

# Tackling the Winds of Change: Market Studies on Emerging Competition Issues

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## I. What Are “Emerging Competition Issues”

Emerging competition issues (or risks to competition) can be described as scenarios in which certain new market characteristics create a threat to competition. These can include changes in the conduct of companies operating in concerned markets or in consumer behavior; or new public-sector interventions in markets (whether through policy, regulation, or direct participation in the supply and demand sides of markets).

As emerging competition issues arise when a market is subject to change, the types of issues competition authorities have faced (or are currently facing) can be categorized in terms of their drivers: changes to the structural characteristics of a market or sector; new demand-side issues; regulatory frameworks that become obsolete; and new public-policy initiatives; all of which can change market dynamics.

Structural emerging issues<sup>2</sup> have risen, for example, with the increased digitalization of markets and their platforms’ business model. Such markets are characterized by large economies of scale and scope, strong network effects, high barriers to entry, and winner-takes-most dynamics that can lead to increasingly concentrated markets. Although concentration is not intrinsically harmful to consumers, competition risks can arise. It can allow companies to monitor their competitors’ behavior and create incentives to compete less vigorously without any direct coordination.

Demand-side emerging issues<sup>3</sup> have risen, for example, with the growth of business models in which products are offered at no cost. These

business models present novel challenges relating to behavioral biases. Receiving the product free can lead consumers not to focus on the quality of the services provided, for example, and this may reflect consumers’ optimism bias and limited information. Another behavioral bias is consumers tend to express significant concerns about privacy and rate it as important, yet tend not to make product decisions based on privacy preference.<sup>4</sup>

Regulatory emerging issues arise when markets undergo significant change and the need to keep regulations up to date becomes even more important. This presents a two-fold challenge. First, there is the issue of whether existing regulation is hindering competition, entrepreneurship, and innovation. Second, there is a question of whether existing regulation remains appropriate to address new issues. For example, the entry of Uber into the market for paid passenger transportation exemplified the disruptive effects of innovation but addressed some market failures in the sector where certain regulations had become unnecessary.

Potential competition issues related to public policy could also arise with the after-effects of COVID-19. For example, there is a risk that government financial aid to restart weakened economies, combined with protectionist measures for domestic production, could increase trade barriers and weaken import competition.

Competition authorities’ advocacy work, often based on market studies, can contribute to the design of industrial policies that are focused on promoting or allowing competition, for example, through the reduction of regulatory barriers to

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<sup>2</sup> Structural emerging competition issues refer to changes to the structural characteristics of a market or sector.

<sup>3</sup> Demand-side issues refer to the causes, such as information asymmetries or behavioral biases, that prevent the demand side of the market (i.e. consumers) to act as a discipline mechanism on the supply side of the market (i.e. firms) to deliver quality products at the lowest price.

<sup>4</sup> *Antitrust: Commission launches sector inquiry into the consumer Internet of Things (IoT)*, OECD (2018), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1326](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1326).

entry, as evidence shows that industrial policy's long term impacts can be maximized when they are applied in markets where there is at least some competition.<sup>5</sup>

## II. Market Studies in the Antitrust Toolkit

Market studies are one of several tools at the disposal of competition authorities, alongside its enforcement and other advocacy tools.<sup>6</sup>

Whether market studies are better suited to make markets more competitive is not an issue that can be determined in the abstract. Competition authorities generally use both enforcement and advocacy tools that are often complementary and mutually reinforcing. However, in the case of emerging competition issues, the authorities are unlikely to have enforcement cases or detailed knowledge of the market in question. Enforcement tools are mainly ex-post. Therefore, they may not be the most effective tool to tackle emerging competition issues when an authority aims to address issues before they become widespread. Hence, the use of market studies may typically precede other enforcement actions and so act as a beneficial ex-ante tool.

Moreover, market studies are a flexible tool that allows competition authorities to examine broader competition issues in a market or sector outside of the context of merger reviews or antitrust investigations. For example, when markets are characterized by high or discriminatory prices or poor quality, it may well be that the cause is not anticompetitive conduct by incumbents or agreements between firms, but rather market features such as high barriers to entry, behavioral biases that lead to consumer frictions, network effects, anticompetitive regulation, or distortions of competitive neutrality. This broader brush tool to investigate market characteristics, dynamics, and barriers to competition can help governments tackle issues such as those of

greater concentration and profitability in many markets around the world.<sup>7</sup>

## III. Strengths and Weaknesses of Market Studies

The legal framework for market studies in a jurisdiction, including the powers and flexibility of the competition authority, has implications for the types of competition issues that can be explored, the depth in which they can be explored, and the possible outcomes of market studies. Despite differences across jurisdictions, market studies present common strengths as well as limitations.

In terms of strengths, market studies can be more forward-looking, cover a broader set of issues, focus better on the dynamic process of rivalry, and promote competition more effectively than can enforcement. This enables the authority to consider market-wide emerging problems and the interlinkages of the different factors (supply and demand side issues) creating competition concerns, irrespective of individual firms.

Market studies may also be an easier way to provide market certainty and clarity early on about business practices as opposed to lengthy enforcement cases with novel case-specific arguments that can be difficult to prove. A market study also provides an upstream opportunity for an authority to shape a market by clarifying that certain behavior may infringe competition law, even where the study finds no specific instances of its occurrence yet.

Market studies are not without limitations, however, as any recommended changes to legislation tend to be static and can take time to implement. At a time of rapid technological change, swift legislation updates are key to reducing the risk of existing legislation restraining competition and innovation.

<sup>5</sup> OECD (2020), <https://www.oecd.org/daf/competition/the-role-of-competition-policy-in-promoting-economic-recovery-2020.pdf> at pages 25 and 26.

<sup>6</sup> The term "market study" is interpreted in this note to comprise a variety of instruments used in various jurisdictions featuring similar characteristics, such as sectoral inquiries (European Union and a number of its member states); market inquiries (South Africa); fact-finding inquiries (Italy); fact-finding surveys (Japan); and general studies (US Department of Justice).

<sup>7</sup> Directorate for financial and enterprise affairs (OECD Competition Committee, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)46/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf).

In most jurisdictions, recommendations issued by competition authorities are not legally binding, which can limit their effectiveness. In the few jurisdictions where competition authorities can issue legally binding recommendations, this power comes with tight governance and procedural checks and balances to ensure authorities are accountable and remain within their remit.

Market studies can also be costly and time-consuming. However, it will be a worthwhile tradeoff if the market study outcome is expected to be effective at initiating solutions and reducing uncertainties of the authority's application of competition principles in emerging or changing markets, thus reducing the likelihood of breaches of competition rules and the future burden on enforcement.

Overall, market studies can play a key preventive role in identifying and diagnosing emerging competition issues by exploring the different drivers and clarifying the options available from a competition policy, competition enforcement, regulatory, or other policy perspectives. As a result, market studies can initiate solutions to mitigate consumer harm before it becomes widespread, promote further competition, and reduce the likelihood of (or opportunities for) violations of competition laws.

#### IV. Some Examples of Market Studies on Emerging Issues

The experience gathered by advanced competition authorities suggests following a number of precise steps to ensure a smooth and cadenced development of a project utilizing market studies. These steps span from the selection and prioritization of the sectors that require market investigation to the collection and analysis of the relevant information of the sector.<sup>8</sup> Precious guidance in this respect has been provided by the OECD's *Market Studies*

*Guide for Competition Authorities* (2018)<sup>9</sup> and the International Competition Network's *Market Studies Good Practice Handbook* (2016)<sup>10</sup>.

However, the process may become more complex when the object of the investigation is still an emerging competition issue rather than a full-fledged market feature. Competition authorities need to adjust their toolkit and find innovative ways to detect germinal changes.

Some concrete experiences by competition authorities may offer some insights. In 2017, the Netherland Authority for Consumers and Markets ("ACM") carried out a market study on online video streaming to project potential anticompetitive risks, finding sufficient competition between market participants and that the market was sufficiently dynamic. However, the likelihood of anticompetitive problems and the impact thereof were strongly related to further market developments. The ACM identified three scenarios in which such risks could occur: i) the collection of consumer data by online video platforms leads to market power; ii) video platforms generate market distortions by bundling advertising space with their own technology; iii) publishers become highly dependent on a large market participant for access to consumers and higher revenues.

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The Italian Competition Authority relied on cooperation to gain a better view of potential competition issues associated with big data. It carried out a sector inquiry in cooperation with the Data Protection Authority and the Communication Authority, which enabled them to cover a broad range of issues in the sectors of telecommunications, media, digital platforms, insurance, and banking. The joint inquiry, published in 2020, recommended using data protection laws and consumer protection tools

<sup>8</sup> The authors of this article also created a training video in cooperation with the OECD-GVH Regional Centre for Competition. See *Effective market studies on competition issues explained in 7 minutes*, <https://www.youtube.com/watch?v=01mgPv42cP8>.

<sup>9</sup> MARKET STUDIES GUIDE FOR COMPETITION AUTHORITIES 2018 (2018), [www.oecd.org/daf/competition/market-studies-guide-for-competition-authorities.htm](http://www.oecd.org/daf/competition/market-studies-guide-for-competition-authorities.htm).

<sup>10</sup> MARKET STUDIES GOOD PRACTICE HANDBOOK (2016), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG\\_MktStudiesHandbook.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_MktStudiesHandbook.pdf).

<sup>11</sup> ACM (2017), a closer look at online video platforms, <https://www.acm.nl/en/publications/closer-look-online-video-platforms>.



to reduce information asymmetries between users and providers during data collection.<sup>12</sup>

In 2014, the Mexican Competition Authority (“COFECE”) conducted a market study on the financial sector and warned that consumers had few options to access better quality products and services due to low competitive pressure among the service providers.<sup>13</sup> After this study was published, fintech companies created new means for providing financial services. COFECE combined the findings of its market study with advocacy initiatives to better understand the competition issues arising from the digital economy. The market study paired with advocacy initiatives enabled COFECE to advance procompetitive regulatory frameworks in a fast-changing market. Mexico’s Fintech Law, adopted in March 2018, included several COFECE’s recommendations.<sup>14</sup>

## V. Conclusions

On balance, market studies can play a key preventive role in identifying and diagnosing emerging competition issues. The use of market studies contributes to the debate on how to apply and adjust existing competition tools to more efficiently deliver the benefits of [competition policies/regulation/the tools] to the society in a changing world.

Building on its significant expertise, the OECD Competition Division can assist competition authorities, regulators, ministries or other policymakers with market study projects. This can be particularly valuable in circumstances where the OECD’s independent analysis would be of assistance, or in jurisdictions that have limited experience with these tools.

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<sup>12</sup> The Italian Competition Authority, the Data Protection Authority, and the Communication Authority (2020), Big Data Sector Inquiry, <https://en.agcm.it/dotcmsdoc/pressrelease/Italy%20Big%20Data%20Sector%20Inquiry%20-%20Summary.pdf>.

<sup>13</sup> COFECE (2014), Research and recommendations on competition conditions in the financial sector and its markets, <https://www.cofece.mx/executive-summary-researchand-recommendations-on-competition-conditions-in-the-financial-sector-and-itsmarkets/>.

<sup>14</sup> COFECE (2017), Opinion, Law to Regulate Financial Technology (fintech) Institutions, <https://www.cofece.mx/cfresoluciones/docs/Opiniones/V20/6/3953499.pdf>.