

*CPI EU News Presents:*

# OECD Roundtable on Market Studies: Consensus on the Strengths and Limitations & Divergence on Binding Remedies

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January 2021

On December 10, the Organization for Economic Cooperation and Development's ("OECD") Competition Committee held a roundtable on "Using market studies to tackle emerging competition issues." The country submissions and speaker presentations are publicly available on the [OECD's website](#). The Secretariat's background note, country submissions by the United States, Japan, and Mexico, and the submission by Business at OECD ("BIAC") represent some of the key opinions on the use of market studies. The submissions explore the strengths and limitations of using market studies to diagnose and solve novel competition issues; the utility of using them beyond traditional enforcement actions; and the potential dangers of imposing market-wide binding remedies following market studies absent a finding of violation of the law, especially in dynamic sectors.

### **OECD Background Note: Market Studies Used as a "[F]lexible" and "[F]orward [L]ooking" Tool, But Remedies That Follow Should Be Proportionate and Principle-Based**

The Secretariat's background note describes how market studies can be used by competition authorities as a "flexible tool" to examine new and evolving challenges "outside the context of merger reviews or antitrust investigations."<sup>2</sup> The submission by BIAC finds that "holistic yet structured assessments" are better suited to evaluate new business models with "overlapping ecosystems of suppliers and customers."<sup>3</sup>

Market studies are useful, according to the Secretariat, in part because they are forward-looking and market-wide in nature. Enforcement actions are limited to historical or ongoing anticompetitive practices by specific companies. Market studies, by contrast, can look at potential scenarios in the entire market and "identify and diagnose emerging competition issues."<sup>4</sup> The Secretariat considers such a holistic tool important, especially in dealing with certain structural features such as "large economies of scale and scope, strong network effects, high barriers to entry, and 'winner-takes-most' dynamics" that risk leading to high concentration, even if no anticompetitive conduct has yet been taken by incumbents.<sup>5</sup> In other words, market studies provide opportunities to "focus the analysis on the process of competition and not just on outcomes."<sup>6</sup> The Secretariat's background note states that such a tool applies not only in digital markets, but also in any type of "challenger" businesses with "innovative business models and new technologies" that will potentially disrupt the existing markets.

The Secretariat believes market studies are good at creating "synergies" between competition law and other policy areas by analyzing the market from the perspectives beyond competition to include consumer protection or data and privacy considerations.<sup>7</sup>

The Secretariat's background note also points out potential limitations of market studies. Substantively, the Secretariat cautions that even though the studies can offer more predictability to companies entering the market, agencies need to avoid offering static recommendations or remedies that no longer fit market reality by the time the study is published, especially in fast moving digital markets. To solve that issue, the

Secretariat encourages broad “principle-based primary legislation,” to be followed by secondary legislation or guidance tailored to new sector conditions later on as needed.<sup>8</sup>

The Secretariat acknowledges the difficulty to implement recommendations coming out of market studies as they will not be legally binding in most jurisdictions. The note suggests putting the burden on lawmakers to explain why they opt out of adopting any recommendations of the competition authority. By contrast, for the few jurisdictions that can issue binding recommendations (including potentially the European Commission given the “New Competition Tool” currently being considered), the Secretariat believes such power should “com[e] with very tight governance and procedural checks and balances to ensure the competition authority remains within its remit and is accountable for its interventions.”<sup>9</sup>

The Secretariat believes there are clear benefits for different competition authorities and governments to work together and develop a “shared international approach” as the emerging competition issues are global in nature, and common issues deserve common approaches.<sup>10</sup>

### **Submission by the United States: Cautiously Optimistic About Market Studies’ Offering of Holistic Insights in Evolving Sectors Limited to “a [S]napshot in [T]ime”**

The U.S. submission states that market studies may be appropriate in sectors with evolving competition landscapes, and when the competition authorities need to be educated on certain novel market conditions or past wins and losses therein.<sup>11</sup> The submission finds market studies helpful as they provide agencies with “stakeholder, academic, industry and consumer feedback,” and data that allow agencies to perform empirical research in support of policy recommendations.<sup>12</sup> As pointed out by the background note, the U.S. submission also recognizes that market studies can only provide information “relevant to a snapshot in time.”<sup>13</sup> Any remedy based on the market study findings needs to be carefully evaluated as the snapshot captured by the market study might have already shifted. Moreover, the submission acknowledges that such studies are “extremely resource intensive” for the agencies and “burdensome to companies both in terms of time and cost of compliance.”<sup>14</sup>

The submission introduces the U.S. agencies’ market studies portfolio, including workshops, retrospective studies of consummated mergers, and market studies conducted without a specific law enforcement purpose under the FTC’s 6(b) authority.

The submission briefly summarizes several recently held workshops on evolving market trends, including a workshop on “Venture Capital Investment and Antitrust Law.”<sup>15</sup> It covered trends in venture capital investment since the 1990s, tips from investors on how to “identify nascent competitors” and why some competitive alternatives to the market-leading platforms have tended to become less attractive investment opportunities in recent years.<sup>16</sup>

The retrospective studies are intended to analyze whether the agencies’ reporting threshold for mergers has been too high, how effective the tools used by the agency economists are in predicting effects of proposed mergers in the markets, and how

effective merger remedies are in maintaining or restoring competition lost due to a merger.<sup>17</sup>

The submission also illustrates how the FTC is currently using its 6(b) authority to study the “acquisition strategies” of the largest technology firms – including Alphabet, Amazon, Apple, Facebook and Microsoft – by looking at acquisitions falling below the reporting threshold.<sup>18</sup> Information gathered from this study will be analyzed to examine to what extent those firms are making acquisitions of nascent or potential competitors, and whether those below-the-thread deals or agreements have raised competitive concerns.<sup>19</sup> Although this study of below-the-thread deals may offer insights into whether current merger control is effective in digital markets, how agencies will manage the scope and frequency of similar studies given the submission’s acknowledgement of high burdens relating to market studies remains to be seen.

### **Submission by Japan: Market Studies – Leading to Recommendations for Businesses’ Voluntary Improvement – Considered “[N]ecessary” to Obtain a “[F]ull [P]icture” of a Market**

Japan’s submission considers market studies “necessary” to gather reliable factual findings and to obtain a “full picture” understanding of market structures or trade practices, and eventually to ensure appropriate implementation of competition law and policy.<sup>20</sup> “[F]act-finding surveys” conducted by the JFTC also aim to “prevent” anti-competitive practices before they materialize, as mentioned in the background note.<sup>21</sup>

The submission points out fact-finding surveys, conducted by the Economic Affairs Bureau, bear no direct relationship with actual party-specific investigations conducted by the Investigation Bureau.<sup>22</sup> The JFTC, however, will issue letters to companies that may “potential[ly] infring[e]” antitrust law, as found in the surveys, and encourage them to “voluntarily improve such practices in [a] pro-competitive way.”<sup>23</sup>

The submission describes its recent market study on code payment services (one of the cashless payments methods). The JFTC interviewed over 50 banks and fintech companies and issued questionnaires to more than 100 businesses, during which the JFTC finds that the market condition made it “indispensable for nonbank code payment providers to make contracts with banks,” thus granting banks “incentives to exclude nonbank code payment providers from the market.”<sup>24</sup> The survey report therefore recommended that banks should consider “developing an environment” in which nonbank providers can have access to the Application Programming Interfaces used by large banks, and then develop substitutes for banks’ services.<sup>25</sup>

### **Submission by Mexico: Enthusiasm for Article 94’s Authority to Issue Binding Remedies Following Market Studies. Expectations for More Jurisdictions to Adopt Similar Approaches**

Mexico’s submission discusses the Federal Economic Competition Commission’s (“COFECE”) uncommon authority to issue legally binding recommendations following a “market investigation” under Article 94 of the Federal Law of Economic Competition.

The submission describes Article 94 as a “hybrid” competition and regulatory tool, allowing the Mexican agency to conduct a thorough market assessment aiming to identify “structural problems [and] order their correction through various remedies.”<sup>26</sup> Recommendations could be subject to judicial review if an appeal were filed.<sup>27</sup>

The submission states that this tool has been effectively used by the COFECE to intervene in digital markets, when the issues are typically “unnoticed” by traditional antitrust tools.<sup>28</sup> Due to the “winners-take-all” dynamics in digital markets, the submission argues that Article 94 allows the Commission to intervene at an early stage, before any single market participant acquires substantial market power. The submission finds Article 94 useful in analyzing behaviors that “do not necessarily fit in the list of abusive of dominance practices” but were identified in the international discourse as potentially problematic, such as self-preferencing practices, imposition of abusive contractual terms, or collusion using algorithms.<sup>29</sup>

Only the United Kingdom, Iceland, Greece and South Africa have similar broad authorities as Article 94 to impose binding remedies after a market study.<sup>30</sup> But the submission observes that the international community has started to recognize the effectiveness of similar *ex-ante* market study authorities independent from an entity’s specific anticompetitive conducts, especially in the analysis of digital markets, citing the EU’s contemplation of the “New Competition Tool.”<sup>31</sup> Indeed, there is an ongoing debate on whether antitrust law needs a reform vis-a-vis the digitalization of markets and market-wide remedies may be more effective in tackling certain types of issues. However, as the Secretariat’s note cautioned, with great power comes great responsibility, such market-wide remedies need to come with strong procedural checks and balances. It is also worth considering whether one-size-fits-all remedy packages that will accurately target the issues corresponding to businesses with diverse business models truly exist.

### **Critiques by BIAC: Market Studies Not Predictive in Nature, Remedies That Follow Should Be Recognized as an “[E]xtraordinary” Power**

BIAC’s submission cautions against unrealistic expectations for market studies and discusses several of their limitations and dangers.

First, BIAC explains that market studies are not inherently “predictive.” To the contrary, market studies are to some extent limited by agencies’ preconceived beliefs on how antitrust law is failing because they tend to focus on “markets with known and observable existing systematic challenges.”<sup>32</sup> As a result, the submission expresses doubt on market studies’ potential as a “panacea” for resolving emerging and future issues in markets.

Second, to prevent market studies from becoming “burdensome fishing expeditions,” BIAC emphasizes the need for a “clearly articulated test for when a study is warranted,” including why existing competition powers are insufficient.<sup>33</sup> The submission does not believe “vague notions of concentration and profitability” are sufficient reasons, for example, to launch market studies. BIAC opines that a clearly-set out scope and objectives may potentially avoid subjecting companies to “mission creep.”<sup>34</sup> To

properly manage the scope and minimize unnecessary burden on companies, BIAC believes preliminary inquiries in the format of pilot questionnaires or consultations of key stakeholders in the preliminary stages can be useful.<sup>35</sup>

Third, BIAC points out that the ability for a competition authority to impose remedies on businesses in the absence of any infringement is an “extraordinary power” without the “democratic legitimacy of an elected legislator.”<sup>36</sup> BIAC thus “strenuously disagrees with the need for powers to impose remedies” to be included in market studies.<sup>37</sup> The preferred route, rather, is for market studies to “analyze, diagnose and inform, but for changes to be achieved through other means.” Avenues like individual voluntary commitments, code of conduct, or legislation should all be options.<sup>38</sup> BIAC’s warning is on point because authority to issue binding remedies following market studies risks turning agencies into regulators.

If remedy powers are to be included, the submission stresses the need for agencies to “proceed cautiously and proportionately,” as market studies are not the place for “creative and speculative theories of harm.”<sup>39</sup> BIAC states that agencies should design remedies that are “effective and proportionate to the issues identified,” and avoid remedies that may “chill innovation.”<sup>40</sup> BIAC also suggests the importance of a “merits-based judicial review of any remedies” that come out of market studies, and to put in place structures to “revisit remedies over time” especially in dynamic markets.<sup>41</sup> Agencies should recognize the potential need to allocate long-term resources to keep the code of conduct up to date because otherwise, a rigid outdated code of conduct may instead stifle innovation in fast-moving sectors.

Lastly, BIAC warns that the many emerging competition issues, especially the ones in digital markets, are inherently global, and therefore “inappropriate for consideration, and certainly unsuitable for remedy, at the level of a single jurisdiction.”<sup>42</sup>

## **Conclusion**

The country submissions reveal a varying degree of enthusiasm for the use of market studies in terms of how useful they will be in tackling emerging competition issues beyond the existing enforcement tools, and whether any legally binding remedies should come out of those studies. Overall, the submissions recognize market studies’ utility in obtaining a market-wide picture of evolving sectors, but also counsel that, before fully grasping the strengths and limitations of market studies, agencies should remain realistic about what they can achieve and stay vigilant to the danger of overusing them due to the high compliance costs they impose on companies. BIAC’s submission also urges agencies to keep in mind that imposing binding, one-size-fits-all remedies on companies without any specific violation may lead to unintended consequences. These may include preventing the flexibility needed, particularly in fast-moving and dynamic markets.

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- <sup>2</sup> OECD (2020), *Using Market Studies to Tackle Emerging Competition Issues*, at 3, <http://www.oecd.org/daf/competition/using-market-studies-to-tackle-emerging-competition-issues-2020.pdf>.
- <sup>3</sup> Contribution by BIAC, *Using Market Studies to Tackle Emerging Competition Issues*, OECD (Nov. 26, 2020) ¶ 5, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)53/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)53/en/pdf).
- <sup>4</sup> OECD (2020), *supra* note 2, at 19.
- <sup>5</sup> *Id.* at 11.
- <sup>6</sup> *Id.* at 20.
- <sup>7</sup> *Id.* at 20.
- <sup>8</sup> *Id.* at 22.
- <sup>9</sup> *Id.* at 27; The New Competition Tool ("NCT") would allow the European Commission to intervene earlier in general—either “before a dominant company successfully forecloses competitors or raises costs, or [simply] when a structural risk of competition prevents the internal market from working well.” *Id.* at 18; see also *Public Consultations: Impact Assessment for a Possible New Competition Tool*, European Commission (Oct. 26, 2020), [https://ec.europa.eu/competition/consultations/2020\\_new\\_comp\\_tool/index\\_en.html](https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html).
- <sup>10</sup> OECD (2020), *supra* note 2, at 28.
- <sup>11</sup> Contribution by the United States, *Using Market Studies to Tackle Emerging Competition Issues*, OECD (Nov. 26, 2020) ¶ 29, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)37/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)37/en/pdf).
- <sup>12</sup> *Id.* ¶ 27.
- <sup>13</sup> *Id.* ¶ 28.
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.* ¶ 14; *Venture Capital and Antitrust; Transcript of Proceedings at the Public Workshop Held by the Antitrust Division of the United States Department of Justice*, US Dep't of Justice (Feb. 12, 2020), <https://www.justice.gov/atr/page/file/1255851/download>.
- <sup>16</sup> *Id.*
- <sup>17</sup> *Id.* ¶ 21, 24.
- <sup>18</sup> *Id.* ¶ 19.
- <sup>19</sup> *Id.*
- <sup>20</sup> Contribution by Japan, *Using Market Studies to Tackle Emerging Competition Issues*, OECD (Nov. 26, 2020) ¶ 1, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)74/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)74/en/pdf).
- <sup>21</sup> *Id.* ¶ 4.
- <sup>22</sup> *Id.* ¶ 7.
- <sup>23</sup> *Id.* ¶ 8.
- <sup>24</sup> *Id.* ¶ 21.
- <sup>25</sup> *Id.* ¶ 24.
- <sup>26</sup> Contribution by Mexico, *Using Market Studies to Tackle Emerging Competition Issues*, OECD (Nov. 26, 2020) ¶ 19-20, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)67/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)67/en/pdf).
- <sup>27</sup> *Id.* ¶ 21.
- <sup>28</sup> *Id.* ¶ 25.
- <sup>29</sup> *Id.* ¶ 26.
- <sup>30</sup> *Id.* ¶ 27.
- <sup>31</sup> *Id.* ¶ 28-29.
- <sup>32</sup> Contribution by BIAC, *supra* note 3, ¶ 9-10.
- <sup>33</sup> *Id.* ¶ 25-26.
- <sup>34</sup> *Id.* ¶ 28.
- <sup>35</sup> *Id.* ¶ 28-29.
- <sup>36</sup> *Id.* ¶ 16, 18.
- <sup>37</sup> *Id.* ¶ 31.

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<sup>38</sup> *Id.* ¶ 20.

<sup>39</sup> *Id.* ¶ 13.

<sup>40</sup> *Id.* ¶ 31.

<sup>41</sup> *Id.* ¶ 32-33.

<sup>42</sup> *Id.* ¶ 37.