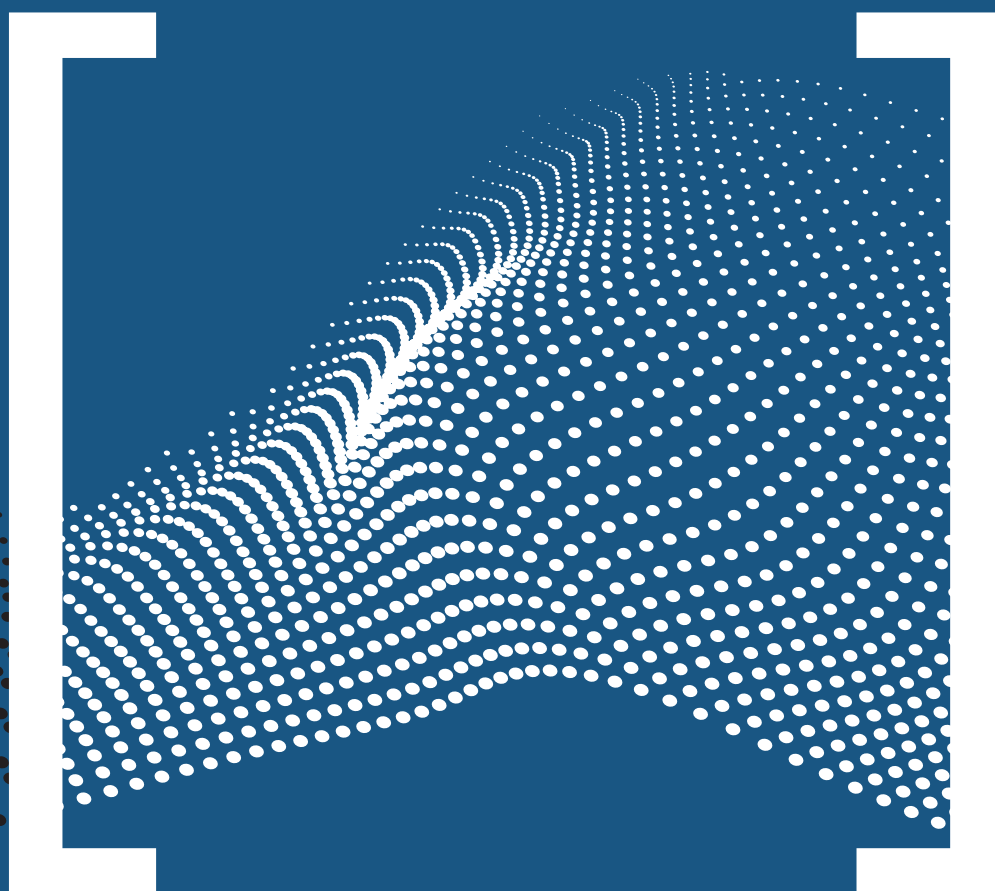


COMPETITION POLICY IN EASTERN EUROPE AND CENTRAL ASIA

Focus on Market Studies



OECD-GVH Regional Centre
for Competition in Budapest (Hungary)
Newsletter No. 18, January 2022



Inside a competition authority
RUSSIAN FEDERATION

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Foreword:

Budapest at the crossroad of international competition



Renato Ferrandi
Coordinator of the Regional Centre,
OECD

In October 2021, Budapest was at the heart of international competition when GVH, the Hungarian Competition Authority, hosted the **Annual Conference of the International Competition Network (ICN)**. ICN is an international organisation that brings together 140 competition authorities from around the world. Its online Annual Conference was attended by more than 1,700 competition-law experts from around 130 countries.

The event allowed for information sharing and discussion about the latest developments in competition policy and law enforcement, and proved a great opportunity to confirm the role being played by the GVH at the international level. This is best exemplified by the OECD-GVH Regional Centre for Competition (RCC), a major GVH outreach and co-operation initiative in Eastern Europe and Central Asia.

This has been **another challenging year** for our Regional Centre. In 2021, the RCC has not been able to hold in-person seminars and was unable to welcome its beneficiary authorities to Budapest. However, it did manage to adapt to these changes and proposed a number of relevant virtual seminars, which were highly appreciated by participants. At the same time, this review has strengthened the RCC's reputation as a leading reference for competition in the region. It attracts an increasing number of readers and contributors from RCC beneficiary economies and from other countries around the world. Its video-based training project, Key Competition Topics Explained in a Few Minutes, has also proved an undisputed success.

The RCC would like to wish all the best to the **newly appointed Head of the OECD Competition Division**, Mr Ori Schwartz, who has kindly sent an open letter to this review. The Centre is also very grateful to Mr Antonio Capobianco, the Deputy-Head of the Division, for all the support he has provided over the last few years.

This issue of the RCC review is dedicated to **market studies**, a powerful tool for competition authorities to examine broader competition issues in a market or sector, outside of the context of merger reviews or antitrust investigations. The RCC received an impressive number of contributions, which allows comparison between the experience developed in Eastern Europe and Central Asia and that of other advanced competition authorities. The RCC is also glad to welcome an article by colleagues from the OECD Productivity, Innovation and Entrepreneurship

Division, which provides a broader overview of competition dynamics worldwide. Indeed, it highlights how a trend towards increased industry concentration and mark-ups seems to point to a change in the way that market forces work.

The RCC is also keeping a promise. At the RCC seminar entitled "The Assessment of Abusive Conduct by Dominant Players" held in September 2021, noted competition expert Livia West was set to make a highly anticipated presentation on different views of abusive conduct across jurisdictions, in particular in the European Union and the United States. Unfortunately, she was unable to attend, but, as promised, she drafted an article version of her presentation.

Finally, the RCC continues its virtual trip around its beneficiary competition authorities. For this issue, the newsletter features an exploration of the strategies and enforcement and advocacy records of the **Federal Anti-Monopoly Service of the Russian Federation**.

Enjoy your reading!

The **next issue** of the review will focus on **effective investigation in competition cases**. The RCC would like to learn of its members' experiences in dealing with the set of tools available to their respective competition authorities to gather direct and indirect evidence, including requests for information, dawn raids, hearings, leniency systems and efficient procedures. The RCC invites **contributions by 15 April 2022**.

Open letter from Ori Schwartz, new Head of the OECD Competition Division



Ori Schwartz
Head of the Competition
Division, OECD

Dear friends of the OECD-GVH Regional Centre for Competition,

I am delighted to have recently joined the OECD as Head of the Competition Division and I am eager to continue with the fruitful co-operation between the OECD and the GVH in the framework of the Regional Centre for Competition in Budapest.

We are particularly proud of the accomplishments made by the OECD-GVH Regional Centre for Competition, which constitutes a unique example of successful long-term co-operation between an international organisation and a competition authority. I had the pleasure of participating in RCC training sessions in Budapest as a speaker, and I am aware of their outstanding quality.

In its 16 years of activity, the OECD-GVH RCC has built a solid reputation as a leading platform for capacity building

and policy advice to competition authorities in Eastern Europe and Central Asia. I am also fully supportive of the centre's new projects – such as this review and the training-video series Key Competition Topics Explained in a Few Minutes – which are further increasing the scope and impact of its activity.

The partnership between the OECD and the GVH offers precious opportunities for the dissemination of international and OECD best practices, as well as for the promotion of procedural and substantive convergence between jurisdictions across Eastern Europe. In close collaboration with Renato Ferrandi, I will ensure that the Competition Division fully supports this partnership.

I look forward to meeting you in person at the earliest opportunity.

Ori Schwartz

Until his appointment to the OECD, Ori Schwartz was Chief Legal Counsel and Head of the Legal Department at the Israel Ministry of Health. Prior to that, he was the Chief Legal Counsel and head of the Legal Department at the Israel Competition Authority (ICA) between 2011 and 2018, overseeing all matters of competition policy, enforcement and regulation, and also serving as Acting Director General from 2015 to 2016. Ori previously served at the ICA as team leader for the communications and retail sectors (2008-2011), lawyer for the communications and retail sector (2007-2008). He was a lawyer in the private sector from 2002 until 2006.

An Israeli national, Ori holds a master's degree in Law from the Hebrew University of Jerusalem and a second master's degree in European Law and Economics from the University of Hamburg.

Ori will oversee the work of the Competition Division to promote sound competition and pro-competitive regulatory policies for growth and sustainable development, and support the OECD's Competition Committee.

OECD-GVH Regional Centre for Competition 2022 Programme



Csaba Balázs Rigó
President of the Hungarian
Competition Authority

It is my pleasure to present and introduce the 2022 Programme of the OECD-GVH Regional Centre for Competition in Budapest, Hungary.

Before doing so, I would like to reflect on 2021. The year has seen the RCC approach the COVID-19 pandemic not simply as a limitation on its activities, but rather as an opportunity to find new ways and formats to bring the competition community together. While the RCC was compelled to postpone some of its crucial activities, the response by beneficiary authorities has been extraordinary, enabling us to organise the majority of the events online and maintain the outstanding quality of the seminars.

In 2021, the RCC was able to:

- organise its core seminars in a virtual format, including the Outside Seminar, GVH Staff Training and the joint RCC-FAS Russia Seminar
- take advantage of the online format by extending the maximum number of participants from beneficiary authorities, with more than 100 participants for certain events
- welcome distinguished speakers, among them Professor William Kovacic from George Washington University.

In addition, the RCC completed a set of training videos – Key Competition Topics Explained in a Few Minutes – that have developed into a structured online training course on key competition principles. As an example, the video on “Bid Rigging and Competition Policy” has now reached nearly 1 500 views, while the “Antitrust Commitments” video has been viewed around 1 100 times. These are extremely good results for educational materials.

The RCC 2022 Programme has been carefully drafted to enable us to adjust flexibly to developments with the ongoing COVID-19 pandemic. As soon as circumstances permit, the RCC will return to in-person seminars that remain the most effective format for both training and networking, while remaining ready to move to online solutions if necessary.

The following **in-person seminars** will be organised by the RCC during 2022:

- February: seminar on “Market Definition: Methodologies, Challenges and Developments”

- May: Introductory Seminar for Young Staff on “Key Competition Law Principles and Procedures”
- June: Outside Seminar in Moldova on “Interim Measures in Competition Cases”
- September: GVH Staff Training
- November: Joint RCC-FAS Russia seminar.

These seminars for our key beneficiary authorities will be complemented by **three special events**: two seminars for national judges and the Heads of Agency meeting.

I am also pleased to announce that the GVH’s application to the European Commission to organise two seminars on “European Competition Law for National Judges” within the framework of the 2022 programme successfully passed its evaluation. As the European Commission only approved six applications in total, this is both significant for the centre and recognition of the excellent work carried out by the OECD and GVH within the framework of the RCC.

The Heads of Agency meeting celebrating the **15th anniversary** of the RCC’s establishment was postponed in 2020 due to the outbreak of the pandemic, so we will mark this special occasion within the framework of the 2022 Heads of Agency meeting.

The RCC has been further expanding its scope and reach thanks to a **number of initiatives** launched over the past two years, which will continue.

- The training video project will expand with two special new videos for national judges, in addition to the training videos in English and Russian already available.
- The RCC will also publish two newsletters and an annual report in 2022, which will be made available for the general public on the RCC website.
- A special anniversary publication will feature Heads of Agencies and their different visions for future RCC developments and be published as a special supplement to our biannual newsletter, which reports key outcomes and an overview of the best examples of regional and international co-operation.

I would like to take this opportunity to thank the joint OECD-GVH team and, in particular, our competition expert Renato Ferrandi, for their dedication and the excellent results they have achieved. I am sure these will be confirmed and even improved in 2022.



PROGRAMME 2022

A. SEMINARS ON COMPETITION LAW

16-17 February Virtual	<p>Market Definition: Methodologies, Challenges and Developments</p> <p>The definition of a relevant product and geographic market is a necessary step in most competition cases, particularly in merger cases. The seminar will look at basic investigatory and analytical steps and the economics of market definition. Practical case examples from OECD members will be presented in order to illustrate the theoretical concepts. Participants will be asked to join experts in hypothetical case exercises.</p>
22 March Virtual	<p>Heads of Agency Meeting: Reviewing the Past to Design the Future</p> <p>In a globalised world, high levels of expertise and international co-operation have become indispensable for competition authorities. Building on the RCC's successful experience over the past 17 years and its international competition initiatives, the event will explore the ways in which the centre's role as a catalyst for capacity building and enhanced regional co-operation can be further enhanced.</p>
16-19 May Budapest	<p>Introductory Seminar for Young Staff: Competition Law Principles and Procedures</p> <p>This seminar will provide young staff working in competition authorities with an opportunity to deepen their knowledge of key notions and procedures in competition-law enforcement. Experienced practitioners from OECD countries will share their knowledge and answer questions from participants on cartels, mergers and abuse of dominance. The seminar will look at basic legal and economic theories, as well as the relevant case law. Participants will have the chance to face and discuss procedural issues through practical exercises.</p>
26-27 May Budapest	<p>COMPETITION LAB FOR JUDGES Stepping Up with the Fundamentals of Competition Law: From Core Principles to Advanced Competition-Law Enforcement</p> <p>This seminar will focus on the fundamental principles and concepts of EU competition law that are addressed by national judges in competition-law cases over which they preside in the context of both public and private enforcement. The understanding of fundamental notions of EU competition law will be enhanced through a two-step approach: first, by setting out the elements that form each concept, and second, by exploring challenges in competition-law enforcement and judicial review of competition authorities' decisions.</p>
14-16 June Moldova	<p>Outside Seminar in Moldova: Interim Measures in Competition Cases (tbc)</p>
20-21 September Budapest	<p>GVH Staff Training</p> <p>Separate sessions will also provide dedicated training discussions and lectures for the GVH's merger section, antitrust section, economics section, consumer-protection section and Competition Council.</p>
18-20 October Russia	<p>Joint RCC-FAS Seminar in Russia</p> <p>To be agreed with FAS Russia. Current proposals include ex ante regulation and competition in digital markets, and competition interventions against anticompetitive state actions.</p>
10-11 November Budapest	<p>COMPETITION LAB FOR JUDGES Stepping Up with the Economics of Competition Law: From Core Principles to Application in Practice</p> <p>This seminar will focus on economic notions underlying the EU competition-law framework to introduce complex economic notions in a friendly manner and inform judges of the use of economic concepts, tests and evidence when assessing cases under EU competition law. The seminar will highlight key economic concepts for market-definition purposes and for the assessment of anticompetitive effects.</p>

B. TRAINING-VIDEO PROJECT: KEY COMPETITION TOPICS EXPLAINED IN A FEW MINUTES

Five additional videos, each in both English and Russian

Two special videos for judges

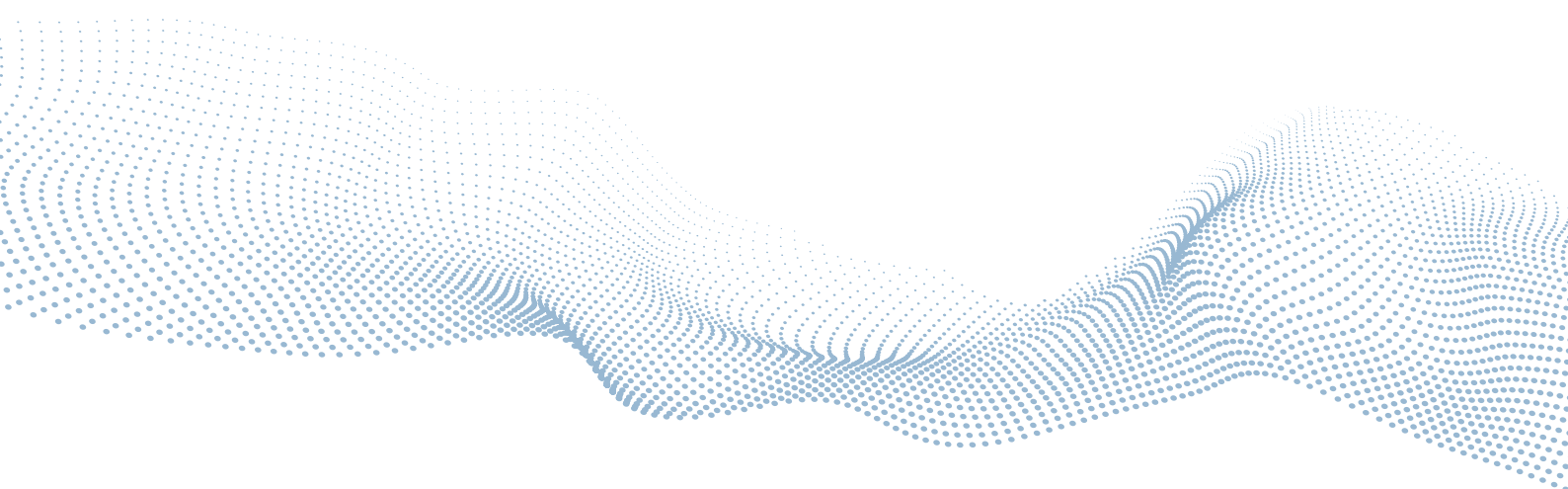
C. RCC NEWSLETTER: "COMPETITION POLICY IN EASTERN EUROPE AND CENTRAL ASIA"

Two issues of the newsletter (January and July), in both English and Russian

Anniversary publication: special supplement to the July newsletter, focused on regional and international co-operation

D. RCC ANNUAL REPORT

Publication of the RCC Annual Activity Report 2021, in both English and Russian



Exclusionary abuses: uncertainty may lead to case outcomes determined by policy choices



Livia Solange West
Senior Director,
APCO Worldwide, Brussels
Founder & Managing Director,
The Vectory, Brussels

Introduction

Certain types of conduct by dominant firms have the effect of excluding competitors from the market. But does that mean this conduct should be considered an abuse and therefore in violation of the competition laws? Maybe, but not necessarily. It depends on whether the exclusion is “good” or “bad”.

Healthy and desirable competition also has the effect of excluding competitors. A firm with better products or services, and/or lower prices or other better terms valuable to consumers will usually gain market share while its competitors lose business and are eventually driven out of the market. A firm that grows large due to its so-called “superior business acumen” or “efficiencies” is one of the primary objectives of the competition laws and should be rewarded compared to its less efficient competitors. This type of exclusion can be said to be “good” for society and is referred to as “competition on the merits”.

Exclusion which can be said to be “bad” for society is that which arises from a firm simply using its resources to interfere with the ability of a new entrant to use its own superior business acumen or efficiencies. This type of exclusion does not reward new development of superior business acumen or efficiencies, but rather the use of size and resources gained from past efficiencies to stifle emergence of new developments. Bad

exclusion is often referred to as “exclusionary abuse”, especially in the EU.

The distinction may sound simple in theory but determining which type of exclusion is present in any particular set of facts can be difficult. One reason is that both types of exclusion often have similar elements: lower prices or higher levels of protection for valuable assets like intellectual property created through creativity, investment, and effort.

In cases dealing with discounts or refusals to deal, there is inherent uncertainty and some degree of risk that enforcers will mistake one type of exclusion for the other. In other words, there is a risk of false negatives (firm conduct is wrongly rewarded) or false positives (firm conduct is wrongly punished). In light of this inherent uncertainty, each decision-maker can be said to make an explicit or implicit policy choice: is it more important to avoid false negatives or false positives?

The discussion below aims to provide a few examples from previous cases involving discounts or refusals to deal where different legal approaches taken by decision-makers in the same case, as well as different outcomes in similar cases, could be better understood by probing these cases for the type of policy choice selected.

Intel – how low is too low?

The Intel case in the EU examines the point at which low prices should be considered too low and shows how three different decision-making bodies in the same jurisdiction - the European Commission, the General Court, and the Court of Justice - took three different legal approaches to this issue.

- The key facts of the Intel case may be summarized as follows:
- The relevant market was defined as computer chips of a certain type of architecture that were key components in the overall performance of computers on a world-wide basis.
- The main competitors were Intel, a large well established market leader holding 70% market share, and AMD, a smaller firm challenging Intel with significantly improved chips for price and performance.
- Computer makers had concerns about sales of computers with Intel chips falling behind those with AMD chips in retail shops.
- Intel offered its customers (computer makers) secret, oral rebates from base price plus rebates for marketing promotional activities conditioned on buying all or almost all chips used (so-called “fidelity rebates”).
- The computer makers calculated the effect of buying AMD chips on rebates from Intel (loss/benefit analysis).
- AMD’s market share increased during the relevant period.

The European Commission decided that although the key facts outlined above amounted to a presumption of abusive exclusion by Intel, it was also appropriate to embark on an effects-based analysis of whether an as-efficient competitor with a smaller sales base would be foreclosed from the market when faced with the fidelity rebates offered by Intel (often referred to as the “as-efficient competitor test”). At the time, there was criticism from economists pointing out that loyalty rebates by dominant firms could have pro-competitive effects, and the European Commission considered it important to acknowledge that not all fidelity discounts constitute violations of the EU competition laws. After all, lower prices and the resulting exclusion of less efficient competitors are generally regarded as one of the objectives of these laws. The European Commission wished to emphasize that enforcement efforts should focus on those discounts that resulted in foreclosure of a competing firm that was at least as efficient as the discounter but had a smaller sales base as it tried to challenge a larger firm with an established customer base. This seems to indicate a desire on the part of the European Commission to eliminate as much risk as possible with respect to the potential for error in its classification of exclusion in the Intel case as “bad”.

However, the European Commission’s efforts to get its analysis right ultimately led to further criticisms and disagreements. Intel appealed the decision, arguing that significant errors in the Commission’s effects-based analysis called into question the presumption that the rebate scheme was abusive rather than just simply a competitive response to a challenge from a competitor. If the result of the Commission’s effects-based test revealed no significant anti-competitive effect, it would beg the question regarding whether Intel’s rebate scheme should be deemed to have violated the competition laws.

The General Court disagreed with the European Commission’s

approach, holding that the facts established a presumption of abusive exclusion, upon which there was no need for any additional as-efficient competitor analysis. It proceeded to ignore that part of the Commission’s decision and denied Intel’s invitation to assess the details of the Commission’s effects-based assessment. Based on this, the General Court seemed to indicate its general strong preference for avoiding false negatives in fidelity rebate cases.

The Court of Justice disagreed with the General Court and offered yet another formulation of the legal analysis. According to the Court of Justice, the facts indeed established a presumption of abusive exclusion; however, since the European Commission exercised its discretion and chose to embark on an additional effects-based analysis, the General Court had a duty to assess the alleged errors made by the European Commission in carrying out its as-efficient competitor test. The case was thus referred back to the General Court for further consideration. Based on this decision, the Court of Justice appears to have less comfort than the General Court that priority should be given to avoiding false negatives, especially if an effects-based test reveals no significant negative effect.

The three approaches taken by the three different decision-makers in the EU illustrate how tricky the assessment of discounts can be. The question of how low is too low when it comes to prices can be very difficult to answer. Policy therefore appears to play a large role in such uncertain circumstances. In the case of Intel, the three decision-making bodies chose to prioritize the avoidance of an outcome where Intel was rewarded for its fidelity rebate program, but each could be said to have had different levels of comfort with this policy choice, possibly explaining why each put forth a different legal approach for resolving the case.

IMS Health and Trinko – how high is too high?

The IMS Health case in the EU and the Trinko case in the US both involved new entrants asking for access to property of their more established competitors. In both cases, the established firms chose a high level of protection for their property and refused access. The new entrants alleged those refusals to deal were violations of the competition laws.

In IMS Health, the key facts may be summarized as follows:

- The relevant market was regional sales data service for pharmaceuticals based on a certain methodology IMS had developed for dividing Germany into 1860 geographical zones for reporting data, created by use of various criteria (geographic boundaries, post codes, population density, transport connections, etc.).
- The competitors were IMS Health, the leading data service provider that developed and owned the copyright to the segmentation method, and NDC Health, the new entrant offering a sales data service that was almost identical to that offered by IMS, minus IMS’s geographical segmentation method.
- Clients contributed to development of the segmentation by providing feedback.

- IMS gave free copies to pharmacies and doctors, helping its segmentation to become the industry standard.
- Clients adapted their information and distribution systems to IMS’s segmentation method and would incur high switching costs for using another segmentation, even if the new segmentation offered higher quality at a lower cost.

Based on the importance attributed to the last three facts set out above (which the Court called “exceptional circumstances” in an apparent effort to narrow the future application of this caselaw), the Court decided to force IMS to offer NDC a license to use IMS’s segmentation while competing directly against it. It can be inferred that the EU Court believed the intention of a new entrant to offer competing products/services at an effective price justifies forcing access to intellectual property developed by the established service provider. It can further be inferred that the Court decided false negatives deprive the market of possible new products/services, and that intervention promotes competition on the merits.

In *Trinko*, the key facts may be summarized as follows:

- New federal laws in the US forced telecommunications network owners to provide access to competitors on a non-discriminatory basis at a cost-based rate set by law.
- The relevant market was Verizon's operations support systems necessary for AT&T to provide voice telephony services to end customers.
- The competitors were Verizon, owner of a telecommunications network in New York state offering voice telephony services, and AT&T, the new entrant with an interconnection agreement to Verizon's telecommunications network competing with Verizon for end users of voice telephony services.
- Verizon refused to fill AT&T's orders for operations support such that AT&T customers had poorer voice telephony service than Verizon customers.
- Verizon was found in violation of its non-discrimination obligations and sanctioned under the framework of the federal law.

AT&T sought further remedies for its competitive disadvantage

due to Verizon's refusal to deal under the antitrust laws. The US Supreme Court focused on the fact that providing access to operations support systems was not voluntary, but rather forced by law at a certain price with a specific system for sanctioning violations. The Court decided that Verizon's refusal to supply on forced terms does not necessarily mean it intended to foreclose competitors. The court explicitly explained that the opportunity to charge monopoly prices is an important element of the free-market system because it attracts "business acumen" (risk, innovation, growth). The court thus believed that false positives chill the very conduct the antitrust laws are designed to protect – competition on the merits – and that intervention chills competition on the merits.

One possible way to understand the different outcomes in these similar cases involving refusal to deal is the fundamental policy choice prioritized by the courts examining them. The choice of policy drives the court's focus as it considers the factors for or against mandating access to a competitor's resources under the competition laws. In other words, the US Supreme Court chose to prioritize a different policy choice than the Court of Justice of the EU.

Conclusion

For enforcers reading these prior cases for the purpose of understanding how the competition laws should be applied to alleged exclusionary abuses in current cases under consideration, these prior cases may appear complex and more confusing than explanatory. One way that these cases could be assessed is by looking at them through the prism of policy.

Where uncertainty about whether the exclusion of competitors is "good" or "bad" seems high, outcomes may essentially come down to choosing between prioritizing the avoidance of false negatives or false positives. Which policy will your authority choose?

Cases

Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel).

Intel v Commission (T-286/09), judgment of 12 June 2014.

Intel v Commission (C-413/14 P), judgment of 6 September 2017.

IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG (C-418/01), judgment of 29 April 2004.

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872 (2004).

MARKET STUDIES



Using Market Studies to Tackle Emerging Competition Issues



Patricia Bascunana-Ambros
Manager, Competition and
Economics Division
Financial Conduct Authority, UK



Renato Ferrandi
Senior Competition Expert, OECD

The increasing digitalisation of markets and the use of other new technologies has left competition authorities facing emerging competition issues. The structural features of these markets can lead to increased concentration, while remaining short of individual market power. Novel demand-side issues, such as the increased use of big data, have also arisen, which competition authorities have been unable to address through competition enforcement alone. Authorities are also facing emerging regulatory competition issues as the need to keep regulations up to date becomes ever-more important with markets undergoing significant change. Over the longer term, the post-COVID-19 competitive landscape may present new competition issues

Market studies are a flexible tool that allow competition authorities to examine broader competition issues in a market or sector, outside of the context of merger reviews or antitrust investigations¹. According to the OECD, “market studies assess whether competition in a market is working effectively and identify measures to address any issues that are identified. The most common market study outcomes are recommendations for regulatory changes, calls for firms to change their behaviour, or law enforcement interventions”².

Nearly all competition authorities in OECD member countries use market studies in some form in their work, ranging from short, informal assessments to lengthy, formal processes involving multiple rounds of stakeholder input and empirical analysis. The variation in legal frameworks, which differ across jurisdictions, partly explains market studies’ wide range of depth and formality. Nevertheless, commonalities do exist; for example, most competition authorities have some type of power to conduct market studies and this power is usually explicit.³

The objectives of market studies are also broad and vary across jurisdictions. The most common are competition advocacy; enhancing a competition authority’s knowledge of a specific sector; and supporting a competition authority’s enforcement efforts when evidence is uncovered that leads to the opening of an investigation.

This article focuses on the use of market studies that have the specific objective of addressing emerging competition issues. It aims to contribute to the debate on how best to use and adjust the existing competition-policy framework and tools so they better deliver benefits to society in a changing world. In doing so, it looks beyond enforcement tools; competition authorities’ experience in both antitrust and merger cases in various industries has shown that challenges to effective competition do not come solely from anticompetitive behaviour or merger strategies.

For example, when markets are characterised 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, behavioural biases that lead to consumer lock-in, network effects, anticompetitive regulation, or distortions of competitive neutrality. Having the tools to investigate, and where possible remedy, such features is particularly important in the current context of increasing concerns over the trend towards greater concentration and profitability in many markets around the world.⁴

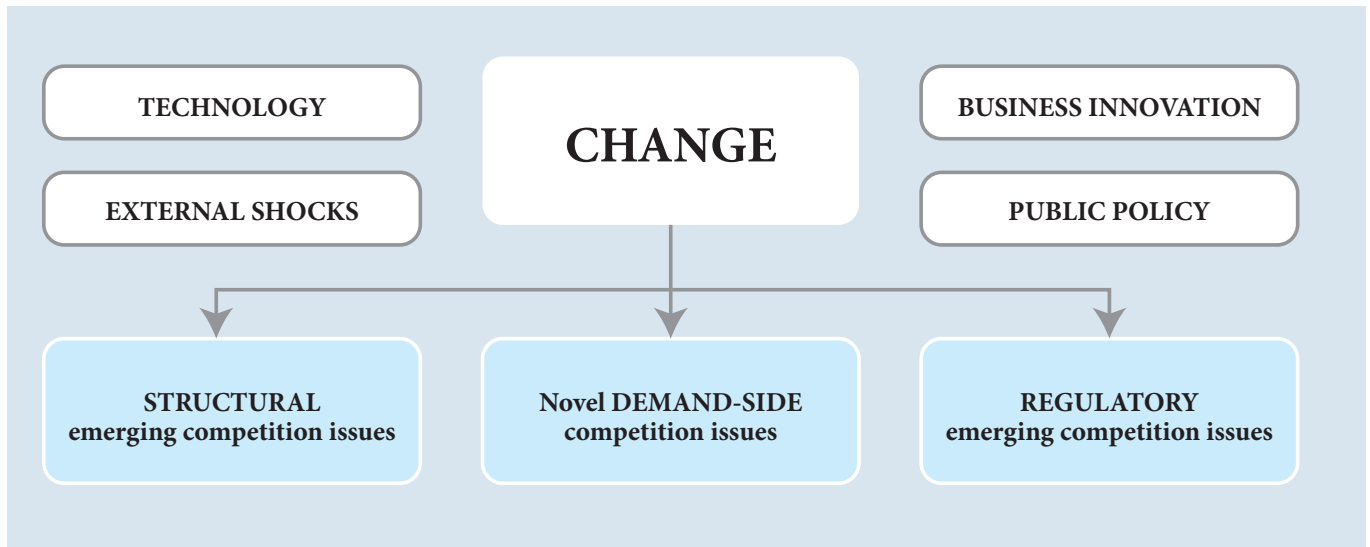
- 1 The term “market study” is interpreted in this note to comprise a variety of instruments used in various jurisdictions featuring similar characteristics, such as sectoral enquiries (European Union and a number of its member states); market enquiries (South Africa); fact-finding enquiries (Italy); fact-finding surveys (Japan); and general studies (US Department of Justice).
- 2 OECD (2018), Market Study Guide for Competition Authorities 2018, <https://www.oecd.org/daf/competition/market-studies-guide-for-competition-authorities.htm>
- 3 OECD (2016), The role of market studies as a tool to promote competition, [https://one.oecd.org/document/DAF/COMP/GF\(2016\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf).
- 4 OECD (2018), Quality consideration in digital zero-price markets, [https://one.oecd.org/document/DAF/COMP\(2018\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)14/en/pdf).

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 behaviour; or new public-sector interventions in markets (whether through policy or regulation or direct participation in the supply and demand side of markets).

As emerging competition issues arise when a market is subject to change, the types of issue competition authorities have faced (or are currently facing) can be categorised in terms of their drivers: changes to the structural characteristics of a market or sector; new demand-side issues; out-of-date (or new) regulatory frameworks; and new public-policy initiatives that potentially change market dynamics (Figure 1).

FIGURE 1. DRIVERS AND TYPES OF EMERGING COMPETITION ISSUES



Source: author

Table 1 summarises the common emerging competition issues currently facing different competition authorities.

TABLE 1. TYPES OF EMERGING COMPETITION ISSUES

<p>STRUCTURAL Emerging competition issues</p>	<p>Even if short of individual market power, structural characteristics such as large economies of scale and scope, strong network effects, high barriers to entry, and “winner-takes-most” dynamics among other structural characteristics, 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’ behaviour and create incentives to compete less vigorously without any direct co-ordination. In certain situations, it can be a side effect of durable market power that insulates firms from competition (although concentration is not on its own proof that this is the case). The increased digitalisation of markets and their platforms’ business models has given rise to structural characteristics that drive highly concentrated markets.</p>
<p>DEMAND-SIDE Novel competition issues</p>	<p>Novel demand-side issues have risen, for example, with the greater use of big data, which allows businesses to collect personal data. These kinds of demand-side issues affect market competition in ways that competition authorities cannot address through competition enforcement alone. These markets are characterised by substantial information asymmetries between consumers and providers about how collected data are being used. An example is companies using complexity in their terms and conditions of use as a strategy to disempower consumers, who often do not read them or find it difficult to understand the amount of data they are sharing and how these are being used. The growth of business models in which products are offered at no cost also presents novel challenges relating to behavioural biases. Receiving the product free can lead consumers not to focus on the quality of the services provided, for example, and this may reflect optimism bias and limited information. Another behavioural bias is consumers tend to express significant concerns about privacy and rate it as important, yet tend not to make product decisions that take it into account.⁵</p>

5 OECD (2018), Consumer-facing remedies, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1326.

REGULATORY Emerging competition issues	<p>When markets undergo significant change, 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 the promotion of competition, entrepreneurship and innovation. Second, there is a question of whether existing regulation remains appropriate to addressing new issues.</p> <p>In addition to regulatory frameworks, changing public-policy initiatives also have the potential to alter market dynamics, such as countries being called to strengthen their commitment to the United Nations Sustainable Development Goals.⁶</p> <p>Over the longer-term, 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 may be combined with protectionist measures for domestic production. This could take the form, for example, of increased trade barriers that weaken import competition.</p> <p>More broadly, industrial policy over the past few years has emphasised the use of selective tools focused on policies such as clustering, place-based and mission-oriented innovation. A move away from these type of policies towards more traditional ones may shield companies from competition and reduce their efficiency and contribution to economic recovery.⁷ Competition authorities' advocacy work, including market studies, can contribute to the design of industrial policies developed with competition principles in mind.</p>
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Advantages and limitations of market studies to tackle emerging competition issues

These changes in competition issues present new and evolving challenges. Competition authorities are unlikely to have sufficient enforcement experience or knowledge of the markets in question to understand potential competition issues and identify how best to address them. The use of market studies may therefore precede other enforcement actions and act as beneficial ex ante tools.

Market studies can be more forward-looking, cover a broader set of issues, better focus on the dynamic process of rivalry, and promote increased competition than can enforcement. This enables the authority to consider market-wide 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 about anticompetitive practices as opposed to lengthy enforcement cases with 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 behaviour may infringe competition law, even where the study finds no specific instances of its occurrence.

Market studies are not without limitations, however. Any recommended changes to legislation tend to be static and can take time to implement. At a time of rapid technological change, how legislation can be changed is key to reducing the risk of existing legislation restraining innovation.

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 rightly comes with extremely tight governance and procedural checks and balances to ensure authorities are accountable and remain within their remit. This inevitably further increases the cost of market studies in terms of time and resources. Table 2 summarises the strengths and limitation of market studies to tackle emerging competition issues.

TABLE 2. STRENGTHS AND LIMITATIONS OF MARKET STUDIES TO TACKLE MERGING COMPETITION ISSUES

STRENGTHS	LIMITATIONS
<p>Forward-looking. Competition enforcement tends to focus, for sound legal and economic reasons, on the actual or potential harm caused by historical or ongoing anticompetitive practices. Market studies contribute by providing the flexibility to be forward-looking. They serve to identify and diagnose emerging competition issues by exploring different drivers and identifying possible solutions.</p>	<p>Risk of static remedies and outcomes. Recommended changes to legislation and regulation tend to be static in nature and can take time to change. In a time of rapid technological change, the methods used to change legislation are particularly important.</p>

6 UN (2015), The 2030 Agenda for Sustainable Development, <https://sdgs.un.org/2030agenda>

7 OECD (2020), Competition policy responses to Covid-19, https://read.oecdilibrary.org/view/?ref=130_130807-eqxnigyo7u&title=OECD-competition-policy-responses-to-COVID-19.

STRENGTHS	LIMITATIONS
<p>Cover a broader set of competition issues. Market studies analyse whether competition problems exist in a sector instead of analysing the conduct of individual firms in a market. These studies can cover a broader set of issues than can be done in competition enforcement. In particular, they are well suited to carrying out holistic analyses of markets in which problems might be market-wide and interlinked factors are creating competition concerns (such as supply-side issues, consumer protection issues, and data and privacy issues).</p>	<p>Risk of recommendations remaining unimplemented. The risk of recommendations not being considered or implemented can be reduced by obliging rule-makers to justify their reluctance to adopt a competition authority's recommendations. Where specific rules on consultation procedures are lacking, certain procedural safeguards or formalisation of the consultation process might be beneficial, such as for less mature competition authorities where consultation appears not to be working.</p>
<p>Focus on the dynamic process of rivalry. Market studies offer the opportunity to focus the analysis on the competition process and not simply on outcomes. This can be particularly important when understanding whether outcomes are competitive becomes more difficult, such as when markets are constantly changing as a result of the forces of innovation, globalisation, or other drivers.</p>	<p>Study costs and time. Market studies can be costly and time consuming – depending on their scope and depth of analysis – for competition authorities and market participants subject to the study.</p>
<p>Play a proactive role in promoting competition. Competition enforcement mainly focuses on preventing the reduction of competition, for example, through mergers, collusion or abuse of dominance. Market studies play a more proactive role in promoting increased competition.</p>	<p>Risk of information from stakeholders not being forthcoming. Not all authorities benefit from the power to require private parties to provide information for market studies. In these situations, authorities need to rely more on the willingness of stakeholders to provide information on a voluntary basis.</p>
<p>Provide flexibility on the design of effective recommendations and outcomes. Much of the work of competition authorities focuses on supply-side interventions. Market studies represent a flexible tool for authorities seeking to improve market outcomes by addressing issues on both markets' supply and demand side. As a result, they can offer targeted, pro-business and pro-consumer solutions to foster competition.</p>	
<p>Involvement in market studies tends to be less legalistic and adversarial. A market participant's involvement is also more open relative to its engagement in enforcement cases. Greater transparency during the market study therefore stimulates co-operative engagement.</p>	

Conducting effective market studies

One of the main problems with market studies is that in most jurisdictions they lack binding deadlines⁸. Yet, at the same time, they are extremely resource-intensive exercises. As a result, without a serious commitment from the competition authority, there is a risk that market studies end up giving way to other priorities and being delayed. This can have a strong negative impact on the motivation of staff working on the study and, ultimately, on the quality of the results, which may finish up as untimely and based on data that have lost their significance.

The decision to engage in a market study should therefore be carefully considered and then followed by a number of steps to ensure a smooth and cadenced development of the project. The OECD's Market Studies Guide for Competition Authorities (2018) and the ICN's Market Studies Good Practice Handbook (2016) provide precious guidance in this respect.

Competition authorities should focus their efforts on few, selected market studies that can genuinely increase their wealth of knowledge. The first step is to **select and prioritise** sectors that require market investigation. The previous section of this

article – “Emerging competition issues” – might be helpful in identifying those sectors most affected by novel and uncharted competition challenges. Other key criteria for selecting the right sectors are strong economic, social or political relevance, a high degree of regulation, or a large record of previous investigations.

The second step is rigorous **scoping and planning**. Competition authorities should resist the temptation to explore all facets of a sector. They should rather clearly identify the borders of their analysis, based on a first hypothesis of the competition issues at stake. Pre-consultation of available studies in other jurisdictions may be helpful to this end. The International Competition Network has created the ICN Market Studies Information Store, a web-based catalogue of ICN members' market studies, categorised by jurisdiction and sector⁹. The authority should then appoint a dedicated project team and agree on a credible timetable. The original plan will most likely need to be revised in the face of changing circumstances, but having clear ideas set out in a desired road map is essential to keep pace.

8 The UK, for example, has statutory deadlines when conducting market studies. See, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/624706/cma3-markets-supplemental-guidance-updated-june-2017.pdf.

9 See, www.internationalcompetitionnetwork.org/working-groups/advocacy/market-studies/market-studies-information-store.

The third step may be the **collection of basic information** through initial desk research. This pre-existing preliminary information usually includes relevant economic data, the analysis of the companies operating in the sector, the characteristics of their products or services, the consumer profile, and a possible regulatory framework. It is a good practice to return to these early steps and run a “sanity check” to make sure that previous assumptions and determinations still hold once the additional information has become available.

Up to this point, a market study is an internal, confidential project. The next stage is when many competition authorities **officially launch** the study, communicating the reasons for the project, its scope and timeline, and any relevant contacts. They usually write a press release, while publishing a statement on their website and social media. Making the market study public is advisable for many reasons. First, it simplifies the interaction with stakeholders and allows unexpected sources of information to come forward. Second, transparency increases trust in an institution and improves understanding of its objectives. Finally, the launch of a market study about a specific sector is already a policy message in itself, because it indicates that the authority is concerned about possible competition restrictions. This might trigger self-initiated pro-competitive initiatives and foster positive solutions.

The fifth step, the **selection of the methodology and the ensuing data collection**, is the core of the research. The most-used tools in this step are stakeholder interviews and requests for information. Surveys can be a valuable alternative when consumers are too numerous or heterogeneous to allow for the systematic use of interviews or targeted data requests. The danger of this phase is a possible lack of focus in the questions, which might result in the gathering of an excessive range of

useless data, while missing the real key points. Starting with a small pilot group, focusing on few questions and then adjusting based on their feedback can be a valuable strategy to ensure clarity and consistency in the questions.

Depending on the outcome of the data-collection process, it might be worth gathering **additional information**. This may also be the right stage at which to consider involving external experts or consultants, and to liaise with sector regulators.

At this stage, the data should be ready for **analysis** using the selected methodological approach or approaches. Depending on the specific objectives and complexity of the market study, the analytical methodology can entail identifying market structure and key characteristics, price analysis, price-concentration analysis, supply- and demand-focused analysis, and a regulatory assessment.

The subsequent, crucial step is the **drafting of the final report**. Summarising the results of many months of research and conveying the key messages in clear, accessible language is a skill. Too often competition experts are too focused on their work to consider their future readers. Yet, all that work will have an impact only as long as the competition authority can present it in a clear, engaging and compelling way. Communication remains a field in which competition experts still have much to learn, despite undeniable progress over the past few years. Table 3 lists a selection of basic drafting suggestions that might be helpful.

TABLE 3. BASIC DRAFTING SUGGESTIONS

- Do not write anything you would not like to read.
- Be focused, clear, and concise.
- Cut everything that is not strictly necessary.
- Tell a story: narration is more convincing than formalism.
- Keep it simple: simple words, clear ideas and short sentences are vital to delivering messages effectively.
- Use data in a powerful way: statistics should be easily understood and refer to experiences to which people can relate.

Equally important is **publishing the findings** of the market study so they reach the relevant audience. This can be done through news releases, press conferences, social-media posts, and dedicated events. Certain competition authorities organise follow-up meetings with the stakeholders and policymakers who contributed to the study. The objective of these communication efforts is not to summarise the report, but rather to deliver a few, powerful key messages to target audiences.

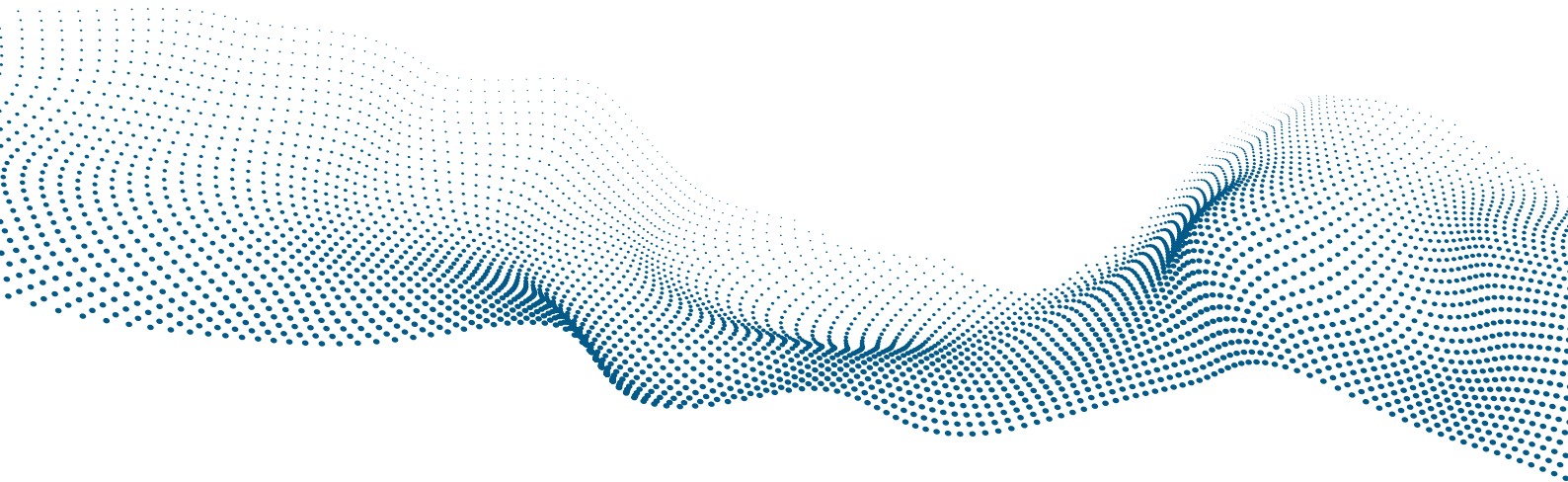
This might seem the end of the project, yet a final step increasingly being taken by competition authorities: **ex post evaluation**.

To this end, the simple question is: did the market study make a difference? To answer this question, competition authorities have to monitor the implementation of their recommendations and determine whether competition problems persist in that sector at a distance of time. This is obviously important to foster concrete results of the study, but also has a more general value in terms of knowledge management. In particular, it allows the competition authority to learn from its mistakes in conducting market studies, identifying possible solutions, and triggering actual change.

Conclusions

On balance, 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 to tackle them from the perspectives of competition policy, competition enforcement, regulation, or other policy

solutions before consumer harm becomes significant. The use of this market studies contributes to the debate on how best to use and adjust existing competition tools to better deliver benefits to society in a changing world.



Increasing mark-ups and concentration: a cross-country perspective using firm-level data



Sara Calligaris
Economist, Productivity Innovation
and Entrepreneurship Division
OECD



Chiara Criscuolo
Head of Division
Productivity Innovation
and Entrepreneurship Division
OECD

Significant productivity differences exist across firms (Syverson, 2004)¹⁰. Recent OECD research has unveiled that this “corporate inequality” - measured as the productivity gap between successful firms and the rest of businesses within the same industries - has increased significantly since the 2000s both at the global level (Andrews et al., 2016) and within countries (Berlingieri et al., 2017).

Concomitant with this increase in “corporate inequality”, in OECD countries - and especially in digital-intensive sectors - there has been a significant increase in mark-ups and revenue concentration.

Although historically most of the evidence has focused on the United States, similar trends in these proxies of competitive environment have become evident for other countries. Certainly, the evolution of each of these indicators taken on its own might not be a very meaningful indicator of change, as they can all be subject to measurement and methodological criticisms. However, these changes considered in combination with each other, suggest that something is changing about competitive dynamics more generally, driven by common structural factors.

Mark-ups have increased especially in digital intensive sectors

Recent firm-level evidence building upon Calligaris et al. (2018) points to increasing differences in firm-level mark-ups, defined as the wedge between unit prices and marginal costs.¹¹ Figure 1 provides evidence of an increase in mark-ups since the early 2000s across 12 countries of the Euro area, driven mainly by increases in the top half of the mark-up distribution (Figure 1, Panel B). Interestingly, these results suggest that firms operating in digital intensive industries¹² have on average higher mark-ups than firms in less digital intensive industries (Figure 1, Panel A), with the difference becoming significantly larger over time.

Mark-ups are related to the competitive environment in which firms operate, and therefore an increasing trend in this measure might be an indicator that market power is growing, and consequently competitive intensity is weakening. For example, firms in highly regulated sectors, where barriers to entry are

high, have been found to enjoy positive rents and charge higher mark-ups (Griffith et al., 2006).¹³

However, higher and increasing mark-ups might also be a reflection of structural changes in production technologies, particularly important in digital intensive sectors due to the increased role of intangible assets. In digital and intangible intensive sectors, where marginal costs are low but fixed costs are high, prices might not drop to the same extent as marginal costs because firms need to generate revenues to cover fixed costs (e.g., related to innovation investments), and this will translate in higher mark-ups. In this case, profits remain low and higher mark-ups do not necessarily equate to market power. Therefore, in these cases the increase in mark-ups is likely to reflect the greater impact that technological innovation is having on markets during the digital transition.

10 This document, as well as any data and any map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area. The opinions expressed and arguments employed herein are those of the authors and do not necessarily reflect the official views of the OECD or of the governments of its member countries. This article draws significantly from the paper “Changes in productivity and industry dynamics in the digital transition: cross-country evidence from firm-level data” (by C. Criscuolo, Competition Law & Policy Debate, 2019), and from joint work with Matej Bajgar, Andrea Greppi, Luca Marcolin, Gianpiero Mattera, and Jonathan Timmis. We are indebted to them all. We would also like to thank Isabelle Desnoyers-James for excellent statistical assistance. Responsibility for any errors in the article remains our own. E-mails: sara.calligaris@oecd.org and chiara.criscuolo@oecd.org.

11 Firm-level mark-ups are estimated following the methodology proposed by De Loecker and Warzynski (2012), who build on Hall (1986).

12 Digital intensive industries are defined following the taxonomy developed by Calvino et al., (2018), who develop a taxonomy of digital intensive industries classifying economic activities according to different dimensions of digital intensity. This taxonomy ranks industries according to their digital intensity, aiming at characterising the digital transformation in its technological component (using the share of ICT tangible and intangible investments and the share of intermediate purchases of ICT goods and services); the human capital required (focusing on the share of ICT specialists in total employment); the way it changes how markets operate (proxied by the share of turnover from online sales); and the extent to which automation is occurring (using the stock of robots per hundreds of employees) in different industries of the economy. The interested reader can find all the methodological details in Calvino et al. (2018).

13 OECD (2016) discusses how partitioning strategies enable firms to raise mark-ups.

Industry concentration has increased in the last decade

Several studies (e.g., Autor et al., 2020) consensually point also to an increase in market concentration in the United States over the last decades. Evidence for Europe remains more limited and less clear cut.¹⁴ Given that industry concentration is sometimes seen as a proxy for the degree of competition, these different trends in concentration have been interpreted by some economists as indicating that European markets have become more competitive than those in the United States (Gutiérrez and Philippon, 2018).

For these reasons and to improve the measurement of industry concentration in Europe, build new evidence on industry concentration trends in Europe and in North America. They provide evidence on industry concentration at both the country and the world-region level, by: calculating country-level industry concentration measures from novel data representative of the entire firm population in 12 European countries; and by developing a methodology for calculating industry concentration at the supranational level. Building upon Bajgar et al. (2019), Figure 2 documents an increase in industry concentration in 12 countries of the Euro area between 2000 and 2018 of the order of 8 percent. Differently from mark-ups, the increase is observed does not seem to be significantly related to the digital-intensity of the sectors.¹⁵

However, the use of industry concentration measures as proxy for the degree of competition in a market is not free from criticism.¹⁶ First, industry concentration is a much broader measure than market concentration. The fact that a large share of industry activity is being held amongst a few large firms will only translate in concentrated product markets if those large firms are all leading firms in the same market for specific products or services that are close substitutes (OECD, 2018; Werden and Froeb, 2018). An increase in industry concentration at the national level could actually lower concentration at the local market level, if the increase in concentration is driven by the expansion of the largest players into new geographical areas (Rossi-Harnsberg et al., 2018). Second, as discussed in the case of mark-ups, industries with high concentration may still be very competitive if concentration is the result of high fixed costs or strong network effects, but close rivals still compete aggressively for the market, or the threat of entry is high. Thus, increase in concentration could be well related to anti-competitive regulations or the competition policy environment, but it could also be that technological developments, integration of global markets or sustained innovation allow the most efficient firms to increase their competitive edge over other firms.

Conclusion

The article proposes a brief firm-level based overview of evidence on recent changes in measures of competitive environment. The first aim has been to extend the evidence that was well-known for the US to a broader set of OECD countries; the second to bring together two different indicators – industry concentration and firm mark-ups – in a coherent way.

Each measure captures different features of the competitive environment and needs some caveats, but they show consistent patterns, suggesting that something is changing about competitive dynamics more generally. Indeed, taken together, these different pieces of evidence seem to point to a change in

the way market forces work, rather than only reflect regulation or antitrust enforcement failures.

The evidence brought together in the article suggests that most OECD economies appear to be less dynamic, with increased industry concentration and mark-ups. Whether these findings are the result of a reduction in competition, or a sign of competition in action remains unclear and the subject of a heated debate. A better understanding of the causes driving the changes documented is required before drawing conclusions that would be relevant for policy.

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¹⁴ Bessen (2017), Furman and Orszag, (2015), Gutiérrez and Philippon (2017a,b), and Grullon et al. (2017) provide evidence of an increase in product market concentration since the 1980s in the United States. Gutiérrez and Philippon (2017a) show that, contrary to trends in the US, concentration in Europe has been stable (or decreased), similarly Valletti et al. (2017) have found little indication of increasing concentration.

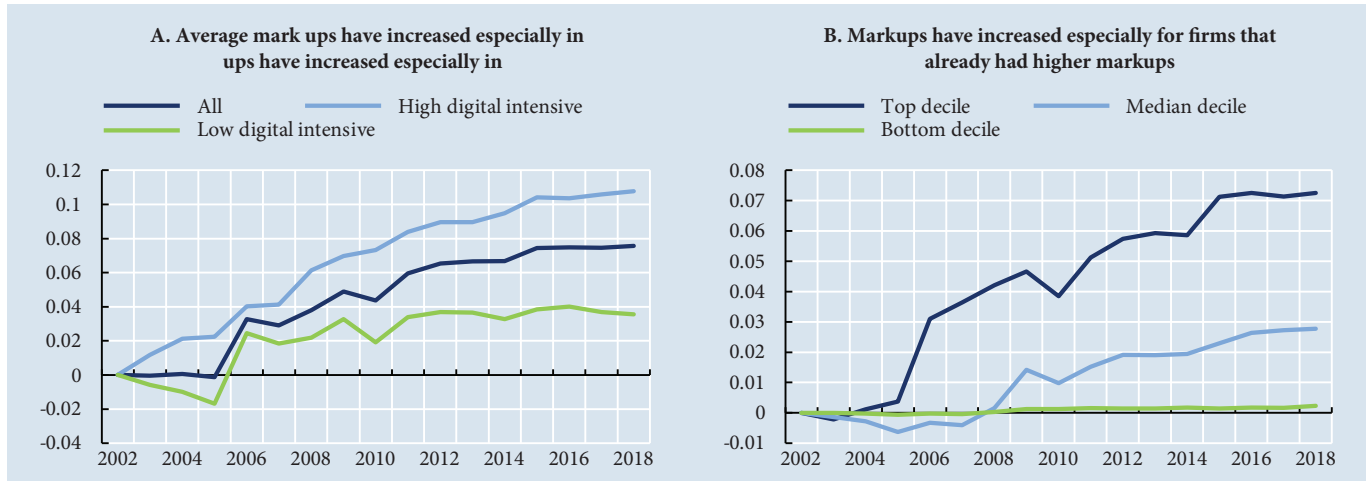
¹⁵ That notwithstanding, recent trends in mergers and acquisition activities point to an increase in the number of acquisition of firms that operate in digital intensive industries, but the (revenue based) size of targets is relatively small, so this might explain why this increase does not translate in significant differential changes in the concentration numbers in these industries.

¹⁶ Nevertheless, carefully documenting trends in industry concentration is important because when considered together with a range of additional metrics, it can help provide additional evidence on whether significant changes are occurring (see OECD (2018) for additional details on the use of industry concentration as a proxy for competition intensity). An increasing scale of a few firms may also mean fewer buyers in input markets and local labour markets – i.e. monopsony – potentially impacting contractual terms for suppliers and workers (OECD, 2008). In addition, lobbying is more likely to be undertaken by larger firms and by firms in concentrated markets, which may inform policy differentially in concentrated industries (Dellis and Sondermann, 2017). Finally, high concentration may impact firm risk-taking behaviour if they can be seen as “too big to fail”.

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Figures

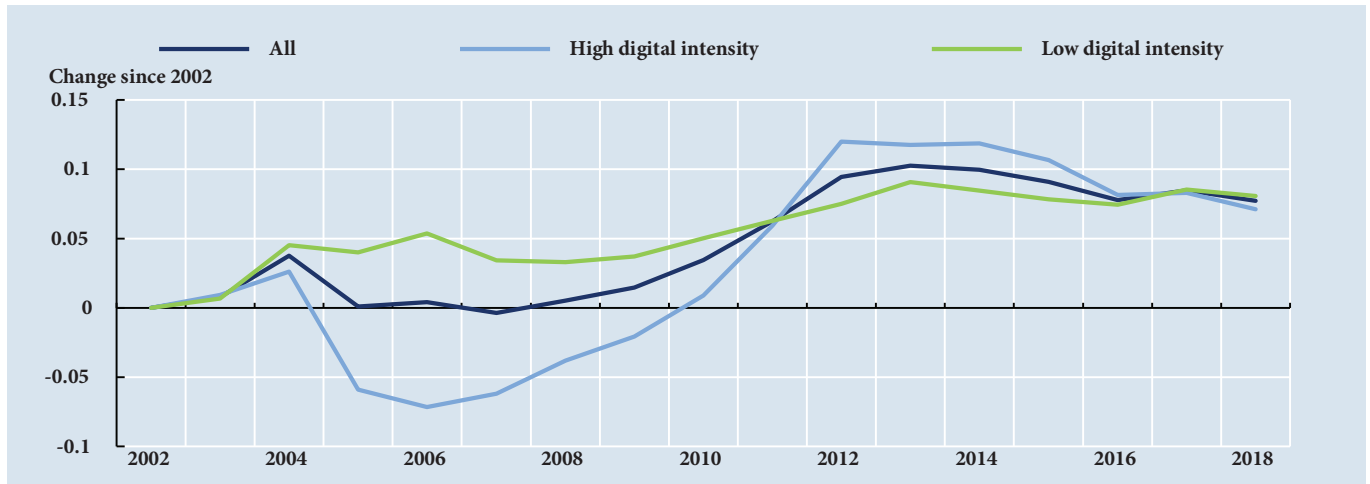
FIGURE 1: MARK-UPS HAVE INCREASED ESPECIALLY IN DIGITAL INTENSIVE SECTORS AND AT THE TOP OF THE DISTRIBUTION



Note: The graph is based on Orbis data. Unconditional averages of firm-level log markups, assuming a Cobb-Douglas production function with 3 inputs (K, L, M) and intermediates as fully flexible input. The countries include BEL, DEU, EST, ESP, FIN, FRA, IRL, ITA, LVA, NLD, PRT, SVN. Included industries cover 2-digit manufacturing and non-financial market services. In left panel, the graph reports log markups in high digital intensive industries (light blue line), low digital intensive industries (green line) and overall (dark blue line), and indexes the 2002 level to 0. Hence the vertical axes represent log-differences from the starting year which, given the magnitudes, approximates well for growth rates. The digital intensity of industries is defined using the digital intensity indicator of 2013-15 constructed by Calvino et al. (2018); industries are classified as “high digital” if they are in the top quartile of the industry distribution in terms of digital intensity. In the right panel, the graph reports log markups-ups in the bottom (green line), the median (light blue line) and the top (dark blue line) decile of the markup distribution, and indexes the 2002 level to 0. Deciles of the distribution are defined relative to the rest of the firms in each 2-digit industry-year.

Source: Elaborations on Calligaris, Criscuolo and Marcolin (2018)

FIGURE 2: INDUSTRY CONCENTRATION HAS INCREASED IN THE LAST DECADE



Note: The graph is based on Orbis-Zephyr data. Share of sales accounted for by 8 largest business groups in the available countries of the euro area. The countries include BEL, DEU, EST, ESP, FIN, FRA, IRL, ITA, LVA, NLD, PRT, SVN. Included industries cover 2-digit manufacturing and non-financial market services. The graph reports the cumulative weighted average change in industry concentration in high digital intensive industries (light blue line), low digital intensive industries (green line) and overall (dark blue line), with weights given by each industry's share in the total sales across all industries of the region. The graphs can be interpreted as the cumulated absolute changes in levels of sales concentration for the mean 2-digit industry. The digital intensity of industries is defined using the digital intensity indicator of 2013-15 constructed by Calvino et al. (2018); industries are classified as “high digital” if they are in the top quartile of the industry distribution in terms of digital intensity.

Source: Elaborations on Bajgar, Berlingieri, Calligaris, Criscuolo and Timmis (2019).

Market Studies in Moldova



Ion Maxim
Vice President, Competition Council of the Republic of Moldova



Diana Rusuhanu
Head of Research and Analytics
Department Competition Council of the Republic of Moldova

The Competition Council of the Republic of Moldova conducts market studies in order to gain in-depth knowledge of markets and identify malfunctioning or competitive risks, as well as to issue recommendations for improving the competitive environment.

One of the competition authority's most important tasks and key to efficient and fruitful market studies is the selection of the economic sectors to be investigated. Given that both human and time resources are limited, a complex and exhaustive approach is required to select the correct market to study. It is necessary to select those sectors that are of particular importance for the national economy and that show signs of a possible distortion of competition.

Based on these concerns, the Competition Council has developed and implemented a methodology for monitoring the integrated risk indicator of competition distortion, an indicator calculated annually based on statistical information at an economic sectoral level. The integrated risk indicator is based on the structure-conduct-performance model, according to which the competitive environment has a direct impact on market structure, which in turn influences the conduct of enterprises in the market and so affects the performance of the economic sector.

The integrated risk indicator is designed to function as a preliminary scanning tool for all sectors of the national economy in order to identify those sectors that are at increased risk of distorting competition. As the value of the integrated risk indicator is insufficient in any examined sector, the Competition Council requires further analysis of its specifics and developments so it can make findings on the state of competition in that sector of the national economy. While there are risks to competition if an economic sector has a high-value integrated risk indicator, this does not automatically mean that it is suffering from competition distortion. At the same time, a low value of the integrated risk indicator does not exclude the existence of risks or competitive problems.

The first stage of the procedure for determining the integrated risk indicator is the calculation of nine relevant indicators for each economic sector.

1) Total turnover and

2) **total assets** reflect the importance of the examined sector for the national economy. The value of these indicators reflects the share of the economic sector in GDP and its production

capacity. Sectors with higher values of these indicators will receive a higher score in the final calculation.

3) Total number of enterprises;

4) coefficient of variation of sales revenues;

5) **coefficient of asset variation** are indicators that reflect market structure.

The **total number of enterprises** in the economic sector is determined by totalling the active enterprises that generated revenue in the previous year. A large number of enterprises active in the market may mean a lower level of concentration and a more competitive situation.

The **coefficient of variation of sales revenue** is a dimensionless parameter that reflects the degree of heterogeneity and concentration of an economic sector depending on the sales revenue generated by enterprises. A lower value of the sales revenue coefficient produces a higher Herfindahl-Hirschman Index (HHI) market-concentration score, and an unfavourable competitive environment. An increased coefficient of variation of sales revenue means an intensification of competition in a sector, whose structure becomes less uniform. At the next stage, a higher score is given for small values of the coefficient of variation of sales revenues, and a lower score will for high values.

The **coefficient of asset variation** in a given economic sector reflects the degree of its heterogeneity, depending on the production capacities held by enterprises. The existence of an obvious leader in production capacities means an increased risk of distortion in the competitive environment. High values of the coefficient of variation of assets lead to a higher score, and vice versa.

6) Relative change in the number of enterprises compared to the previous year;

7) relative profitability; and

8) relative change in average labour productivity.

The **relative change in the number of active enterprises compared to the previous year** reflects recorded inflows and outflows in the examined sector. The increase over time in the number of enterprises active in a given economic sector is favourable for competition in this sector, and leads to a low score. Companies exiting the market and a decrease in their number reflect an unfavourable competitive environment, and so lead to higher score.

Relatively high values of **profitability** in one economic sector compared to others may be a sign of low effective competition between companies, which means a high score. Relative changes in labour productivity are an indicator of the efficiency of resource use. Competition stimulates productivity growth. The increase in labour productivity over time in an economic sector is a sign of intensified competition, and so scores lower.

The final indicator is

9) the importance of the economic sector for consumers.

This is determined by calculating the share of each category of expenditure in the total average monthly consumer expenditure per person.

Series of structured data – with significant variability – are obtained for each of the nine indicators; these represent the values of the indicator for each of the sectors of the national economy. As the data series obtained are not homogeneous, the results need to be translated so they can be quantified by assigning points, in order to aggregate them into an integrated risk indicator.

For this next stage, each economic sector a score is given a value of between one and seven, depending on 1) the correlation between the calculated indicator and the risk of distorting the competitive environment, and 2) how the calculated indicator for this economic sector is positioned against this indicator's minimum, average and maximum values registered at the level of national economy.

As a rule, a higher score is given to economic sectors of particular importance to the national economy and to consumers, or those that present an increased risk of distorting the competitive environment.

Finally, as an aggregate indicator, the integrated risk indicator for each economic sector is determined by totalling the sectoral scores for each of the 9 relevant indicators. After calculating this figure, the final ranking is elaborated and published in a table in which all economic sectors are presented according to the Classification of Activities in the Moldovan Economy (CAEM) sorted in descending order depending on the obtained value of the integrated risk indicator.

The experience of the Republic of Moldova has shown the practical application of this methodology and that assigning priority levels to economic sectors depending on the integrated risk indicator can be an effective method of identifying

economic sectors that should be studied in more detail by the competition authority.

For example, chemical trading has been identified and selected for study as a sector with a high risk of distorting the competitive environment following the calculation of the integrated risk indicator based on available statistical data for previous years. In 2019, a study of the chemical market was initiated, in particular to examine the retail market for phytosanitary products and fertilisers. The market study determined that the characteristics of this particular market in Moldova showed a possible distortion of competition. Following a more detailed examination of offers submitted to agricultural producers, the Competition Council also found that there were signs of an anticompetitive agreement concerning the marketing of phytosanitary products and fertilisers by the main market players.

As a result, an investigation was launched in 2020 into signs of anticompetitive agreements, revealed by price fixing, in the phytosanitary products and fertiliser market. The investigation ended in March 2021 with the discovery of a violation and the largest cartel ever detected by the Competition Council: four companies directly and indirectly had established and fixed sales prices and other trading conditions when trading Bayer and Belchim branded phytosanitary products and fertilisers with third parties in Moldova over the period 2015-2020. This finding resulted in the Competition Council imposing perhaps the largest administrative fine ever in Moldova: the four enterprises were fined a total of EUR 4.4 million for participating in hardcore horizontal cartel agreements.

The investigation uncovered direct evidence that demonstrated communications between the companies fixing prices and certain conditions for the trading of phytosanitary products to agricultural enterprises in the country. These cartel agreements raised prices, which were found to be 28-43% lower in Romania and Ukraine than in Moldova. Consumers had been forced to buy agricultural products at higher prices, and domestic agricultural products had become less competitive.

Given the results obtained from this process of selecting potential markets studies based upon sectoral screening of the national economy according to risk criteria, the Competition Council will continue to use this tool in planning its activity, including taking into account its future development and improvement.

Experience of the Serbian Competition Authority with Market Studies



Jelena Popović Markopoulos
Senior Advisor,
Division for Economic Analyses
Commission for the Protection of
Competition, Serbia

Introduction

Market studies are considered a useful tool for competition authorities seeking to obtain a greater understanding of the functioning of a certain market or market segment.ⁱ Not only do they provide a snapshot of a market at a specific period of time, but they can also illustrate the dynamics of competition development over the years. In this way, they can provide competition authorities with indications of the qualitative

drivers behind competition (or its lack), in addition to securing a robust statistical basis. The value of market studies cannot be questioned, particularly as challenges to effective competition do not come solely from anticompetitive behaviour. This argument is especially true for competition authorities, which are often relatively new and may lack the necessary enforcement experience.

Market studies by the Serbian Commission for Protection of Competition

In the Republic of Serbia, the Commission for Protection of Competition (CPC), the national competition authority, was created in 2006. Its competences are set out in Article 21 of the Law on Protection of Competition, and include a delegated power to “monitor and analyse the conditions of competition in individual markets and in individual sectors.”ⁱⁱ

However, the legal basis for sectoral inquiries is set out in Article 47 of the Law, according to which they may be launched by the CPC when price movements or other circumstances indicate the possibility of restriction or distortion of competition. To carry out sectoral inquiries, the CPC is entitled to require undertakings to submit all necessary information or documents, including agreements, decisions or notices related to concerned practices. If undertakings fail to comply with a request for information, they may be subject to procedural penalties, set out in Article 70 of the Law.ⁱⁱⁱ

The CPC predominantly undertakes market studies in-house; only three inquiries have been partially or entirely commissioned so far. In 2010, to strengthen its capacities to conduct market studies and economic analyses in general, the CPC established a separate division, the Division for Economic Analyses, which now conducts two types of market studies - sectoral inquiries, as comprehensive in-depth research projects, and inquiries into competition conditions in a market, as more flexible and smaller-scale research tasks.

Since its formal establishment, the CPC has completed 20 sectoral inquiries^{iv} and 6 inquiries into competition conditions in a variety of markets; 5 sectoral inquiries are currently underway. Although the two types of market studies differ in terms of scope and investigative powers, both may result in the

same outcome. One major reason sectoral inquiries have been given priority is that inquiries into competition conditions lack sanctions for failing to submit the required documentation. Namely, in a sectoral inquiry, the CPC is entitled to issue mandatory requests for information, while inquiries into competition conditions primarily rely on information volunteered by market participants and other stakeholders.

The decision about which market to analyse is made by balancing different criteria. Priority is often given to the importance of a particular market for the country’s overall economic development, its impact on other (adjacent) markets and consumer benefits, together with the urgency of the issue in question. In its practice so far, the CPC has prioritised markets that have recently been liberalised (such as those for petroleum products and rail-freight transport); markets where major structural changes have occurred (such as those for sugar and sugar-beet production and sale, wholesale of mineral fertilisers, and food retail), and markets that have developed rapidly (such as software and IT equipment). The CPC has also focused on markets for which it received a number of complaints from market participants or requests for individual exemption of restrictive agreements (including markets for sports footwear, clothing and equipment, insurance, and tyres), as well as markets that have been featured in the media (such as that for baby equipment) due to their sensitive nature. Lastly, certain inquiries have emerged from market changes caused by sudden or unusual price movements (such as in the markets for raspberry purchasing and export, and sunflower production and sales) or market shortages (such as the of milk and milk products production and processing market).

In its market studies the CPC always combines primary and secondary research. In general, semi-structured questionnaires for market participants and other stakeholders represent the main source of information, complemented by relevant publicly available data and personal interviews as needed. Collected data and information are processed using qualitative and quantitative techniques, selected according to the nature of available data and their completeness, as well as the scope and the specific purpose of the inquiry.

The vast majority of the completed market studies have resulted in competition advocacy, in the form of non-binding recommendations to relevant authorities mainly addressing necessary changes in the relevant regulatory framework. Three market studies have generated, directly or indirectly, competition infringement proceedings, while two others resulted in findings aimed at facilitating the drafting of respective block-exemption regulations. Finally, several inquiries have indicated the need to create a comprehensive, sector-specific database and to engage in more frequent market monitoring.

When conducting its market studies, the CPC co-operates closely with all relevant stakeholders, including central and local government institutions, sectoral regulators, statistical office, chambers of commerce, and other professional associations. Co-operation is mainly aimed at gathering valuable data and information, as well as ensuring that any recommendations issued after an inquiry are fully implemented, despite being voluntary. The most recent example of such co-operation was during the sectoral inquiry into tour operators, the findings of which were published in May 2021.

Conclusion

Depending on the particular legal framework and its practical enforcement, market studies may range from simple fact-finding exercises to multi-year sectoral inquiries. In its work since 2006, the CPC has mainly used market studies to obtain valuable information about the functioning and dynamics of a market, against the backdrop of the relevant regulatory environment, previously received complaints, recent structural changes or external shocks.

That inquiry was triggered by a number of complaints by tour operators related to certain problems they were facing, notably related to difficulties in obtaining the financial guarantees and other financial instruments necessary to renew their licences. The inquiry was launched in February 2020, just before the outbreak of the COVID-19 pandemic, which worsened the situation in the tourism sector in Serbia and further highlighted the shortcomings in the licensing process for tour operators.

Based on the inquiry's conclusions, the Commission issued recommendations addressed to relevant authorities and market participants. These contained specific proposals to amend the relevant regulatory framework and in particular, the rulebook on travel guarantees, as well as to analyse the reasons why banks and most insurance companies are not active in the travel-insurance market. Insurance companies have been advised on potential anticompetitive effects of co-insurance agreements and the appropriate procedure to follow, while tour operators have been instructed that the criteria for selecting a company to insure them should be clearly defined in advance. Furthermore, the establishment of a guarantee fund was proposed to the competent authorities, which would allow full compensation for all tour operators in insolvency cases. As certain changes in the relevant regulatory framework came into force in late 2020, just before the inquiry's final report was released, the CPC concluded that it is necessary to continue monitoring this complex and dynamic market.

Despite the general benefits of sectoral inquiries, their use is not without its limitations. Complex market studies take time and engage significant human resources, which, in case of tight deadlines makes them a less appropriate tool. For those reasons, exposure to international practice and exchange of experiences between competition authorities can certainly prove useful.

Sectoral Inquiry into the Market for Hospital Services in Albania



Professor Juliana Latifi
former Chair,
Albanian Competition Authority



Mimoza Kodhelaj
Director,
Albanian Competition Authority

1. Legal bases and methodology

The Albanian Competition Authority (ACA) has the authority to launch a market study (MS) or a sectoral inquiry (SI) in a sector of the economy to understand markets that have not previously been under investigation, as set out in Article 41 of Law No. 9121/2003 on Competition Protection. Among the subjects included in the resulting report are a legal assessment, identification of market players, market structure, the role of regulators, and barriers to entry or exit. ACA may conduct MS or SI of its own initiative or following a request from the parliament or other regulators if price rigidity or other factors suggest that competition is being restricted or distorted.

The methodology used is based on best practices from OECD roundtable discussions practices,^v the International Competition Network's Market Studies Good Practice Handbook,^{vi} European Commission competition publications,^{vii} and the structure-conduct-performance model. MS and SI may result in a Competition Commission decision (CCD) to open in-depth investigation or recommendations – without enforcement actions – for regulators or obligations for market players.

2. Hospital services market

An SI in the hospital services market was launched in 2018 after CCD No. 552/2018^{viii} and studied the period from January 2016 to December 2019. For the collection of necessary facts and data, requests for information, based on Articles 33 and 34 of Law No. 9121/2003, were sent to public and private hospitals, the Ministry of Health and Social Protection, and the Compulsory Health Insurance Fund (FSDKSH).

The hospital-services market in Albania is based upon Law No. 10107/2009 on Health Care in the Republic of Albania, as amended by Law No. 9106/2003 on the Hospital Service in the Republic of Albania, which aims to regulate the organisation, functioning, and control of hospital service. Hospital service providers are either public or private depending upon an institution's financing and affiliation, and are also divided into general and specialised. The hospital-services market in Albania is mainly public and organised into three levels:

primary, secondary, and tertiary services. Prices in public hospitals are approved by Ministry Order No. 28/2016 on the Referral System and Tariffs for Public Health Service, which defines the functioning of the referral system used in patient diagnoses: initially by a general practitioner, followed by a more in-depth visit to a specialist doctor, and then, if necessary, by hospital. Private hospitals' service charges are set by their governing bodies. Patients often have long-term relationships with a particular service provider, which can have exclusionary effects for other competitors. A patient's demand for hospital service is determined by the doctor. Private hospitals must compete with public hospitals in terms of quality and variety of services, while a patient must balance cost and quality when choosing between public and private services. There are currently 13 private hospitals operating in Albania, mainly located in Tirana.

3. Findings of the sectoral inquiry

The hospital-services market is regulated by current legislation and regulators. In the public sector, the Ministry drafts and is responsible for policies, strategies and regulation, as well as co-ordination of all actors within and exterior to the system.

The high barriers that restrict the entry of potential competitors in the market include:

- **Legal barriers, rules, licences, and specific criteria.** The Ministry recognises, opens, classifies and licenses public and private hospitals, following the fulfilment of conditions and standards based on technology and specific requirements. Legal entities seeking to exercise in the field of private hospital services must apply to the National Business Centre – the government body that issues business

licences – in addition to meeting the requirements set out in both Law No. 9106/2003 and Decision of the Council of Ministers (DMC) No. 910/2008 on the Approval of Private Activity in the Field of Health.

- **Economic barriers of structural nature.** The financial costs of initial or expansion investments in the hospital service are high, in terms of both premises and medical and electromedical equipment. High economic barriers to entry also result in high barriers to exit from the market (bankruptcy) where the costs of loss are very high. The main private hospitals in Albania are foreign investments.
- **Strategic barriers related to governance policies.** In October 2015, the government awarded a dialysis service concession contract to Diavita, which constitutes a special right. Under Article 69 of Law No. 9121/2003 on the Obligations of Central and Local Administration Bodies, each draft normative act must be evaluated in advance by the ACA. The granting of special rights also requires ex ante evaluation by the ACA. Private hospitals that hold such special and exclusive rights must respect competition principles and rules, and comply with the provisions of Article 9 of Law No. 9121/2003 regarding abuse of dominant position; that is the imposition, directly or indirectly, of unfair purchase or sale prices or other unfair trading conditions, and the restriction of production, markets or technical development.

In terms of **market structure** and **conduct assessment**, the SI gave insights on market structure and concentration, and the analysis of prices applied by public and private hospitals regarding service packages for dialysis, cardiology and cardiological surgery, kidney transplants, cochlear implants, cataract treatment, and radiotherapy.

These service packages are fully covered by the FSDKSH as foreseen in Law No. 10383/2018 on Compulsory Health-Care Insurance in the Republic of Albania, and Decision of the Council of Ministers (DMC) No. 308/2014 on the Approval of Health-Service Packages to be financed by FSDKSH in Hospital Service. FSDKSH covers expenses for both public and private hospitals, which makes them competitive. The FSDKSH Administrative Council (ACF) approved Decision No. 88/2014 on the Rules, Criteria and Organisation of the National Register of Packages Funded by FSDKSH, in which Article 11 states: “If at a certain time there are no free beds in public hospitals, then

an authorised officer of FSDKSH may register a patient in a private hospital that has a contract with FSDKSH”, and Article 12 states: “In cases outside medical and technical capacities, and in new cases the registration in private hospitals is done equally, in alphabetical order, taking into account the specifics of the service.” Referring to Article 11, public hospitals are the priority service providers.

The dialysis service package is provided by both public and private hospitals. Market concentration is extremely high as the concessionaire Diavita has 30% of the market, including all dialysis services in several districts. The American Hospital and the International Hospital have 55% of the market, while the public University Hospital Centre has only 10%. The American Hospital and the International Hospital hold a dominant position in the dialysis service.^{ix}

For the dialysis service, two prices are applied: EUR 92 for each session offered by Diavita and EUR 99 for each session offered by public and non-Diavita private hospitals. The efficient competitor test and financial statements show Diavita’s positive financial results, with a profit rate of 6.2%. Diavita offers only the dialysis service, which implies that the revenues cover costs, so the price of EUR 99 is a fair price, which ensures the efficiency of the service.

For other service packages, cardiac packages, radiotherapy, and cataract treatment are mainly covered by the public University Hospital Centre, while kidney transplant packages are covered by the American Hospital. Neither kidney transplants nor cochlear implants are undertaken in public hospitals.

It was found that there is unequal distribution of services between private hospitals in the provisions of ACF. The American Hospital and the International Hospital have received the largest share of funds from FSDKSH: around 39% of total funds, 62.6% of funds for dialysis services, and 1% of funds for kidney transplantation. Expanding the number of service packages covered by FSDKSH would increase the degree of service substitutability in public and private hospitals by making them more competitive.

In terms of performance, all hospitals, with the exception of one private hospital, were loss-making. A lack of profit is accompanied by a decrease in capital, uncertainty around continuing economic activity, a lack of ability to invest, and is directly linked to an inability to reduce prices.

4. Decision of the Competition Authority and final remarks

On 23 September 2021, the ACA published Decision No. 835, which made the following recommendations.

1. **The Ministry should request an evaluation from ACA for each draft normative act that specifically deals with:**
 - a. quantitative restrictions concerning trading and market access
 - b. establishment of exclusive or special rights, in certain areas for certain undertakings or products
 - c. the imposition of uniform practices in prices and selling conditions.
2. **FSDKSH must ensure fair distribution of service packages, as set out in DMC No. 308/2014, so that all private hospital providers are placed on competitive terms.**

The hospital services market should be monitored by ACA for one year, particularly the service packages financed by the FSDKSH.

Sectoral Inquiry into the Electricity Market in Bulgaria



Nevena Nikolova-Melikova
State Expert, Antitrust Department
Commission for Protection
of Competition, Bulgaria



Iva Nakova
State Expert, Antitrust Department
Commission for Protection
of Competition, Bulgaria

Through Decision No. 152/13.02.2020, the Commission for Protection of Competition (CPC) began a sectoral inquiry of the competitive environment of the wholesale electricity market at freely negotiated prices in Bulgaria. The inquiry covered the period from 1 January 2016 to 30 September 2019. In view of information received in the course of the proceedings, the CPC examined the specifics and functioning of the electricity exchange market in which wholesale electricity trading takes place.

The analysis found that the process of supplying electricity to end users is vertically structured and covers the following activities: production and generation, transmission, distribution, supply, and the wholesale and retail electricity trade. The overall functioning and interaction of activities within the energy system are secured by the existing balancing market.

A characteristic feature of the studied period was that electricity production in the country permanently exceeded consumption, which has effects on quantities imported and exported. During the period, the export of electricity was almost three times the import. There was a tendency to reduce imports of electricity, while maintaining the volume of both produced and consumed electricity in the country.

The largest share of total electricity generation for the period was that of thermal power plants, which generated between 40% and 45% of total production, followed by the nuclear power plants, with a share of 39% to 43%. Third was hydropower, with a share of between 7% and 11%. The share of electricity produced by factory power plants (6%) and renewable energy sources (3%) was a constant value.

The electricity market in Bulgaria is based upon a hybrid model divided into two market segments: a regulated segment in which pricing is regulated by the Energy and Water Regulatory Commission (EWRC), and a transactional segment with freely negotiated, market prices.

As part of the market segment, the Independent Bulgarian Energy Exchange (IBEX) began trading in January 2016, initially with a day-ahead market segment, followed shortly afterwards by a bilateral-contracts segment. The latter offers long-term standardised products with a delivery period of one day to one year. In April 2018, the Intraday market segment was added. The exchange trading is licensed to IBEX EAD, a subsidiary of Bulgarian energy holding company EAD.

Until the beginning of 2018, electricity producers mainly sold excess energy through periodic tender procedures, carried out on online platforms, with quantities offered announced in advance. In order to stimulate the wholesale market on IBEX, the Energy Act imposed an obligation on producers that own a power plant above a certain capacity only to sell their energy on IBEX as of 1 January 2018. In addition to these legal changes, the European Commission's antitrust decision in Case AT.39767-BEH Electricity also contributed to the effective liberalisation of the supply-side wholesale market.^x

The following problems were identified during the market study.

1. Unpredictability of the legal framework and lack of long-term development strategy.
2. Incomplete liberalisation of the electricity market.
3. Restrictions on import and export of electricity and a lack of market integration.
4. The obligation for producers to sell all excess electricity on IBEX as a mandatory channel for electricity trading.
5. Lack of adequate products offered on the energy exchange.
6. Problems with free trade in the bilateral-contracts market segment.
7. High fees for energy-exchange trading.
8. Insufficient market transparency, specifically for exchange trading.
9. A lack of control of the State Energy Regulatory Commission (EWRC) over the IBEX activities.

The CPC proposed a number of measures to improve the competitive environment.

1. Measures to ensure a predictable and stable regulatory framework

To comply with the principle of legal certainty and to enable participants to plan market strategies, the CPC had the following recommendations.

- The Ministry of Energy should develop and submit for public consultation a draft Strategy for Sustainable Energy Development of the Republic of Bulgaria as soon as possible.

- Amendments to the regulatory framework should be subject to public consultation, which would allow for a constructive exchange of ideas and proposals of all interested parties.
- Authorities that adopt or issue regulatory and administrative acts should submit drafts of any such act to the CPC to allow them to be assessed for compliance with competition rules before their adoption or issuance.

2. Achieve complete liberalisation of the electricity market

The CPC believes that the simultaneous existence of regulated and liberalised market segments impedes the development of natural competitive processes and so had the following recommendations.

- Development of a plan for gradual complete liberalisation of the electricity market that would provide the necessary steps for achieving this goal and the deadlines for their implementation.
- Development of the necessary measures for the social protection of vulnerable consumers.

3. Active and effective ex ante control over the activity of electricity exchange operator IBEX

IBEX is the only electricity exchange trading platform in Bulgaria and where all producers are obliged to sell electricity produced for the liberalised market. This means that effective regulatory control over the trading rules and tariffs adopted by the electricity exchange operator must be exercised. CPC had five recommendations.

- The introduction of electricity trading rules that set out a procedure for EWRC control of those IBEX actions that give rise to rights and obligations for exchange participants.
- Electricity trading rules that explicitly state the possibility of EWRC exercising ex officio control and upon referral by participants of IBEX, as well as an obligation on IBEX to submit for approval by EWRC any changes in rules and tariffs.
- The establishment of a public consultation procedure that enables interested parties to comment on draft rules and tariffs subject to EWRC control.
- The creation of normative rules for determining electricity-exchange fees, with regard to fee types, the principles for determining their rates, and general principles that oblige IBEX to determine them in a transparent and objective manner.
- EWRC should carry out a comprehensive review of the existing electricity exchange rules and take measures for

their modification and refinement to prevent the possibility of IBEX manipulation and to ensure its objectivity and transparency.

- With the forthcoming realisation of a full coupling of the Bulgarian electricity market with markets in neighbouring countries and the complete liberalisation of the market, abolish the obligation for producers to offer all electricity produced to IBEX as the sole channel for wholesale electricity trading.

4. Active control of the wholesale trade by the EWRC

A number of alerts have been received about manipulations in the wholesale electricity market. These are violations of Article 5 of Regulation (EU) No. 1227/2011 of the European Parliament and of the Council of 25 October 2011 on Wholesale Energy Market Integrity and Transparency (REMIT). The investigation, establishment and sanctioning of these infringements are entrusted to EWRC. To establish a co-ordinated approach to dealing with market abuse and distortions of competition in wholesale energy markets, the CPC had three recommendations.

- The EWRC should take active and timely measures for effective exercise of its powers to investigate and sanction infringements under Articles 3 and 5 of REMIT in order to ensure the market's efficient and transparent functioning.
- Amend paragraph 8, Article 74a of the Energy Act to ensure publicity and transparency of EWRC's control under REMIT, including the maintaining of a public register of adopted acts, so as not to impede the effective exercise of the investigation powers.
- Enhanced co-operation and interaction between the EWRC and the CPC to achieve the objectives of Article 74π of the Energy Act, REMIT and the LPC on the basis of jointly agreed rules, as well as the establishment by EWRC of the necessary organisation for their implementation.

5. Other measures to stimulate competition in the liberalised market

The CPC recommended that the competent authorities should take further measures to increase the transparency of the wholesale electricity market, such as the provision of public information on the current generation of electricity from any producer in the country and actual information on the extent of interconnection transfer-capacity utilisation. In order to stimulate competition in the market and to limit the possibilities for market manipulation, the CPC recommended that the competent authorities should continue their efforts to achieve market coupling in all segments as soon as possible.

Competitive Neutrality in the Banking Sector: The Case of Ukraine



Maryna-Olha Mykhalska
Deputy Head of Communications
Telecommunications and
Financial Markets Section
Antimonopoly Committee of
Ukraine



Olga Nechytailo
State Commissioner
Antimonopoly Committee of
Ukraine

In 2019-2020, the Antimonopoly Committee of Ukraine (AMCU) conducted a study of the banking-services market that aimed to detect any violations of the principle of competitive neutrality through the adoption of legislative and regulatory acts that give public-sector banks exclusive rights to provide banking services in certain segments of the banking market.

The term “public-sector banks” refers to banks in which the state’s share is at least 75% of the authorised capital. In total, more than 70 banks are operating in the Ukrainian banking-services market – making it potentially competitive – including four public-sector banks:

- State Savings Bank of Ukraine (Oschadbank), a joint stock company whose authorised capital is 100% state owned
- PryvatBank (PrivatBank), a joint stock company and commercial bank whose authorised capital is 100% state owned
- State Export-Import Bank of Ukraine, a joint stock company whose authorised capital is 100% state owned
- Ukrgasbank, a public joint stock company and joint stock bank whose authorised capital is 75% state owned .

The AMCU found that only public-sector banks are allowed to provide banking services in certain market segments, with entry barriers for privately held banks. In addition, it was established that the vesting of exclusive rights to service a particular segment of the banking services market may also apply to only a specific bank among public-sector banks.

Among the consumers subject to restrictions in their bank use are military pensioners, displaced persons, recipients of subsidies, budgetary institutions and entities receiving budget payments, business entities that use accounts with a special mode of use,^{xi} for example, participants in the electricity market. In general, the restrictions apply to more than 15 segments.

Certain restrictions were established 10-20 years ago and are therefore perceived as “established practice”. Since 1992, for example, military pensioners can receive their pension only at Oschadbank, regardless of whether it is convenient for them to be served by this bank or not. Since 1995, libraries and museums in Ukraine are obliged to open accounts exclusively in public-sector banks, with other cultural institutions obliged since 2010 and scientific institutions since 2015.

In recent years, legislation has also established new segments subject to restrictions. These include housing subsidies; payments for housing and communal services; monetary compensation payments for housing to certain categories of persons; payments of the “baby package”^{xii}; and deposit accounts for crediting funds related to enforcement of decisions.

The use of only public-sector banks for the provision of certain banking services has resulted in:

- fully privately owned banks being limited in their ability to provide services in the respective segments of the banking-services market
- consumers unable to choose a provider of the banking services based upon price or quality.

To assess the competitive potential of the banking market, the AMCU studied the level of interest of privately owned banks in servicing still-closed segments of the banking-services market. This made it clear that certain segments were extremely attractive to private banks, while there was less interest for other segments.

The study also discredited theories that the granting of exclusive rights to public-sector banks is due to unique technologies for providing services and that this is a widespread global practice.

According to the AMCU, the current level of concentration in certain segments of the banking-services market means there is a need to create more competitive conditions for banks under all forms of ownership, in particular, by taking measures to improve the efficiency of their own business processes, improve service, and the quality of service provision. The National Bank of Ukraine, which regulates the banking-services market, also declares the need for competitive conditions for all banks.

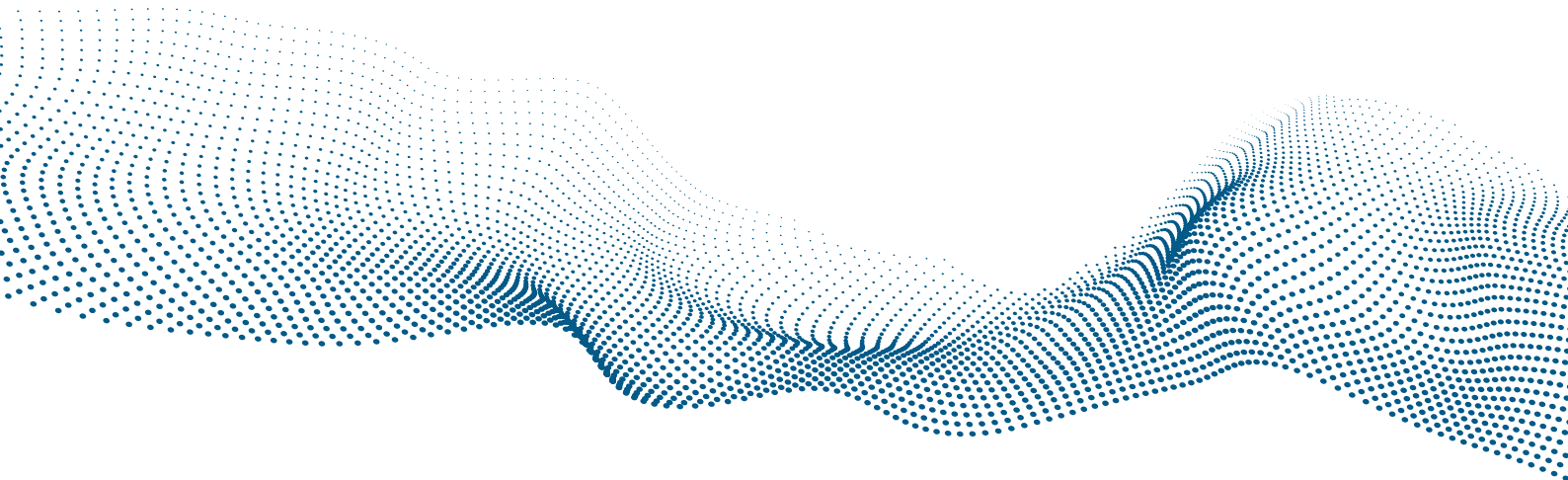
Trade associations in the banking-services market also note that there are no grounds for granting public-sector banks exclusive rights to service certain segments of the banking-services market. Both government bodies and individual participants in the banking-services market hold the opposite opinion, however.

The results of the study indicate the need to introduce a competitive basis for the provision of banking services. It recommends that the existing barriers to accessing the closed segments of the banking-services market should be:

- analysed to assess their feasibility and the possibilities of reducing them
- revised to take into account the presence of a significant number of potential participants, their stability, systemic importance, among other factors.

In order to prevent violation of the principle of competitive neutrality in the regulation of the banking-services market, AMCU approved the study and its report and sent proposals to the Cabinet of Ministers of Ukraine. These concerned instructing the central authorities to reduce or eliminate barriers to the development of competition in certain segments of the banking-services market, in particular, by undertaking to:

- check the feasibility and other grounds for maintaining barriers
- submit to the government a proposal to amend legislative and regulatory acts so as to abolish the exclusive rights of public-sector banks to service sectors for which no significant risks are forecast
- submit to the government proposals to introduce competitive mechanisms for the selection of banks that will serve those segments for which significant risks are forecast.



Antimonopoly investigations and analyses of digital markets: FAS Russia practice



Stanislav Kotelnikov
Head of Information Technology
Division Department for Regulation
of Telecommunications
and Information Technology
FAS Russia

Anti-monopoly regulation in the Russian Federation is more than 30 years old. During this time, the Federal Antimonopoly Service of the Russian Federation (FAS Russia) has developed significant practical experience in regulating various economic areas, including natural monopolies, government procurement, and traditional competitive markets. It is currently faced with the task of establishing adequate mechanisms for the review and regulation of digital markets.

FAS Russia's active research in digital markets dates back to 2015, when it investigated the market of pre-installed applications for the Android operating system. The case determined that the Google's pre-installed Google Play store was restricting the about 10 smartphone manufacturers to pre-install applications that competed with those in the Google Mobile Services (GMS) package, as well as those alternative applications' placement on the screens of mobile devices. As a result, smartphone manufacturers were forced to decline pre-installing applications from a Russian developer and competitor to GMS. Based on its investigation, FAS Russia determined that Google had violated Russian antitrust laws, and an order was issued against it.

The FAS Russia decision and order were confirmed by the courts and came into legal force. As part of the legal proceedings, an amicable agreement was concluded between FAS Russia and Google, under which the company ceased its anticompetitive practices that prevented smartphone manufacturers from pre-installing competing software from Russian developers, and added a search-engine selection window for consumers in the Russian Federation from 2017.^{xiii}

Since the consideration of this antitrust case against Google, FAS Russia has successfully conducted antitrust investigations against global and Russian participants in digital markets, including Microsoft, Apple, Booking.com, HeadHunter, and Yandex.

Even after this anti-monopoly practical experience, FAS Russia's approaches to the analysis of various digital markets and the assessment of anticompetitive actions in them are still at a formative stage.

The current regulatory framework is the Law on Protection of Competition. It forms the basis of anti-monopoly regulation in the Russian Federation, yet was designed to regulate traditional product markets and so fails to take into account the specific

features of digital markets, such as network effects, zero-priced goods, and the monetisation of digital goods.

FAS Russia is currently developing amendments to the Law on Protection of Competition – the “fifth anti-monopoly package” – designed to fill in these gaps and consolidate the basic concepts related to digital markets.

Digital markets and the relationships between market participants are characterised by dynamism and complexity, which complicates analysis for the regulator.

Within the current framework of the Law on the Protection of Competition and Order of FAS Russia of 28 April 2010 No. 220, which established the procedure for analysing the state of competition in commodity markets, FAS Russia determines the main parameters used when assessing the state of competition. These are:

- product boundaries of the market
- geographical boundaries of the market
- composition of economic entities operating in the market
- volume of the market and the share of companies in it
- barriers to entry to the market.

When determining each of the above parameters for digital markets, objective difficulties almost always arise resulting from the nature of these markets.

In terms of product boundaries, FAS Russia has been focusing on the functional purpose of a product and consumer preferences for its use. At present, any digital product or service is a collection of many simultaneously provided products or services. For example, a hotel aggregator, such as Booking.com or Expedia, is simultaneously an advertising platform, a showcase for hotels, a platform for booking and paying for rooms for end users, and a platform for user ratings. The combination of these parameters is what constitutes the value for end users. At the same time, customers may not consider it as an aggregator and focus on just one aspect, such as hotel reviews.

Defining product boundaries in digital markets therefore sets many challenges, with a wrong answer potentially leading either to a significant narrowing of the product market or its excessive expansion. This could lead as a consequence to the creation of unduly qualified dominant entities or the exclusion of truly dominant entities from among them.

The difficulty defining the geographical boundaries of digital markets arises in defining the geographical basis of a particular digital product's provision. For example, app stores for Android and iOS operating systems are provided around the world, yet feature a number of significant regional or country-based restrictions, such as national legal regulation, interface languages, availability of various applications, and individual functions. These features affect the definition of geographical markets, which, due to the totality of regional or country-based restrictions, may indicate that the geographical boundaries of the digital market should be determined as being that of one country.

Another challenge in evaluating digital markets is defining an indicator to calculate the volume of a product market. As most digital markets are developing rapidly, there is at present no single statistical mechanism with parameters that could take into account the essence of products provided in digital markets. Participants in digital markets carry out their own – sometimes haphazard – accounting for business activities, which to a certain extent prevents regulators from monitoring their activities.

When determining the size of a digital market under study, FAS Russia endeavours to base its analysis upon several parameters that characterise that particular market and the companies in it. One such parameter is a company's revenue from activities in the market (advertising, organising room reservations, charging a taxi aggregator's commission). Another such parameter reflects the essence of companies' businesses in the digital market under consideration, such as the number of trips through a taxi aggregator, number of bookings through a hotel aggregator, and number of resumes in a recruiting service's database.

There are also universal standard indicators that are customarily used to measure the position of various participants in digital markets: number of unique users, number of clicks, number of visits to the site. At the same time, in FAS Russia's opinion, these indicators can be taken into account only as additional indicators to determine the volume of the product market,

since at present there is no single standard for calculating such indicators, with different companies using and understanding these indicators in their own – often contradictory – way.

At the end of an analysis of a product market, FAS Russia must assess the presence or absence of barriers in the market and their level. In digital markets, the network effect of a company and its products can constitute a barrier, yet antitrust regulators currently have no single unified framework when assessing network effects and their impact on markets, consumers and businesses. In such a situation, it is important that anti-monopoly authorities co-operate and join forces to develop common approaches and methods for assessing network effects.

In addition to economic analysis, an important aspect of an antitrust investigation in the digital market is the assessment of companies' actions that may violate antitrust laws. This process faces natural barriers that can arise both independently (difficulty in assessing the product, algorithms, software codes, theory of harm), and in connection with contrary behaviour of the companies themselves (hiding required information, understating performance indicators).

At the same time, even if a company's guilt in abusive and anticompetitive behaviour in the digital market is proven, there remains the question of which are the proper measures to correct the situation.

This issue of releasing an enforceable order and exercising effective control over its implementation is relevant not only to FAS Russia, but also to other anti-monopoly regulators. Given the fact that prescriptions are usually issued for future actions in digital markets,^{xiv} the consequences of which are difficult to predict, and also taking into account the fact that the antitrust authority usually has less information than the investigated company, it is important when issuing a prescription or order to work out in detail its enforceability and possibility of controlling its implementation not only by the regulator, but also by the public and the business community.

Market Studies in Azerbaijan: Selection, Analysis and Assessment of Competition Issues and Eventual Use of the Findings of Market Studies



Jafar Babayev
Chief Adviser to the Head
State Service for Antimonopoly and
Consumer Market
Control, Azerbaijan



Mirhasan Mammadov
Senior Consultant
State Service for Antimonopoly and
Consumer Market
Control, Azerbaijan

1. Launching an investigation

The State Service for Antimonopoly and Consumer Market Control under the Ministry of Economy of the Republic of Azerbaijan is responsible for promoting competition and protecting consumer markets. There are two selection methods

through which the State Service starts investigations on potential cases that violate anti-monopoly and competition legislation.

2. Case-selection methods

When initiating competition investigations, Azerbaijani legislation distinguishes between cases with claim-based approaches and those with initiative-based approaches.^{xv}

The claim-based method begins with a proactive application or complaint from third parties, which may include legal entities, individual entrepreneurs, non-profit organisations, and public organisations, as well as state bodies. All are entitled to submit

their complaints to the State Service, which sources the majority of its cases in this way.

The initiative-based method is used in cases that originate in State Service internal investigations. The information that provokes these investigations can come from public sources, media outlets, news or social media, and often, periodic research and analysis by the State Service's Analytical Department.

3. Procedures for case analysis: investigation stage

Irrespective of the method used for case selection, one or more experts from relevant departments of the State Service are assigned to the case. These experts have the right to request documents from involved parties and obtain explanations about the facts that led to the investigation. Experts can also involve independent consultants or professionals to provide better assessment of the specific issues in which the State Service lacks expertise. At this stage the State Service is not limited to a specific period, but the entire process should be based on a reasonable time frame.

Once experts are confident that all necessary data have been collected to reach a conclusion, they prepare a report for the director of the department. This report includes all the evidence analysed during the investigation phase and provides recommendations for solving the issue. Two types of recommendations are possible: 1) dismissal of the case or 2) a move to the examination stage. If the director of the department approves the report, then it is passed to the head of the State Service for approval. Finally, if approval is obtained and top State Service management agrees with the report's findings, a special commission for the case examination is established.^{xvi}

4. Resolution of the case: examination stage

The commission consists of at least three State Service employees. Although the commission uses the findings of the report, it starts its examination anew. During this stage in-person meetings are held with all involved parties, arguments are heard, and necessary documents and data are obtained.^{xvii} The commission may hold meetings until it is confident that it has collected all necessary evidence to make a final decision.

A case must be resolved no longer than nine months after the commission's formation by the head. After commission members agree on the final decision, a hearing with all involved parties is convened. The decision announced should reflect the circumstances of the case and the conclusions reached by the commission. A written resolution is delivered to all parties.

Two main types of conclusions can be reached by the commission. The first is the dismissal of the case because that the accused party has remedied any issues violating the law or involved parties have agreed to resolve the issue between each other. The second type is the issuance of the instructions to

the accused company that demand actions to prevent further violation of the law. In addition, the State Service can impose financial sanctions on companies that violate the law and fail to co-operate during the investigation stage.

5. Practical experience of the State Service

The law provides the State Service with guidelines for dealing with competition issues, but it remains important to establish practical procedures. Three recent cases, brought forward in

2021, give concrete examples of work undertaken by the State Service about competition issues.

5.1 Claim-based cases

A typical claim-based case was brought by the Food Safety Agency of the Republic of Azerbaijan (FSA) against companies producing energy drinks in 2021. The FSA argued that the products' packaging was misleading to consumers as the products did not qualify as energy drinks, which was a violation of the Law of the Republic of Azerbaijan on Unfair Competition. In such cases, the analysis is usually straightforward and the issue just needs to be fact-checked. The commission decided that involved companies had to change their packaging and imposed financial penalties as misinformation issues were not fixed during the investigation and examination stages.

Another case was brought forward following complaints from food-delivery companies in 2021 and concerned the new and growing food-delivery market. Wolt, the dominant service provider, had established exclusivity agreements with the largest restaurants and food chains, which had prevented other delivery services from engaging with these food chains, effectively hindering competition. The analysis of this case was also relatively simple with agreements checked and breaches of the law confirmed. Financial sanctions were imposed and the company was required to amend its exclusivity agreements.

5.2 Initiative-based cases

In 2021, the State Service initiated a case against Norm OJSC, a cement producer, and its distributors. The working procedure used by the Service to solve this issue was useful for the formation of the market studies. The case came to light thanks to regular market observation by the Analytical Department. It observed significant and rapid price hikes in the market for cement products, which had begun to significantly impact other industries, particularly by causing inflation in the construction market.

Solving this case was not straightforward, however, as there was no clear violation of the law. Furthermore, external factors or global inflationary pressures could have been playing a role in the price spikes. The case required detailed analysis of both internal and external markets, distribution structure of the producers and production procedures to prepare the final research.

At the initial stage, relevant data were collected from both the State Statistical Committee and the Analytical Department. Additional information was then obtained from domestic producers and cross-checked to deal with the issues of asymmetrical information. The results of the analysis revealed a oligopolistic market structure, and the existence of a dominant position and complicated distribution channels, which together had led to price increases. The findings were used by the commission, which took precautionary measures and ordered Norm OJSC to create direct sales channel for all wholesale cement buyers. In this case, the company was not fined due to its active and timely engagement with the State Service and its pledge to resolve the issues promptly. The company complied with the commission's resolution within one month of its adoption.

6. Use of findings in competition cases for market studies

The Norm OJSC case is indicative of how information gathered can facilitate extensive market research. The analysis of the domestic cement production, market structure, current price trends, and demand forecasts, allowed the formulation of recommendations to the government. This extensive investigation of the cement market provided a clear picture of the current situation and enabled the State Service to react when necessary. Additionally, potential solutions to reduce cement prices and improve competition in the market were offered to the Ministry of Economy.

The State Service is currently undergoing a process of restructuring and is planning to establish a proactive approach in facilitating competition in the domestic markets. One method would be to conduct regular market studies that include: 1) market observation; 2) analysis and research; 3) measurement of competition level; and 4) potential solutions for competition issues. In summary, the State Service is learning from its own and international experience, and taking active steps in order to improve its framework for preventing unfair competition and improving competitive behaviour.

Georgian Competition Practice and Policy in the Era of Digital Marketing: What is New Under the Sun?



Gvantsa Chaduneli
Head of Division
Detection and Prevention of
Competition Restrictive Agreements
Georgian National Competition
Agency



Giorgi Meladze
Chief Specialist
Economic Competition
Protection Department
Georgian National Competition
Agency

Introduction

In general in Georgia, traditional forms of competition between entities are gradually moving into the virtual space, with companies using online platforms to provide a competitive advantage. This trend has only become stronger since the beginning of the COVID-19 pandemic when working remotely was recommended in almost all areas of public-economic life. E-commerce and online sale of products and services have covered the biggest portion of the consumer market and the relevancy of e-commerce has almost doubled in practice.

As in other fields of law, significant challenges to competition-law enforcement have been created by the digital economy and the shift from traditional to online markets. Under the Association Agreement between the European Union

and Georgia, the country committed to “comprehensive competition laws, which effectively address anticompetitive agreements, concerted practices and anticompetitive unilateral conduct of enterprises with dominant market power and which provide effective control of concentrations to avoid significant impediment to effective competition and abuse of dominant position.”^{xviii} The Association Agreement also commits Georgia to supporting the development of e-commerce in the country, including consumer protection and the introduction of mechanisms to enhance consumer trust in e-commerce.^{xix} Combining these two obligations sets a new challenge to competition policy and requires adaptation.

1. E-commerce and competition policy from a legal perspective

Despite significant changes made to Georgian competition law in recent years to bring it more in line with EU law,^{xx} in terms of substance or in an institutional sense, Georgian competition law does not contain provisions for the enforcement of competition rules for online platforms. Moreover, no other specific law exists to regulate the e-commerce sector.

From this perspective, the practices of the Georgian National Competition Agency (GNCA) was ahead of regulatory provisions, as the agency already had already had experience

in studying cases of competition restriction in online markets after complaints from economic agents about potential violations of the competition law by electronic platforms. Certain precedents have already been set. In general, claims submitted by undertakings about violations of competition rules mainly concern instances of unfair competition, but GNCA has also dealt with a case about competition-restricting deals or agreements.

2. Unfair competition in the e-commerce market

GNCA practice in relation to unfair competition in electronic markets has primarily handled complaints based on paragraphs 2.a and 2.c of Article 113 of the Law of Georgia on Competition, which prohibit:

- “provision of information about goods by any means of communication ... which misleads consumers and encourages them to perform certain economic actions”^{xxi}
- “undermining by an undertaking of a competitor’s business reputation ... unreasonable criticism or discrediting”^{xxii}

One recent case to rely on these paragraphs was the GNCA’s investigation of Algorithm,^{xxiii} which was completed in July 2021. The case concerned two companies registered under an identical name (Algorithm) and both competing in the same market of computer equipment and services.

The complainant was founded in 1989 and had long experience and a good reputation among consumers in the sector; the defendant arrived on the market in 2014. Both companies advertised their services and products on online platforms, such as Facebook and websites.^{xxiv}

Importantly, consumers involved in the case admitted to having mistaken the two firms due to the identical names and similar domain name on their websites and in email addresses.^{xxv} This resulting in their buying what they considered sub-standard products from the defendant.

The GNCA's decision was that the defendant's website, used for the promotion and presentation of its services and products, and its advertising on various online platforms were misleading and confusing for consumers.

In its decision, the GNCA explained that such advertising damages the interests of both consumers and the complainant. Consumers have the right to be in full control of their choices and to be able to distinguish easily between companies when buying certain services or products.

The GNCA stated that the defendant was in violation of competition law, notably unfair competition through electronic communication, and ordered it to manage its advertising to prevent the risk of misleading and confusing consumers.

3. Agreements restricting competition in the e-commerce sector

To date, GNCA has had only one case concerning a potential agreement that contravened competition law in the e-commerce sector.

On 15 November 2016, a complaint was submitted to the GNCA by the Competition Law and Consumer Protection Centre about the potential violation of Article 7 of the Law on Competition, which deals with restrictive agreements, by Booking.com. The violation concerned Booking.com's use of so-called "wide price parity" most-favoured-nation (MFN) contractual conditions (also known as price equality). In particular, the complainant demanded that the GNCA evaluate if the referred conditions were considered or included in contracts by Booking.com with partner hotels in Georgia and its compatibility with competition law.^{xxvi}

Stakeholders interrogated during the administrative proceeding mentioned that the general principle of Booking.com facilitates healthy competition as all market players are able to see their competitors' prices on the website and so offer the best price to consumers. In their opinion, the main competitive advantage of Booking.com is how it allows the end consumer to access the service at the lowest price. Booking.com itself and certain stakeholders claim that the website did not use and does not use sanctions in the Georgian market to enforce MFN conditions and according to those stakeholders, a number of hotels had much lower prices on Booking.com than on their own websites or with travel agencies, and corporate or walk-in clients.

Moreover, Booking.com expressed a readiness during the proceedings to extend conditions compulsory in EU countries

to Georgia by applying a narrow price-condition MFN, as in the EU, and to refuse parity-price availability for all properties in Georgia.

Taking this into account, the GNCA concluded that no restriction of competition through MFN conditions existed for Booking.com contracts on the Georgian market at that time. This led to its conclusion that there were no legal grounds for commencing an investigation about a possible violation of Article 7 of the Law of Georgia on Competition.

The GCNA nevertheless continued to monitor online booking platforms for Georgian hotels until June 2019. This procedure aimed to study how contracts between online booking platforms and hotels complied with a healthy competition environment and to identify MFN conditions in these contracts. Within the monitoring process, the GCNA evaluated Booking.com's fulfilment of its commitments undertaken with the agency. The company presented GCNA with its general terms and conditions – the contracts concluded with hotels and exclusion of MFN conditions – designed to meet these commitments.

On the basis of provided information and a review of measures carried out by the company, the GCNA considered that Booking.com had fulfilled its commitment and had excluded MFN conditions from its contracts with hotels in Georgia.^{xxvii} Within the frames of monitoring, the behaviour of companies operating on the relevant market were studied in relation to the Competition Law with an aim to identify the cases of non-compliance (if any) and in order to ensure the compliance of the entire market with the principles of competition law.

Conclusion

The GCNA's recent practice clearly shows an unprecedented increase in the number of complaints related to potential violations of competition rules by online platforms. Despite there being no specific laws that deal with e-commerce, the GCNA's work has already set certain precedents and developed standards for dealing with complaints about online markets.

The development of online markets and the e-commerce boom will create a need for modifications in competition policy and law, both for regulation and enforcement. To regulate competition on the online markets and to introduce relevant legislative changes, amendments will clearly need to be made to the Georgian Law on Competition in the near future.

Market studies promoting competition: the case of the Hungarian Competition Authority



Mariann Leskó
Economic Analyst, Hungarian
Competition Authority

Understanding industries is one key to the success of competition agencies. Ensuring that the Hungarian Competition Authority (GVH) meets its core objectives, such as the increase of consumer welfare through the freedom and fairness of competition, relies heavily on the knowledge its staff

is able to rely on as part of a formal case investigation or when promoting competition in other activities. Market studies are therefore excellent instruments for deepening knowledge about a particular industry and to create resources that build confidence in subsequent decisions.

Types of market studies

The general purpose of a market study is to better understand a given market. This can take in the description of structural characteristics as well as the analysis and forecast of dynamic trends shaping the market.

The GVH, like many other competition authorities, aims to address two main objectives in its market studies. The first is to support its own enforcement activity: the final report of a market study can be a rich resource for other investigations in related markets. Moreover, it can help uncover conduct that may require the opening of a formal investigation, and can also support decisions taken in merger cases. The second objective is to support advocacy initiatives, as a thorough understanding of a sector's main areas of concerns allows for more reliable recommendations and proposals to be given.

The GVH has the power to conduct two types of market studies: market analysis and sectoral inquiries.^{xxviii} The main difference between the two is that a market analysis is initiated by the authority with the aim of simply understanding the operations or dynamics within a market, while a sectoral inquiry is launched where there are strong suspicions of competition

problems. This results in a sectoral inquiry having stricter procedures. As explained in a 2017 newsletter article,^{xxix} the GVH has fewer effective tools at its disposal when conducting a market analysis. For example, stakeholders may voluntarily answer for requests for information (RFI) in a market analysis, but in a sectoral inquiry, the GVH has the power to fine stakeholders who do not respond to mandatory RFIs.

There is no statutory time frame for a market study and in general, it can last from six months to several years. The period is determined simply by the time necessary to have a well-grounded understanding of a market's operations and prevailing trends. This can prove unacceptably slow for certain areas of concerns that may be the initial cause for a study. Partly for this reason, during the emergency period of the COVID-19 pandemic, the Hungarian government granted an entitlement that allows for accelerated sectoral inquiries that last for one month by default and can be extended twice to last a maximum of three months.^{xxx} This tighter time frame naturally reduces the depth of knowledge that the authority can bring to any identified competition concerns, but does allow for more appropriate and timely reactions to specific current issues.

Choosing the sector

Although many sectors could be interesting to study, the GVH has restricted resources to allocate to market studies. It must therefore apply a number of criteria when taking a decision about whether to initiate one.

The authority's ability to detect possible competition restrictions plays a substantial role in sectoral inquiries. The GVH considers all complaints it receives from market participants, both those of consumers and companies, and if many concern the same specific aspects of competition or emerging sectoral trends, the authority considers starting a market study in that sector. Similarly, the number of antitrust investigations or merger cases

growing significantly in a sector may indicate a sector-wide problem of distorted competition that the GVH may investigate to have a wider perspective.

Furthermore, if a market is of special interest for any other reason – for example, it is part of a sector for which regulations are under review – then a market analysis can help the GVH in forming its opinion on the competition aspects of that market. An emerging, dynamically changing market could also become a focal point of interest for the authority, which has the option to start a market analysis for the sole purpose of better understanding a market, without the assumption of impaired competition.

Main areas of recommendations

A market study always results in a report that explains its findings in detail and sets out recommendations for stakeholders, market regulators (if they exist) and lawmakers that might serve to improve sectoral competition. Any recommendations are non-binding for the stakeholders, however, and are regarded as a channel for the authority's competition advocacy responsibilities. In cases where the GVH identifies suspicious conduct by undertakings that may infringe competition law, it may initiate a formal investigation based on the findings.

Afterlife of market studies

The GVH initiated its first market study in 2001 and has since concluded three market analyses and eight sectoral inquiries.^{xxxix} It is currently working on two market studies: a market analysis of the e-commerce sector, and a sectoral inquiry into the hospitality industry's beverage-distribution sector. One accelerated sectoral inquiry was also recently carried out, which related to disturbances in the construction industry due to the COVID-19 outbreak.

In some cases, the findings of a sectoral inquiry have led to the initiation of a formal antitrust investigation. For example, the initiation of and reasoning in the decision of an abuse of dominance case in the banking sector relied heavily on the knowledge gathered in a 2009 GVH sectoral inquiry on customer mobility in retail banking in Hungary.^{xxxix}

Market participants' behaviour can, of course, move towards more competition-friendly directions even without the initiation of a formal investigation. The preliminary results of the 2016 sectoral inquiry into online hotel bookings stated, in line with the findings of other competition authorities, that wide most-favoured-nation (MFN) clauses were most likely restricting competition. In response to the preliminary report, the largest player in the Hungarian online hotel-booking market made a voluntary commitment to switch to narrow MFN clauses in its contracts. This benefited consumers and saved the authority further resources. The 2020 market analysis of online comparison tools contained recommendations that served to guide stakeholders towards more competitive and transparent practices. Improved user experience, clear rules on product display rankings, and transparent presentation of paid advertisements all help consumers make informed choices that fuel competition.

The authority may state its opinion of an observed general conduct in the market, and frequently raises awareness of potential issues. It commonly provides guidance on how market players can encourage conscious consumer behaviour to drive competition within the market. Recommendations for new amendments to existing regulation can also be presented in a final report, as well as reviews of the effects of any recent changes in legislation.

Successful recommendations regarding regulations also show the positive impact of market studies. The 2016 market analysis of film distribution showed that significant mergers had taken place in the industry, but all were below the turnover-notification threshold. As a consequence, parliament accepted an amendment to merger regulations that allows for an investigation when a merger has the potential to reduce competition in a market even if the transaction is below the turnover threshold. Supplementary to the implemented regulatory changes, in annual reports to the Hungarian Parliament, the GVH has proposed improvements to regulations. These proposals aim to improve competition in specific areas and can be presented with greater confidence to the legislators when supported by in-depth studies.

Aside from direct impacts, the GVH benefits from market studies in several areas of its own operation. Authority employees can turn to these reports when working on an investigation in a related or similar industry. Media coverage is easier to create with a report that is written with the public in mind, which also assists in promoting competition among consumers. Finally, the experience gained during the planning and management of these studies can teach valuable lessons that are also useful for other projects.

In general, the afterlife of a market study has direct and indirect impacts on competition, through enforcement and advocacy, and through regulation and voluntary commitments. In the Hungarian experience, studies are regarded as flexible supplementary tools that support the authority in achieving its objectives to promote competition and consumer welfare.

Problems of Competition Restrictions in Healthcare in the Republic of Belarus



Alesya Abramenko

Head of the Department
for Social Sphere and Services
Ministry of Antimonopoly
Regulation and Trade,
Republic of Belarus

The regulation of medical-product markets is undoubtedly socially oriented, affects the interests of a wide range of market participants, and directly influences both prices and the availability of drugs, medical equipment and related services for consumers.

In order to eliminate the consequences of anticompetitive restrictive practices, the Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus (MART) attempts to influence both market participants and the regulator – the Ministry of Health of the Republic of Belarus – by undertaking both preventive and suppressive measures.

Case one: Trademark infringement

As a result of an ex officio anti-monopoly investigation by MART, it was established that in 2017 the New Vision Medical Centre, domiciled in Belarus, had registered the trademark Rayner for intraocular lens prostheses for implantation without the consent of Rayner Intraocular Lenses, the authorised exclusive distributor in Belarus.^{xxxiii}

After registering the trademark, New Vision Medical Centre submitted a request to the State Customs Committee that it adopt measures to protect its rights to the corresponding intellectual property. This action, which would have given New Vision Medical Centre complete control of all deliveries to Belarus of intraocular lens prostheses under the Rayner trademark, might have led to price increases for these products, and would have made it impossible for other companies to import similar goods into Belarus, including their original manufacturer, Rayner Intraocular Lenses.

In parallel, other entities also intended importing and trading Rayner trademarked prostheses in Belarus.

MART established that New Vision Medical Centre had violated anti-monopoly legislation through the illegal acquisition and use of an exclusive right to the Rayner trademark in relation to intraocular lens prostheses for implantation. In accordance with subparagraph 1.3 of paragraph 1 of Article 25 of the Law of the Republic of Belarus, February 5 1993, No. 2181-XII on Trademarks and Service Marks, the establishment of the existence of unfair competition may be the basis for invalidating the provision of legal protection to a specified trademark.

In this case, MART encountered a problem in its interaction with the antitrust authorities of other countries: no replies to the MART request were received from the Competition and Markets Authority in the United Kingdom and the Competition Council of the Republic of Lithuania.

Case two: Pharmacies

Article 16 of the Law of the Republic of Belarus, December 12, 2013, No. 94-3 on Counteracting Monopolistic Activities and Development of Competition states that to prevent violations of anti-monopoly legislation, MART has the right to send to an official of a legal entity, including a state body, a written warning about the inadmissibility of any actions that may lead to a violation of antimonopoly legislation. MART did this when it alerted the Ministry of Health that legislation in development by the ministry could lead to a violation of anti-monopoly legislation.

MART found that a draft decision of the Ministry of Health, which had been posted on a website called Legal Forum of Belarus for public discussion, included a text related to a new version of the Good Pharmacy Practice guidelines. This

contained requirements for pharmacies of the fifth category – those located in places with the greatest concentration of population, such as in shops, markets, train stations and hotels – that would have restricted competition and harmed the rights, freedoms and legitimate interests of legal entities or individuals.

The new requirements envisioned an increase in the area of fifth-category pharmacy from 15m² to 25m², while making it obligatory for a legal entity owning such a pharmacy to own a first- or second-category pharmacy in the administrative centre of the district in which the fifth-category pharmacy is located.^{xxxiv}

A MART analysis of information in the Register of Licences for Pharmaceutical Activity showed that such a decision by the Ministry of Health will negatively affect the activities of 53% of holders of licences for pharmaceutical activities of retail sales of medicines. It was also found that the introduction

of new requirements would also constitute a barrier for new business entities' entry into the retail market for medicines and pharmacy products. Despite the warning issued by MART, the necessary amendments to Good Pharmacy Practice have yet to be made.

Case three: Licensing of maintenance work

In 2021, MART received complaints from entities engaged in the installation, adjustment, maintenance and servicing of medical equipment, and determined that a number of regulatory legal acts in health care, along with restrictive actions of the Ministry of Health, are hindering the development of competition.

There is currently no licensing of maintenance works in Belarus. In accordance with regulatory legal acts, entities have the right to perform maintenance work after a decision of the Ministry of Health allowing maintenance work to be performed. As of July 2020, in order to obtain such a decision, the applicant must submit a certificate to the Ministry of Health attesting to having been trained by the manufacturer of the particular medical equipment or being an authorised representative of the manufacturer, specifying not only the kind, but also the type and model of medical equipment.

Of the business entities carrying out servicing works surveyed by MART, 71% said that the requirement to specify the type and model of medical equipment in the certificate limits the possibility of obtaining a decision and, accordingly, reduces the pool of legal entities allowed to carry out servicing. Such businesses have to employ staff with a training certificate only for a certain type of medical equipment.

According to 88.9% of the healthcare institutions surveyed by MART, the specification of the model of medical equipment limits competition in the product-servicing market, and also

negatively affects the conduct and results of public-procurement procedures. This means there is a decrease in the number of participants in the market, as, for example, the absence of a decision locks business entities out of public-procurement procedures; and there is an unjustified increase in the cost of contracts with winners of public-procurement procedures for servicing work.

A number of healthcare institutions noted an increase in unsuccessful public-procurement procedures for servicing works for the period from January 2020 to March 2021. Thus, the need to submit a training certificate for particular models in order to obtain a decision from the Ministry of Health has led to a reduction in the number of business entities providing servicing work. This is anti-competitive according to Article 7 of the Competition Law, which states that the conditions of restriction of competition include a reduction in the number of independent economic entities in the product market.

Following requests from business entities and to allow the development of product markets and competition in line with paragraph 48 of Article 14 of the Competition Law, MART suggested to the Ministry of Health that it draft a normative legal act that would exclude the requirement to submit an equipment-specific training certificate to obtain a decision.

MART's proposal was accepted, and legislative changes were adopted in August 2021.

Case four: Training certificates

On 3 September 2020, the Ministry of Health decided to permit the acceptance of documents from manufacturers as certificates of training that contain confirmation that the legal entity is an authorised representative of the manufacturer as regards technical servicing and repair of medical equipment, without reference to specific specialists of the applicant.

At the same time, guidelines issued by the Ministry of Education stated that training certificates can be issued to trainees who have mastered the content of the corresponding educational programme, regardless of the legal entity that employs them.

On 3 December 2020, however, the Ministry of Health decided that to ensure proper servicing quality letters from manufacturers of medical equipment revoking previously issued certificates of training in repair and servicing of medical equipment. Revoked certificates would not be accepted for consideration.

This decision of the Ministry of Health was later formalised in regulatory legislation, according to which, in order to ensure proper quality of the servicing in the presence of letters from manufacturers the Ministry of Health would no longer accept

withdrawn certificates for consideration for its conclusion as regards servicing medical equipment from such manufacturers.

Neither the Ministry of Health nor health-care institutions provided any information in response to MART's request concerning the incidence of existing complaints from health-care institutions about the quality of servicing performed by business entities.

Based on the information provided by businesses, it was established that certificates had been revoked by manufacturers after the employees had moved to a competing firm. The Ministry of Education explained that education legislation does not provide for the possibility of revoking a training certificate.

The Ministry of Health's policy of accepting letters from manufacturers and, accordingly, revoking certificates, significantly affects businesses' access to the market for the provision of servicing, as well as reducing health-care institutions' choice of business entities that can provide servicing.

Following requests from business entities and to develop product markets and competition in line with paragraph 48 of Article 14 of the Competition Law, MART suggested to the Ministry of Health that it amend the regulatory legislation to provide:

- criteria for the acceptance of letters from manufacturers, which would not depend on the change of workplace of a person holding a certificate, but should be based solely on actual loss of the qualifications under issue; for

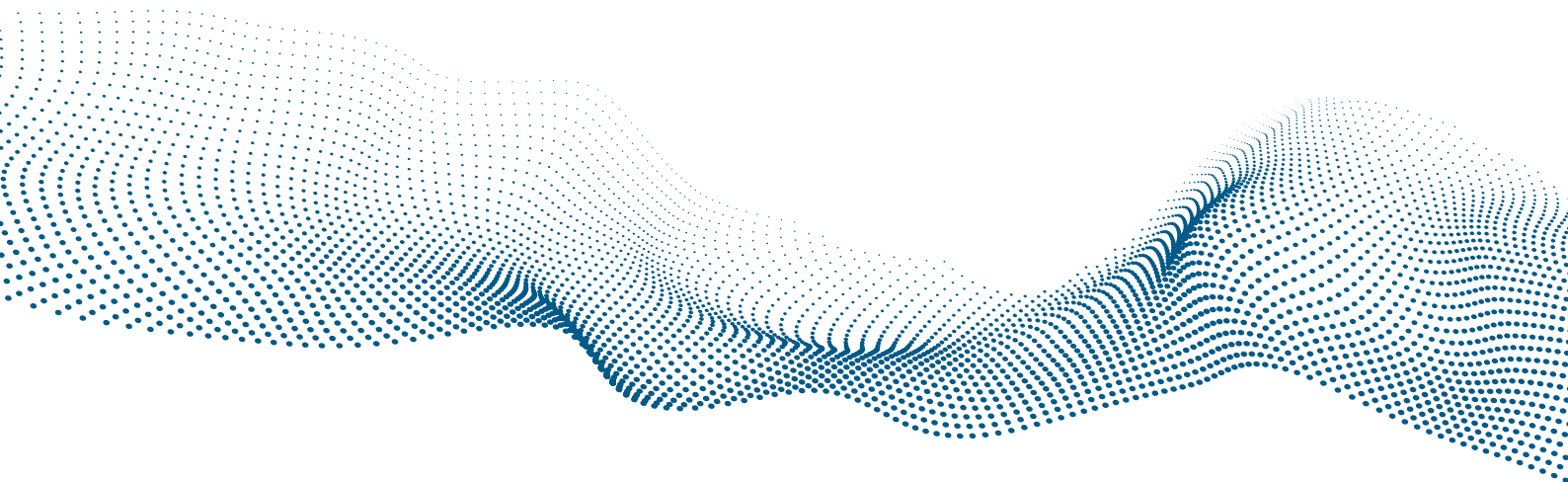
example, presence of documented complaints from health-care institutions about lack of competence or improper servicing performed by employees of an economic entity for the maintenance of medical equipment of a particular manufacturer

- the right of a person holding a certificate, in cases of receipt of a letter from the manufacturers, to submit documents confirming the relevant qualifications.

Conclusion

In all the above cases, MART assessed the consequences of restricting competition by proactively conducting a survey of market players without resorting to classic analytical tools.

These cases illustrate the positive impact of measures taken by MART to develop healthy competition through the removal of unnecessary administrative barriers.



The CNMC's experience in market studies in Spain: practical tips



Lara Tobías Peña
 Head of Market Studies Unit,
 Advocacy Department
 National Commission on Markets
 and Competition, Spain

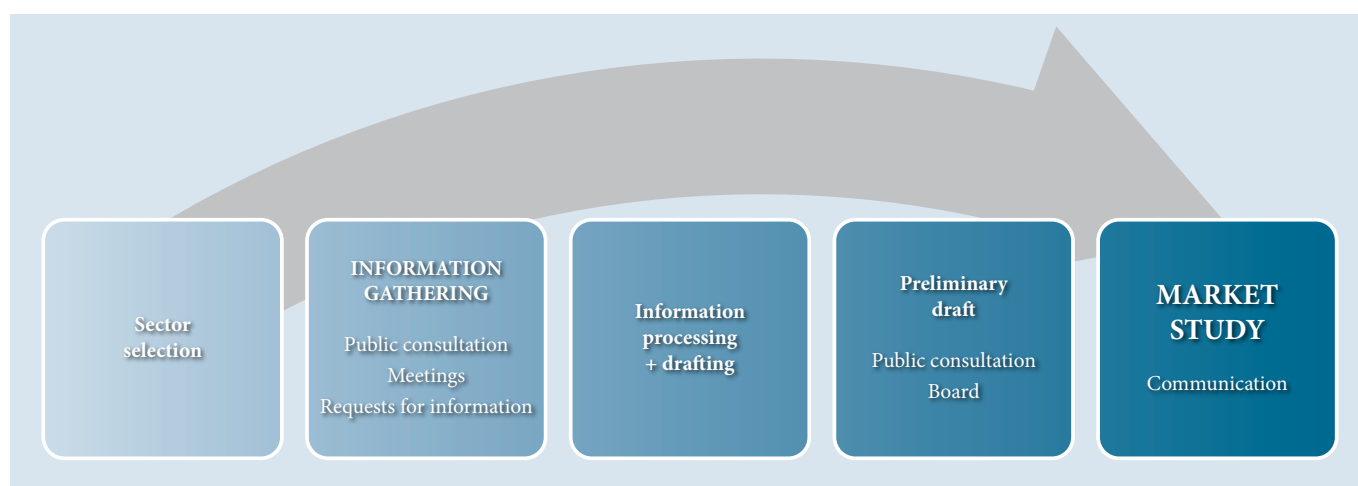
The CNMC has a long-standing experience in market studies, which are one of the main advocacy instruments of the Spanish Competition Authority. Market studies are a deep legal and economic analysis of the competitive dynamics of a market or sector. Their goal is to identify restrictions to competition, which often (but not always) stem from a suboptimal regulation, and find a way to alleviate them. They always include a set of recommendations addressed to relevant addressees (generally, policymakers) aimed at correcting the distortions of competition identified. Given the depth of the analysis, they are a time- and resource-consuming exercise for the Authority, which means that planning and evaluation of the exercise is key to its success.

In the case of Spain, CNMC's market studies are non-binding opinions and, as such, cannot be challenged before the courts.

They should not be confused with other means of intervention of the Authority, such as antitrust cases (where the Authority investigates whether there has been a breach of competition law and can impose fines on firms), opinions on draft regulation (which are issued concerning regulation that has not been yet approved, whereas market studies analyse standing regulation), guidelines (which do not analyse a specific sector, but rather serve as informative material on certain issues) or academic studies (academia has a broader perspective and aims to contribute to general knowledge).

As stated above, given the limitation of resources every Competition Authority is subject to, a thorough planning of a market study is the key to making the most of the available capacities. The production process of a market study can be structured in several phases, as represented in figure 1.

FIGURE 1: PHASES IN A MARKET STUDY



In the following sections, I will explain the main elements that should be taken into account during each phase to guarantee

the success of the market study, using the CNMC's practical experience as guideline.

1. Sector selection

When deciding which sectors should be analysed through a market study, the CNMC always considers the tools and resources it has. Market studies are only one of the many tools that the CNMC can use to state its position concerning the competitive situation in a given market. Thus, the first step is to

assess whether diving into a market study is the most efficient way to intervene in a specific situation. Market studies often are a good tool to address competitive distortions that stem from the regulatory framework or to improve the Authority's understanding of competitive dynamics in sectors that are

relevant for the national economy (e.g. strategic sectors) or for consumers. It is also important to bear in mind that market studies can be complementary with enforcement actions and that a big part of the success of a study is acting in a timely manner: e.g. if a relevant regulatory reform is being debated or if a specific sector is being disrupted by new developments, such as digitalisation.

The CNMC's working plan concerning market studies is included in its Action Plan¹⁷, which at present is published

biannually. For the years 2021-2022, the plan includes market studies on sectors that directly affect citizens' welfare (e.g. a study on the marketing and wholesale distribution of pharmaceutical products, which is planned for 2021); studies that contribute to competitiveness, digitisation and growth (e.g. in July 2021 the CNMC has published a market [study on the competition conditions in the online advertising sector in Spain](#)¹⁸); and studies that contribute to environmental sustainability (e.g. a study on recycling, which is planned for 2022).

2. Information gathering

This phase is critical to the quality and success of the market study. The CNMC uses all the means at its disposal to gather relevant and accurate information on the sector and to identify potential competition issues. There are three main sources of information:

- **Background information:** It is mainly publicly available information that stems, among others, from the CNMC's former experience both in enforcement and advocacy activities, the internet or public databases, academic literature, studies or reports by other Competition Authorities, national and international regulation, and press.
- **Public consultations:** They are a powerful tool that can be used both at the beginning and close to the conclusion of the market study. They are particularly useful to help identify relevant stakeholders and to obtain information otherwise difficult to gather. In recent years, the CNMC has made an effort to try and systematically launch public consultations in all its market studies, be it at the beginning of the process (as was the case with the launch of the market [study on the competition conditions in the online advertising sector in Spain](#) in April 2019, or the market study on intercity passenger transport services by coach in December 2019) or close to its conclusion (e.g. the public consultation on the market study on marketing and wholesale distribution of pharmaceutical products in Spain, launched in January 2021)¹⁹.
- **Engagement with stakeholders:** Any individual or organization that has an interest in the market, or could be affected by the issues or any outcomes of the market study, that may come out of the study (policymakers, government departments, incumbent operators, potential entrants, consumers, employees, trade unions, academics...). They can help the Authority understand market dynamics, provide useful information on the sector and are relevant to enhance the credibility of the results (it is important to listen to the views of the agents that directly operate in the market) and to help communicate the main findings (after being heard, they will be much more prone to help disseminate the results of the study). There are many ways in which the CNMC engages with stakeholders, such as through public consultations (see above), the launch of requests for information, or meetings. However, when engaging with stakeholders, the Authority must always bear in mind that the information gathered may be biased, incorrect or incomplete; that there is always a risk of regulatory capture and, hence, a risk of credibility loss. Therefore, it is paramount to always engage based on the principles of impartiality, objectivity, independence and transparency.

3. Drafting

Considering that market studies are thorough legal and economic analyses of the competitive dynamics of a market or sector, very often they result in rather long reports. This means that frequently readers will prioritise the executive summary over the whole report. And even when diving into the report, they will pay particular attention to the final chapters: Conclusions and recommendations.

For this reason, the drafting of these sections must be particularly tended to. It is important to pay particular attention to the language and reasoning of the conclusions, to make sure

that it is easy to follow and understand, as well as to the clarity and concretion of the recommendations. In particular, it is key to clearly identify the addressees of the recommendations to guarantee that the message reaches the relevant stakeholders and to maximise the impact of the recommendations.

17 Available here (Spanish version): https://www.cnmc.es/sites/default/files/editor_contenidos/CNMC/20210507_Plan%20de%20Actuaciones_def.pdf.

18 Available here (English version): https://www.cnmc.es/sites/default/files/3696007_0.pdf.

19 More information available here (English version): <https://www.cnmc.es/en/ambitos-de-actuacion/promocion-de-la-competencia/mejora-regulatoria/consultas-publicas>.

4. Publication and communication of the results

One may think that publishing the study is the end of the journey but, far from it, it is just a step in the way. The final stage is communicating and disseminating the results and it is crucial to do it right if the study is to have impact and achieve its goal: Giving policymakers the tools to correct distortions to competition in order to enhance general welfare.

This final phase in the life of a market study includes the submission of the report to policymakers and government departments, the publication of the report, an intense effort of public communication (through all sorts of materials: Press releases, social media, blog entries, audio-visual materials...) and the organisation of public events concerning the market study, such as public presentations or roundtables.

A good example of the relevance of going the extra mile once the market study has been published is the CNMC's experience concerning its [Market study on the impact on competition of technological innovation in the financial sector \(fintech\)](#)²⁰,

published in November 2018. After the publication, the CNMC did a substantial effort to communicate the results, through the release of an explanatory video in social media and YouTube²¹, the organisation of two public events to discuss the main issues with experts and stakeholders during 2019 or the participation in a documentary on fintech produced by a consumers association in 2020²². One of the recommendations included in the report was to create a regulatory sandbox to facilitate the adoption of new technologies in the financial sector. In late 2020, the Spanish parliament passed a law creating said sandbox²³.

This example highlights how the life of market studies spans beyond their publication and the importance of keeping up the effort of communication in order to achieve results. Three years after its publication, the CNMC's study on fintech is still one of the most influential ones.

5. Conclusion

To sum up, market studies are a powerful competition advocacy tool. They are extremely valuable for Competition Authorities, as they enable the institution to gather knowledge and insight of the functioning and regulation of a specific market/sector; but they are also an extremely useful instrument to convey the Authority's advice on how to improve the functioning of markets in order to increase general welfare.

As powerful as they are, they are also time- and resource-consuming. It is therefore of utmost importance that the Authority carefully plans its market studies activities based on its priorities and availability of resources. Once the report has been published, a communication effort must be made to ensure that the findings and recommendations are known to relevant stakeholders and to guarantee the relevance of the market study.

20 Available here (English version): https://www.cnmc.es/sites/default/files/2218346_1.pdf.

21 Available here (with English subtitles): <https://www.youtube.com/watch?v=D9j1TezFRWs>

22 Available here (Spanish version): <https://www.youtube.com/watch?v=YiHBy7ijtO0>

23 More information available here: <https://www.tesoro.es/en/solicitudes-para-el-espacio-controlado-de-pruebas>.

Market studies as the start of something bigger

A case study from the Netherlands: market study into mobile app stores



Samira Rharissi
Senior Enforcement Officer
Telecom, Postal and Transport
department, ACM



Femke Nagelhoud - de Jong
Senior Enforcement Officer
Telecom, Postal and Transport
department, ACM

The Establishment Act^{xxxv} contains rules concerning the establishment of the Netherlands Authority for Consumers and Markets (ACM) in 2013, provides ACM with powers to initiate market studies^{xxxvi} if such are, in its own judgement, necessary for the execution of its tasks. In addition, this act stipulates that, when requested to do so, companies are obliged to provide ACM with information and data, allowing ACM to fulfil its tasks.^{xxxvii} Together, these rules give ACM a useful tool to carry out market studies, a tool that ACM often uses as an instrument to gain more insights or to learn more about the state of affairs regarding a certain market. Through such market studies, ACM is able to expand its knowledge about a specific market or sector; learn whether there are any problems (market problems or otherwise), and obtain the knowledge it needs to understand their causes. When conducting market studies, ACM interacts closely with stakeholders in a specific sector, which increases our visibility in the market. This helps in getting in touch with stakeholders that had been off our radar, but that are able to provide ACM with information or complaints that are useful to conduct our oversight. So, market studies give ACM the opportunity to do a deep dive in a certain sector or market, and decide whether and, if so, what type of regulatory intervention is available and needed.

Why did ACM look into mobile app stores?

Being both the competition authority as well as the telecom regulator (among other sectors) in the Netherlands, ACM monitors the trends and developments on this market, not only focusing on the more traditional telecom services but also thereto-related more innovative services. Such services have become more relevant because of the increasing importance of smart mobile devices. One such example is app stores, which allow business users to distribute their apps on smart mobile devices. Over the years, apps have become more important for consumers to access content and services on the internet, and thus also for business users to offer their services and content through apps. Given that the majority of Dutch consumers have access to either a smartphone with iOS or Android, their respective proprietary app stores (Apple's App Store and Google's Play Store) are important gateways for business users to offer their content and services to consumers via an app.

Since ACM is an integrated authority, charged with competition oversight, regulation of several sectors, and enforcement of consumer protection laws, we are able to look at any sector from different perspectives. By putting together a market study team with enforcement officers from the different relevant departments, ACM not only has the ability and capacity to study a certain sector in-depth, but also to take a broader perspective.

This is exactly what we did when we conducted the market study into mobile app stores, starting in the summer of 2018. This article offers insights into why ACM started to look into app stores, what choices we made concerning the scope of the study, and what steps we took to collect the relevant information. At the end of this paper, we will share some insights regarding the findings of our market study, and discuss the other outcomes of our market study, besides starting a formal competition investigation under Article 102 TFEU.

The applicable terms and conditions that app providers have to comply with and that are set by the app stores' owners, can influence the availability of apps in the app stores, the conditions under which app providers and consumers can use the app and might also affect competition by steering consumer behavior to their proprietary services.

ACM conducted its market study into app stores, in order to understand the market dynamics. This enabled us to identify potential harmful conduct and to be able to decide whether the identified practices call for further investigation. The market study also helped us to determine whether a regulatory gap exists or not.

Choices concerning scoping

When conducting market studies, one of the most important decisions to make is about the scope of the market study. The scope not only determines the main focus of the market study, but also the duration thereof, what type of information you need to collect, and from what market participants, and what framework you want to use to analyze the findings of the market study.

As mentioned above, ACM has the advantage of having a broad set of competences and, therefore, frameworks to use when investigating problems in a specific market or sector. However, if this is not the case, keep in mind that a market study is also a great tool for identifying problems that do not fall directly under your competence as an authority, but addressing those problems can help identify regulatory gaps.

Steps to take

ACM began its study into this market starting with the many articles and information written about app stores. Based on this publicly available information, ACM assessed (i) whether the app stores of Apple and Google might have a bottleneck position, (ii) whether there are any realistic alternatives to these app stores, and (iii) what competitive restraints there are within and outside the ecosystems of Apple and Google.

To gain more insight into the approval and selection processes of the app stores, we interviewed several app providers of different sizes and that are active on the Dutch market. We spoke to the app providers about (i) what their experiences are in both app stores; (ii) whether they experience any problems in the approval process, (iii) the transparency and communication with Apple and Google, and (iv) viable alternatives to reach Dutch consumers via smartphones. During the process, we received several reports from app providers about the conduct of Apple and Google.

Furthermore, we spoke to Apple and Google to ask about their views on app stores and the rationales behind their general terms and conditions. All of this input combined gave us insight into the conduct of Apple and Google as the owners of respectively the App Store and the Play Store.

After the market study

The market study into app stores had multiple follow-ups. First, together with the publication of our market study in April 2019, ACM announced an investigation into abuse of dominance by Apple in its App Store.^{xxxviii} ACM believed that the findings of the market study could indicate conduct exhibited by Apple that violates competition law.

Second, ACM used the findings from the market study to contribute to the national and European debate on ex-ante regulation in digital markets. One of the type of conducts identified by our market study was self-preferencing of proprietary Apple and Google apps. This type of conduct exhibited by gatekeepers

For the market study into app stores, we limited the scope of our investigation to the relationship between app providers and app stores as well as to the impact of this relationship on the availability of apps. We took the consumer side of the market into account in an indirect manner only. With regard to the framework, we decided to use the public interests that ACM oversees, which are well-functioning markets and consumer protection. This allowed us to look at the competitive dynamics within the app stores market, without having to define markets or only being able to analyze the findings of our study using the EU competition law framework.

Next, ACM examined in what way the importance of app stores and the conduct exhibited impact the public interests that ACM oversees.

We rounded off our market study by presenting our findings. Our market study showed that both the Google Play Store and the Apple App Store are part of a larger ecosystem and that when studying both app stores it is important to also take their respective ecosystems into account. Furthermore, our study also found that the app stores and their surrounding ecosystems form a very important base from which Apple and Google can expand their platform-ecosystem and secure the bottlenecks they have already captured. This has allowed us to not only understand the respective business models but also to put the exhibited conduct in the right perspective. We identified three types of potential harmful conduct, which are (i) favoring one's own apps over apps from other providers, (ii) unequal treatment of apps in general, and (iii) a lack of transparency.

Given the important positions of Apple and Google with their respective app stores as well as the way in which they impact the public interests ACM oversees, ACM concluded that this conduct might warrant further investigation and action from authorities like ACM and/or require action from lawmakers.

like app stores, is under more scrutiny nowadays and considered harmful beforehand under the Digital Markets Act, as proposed by the European Commission at the end of 2020.

Third, our findings helped other investigators and authorities who study this market. One example comes from the US House of Representatives, which used our market study as an important source throughout their review of the mobile app store market.^{xxxix}

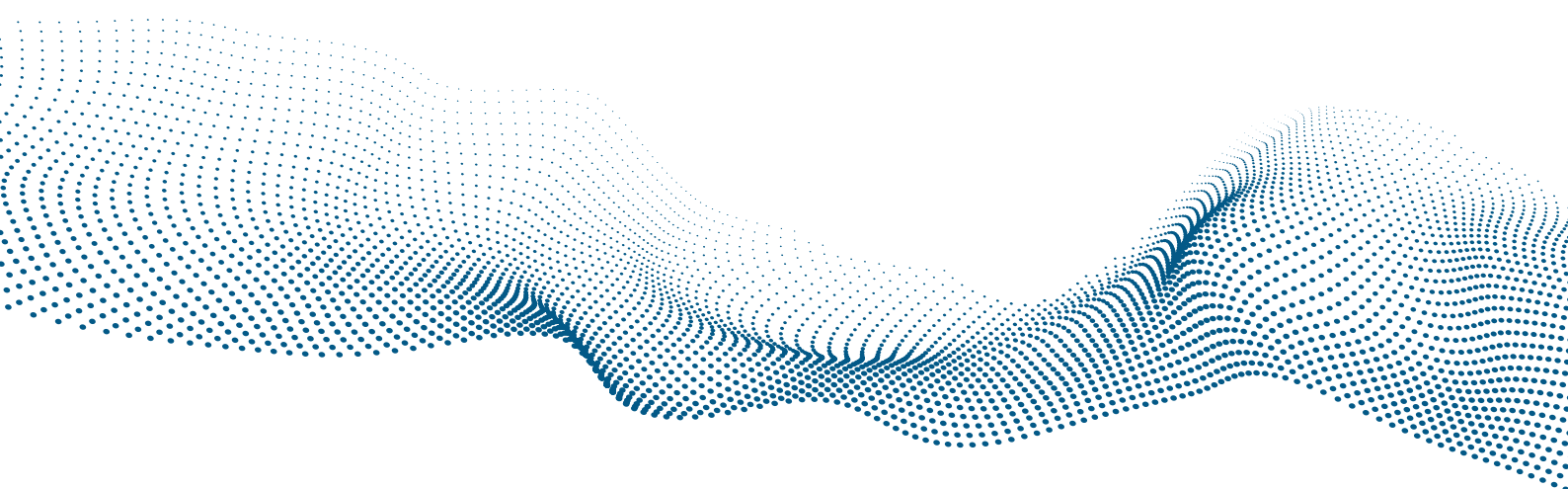
These three follow-ups show that conducting and publishing findings of a market study can contribute to debates on certain problems or topics in a broader sense.

Concluding remarks

In conclusion, we can easily say that the market study into app stores gave us a lot of insight into a market that had previously been unknown to us. This helped ACM to understand the market, its difficulties and structures, which helped us see the relevant problems that might warrant action. It also helped us contribute to the ongoing debates on the Digital Markets Act and on regulating gatekeeper platforms.

ACM will continue to use the market study instrument to increase our knowledge about certain markets and topics to see where we as an authority are most needed. In May 2021, we announced our market study into cloud services.^{xl} We look forward to finding out what that study will reveal next.

Samira Rharissi and Femke Nagelhoud - de Jong both work as Senior Enforcement Officers in the Telecom & Digital team of ACM's Telecom, Postal and Transport department. Both have a background in economics.



Grocery Market Study: Experience from New Zealand



Richard May
Competition Expert, OECD
Formerly Principal Adviser,
Market Studies, New Zealand
Commerce Commission



John Small
Commissioner, New Zealand
Commerce Commission

Background, powers and history

1. The New Zealand Commerce Commission (NZCC) was created to enforce the Commerce Act (1986). This law was amended in 2018 to enable the NZCC to undertake competition studies, known as market studies, which examine competition in specific markets and can make recommendations for improving competition. Studies can be initiated by the NZCC or the Government, with the latter option being used so far. The NZCC is obliged to consult on a Draft Report and provide its Final Report to the Minister by a set date. Any resulting policy choices rest with the Minister.
2. The first study was into retail fuel markets, and concluded in December 2019. It identified the absence of effective wholesale competition as the major impediment to competition, recommending liberalisation of wholesale

contracts and the enabling of spot trading at terminal gates. The Government passed new legislation to give effect to these recommendations and the resulting regime has started to come into force.

3. The second study was initiated into the grocery retail sector in November 2020. Originally it had a 12-month duration, but this has been extended to March 2022 due to pandemic-related disruption (including to the grocery retailers). This sector is highly concentrated, partly as a result of a 3-2 merger that was initiated just days before New Zealand's merger threshold test was tightened in 2001. The two main operators supply the six main supermarket banners which sell at least 80% of retail groceries. A fringe of smaller operators target niches, and many resell groceries bought from the retail stores of the duopolists.

Scoping our analysis

4. For any market study, and particularly those on large sectors like retail groceries, it is important to devote sufficient effort in carefully scoping early on. Scoping aims to ensure the study uses its resources efficiently and effectively, focusing on the key issues. At the same time, an authority must balance this by remaining flexible and open-minded, as making early scoping decisions risks excluding potentially important issues.
5. To inform the scoping exercise, we reviewed previous enforcement action that the NZCC had conducted into the sector and studies conducted by other competition authorities. We supplemented this with desk research on the sector and reviews of the relevant economic literature. From this work, we sought to identify the likely main issues for the study.
6. To aid of the transparency of the study, we published a process paper in the first few days of the study which explained the likely steps for the study and how stakeholders could have their say. We also consulted stakeholders on the scope of the study early on by publishing a preliminary issues paper, inviting industry participants to provide their feedback. Non-confidential versions of submissions

were published on our website, with submitters required to identify material they considered confidential as part of the submission process. Cross-submissions were allowed and also published.

7. We received submissions from a wide range of stakeholders, including major retailers, supplier associations and consumer groups. The responses aided our understanding of the sector and helped us refine our thinking regarding the likely main issues.
8. It is important to develop an analysis plan as early as possible. As a starting point to planning our analysis for this study, we considered the key aspects that needed to be tested for each of the likely issues. We then identified possible analyses to test those aspects. To assist in doing so, we categorised analysis into:
 - a. Desk based research, websites and academic literature
 - b. Information and interviews with third parties, including contemporaneous business documents
 - c. Descriptive statistics, including market shares
 - d. Larger pieces of analysis (e.g econometrics, consumer surveys)

9. Having identified a range of potential analysis options, we then carried out a prioritisation exercise, considering the expected insight compared to the resources and time required, as well as the risks. Given the project's timeframe, careful judgements were required from the outset in order

to identify and plan some parts of analysis. For example, we sought to prepare information requests for industry participants and initiate large pieces of analysis as soon as possible.

Our analysis

10. As with many competition projects, requesting information from industry participants was a vital part of the study. The NZCC used a mixture of written information requests and meetings to increase our understanding of the sector and test the main issues. We requested large amounts of information from the major retailers, including internal documents, accounting data and pricing records, which were invaluable in understanding the sector and testing the main issues. Given the impact of COVID-19, a large proportion of our meetings with industry participants were held via video conference, with appropriate information provided beforehand via email.
11. Throughout the study we kept stakeholders informed of our progress via our website and a mailing list. We also provided an email address for stakeholders to contact us in relation to the study. We engaged with a wide range of stakeholders during the study, including product manufacturers, wholesalers, a wide mix of different retailers, government agencies, overseas retailers, consumer organisations, and even experts on land planning and development.
12. In addition, the NZCC also used surveys to gather information from consumers and supermarket suppliers.
13. Our consumer survey was hosted on the Commission's website and asked consumers about their typical shopping habits, including where they bought their groceries and why. We promoted the survey with consumer groups and used Facebook for advertising. Over 10,000 consumers responded. We further explored consumer shopping behaviour by commissioning qualitative research.
14. Our supplier survey asked suppliers about their relationships and experiences with retailers. There were concerns that suppliers would be reluctant to share information with us given the fear of potential repercussions. To reduce this risk, we identified strong processes on how information would be protected and communicated these to suppliers. We also allowed suppliers to provide information anonymously if they wished, although many respondents to the survey chose not to.
15. We also commissioned two pieces of external economic analysis. The first was an econometric analysis, which considered the relationships between local market concentration and prices. The second was a piece of behavioural economic research, which tested the effect of pricing practices, particularly promotions, on consumer purchasing patterns.
16. The particular topics examined could be divided into two groups: factors that are likely to affect competition (e.g. entry barriers, consumer behaviour) and indicators of the outcomes (e.g. prices, profitability). Depending on the subject of the study, it may be very challenging to get reliable outcome measures and to compare them with competitive market benchmarks. In the authors' view, outcome indicators are useful but not absolutely necessary for market studies. Reliable assessment of competitive intensity and ways to improve competition can be achieved without outcome indicators.

Draft findings and next steps

17. The Draft Report provisionally concluded that competition did not seem to be working well. Our consumer research showed a strong tendency to use a single supermarket for many if not most of the groceries for each household. Smaller stores do not have the range to compete for regular "main" shops, and the evidence suggested that they also fail to constrain the major chains for other "top-up" shopping. Significant barriers to entry and expansion were identified, along with concerns over the bargaining imbalance between suppliers and supermarkets. We also reported high returns on capital and internationally high grocery prices. Some of the conduct we identified might breach competition or fair-trading laws which are also enforced by the Commission. These are being considered separately, leaving the market study to focus on recommendations that are not achievable through enforcement actions.
18. A wide range of options were outlined for recommendations to address these issues. These include methods to free-up sites for supermarkets, to promote independent wholesale supply and also some divestment options to create new at-scale rivals. For natural justice reasons it is important to expose all potential recommendations to a transparent consultation process. The next step is to consult widely on these options. This occurs through written submissions, an open inquisitorial style hearing, separate confidential bilateral meetings and finally a cross-submission process.

ICN Resources for Competition Agencies to Plan and Conduct Market Studies



Matthew Wong
Senior Adviser, Advisory &
International Affairs
Hong Kong Competition
Commission

In May 2021, the OECD-GVH Regional Centre for Competition in Budapest (Hungary) hosted a virtual seminar in which competition experts from several jurisdictions gathered and shared their experiences and good practices on conducting market studies. Speakers discussed the fundamentals such as the objectives and use of market studies, as well as gave practical tips on managing the process. Some topical issues were also explored in the virtual seminar, as the participants engaged in intriguing dialogues on matters such as how to use market studies to tackle emerging competition issues, and how they could strengthen advocacy and support enforcement. On behalf of the International Competition Network (ICN) Advocacy Working Group (AWG), the Hong Kong Competition Commission was also invited to give an overview of the ICN's resources which competition agencies may draw on as they start to make strategic plan for a market study. To further assist agency officials to make use of the ICN Work Products, this article outlines and elaborates on these publicly available materials which may help competition agencies to manage market studies in an effective and efficient manner.

Market studies take an in-depth look at the market in question and generate relevant data and knowledge which can be valuable for agencies to make informed decisions as to the best way to address competition issues. Market studies also give agencies a better understanding of the market structure

and landscape which in turn would help identify areas where antitrust infringements may arise. Sometimes, problematic market structures that hinder competition could also be caused inadvertently by public policies or government actions, and then, market studies assist competition agencies to make recommendations such as regulatory reforms to remove the restrictions.

Market studies are, no doubt, complex exercises and requires detailed planning and prolonged engagement. For the significant amounts of time and resources involved in a study, the responsible officials should carefully devise a roll-out plan to ensure that the market study would be conducted in an efficient and transparent manner, and that the resources invested would be allocated efficiently.

Over the years, the ICN AWG has developed two documents and an online resource platform to facilitate competition agencies in planning and executing these resource-intensive projects. They are: (1) Market Studies Guiding Principles Booklet published in May 2016, (2) Market Studies Good Practice Handbook first published in 2012 and updated in 2016 (3) Market Studies Information Store that to be expanded in 2022. They are great supplementary resources to the OECD Guide on Market Studies published in 2018.

Market Studies Guiding Principles Booklet²⁴

The Guiding Principles for Market Studies Booklet offers agency officials an understanding of the overarching issues that should be considered before and when undertaking market studies. The Booklet also provides some hands-on tips on matters, such as how to engage and gain buy-in from internal stakeholders, and how to allocate responsibilities between agency leadership and working-level staff.

It is a good starting point for any agency officials who begin to think about how to proceed with a market study, while it is an easy-to-read document for any first-timers to be involved in market studies. From cover to cover, the Booklet has only 20 pages, with each page only containing a few paragraphs of

content. This Booklet would give an overview and a general sense of what are the major steps that need to be done and issues to be considered throughout a market study exercise. We believe that responsible officials should find it particularly useful when it is used and read in conjunction with the OECD Guide on Market Studies.

Guiding principle documents are the highest-level materials published by the ICN, and therefore have been drafted to have relevance for the broadest range of enforcement authorities possible. They are not prescriptive, and users should select from them according to their agency's own needs, priorities and resources, subject to their differing legal powers and functions.

24 Web link to the material: <https://www.internationalcompetitionnetwork.org/portfolio/market-studies-guiding-principles-booklet/>

Market Studies Good Practice Handbook²⁵

As compared with the Guiding Principles Booklet, the Market Studies Good Practice Handbook is a longer and more detailed document with more than 50 pages of content. In fact, the high-level guiding principles contained in the Booklet are based on and derive from the Good Practice Handbook. The Handbook identifies a number of good practices when preparing for and conducting market studies.

The Handbook was first developed in 2012 by the ICN AWG, and was updated in 2016 to include the accumulated experiences and lessons learned since then. The Working Group has also improved the format of the Handbook to be more user-friendly. In seven chapters, the Handbook elaborates on the key steps in detail that a market study process may involve, including:

- identifying and selecting a market to study,
- scoping and planning a study,
- planning stakeholder engagement,
- launching a study,
- collecting and analyzing information,
- developing and securing outcomes
- and evaluating a study.

Just like when referencing the guiding principles promulgated in the Booklet, competition agencies should select and make reference to the good practices according to their own needs, priorities, and resources, and subject to their varied statutory powers and given functions.

Market Studies Information Store²⁶

The Info Store is a web-based catalogue of market studies where competition agencies could take an inventory of what have been done in overseas jurisdictions over the years. The agency officials could find inspirations for topics of the studies, and learn about specific approaches adopted by individual agencies to particular market problems. By scanning through the entries in the Info Store, agency officials could also identify specific competition authorities whom they may contact direct for further assistance and advice. The Info Store enables competition agencies to identify existing market studies in particular industrial sectors as well as in particular jurisdictions, and that would eventually help cross-fertilize ideas about market issues.

Each entry in the catalogue gives a brief description of the study's subject matter, source of ideas (e.g. whether the study is on the agency's own initiative or commissioned by government), purpose and outcomes. The Info Store has accumulated studies from as early as 2006 which have been conducted by more than 40 competition authorities from jurisdictions of all sizes and in various stages of economic developments. The recorded studies cover 29 industrial sectors, ranging from construction to

insurance, from e-commerce to transport. Where available, the Info Store also provides web links directing to the contributing agencies' websites, where one can easily find those reports in full. This online resource platform has been and will continue to be updated on a regular basis, possibly about every three to four years, to ensure the most up-to-date information will be available to the competition agencies.

In light of the rapid development of disruptive technology and the digital economy worldwide in recent years, competition agencies have been keen to learn more about peers' experiences in conducting market studies in those areas. The Info Store was thus last updated in 2020 with the addition of over 120 new entries, many of those are related to competition issues arising from the digital economy. Back then, the AWG Co-chairs also prompted newer and smaller agencies to share their experiences in market studies, as we believe that competition agencies of similar background would be interested to learn about what each other have been doing in market studies. By the same token, we encourage your agencies to contribute to the meaningful project in the upcoming round of update.

Work in progress

Looking ahead, in the coming ICN year of 2021-22, the AWG will make an effort to expand the Market Studies Information Store with a new section dedicated for international collaborative studies. In recent years, we have seen more and more multi-jurisdictional initiatives, such as the joint French-German competition agency paper on big data in 2016 and the 2018 project on artificial intelligence as well as the joint memorandum on digital economy by the Belgian, Dutch and Luxembourg competition authorities. This upcoming exercise by the AWG will call for, collect and compile research studies that are jointly conducted by competition agencies and those

undertaken by international and regional organizations. The ICN recognizes the ever-growing importance of international cooperation between competition agencies on advocacy initiatives, especially in the digital space. We are hopeful that, entering into its third decade, the ICN will continue to serve as a key forum for competition authorities to explore ideas and exchange experiences in researching into economic sectors and markets many of which are becoming increasingly borderless.

²⁵ Web link to the material: <https://www.internationalcompetitionnetwork.org/portfolio/market-studies-good-practice-handbook/>

²⁶ Web link to the material: <https://www.internationalcompetitionnetwork.org/working-groups/advocacy/market-studies/market-studies-information-store/>
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NEWS FROM THE REGION



2021 ICN Annual Conference



Miranda Molnár
RCC Coordinator, GVH

On 13-15 October 2021, with the support of the Hungarian government, the Hungarian Competition Authority (GVH) hosted the 20th ICN Annual Conference. The event marked the closure of the International Competition Network's second decade and the beginning of its third.

In light of the travel restrictions in place in many countries around the world, the conference was eventually held online instead of the originally planned in-person event. This allowed a much-wider audience to participate than would have been possible for a real-life conference. Indeed, the conference's inclusive nature was shown by a virtual audience for the professional programmes of more than 1 000 competition-law experts from around 130 countries. The 2021 ICN Annual Conference brought the competition community together, including members of competition agencies, academics, experts, economists, representatives of international organisations and other non-governmental advisors (NGAs), whose active participation greatly contributed to the event's success and achievements.

The conference provided competition-law experts from around the world with a great opportunity to share their experiences and exchange views on a wide range of issues. Within the framework of the conference's 21 plenary and break-out sessions, panel members took an overview of the results of several years of international co-operation and engaged in dynamic discussions on competition policy and enforcement in the areas of advocacy, agency effectiveness, cartels, mergers, and unilateral conduct, in particular. Some of the important topics touched upon by the competition community at the conference included the GVH's special plenary session on "Sustainable Development and Competition Law"; the ICN Third Decade project; international co-operation in fighting cross-border cartels; and the Steering Group project on the intersection between competition, consumer protection and privacy.

Since the break-out sessions constitute an essential element of all ICN annual conferences, each working group had two dedicated interactive sessions to allow for more informal and open discussions among the panel members and with the audience on topics of particular interest. The conference's plenary sessions



were all recorded and made available to the wider public on the conference website, together with other relevant documents, including the conference agenda, work products, and activities and videos of the working groups.

As this was the 20th annual conference in ICN history, the GVH prepared three compilations to commemorate the occasion and to provide the audience with a comprehensive overview of the conferences' two-decade history. This remarkable project, which created a valuable summary of 20 years of achievements, would not have been possible without contributions from the organisers of previous ICN annual conferences and former chairs of the Steering Group.

The host authority strove to make up for the lack of in-person participation at the conference by organising various social events online, including folk music and dance shows, an online tour of the Hungarian National Museum and sand animation, all of which gave participants a unique experience and enabled them to gain a deeper insight into the customs, traditions, history and culture of Hungary. Videos and pictures depicting the landscape, natural beauties and everyday life of Hungary were shown between the sessions to further encourage the audience to visit the country. The anniversary publications, the GVH's special project and the Hungarian Tourism Agency videos will remain available on the conference website until the end of October 2023, to make this valuable professional content more accessible for a wider group of people.



15/10/2021

Special project: sustainable development and competition enforcement



Csaba Kovács
Deputy Head
Competition Economics and
Market Research Section GVH

In its role as host agency of the 2021 ICN Annual Conference, GVH took the traditional opportunity given to the host of showcasing an issue it considers relevant to other participants. The GVH used this unique occasion to survey competition agencies and non-governmental advisors (NGAs) worldwide about sustainability and competition.

An emerging and hotly debated topic is whether competition agencies should incorporate sustainability

considerations into enforcement, and if yes, how. Arguably, these considerations could serve as a theory of harm in some cases, or as a justification and defence for the parties in others.

The GVH survey aimed to explore actual experience, rather than prescriptive theories. It focused on restrictive agreements, while also covering institutional aspects, such as capacity building and co-operation.

Main conclusions^{xli}

- The idea that competition enforcement could have a reasonable, albeit limited role in achieving sustainability objectives is widely supported by NGAs with experience in the field.
- Efficiency and welfare standards do not seem to impede sustainability cases and special competition-law provisions do not seem to be conducive to such cases per se. Legislative action does not therefore seem to be imperative, yet may be instrumental in certain – perhaps, many – jurisdictions. Soft laws and guidance, however, are called for by NGAs.
- So far there has been little – albeit growing – practical experience and it has been largely limited to Europe. However, the number of sustainability cases have started to grow, with interest and anticipation extend well beyond Europe, suggesting that such cases will be more frequent and widespread in the future.
- In practice, sustainability considerations more often emerge as a defence (rather than prompting sustainability-related competitive concerns). Sustainability defence also seems to be a more recognised concept, and its analysis seems to be more evolved.
- Additional skills are most likely needed, along with increased attention and preparations. However, “competition policy R&D” appears to be fundamental.
- International co-operation – both between foreign counterparts and through the work of international organisations – is seen as useful and supported by respondents.
- Results are inconclusive as to whether international convergence or divergence is unfolding, even if there are signs of regional convergence in Europe.

Overall, sustainability will likely be a major topic for competition agencies, including those of RCC beneficiary countries, in the coming years.

In addition to the survey, a panel discussion on the topic was held on the first day of the conference.^{xlii}

Commission for the Protection of Competition of the Republic of Armenia: Path Travelled and Achievements Attained



History

The Commission for the Protection of Competition was established in 2001 by the Republic of Armenia Law on the Protection of Economic Competition. A state body implementing state policy in the area of protecting economic competition, the Commission is currently autonomous. In the 20 years since its formation, it has made much progress.

In 2007, the Commission was empowered to carry out inspections, and state aid was included in the list of sectors subject to control.

In 2011, a procedure for monitoring and reviewing mergers was introduced, the size of imposable fines increased, and the concepts of dominant position and other concepts in competition legislation refined.

In 2015, the status of the Commission as an autonomous body

and the procedure for its setting up were for the first time enshrined in the Constitution of the Republic of Armenia, significantly increasing the guarantees of its independence.

In 2018, the provisions related to the Commission set out in the constitution were added to the Competition Law and it was brought into line with the Treaty on the Eurasian Economic Union and international best practice.

In 2019, the right to nominate a candidate for a vacant position of Commission member was assigned in turn to the governing parties, the opposition parties of the National Assembly, and the government of the Republic of Armenia.

In 2021, comprehensive amendments were made to the Law fundamentally changing the Commission's status and powers and its quality parameters.

The Commission

The Commission for the Protection of Competition's board consists of a chairman and six members appointed by the National Assembly of the Republic of Armenia; it employs 86 people, most of whom are women.

In recent years, new specialists from various sectors of the economy have joined the Commission team and the average age of employees has dropped. Educationally, 16% of employees are science graduates and 34% have a master's degree.

Innovations

Improving the institution of state aid

The Commission's priorities include the continuous monitoring of state aid and support, and the development of institutional control over state aid with continued measures to improve legislation. In May 2020, the government of Armenia established a procedure and terms for state bodies to submit information

on state aid to the Commission. This was seen as especially important for cases where state aid may have restrictive, preventive or prohibitive effects on economic competition, and for identifying situations harmful to consumer interests.

Establishment of the mechanism for market surveys

The 2021 version of the Competition Law established a comprehensive tool kit for sectoral surveys and the procedures for their implementation.

Expansion of procedures for providing opinions

This tool kit plays an important role in the Commission’s preventive powers. Stakeholders can now obtain an opinion on their compliance with competition law before any actions are

taken, transactions concluded, or legal acts adopted. This adds to the Commission’s preventive value.

Introducing the concept of strong bargaining power

Regulations aimed at ensuring fair competition between large retail chains and suppliers have been reintroduced. In particular, the concept of strong bargaining power was brought into the

Competition Law, and typical manifestations of bargaining-power abuse were imagined.

Reforming the framework for adopting consultative guidelines

Around the world, the development of advisory regulations, such as in the Russian Federation, and normative legal acts, such as those in Lithuania, Slovakia, Hungary, and Australia,

has become widespread. The Commission has developed similar guidelines to ensure a fair competitive environment between major retailers and suppliers.

Achievements: improving competition

The Commission’s work has resulted in studies, the initiation of administrative proceedings, and a noted improvement in the competitive environment of certain product markets. It has achieved good results in the socially important butter and sugar markets, which have long been considered highly concentrated. These improvements have included:

- the removal of barriers to entry into the butter market, and the implementation of equal conditions for economic entities in the retail sector

- a better competitive environment in the sugar market, with the elimination of discriminatory conditions and an increase in the number of market participants
- a decrease of almost 50% in occurrences of unfair competition in the dairy market
- a significant drop in cases of misleading advertising.

VIOLATIONS OF THE LAW ON COMPETITION, 2010-2020

VIOLATION	CASE NUMBERS
Abuse of dominant position	121
Anticompetitive agreements	90
Concentration	576
Unfair competition	744

Future Commission policy priorities

In 2022 and 2023, the Commission’s policies will aim to address four priority areas.

1. Further legislative development

The entry into force of the new version of the Competition Law on 31 May 2021 has made it necessary to develop and approve around 40 implementation regulations to provide the business

community with a transparent, clear-cut and understandable presentation of the legal environment.

2. Digitalisation

Within the framework of the implementation of World Bank’s “Third Public-Sector Modernization Program” in Armenia, an electronic system is being developed for the Commission. This will consist of an external website and an internal platform that will allow the integration of information collected from external sources and its transfer to the internal system, and automatic publication on the website of information from

internal procedures. The website will provide information on the activities of the Commission, the latest news, a description of ongoing litigation procedures, and a database of decisions taken by the Commission, as well as the results of interactive price monitoring for a number of goods. Individuals and legal entities will be able to submit applications, declarations and reports, and receive notifications and information on the

progress of procedures on pre-registered personal pages. The electronic system will be integrated into other government agencies' databases and automatic data loading will ease administrative burdens, accelerate workflows, and improve efficiency in the use of time and resources. Through the

electronic system, government agencies will also be able to submit online information about any current provision of state aid. The creation of this new electronic tool kit aims to ensure a high degree of transparency in the Commission's activities.

3. Personnel management: retraining and attracting new staff members

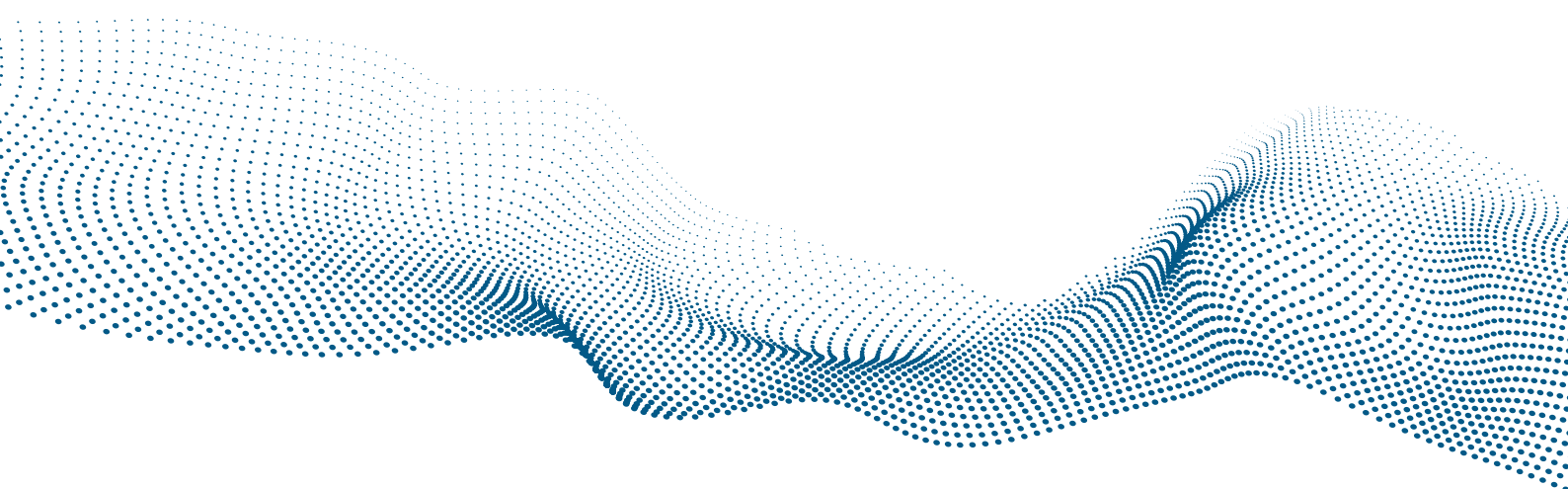
Much attention has been paid to improving staff members' knowledge and skills, and keeping their knowledge base up to date through training. Many programmes, including those for the exchange of experiences, are being implemented with the support of international partners .

The Commission co-operates with specialised universities across Armenia. Memoranda have been signed with a number of educational institutions for joint retraining and training courses.

4. Competition advocacy and public awareness

Competition advocacy and better public awareness are essential prerequisites for the effective exercise of the Commission's mandate. In this area, the work of raising awareness is carried out with three main sets of stakeholders: government agencies; the business community; and the general public.

The Commission has had successes in these sectors over the years, but the tasks ahead are much greater. The Commission will continue to make significant efforts to identify behaviour that limits economic competition and to support the progressive development of a culture of fair, equitable and honest competition.



UOKiK activities in 2020



Created in 1990, the Office of Competition and Consumer Protection (UOKiK) is a central government administration authority responsible for competition and consumer protection policy in Poland. Its activities are financed from the state budget. Its president, currently Tomasz Chróstny, is appointed by the prime minister of Poland and acts as head of UOKiK. The Office's main competencies in competition control are antitrust, merger control, contractual advantage, and bid rigging. Its other competencies include consumer protection, trade inspection-supervision, product safety and market surveillance, supervision of state aid, and payment gridlocks. Of its 591 employees, 150 work in competition protection. UOKiK has an annual budget of just over PLN 101 million.

In 2020, UOKiK's activity was heavily impacted by the global COVID-19 pandemic, which not only forced UOKiK to make significant changes in its work organisation, but also posed new challenges in the protection of fair competition. UOKiK had to respond to an increased risk of market violations for strategic medical products and the possibility of hostile takeovers of Polish undertakings of strategic importance.

Consequently, alongside the most important information regarding UOKiK's activity in competition protection and providing cases of concrete actions, UOKiK will present its response to COVID. More detailed information on its activities in 2020 can be found in UOKiK's annual report, available online on the Office's website.^{xliii}

Competition-restricting practices in 2020

UOKiK's activity - summary

UOKiK may conduct two types of proceedings in connection with a suspected violation of the prohibition on competition-restricting practices: **explanatory and antitrust**.

Explanatory proceedings are initiated in response to a suspicion of violation of antitrust law. They investigate a specific matter, not specific entities, although they may result in the initiation of antitrust proceedings against a specific entity.

In 2020, UOKiK initiated 64 explanatory proceedings and 7 antitrust proceedings. All 7 antitrust proceedings concerned horizontal agreements and bid-rigging.

UOKiK issued 15 decisions concerning competition-restricting practices. The total resulting financial penalties amounted to PLN 187.2 million. For the first time, UOKiK issued decisions **imposing financial sanctions on managers personally responsible** for concluding illegal agreements.

Penalties can be reduced if parties co-operate with UOKiK. Two forms of co-operation can lead to a reduction. The first is a **leniency programme**, which applies to entities involved in prohibited agreements, and sees fines imposed on undertakings and managers lifted in full or significantly reduced. In 2020, undertakings submitted three applications to take part in this programme. Sanctions in four decisions taken in 2020 were reduced in the framework of the leniency programme. Undertakings can also opt for voluntary submission to a penalty, which applies to all types of violations (anti-competitive agreements and abuse of a dominant position) and allows for a fine to be reduced. In 2020, UOKiK issued three decisions related to **voluntary submission** concerning six undertakings and one manager.

Competition-restricting practices case: market sharing

A market-sharing agreement can be as dangerous a restrictive practice as price collusion. Instead of competing fairly with each other, undertakings decide not to compete in a selected area and allot territory, goods, or customer groups among themselves.

An example of such practice was two agreements concluded between producers and sellers of industrial animal feed – Polmass and its competitors, Ekoplón and Agro-Netzwerk Polska – which involved sharing the domestic market for milk replacements for cattle.

Evidence of both anticompetitive agreements was found after searches at the three companies' headquarters. In September 2021, Polmass and Ekoplón were fined over PLN 17 million, and in a second case, Polmass received an additional fine of over PLN 2.5 million. The penalty against Agro-Netzwerk Poland was waived after it provided valuable evidence of the agreement under the leniency programme.

Competition-restricting practices case: bid rigging

In response to the growing importance of bid-rigging within the authority's activity, UOKiK decided to introduce organisational changes and in 2020 established the Department for Bid Rigging Prevention.

In September 2020, UOKiK found bid-rigging in a tender procedure organised by PKP TLK for the supply of wooden railway sleepers in 2014 and 2015. The tender has been divided into two tasks, and the undertakings agreed among themselves exactly who was to bid in each and the price to propose. The

bid riggers agreed that the first task would be won by Track Tec, and the second by a specially created consortium of ThyssenKrupp and KZN Biezanów. Entities that did not tender were to participate as subcontractors.

Arrangements between the companies were made in 2013-2014 during meetings in hotels and restaurants in Katowice, Kraków and Warsaw and during telephone conversations. UOKiK imposed penalties on the participants in the tender collusion that totalled nearly PLN 13.5 million.

Competition-restricting practices in the time of COVID-19

With the emergence of the COVID-19 pandemic in 2020, UOKiK took steps to:

1. monitor the market for new violations
2. launch a new channel for communicating with market participants.

UOKiK conducted proceedings in markets for products vital to preventing the spread of COVID-19, including tests, laboratory-test reagents, and medical supplies, such as masks, and disinfectant alcohol. This was aimed at determining whether anticompetitive practices such as prohibited arrangements

or abuse of dominant position were taking place due to the growing demand for medical supplies. UOKiK set up a special helpline to allow hospital directors to report legal violations.

To meet the needs of businesses, the Office created a special email address for the duration of the pandemic.^{xliv} Additionally, a section was added to the Office's website containing information on business conditions during the pandemic, including issues such as COVID-19 and state aid, COVID-19 and competition law, and guidelines for undertakings, including unfair use of contractual advantage during the pandemic.

Concentration control in 2020

UOKiK's activity: summary

In 2020, UOKiK conducted 264 new concentration-control proceedings, which resulted in 243 decisions, including 242 ordinary approvals and one conditional decision. Not a single concentration action was prohibited.

UOKiK approves concentrations if they will not significantly restrict market competition. Conditional concentration may be approved if certain conditions are met (such as resale of a portion of assets). Additionally, extraordinary approval of a transaction despite anti-competitive effects can be granted in cases where such a transaction will significantly contribute to economic development or technical progress, or will have a positive impact on the national economy.

Concentration control case: Nord Stream violation

This precedent-setting decision was the result of more than two and a half years of proceedings against Gazprom and five international entities responsible for financing the Nord Stream 2 (NS2) gas pipeline

UOKiK first analysed the case of the Nord Stream 2 construction project in 2016 and it was determined that the planned merger of Gazprom and five international companies could lead to a restriction of competition. Facing objections from UOKiK, the participants withdrew their concentration application, which meant it was prohibited.

In 2017, UOKiK reopened the case after media reports of new arrangements between participants in the Nord Stream 1 consortium. The proceeding confirmed that the six companies

The obligation to notify the intent to concentrate applies to undertakings whose total turnover exceeds EUR 1 billion worldwide or EUR 50 million in Poland in the year preceding the notification.

If undertakings consolidate without UOKiK's prior approval – even unintentionally – they may be fined up to 10% of the previous year's turnover. What is more, fines of up to EUR 50 million might be imposed on undertakings that fail to provide information during UOKiK proceedings. In 2020, the total amount of penalties imposed exceeded PLN 29 billion.

had entered into several NS2 financing agreements at the time, despite UOKiK's objection to the establishment of a joint venture.

In assessing the degree of infringement, UOKiK found that the companies had never abandoned their intention to consolidate, but had simply implemented it in a different form.

As the companies financing the pipeline had acted intentionally, they were given a maximum fine of 10% of their annual turnover in each case. UOKiK imposed a fine of over PLN 29 billion on Gazprom and over PLN 234 million on other consortium participants.

Concentration control case: conditional approval for a transaction in the cable TV and ISP market

In August 2018, a transaction involving Vectra's intention to take over Multimedia Polska was reported to the Office. As both undertakings were operating in the cable-TV and Internet service-provider markets, Vectra was obliged to meet certain conditions to eliminate threats to fair market competition in 21 localities.

Vectra had to sell its own networks or ones owned by Multimedia Polska in eight cities. Additionally, it had to establish new companies to which it would transfer property from each of the cities mentioned, including subscriber contracts, telecommunications infrastructure, employee contracts,

accounting and technical documentation, and subscriber databases. These companies will then be sold to an independent investor, with the buyer not being allowed to belong to or be jointly controlled by any entity in the Vectra capital group. The buyer will also need to be approved by UOKiK.

Another condition was that subscribers in 13 other localities would be allowed to change their service providers freely. Within seven months of the decision becoming final, Vectra was ordered to inform customers that they could terminate their contracts for pay TV and fixed-broadband Internet access free of charge during the following nine months.

Concentration control in the time of COVID-19

In July 2020, UOKiK was given new responsibilities in the protection of Polish undertakings of strategic importance to public order, security, and health.^{xlv} The introduction of new competences was necessitated by the deteriorating economic situation caused by the COVID-19 pandemic, as well as the risk of domestic companies being taken over by investors from non-EU, EEA, and OECD countries.

The protection applies to undertakings based in Poland, whose revenue from sales and services in Poland exceeds the equivalent of EUR 10 million in one of the two financial years preceding the intent to take over. At the same time, such an entity must also meet one of the following conditions:

- be a public company, regardless of its type and industry
- possess property that features the list of facilities, installations, equipment, and services that comprise

critical infrastructure

- be developing or modifying software for applications listed in the Act on Investment Control
- be engaged in one of the industries specified in the Act on Investment Control, particularly energy, fuel, chemicals, armaments, telecommunications, IT, medical or meat, milk, grain, fruit and vegetable processing companies.

The entity making the transaction must notify UOKiK, which conducts a verification proceeding upon receiving such a notification. If the transaction does not raise objections in terms of public order, safety or health, UOKiK issues a no-objection decision. Acquisition of a protected undertaking without notice or despite a UOKiK objection is void. By the end of 2020, UOKiK had received four applications under the new rules.

Contractual advantage in 2020

UOKiK's activity summary

UOKiK monitors the agricultural and food market for unfair trade practices in relations between undertakings in the product supply chain. The regulation on contractual advantage gives four examples of violations, which include unreasonable termination or threatened termination of a contract and unreasonable extension of payment terms. The intervention of UOKiK in the agricultural and food market is possible in all cases of abuse of contractual advantage, regardless of undertakings' turnovers. Anyone with knowledge of unfair trade practices may file a notice with UOKiK. Notifying parties are guaranteed full anonymity, and their data and the content of

the notification are not disclosed at any stage of the proceeding.

In order to protect the interests of agricultural producers, UOKiK initiated 42 proceedings concerning contractual advantage: 36 explanatory proceedings and 6 proceedings on practices unfairly using contractual advantage. These addressed the practices of major retail chains and processors. Five decisions were issued to agricultural- and food-market operators.

Contractual advantage case: penalty for retroactive discounts

In December 2020, UOKiK completed precedent-setting proceedings against Jeronimo Martins Polska (JMP), which had been initiated in 2019. UOKiK had questioned the discounts that JMP demanded from its suppliers at the end of a billing period, after the deliveries had been made and without the amount being set in advance in the contract. These were the so-called "rappel extra", amounts by which the undertaking arbitrarily reduced the remuneration of its contractors. Due to JMP's market power, suppliers agreed to unfavourable

terms for fear that ending the co-operation could mean even greater financial losses. During the period under investigation – between 2018 and 2020 – JMP "earned" more than PLN 600 million from the questioned practices.

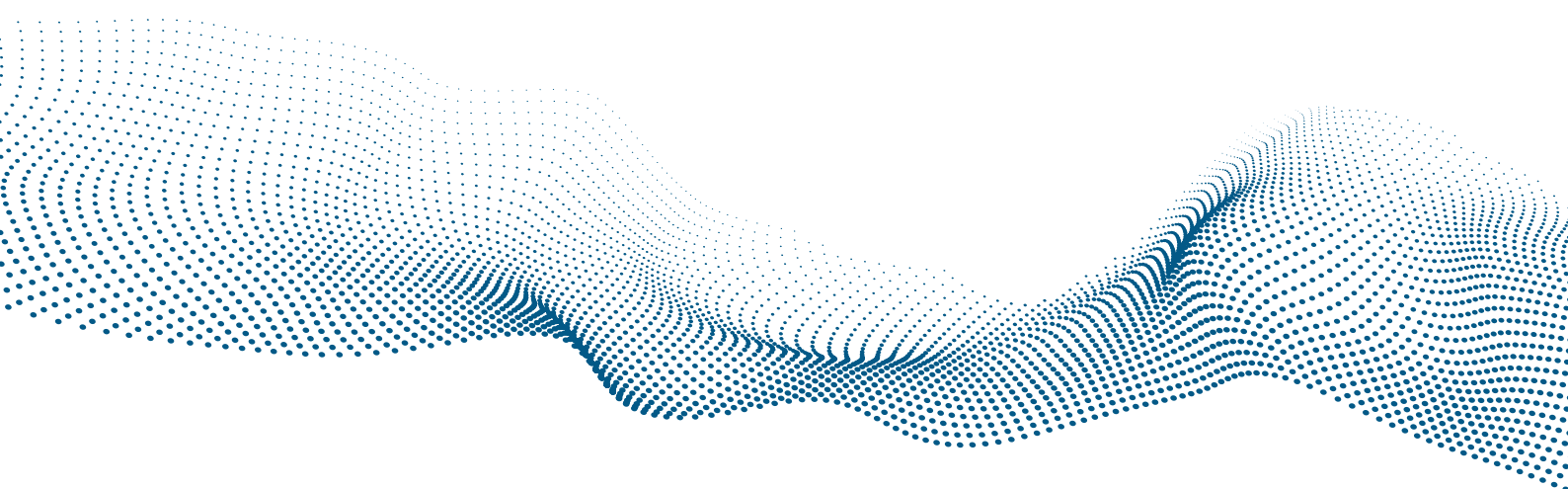
The proceeding ended with a ban on unfair retroactive discounts and a fine for JMP of over PLN 723 million.

Contractual advantage in the time of COVID-19

From April to June 2020, UOKiK conducted a large-scale “COVID 100 action”. This was a series of explanatory proceedings that looked at whether major agricultural and food operators were paying their suppliers on time. In addition, the Office checked whether the epidemic was being used as an excuse to make unfavourable changes in their contracts with

smaller contractors. UOKiK requested explanations from nearly 100 undertakings, including retail chains operating in Poland and the largest producers in the meat, dairy, fruit, vegetable, cereal and oil-plant processing sectors. As a result of the actions taken, over PLN 500 million of outstanding receivables was paid by companies to their suppliers.

Authority	UOKiK (Urząd Ochrony Konkurencji i Konsumentów) Office of Competition and Consumer Protection
Authority’s chairperson	President of UOKiK Mr Tomasz Chróstny
Authority’s competences in the domain of competition control	<ul style="list-style-type: none"> • Antitrust • Concentration control • Contractual advantage • Bid-rigging
Other authority’s competences	<ul style="list-style-type: none"> • Consumer protection • Supervision over the Trade Inspection • Product safety and market surveillance • Supervision of state aid • Payment gridlocks
Authority’s budget	PLN 101,036,000
Number of staff	591 – out of which 150 employees work in competition protection



Mirta Kapural appointed President of Competition Council of Croatia

Following the proposal of the Government of the Republic of Croatia in the mandatory procedure carried out after it had published a public call for applications, the Croatian Parliament adopted on 1 October 2021 the decision on the appointment of Mirta Kapural PhD, President of the Competition Council. Preceding this decision, the Croatian Parliament relieved Mirta Kapural PhD from duty of the member of the Competition Council.

Mirta Kapural PhD has been employed at the Croatian Competition Agency since 2004. First, she was head of Section – Market in Services in the Anti-trust Division of the Croatian Competition Agency. In 2007 she took a position of deputy head of International and European Cooperation Department and on 25 January 2019 she was appointed member of the Competition Council for a five-year term.

Her jobs particularly involved cooperation with the European Commission and the national competition authorities of the neighbouring and other countries, participation in the Croatian negotiations for the accession to the EU, active participation in the work of the European Competition Network (ECN), the International Competition Network (ICN) and OECD.

During her involvement in international cooperation affairs, she gained practical experience in in the European Commission DG Competition in Brussels. She was engaged as an expert for competition law in the EU twinning project in Kosovo and TAIEX project in northern part of Cyprus.



She was the Croatian representative in the negotiations about the Directive to make national competition authorities more effective enforcers (ECN+). From 2016 – 2017 she led the working group for the drafting of the Act on actions for damages for infringements of competition law and from 2019 – 2021 she led the working group for the drafting of the revisions of the Competition Act (Act on the Amendments to the Competition Act).

Ms Kapural started her career in 1999 in then Ministry for European Integration, where she performed the jobs linked to harmonization of the Croatian legislation with the EU acquis, concretely, she prepared legal opinions about the compliance of the Croatian legislation with the EU acquis in a number of areas of the EU law and in Governmental Office for Human Rights.

After she finished the Faculty of Law in Zagreb, she got a master's degree in Contemporary European Studies, University of Sussex, and in 2012 she achieved her doctoral degree at the Faculty of Law in Zagreb in the area of commercial law and competition law with the thesis "Application of leniency or reduction of fines in competition law".

Ms Kapural is the author of a series of research and scientific papers in the area of competition law that have been published in domestic and foreign professional journals and books. She regularly takes part in international workshops and conferences about competition law, as a participant or a speaker. She is a lecturer and author of the curriculum on competition law at the State School for Public Administration and a visiting speaker about competition law.

NEWS

FROM THE OECD



OECD Competition Week December 2021: Lessons and Challenges



Aura García Pabón
Junior Competition Expert, OECD

This has been a year like no other. While the economies around the world are facing the challenges of recovering from the pandemic and entire sectors and value chains continue to be disrupted by the resulting economic crisis, competition authorities have been forced to find ways to help and promote fast and robust growth. From 29 November to 3 December 2021, the Competition Committee of the OECD and its two working parties met virtually, to discuss and exchange views about certain of the key policy issues competition authorities are currently facing.

Over the last few years, the transition to digital economies has been a key issue in competition policy. Understanding the way these markets work and the incentives technology companies have to innovate and compete is an issue being tackled by different competition authorities around the world.

The first roundtable explored certain competition issues that might arise in the markets for books and e-books, which have been characterised by public interventions with cultural-policy objectives, as well as the promotion of quality and diversity of options available for consumers.

During the discussion, many jurisdictions shared the challenges they have faced when investigating these markets, such as how to define the markets and assess substitutability patterns, and which are the new problems arising from digitalisation. Certain key conclusions from the discussion can be drawn.

1. A general rationale behind government intervention in books markets is their specificity: cultural goods with likely positive externalities in consumption, they can be seen as entertainment products that have significant economies of scale yet, depending on the context, can rely on small language zones and be subject to censorship.
2. Most of the countries present noted the existence of price-fixing mechanisms, either through direct regulation or agreements between market participants. Resale price maintenance (RPM), price discrimination and exclusivities have been among the common practices in these markets, sometimes even enjoying exemptions to competition laws. Yet experience has shown that market liberalisation has a positive impact on prices and consumer welfare, although the overall effects on efficiency remain less clear.
3. These markets now have new features to consider during analyses, particularly due to the increased use of e-books. An

evolution in how certain risks, such as piracy, are assessed with the introduction of digital tools and other factors have also begun to be key to understanding market dynamics. Online public user ratings are changing consumers' preferences and experiences, and a proliferation of self-publishing possibilities might increase variety. However, a general conclusion reached during the discussions was that consumers' purchasing patterns have not changed and their reading habits have been fairly stable over the past few years.

The second roundtable focused on international co-operation, particularly, the state of implementation and policy impact of the 2014 OECD Recommendation on International Co-operation on Competition Investigations and Proceedings.

The main conclusion of the discussion was that while there is international co-operation, mostly in merger review, and the recommendation has been implemented and remains relevant, competition authorities can still do better and continue improving their co-operation.

There was unanimous agreement among participants that international co-operation and capacity is becoming increasingly important as markets evolve and cross-border competition issues increase. There was also a consensus that international co-operation remains limited due to persistent legal barriers to the exchange of information between competition authorities and that these obstacles increase with greater differences between jurisdictions' legal regimes.

Regional co-operation was repeatedly mentioned as a key and inspiring area for future developments as regional networks that share aspects of their competition policies can more easily overcome such challenges. Using certain existing regional co-operation models and networks with successful experiences on co-operation as examples could be useful in identifying common approaches that could then be expanded into wider international co-operation. Widespread in-depth analysis of existing legal barriers to increased co-operation will be vital to finding the most suitable methods to overcome the challenges.

The third roundtable discussed environmental considerations in competition enforcement. Its main objective was to understand how competition authorities can assess environmental considerations in investigations and the challenges when addressing sustainability issues in their decisions.

Competition policy could be an organic driver of environmental goals. Even though competition law is sometimes perceived as being incompatible with environmental objectives, adjustments in how environmental effects are considered in competition enforcement could lead to competition policy that supports greener markets and activities, rather than blocking environmentally friendly developments or innovations.

The roundtable discussion centred on how adequately to measure any environmental benefits of different types of conduct within a competition framework. Focusing on long-term, non-price efficiencies, assessing out-of-market benefits, and taking into account consumers' willingness to pay for greener products – including both the direct value from use or consumption and the passive value from their existence – are all strategies that competition authorities could follow by using their existing analytical tools to capture environmental considerations and improve competition assessments.

The discussion revealed that competition authorities around the world are willing to acknowledge benefits for environmental issues from certain types of conduct or transaction. They also recognised the challenges of assessing and evaluating such benefits, even if traditional methods that can account for such effects are already being used.

The following round table addressed ex ante regulation and competition in digital markets. Regulators are becoming more aware of increases in market power of the large digital platforms and the discussion centred on the rationale and background for ex ante regulation in digital markets, the possible design and scope of such regulations, and the potential need for international co-operation to improve results.

For certain jurisdictions and experts, ex ante regulation in digital markets is essential as ex post enforcement tools often arrive late or prove insufficient. Ex ante regulation can be a complement to limited possibilities of enforcement or can speed it up, allowing authorities to keep up with the pace of changes and innovation in such markets. There has been a wave of regulatory initiatives and competition-law reforms to tackle conduct in digital markets. The majority are focused on assessing market power of platforms, managing the effects of such market power, and preventing market concentration. Despite this shared effort, many of the proposed ways to tackle the problems either lack focus or look at only a limited set of issues, such as competition concerns or broader issues related to consumer protection and data privacy.

Another common element between the different initiatives is their scope. In general, ex ante regulation should cover big-tech companies, which are relevant players (and gatekeepers) with an entrenched and durable position in the market. Approaches differ, however. Certain jurisdictions have defined quantitative criteria; others consider that qualitative case-by-case analysis should be undertaken to guarantee proportionality of any regulations.

Finally, another source of divergence is the level of detail that the obligations and prohibitions in ex ante regulations should include, including whether they should include principles and basic guidance or specific rules of conduct.

Fostering competition in the design of ex ante regulation, particularly in digital markets, is acknowledged to be of

increasing importance, and jurisdictions would definitely benefit from co-operation and sharing experiences. There is, however, still debate around regulatory content and scope.

The final roundtable explored competition issues in news media and digital platforms. Digital markets are currently being targeted by competition authorities due to their impact on different industries. The news media is no exception as the Internet has caused deep shifts and changes in the supply and demand of news content around the world. Competition concerns have emerged as the news-media industry has embraced the digital era.

First, the complex horizontal and vertical commercial relationships between news publishers and digital platforms allow for both exclusionary and exploitative conduct. Potential abuses arise from platforms' exercise of market power and are related to a high concentration and lack of transparency in the market, resulting in incentives to leverage position and possible free-riding behaviour. This can end in discrimination, targeted actions, self-preferencing, and, in general, foreclosure actions resulting from data collection. Other behaviour may originate in bargaining problems, with exploitative consequences, or in an adverse selection issue, where platforms could end up influencing consumers and affecting plurality and trust.

Second, risks to media plurality and unequal consumer access to information are a common theme. While there is no obvious consensus on whether this should be explicitly assessed in competition analysis, more effective competition might be expected to improve the quality and accuracy of news content, as well as increase consumer choice, ultimately addressing some of these concerns.

Competition authorities are contributing to a better understanding how markets function and fail, particularly through market studies and enforcement actions, yet a need remains to consider a wide range of potential solutions to address these issues, including both strong competition enforcement against anti-competitive conduct of digital platforms and regulatory reforms.

The **20th Global Forum on Competition** took place immediately after Committee Week the 6-8 December. Three main topics were discussed at the event, which includes non-OECD countries and encourages stronger co-operation between competition authorities around the world.

The forum's first topic dealt with the **relationship between trade, development and competition**. The main milestones in the evolution of trade and competition laws were described and experts illustrated how trade and competition can promote development. It was noted that the COVID crisis has added a layer of government intervention that must now be taken into account. In general, open and competitive markets are a driver of economic development. This had led to a consensus about the need for competition authorities to become more involved with other policy makers; for example, by expanding their advocacy efforts to facilitate market flexibility at regional levels to foster wider competition. A key lesson from the discussion was that co-operation in cross-border issues could be key to reaching economies of scale and coherent decision-making about competition matters.

The second topic discussed during the forum focused on **economic analysis and evidence in abuse cases**. Invited experts agreed on the need for an effects-based approach to abuse of dominance cases, as well as on the difficulties in investigating them due to inconsistencies in what is considered legal and illegal conduct in different legal regimes. This means that economic analysis plays a key role in underpinning theories of harm that centre upon the nature of specific conducts. Economic analysis in abuse of dominance cases ranges from assessing firms' market power to analysing whether a conduct harms competition to evaluating the adequacy of sanctions or remedies.

While some quantitative analysis – price and cost comparisons – and profitability analysis are relevant for abusive conduct, the discussions concluded that an adequate balance between quantitative and qualitative analysis remains important and strongly depends on the availability and reliability of data, as well as an authority's resources.

It is key that competition authorities acknowledge both the potential harm that dominant firms' abusive conduct can do to an economy and the difficulty of assessing whether commercial unilateral conduct is anticompetitive or not. For that, there should be cautious, yet active enforcement of abuse of dominance provisions.

The third and final day of discussion touched upon the need for the promotion of **competitive neutrality**. In light of the OECD Council's adoption of the Recommendation on Competitive Neutrality in 2021, the discussion centred on types of identified neutrality distortions and the main sets of tools used to address them and promote competitive neutrality.

Having a level playing field for all participants in a market is essential to achieving an efficient allocation of resources.

Distortions from regulatory frameworks, public-procurement processes or state aid can favour certain enterprises over others, give them a competitive advantage, and have significant negative impacts on welfare.

Competition authorities at the forum shared their different experiences of promoting competitive neutrality. While most rely on advocacy efforts to review legislation and provide advice, others described using enforcement actions to remove unreasonable restraints that harm markets and consumers due to discriminatory approaches. The limited role competition authorities play in certain specific state-aid measures was emphasised and it was suggested that this could intensify uneven playing fields during the COVID-19 crisis.

Finally, the fundamental importance of increased co-ordination and learning from other competition authorities' experiences on how to tackle and enforce these issues was consistently highlighted during the forum, as competitive-neutrality issues are particularly widespread at local levels.

The December 2021 Competition Week and Global Forum on Competition again showed how competition authorities around the world are acknowledging new dynamics in markets and the necessity to meet these new challenges. Moreover, the two events showed just how vital dialogue between authorities is to increasing co-operation and experience exchange. It is unquestionably the best way to understand the current challenges faced by competition authorities in dynamic and constantly evolving markets.

Competition policy in Western Balkan economies



Renato Ferrandi
Senior Competition Expert, OECD

A periodic outlook

Are the competition-policy settings, processes and institutions in the six Western Balkan economies – Albania; Bosnia and Herzegovina; Kosovo²⁷; North Macedonia; Montenegro; and Serbia – ready to face the challenges ahead? What could be improved to foster their competition enforcement and advocacy action? In July 2021, the OECD published *Competitiveness in South East Europe 2021*,^{xlvi} the new edition of a periodic outlook of several policy areas in the six Western Balkan economies.

I worked on the Competition chapter, in close co-operation with my colleagues at the OECD Global Relations Secretariat and from the relevant competition authorities.

The findings of its analysis of competition policy and subsequent recommendations might prove an inspiration for many jurisdictions in Eastern Europe and Central Asia.



Scope of action: adequate powers to investigate and sanction, but limited professional and financial resources

The competition authorities of the six Western Balkan economies have appropriate powers to investigate and powers to sanction antitrust infringements, and to review mergers and acquisitions. During an investigation, all six competition authorities have the power to compel investigated firms and third parties to provide relevant information and are permitted to perform unannounced inspections of their premises.

For **competition infringements**, the final decision is based on a thorough scrutiny of the collected evidence, which may include an economic analysis of competitive effects. If infringements are found authorities can impose cease-and-desist orders, remedies and sanctions on the firms concerned. In particular, authorities have the power directly to impose significant fines, which can be up to 10% of an undertaking's aggregate turnover, in line with EU provisions. The only exception is Montenegro, where investigations fall under the remit of the Agency for Protection of Competition and fines under the Misdemeanour Courts, which can conduct the relevant procedure and determine the amount. The six competition authorities can

also adopt interim measures ex officio, based on preliminary (prima facie) evidence if the alleged competition breach poses a risk of serious and irreparable damage. They may also order behavioural and structural measures to eliminate harmful effects on competition or accept and make binding commitments offered by the parties to address the competition concerns.

All domestic legal regimes also provide for leniency programmes, which grant total or partial immunity from sanctions to firms that report the existence of the agreement and submit appropriate evidence to the competition authority. With the exception of Bosnia and Herzegovina, all the mentioned competition authorities can enter into settlements with the parties under investigation for alleged antitrust infringements, and so terminate investigations.

For **merger reviews**, domestic competition laws provide for ex ante control, following the principles of the EU Merger Regulation. The competition authorities must prohibit concentrations that significantly restrict effective competition,

²⁷ 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.

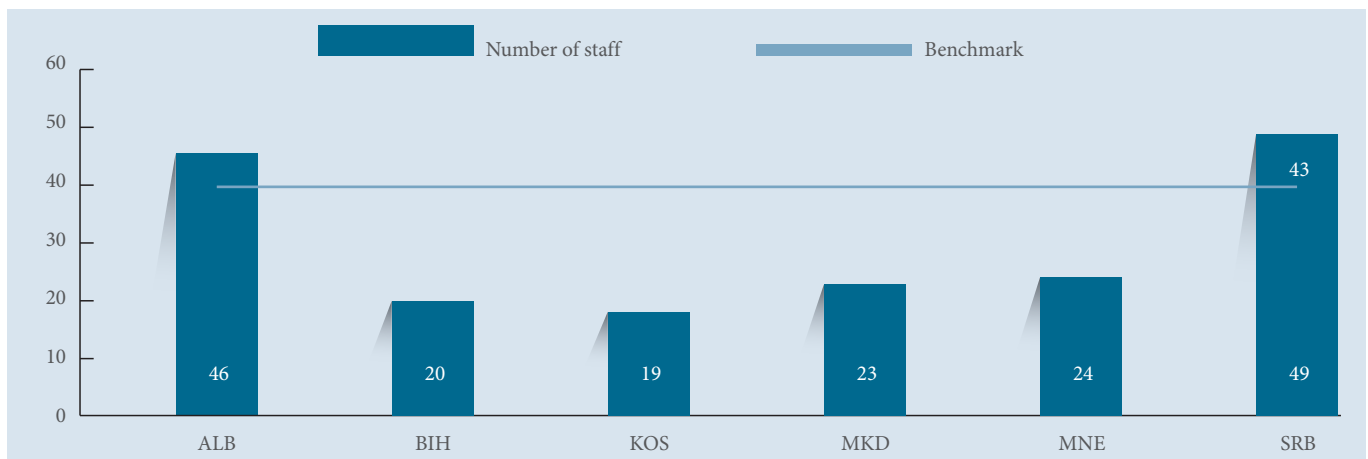
in particular as a result of the creation or strengthening of a dominant position. They can authorise transactions subject to structural and behavioural remedies that address any competition concerns; these can include divestiture of assets and obligations to act or refrain from acting in a certain way.

The assessment of notified mergers must follow thorough scrutiny of evidence, which includes an economic analysis of the restrictive effects and of possible efficiencies stemming from the concentration. For merger reviews, the competition authorities of the six economies can compel merging firms and third parties to provide relevant information and may perform unannounced inspections on the premises of the parties.

The weakness of all six competition authorities seems to be the **lack of sufficient financial and human resources**, which

are key to the effective enforcement of competition law. The OECD CompStats database^{xlvii} collects general statistics on competition agencies and its 2021 data set provides an update on competition-enforcement trends for the competition authorities of 56 jurisdictions, including 37 OECD countries and 19 non-OECD economies, across a wide geographic diversity. In 2019, the average total staff of 15 competition authorities in small economies (with a population below 7.5 million) reviewed by CompStat was 114, of whom 43 were working on competition. Among the six competition authorities in Western Balkan, only Albania and Serbia have a similar number of staff; for the others the figure is much lower (see Figure 1).

FIGURE 1. NUMBER OF STAFF WORKING ON COMPETITION IN THE SIX WESTERN BALKAN AUTHORITIES

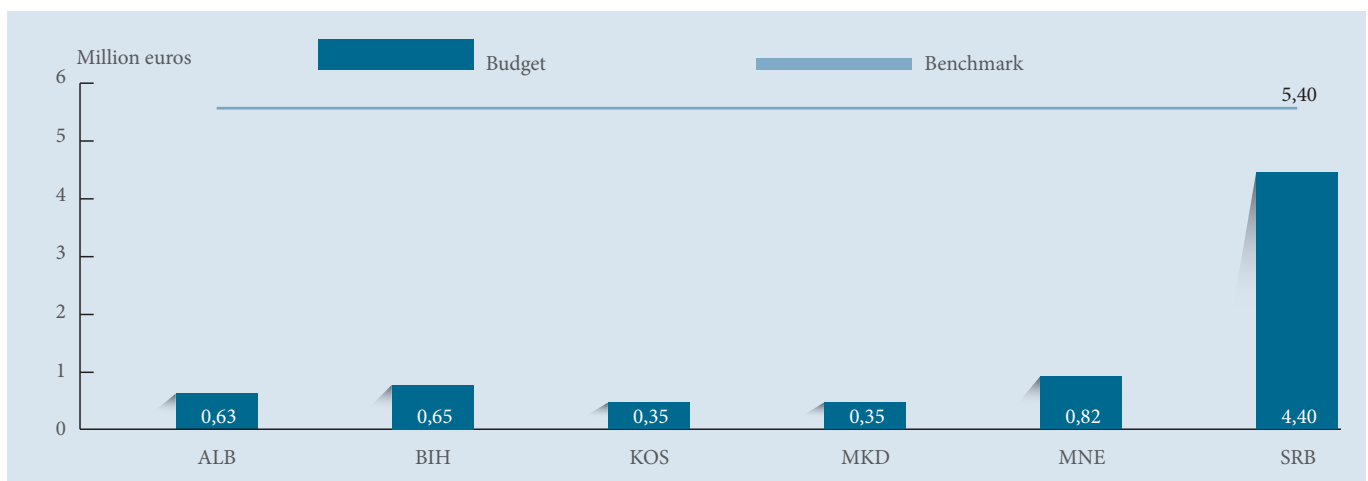


Source: OECD (2021), *Competitiveness in South East Europe 2021*.

The financial situation is even more serious: the budgets of the six competition authorities are extremely low compared to international averages. The competition authorities of Albania, Bosnia and Herzegovina, Kosovo, North Macedonia and Montenegro rely on annual budgets of between EUR 347 000

(North Macedonia) and EUR 820 000 (Montenegro), significantly below the average financial resources (EUR 5.4 million in 2019) of the 15 benchmark competition authorities. Only the Serbian competition authority approaches this amount (see Figure 2).

FIGURE 2. BUDGET OF THE SIX WESTERN BALKAN COMPETITION AUTHORITIES, 2019



Source: OECD (2021), *Competitiveness in South East Europe 2021*.

The reasons for the limited financial and human resources could include low gross domestic product, small population sizes, low costs of living, and the young age of an institution. Nevertheless, a competition authority needs a minimum number of qualified officials to be able to fulfil its tasks, which include monitoring all sectors of the economy, conducting complex investigations,

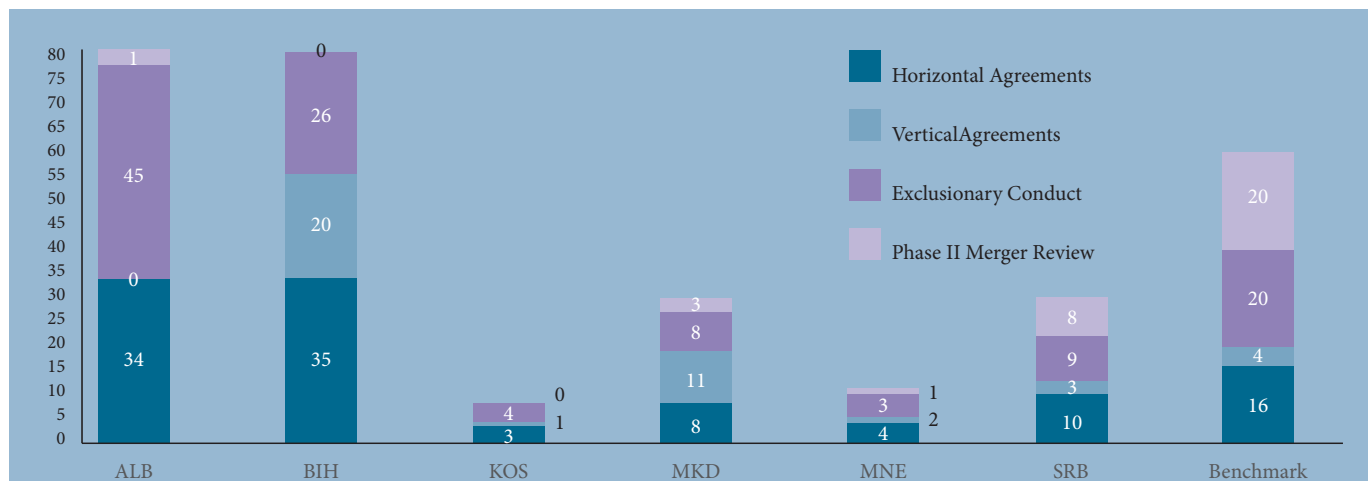
and analysing existing and draft legislation to advocate the removal of competition restrictions. Similarly, adequate economic resources are necessary to attract skilled officials and retain them over time. Effective enforcement also increasingly requires the use of costly digital devices, which are often indispensable for collecting and analysing evidence.

Competition enforcement: limited decisions and sanctions for horizontal and vertical agreements, and exclusionary conduct

Despite a comprehensive legal and institutional competition framework in the six Western Balkan economies, competition enforcement is still limited. The number of **enforcement decisions** adopted by the competition authorities of the six economies between 2015 and 2019 was generally lower than that of the 15 benchmark competition authorities in the OECD CompStat database. Over the same period, the six adopted on

average 16 decisions on horizontal agreements, 4 on vertical agreements and 20 on exclusionary conduct. Only Albania stands out, with a higher number of infringement decisions than the benchmark (see Figure 3). Bosnia and Herzegovina's figures also appear high, but most do not refer to actual competition enforcement, instead being simple decisions to reject requests by complainants.

FIGURE 3. NUMBER OF COMPETITION DECISIONS, 2015-2019



Source: OECD (2021), *Competitiveness in South East Europe 2021*.

Note: Data for Bosnia and Herzegovina are not immediately comparable with other countries' as they mostly refer to the non-opening of formal proceedings, rather than to actual proceedings.

The **Albanian Competition Authority** has an appreciable record of formal proceedings tackling horizontal and vertical agreements, including bid rigging in public procurement. Yet even here, the total amount of fines imposed on participants in anti-competitive agreements over the past five years was just EUR 2.2 million, as opposed to EUR 13.5 million levied on average by the 15 benchmark competition authorities over the same period.

In **Bosnia and Herzegovina**, as noted above, the majority of decisions adopted by the country's Competition Council were related to the non-opening of formal proceedings. The result is that the impact of competition enforcement has been limited and fines were negligible. For example, no significant fines have been imposed over the past five years for prohibited agreements and only one relevant fine was imposed, in 2018, for an abuse of dominance in the delivery of heating energy.

Despite a limited number of decisions, the **Serbian Commission for the Protection of Competition** has performed well over the

past few years. It took only one decision concerning horizontal anti-competitive agreements in 2019, but in the previous four years it had made nine cartel decisions, which included cases of bid rigging in public procurement. In 2020, the Commission issued five infringement decisions and imposed fines on the parties: one case related to horizontal price fixing, one to bid rigging, two cases concerned resale price maintenance and one an abuse of dominant position. The total amount of fines imposed on parties involved in anticompetitive agreements reached a peak of EUR 3.8 million in 2018, but decreased to EUR 857 000 in 2019.

In **North Macedonia**, the number of decisions tackling horizontal agreements has been low, particularly in recent years. The Commission for the Protection of Competition has primarily invested its resources in investigating vertical agreements. Sanctions on cartels were negligible until 2019, when the commission imposed a fine of EUR 1.7 million on two pharmaceutical companies.

In **Montenegro**, between 2015 and 2019, the Agency for Protection of Competition adopted only four cartel decisions, two decisions on vertical agreements and three on abuse of dominance. In 2019, the agency opened two vertical investigations concerning resale price-maintenance violations, which is a hardcore restriction in Montenegrin competition law. As said, in Montenegro investigations fall under the remit of the Agency for Protection of Competition and the imposition of fines under the Misdemeanour Courts. The fines imposed by Misdemeanour Courts were particularly low, less than EUR 100 000 a year. The highest fines imposed were not for cartel cases, but for abuse of dominance.

In the same 2015-2019 period, the **Kosovo Competition Authority** investigated an extremely limited number of cartels, vertical agreements and abuses of dominant position, and imposed no fines. It either found no infringements or accepted commitments and closed the cases, often noting the limited awareness of competition rules in domestic firms. However, in 2020, the authority concluded a major investigation into a horizontal price agreement by 13 oil companies and imposed overall sanctions of more than EUR 1 million.

Leniency programmes have been introduced in all six economies, but have proven ineffective. Only the Serbian Commission for the Protection of Competition has so far received a leniency application, in 2018. This problem is common in most inexperienced and even some experienced competition

agencies around the world. Nevertheless, the region's poor performance is unsurprising given that a prerequisite for the effectiveness of a leniency programme is a genuine threat of sanctions that leads cartelists to report the existence of an agreement to a competition authority. Considering the low sanctions imposed in the six West Balkan economies, cartelists have no real incentives to submit an application.

The use of **unannounced inspections** varies across the region. Also called dawn raids, these inspections of premises are a crucial investigative tool to substantiate allegations so that robust decisions can be adopted, particularly in the case of cartels. Both the Albanian Competition Authority and the Serbian Commission for the Protection of Competition make frequent use of this power. However, the other competition authorities in the region seem to be reluctant to do so, although some have recently begun. For example, the Commission for the Protection of Competition of North Macedonia carried out three dawn raids in 2019, compared to only one previously. The Montenegrin Agency for Protection of Competition began performing unannounced inspections for agreement cases in 2019 in the context of antitrust proceedings on resale price maintenance. The Bosnian Competition Council and the Kosovo Competition Authority are yet to perform any dawn raids.

Merger control: low activity

The number of **Phase II investigations**, which are in-depth analyses of a transaction that might raise competition concerns, has been insignificant or non-existent in the region. The exception is Serbia, where in 2018 and 2019, the Commission for the Protection of Competition carried out eight Phase II investigations and one case of "gun-jumping" (the failure to notify the competition authority of a merger or the implementation of all or part of the merger during mandatory waiting periods). The commission did not prohibit any transaction, but cleared three cases by imposing remedies. Three additional Phase II merger reviews and two gun-jumping cases were also conducted in 2020. In North Macedonia, one merger was blocked in 2017 and two were approved

with remedies over the past five years. In Albania, only one merger was investigated in-depth and eventually approved with remedies, in 2019. Another transaction was cleared with conditions and obligations in 2020. In the other jurisdictions, all mergers were unconditionally cleared in Phase I, removing the need for a Phase II in-depth review.

The reason for the low activity on merger reviews in the six Western Balkan economies, which again is not specific to the region, could be the unproblematic nature of most transactions, as many of the notified mergers concerned extraterritorial transactions that had little or no impact on the economy.

Competition advocacy: six authorities engaged in promoting competition

All six competition authorities are able to formulate **opinions and recommendations** regarding economy-level or local laws or regulations that affect or may affect competition. They can also assess possible barriers to competition in economic and administrative regulations that are aimed at pursuing general economic interests. In performing this duty, they usually cooperate with the government and regulatory institutions, including public-procurement agencies.

The competition authorities can conduct **market studies** on their own initiative or following a request by parliament or other regulators if price patterns or other circumstances suggest that competition might be restricted or distorted.

The only exception is the Competition Council of Bosnia and Herzegovina, which does not have the legal power to conduct market studies.

The **Albanian** competition authority issued 25 formal opinions in 2019, which represents a substantial increase from 17 in 2018 and even lower figures in previous years. The sectors addressed by recommendations on draft regulations include water, energy, media and telecommunications. In the five-year period of 2015-2019, the Albanian competition authority concluded on average four general inquiries a year, addressing key sectors such as higher education, banking, health care and liberal professions. In 2020, the authority adopted the

Competition Advocacy and Communication Strategy, which aims to increase its advocacy role.

The Competition Council of **Bosnia and Herzegovina** did not issue formal opinions to the government or parliament on draft or existing laws or regulations in the period 2015-2019. However, it co-operated with public institutions on competition matters and expressed its view on industry practices that may restrict competition. After a request by the Agency for Public Procurement, it also analysed the rules on public tenders. Importantly, as already highlighted, the Competition Council of Bosnia and Herzegovina, unlike the vast majority of competition authorities in the world, does not have the legal power to conduct market studies.

The **Kosovo** Competition Authority has actively engaged in competition advocacy in several sectors, particularly since 2019. It has issued opinions and recommendations to the Central Bank of Kosovo on insurance companies, to the Ministry of Health on price regulation for medicinal products and equipment, and to the Tax Administration of Kosovo on the provision of cash-register equipment. In 2019, it published two market studies, one on the telecommunications sector and one on the energy sector. In 2019, it signed memoranda of understanding with several sector regulators.

The Agency for Protection of Competition of **Montenegro** has issued a limited number of opinions over the last five years. The main interventions concerned the Law on Free Access to Information in 2016 and the Draft Law on Audiovisual Services

in 2019. The agency signed a co-operation agreement with the Public Procurement Administration in 2015. It conducted no market studies.

The Commission for the Protection of Competition of **North Macedonia** issued seven formal opinions in 2019, including one each on the Law on Public Procurement and the Law on Misdemeanour. The suggestions made were later implemented. In December 2014 the commission issued guidelines for detecting bid rigging in public procurement, in co-operation with the Bureau for Public Procurement. It has not conducted any recent market studies.

The **Serbian** Commission for Protection of Competition has engaged in a wide range of initiatives aimed at promoting compliance with competition principles in laws and regulations, with the number of formal opinions addressed to the government or courts more than doubling since 2018. The initiatives include an opinion on the regulation of ride-hailing services and an opinion on regulatory impact assessment, both in 2018. In 2019, the Commission signed a memorandum of understanding with the Public Policy Secretariat to improve competition assessment of legislation, based upon the OECD's Competition Assessment Toolkit. It has also conducted outreach activities to promote co-operation with other public authorities, including public-procurement officials. It has performed at least three market studies a year over the past four years.

Procedural fairness: generally good performance

The competition authorities of the Western Balkan economies follow **transparent procedures**, which are broadly aligned with best international practices. They must give notice of their decision to open formal proceedings and state the purpose of the investigation and the concerned parties, while encouraging interested third parties to come forward if they wish to participate. All final decisions regarding alleged competition infringements and mergers are published.

Prior to the adoption of a final antitrust decision, competition authorities must inform the parties of the relevant facts, evidence and other elements on which the decision is based, and enable them to submit a defence. Parties have the right to be heard before the board takes a final decision. At every stage of the proceedings, the parties may consult with the case team.

Likewise, if competition authorities intend to prohibit a merger transaction, they must inform the merging parties about the

evidence and conclusions on which the decision will be based and enable them to submit their remarks and possible remedies. The parties can participate in the process that leads to the determination of conditions and obligations, and can consult with the competition authority during the entire procedure.

The authorities' decisions can be appealed before **administrative courts** in the first instance and eventually before the high courts. In Bosnia and Herzegovina there is only one level of judicial review.

Most of the six competition authorities have adopted and published **regulations and guidelines** about subjects including the investigative procedure, the procedure for concentrations of undertakings, the assessment of horizontal and vertical agreements, and the calculation of fines.

Conclusions: promising areas of action

Like most competition authorities in Eastern Europe and Central Asia, those in the six Western Balkan economies are still young institutions. Since they operate in jurisdictions that are historically unfamiliar with competition policy, their main concerns in this early phase of their existence should be strengthening their **credibility and reputation** and promoting a **pro-competitive environment** for companies.

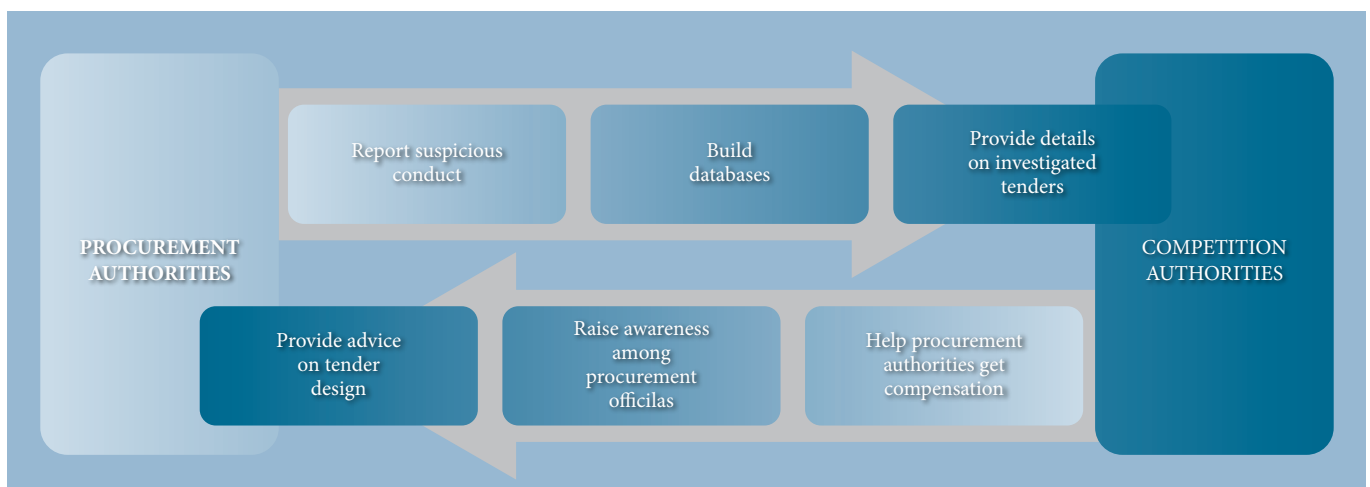
In particular, the six competition authorities should engage in cases that will have a strong impact on consumer welfare. **Cartels** are the most clear-cut and indisputedly harmful competition infringements and affect every economy. The efforts of these authorities should be focused on detecting cartels and imposing heavy fines on infringers to deliver a strong message that firms engaging in collusion risk being severely

punished. If the level of fines sufficiently exceeds illicit gains, offences can be deterred even when the probability of paying a fine is low. Concerns about fines is also a key driver of leniency applications, which means that increased cartel sanctions would improve the effectiveness of leniency programmes – unproductive in the region so far – and further boost detection.

A promising area for cartel detection is the **fight against bid rigging**. Public procurement is a key sphere of action both for cartel enforcement and competition advocacy. Bid rigging results in significant harm to the public budget and taxpayers, dampening innovation and creating inefficiencies. The six

competition authorities already co-operate with their domestic agencies for public procurement and other procurement bodies. With enhanced co-operation the design of the procurement process could be improved to reduce the risks of bid rigging, while increasing opportunities for the detection of bid-rigging conspiracies (see Figure 4). The extensive activities carried out by the OECD in this respect, notably the OECD Recommendation on Fighting Bid Rigging in Public Procurement^{xlviii} and the Guidelines on Fighting Bid Rigging in Public Procurement,^{xlix} can be helpful points of reference for future initiatives.

FIGURE 4. THE BENEFITS OF CO-OPERATION BETWEEN COMPETITION AND PROCUREMENT AUTHORITIES



Source: author

At the same time, these competition authorities should not desist from advocating against competition restrictions in laws and regulations. All have engaged in **competition advocacy**, which is a necessary complement to competition enforcement to avoid legal constraints and promote a competition culture. Competition authorities can help governments eliminate barriers to competition by identifying unnecessary restraints on market activities and developing alternative, less restrictive measures that still achieve government policy objectives. The majority of the six competition authorities have sent formal opinions to policymakers to urge them to remove competition restrictions in laws and regulation. The OECD Competition Assessment Toolkit¹ can provide further guidance in this regard. The Toolkit is a practical methodology that helps to develop alternative ways to achieve the same objectives, with minimal harm to competition.


Competition advocacy can also contribute to establishing a **competition mindset and culture** within an economy and to strengthening the competition authority’s standing and reputation. All the reviewed competition authorities regularly offer training activities and events to increase competition awareness among citizens, firms and institutions, and to explain the benefits of competition.

Furthermore, the six competition authorities should consider a more systematic use of **market studies**, which can assess how competition in a sector or industry is functioning, detect the source of any competition problems, and identify potential solutions. Market studies can improve the quality and credibility of advocacy initiatives, while boosting and better orienting competition enforcement.

As highlighted in the OECD’s Competitiveness in South East Europe 2021 report, the competition authorities of the six Western Balkan economies can support economic growth and contribute to a quick recovery after the COVID-19 crisis. To this end, they must establish themselves as strong, influential entities by tackling antitrust infringements and advocating for the removal of competition restrictions in laws and regulations. An increase in their professional and financial resources would ease the attainment of these objectives and help them duly perform all their activities.

Finally, in the face of increasingly complex and supranational competition infringements, regional and international co-operation, as well as constant training, are ever-more necessary to respond effectively to future challenges.

Inside a Competition Authority: Russian Federation



The activity of the Federal Antimonopoly Service of the Russian Federation



Federal
Antimonopoly Service
(Russian Federation)

1. The Institution

Head

Maxim Shaskolsky has been head of the Federal Antimonopoly Service of the Russian Federation (FAS Russia) since

11 November 2020. He is also Chairman of the FAS Russia Presidium.

FAS Russia Presidium

The FAS Russia Presidium is a collegial advisory body that considers the most important issues that fall under the service's competences. These include issues related to the application of the Russian Federation's anti-monopoly legislation; administrative legislation; advertising legislation; legislation for the activities of natural monopolies; legislation on the control of foreign investments in business entities strategically important to the country's defence and state security; and legislation on the placement of orders for the supply of goods, work performance and provision of services for state and municipal needs. FAS Russia also revises decisions and orders of its own territorial bodies in cases of violation of anti-monopoly legislation when such decisions and orders do not conform to uniform application conditions of legislative anti-monopoly norms.

In addition, the FAS Russia Presidium annually approves the Review of the Practice of Application of Anti-monopoly Legislation, which includes the most significant cases considered during intradepartmental appeals in all cases of anti-monopoly violations.

As well as the head of FAS Russia, the Presidium includes all his deputies, the heads of the Moscow and Moscow region offices of FAS Russia, and the heads of departments of the FAS Russia Central Office, including the Control and Finance Department; Legal Department; Department for Combating Cartels; Department for Regulation of the Fuel and Energy Complex and Chemical Industry; as well as executive assistants.

System for appointments to managerial level posts

The head of FAS Russia, the state secretary-deputy head, and deputy heads are appointed by the government of the Russian

Federation. There is no limit on the duration of the terms of office of the head of FAS Russia and his deputies.

Anti-monopoly legislation

The anti-monopoly legislation of the Russian Federation is based on the Constitution of the Russian Federation and the Civil Code of the Russian Federation, and is composed of the Federal Law of 26 July 2006 No. 135-FZ on Protection of Competition and other federal laws governing relations related to competition protection. These include the prevention and suppression of monopolistic activities and unfair competition for Russian legal entities and foreign legal entities, organisations, federal executive authorities, state authorities of constituent entities of the Russian Federation, local self-government bodies, other entities exercising the functions of these bodies, bodies or organisations, as well as state non-budgetary funds, the Central Bank of the Russian Federation,

and individuals, including entrepreneurs under laws such as Code of Administrative Offences of the Russian Federation, Federal Law No. 44-FZ on the Contract System in the Area of Procurement of Goods, Works, Services to Meet State and Municipal Needs; Federal Law No. 223-FZ on the Procurement of Goods, Works, Services by Particular Types of Legal Entities, and Federal Law No. 38-FZ on Advertising.

Over the past 15 years, the Law on Competition has been subject to certain targeted amendments that, without changing its systemic approaches to regulating the situation in the markets, modernised it to keep it in line with the market situation.

The first anti-monopoly package in 2006 unified two laws:

the Law on Competition and Restriction of Monopolistic Activity in Commodity Markets and the Law on Protection of Competition in the Financial Services Market. It allowed for a reduction in administrative pressures on business and detailed the regulation of the procedure for considering cases.

A second amendments package in 2009 provided for the definition of the price of the goods, strengthened control over anticompetitive actions by the authorities, introduced the requirement to disclose ultimate beneficiaries, and raised the threshold values of organisations' assets for the purposes of economic concentration.

A third package, introduced in 2012, clarified the legal environment and was largely liberal in nature. It introduced a mechanism to prevent violations of anti-monopoly legislation, specified the requirements for ruling agreements and concerted

actions anticompetitive, changed the procedure for providing state and municipal property, consolidated administrative procedures for appeals of tender results, and identified mitigating and aggravating circumstances.

A fourth anti-monopoly package in 2015 continued the legislative liberalisation initiated by the third package. It expanded the institution of prevention and warned against the actions of authorities and unfair competition, focusing on major matters with an impact on the state of competition in general, without infringing the interests of particular consumers.

One of FAS Russia's key proposals in a fifth anti-monopoly package currently under consideration is anti-monopoly regulation of digital platforms. FAS Russia plans to submit this fifth package for consideration by the State Duma within a short time.

Decisions in cases of violation of anti-monopoly legislation

The procedure for considering cases of violation of anti-monopoly legislation is set out in Chapter 9, Article 49 of Federal Law No. 135-FZ of 26 July 2006 on Protection of Competition, according to which FAS Russia, when deciding on a case on violation of anti-monopoly legislation, must:

1. evaluate the evidence and arguments presented by the persons participating in the case
2. evaluate the conclusions and explanations of experts and persons with information about the circumstances under consideration by the commission
3. determine the norms of anti-monopoly laws and other legislation of the Russian Federation said to have been violated as a result of the actions (or inaction) under consideration by the commission
4. establish the rights and obligations of the persons participating in the case
5. resolve the issue of issuing prescriptions and their content, as well as the need to take other actions aimed at eliminating and preventing violations of anti-monopoly legislation, including sending materials to law-enforcement agencies, taking legal action, and sending proposals and recommendations to state bodies or local self-government bodies.

The operative part of the decision ascertaining a violation of the anti-monopoly legislation cases must be made publicly available after the conclusion of the case, should be signed by all members of the commission who participated in the decision, and be attached to the case. The decision must be made in full within ten working days from the date of the announcement of the operative part of the decision. Copies of such decisions are immediately sent or handed over to those persons participating in the case. The date the decision is passed in full is considered the date of its adoption.

An FAS Russia decision or order can be appealed within three months of the date of the decision or issuance of the prescription. If an application is filed with an ordinary court or an arbitration court, execution of the anti-monopoly authority's order is suspended until the court's decision enters into legal force.

In addition, FAS Russia adopted a number of administrative regulations that pertain to various aspects of the activities of the Russian competition authority, including the execution of the state function to initiate and consider cases of violations of the anti-monopoly legislation of the Russian Federation.¹¹

FAS Russia's other competences

In addition to its remit of anti-monopoly regulation, FAS Russia ensures:

1. compliance with advertising legislation
2. provision of state preferences
3. compliance with legislation on public procurement, including in the area of defence and security
4. anti-competitive actions of state authorities
5. observance of the legislation on foreign investments in strategic companies
6. compliance with trade legislation in terms of compliance with anti-monopoly requirements
7. tariff regulation:
 - exercise of state control (supervision) over the establishment and application of state-regulated prices (including tariffs, surcharges, fees and rates), as well as compliance with information-disclosure standards
 - establishment and maintenance of the federal register of suppliers and their areas of activity
 - creation and maintenance of the register of subjects of natural monopolies, which guides state regulation and control
 - resolution of disputes in tariff regulation in regional and local markets.

FAS Russia staff

FAS Russia has a total workforce of 3 504, of whom 1 189 work in the central office and 2 315 work in 84 territorial offices in the constituent entities of the Russian Federation. Structurally, departments of FAS Russia are based on the sectoral principle and carry out oversight related to anti-monopoly control in their corresponding sectors of the economy.

Accountability

FAS Russia annually submits a report on the state of competition in the Russian Federation to the government, which is then posted on its official website.

This report includes an assessment of FAS Russia's activities and the state of competition in Russia, including information on improvements in the competitive environment and implementation of measures proposed in previous reports

There are 1 939 employees involved in competition-law enforcement.

and assessments of their effectiveness, both by third-party organisations and by the agency itself. The report is discussed at meetings of members of the government of the Russian Federation. The authority's current tasks are discussed at meetings of the FAS Russia Collegium and of the FAS Russia Presidium.

2. Anti-monopoly law enforcement in 2020

2.1 Cartels

NUMBER OF CASES PROCESSED IN 2020

Decisions ascertaining violation	329
No violation determined	84
Total	413

The total amount of fines imposed in 2020 for cartels was RUB 3.97 billion. Applications to FAS Russia's leniency

programme numbered 222, of which 114 were applications from the first applicant.

Main cases

Oil-trading cartel

One precedent-setting case was collusion between Russia's two largest oil traders. The companies' actions in 2018 had an impact upon petroleum prices on the trading exchange, which, as prices on the exchange are indicative for the market, may have led to an increase in prices for oil products throughout the country.

FAS Russia analysed the trade policies of large oil companies to understand to what extent representative indicators formed on the exchange were being applied in practice. This revealed that large companies were using stock indicators to set prices for petrol and diesel fuel on the domestic market. The implementation of an anti-competitive agreement by the

respondents directly influenced the formation of indices, which were subsequently used by other market participants.

After analysing the contract registers of the defendants both on the exchange market and in the over-the-counter segment, it was determined that the implementation of the cartel had allowed them to resell the same product several times both on the exchange and over-the-counter in order to increase the price for end consumers, even though the goods were transferred only once – from the vertically integrated oil company to the final customer. In July 2021, FAS Russia imposed a total fine on the cartel participants of more than RUB 1 billion.

Orthopaedic products cartel

In August 2020, FAS Russia determined that six companies – Trives Trade, Medexpert, Optomed, Maltri, ORTO and Ecoten – had violated anti-monopoly legislation in the wholesale market for orthopaedic products.

The companies entered into an anticompetitive collusive relationship to set and maintain prices for products sold at the highest possible level for each supplier by monitoring

compliance with recommended retail prices. They also used an online automatic price-monitoring service, which allowed them to track prices not only from their own wholesale buyers, but also from companies purchasing similar goods from other suppliers, and to apply sanctions on those retailers who sold products at prices lower than the recommended ones.

2.2 Non-cartel agreements

In addition to cartel agreements, Russian Federation anti-monopoly legislation also distinguishes the following types of anti-competitive agreements:

- illegal conclusion of “vertical agreements”
- agreements leading to price manipulation in the wholesale and retail electricity markets
- other agreements restricting competition
- co-ordination of economic activities

- co-ordinated actions between competing economic entities
- concerted actions leading to price manipulation in the wholesale and retail electricity markets
- other co-ordinated actions of competing economic entities.

In 2020, 220 decisions were adopted for the above types of anti-competitive agreements, with fines totalling RUB 146.7 million imposed for non-cartel agreements.

Main cases

Deterioration of conditions for calculating loyalty points without notifying customers

Information monitoring by FAS Russia found that in April 2020 Asian-Pacific Bank had made changes to the conditions of its Status loyalty programme. These cancelled the accrual of cashback points for a number of purchase categories, reduced point awards to only special categories, and increased the minimum purchase amount required to earn points.

These changes were made by the bank without observing legal procedures and without informing customers despite this being provided for in the contract. Information about the changes was only published at the end of April when the bank released the tariff revisions on its website, despite the changes having

been applied since 1 April 2020.

Consumers basing their expectations on the previous conditions did not receive the expected cashback due to the bank’s two-fold increase of the minimum purchase amounts, as well as the cancellation of cashback points for purchases made outside of certain categories.

As these actions contained conditions of violation of anti-monopoly legislation, FAS Russia issued a warning to Asian-Pacific Bank, which then fully implemented its requirements.

2.3 Abuse of dominant position

NUMBER OF CASES PROCESSED IN 2020

Decisions ascertaining violation	348
No violation determined	191
Total	539

The total amount of fines imposed for abuse of a dominant position in 2020 was RUB 3.27 billion.

Main cases

FAS Russia case against Apple

In August 2020, FAS Russia completed its consideration of the case against Apple for violation of the anti-monopoly law.

Based upon the results of the investigation, Apple’s 100% share of the market for the distribution of mobile applications on its iOS operating system was determined to a dominant position. FAS Russia also established that Apple had abused this dominance with regards to developers of parental-control mobile applications and limited competition in the distribution market for iOS driven mobile apps.

The violations also included Apple excluding any third-party application from its App Store, even if an application met all the company’s requirements.

After the conclusion of the case, Apple was issued an order to remedy the violation, according to which the company had to remove from its documentation the provisions that gave it the right to reject the inclusion of third-party applications in the App Store for any reason.

On 26 April 2021, FAS Russia imposed on Apple a turnover-based fine of RUB 906.3 million.

FAS Russia case against Booking.com

In December 2020, FAS Russia completed its investigation of an antitrust case against Booking.com. Based on the evidence gathered, the company’s 80% market share was said to give it a dominant position in the Russian market for the provision

of services by information aggregators for accommodation facilities, such as hotels, pensions and hostels.

The violation was the establishment by Booking.com of price parity clauses and conditions for Russian hotels when prices on the Booking.com website should have been the same or more favourable on other channels that sell hotel services, both online and offline. The same applied to hotel services: those on Booking.com should have been no worse in terms of quantity and quality than those on other sales channels. Booking.com had been issued two termination warnings for activities that constitute antitrust violations, but these warnings had been ignored. It had also had been issued an FAS Russia order to exclude parity conditions from agreements with hotels, but the violation had not been implemented.

In late August 2021, FAS Russia fined Booking.com for abusing its dominant position in the Russian market. The fine imposed was RUB 1.3 billion or 11.5% of the company's 2020 turnover in Russia.

Dawn raids

The number of cases in which dawn raids – known as “unscheduled on-site inspections” in Russia – were conducted in 2020 was 41.^{lii}

3. Overview of judicial reviews, 2020

REVIEWS OF COMPETITION-PROTECTION CASE BY THE ARBITRATION COURT

Decision upheld entirely	21
Decision upheld but for the amount of fines	-
Decision upheld partially	-
Decision overturned	7
Total	28

The Court of General Jurisdiction heard no reviews of competition-protection cases in 2020.

Main cases

A particularly striking example of the elimination of monopolistic activities in the Russian Federation is the decision of FAS Russia in Case No. A40-91027 / 2019 to adjudge the actions of port operator Varandey Terminal as a violation of paragraph 1, part 1 of Article 10 of the Law on Protection of Competition. The order issued on the basis of this decision to desist and eliminate the violation was challenged.

FAS Russia determined that from 2015 to 2019 this operator of a marine terminal providing oil transshipment services in the port of Varandey in Nenets Autonomous District set the price of oil transshipment at RUB 2 200 to RUB 2 500 a tonne, when its real cost was only RUB 650 to RUB 850 a tonne. This price gouging was made worse by consumers having no other port through which to transport oil than Varandey.

With prices set at these levels, Varandey Terminal's profitability ranged between 165% and 267%, figures far above the industry's average profitability of 18%.

Booking.com appealed the FAS Russia fine, but it was upheld at two levels of appeal courts. On 11 November 2021, the Arbitration Court of Appeal confirmed the decision of the first instance and upheld FAS Russia's decision and fine on Booking.com.

On 24 November 2021, the Moscow City Arbitration Court confirmed the fine amount and upheld FAS Russia's ruling on Booking.com's administrative offence.

Varandey Terminal appealed FAS Russia's decision and order. The courts examined the application of the condition provided for in part 2 of Article 6 of the Law on Protection of Competition, which affords the admissibility of the price of a service that results from innovative activity. They concluded that this was applicable only if the service defining the product boundaries of the market is itself innovative. This meant that the innovative nature of the infrastructure required to provide this service – such as patented technical solutions – was not relevant to part 2 of Article 6. In addition, a prerequisite for any application of this exception is the receipt of proportionate benefits from the service provider's actions, which cannot be based solely on the fact of receiving the service.

After the rejection of its appeals of FAS Russia's sanctions, the company was found administratively responsible and a fine of RUB 363.5 million was imposed. This sum was also upheld by two appeal courts.

4. Economic concentration transactions

NUMBER OF REVIEWED MERGER APPLICATIONS AND NOTIFICATIONS, 2020

Unconditionally cleared	1 081
Cleared with remedies	48
Blocked	23
Total	1 152

Main transactions

Telecom operators and 5G

On 21 December 2020, FAS Russia considered an application for preliminary consent of an agreement on joint activities to set up a 5G network by mobile cellular telecoms operators in the Russian Federation.

If implemented, this joint-venture agreement would create the conditions for equal access to radio frequencies for all participants in the mobile-wireless communications market. In particular, telecom operators involved in the transaction would develop with the anti-monopoly authority the terms of use for the infrastructure and the sharing of radio frequencies, as well

Alstom and Bombardier merger

In 2020, FAS Russia investigated the competition issues of French company Alstom's acquisition of Bombardier Transportation. This was because Alstom held a 20% stake in Transmashholding (TMH), the largest Russian manufacturer of equipment for rail transport, while Bombardier had a share in Bombardier Transportation (Rus) and First Locomotive Company. These holdings meant that the transaction would affect the rolling-stock and signalling-systems markets in Russia.

as conditions for the provision of that infrastructure for mobile virtual network (MVN) telecom operators.^{liii}

FAS Russia considers that access to the released radio-frequency spectrum for the construction of 5G networks and their subsequent use for the provision of mobile communication services is an opportunity to introduce a new generation of communication services to the Russian Federation. So, after guarantees of telecom-operator access to the frequency spectrum being released, FAS Russia approved the deal.

As part of its consideration of the transaction, FAS Russia analysed the companies' activities and requested the opinion of Russian Railways, the largest customer of these products. It then drew conclusions about transaction's impact on the state of competition in the affected relevant markets in the Russian Federation.

On 29 July 2020, the transaction was approved without any additional conditions.

5. Competition advocacy

Main FAS Russia initiatives, 2020

When Federal Law of 1 March 2020 No. 33-FZ on Amendments to the Federal Law on Protection of Competition was adopted, it officially introduced the idea of a "system of internal compliance with the requirements of anti-monopoly legislation" – or in commonly parlance, "antitrust compliance" – to Russian legislation. The law made official the right for businesses to implement anti-monopoly compliance programmes, a list of requirements for an internal act of anti-monopoly compliance, the possibility of its joint approval with the FAS Russia.

Companies have the right to send internal acts or drafts of proposed anti-monopoly compliance policies to FAS Russia, to ensure that they correspond to legal requirements. FAS Russia is given 30 days to review the documents and prepare a relevant opinion. The introduction of these types of compliance policies

in organisations helps to reduce the number of anti-monopoly violations, and also reduces the likelihood of dawn raids by the regulator.

In addition, as part of the implementation of the National Plan, a system of internal compliance with the requirements of anti-monopoly legislation was also introduced in executive authorities at the federal and regional levels. To ensure a unified approach to the establishment and implementation of a system of internal anti-monopoly legislation compliance by federal executive authorities, methodological recommendations were approved to improve federal executive authorities' processes. These recommendations are also intended for use by executive authorities of the constituent entities of the Russian Federation and local governments.

Results

The establishment of an anti-monopoly compliance system can contribute to increased efficiency and success of an economic entity through the introduction of a risk-prevention approach. It is also the most effective means of protecting companies from the risks of violating relevant laws and having to face their negative consequences. The presence of such an ongoing system allows a company's management to remain up to date, while constantly improving the efficiency of business processes and guaranteeing relative confidence in the legitimacy of the company and its employees' actions.

In addition, authorities also experience a pro-competitive effect from the implementation of measures aimed at introducing anti-monopoly compliance.

Currently, all authorities of the constituent entities of the Russian Federation have adopted rules on anti-monopoly

compliance. As of the end of 2020, regional executive authorities in 74 of these constituent entities (87.06%) has carried out work to approve compliance risk maps, and 78 constituent entities (91.76%) had approved action plans to reduce compliance risks.

In 67 constituent entities (78.82%), work has begun to introduce anti-monopoly compliance in local governments; in 49 regions (57.65%), local governments are working on the development and approval of compliance risk maps and in 51 constituent entities (60%) are developing and approving action plans to reduce compliance risks.

The work of the constituent entities of the Russian Federation in organising anti-monopoly compliance helps to reduce the number of violations of anti-monopoly legislation by executive and local authorities.

6. Market research

The FAS Russia Commission for Analysis of Commodity Markets has existed since 2012 and includes representatives of structural divisions of the central office and territorial bodies of FAS Russia, the Public Advisory Council and expert councils of the FAS Russia, and other public authorities, as well as representatives of business, public associations and scientific organisations. The Commission considers the proposals of the

representatives of FAS Russia and develops draft plans for its work in the analysis of markets for goods, services and works, along with relevant guidelines.

At commission meetings, FAS Russia reviews and approves the relevant analytical reports.

Key questions to the Federal Antimonopoly Service of the Russian Federation (FAS Russia)

What are the main challenges FAS Russia faces and what are its priorities for the near future?

FAS Russia's ongoing work to increase the level of competition in the country has been affected by the consequences of the COVID-19 pandemic, which have also impacted on the Russian economy, with small and medium-sized businesses in particular requiring support.

Global economic challenges also highlight the authority's need to improve legal and organisational measures to protect and develop competition.

The strategic objectives for achieving these goals in the medium term are set out in the National Plan for the Development of

Competition in the Russian Federation for 2021-2025, approved by the Order of the Government of the Russian Federation, 2 September 2021 No. 2424-r.

This National Plan sets out a series of priority tasks that include support for small and medium-sized businesses; the transition from quantitative to qualitative indicators of competition development; a decrease in the share of competitive markets held by organisations with state and municipal participation; and the digitalisation of anti-monopoly and tariff regulation.

What are the authority's strengths and weaknesses?

FAS Russia is one of the few agencies in the world with the functions of a macro-regulator. Its powers include control over compliance with competition laws, over the process of public procurement and foreign investment, and over compliance with advertising legislation and tariff regulation.

This synergy of FAS Russia's powers is one of its strengths. Having powers over anti-monopoly and tariff regulation, and control over state orders and state-defence orders allows FAS Russia to enact pro-competitive regulation; optimise costs in regulated sectors; focus on the interests of consumers; and ensure the unity of approaches to regulation and the availability of infrastructure on non-discriminatory terms.

FAS Russia's structure is also worth noting; it includes the central office and 84 territorial bodies that provide for anti-monopoly control in the regions. Territorial bodies are subordinate to the head of FAS Russia and are financed from its budget. This hierarchy and control allow for the most effective implementation of anti-monopoly regulation in all constituent entities of the Russian Federation, ensuring the uniformity of law enforcement.

FAS Russia is facing, like many anti-monopoly authorities, a number of challenges in its activities. In particular, the development of digital platforms requires appropriate adaptation of antitrust regulations.

What is the level of competition awareness in the Russian Federation? Do policy makers consider competition issues? Is competition compliance a significant concern for businesses?

FAS Russia pays special attention to measures aimed at raising awareness of competition policy among businesses, consumers and authorities. One of its main functions is to prevent violations of anti-monopoly legislation, which it implements through competition advocacy.

FAS Russia and its territorial bodies regularly publish information in federal and regional mass media about the state of competition and measures taken to protect and develop it; clarifications of legislation; news about its activities and work with submissions from citizens, authorities and entrepreneurs; texts of decisions and orders; interactions with the business community, including through participation of FAS Russia representatives in conferences, seminars and round tables.

In addition, FAS Russia annually submits a Report on the State of Competition to the government of the Russian Federation, which assesses the state of competition in the country according to it, civil-society institutions, federal executive authorities, the Central Bank, public business associations, and expert

organisations. The report is published on FAS Russia's official website and available to all, including representatives of the business community.

FAS Russia also supports the development of self-regulation mechanisms for the market. These are set out in codes of conduct and good practice that allow entrepreneurs to set standards for their activities by themselves, with their observance subsequently monitored. This minimises the state's participation in business entities' activities while maintaining their responsibility to consumers.

Self-regulation of the market is inextricably linked with the implementation of the antitrust-compliance mechanism. For this purpose, Federal Law No. 33-FZ of 3 January 2020 on Amendments to the Federal Law on Protection of Competition was passed with its formal inclusion of the concept of a "system of internal correspondence to competition legislation requirements" and the right of economic entities to introduce antitrust compliance.

Of which decisions over the past two years is FAS Russia most proud and which cases does it feel could have been conducted better?

FAS Russia is actively working to improve approaches to assessing competition and law enforcement in digital markets. In particular, the department has brought new approaches to its investigations of digital platforms, including those concerning Google, Apple, Microsoft, Booking.com and HeadHunter.

One of the most significant investigations of 2020 was an anti-monopoly case against Apple, begun after the complaint from AO Kaspersky Lab. FAS Russia established that Apple was abusing its dominant position – which amounted to 100% control – in the market for the distribution of mobile applications on its iOS operating system.

Since October 2018, Apple had implemented a consistent policy of limiting the tools and capabilities for the development of parental-control apps, with the result that most of the functionality of third-party apps was lost. The implementation

of this policy coincided with the release of the Apple's own pre-installed Apple Screen Time application, which has similar functionality to parental-control applications.

FAS Russia determined that Apple had abused its dominant position over developers of parental-control mobile applications and had limited competition in the distribution market for applications for mobile devices running the iOS operating system.

The violation also included Apple's imposition of its right to exclude any third-party application from its App Store, even if an app met all the requirements. The case resulted in Apple being fined RUB 906.3 million for violating antitrust laws. The company disagreed with FAS Russia's decision and continues to appeal the fine.

If FAS Russia could make one major change in Russian competition law, what would it be?

The modern economy makes it increasingly urgent to adopt legislative changes that provide for antitrust restrictions on digital giants. That is why the current priority tasks for FAS Russia include further improvement of law-enforcement practices in digital markets, the development of approaches to defining such markets, and assessing the state of competition in them.

With this in mind FAS Russia has developed and submitted to the Russian government bills aimed at improving anti-

monopoly regulation in the digital economy; this is known as the fifth anti-monopoly package.

The adoption of these bills will go a long way to ensuring the effectiveness of antitrust control measures in modern digital markets, as well as creating legal mechanisms to counter digital cartels and the abuse of dominant position by digital monopolies.

Is international and regional co-operation helpful and is it functioning correctly?

In the context of globalisation, international co-operation is a key factor in ensuring the effective enforcement of competition law, as it allows antitrust authorities from different countries to pool resources, reduce the cost of regional research, and improve the quality of training and awareness of competition regimes.

In addition, international co-operation plays a significant role in the direct implementation of antitrust enforcement; for example, when considering global economic-concentration transactions and during investigations of violation of antitrust laws with cross-border effects.

As many years of experience have shown, close co-operation at international and regional levels allows competition authorities to respond in a timely manner to new economic challenges, as well as effectively combat violations of competition in cross-border markets and come to the most balanced decisions.

FAS Russia gives international co-operation an important place in its activities. Currently, it has a significant contractual portfolio of more than 70 agreements, including 6 that are intergovernmental, which allows it to effectively carry out

international co-operation. "New level" agreements, which consolidate the tools allowing law-enforcement interaction with the competition authorities of foreign countries, are particularly important.

FAS Russia has also sought to expand regional co-operation, including with the Eurasian Economic Union and the other BRICS member states (Brazil, India, China and South Africa), in order to harmonise procedures and basic law-enforcement standards, as well as to exchange best practices.

In addition, FAS Russia is an active player in the international arena and participates in shaping the global competitive agenda within the framework of the activities of such organisations as the OECD, International Competition Network (ICN) and United Nations Conference on Trade and Development (UNCTAD).

In particular, in 2020 the guidelines and procedures for international co-operation in accordance with Section F of the UN Competition Complex, developed by UN member states at the initiative of the FAS Russia, were officially adopted on the UNCTAD platform.

What is FAS Russia's opinion of the OECD-GVH Regional Centre for Competition? How could it improve?

The work of the Regional Competition Centre (RCC) in Budapest is clearly important for the activities of competition authorities in Southeast, Eastern and Central Europe. That work aims to improve the competition and economic growth of the beneficiary countries, as well as the welfare of their populations.

Long-term co-operation with the OECD-GVH RCC allows FAS Russia to keep abreast of the OECD's latest developments in competition policy, as well as to use the experience of this authoritative organisation in its legislative and implementation activities.

The value of the RCC's activities lies in ensuring the transfer of practical knowledge, including the participation of outstanding international experts. In our opinion, the RCC is a fundamental institution for the dissemination of best practices in the area of

competition policy, as well as a wider international platform for discussing various aspects of competition and developing approaches to solving urgent problems in antitrust regulation.

Over many years of activity, the RCC has launched a number of successful projects, participation in which has allowed representatives of beneficiary countries' competition authorities not only to expand their knowledge in the field of competition and increase their professional skills, but also to establish working contacts with representatives of various competition authorities.

In this regard, it remains to hope that the RCC undertakes new ambitious projects that will contribute to the development of international co-operation and ensure conditions for fair competition in all beneficiary countries.

Key competition topics explained in few minutes: RCC training videos already a success

Impressive scores

The OECD-GVH Regional Centre for Competition training videos explain the key messages of our seminars in just a few minutes, offering additional, engaging training opportunities to beneficiary competition authorities and anyone interested in competition issues. So far, the RCC has released four of these Key competition topics explained in few minutes training videos, all in English and in Russian, with a fifth scheduled to appear soon.

In 2022, the project will continue to be developed and launch five additional videos.

The first Key competition video focused on **antitrust commitments**. Launched in February 2021, it has since reached over 1 700 views (more than 1 100 for the English version and 600 for the Russian), making it the most viewed OECD video on competition in 2021.

The second video addressed **competitive neutrality** and was released to coincide with the adoption by the OECD Council of a Recommendation on Competitive Neutrality. This establishes a set of principles to ensure that governments' actions are competitively neutral and that all enterprises face a level playing

field, irrespective of factors such as ownership, location or legal form. The RCC video provides a comprehensive overview of these issues in only six minutes. The video currently has around 1 300 views (over 900 for the English and 400 for the Russian version).

The third video explains how competition authorities and procurement bodies can contribute to the **fight against bid rigging** and to obtain better and cheaper public services. The seven-minute English version of this video has reached 1 600 views.

Finally, the latest video, released in late October 2021, illustrates **abuse of dominance** and explains which criteria competition authorities use to distinguish between lawful and abusive practices by dominant firms, such as digital giants. At time of writing, the video – only currently available in English – has over 740 views.

A fifth video, set to be released soon, will address market studies, a powerful tool for competition authorities when examining broader competition issues in a market or sector outside the context of merger reviews or antitrust investigations.

Promising developments

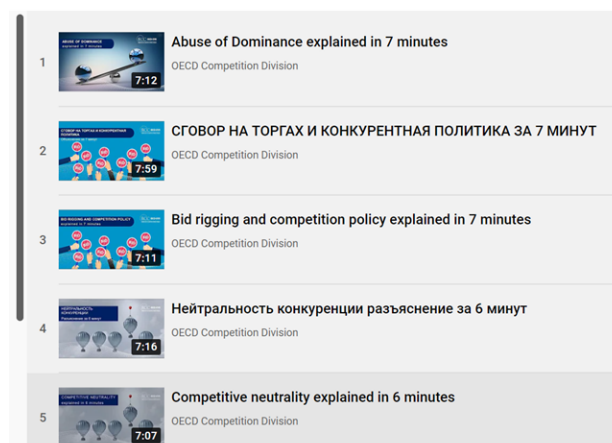
Topics being considered for 2022 include effective investigation during competition cases, competition in the pharmaceutical sector, and regulation and competition in digital markets.

Thanks to the enthusiastic support of beneficiary competition authorities, the RCC is now adding **subtitles** to all videos. Languages already available are Albanian, Armenian, Bulgarian, Georgian, Romanian, Serbian and Ukrainian, as well as Finnish, French, German, Italian, Portuguese, Spanish and Swedish.

The OECD-GVH RCC and the United Nations Economic and Social Commission for Western Asia have signed an agreement for the creation of **Arabic versions** of the RCC training videos.

The RCC is looking forward to announcing more great news in the near future!

WWW.YOUTUBE.COM/PLAYLIST?LIST=PLYBGVYEBNLQ5NWCYUZRII-1XVMTNAF2N



LITERATURE DIGEST



Pedro Caro de Sousa
Competition Expert, OECD

This issue of the Literature Digest for the [December] 2021 issue of the RCC Newsletter looks at recent papers on market studies.

Additionally, I suggest you read the OECD's work on the topic, as well as its 2018 OECD Market Studies Guide for Competition Authorities (you can find these at <https://www.oecd.org/daf/competition/market-studies-and-competition.htm>).

More detailed reviews of the papers discussed below – together with those of other papers – can be found at www.antitrustdigest.net.

Alexandre de Stree and Pierre Larrouche ‘The integration of wide and narrow market investigations in EU economic law’ in Motta, Peitz, Schweitzer (eds) Market Investigations: A New Competition Tool for Europe? (Cambridge University Press, 2021) Chapter 4’

In 2020, the European Commission embarked on a major reflection and consultation exercise aimed at adapting EU economic law to contemporary challenges, in particular to the competition issues raised by the deployment of digital technologies. One option considered was the adoption of a New Competition Tool to deal with structural competition problems which could not be addressed adequately by traditional competition law. The initial impact assessment of the Commission envisaged four different options, which could be distinguished on the basis of:

- (i) the scope of the market investigation: (a) a wide scope tool applicable horizontally to all sectors of the economy (as it is the case for standard competition rules) or (b) a narrow scope tool limited to certain sectors, in particular digital or digitally-enabled markets;
- (ii) the threshold for intervention: (a) a low threshold tool applicable to all cases of structural competition problems (and potentially to all firms in those markets) or (b) a high threshold tool limited to dominant firms as is the case under Article 102 TFEU (but without having to prove abuse).

Even as the Commission opted for a narrow option in its proposal for a Digital Markets Act (DMA), this chapter analyses how to integrate both types of market studies/investigations within EU economic law.

The introduction of such a tool requires thoughtful consideration of how all these regimes interact. In the EU, competition law and sectoral regulation are complements which pursue similar objectives through different means. The application of a new

market investigation tool in a regulated sector – electronic communications, energy, transport, financial services, etc. – may therefore be justified and useful to remedy a structural competition problem that either does not trigger regulatory intervention, or for which available regulatory remedies offer no effective solution.

Market investigations will also fit within the broader landscape of EU economic law if they share a clear commitment to the theoretical and methodological foundations of such law. Given this, market studies should be economically grounded, and clearly seek to promote competition and a level-playing field within the internal market.

Since market investigations are closely linked with competition law, its institutional structure is best embedded within existing competition enforcement structures. In concrete terms, this would mean that a round of consultation within the ECN should be undertaken every time the Commission (or an NCA) proposes to launch a market investigation. Further, since the authorities in charge of sector-specific regulation are often national, transversal cooperation between the Commission and national regulatory authorities is needed at every stage of a market investigation into a regulated sector. At the remedial stage, if a structural competition problem has been identified in a regulated sector, then the Commission should design the remedies in close cooperation with the relevant national regulatory authorities.

The paper is based on an expert study on the interplay between the New Competition Tool and Sector-Specific Regulation in the EU which was prepared in September 2020 for the Directorate-General Competition of the European Commission. The discussion of the interaction between competition law and sector regulation is top-notch, and the analysis of the interaction of these policy instruments comprehensive and illuminating.

Amelia Fletcher ‘Market Investigations for Digital Platforms: Panacea or Complement?’ (2021) Journal of European Competition Law & Practice, Vol. 12/1, p. 44

There is growing international consensus that standard competition law, while valuable, is inadequate for addressing the panoply of competition problems arising in digital platform markets. This paper investigates the value of introducing a market investigation tool in this context, based on recent the UK experience. It argues that market studies have the potential to be hugely helpful, both in the digital sphere and more widely. At the same time, market studies have inherent limitations and

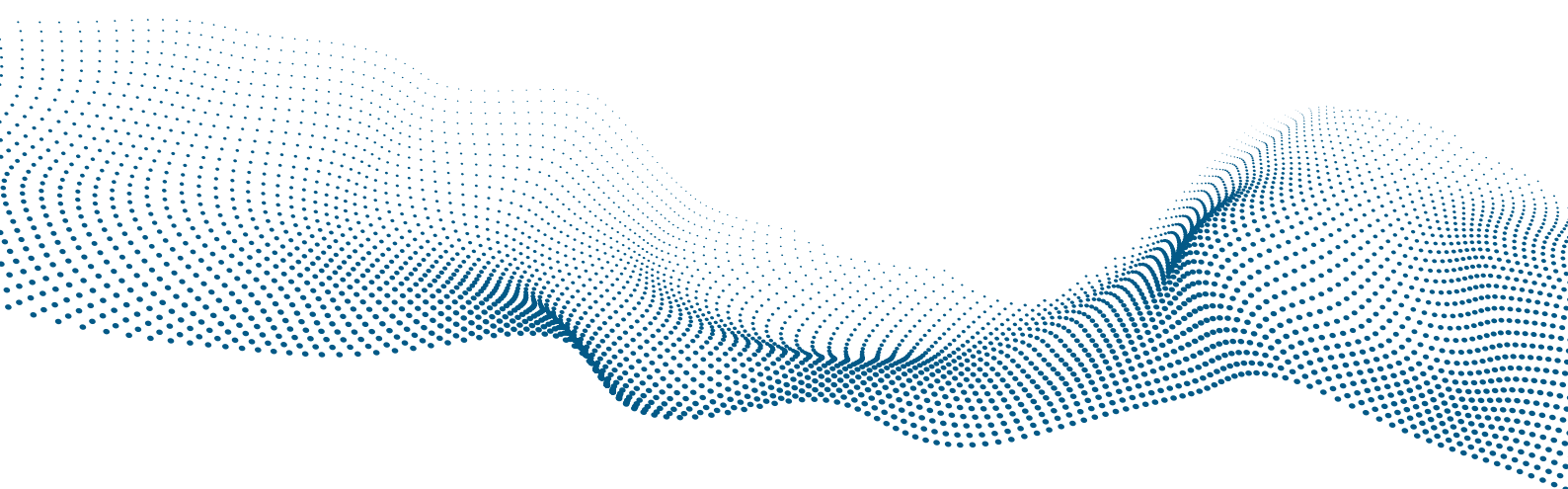
should not be viewed as a full solution to the issues raised by digital platforms, but rather as a valuable complementary tool alongside new ex ante regulation.

Market investigations have major positives and would be a valuable addition to a competition agency's toolkit. Most competition law provisions are primarily focused on preventing competition from worsening, while market studies can play a more proactive role in promoting increased competition. For example, market studies can introduce market opening measures that are intended to shift the whole nature of competition. Further, market studies can tackle any and all 'features' of markets which are found to adversely affect competition. In addition to firm conduct, such features can also comprise factors such as economies of scale and scope, network effects, regulatory and structural barriers, and consumer behavioural factors. Market studies are especially well suited to carry out holistic analyses of markets where problems are market-wide and there are a variety of interwoven factors—structural and behavioural—creating competition concerns.

By contrast, authorities in standard competition cases tend to focus more narrowly on one issue and (in abuse cases) one firm.

However, market studies also have limitations, and should not be viewed as a full solution to digital platform issues. In particular, although market studies have huge flexibility in designing and implementing remedies, the process of monitoring, enforcing, and revisiting these remedies over time has some important limitations. As such, the introduction of ex ante regulation could be justified even where market studies are possible. But even where pro-competitive digital platform regulation is introduced, market studies will still likely have an important role to play – with their value in practice ultimately depending on the powers incorporated within the relevant ex ante regulatory framework.

In short, this thoughtful piece should be a first port of call for anyone interested not only on the possibilities of engaging in market studies in digital markets, but on the virtues and limitations of market studies more widely.



CONTACT INFORMATION

OECD-GVH Regional Centre for Competition in Budapest (Hungary)

Gazdasági Versenyhivatal (GVH)

Alkotmány u. 5.

H-1054 Budapest

Hungary



Renato Ferrandi

Senior Competition Expert,
Coordinator of the Regional Centre,
OECD

renato.ferrandi@oecd.org



Gabriella Szilágyi

Head of Section,
International Section, GVH

szilagyi.gabriella@gvh.hu



Miranda Molnár

RCC Coordinator,
International Section, GVH

molnar.miranda@gvh.hu



Orsolya Hladony

Assistant,
International Section, GVH

hladony.orsolya@gvh.hu



Translation from and into Russian
by **Taras Kobushko**.

Endnotes

- i The findings, interpretations, and conclusions expressed in this paper are those of the author and do not necessarily reflect the views of the Commission for the Protection of Competition of the Republic of Serbia.
- ii Article 21.1(), of the Law on Protection of Competition, No. 51/2009 and 95/2013, Official Gazette of the Republic of Serbia.
- iii Procedural penalties for non-compliance in the case of sectoral inquiries were introduced by amendments to the Law in 2013.
- iv Out of 20 sectoral inquiries, 9 were related to the production, wholesale and retail market for petroleum products, covering the 11-year period from 2008 to 2018.
- v www.oecd.org/daf/competition/market-studies-and-competition.htm.
- vi www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_MktStudiesHandbook.pdf.
- vii https://ec.europa.eu/competition-policy/publications_en.
- viii http://caa.gov.al/uploads/decisions/552_-_Vendim_per_hapje_hetimi.pdf
- ix CCD No. 539/2018 has authorised the acquisition of the International Hospital by the American Hospital; see, www.caa.gov.al/uploads/decisions/Vendim_nr_539_dat_24.07.2018.pdf
- x European Commission (2015), Case AT.39767-BEH Electricity, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39767.
- xi A special mode of use for the implementation of the relevant settlements consists of a special procedure for using the funds placed on them. The laws of Ukraine and the legal acts of the Cabinet of Ministers of Ukraine may determine cases in which it is necessary to open current accounts with a special mode of use, a list of banks in which these accounts can be opened, and a settlement mechanism may be established. A special mode of use for the implementation of the relevant settlements implies a special procedure for using the funds placed on them. That is, non-cash payments by using a current account with a special mode of use should be carried out only in the manner determined by the relevant legislative act.
- xii The implementation mechanism for the Resolution of the Cabinet of Ministers of Ukraine dated 29 July 2020 No. 744 on Some Issues of the Implementation of the Pilot Project on the Monetisation of One-Time In-Kind Aid “Baby Package” 2020-2021 provides for the transfer of financial aid to new parents or in their absence, foster carers, foster parents, parent-educators, guardians, but only to PryvatBank.
- xiii See, <https://en.fas.gov.ru/press-center/news/detail.html?id=49774>.
- xiv See, www.searchneutrality.org/google/comparison-shopping-services-open-letter-to-commissioner-vestager.
- xv The Law of the Republic of Azerbaijan on Antimonopoly Activity; the Law of the Republic of Azerbaijan on Unfair Competition.
- xvi The formation of a commission and the launch of the examination stage is documented by a special resolution of the head.
- xvii Failure to submit requested data to the State Service is subject to financial sanctions.
- xviii Article 204 of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, [https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830\(02\)](https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02)).
- xix Association agreement, Title IV, Chapter VI, Section 6, and Sub-Section 1.
- xx The fundamental changes made to the Law of Georgia on Competition by the Law of Georgia No. 7126 of 16 September 2020 are particularly important; see the final version of the law: <https://matsne.gov.ge/en/document/view/1659450>.
- xxi Paragraph 1.a, Article 113, Law of Georgia on Competition. The GCNA has employed this paragraph to review several cases: Algorithm (ID: 205043237) vs. Algorithm (ID: 402084980), 20 July 2021; GT Motors vs. G.T. Motors, 14 September 2020; Dazga vs. Solvey, 18 October 2018; S. Virsaladze Scientific-Research Institute of Medical Parasitology and Tropical Medicine vs. Medical Parasitology and Tropical Medicine Research Institute, 14 September 2016. See, <https://competition.ge/decisions/unfair-competition/by-prohibition>.
- xxii Paragraph 1.c, Article 113, Law of Georgia on Competition. The GCNA has employed this paragraph to review several cases: Design House vs. DNA, 30 May 2018; Itechnics vs. Iplus, 19 July 2017. See, <https://competition.ge/decisions/unfair-competition/by-prohibition>.
- xxiii See, <https://admin.competition.ge/uploads/565c0b3130d147e79f9347cd99f8d636.pdf> (in Georgian).
- xxiv The names of the official Facebook pages and website domains had the same company name. The domain names for the websites and email that the complainant had owned for many years had been taken by the defendant.
- xxv At the time of the case review, the Georgian Law on Entrepreneurs did not prohibit the registration of the same company name. From 1 January 2022, a new law will become effective in Georgia; its Article 16(5) states: “the company name of an entrepreneur (excluding the individual entrepreneur) must be different from a previously registered company name. The company name of an entrepreneur shall be changed or something shall be added to the name if required to differentiate it from the company name of another entrepreneur with an identical name. See, <https://matsne.gov.ge/ka/document/view/5230186?publication=0#DOCUMENT:1>.
- xxvi Booking.com also discussed its position during the proceeding and explained that guaranteeing that hosts or hotel owners offer the same or better prices and booking conditions on the Booking.com platform as they offer on their own websites or to other travel agencies ensured that the hotels would not use Booking.com simply as a marketing channel. Besides, the company stated, a best-price guarantee does not affect new attempts to enter the market.
- xxvii During its study, GNCA monitored the following online booking platforms: Booking.com, Expedia, Airbnb, Hotel24.ge, Hrs.com, Ostrovok.ru and Booking24.ge. Out of seven platforms selected as a target group, the MFN conditions of four (Ostrovok.ru, Hrs.com, Booking24.ge, Booking.com) required adjustment to meet competition law, while three (Expedia, Airbnb, Hotel24.ge) had no illegal contractual conditions. GNCA ensured that provisions in the contracts concluded by online booking platforms were harmonised with the Law of Georgia on Competition and that at that moment, cases of violations had been identified on the online booking platforms. The agency has stated that it will take immediate measures if a healthy competition environment is jeopardised.
- xxviii Article 43/C(1) and Article 43/D(1) of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.
- xxix Udvardi, A. & A. Kulcsár (2017), “Experience of the Hungarian Competition Authority Relating to Market Studies”, OECD-GVH RCC Newsletter, Issue No. 9, July 2017.
- xxx Government Decree No. 406/2021 (VII.8.).
- xxxi The list of market studies is available on the GVH website with an executive summary in English for selected reports; see, https://gvh.hu/en/resolutions/sectoral_inquiries_market_analyses.
- xxxii Case Vj-63/2008; see, www.gvh.hu/dontesek/versenyhivatali_dontesek/archiv/dontesek_2008/5935_hu_vj-632008010.
- xxxiii Intraocular lenses are eye prostheses intended for ophthalmic surgery. Those with the name Rayner were first introduced into public circulation in Belarus in 2001 directly by their UK-based manufacturer, Rayner Intraocular Lenses.
- xxxiv First-category pharmacies have certain internal production capacities, as well as retailing medicines. A first-category pharmacy must have a surface area of at least 100m². Second-category pharmacies are pharmacies with a surface area of at least 60m².
- xxxv Establishment Act of the Netherlands Authority for Consumers and Markets | ACM.nl

- xxxvi Establishment Act, Section 2, Paragraph 4
- xxxvii Establishment Act, Section 7
- xxxviii ACM launches investigation into abuse of dominance by Apple in its App Store | ACM.nl
- xxxix Competition_in_digital_markets.pdf (house.gov)
- xl ACM launches market study into cloud services | ACM.nl
- xli The survey report and its appendices are available on the GVH website; see, www.gvh.hu/en/gvh/Conference/icn-2021-annual-conference/special-project-for-the-2021-icn-annual-conference-sustainable-development-and-competition-law.
- xlii A recording of the panel discussion – “Host’s Special Plenary Session: Sustainable Development and Competition Law” – is available on the ICN 2021 website; see, <https://icn2021budapest.hu/site>.
- xliii See, www.uokik.gov.pl/publications.php#faq4470.
- xliv The address is: covid-konkurencja@uokik.gov.pl.
- xlv New regulations are temporary and have been introduced for a time period of two years.
- xlvi OECD (2021), Competitiveness in South East Europe 2021: A Policy Outlook, Competitiveness and Private Sector Development, OECD Publishing, Paris, [www.dx.doi.org/10.1787/dcbc2ea9-en](https://dx.doi.org/10.1787/dcbc2ea9-en).
- xlvii OECD (2021), OECD Competition Trends 2021, Volume I: Global Competition Enforcement Update 2015-19, www.oecd.org/daf/competition/oecd-competition-trends-2021-vol1.pdf.
- xlviii www.oecd.org/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm.
- xliv www.oecd.org/daf/competition/cartels/42851044.pdf.
- l www.oecd.org/competition/assessment-toolkit.htm.
- li Order of FAS Russia of 25 May 2012 No. 339 on Approval of Administrative Regulations of the Federal Antimonopoly Service for the Execution of State Function for Initiating Cases on Violations of Anti-monopoly Legislation of the Russian Federation.
- lii FAS Russia does not keep separate statistics of unscheduled on-site inspections classified by the different types of anticompetitive practices.
- liii MVN telecom operators use virtual networks of mobile wireless communication based upon nodal elements of other operators’ communication networks.