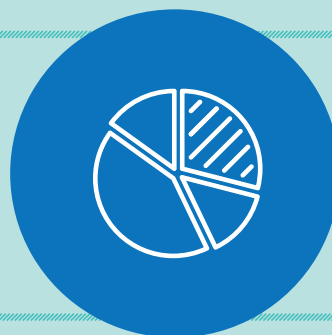




# Market Studies Guide for Competition Authorities

2018





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## About this guide

This document summarises the work conducted by the OECD Competition Committee and its Secretariat on the subject of market studies. It can be used by competition authorities, and competition policymakers more broadly, when designing a framework for market studies, and when executing market studies. While the specific approach and framework for market studies currently varies significantly across jurisdictions, there are substantial insights that can be shared from the experiences of competition authorities.

Further information on the topics covered in this document can be found in the resources included in the Annex. This document can be read in conjunction with the International Competition Network Market study good practice handbook (“ICN Handbook”), which contains further insights about the use, planning and execution of market studies.





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# 1. Introduction: Market study objectives and legal frameworks

Market studies<sup>1</sup> are a versatile tool for competition authorities to analyse whether there are competition problems in a sector, outside the context of a merger review or antitrust investigation. Nearly all competition authorities in the OECD conduct some type of market study, ranging from short, informal assessments to lengthy, formal processes involving multiple rounds of stakeholder input and empirical analysis.

- **Competition advocacy** is one of the primary objectives for carrying out a market study.
  - Authorities can use market studies to identify reforms in a sector whose policy or regulatory framework includes unnecessary restrictions on competition, or to make clear the competition implications of proposed policies or legislation being considered by the government.
  - In other cases, market studies can be used for advocacy efforts aimed at market participants, for example clarifying that certain kinds of conduct is an infringement of competition law in order to change current firm practices, or prevent the emergence of anticompetitive conduct in an evolving industry.
  - Advocacy efforts aimed at the public can be undertaken via market studies as well. For instance, a market study could address misconceptions among consumers regarding the state of competition in a market.
- Market studies can also be a valuable tool to **enhance a competition authority's knowledge of a specific sector**, which can be leveraged in future merger cases or investigations into anticompetitive conduct. Market study reports can be a valuable resource for policymakers as well – particularly if jurisdiction-specific publications regarding the sector are not available. Consumer protection is another important theme of market studies conducted by competition authorities. A study can identify consumer protection concerns, or certain behavioural biases on the part of consumers, that may be undermining effective competition in a market. It can also serve as a starting point for measures to better inform consumers, open consumer protection investigations, and, depending on the powers of the competition authority, measures requiring firms to facilitate consumer awareness and switching. Competition authorities that are separate from consumer protection authorities may also find market studies an effective method to facilitate cooperation between the agencies.

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<sup>1</sup> Market studies are also known in some jurisdictions as sector inquiries, market inquiries, analyses of competitive situations, fact-finding inquiries, fact-finding surveys, or general studies.



- Market studies can **support a competition authority's enforcement efforts** as well, by uncovering evidence that leads to the opening of investigations. For example, a market study's price analyses and consumer consultations may lead a competition authority to identify firm coordination or abusive conduct as the source of competition problems in a market, potentially leading to follow-up enforcement actions.
- Several ancillary objectives can be achieved with market studies as well, including:
  - Conducting an **ex-post assessment** of a previous merger or antitrust enforcement decisions
  - **Improving public awareness** of the competition authority and the benefits of competition generally
  - **Building a relationship with sector regulators**, and imbuing those regulators with a competition promotion mind-set – particularly when a competition authority jointly-executes the market study with the regulator

While market studies can be useful in a wide variety of circumstances, competition authorities should consider on a case-by-case basis whether a study would be the most appropriate tool in a given situation. In some cases, the direct opening of an enforcement action, or more informal advocacy initiatives, may be more appropriate and cost-effective responses to a given competition problem.

## Legal frameworks

The legal framework for market studies in a jurisdiction, including the powers and flexibility that the competition authority has, will have implications for the types of competition problems that can be explored, the depth with which they can be explored, and the possible outcomes of market studies. As a result, this framework can be a key determinant of the success of market studies as a tool for competition policy in a jurisdiction.

Most competition authorities have some type of power to conduct market studies. It is more common for this power to be an explicit, legislative power, rather than one inferred from the general powers granted to an authority.

In some jurisdictions, the competition authority may be required under legislation to conduct a study on any subject referred to it by the government or, in some cases, a sector regulator.

The maximum duration of a competition authority market study may be circumscribed in legislation, or may otherwise be subject to a standard timetable to which an authority may have committed (in some cases with the possibility of an extension).

Competition authorities with the power to conduct market studies generally also possess powers to collect information for the purposes of conducting those studies.

- Several authorities have the power to issue mandatory information requests to stakeholders, and in some jurisdictions this power extends to other public bodies such as sector regulators. Authorities report that these powers are generally used when voluntary information collection strategies are unsuccessful or impractical.
- Information collection powers are commonly accompanied by powers to impose sanctions on parties that fail to comply with information requests. However, in some cases competition authorities must apply to courts to levy sanctions rather than to directly impose them.

## 1. INTRODUCTION

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- Information collected over the course of a market study is, in general, subject to legal protections, particularly confidential information collected from businesses or other stakeholders.
- In most cases, the information obtained by market study teams can be used in follow-up enforcement cases, subject to some conditions. Several authorities balance the desire to use such information for enforcement purposes with the need to encourage voluntary market participant cooperation. One way to achieve this balance is to emphasise to market participants the value to them of participating in efforts to create an accurate understanding of the sector, and to shape any potential remedies or recommendations.

In some jurisdictions, the legal framework for competition authority market studies involves a two-step process, which consists of an initial study to determine whether there are competition problems that merit further examination, followed in some cases by a more in-depth investigation that includes formal market definition, information requests and potential legal orders to rectify competition problems.





## 2. The market study process

Competition authorities follow a broadly similar process, and face many similar challenges, when conducting market studies. This process is summarised in **Section 4**, which emphasises the dynamic nature of a market study: as the market study team develops a clearer picture of the sector, it may need to continually revise its project plan, information collection strategies, or analytical approach.

To provide certainty to market participants and other stakeholders, several competition authorities have published guidelines on the procedure that will be followed in a market study. These guidelines can give stakeholders an idea of selection and prioritisation principles, timelines, opportunities to provide comment, the types of competition issues that will be analysed, the types of evidence that will be considered, and the types of outcomes that may be involved.

The market study process generally involves the activities described below.

### Step 1. Selecting and prioritising sectors



There are a range of factors that competition authorities should balance when selecting and prioritising sectors for market studies. These are set out in **Section 3** of this document.

### Step 2. Scoping and project planning



Several authorities emphasise the importance of project scoping and planning at the outset of a study.

- **Scoping:** Defining the scope of a market study, in terms of the sectors and issues to be considered, can be an important first step in planning the study. However, the question of whether an authority formally defines the markets for the study requires consideration, as it may involve unnecessary risks, including potential impacts on future merger cases. While it is important for market study teams to determine the population of firms they will be studying, it is not clear that a formal, published market definition is required for these studies, unless specifically required (for example, when formal remedies are involved). The ICN's Handbook (Part 3) contains further insight on market study scoping.
- **Pre-consultations:** When an authority is likely to be mandated to conduct a market study by another government body, the ICN's Handbook suggests engaging with the government body in advance of receiving the request or mandatory order. This can help ensure that timelines and expectations are clarified (see Part 2.5 of the Handbook for further details).

- **Hypotheses regarding competition problems:** An initial set of hypotheses about competition problems in a market can be used to inform market study plans, and guide information gathering and methodology selection. These hypotheses can come from preliminary theories of harm identified during the process of selecting and prioritising sectors for the study.
- **Market study teams:** At the outset of a study, a team should be selected, a timeline established and a project plan set, in terms of the main stages and activities for the study. Market studies are often conducted by ad-hoc teams, although some competition authorities have dedicated teams that specialise in advocacy and market studies. Retaining outside experts can be an effective way of obtaining sector or methodological expertise without taxing a competition authority's internal resources, but could involve challenges and limit the internal capacity-building benefits of a market study.
- **Stakeholder engagement planning:** Key stakeholders should be identified early in a study, and a strategy for engaging them should be developed (as discussed in Part 4 of the ICN Handbook).
- **Identifying risks associated with the study:** Some competition authorities also conduct a risk assessment while planning a market study, identifying key risks and a strategy to deal with them.

### Step 3. Preliminary information collection



The collection of available background information – basic information on a sector's structure, participants, products (or services), consumers and regulatory framework from publicly-available sources as well as an authority's past cases – is a common starting point for market studies. Preliminary consultations can also be held with key stakeholders.

This process will help inform methodology selection and identify key areas for further information collection. In addition, it will allow the study scope and project plan to be refined (see **Section 4.1**).

### Step 4. Launching the market study



A market study should be formally launched, with a published statement that clarifies the reasons for conducting the market study, its scope and timeline, and information on consultation methods as well as key contacts. To formally launch a study, a competition authority can use press releases, public announcements and featured documents on their website, among other communication tools. Part 5 of the ICN Handbook contains further details on market study launch strategies.

### Step 5. Methodology selection



Choosing the right methodologies is crucial for the success of a market study. Once a market study team has developed its preliminary hypotheses and collected an initial batch of requisite information, it can proceed to methodology selection. This will involve identifying the analysis required to test the hypotheses, and identifying methodologies for filling any gaps in information or data required for this

analysis. Further modifications to the study scope may be required if there are analytical or information limitations.

## Step 6. Additional information collection



Information gathering methods used for market studies include stakeholder interviews and information requests, surveys, and data collection. These methods may be employed at various points following the launch of a market study. Limitations in data availability, or new findings, may lead to revisions in the analytical methodologies selected.

## Step 7. Analysis



**Section 4.2** describes the methodologies commonly used by competition authorities and best practices for their application.

## Step 8. Selection of intended outcomes, reporting and outreach



**Outcome selection:** Once any competition problems in a sector have been identified, a market study team must develop, and consult stakeholders on, a course of action, whether in the form of recommendations for government, advocacy activities vis-à-vis market participants, follow-up enforcement actions, or other measures. **Section 5** describes the potential market study outcomes, which vary according to the legal powers of the competition authority and the competition problem identified.

**Publication:** The market study can formally conclude with the publishing of a final report, which describes the sectors analysed, the competition problems identified, the methodologies applied to reach these conclusions, and the outcomes selected.

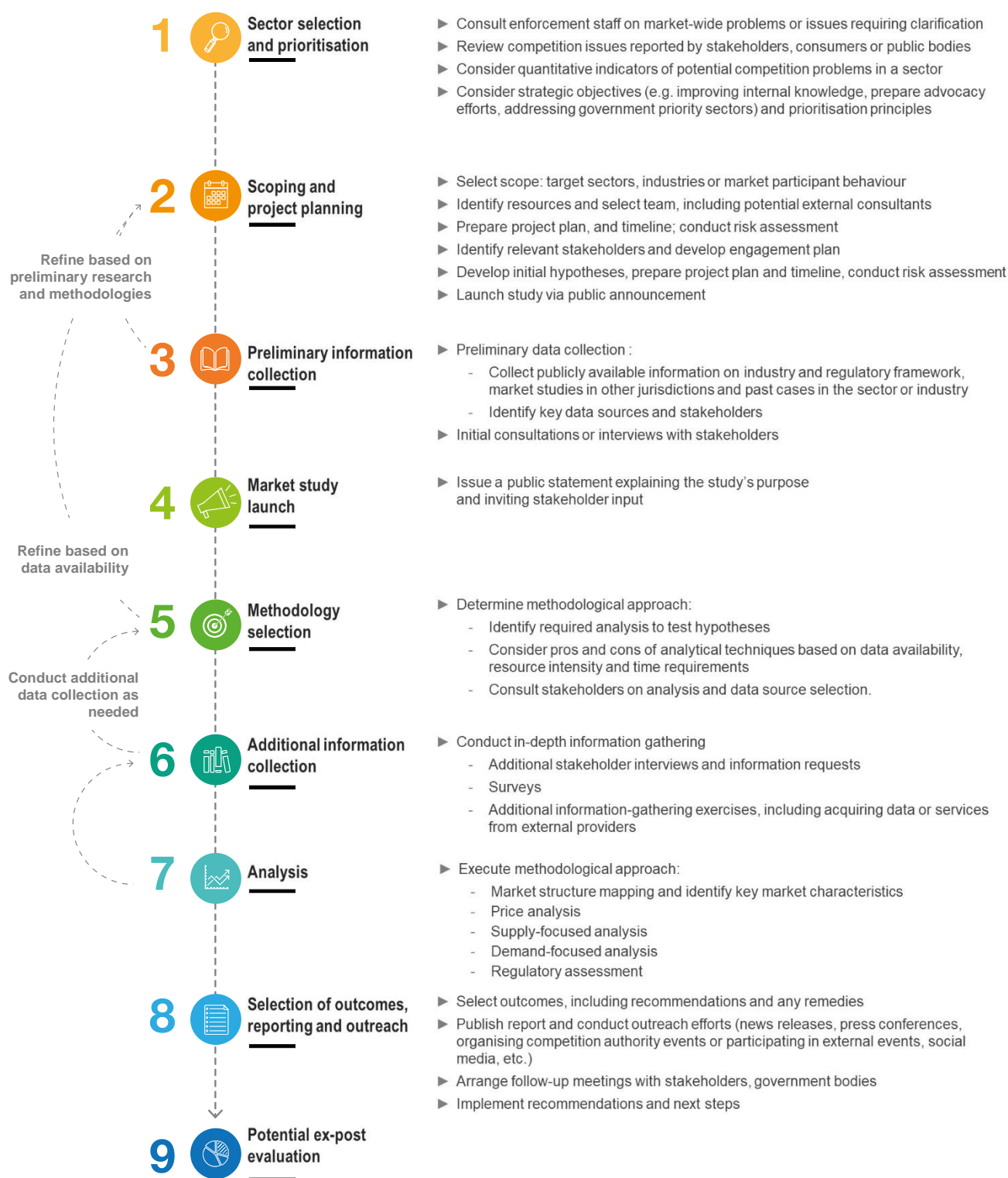
**Outreach:** Publishing a final market study report is not likely to be the end of a competition authority's work on the topic. An authority may be required to advocate for the implementation of the study's recommendations, or to publicise the study's findings. A sector may also be revisited after several years have elapsed, either comprehensively or with a high-level review to determine the extent to which an authority's recommendations have been implemented, and the extent to which the competition problems identified have been addressed.

## Step 9. Potential ex-post evaluation

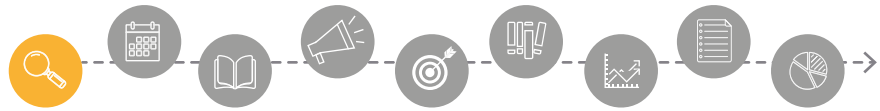


To develop lessons learned, and establish the value of market studies generally, competition authorities may wish to conduct an ex-post evaluation of a market study, as described in **Section 6**.

**Figure 1. The market study process**



Source: Adapted from OECD (2017b)



### 3. Selecting and prioritising sectors

The selection and prioritisation of sectors for market studies requires careful consideration, given the resources required to conduct a market study. There is no one single indicator that can be used to identify and prioritise candidate sectors; rather, a range of factors should be considered by competition authorities.

There are two primary approaches that can be used as starting points for competition authorities when selecting sectors for market studies.

- **Qualitative approaches** rely on observations from market participants, case handlers and stakeholders. Information that can be used to develop a set of candidate sectors include insights developed during merger reviews and informal internal consultations, as well as more formal requests from other government entities. Trends in consumer complaints, feedback from academics and think tanks, and research on trends or recent innovations can also be helpful. Some competition authorities task a specific team or staff member with developing a list of candidate sectors.
- **Quantitative approaches using indicators**, namely aggregate statistics that could point to sector-wide competition problems, have been considered by several competition authorities, but are not widely relied upon. They include: the degree of government involvement in a sector (via regulation or ownership), recent price increases (or relatively high prices compared to other jurisdictions), increased concentration, a lack of market entry, market share stability, entry and exit barriers and trends in innovation. There are numerous methodological challenges with considering each of these indicators, and so they should not be analysed in isolation, but together they can help to identify an initial set of candidate markets for further consideration.

The initial selection of sectors can be guided by a set of preliminary hypotheses about the potential competition problems in the sector that the agency could seek to address. These hypotheses can help inform prioritisation and scoping, but several competition authorities have emphasised the need for these hypotheses to not impair the flexibility to explore additional theories during the market study process, provided sufficient evidence is available to merit such an analysis.

The sectors selected by competition authorities for market studies will be partially defined by the objectives that the authority pursues when it conducts market studies. If an authority conducts studies primarily for advocacy purposes, it may focus on more heavily-regulated sectors, or sectors in which there are signs of anticompetitive practices. Pursuing studies for internal information purposes could lead to an emphasis on concentrated sectors with significant merger activity, or emerging sectors (e.g. digital sectors). A decision to use market studies to address consumer protection or other consumer-focused issues may lead to the selection of sectors where there appear to be poor outcomes for consumers that may not be fully explained by competitive conditions in a market (for example, this could include markets involving complex choices or barriers to



switching on the consumer side). Such problems could be more of a priority in markets affecting a broad base of consumers.

Once some candidate sectors are identified, competition authorities can narrow the list by applying some strategic considerations.

- **Government priority sectors** are a common strategic choice for competition authorities to conduct market studies. Such studies can help inform the policy process, for example, by preventing the adoption of new measures with unnecessarily negative competitive impacts or identifying opportunities for regulatory reform. Study recommendations regarding government priority sectors may also be more likely to be adopted, relative to recommendations for sectors that are not a focus of policymaker attention. However, it can be challenging for competition authorities to ensure market studies are completed in time to have a bearing on the policy development process, since authorities may have to anticipate issues before they become a topic of public attention.
- **Sectors undergoing significant change** can also offer strategic opportunities for competition authorities to conduct market studies. In particular, market changes can give rise to potential future enforcement concerns, lead to regulatory challenges or result in mergers for which an authority may wish to acquire some expertise. Market studies focusing on these changes can clarify for market participants the types of conduct that the authority considers anticompetitive, and may also give rise to follow-up studies on new issues that are uncovered.
- **Sectors in which there have been numerous antitrust cases** can be good candidates for market studies as well. A study could uncover factors that contribute to these competition problems, such as conduct that facilitates collusion or a lack of clarity regarding whether a given type of conduct is permitted by competition law. Sectors that have been studied in other jurisdictions can similarly be an effective area for competition authorities to focus on, although the unique circumstances in a jurisdiction should be considered.
- **The competition orientation of sector regulators** can also be relevant, as sectors that are regulated according to a framework that was not designed with competition in mind may present substantial opportunities for the competition authority to produce positive changes.
- **The degree of public concern in a market** is also considered by several competition authorities, although commencing a market study may lead to expectations about enforcement actions or other outcomes that may not reflect the reality of a sector, and so careful communication could be required.

Some competition authorities use quantitative indicators to help prioritise among candidate sectors for market studies, in conjunction with the strategic considerations described above. These indicators include the relative importance of a sector for the broader economy in terms of output, employment, weight in consumer baskets, research and development spending and total investment, as well as the extent of interrelationships with other sectors of the economy and social considerations (e.g. the relative importance of a sector for low-income households).

Competition authorities may also prioritise sectors for which a market study may be more likely to produce results. For example, a sector could be prioritised if a market study is the only opportunity an authority has to delve into certain issues, or to collect certain information that may not be publicly available but which is essential to analyse a market-wide competition problem (as opposed to a firm-specific one).



## 4. Methodologies for conducting market studies

There is no single, standard methodology for conducting a market study, given the variety of market study objectives and the unique circumstances of each sector. However, competition authorities face many similar challenges when conducting market studies.

### 4.1. Information collection methodologies

Competition authorities can collect a wide range of information for the purposes of conducting a market study.

#### Background information

Information already collected by the competition authority from past cases or other market studies should first be considered to avoid duplicative information collection, and to inform the selection of additional information sources.

Market studies or enforcement actions by other competition authorities, and studies prepared by other government bodies or regulators, are a common source of preliminary background information and data.

Complaints received by the competition authority, and public commentary indicating concerns with the functioning of the sector in question, can guide the formulation of hypotheses, analysis and presentation of issues in the market studies report.

A wide range of additional background information, from academic articles to financial statement filings to news articles, can be used to develop a preliminary understanding of a sector and to bridge outstanding gaps in information.

#### Stakeholder interviews and information requests

Stakeholder interviews can be an effective way to identify market participant concerns, refine hypotheses, identify additional stakeholders and test survey design, where relevant. Some authorities organise sessions with a variety of stakeholders to encourage interaction, whereas others group stakeholders based on their level of expertise and familiarity with competition law.

A co-operative relationship with industry and consumer associations can enhance participation in stakeholder consultations. When a market study could result in remedies, firms can be incentivised to identify voluntary measures early on, as part of the consultation process, to address any competition concerns.

Mandatory information request powers can be an effective tool for market study teams to uncover key insights that would not otherwise be available. The effectiveness of mandatory information requests can be enhanced when they are accompanied by other approaches to help market study teams determine “what they don’t know.”

Care must be used when handling data provided by market participants to ensure that differences in definitions, time periods and other specifications (such as exchange rates and built-in assumptions) do not prevent comparisons among the responses of different market participants. Standardised data collection templates can help address these issues, but may increase the burden on respondents. In some cases, using third-party databases may be preferable.

Additional written stakeholder feedback, on findings and recommendations, can be encouraged by publishing study updates and sharing preliminary findings with stakeholders.

### **Surveys**

Surveys can be particularly useful when the population of relevant stakeholders (often consumers) is too large or heterogeneous to permit the systematic use of interviews or targeted data requests. Surveys can also be used to test the effectiveness of proposed remedies.

Surveys require careful consideration with respect to the selection of the target population, the identification of a clear survey objective (i.e. the precise gap in information or data that the survey is intended to fill should be clearly defined), the sampling approach (including the use of sub-groups and the implications on sample size and representativeness) and the survey method (in-person focus groups, online questionnaires, telephone surveys, mail-in questionnaires or field interviews).

The risk of bias or adverse outcomes stemming from survey design can be minimised by:

- ensuring that questions are worded neutrally
- being conscious of the impact of the order of questions
- considering randomising the order of response choices
- avoiding “double barrelled” questions that address multiple topics at once
- considering whether questions with agree/disagree answers can be replaced
- framing hypothetical price increases in absolute amounts rather than percentages
- considering whether ranking type questions are more appropriate than rating type questions
- ensuring consistency in the wording of questions provided to each respondent

It is good practice to test the design of a survey with a pilot process, first with internal competition authority staff, and then with a small select group of the target population.

Competition authorities often obtain the assistance of market research firms to conduct large-scale surveys in the field. The selection of these firms should involve careful consideration of their quality standards, procedures and measures to ensure transparency.

Prior to incorporating survey results into analysis, market study teams should consider the response rates (and corresponding implications for representativeness) as well as whether the responses could reflect biases in respondent perceptions.

## **Additional information gathering methods**

Purchasing data from market data providers is an alternative to market participant data collection when the latter would be resource-intensive, or where there are concerns about accuracy and completeness.

The use of internet product searches and secret shopping can provide valuable evidence for the analysis of potential market failures, and additional context to information provided by stakeholders during consultations and information requests.

Information on the regulatory framework of a sector can be of fundamental importance to understanding competitive conditions and potential competition problems.

When a sector is heavily regulated, or when a market study team hypothesises that competition may be held back in a sector as a result of regulations or public policies, details of these regulations or policies can be collected and summarised. The OECD's Competition Assessment Toolkit contains insights on how to conduct this process.

## **4.2. Analytical methodologies**

Competition authorities often employ several different methodologies to analyse a sector for a market study. These methodologies are in general grounded in time series analysis, or comparisons with other jurisdictions and other similar sectors, rather than with reference to an idealised perfectly-competitive outcome.

### **Identifying the market structure and key characteristics**

Mapping the structure of a market can begin early in a market study, as it can inform stakeholder consultation efforts and play an important role in refining hypotheses. Diagrams and other visual representations can effectively convey the results of this process in market study reports.

Relevant supplier characteristics that have been examined in market studies include the distribution chain (in terms of structure, key players involved, agreement terms, integration and concentration), barriers to new firm entry, production and pricing strategies and related business models, and the sales process. Comparisons with market structure in other jurisdictions are also common.

The identification of key consumer characteristics can help define the market, assess demand substitutability, identify market failures, discover consumer protection issues, provide valuable input into the design of subsequent analysis, and shape recommendations for market studies. Consumers can be categorised based on their preferences, the degree to which they are engaged in the market (e.g. the intensity of their searching activities), the alternatives available to them, and their behaviour, for example. Consumer-focused analysis can also assess the range of information available to consumers when making their purchasing decision.

Product or service characteristics that can be relevant to this process include an analysis of the basis of competition in the sector, and the identification of product characteristics that lead to market failures.

### **Price analysis**

Market study teams often also conduct at least some type of analysis of prices. However, a comprehensive pricing analysis may not always be possible, and when it is not clear that representative pricing data are available, market study teams are generally cautious in drawing conclusions solely on the basis of price evidence.

Price comparisons can be made between firms offering the same product, between competing products, or between regions or countries for a given product, and can motivate further analysis to understand the drivers of major differences when they exist. Several factors must be considered in order to avoid drawing inaccurate conclusions from price comparisons, including differences in certain costs (such as transport costs), pricing regulation, differences in consumer preferences and exchange rates (for international price comparisons).

In addition to comparisons of price levels, an analysis of pricing strategies and movements can be helpful in drawing broader inferences about competitive conditions in a sector.

### **Profitability analysis**

Some market studies analyse the level and patterns of profitability in a sector. High profits in a sector do not alone suggest a conclusion that competition is not working well in the market. Thus, a market study considering profitability should attempt to identify the sources of high profits (whether they are due, for instance, to innovation and efficiency or competition problems in a market).

The most frequently used methodologies in profitability analysis rely on accounting data. To move from accounting data to variables that have economic meaning, some adjustments are typically necessary. For instance, the value of assets on a balance sheet can be reported at their acquisition cost, but may not reflect the actual value of the assets, required for return on capital calculations. In addition, there may be sector-specific considerations when measuring profitability that should be identified prior to conducting profitability analysis. For example, the return on sales can be used when it is not possible to obtain reliable estimates of a firm's capital.

### **Price concentration analysis**

Price concentration analysis studies the relationship between price and a measure of concentration, such as the Herfindahl-Hirschman index (HHI). This methodology assesses whether there is evidence that increased concentration in the sector is associated with higher prices, and is applicable to a large range of cases.

While a first intuitive conclusion could be reached by plotting the two variables, the most common approach is to estimate an econometric model in which price is estimated as a function of concentration and a number of control variables.

One of the key assumptions in price concentration analysis is that a comparison can take place between the same product in different regions or countries. This can be challenging when there are multiple products or services to compare, or when there are substantial differences with the comparator region or country.

### **Supply-focused analysis**

The prospect of entry or expansion, within a reasonable time period, can be an important competitive constraint on incumbents. Barriers to entry and expansions can stem from market characteristics

(e.g. the importance of certain patents, economies of scale, essential facilities, reputation effects), or regulatory frameworks.

Potential competition problems arising from the conduct of firms that are already in the market can also be analysed during market studies. Studies can, for instance, investigate: (i) the characteristics of the sector and whether they are potentially conducive to co-ordination or tacit collusion; and (ii) market outcomes, such as market share stability over time, price parallelism and high profitability.

Other studies have investigated the relationships between retailers and manufacturers and the implications of potentially problematic unilateral conduct.

Finally, a market study may be an opportunity for an authority to clarify that certain behaviour may be found to infringe competition law, even if no specific instances of this behaviour have been identified during the study.

### **Demand-focused analysis**

The analysis of consumer behaviour reflects the concern that a market may not be working effectively because, for instance, consumers are not well informed, they do not actively compare alternative suppliers and products, or they face substantial switching costs. To conduct this analysis, competition authorities could benefit from the use behavioural economics insights. See, for example, the OECD's report on 'Use of Behavioural Insights in Consumer Policy' (OECD, 2017c).

Issues with consumer purchase decisions and switching often arise in markets with complex products or pricing schemes (e.g. financial services, energy). In these situations, consumers may simplify their decision by focusing on only one or few elements, possibly resulting in less than optimal choices. The tendency of different businesses to highlight different features of a product or service may further create challenges for effective consumer decision making.

When consumers could attain substantial savings by switching from their current suppliers or tariff plans, it may indicate a lack of engagement on the demand side, and therefore that competition may not be working effectively. Providing illustrations of such savings in a market study report and advocacy materials can enhance the impact of a study as well.

Assessing the impact of consumer switching on prices can also help competition authorities to infer the nature and extent of competition in a market.

Switching analysis aims to investigate two main issues: (i) assess consumer mobility, including the extent of switching and the underlying reasons for consumers switching as well as any potential switching costs or barriers to switching; and (ii) assess consumer benefits from switching.

Switching analysis can be conducted using descriptive statistics and econometric analysis. A complete econometric analysis allows a market study team to identify the relationship between a range of individual characteristics with searching and switching behaviour. This rigorous approach allows recommendations to be more targeted, but is data-intensive.

### **Regulatory assessments**

Many studies include an overview of relevant regulations to provide context and inform analysis. In some cases, studies include more extensive assessments of regulation affecting a sector, particularly when regulations restrict entry into the market or negatively affect the behaviour of economic agents. Regulations may also have an impact on market competition even after they have been lifted, which market studies can evaluate.

#### 4. METHODOLOGIES FOR CONDUCTING MARKET STUDIES

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Once regulations that affect competition have been identified, market study teams can proceed by (i) identifying the rationale for the public policy intervention; (ii) identifying potential alternatives, as well as their benefits and risks; and (iii) potentially recommending an alternative, when one is identified which achieves the policy objectives with fewer competition distortions. The OECD Competition Assessment Toolkit can inform this process.



## 5. Remedies and outcomes

Market studies generally culminate in the publishing of a final report, and the selection of a course of action for the competition authority, depending on its legal powers and the competition issues identified (if any). The most common market study outcomes are recommendations for regulatory changes, calls for firms to change their behaviour, or law enforcement interventions. Figure 2 summarises the various types of market study outcomes.

The range of outcomes available to market study teams will in large part depend on the legal powers of the competition authority. In several jurisdictions, these powers limit the competition authority to either issuing recommendations to policymakers, non-binding guidance to market participants, and initiating enforcement investigations. However, as noted in the introduction, a small number of competition authorities have legal powers to impose certain remedies, such as issuing orders to market participants with regards to their conduct, or requiring divestitures. The power to issue orders directly as a result of a market study (rather than in the context of a merger review or antitrust investigation) allows competition authorities to deal with a broader range of competition problems in a market and has permitted the design of more comprehensive and effective remedy packages.









One of the key considerations for competition authorities when selecting a remedy is the balance between its likely benefits and costs, as highlighted in the International Competition Network's Market Studies Good Practice Handbook. The Handbook notes that such an analysis can be particularly important in addressing arguments from market participants who benefit from the status quo.

A package of multiple remedies or recommendations may be required to adequately address the competition problems uncovered.

Early consultation with market participants can be helpful in testing potential market study outcomes and remedies. Stakeholders can also be helpful in proactively identifying potential solutions to competition problems in the sector, which can then be assessed by the market study team for their likely effectiveness.



**Figure 2. Market study outcomes**

 TYPE OF COMPETITION PROBLEM DETECTED	 POTENTIAL REMEDY	 KEY OUTCOME
Legislative, regulatory or policy matters 	<ul style="list-style-type: none"> <li>▶ Develop recommendations regarding existing legislative, regulatory or policy proposals</li> <li>▶ Develop new proposals for legislative, regulatory or policy changes</li> <li>▶ Promote competition awareness among sector regulators or policymakers</li> </ul>	Policy advocacy and legislative change
Consumer protection matters 	<ul style="list-style-type: none"> <li>▶ Refer matter to consumer protection body or initiate consumer protection investigation</li> <li>▶ Conduct advocacy activities and produce materials to improve consumer awareness</li> <li>▶ Conduct outreach to inform firms of the type of conduct that violates consumer protection laws</li> </ul>	Improved consumer and market participant awareness
Enforcement or market participant conduct matters 	<ul style="list-style-type: none"> <li>▶ Initiate investigation into anticompetitive conduct</li> <li>▶ Clarify authority views on conduct that may have a differing interpretation by market participants</li> <li>▶ Follow-up market studies</li> </ul>	Enforcement action & Improved market participant awareness
Market structure matters 	<ul style="list-style-type: none"> <li>▶ Pursue structural remedies</li> <li>▶ Develop recommendations to government on market structure in regulated industries</li> </ul>	Pro-competitive market structures
No problems detected 	<ul style="list-style-type: none"> <li>▶ Publish report and conduct outreach explaining how the market functions, market study findings</li> </ul>	Improved consumer and policymaker awareness

Source: OECD

## 5.1. Legislative, regulatory and public policy matters

Competition concerns stemming from regulation, legislation or other policy matters are frequently identified in market studies. As a result, recommendations addressed to regulators and policymakers are among the most common outcomes of market studies.

Market studies have proposed legislative, regulatory or policy changes to address competition problems, including:

- The removal of regulatory barriers to entry
- Eliminating other regulatory restrictions on competition
- Improving the competitiveness of public concession and procurement practices
- Reducing unnecessary limitations to the role of the private sector in certain markets
- Addressing business practices that may require a regulatory response, for example, to facilitate consumer switching

The formulation of recommendations in relation to regulatory restrictions on competition can be guided by the OECD's Competition Assessment Toolkit.<sup>1</sup> The process set out in the toolkit involves ascertaining the underlying purpose of the restriction, identifying specific elements of the regulation that generate competition problems, developing alternatives, and comparing available options.

Since these measures generally fall outside the realm of competition enforcement, competition authorities are often limited to crafting recommendations for regulators and policymakers to consider. Competition authorities have reported some challenges in having these recommendations accepted, or at least differing levels of success depending on the type of success.

In order to enhance the likelihood that recommendations are adopted, some authorities ensure recommendations are timed to coincide with government or legislative agendas, are as narrowly tailored to the competition issues identified as possible, and are designed with the involvement of sector regulators and relevant line ministries.

## 5.2. Consumer protection and behavioural matters

Market studies also permit competition authorities to investigate concerns regarding demand-side features of a market that they may not otherwise address in case work – particularly if the competition authority does not also have a consumer protection mandate. The design of remedies focusing on consumers can be particularly challenging for competition authorities, and so the involvement of consumer protection and sector regulators could be desirable.

One of the main focus areas of consumer-focused market study recommendations and remedies involves **ensuring that consumers have access to sufficient information, and of the right type, to make a purchase decision**. These measures are often proposed by competition authorities in markets where there would be, without intervention, a substantial imbalance in the information held by suppliers and consumers in a market. Past examples include:

- disseminating information to consumers as part of the market study
- requiring firms to provide consumers with a specific set of information

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<sup>1</sup> Accessible at [www.oecd.org/competition/assessment-toolkit.htm](http://www.oecd.org/competition/assessment-toolkit.htm).

- recommending that regulators take a more active role in helping consumers evaluate their needs and available options
- requiring firms to make certain information available to third party comparison services.

In some cases, market studies may identify **conduct that warrants follow-up action, or at least vigilance, on the part of consumer protection authorities**. Market studies can therefore be used to clearly signal that an authority intends to focus on a certain type of conduct or, if the consumer protection authority is separate from the competition authority, that further action may be required on the part of those authorities.

Some market studies identify the **lack of consumer switching as a primary competition concern**. To address the concern, competition authorities may make recommendations for further regulatory action, but this may not always be appropriate -particularly when the inertia is not due to regulatory barriers or a lack of information. In these cases, authorities may undertake their own measures to directly reach consumers, and encourage greater engagement by consumers in evaluating options as well as making purchasing decisions. Alternatively, consumer authorities may look at whether there are problems of information overload, which may require a different set of regulatory interventions.

Consumer-focused remedies can be particularly challenging in terms of design. While behavioural economics insights can help, the practical impact of certain remedies may be less than expected, or subject to other behavioural biases that may only become clear after testing remedies. Technology-based solutions, such as price comparison websites, may be effective at addressing a lack of consumer engagement by improving simplicity (for example, where there is the potential for information overload due to pricing complexity). Remedies could also seek to address the default settings offered to clients for products and services, since many consumers may tend to accept these default options rather than actively considering the alternatives.

The design of remedies and recommendations focusing on consumer issues can benefit from the involvement of consumer protection agency staff, as well as sector regulators who may be aware of consumer biases and the information required to make a well-evidenced decision in certain markets.

### 5.3. Competition enforcement and market participant conduct matters

Anticompetitive conduct, or the risk thereof, has been analysed in numerous market studies. The outcome of studies that identify these types of issues can include opening an investigation, or simply encouraging market participants to cease problematic conduct before formal investigations are required.

Some studies find concerns warranting follow-up enforcement actions. These include studies that culminate in specific remedies to reduce market transparency, and studies in which an authority declares its intention to investigate certain types of conduct in the future.

Other studies may be used to clarify the competition authority's views on certain types of conduct, eliminating any uncertainty among market participants and potentially encouraging a change in conduct without further action.

In addition, some studies may deal with grey areas of competition law, and encourage market participants to voluntarily change their conduct to avoid additional competition enforcement or regulatory responses.

Obtaining market participant cooperation for market studies when follow-up investigations may occur may be a challenge. However, competition authorities have observed that market participants tend to be eager to address what they may view as misconceptions about their conduct, and are often proactive in developing remedies to mitigate the need for follow-on action.

#### **5.4. Market structure matters**

Relatively few market studies involve remedies or recommendations to directly alter the structure of markets. Those that do tend to be limited to regulated markets with some level of state-owned firm involvement. Further, relatively few authorities possess the legal powers to directly impose market structure remedies via market study instruments.

Market studies in some jurisdictions have included the imposition of market structure remedies in the form of:

- divestiture orders
- recommendations to government on restructuring a market with publicly-owned firms, or involving the provision of public services, by introducing greater private sector involvement
- measures to better harness competition following reforms that instituted structural separation and opened up markets to competition.

#### **5.5. Market studies that do not find competition problems**

Some market studies are conducted by competition authorities when the authority does not suspect the presence of major competition problems, but when it seeks to reassure and explain the functioning of the market to policymakers and the general public. The authority may be obligated to conduct the study based on legislative requests, or may simply wish to respond to concerns among the general public, for example, following a media report on competition in a specific sector.

In these cases, the outcome of a market study may be focused more on providing an analysis of how a market works, and an assessment of any concerns expressed in media reports. Past examples include studies that explained the main determinants of prices, pricing differentials, or the conditions of supply, to address public concerns.

The study can form the basis of follow-up outreach on the part of the authority, including statements in the media, the distribution of communications materials, and presentations to policymakers. Competition authorities may be required to carefully balance the need to address concerns with the expenditure of resources on sectors that are not exhibiting competition problems.





## 6. Ex-post evaluation

While market studies are a common tool for competition authorities, ex-post assessments of their impact are somewhat less common. This may be due to resource constraints, or risk aversion, for example, in the event a negative evaluation is used to argue against the use of authority resources for market studies. However, there are several benefits associated with conducting ex-post evaluations of market study remedies and recommendations.

Ex-post evaluations can help determine the effectiveness of the market study in meeting its objective, and help establish the value of market studies as a tool for competition authorities more generally. Specifically, they allow authorities to:

- **monitor compliance** with mandatory orders, **the implementation of recommendations** by governments, regulators and market participants, **and the effectiveness of the authority outreach activities** with policymakers and consumers.
- **determine whether competition problems in a sector persist**, and therefore whether further study or action is required on their part.
- **develop lessons learnt regarding the selection and application of remedies**, which can be applied to future market studies in the same sector, or studies targeting the same types of problems in other sectors. Testing whether certain types of remedies are more effective than others could also be helpful for merger control and enforcement work.

The OECD Reference guide on ex-post evaluation of competition agencies' enforcement decisions provides insight on the process that can be followed for a comprehensive ex-post assessment of a market study.

Competition authorities may also consider a more limited approach to assessing the outcomes of their studies. For example, they may simply report on the number of legislative and policy recommendations they have made and the number that have been adopted. This reporting could be accessible online and permit the general public to identify in each sector outstanding opportunities to improve the regulatory framework for competition.





# Annex.

## Further resources on market studies

### OECD resources

**Roundtable on market studies (2008):** This introductory Competition Committee Roundtable focuses on when market studies can be an effective instrument, and gathered the experience of competition authorities to date: <http://www.oecd.org/daf/competition/sectors/41721965.pdf>

**Workshop on selection and prioritisation of sectors or industries for market studies (2017a):** The OECD workshop covered how market study objectives, strategic considerations and quantitative as well as qualitative indicators can be taken into account when selecting and prioritising sectors. A summary document can be found at [https://one.oecd.org/document/DAF/COMP/WD\(2017\)49/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)49/en/pdf)

**Roundtable on market study methodologies (2017b):** The OECD Competition Committee discussed information gathering and analytical methodologies for conducting market studies, as well as the market study process. See the **Secretariat background note** available at [https://one.oecd.org/document/DAF/COMP/WP3\(2017\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2017)1/en/pdf) and further resources: <http://www.oecd.org/daf/competition/market-study-methodologies-for-competition-authorities.htm>

**Use of Behavioural Insights in Consumer Policy (2017c), OECD Science, Technology and Innovation Policy Paper No. 36:** This report examines how behavioural insights have been used by governments and other public policy organisations within their consumer policy making process and policy initiatives. It also identifies challenges to applying behavioural insights to policies. <http://dx.doi.org/10.1787/23074957>

**Competition and market studies in Latin America (2015):** This OECD Secretariat report summarises the framework for market studies in Chile, Colombia, Costa Rica, Mexico, Panama and Peru, and identifies some best practices: <http://www.oecd.org/daf/competition/competition-and-market-studies-in-latin-america-2015.htm>

**Survey of competition authorities (2016):** The OECD Secretariat conducted a survey of competition authorities in 59 jurisdictions with respect to the use of market studies by competition authorities, the legal powers to conduct studies and the challenges faced during the process. See the background note summarising the results: [https://one.oecd.org/document/DAF/COMP/GF\(2016\)4/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf)

**Reference guide on ex-post evaluation of competition agencies' enforcement decisions (2016):** This guide covers the evaluation of enforcement decisions, but contains insights that can be applied to the evaluation of market studies: <http://www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf>.

**Competition Assessment Toolkit:** While most market studies will not consist of a comprehensive competition assessment, this toolkit contains several helpful resources for competition authorities conducting market studies in which regulation is likely to be an important topic: <http://www.oecd.org/competition/assessment-toolkit.htm>



## ICN resources

**Guiding principles for market studies (2016):**

<http://www.internationalcompetitionnetwork.org/uploads/library/doc1136.pdf>

**Market studies good practice handbook (2016):**

<http://www.internationalcompetitionnetwork.org/uploads/library/doc1088.pdf>

**Market studies information store:** The information store contains a variety of market studies, organised according to both jurisdiction and sector, to serve as a resource for competition authorities when selecting sectors for study, developing preliminary hypotheses of competition problems, and identifying authorities to contact for further information

<http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy/amsis.aspx>

[www.oecd.org/competition](http://www.oecd.org/competition)

