compliance of the duties of information and collaboration with the CNMC can result in a fine of up to 12,000 euros per day of non-compliance with the request. Hence, every stakeholder, institution or operator is obliged to cooperate and answer the requests for information sent by the CNMC. The mere existence of this legal provision is often sufficient to deter non-compliance with the request for information.

Last, but not least, **stakeholder engagement** is also a significant challenge when carrying out market studies, the first challenge being the identification of the relevant stakeholders. For the CNMC, the identification of the stakeholders depends on the objective of the study. It is therefore of utmost importance to have a clear understanding of the objectives and boundaries of the market study – including the scope of the issues, clarity on what is to be left out, and identification of what the agency would like to achieve and deliver with the market study.

Once the relevant stakeholders for a study have been identified, they need to be classified and prioritised. At the CNMC we use a number of different methods for this.

Generally speaking, for stakeholders that are crucial for the development of the study (such as market operators with significant market shares, sectorial associations, law makers, regulatory bodies or academic experts) the main method of participation is direct bilateral communication (through bilateral meetings, videoconferences or teleconferences), and, to a lesser extent, indirect communication (discussions in forums, round tables and seminars on the market under study). The CNMC often conducts “narrative interviews” to get the best out of key informants. Interviews can be structured to be able to gather their insights on key issues – or can also be semi-structured in which an informal checklist of issues is used to guide the interviews, whilst allowing other issues to arise and be pursued.

For those stakeholders that have problems clearly articulating their arguments in terms of competition policy (as is the case of SMEs), it is advisable to conduct structured (rather than semi-structured) interviews, and to brief them about the main underlying principles of competition policy and the areas of discussion that are of particular interest to the authority. Finally, when the number of stakeholders is too high to initiate individual communication with each stakeholder, a useful and optimal tool to encourage participation is to launch Public Consultations.

The study is of a predominantly economic nature, and focuses on analysing how economic operators compete with each other: what are the main variables in which they compete? (price, quality, differentiation, etc.), how intense is competition and how it is reflected in the market?

The economic and regulatory analysis that is undertaken in a market study enables the identification of restrictions that hinder or prevent effective competition in the market, or that prevent regulation from achieving

economic efficiency. Studies always include recommendations to promote greater competition in the market through (i) the elimination or reduction of existing

restrictions or (ii) recommendations on the behaviour of market operators.

Specific Features of Digital Product Market Analysis



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Nowadays the significant impact of digital technologies on our lives, on the economy and on the relationships between market participants is undeniable.

The main factor that determined the revolutionary processes in the digital economy was the change that took place in relation to the sales process and, as a consequence, that also occurred in the approaches taken to production management.

In a digital economy the main resource is no longer product stocks, but information, which does not run out and is renewed free of charge; trading platforms and operations have moved onto the Internet and have become global; commercial transactional costs are significantly reduced and can even be zero.

Digital markets have a number of characteristics that determine the behaviour of players in the market and are important for the implementation of antimonopoly control.

The main products – software, data, and content – are characterised by their non-materiality, and the zero cost associated with

their replication and transportation to any point.

One characteristic feature is the global nature of these products, which results both from the zero cost of transportation and the specificity of the products – as a rule, they are universal or can be adapted to the specific requirements of national consumption quickly and cheaply.

Digital products have new qualities, and these new properties of the products, together with the specific nature of their sale, require special approaches for conducting market analysis; furthermore, there must also be a consideration of factors that have no influence or that are completely absent in the "traditional" markets for goods, works or services.

Methodological approaches should be divided into the analysis of markets on which the intangible goods are inextricably linked to the physical carrier, and into the analysis of markets on which the digital product is sold without specific hardware devices.

In this article, we will highlight the main methodological approaches to the analysis of the markets of the first type.

The methodology for analysing product markets in the Russian Federation is determined by legislation: The procedure for analysing the state of competition on product markets is contained in Order No. 220 of the

Federal Antimonopoly Service of Russia, dated April 28, 2010.

A dominant position of an economic entity in a particular product market can be determined with quantitative methods. The antimonopoly agency calculates the shares of economic entities in the relevant product market, determines the level of prices, and the level of concentration on the product market.

If the goods in the digital market acquire consumer value solely in connection with the hardware devices, then the application of quantitative methods of analysis is possible. At the same time, an evaluation of the "versatility" of digital markets is becoming more prominent and includes a balanced and thorough assessment of all aspects of the market in order to determine the product market boundaries, the determination of shares in that product market, and the behaviour of sellers and buyers.

The antimonopoly investigation against Microsoft was triggered by a complaint of the developer of anti-virus software – the Kaspersky Labs company. The market analysis was carried out using quantitative methods.

The basis for the antitrust investigation was Microsoft's move to significantly reduce the timeframe (from several months to several days) of providing RTM versions (final versions of the operating system) to third-party software developers (including Kaspersky Labs). Such a reduction could lead to negative consequences for competition in the antivirus software market: third-party developers were unable to adapt their programmes on time and users were left without a vendor choice, automatically receiving Microsoft's own anti-virus programme – WindowsDefender.

FAS Russia came to the conclusion that such behaviour on the part of Microsoft can have negative consequences for the market only if

Microsoft has a dominant position in the market of operating systems for personal devices.

The analysis of the market for operating systems for personal devices was conducted with developers and distributors of operating systems being defined as vendors and developers of application software (antivirus) as buyers.

The digital market also requires an analysis of the attitude of end users of a product, as in these markets the behaviour of both sellers and buyers is largely determined by the preferences and consumer behaviour of end users.

Therefore, the characteristics of the product in the product market (operating system) in question must be determined specifically on the basis of the value and functional usefulness for end users, while also taking into account the features that affect the relations of developers of operating systems and developers of application software.

The buyers receive the final product – the assembly of the operating system, a functionally complete operating system designed for installation on computers (in the form of sales, updates, and in other ways).

The functionality of providing the final assembly of operating systems to companies that produce application software (including antivirus software) is that it allows anti-virus software developers to conduct thorough testing of their antivirus software (and based on the results of the testing they are then able to carry out any necessary corrections of errors in antivirus software, change documentation, and work with Microsoft to eliminate errors, if such errors have been found in the provided OS Windows assembly).

It is the provision of the final assembly (as opposed to the preliminary assemblies) that

determines to what degree it will be possible for the application software developer to enter the software market (it is understood that vendors in this market are software application developers (of antivirus programmes) and buyers are the end users) as well as to continue their activities in this market.

Consequently, the operability of application software for laptops and desktops depends on its compatibility with the operating system installed on laptops and stationary computers.

In this case, the final assembly of the operating system is the same operating system that will be provided for installation on computers (including as an update). The provision of the preliminary and final assemblies is performed exclusively by the developer of the operating system. Consequently, in order to determine the characteristics of the analysed product market, the operating system is subject to evaluation. The operating system is a system software tool that manages the execution of programmes and that manages resource allocation, scheduling, I/O management and data management (ISO 2382-1: 1993).

Operating systems cannot function independently from material (hardware) support and, as a consequence, do not have value for the end user in the absence of a device on which the operating system is implemented.

Thus, the market for operating systems for personal devices is inextricably linked to the hardware market, which is composed of personal computers, as well as personal devices with similar functionalities as a personal computer, such as laptops, tablets, and smartphones. Accordingly, the identification of mutually substitutable goods and the definition of the product market were conducted by FAS Russia in relation to the

market of user equipment, and the results projected onto the market for operating systems.

In the territory of the Russian Federation such personal devices as smart phones, tablets, laptops, and stationary computers are used and these personal devices can be divided by application into two groups: stationary devices and mobile devices.

These personal devices use the following operating systems (B2B International data on the use of operating systems on the market of the Russian Federation):

- Windows Family (Windows Vista / XP, Windows 7, Windows 8/10);
- iOS family;
- Android Family;
- Open operating systems (Linux and others).

At first glance, both stationary and mobile devices provide the user with comparable functionality. It is obvious that stationary and mobile devices differ in size, user menus and the additional devices that the consumer uses (such as a keyboard, mouse, headphones, etc.).

To clarify the boundaries of the product market, it was necessary to determine whether stationary devices and mobile devices form a single product market or if they belong to different product markets. The assessment of substitutability was conducted based on a consumer survey: the representative random sample of adult respondents from all parts of the Russian Federation numbered 1500 people.

The overwhelming majority of respondents (83%) stated that it is impossible to substitute stationary devices with mobile ones and vice versa. The main reasons are: stationary and mobile devices are used for different tasks (78%), they have different technical

characteristics (88%), and show differences in handling and usage (84%).

It is important to note that the option "cannot answer" was chosen by 3 – 4% of the respondents, which is a low figure and indicates that consumers have a clear idea concerning their use of such products.

Thus, consumers consider stationary and mobile user devices to be in different categories.

Moreover, consumers were asked to evaluate the possibility of changing the operating system on the device. 90% of the respondents answered negatively (with 6% declining to give an answer), which confirms the definition of the FAS that the market for operating systems and personal devices is an interlinked one.

It follows that the sales of stationary devices (computers and tablets) and sales of mobile hardware devices (tablet computers and smartphones) form distinct, separate product markets. As a consequence, sales of operating systems installed on fixed devices and sales of operating systems installed on mobile devices form separate product markets.

The market was defined as that of operating systems (final assemblies) for stationary user devices.

The volume of the product market and distribution of shares of sellers in the product market was determined on the basis of data contained in the report of B2B International "On the use of operating systems in the market of the Russian Federation".

In the Russian Federation, the shares were as follows:

1. Microsoft Corporation – 95.6%;
2. Apple Corporation – 2.5%;
3. Companies implementing operating systems based on the Linux kernel and other operating systems – 1.9%.

Barriers to entry to the market were considered to be high, and with this in mind, it was established that Microsoft occupies a dominant position in the market of operating systems for stationary personal devices in the Russian Federation.

As described above, the final assembly is provided solely by the developer of the operating system, so it was consequentially established that Microsoft Corporation has a dominant position in the relevant product market of operating systems, where the developers of application software are the buyers.

Thus, the analysis of the market took into account the behaviour and conditions of actions of buyers who are software developers, the behaviour of buyers that are end users of personal computers, the influence of the behaviour of end users on the trade in the product market under consideration, along with interconnected markets – those of system software and user devices.

Moreover, the product and geographic boundaries of the product market were determined on the basis of the observed characteristic aspects of the trade in operating systems, which, in turn, are determined by the conditions for the trade in personal devices.

This example illustrates the importance of the study and systemic analysis of all aspects of the functioning of such multifaceted markets such as preinstalled software systems.

With the current innovative development of digital markets, working out methodological approaches to the analysis of markets, in which the turnover of products is not connected with the trade in corresponding hardware remains an urgent task, primarily in terms of analysing the multilateral nature of these markets.

Experience of the Hungarian Competition Authority Relating to Market Studies*



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The Hungarian Competition Authority (GVH) is entitled to conduct two types of market studies: *market analyses* and *sectoral inquiries*¹¹. The GVH has applied both types of market studies in recent years gaining valuable experience in this area.

The two types of market studies differ substantially in terms of their functions and their tools. While a sectoral inquiry assumes that competition has been distorted in a market within a specific sector, the launch of a market analysis does not require such an assumption. Contrary to a sectoral inquiry, a market analysis is purely aimed at analysing the operation of particular markets, the market processes and the development of market trends. Consequently, the GVH launches a sectoral inquiry if there are indications that competition has been impaired in a particular sector, while a market analysis will be conducted if the sole aim of

*The views and opinions expressed in this article may not in any circumstances be regarded as stating an official position of the Hungarian Competition Authority.

¹¹ Article 43/C (1) and article 43/D (1) of the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices

the GVH is to acquire information on the functioning of certain markets. In comparison to a sectoral inquiry, the GVH has less effective tools at its disposal when conducting a market analysis, as the latter primarily relies on voluntary information received from market players, public bodies and publicly available information. External consultants may also be involved in a market analysis, although the GVH has not used this tool in its recent market analyses. In a sectoral inquiry, the GVH is entitled to issue mandatory requests for information and sanctions may be imposed in case of non-compliance. Moreover, a sectoral inquiry is subject to more sophisticated procedural rules, for example in relation to the handling of confidential information, judicial review in certain cases, and the publication of the preliminary report of the sectoral inquiry. Despite these differences, both types of market studies may result in the same outcome. If the GVH finds a market disturbance that cannot be remedied by means of competition control proceedings, the GVH has the following options: it may inform the Parliament or the competent authority, and/or it may publish non-binding recommendations for market players and/or it may propose the amendment of legislation.

The GVH has conducted one sectoral inquiry and two market analyses in recent years. The sectoral inquiry on the hotel online booking market was launched due to indications that competition might have been distorted in the market. The sectoral inquiry focused in particular on price parity clauses, commissions paid to online travel agencies and the conditions of market entry. In the course of the sectoral inquiry, the GVH issued

mandatory information requests to market players and used the data of the Hungarian Central Statistical Office as well as other surveys. In addition, a market research company was hired to conduct research into the consumer side of the market. As a result of the sectoral inquiry, the GVH took the position – in line with the conclusions of similar European procedures – that the wide Most Favoured Nation Clause (MFN) may restrict competition by standardising market prices and increasing barriers to entry. In response to the preliminary report, the largest market player of the Hungarian online booking market indicated to the GVH that it plans to switch to the application of a narrow MFN, which is likely to affect the conduct of smaller market players. The GVH has been monitoring the developments in this market in the framework of the monitoring working group coordinated by the European Commission. The monitoring exercise was recently closed¹².

The first market analysis of the GVH examined the structure and the characteristics of the film distribution and exhibition market, in particular the system of distribution agreements between film distributors and cinema operators and the practice of applying Virtual Print Fees (VPF). The launch of the market analysis was motivated by significant changes to the film distribution and exhibition market in recent years. On the one hand, the merger in 2011 between Cinema City International N.V. (CCI) and Palace Cinemas significantly changed the film exhibition market as a consequence of which CCI became a strongly dominant player in Hungary. The authorisation of the GVH was not needed for the merger as the turnover of the parties did not meet the merger notification thresholds.

¹² The report of the monitoring exercise is available on http://ec.europa.eu/competition/ecn/hotel_monitoring_report_en.pdf

On the other hand, significant technical changes had been taking place since the beginning of 2000s, resulting in films being distributed in reusable digital form. VPF was originally introduced in order to share the cinema operators' costs of transition to digital technology among film studios, distributors and cinema operators.

During the market analysis the GVH requested information from film distributors and cinema operators; the response rate was around 50%. The GVH interviewed some market players, associations of market players and a public body, used publicly available information, and sent a request for information to the ECN.

As expected, the market analysis revealed a concentrated structure on the film exhibition market: Cinema City had a market share significantly over 50%, and had a very strong bargaining power against film distributors. As a result of the market analysis, the GVH drew up a number of recommendations, for example the GVH suggested that the rules of merger control should also be applied in those cases where the undertakings do not meet the merger notification thresholds, but which involve a merger that may nevertheless significantly affect the structure of a market. This recommendation resulted in a change of the merger regulation in Hungary. According to the new regulation, the GVH may examine a merger where the turnover of the parties does not meet the notification threshold, but may significantly reduce competition on the market. The GVH published its preliminary results of the market study on its website which proved to be quite useful, since market players – even those who did not reply in the first round – submitted valuable comments.

Another market analysis has been launched to examine the characteristics of the car and light commercial vehicle (LCV) distribution and repair markets. The analysis also involves related motor insurance issues. The GVH

requested information from major car importers, car retailers and repairers, furthermore from insurance companies and public bodies. The GVH also interviewed two car importers. The preliminary conclusions of the market analysis are adversely affected by the lack of contribution of certain market players (car retailers and repairers)¹³. Nevertheless, the response rate of insurance companies and professional associations was high.

Experience has shown that the market analysis – in its current framework – is less effective than the sectoral inquiry. Due to the voluntary nature of the contribution, the information provided by market players is typically short and less sophisticated. However, it has to be noted that both the size and the competition awareness of a particular company also influence its willingness to provide information. The response rate obtained in the sector inquiry (84%) and the

results thereof demonstrate that the requirement of compulsory response may lead to more in-depth and a greater range of information, thereby contributing to a better understanding of the markets and more well-grounded conclusions. Consequently, the current framework on the request for information may be worth reconsidering. Some amendments to the procedural rules – for example the enactment of rules on confidentiality and on the publication of the preliminary report – may also lead to a more sophisticated procedure and better results in the market study.

In summary, the authors are of the view that market analysis is an appropriate instrument if it is used for its intended purpose: to obtain information about the operation of certain markets. Nevertheless, it is not suitable for addressing specific competition issues. The proposed amendments may contribute to a more effective market analysis.

¹³ Only 12 % of the requested market players provided information

Passenger Air Transportation Market of Georgia (2014-2016)



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The article reviews the Georgian passenger air transportation market monitored by Competition Agency of Georgia (established in April, 2014).

The Monitoring Process

In May 2016, pursuant to the competence provided for in section “b” of Article 172 of “Georgian Law on Competition,” the Competition Agency of Georgia started to monitor the Georgian air transportation market. The monitoring was aimed to evaluate the competitive environment on the relevant commodity and service markets and to detect restrictions of competition and

indications of unfair competition in the sector, crucial for one of the most successful industries of Georgia – tourism.

Indeed, according to the Georgian National Tourism Administration, compared to the year 2015, in 2016, the number of foreign visitors entering Georgia has increased from 5 901 094 to 6 360 503, i.e. by 8%.

Also, Compared to the year 2015, in 2016, the number of those visitors who stayed in the country for 24 hours or more has increased from 2 281 971 to 2 714 773, i.e. by 19% (432 802 visitors).

Parallel to the development of tourism, the Georgian air passenger transportation market has been going through a significant modernization and standardization process; fulfilling thoroughly the obligations that Georgia has incurred subsequent to signing the *Common Aviation Area Agreement between the European Union and its Member*

Year	2012	2013	2014	2015	2016
Number of International Visitors	4 428 221	5 392 303	5 515 559	5 901 094	6 360 503
Change (Quantity)	-	964 082	123 256	392 865	459 409
Change (%)	-	22%	2%	7%	8%
Number of Visitors (24 hours or more)	1 789 592	2 065 296	2 229 094	2 281 971	2 714 773
Change (Quantity)	-	275 704	163 798	52 877	432 802
Change (%)	-	15.4%	7.9%	2.4%	19.0%

States and Georgia. The old and inefficient national aviation industry has successfully transitioned to the modern European market structure.

Common Aviation Area Agreement between the European Union and its Member States and Georgia:

The *Common Aviation Area Agreement between the European Union and its Member States and Georgia*, concluded on December 2, 2010 and ratified on February 18, 2011, provides that the parties are “desiring to create a Common Aviation Area (CAA) based on mutual market access to the air transport markets of the Parties, with equal conditions of competition, and respect of the same rules – including in the areas of safety, security, air traffic management, social aspects and the environment; [...] recognizing the importance of the air transport in the promoting trade, tourism and investment.”¹⁴ According to the agreement, Georgia has to harmonize its current aviation legislation with the European directives and regulations. So far, Georgia has transposed nine regulations into its legislation. Our country successfully works to fulfil the rest of the obligations in which the Twinning program (partnership among Georgian Civil Aviation Agency and Austro–Croatian consortium) plays a major role.

Market Definition:

According to the Article 5 of “Methodological guidelines of market analysis” approved by the Chairman of Georgian Competition Agency, the relevant market must be defined by identifying the product and geographic boundaries and time frames of the market.

¹⁴ N.A. “Georgian Civil Aviation Agency.” “Common Aviation Area Agreement Between the European Union and Its Member States, of the One Part, and Georgia, of the Other Part.” Pg. 4. N.A. <http://ec.europa.eu/world/agreements/download/File.do?fullText=yes&treatyTransId=14521>

During the monitoring process of the Georgian air transportation market, the monitoring group identified the following:

- 1) The air transportation service as a product boundary,
- 2) Tbilisi International Airport, Kutaisi International Airport, and Batumi international Airport as the separate geographic boundaries, on the basis of substitution analysis, and
- 3) without any time break, the calendar year (January 1 to December 31) as the time frame of the market.

Barriers to Entry:

During the monitoring process, the monitoring group held meetings with the representatives of the air companies operating on the market, industry experts, and government entities involved in the Georgian Aviation. Based on their responses and the market analysis conducted by the agency, it was found that only the institutional (permissions, regulations, standards, and etc.), technical (infrastructure, staff, and etc.), and financial barriers (capital needed to enter the market, organize the company, operate the flights, and etc.), can be considered as barriers to entry. The monitoring group could not find any other artificial, anticompetitive barriers that could actually or potentially restrict market entry.

The lack of entry barriers resulted in an increase of the number of air companies operating in the international airports of Georgia. 9 air companies operated in Kutaisi International Airport in 2014, 10 in 2015, and 13 in 2016 (nine months). In Batumi International Airport, 15 companies operated in 2014, 20 in 2015, and 35 in 2016 (nine months). In Tbilisi international Airport, compared to 2014, the number of air companies (33) has not changed in 2015. In 2016 (nine months), 31 companies operated in the market, however, the number would have increased in last three months, as the

charter flights (operated by new companies) occurred during this period.

Table 2: Number of the Air Companies Operating in Georgian International Airports (2014- 2016)	2014	2015	2016 (9 months)
Tbilisi International Airport	33	33	31
Kutaisi International Airport	9	10	13
Batumi International Airport	15	20	35

Number of the Passengers in Georgian International Airports (2014-2016):

The data, acquired from the economic agents and the government entities and analyzed by the monitoring group, show the rise of the number of passengers in the airports of Georgia during the years 2014 - 2016.

For example, the number of passengers in Tbilisi International Airport during the last

Decision of the Agency:

On the bases of the market analysis, the agency found that the Georgian passenger air transportation market has been becoming more competitive, effective, and interesting to the airlines.

The Importance of European Union Support

After obtaining independence in 1991, Georgia faced a vital mission to develop a free market oriented economy.

Table 3: Number of Passengers in Tbilisi International Airport (9 month of 2014 – 2016)	2014 (9 month)	2015 (9 month)	2016 (9 month)
Tbilisi International Airport	1 214 223	1 428 106	1 725 492

three years was 1 568 524 in 2014 (1 214 223 in nine months), 1 842 591 in 2015 (1 428 106 in nine months), and 1 725 492 in nine months of 2016. Because of the increased number of passengers and flight frequency, the Turkish Company TAV which operates the Tbilisi and Batumi international airports, has been renovating the Tbilisi international airport and building a new terminal and exit gates and also fixing the existing ones.

The support of the European Union, its member states, the governmental and non-governmental entities is significant for the development of Georgian economy. The *Common Aviation Area Agreement between the European Union and its Member States and Georgia* and the Twinning program in which the Austro-Croatian consortium supports Georgia are a few examples of the European support – indispensable for

Georgian progress. Georgia, on its part, has been taking the necessary steps to implement the European regulations and standards and

to support the formation of competitive markets.

Literature Digest



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William E. Kovacic and Marianela López-Galdos ‘Lifecycle of Competition Systems: Explaining Variation in the Implementation of New Regimes’ King’s College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2017-15¹⁵

This article seeks to determine what jurisdictions must do to successfully entrench

This ‘Literature Digest’ was prepared by Pedro, who is working as a Competition Expert at the OECD’s Competition Division. Before joining the OECD, Pedro worked in the private sector, obtained a doctorate from Oxford and was a full-time University lecturer. He regularly reviews competition articles (you can subscribe to his Weekly Digest by sending him an e-mail). Pedro will point out a few articles previously reviewed in his Digest that might be of particular interest to RCC beneficiaries and which will hopefully inspire and enrich your reading lists. If you come across an article that you think should be mentioned in this section, please do not hesitate to send it to Pedro.

¹⁵ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809360

the institutions needed for effective competition law implementation. It arrives at some interesting conclusions. For example, it considers that measures of early success based on activity (e.g. infringement cases brought, mergers reviewed, etc.) are misleading. Instead: *“In the first decades of a new competition agency, resources should be allocated primarily to the enhancement of institutional foundations and agency capability, and secondarily to the exercise of law enforcement or rulemaking powers.”*

In effect, the establishment of a well-functioning competition system is likely to follow a relatively slow process in most jurisdictions, and it will take around two decades to determine whether a new competition regime is truly successful. The underlying reason for this is that well-established regimes are better positioned to respond to and recover from a number of challenges they will eventually face. These obstacles include learning how to use the agencies’ power, recruiting and retaining capable staff, overcoming judicial resistance, surviving changes in leadership and other economic and political shocks – challenges that can bring even very successful regimes to their knees if they do not have the appropriate institutional foundation.

In short, *‘the path most closely associated with implementation success is a gradual upward sloping curve of progress—a condition*

that underscores the importance of sustained, incremental improvements to institutions entrusted with key implementation tasks.’ The main conclusion is thus that, given a choice between consumption in the form of starting new cases or other programmes and investment in institution-building, new systems are well advised to emphasise investment when allocating resources in the first decades of their development.

While it would have been good if this conclusion had benefitted from a systematic analysis of the empirical evidence supporting it, this is a very interesting article for anyone working in new, up-and-coming competition regimes.

Josef Drexl ‘The Transplantability of the EU’s Competition Law Framework into the ASEAN Region’ Max Planck Institute for Innovation and Competition Research Paper No. 16-11¹⁶

This paper looks at whether elements of a successful competition system can be copied and implemented, also successfully, elsewhere. Its analysis takes as an example the adoption of elements of EU competition law in ASEAN jurisdictions.

The basic argument is that the success of legal transplants depends on socio-economic conditions; and that, as a result, while some elements of a competition system may be transplantable, others may not. Ultimately, a successful transplant from EU competition institutions to ASEAN must take into consideration the goals of the host countries’ competition laws, the level of economic development of their economies, the development of a competition culture in these countries, the comparative advantages of centralised and decentralised enforcement, and (in the case of economic trade areas) the

willingness of countries to surrender sovereignty in the field of competition law.

Without seeking to provide a detailed roadmap, this article should be helpful to anyone considering the adoption, or thinking about how to implement competition provisions originally developed in others jurisdictions where different socio-economic conditions prevail.

Wouter Wils ‘Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future’. *World Competition* 40, no. 1 (2017): 3–46¹⁷

This article provides an overview of private enforcement of EU antitrust law and of its relationship with public enforcement. In Chapter 1, the author reviews the role of public enforcement and identifies three different uses of competition law in civil disputes: (i) as a ‘shield’, e.g. as a defence against claims in contract or tort; (ii) as a basis for claims for injunctive relief, including interim relief; and (iii) as a basis for damage claims, usually as a follow-on to public enforcement decisions.

Chapter 2 looks at the situation in the EU before 2003, a period during which public enforcement predominated, even as courts established that the European Treaty’s competition provisions have direct effect and create rights for individuals. Chapter 3 then reviews the changes brought about by Regulation 1/2003, that allowed NCAs and national courts to fully implement competition law (up until then, the system required exceptions under Art. 101(3) TFEU to be approved by the European Commission). This Regulation contained a number of provisions that: (i) obliged NCAs and national courts to follow prior Commission decisions on antitrust infringements; and (ii) set up

¹⁶ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161

¹⁷ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2865728

mechanisms for cooperation between the European Commission, NCAs and national courts concerning the private enforcement of antitrust rules.

Following a short comparative chapter on the American experience (where private enforcement is the dominant enforcement tool), Chapter 5 provides a detailed description of the Damages Directive, which sets up the discussion of future developments in Chapter 6. While emphasising that public enforcement is likely to remain central to competition law in Europe, this chapter identifies three issues that will likely need to be addressed going forward: (i) the extent, if any, to which the payment of voluntary compensation may lead to a reduction in fine amounts; (ii) the cumulative impact of public sanctions and private compensation on companies and market structure, and whether the focus should not move from fining

companies to sanctioning individuals; and (iii) the impact of civil liability on the attractiveness of leniency programmes.

This is an informative, comprehensive piece. It will be useful to anyone thinking about the interface between public and private enforcement in the EU.

Wouter Wils ‘The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years’ *World Competition* 39, no. 3 (2016): 327–388¹⁸

Another paper by Wils, this one reviews the arguments for and against the use of leniency and assesses them in the light of the European Commission’s experience. Extremely detailed, it is a good resource for anyone considering adopting or reforming a leniency system, or looking for statistics on the topic.

¹⁸https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2793717

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