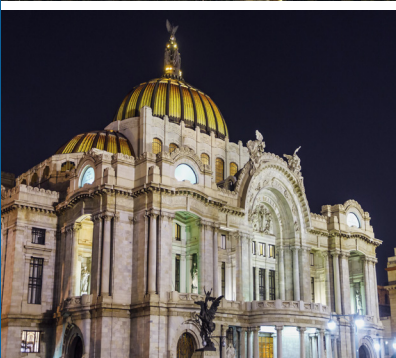


**COMPETITION
AND MARKET STUDIES IN**

**LATIN
AMERICA**

**The case of Chile, Colombia,
Costa Rica, Mexico, Panama and Peru**



Competition and Market Studies in Latin America

The case of Chile, Colombia, Costa Rica,
Mexico, Panama and Peru

2015



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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TABLE OF CONTENTS

Executive Summary	9
1. Introduction	13
2. Chile	15
Fiscalía Nacional Económica	15
Current legal framework for market studies	16
Access to information	17
Evolution of the legal framework	18
Experience in carrying out market studies	19
Objectives and outcomes of market studies	20
Characteristics of market studies	21
Results, government measures and follow-up	23
3. Colombia	25
Superintendencia de Industria y Comercio	25
Current legal framework for market studies	26
Access to information	27
Evolution of the legal framework	27
Experience in carrying out market studies	28
Objectives and outcomes of market studies	29
Characteristics of market studies	29
Results, government measures and follow-up	31
4. Costa Rica	33
Comisión para Promover la Competencia	33
Current legal framework for market studies	34
Access to information	34
Experience in carrying out market studies	35
Objectives and outcomes of market studies	36
Characteristics of market studies	37
Results, government measures and follow-up	38
Superintendencia de Telecomunicaciones	38
Current legal framework for market studies	39
Access to information	40
Experience in carrying out market studies	41
Objectives and results of market studies	41
Characteristics of market studies	41

5. Mexico	43
Comisión Federal de Competencia Económica	43
Instituto Federal de Telecomunicaciones	44
Current legal framework for market studies	45
Access to information	46
Evolution of the legal framework	47
Experience in carrying out market studies	49
Objectives and outcomes of market studies	50
Characteristics of market studies	54
Results, government measures and follow-up	56
6. Panama	59
Autoridad de Protección al Consumidor y	
Defensa de la Competencia	59
Current legal framework for market studies	60
Access to information	60
Evolution of the legal framework	60
Experience in carrying out market studies	61
Objectives and results of market studies	62
Characteristics of market studies	63
Results, government measures and follow-up	65
7. Peru	67
Instituto Nacional de Defensa de la Competencia	
y de la Protección de la Propiedad Intelectual	67
Current legal framework for market studies	68
Access to information	68
Evolution of the legal framework	68
Experience in carrying out market studies	69
Objectives and outcomes of market studies	70
Characteristics of market studies	71
Results, government measures and follow-up	72
Organismo Supervisor de Inversión Privada	
en Telecomunicaciones	72
Current legal framework for market studies	73
Access to information	73
Experience in carrying out market studies	74
Objectives and results of market studies	74
Characteristics of market studies	75
Results, government measures and follow-up	76

8. Good Practices	77
The use of market studies	77
Identifying good practices	77
A flexible and powerful competition tool	78
Key characteristics	81
Market studies distinguished from other actions	81
Outcomes of market studies	82
Examples	84
The UK market study of the dentistry market	85
The EC sector inquiry on pharmaceuticals	86
The FTC's report on authorised generic drug competition	87
The Canadian market study on generic drugs pricing	88
Procedural Aspects	88
Selection of markets to study	88
Prioritisation	90
Pre-launch	91
Launch	92
Hypotheses	93
Information collection	94
Analysis and hypotheses testing	97
Design of recommendations	99
Consultation	100
Publication	101
Follow-up work	101
Ex-post evaluation	102
9. Conclusions and Areas for Improvement	103
The legal powers of the competition agencies	103
The powers to perform market studies	103
The powers to request information	104
Resources	105
The importance of prioritisation	106
Relationship with stakeholders	107
Role of government	109
Ex-post Assessments of market studies	110
Annexe. Comparative information from countries' experience	113
References	115

TABLE OF CONTENTS

Boxes

Box 1. Non-binding opinions under previous Mexican legislation	49
Box 2. First approach on ex-post evaluations on market studies.	57
Box 3. The use of market studies in the UK	80
Box 4. Market studies serving both competition and consumer protection in the UK	84
Box 5. The US Paperwork Reduction Act	96
Box 6. Summary of areas for improvement	111

ABBREVIATIONS

ACODECO	Autoridad de Protección al Consumidor y Defensa de la Competencia (Panama)
COFECE	Comisión Federal de Competencia Económica (Mexico)
CC	Competition Commission (United Kingdom)
CMA	Competition Markets Authority (United Kingdom)
COPROCOM	Comisión para Promover la Competencia (Costa Rica)
DG COMP	Directorate-General for Competition of the European Commission (EU)
FCO	Foreign and Commonwealth's Office (United Kingdom)
FNE	Fiscalía Nacional Económica (Chile)
FTC	Federal Trade Commission (United States)
GDP	Gross Domestic Product
ICN	International Competition Network
IFT	Instituto Federal de Telecomunicaciones (Mexico)
INDECOPI	Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (Perú)
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading (United Kingdom)
OSIPTEL	Organismo Supervisor de Inversión Privada en Telecomunicaciones (Peru)
SERNAC	Servicio Nacional del Consumidor (Chile)
SIC	Superintendencia de Industria y Comercio (Colombia)
SUTEL	Superintendencia de Telecomunicaciones (Costa Rica)
TDLC	Tribunal de Defensa de la Libre Competencia (Chile)

EXECUTIVE SUMMARY

Through market studies, competition authorities can help markets work better especially when obstacles and distortions to competition are not caused by competition law violations. Competition authorities often use this tool to inform governments on problematic markets and recommend areas of improvement.

This report reproduces results of the OECD project on the use of market studies by the competition authorities of Chile, Colombia, Costa Rica, Mexico, Panama and Peru. The current legal frameworks and practices on market studies in these countries have been assessed and recommendations offered on how to improve them. The main findings include:

- Only some of the agencies examined in this report have express powers to perform market studies.
- As a result, only some agencies undertake proper market studies, while others perform them under their general competition powers, which leaves room for confusion and legal uncertainty.
- Only agencies in Mexico and in Peru have express powers to compel information to conduct market studies, supplemented by the power to impose sanctions if the information is not provided, not delivered in time, false or misleading.
- Some agencies do not have sufficient resources dedicated to market studies.
- All agencies rely on criteria for prioritising the studies they wish to do, but not all of them use these criteria in a systematic way. No agency makes these criteria public.
- No agency has published guidelines on market studies to inform stakeholders about the purpose and the possible outcomes of market studies, as well as procedural issues.
- In none of the six countries, the government has made a commitment to respond to the recommendations directed to them as a result of market studies.
- Ex-post assessments of the impact of market studies is rarely done in the countries reviewed in this report.

In light of these findings, the OECD is proposing the following recommendations:

- Costa Rica and Chile should grant COPROCOM, SUTEL and FNE express legal power to undertake market studies and issue recommendations.
- Panama, Costa Rica, Chile and Colombia should provide clear and express legal powers to their respective competition authorities to compel the provision of the information from private firms and public bodies for the purpose of conducting market studies.
- The competition agencies of Panama, Costa Rica, Chile and Colombia should be granted the express power to impose adequate sanctions if compulsory information requests for market studies are not complied with.
- All agencies should ensure that they have in place rules and procedures against any public disclosure of confidential and sensitive information that may be provided by market players and by other government agencies, as part of a market study, and ensure that stake holders are appropriately informed about their existence to encourage co-operation.
- All countries should commit enough financial and human resources to allow their competition agencies to regularly undertake market studies.
- SIC, ACODECO and COPROCOM would benefit from having more resources to employ for undertaking market studies.
- All agencies should regularly train the staff responsible for performing market studies.
- All agencies should ensure they have in place a clear set of criteria for setting priorities among all the problematic markets they may have identified.
- All agencies should publish guidelines to inform stakeholders about what market studies are and their possible outcomes.
- All agencies should undertake to publish a press notice when they launch a new market study, unless this may jeopardise the success of the market study itself. The notice should indicate the market(s) studied, the concerns that have led the agency to start the study, and the possible outcomes. Ideally the notice should also include a tentative timetable and an indication of a point of

contact in the agency for all those who wish to provide feedbacks, comments or information.

- All agencies should undertake to involve stakeholders in the design of the recommendations arising from market studies and should evaluate the expected cost and benefits of each recommendation before deciding the ones to propose.
- The governments of Costa Rica, Chile, Colombia, Mexico, Panama and Peru should commit to publicly respond to any recommendations directed at them arising from market studies, within a period of six months from the date when these are issued. Their response should clearly state for each recommendation whether and when they intend to adopt it and, if they do not, explain the reasons for rejecting it.
- All agencies, as they gain experience in the field of market studies and their recommendations begin to be implemented, should endeavour to perform the ex-post assessment of some of their market studies.

1. INTRODUCTION

This report is one of the outcomes of a project conducted by the Secretariat of the OECD Competition Division with the sponsorship of the UK Foreign and Commonwealth's Office under its Prosperity Fund.¹ It explores the use of market studies among the competition authorities of six Latin American countries (Chile, Colombia, Costa Rica, Mexico, Panama and Peru) with the aim to assess their functioning and offer recommendations that could improve their use as a tool that promotes better functioning markets.

As defined by the Market Studies Good Practice Handbook prepared by the International Competition Network (from here on the ICN), market studies are research projects aimed at gaining an in-depth understanding of how sectors, markets, or market practices are working. They are conducted primarily in relation to concerns about the functioning of markets arising from one or more of the following: (i) firm behaviour; (ii) market structure; (iii) information failure; (iv) consumer conduct; (v) public sector intervention in markets; and (vi) other factors which may give rise to consumer detriment. The output of a market study is a report containing findings based on the research, which may conclude that the market is working satisfactorily or set out the problems found.

The OECD Secretariat, in collaboration with representatives from the UK Foreign and Commonwealth's Office in each target country and with the nine competition authorities for the six Latin American countries involved in the study (some countries had two concurrent competent authorities), took stock of the experience with market studies in Chile, Colombia, Costa Rica, Mexico, Peru and Panama. Information was collected with the use of a questionnaire and through missions to all the countries, interviews with the authorities and a review of the existing literature. Chapters two to seven of this report present those findings.

¹ The Prosperity Programme is the Foreign and Commonwealth's fund to tackle climate change, strengthen energy security and promote an open global economy in key emerging economies; more information is available at www.gov.uk/prosperity-fund-programme.

The eighth chapter summarises what could be regarded as good practices from some of the jurisdictions with the most experience in conducting market studies. This section is based on the existing literature and on the OECD Secretariat's dialog with the competition agencies in these jurisdictions (particularly the UK CMA, the EU DG COMP, and the US FTC). These practices differ in nature and adapt to different legal and regulatory environment, but suggest that market studies are a useful tool worth promoting internationally.

Chapter nine concludes by identifying areas for improvement and providing advice for the six target countries that could help them bridge some of the gaps and weaknesses described in the country chapters in light of the good practices from the more experienced jurisdictions.

The report was officially launched during a two-day event in Santiago, Chile (18-19 March 2015). The event included discussions of good practices as well as capacity building workshops to representatives of competition authorities in the region.

2. CHILE

Fiscalía Nacional Económica

The *Fiscalía Nacional Económica* (from here on the FNE) is the national agency responsible for safeguarding free competition in Chile. As such, it must defend and promote competition in all the markets or sectors of the Chilean economy. Under Decree Law N° 211 (from here on DL 211), the Law on Defence of Competition, the FNE is a public institution with delegated powers, with its own legal personality and assets, and independent of all other bodies and services.

The FNE is headed by the National Economic Prosecutor, who also represents it judicially and extra-judicially. It is subject to supervision by the Ministry of Economy, Economic Development and Tourism in representation of the President of the Republic.

In 2014, the FNE had a budget of USD 10.1 million and a staff of 100 employees devoted to the enforcement of the competition law. Eight professionals (four lawyers and four economists) work in the Division responsible for investigating mergers and preparing market studies. No members of this team work exclusively on market studies.

The institutional system for protecting and promoting competition that is in force in Chile is *two-pronged*, comprising the FNE and the *Tribunal de Defensa de la Libre Competencia* (from here on the TDLC), as well as the Supreme Court of Chile. The FNE is mainly responsible for the investigation and the prosecution of cases while the TDLC is an independent collegiate tribunal that specialises exclusively on matters related to free competition. Its function is to prevent, correct and impose sanction for infringements of the competition law. It normally acts in response to requests or lawsuits initiated by the FNE or by private parties.² The TDLC's final rulings in cases

² The TDLC cannot itself instigate enforcement proceedings (Article 18 N°1 of DL 211) or proceedings with the aim of ruling on whether an act or contract (e.g. a merger or an acquisition) restricts competition; nor can the TDLC impose *ex officio* conditions or remedies on private entities to address competition concerns - (Article 18, N°2 of DL 211). The TDLC can,

of enforcement proceedings and/or consultations³ can be reviewed by the Supreme Court, which is the ultimate judiciary review body.

Current legal framework for market studies

In Chile, the power to carry out market studies is not explicitly enshrined in the law. The FNE has historically based the decision to prepare such studies on legal provisions (particularly DL 211) which were enacted for other purposes. These provisions establish that the FNE is entitled to undertake competition advocacy activities in addition to its enforcement activities.

Article 1 of DL 211 stipulates that the objective of the law is to *promote* and defend free market competition. With this reference to the promotion of free competition, the FNE understands that the law explicitly alludes to the role of *advocacy* for which the preparation of market studies is relevant.

In addition, the list of the legal powers of the FNE includes a set of specific provisions that do not refer to *investigations* (or, in other words, are not for the purpose of enforcement of the law), but are of general application. They are contained in sections f), k), l) and m) of Article 39 of DL 211 and give the FNE the following powers: “(...) (f) to request the collaboration of government services and their employees in the exercise of its functions; (...) (k) to require reports from technical government bodies and hire the services of experts and technicians; (...) (l) to sign agreements with government services and universities or other (overseas) competition agencies for the purpose of promoting and defending free competition; (m) to enter into agreements for the transfer of information with other State bodies or electronic interconnection with private parties or overseas agencies.” Although none of these provisions refers directly to market studies, the FNE has interpreted them as allowing it to perform market studies.

Finally, the FNE has the power to request that the TDLC promotes regulatory changes by modifications or repealing legal provisions that it considers to be at odds with free competition and by issuing legal or regulatory provisions that are necessary to promote competition or regulate the exercise of certain economic activities that take place in non-competitive

however, instigate proceedings to issue instructions of a general nature (Article 18, N°3 of DL 211) or to assess whether regulatory recommendations should be made to the President of the Republic (Article 18, N°4 of DL 211) in order to promote competition in a market.

³ Articles 18, N°1 and N°2 of DL 211.

conditions.⁴ The FNE takes the view that, in order to request the TDLC to exercise this power, it must be able to carry out general assessments of the operation of markets for which purpose market studies are relevant.

Access to information

As indicated above, the FNE does not have explicit powers to carry out market studies, hence it uses its regular information gathering powers to obtain the information required for this purpose. The FNE is expressly empowered to request information from public sector bodies. Article 39 f) of DL 211 establishes that the FNE may (...) “request the collaboration of any employee of public bodies and services, municipal governments or companies or entities to which the State or its enterprises, entities or companies or municipal governments contribute or in which they are represented or hold a stake, who will be obliged to provide this collaboration and to supply the information held in its files and which the National Economic Prosecutor requests, even when this information is classified as secret or restricted, in accordance with the law in force in which latter case the Tribunal's prior authorisation will be required.”

The FNE, however, cannot require information from private parties except in the context of an investigation (i.e. a proceeding whose purpose is to establish an infringement of the competition law). This is regulated by Article 39 point h) of DL 211.⁵ The power to obtain information from private

⁴ Article 39 c) of DL 211 establishes that the National Economic Prosecutor may “require that the Tribunal for Defence of Free Competition exercise any of its powers and take preventive measures in the context of the investigations being carried out by the Prosecution Service”. The TDLC's powers are described in Article 18 of DL 211 and include that of: “4) Proposing to the President of the Republic, through the corresponding Minister of State, the modification or repeal of legal or regulatory provisions that it deems at odds with free competition as well as the issue of legal or regulatory provisions when these are necessary to foster competition or regulate economic activities that are taking place in non-competitive conditions”.

⁵ Article 39 of DL 211 states that “the powers and duties of the National Economic Prosecutor will be: (...) h) To request from private parties information and data that the Prosecutor deems necessary for the investigations he carries out. Individuals and the representatives of bodies with legal personality from whom the National Economic Prosecutor requires data or information whose submission could be detrimental to that party's interests or those of third parties may request that the Tribunal for Defence of Free Competition totally or partially annul the requirement. This request, with its grounds, must be presented to the National Economic Prosecution Service within the five days following communication of the requirement whose effects will be suspended from the moment at which the respective presentation is made. The Tribunal for Defence of Free Competition will review and rule on this request at its next session, reporting

parties, even when this is already in the domain of public bodies and services, is also restricted to enforcement purposes only.⁶ The FNE views this lack of authority to compel information from private parties as an important weakness in its ability to carry out market studies.

The FNE has in the past, nonetheless, signed co-operation agreements with other bodies and sector regulators. One example is the co-operation agreement signed with the National Consumer Service (from here on the SERNAC), the body responsible for consumer protection in Chile. SERNAC has been involved in obtaining information for market studies of interest to both agencies. Other examples of strategic alliances with other agencies include those with the *Dirección General de Aeronáutica Civil*, the *Superintendencia de Electricidad y Combustibles* and the *Superintendencia de Servicios Sanitarios* (OECD, 2008).

The law does not envisage a specific sanction if public bodies do not collaborate with the FNE, as the law orders and only envisages general sanctions for private entities that obstruct its investigations. In general, however, the FNE has not experienced any failure in the public bodies' duty of collaboration.

Evolution of the legal framework

Most of the FNE's current powers and the rules regulating its relationship with the TDLC were established in 2003 by Law N° 19.911.⁷ Subsequently, Law N° 20.361 of 2009,⁸ which strengthened the FNE's power to fight cartels and other serious competition offences, also modified Article 39 of DL 211. In that context, some of the powers that the FNE uses to carry out market studies were strengthened. The reform authorised the National Economic Prosecutor to request information from public bodies or state-owned enterprises. Subject to the authorisation of the TDLC, these public entities now must provide the FNE with the information in their files even if the information has a secret or restricted nature. In addition, the reform increased the number of bodies with which the FNE can sign agreements, including public services and universities.

However, from the standpoint of this report, perhaps the most important aspect of the 2009 reform is that the draft bill, originally

its ruling verbally or in writing to the National Economic Prosecutor, and its ruling will not be subject to any type of appeal."

⁶ See Article 39, point g) of DL 211.

⁷ Available at www.leychile.cl/Navegar?idNorma=217122.

⁸ Available at www.leychile.cl/Navegar?idNorma=1004121.

presented to Congress by the government in 2006, suggested giving the FNE explicit powers to carry out “*studies of the competitive evolution of markets*”. For that purpose, the draft bill directly authorised FNE to request information from public bodies and, more importantly, from all types of private parties under the same conditions in which it can do so in the case of competition investigations. However, as a result of an agreement reached in the Senate, these powers were excluded from the final bill approved by Congress.⁹

Experience in carrying out market studies

The FNE has produced seven market studies, either directly by commissioning them to local or overseas universities or research centres. All the seven market studies are posted on the FNE website.¹⁰ These studies have examined the functioning of competition in the construction, bank, electricity, human health, telecommunications and forestry sectors.

Since 2012, the FNE has also asked the TDLC to issue opinions, highlighting the need to modify legal or regulatory provisions on competition grounds. These requests implied a prior study or analysis of how competition functions in the affected markets. These studies are normally based on the experience acquired by FNE in its enforcement practice in the specific markets.¹¹

⁹ At the time, some members of the Senate's Economy Commission argued against granting market study powers to FNE because they were concerned that parties would not have enjoyed the same degree of legal guarantees and due process as in an enforcement investigation. The history of Law N° 20.361 can be found in the archives of the Library of the National Congress: www.leychile.cl/Navegar/scripts/obtienearchivo?id=recursoslegales/10221.3/3841/2/hdl-20361.pdf. See the second Report of the Economy Commission, pp. 375-380.

¹⁰ See www.fne.gob.cl/promocion-de-la-libre-competencia/estudios-de-mercado/.

¹¹ In this period, the FNE has asked the TDLC to evaluate: (i) the Law for the Promotion of the Merchant Navy, which grants an exemption from competition to shipping conferences and agreements; (ii) the General Instructions N° 1/2006 on public tenders by municipal governments for the hiring of services for the collection and disposal of solid household waste (household rubbish); (iii) provisions issued by the Housing and Urban Planning Ministry (MINVU) and the Undersecretariat for Telecommunications (SUBTEL) to ensure that telecommunications services in buildings and condominiums with a co-property regime are not provided under monopolistic conditions and can be offered by the largest number of possible service providers; (iv) the text of Regulatory

Objectives and outcomes of market studies

When asked to identify the main objectives pursued when carrying out market studies, the FNE highlighted the following (in descending order of importance):

- To assess the level of competition in the market or sector;
- To investigate an alleged market failure that cannot be attributed to an illicit conduct (e.g. parallelism due to oligopoly interdependency);
- To understand how markets operate;
- To prepare for inputting into legislative reforms;
- To increase knowledge of a particular sector.

When asked to identify the market studies it considers most successful based on their results and impact on public debate, the FNE indicated the following:

- “Study of the Effects of Bioequivalence and the Penetration of Generic Drugs on Free Competition”, published in September 2013,¹² which contributed to the ongoing discussion at the time on the new law on medicines;
- “Competition in the Wholesale Electricity Market in Chile” which analysed the dynamics of competition in the electricity wholesale market that involved both tenders by distributors and bilateral negotiation with non-regulated clients.¹³ The report was very effective in drawing attention to the role of competition in the country's energy agenda;
- “The Private Healthcare Market in Chile”, published in 2012, which examined the effect of vertical integration between private clinics

Recommendation Article 18, N°4 of DL 211 on the transfer of LPG tanks (ERN 18-13); and (v) the secondary radio spectrum market (ERN 21-14). The TDLC rulings are available on its website:
www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=2420&IDI=1318

¹² See www.fne.gob.cl/wp-content/uploads/2013/09/estu_001_2013.pdf.

¹³ See www.fne.gob.cl/wp-content/uploads/2014/01/informe_final_FNE_Enero13_2014.pdf.

and health insurers (ISAPREs) and its effects on competition and consumers.¹⁴

With regard to studies that may have proved less successful, the FNE mentioned those in which they lacked the powers to obtain information from market players prevented it from deepening its understanding of the market's functioning or the reason for the poor level of competition.

Characteristics of market studies

Selection and priorities

According to the FNE, the selection of the markets or sectors to be reviewed through a market study is based essentially on internal research, taking into account a series of relevant factors that include the value and importance of the market, the existence of entry barriers, the degree of and propensity to concentration, and the impact on consumers.

The law does not establish any mechanism through which a person or authority can instruct the FNE to carry out studies of specific markets. However, nothing prevents private parties or government bodies from submitting on their own initiative formal request to the FNE or submitting information indicating the opportunity to study a particular sector. The FNE indicated that it is open to consider such proposals on their merit.

Stages

Partly because the law does not expressly refer to market studies, there are limited formal requirements in Chile with regards to their structure and launch. Before starting a study, the FNE does not communicate with potentially interested parties to discuss the subject, scope, stages or timeline of the project.

The FNE does not have guidelines for stakeholders about market studies. There are no legal time limits for performing a study and their length depends exclusively on the deadlines established internally by the FNE.

The FNE does not have guidelines on the treatment of sensitive, confidential or restricted information obtained from interested parties when preparing a market study.

¹⁴ See www.fne.gob.cl/wp-content/uploads/2012/11/INFORME-PUCV-MERCADO-SALUD.pdf.

Use of information

However, the treatment of sensitive, confidential or restricted information by the FNE is expressly regulated with respect to information collected in the course of an investigation (where the FNE can require information from private parties and has broader powers to require information from public bodies). In this case, the FNE relies on an internal protocol, the Internal Instructions for the Implementation of Investigations by the National Economic Prosecution Service (latest version published in May 2013), which is available on its website.¹⁵ In the fact finding for this report, FNE reported that, if it were to receive sensitive information in the course of the preparation of a market study, it would apply the same principles as the Internal Instructions.

It is also important to note that DL 211 establishes the duties as regards confidentiality that must be respected by employees that have had access to information gathered by the FNE in the exercise of their functions and the sanctions that can be imposed for failure to comply with these duties.¹⁶

¹⁵ See www.fne.gob.cl/wp-content/uploads/2013/05/Instr._investigaciones_2013.pdf.

¹⁶ Article 43 of DL 211 establishes that “employees and the other persons who provide services to the National Economic Prosecution Service are obliged to treat as confidential all the information or data to which they may have access in the exercise of their tasks and, especially, that information or data obtained as a result of the powers indicated in points a), g), h) and n) of Article 39 and in Article 41. Notwithstanding the above, such information may be used in fulfilment of the functions of the National Economic Prosecution Service and in the exercise of actions before the Tribunal for Defence of Free Competition or the law courts. Infringement of this prohibition will be punished with the penalties indicated in Articles 246, 247 and 247 bis of the Penal Code and the disciplinary measures that may be applied administratively for the same infringement. In addition, the norms on the responsibilities of government employees and of the State envisaged in Law N° 19.880, in Decree with Force of Law N° 29 issued by the Finance Ministry in 2005 establishing the revised, co-ordinated and systematised text of Law N° 18.834 on the Administrative Statute, and in Law N° 18.575 on the General Framework for Administration of the State will also apply”.

Publication

As a general rule,¹⁷ the FNE publishes all the reports on its market studies on its website¹⁸ and has presented several of them to the general public as part of its annual "Competition Day" event.¹⁹

Along with the reports, the FNE publishes all the supporting information, except for the information of a sensitive, restricted or confidential nature.²⁰

Results, government measures and follow-up

In general, the results of the market studies prepared by the FNE take one of these forms: i) recommendations to the government to reform laws or regulations; ii) recommendations to the government to modify its policies; iii) recommendations to companies; iv) the recommendations to third parties so they take appropriate actions; or v) the enforcement of competition law.

Under Chilean law, the recommendations that may arise from a market study are not binding. The receiving authorities are under no obligation to take them into account or provide a formal response. Similarly, they are not binding for the private sector.

The FNE may, however, ask the TDLC to initiate proceedings to evaluate whether changes in the legal or regulatory framework should be recommended to the President of the Republic. Once such a proceeding has been initiated, the TDLC is obliged to consider the FNE's proposals but not

¹⁷ The question of the publication of market studies appears to have evolved since Chile's contribution to the 2008 OECD Roundtables indicated that "(...) their results and principal conclusions are, therefore, treated as internal information for internal use in the FNE; However, these studies can and have been made public in the context of cases or reports presented to the TDLC".

¹⁸ See www.fne.gob.cl/promocion-de-la-libre-competencia/estudios-de-mercado/.

¹⁹ The "Competition Day" is a seminar organised annually by the FNE in which it presents its work to competition stakeholders, including lawyers, business representatives, academics and TDLC's judges and FNE's staff. The session in which the market studies are presented is open for questions and comments. According to the FNE, its latest studies have been well received although some objections and concerns have been raised.

²⁰ See Article 21 of Law N° 20.285, available at www.leychile.cl/Navegar?idNorma=276363&idParte=0.

to accept them. The conclusions reached by the TDLC are non-binding and the receiving authorities have no general duty to respond. However, among the numerous cases in which the FNE has asked the TDLC to issue an opinion on these matters, there have been only two in which its request was not accepted.

The FNE has not carried out any specific assessment to measure the benefits or concrete impact of the recommendations it has made as a result of its market studies and which have been implemented. However, at the end of 2012, it hired a private consultancy to carry out a study of the perception of competition lawyers of the dissuasive effect of the institutional framework for the protection of competition and of FNE's activities in particular. As regards its work, the results were encouraging.²¹

In any case, FNE indicated that it is open to the contributions that competition lawyers can make to its advocacy work. To this end, in preparation of a study it usually establishes a mechanism for receiving comments, contributions or suggestions within a certain period of time.

²¹ This study is available at www.fne.gob.cl/wp-content/uploads/2013/03/Estudio-FNE.pdf.

3. COLOMBIA

Superintendencia de Industria y Comercio

The *Superintendencia de Industria y Comercio* (from here on the SIC) is an administrative body attached to the Ministry of Commerce, Industry and Tourism. It is administratively and financially independent and has its own budget. It includes different offices, each with specific objectives and powers. The Office of the Delegate Superintendent for the Promotion of Competition (from here on the DO) is the area responsible for protection of competition and its mission is to investigate, remedy and impose sanctions on infringements of competition and unfair commercial practices that restrict competition.²²

In addition to its general enforcement activities, SIC promotes competition through advocacy activities. This function includes: i) advising the government on the design of proposed measures to foster competition; ii) preparing market studies to identify restrictions to competition generated by existing regulations; iii) promoting competition through information campaigns and educational activities; and iv) verify that proposed regulations do not unduly restrict or distort competition.²³

Before Law 1340 of 2009²⁴ came into force, Colombia had competition regimes (and related authorities) on a sectorial basis. This was the case for public utilities (water and sewage services, street cleaning, electricity, basic commuted public telephony, rural mobile local telephony and gas distribution), for the non-residential electricity sector (generation,

²² The Delegate Office for the Protection of Competition is responsible for issues of unfair administrative competition while the jurisdictional powers established in the General Code of Legal Procedures are the responsibility of the Working Group on Unfair Competition and Industrial Property Rights of the Delegate Office for Jurisdictional Affairs.

²³ See www.sic.gov.co/drupal/objetivos-y-funciones.

²⁴ See www.sic.gov.co/drupal/sites/default/files/normatividad/Ley_1340_2009.pdf.

interconnection, transmission, distribution and sale of electricity), as well as telecommunications for non-residential customers, the financial and insurance sectors, television and air transport. When Law 1340/2009 came into force, this multiplicity of competition regimes and authorities ended and powers were transferred to the SIC (OECD, 2012c).

In 2013, the SIC had a budget of USD 49 million of which some USD 8.8 million were allocated to the DO. In 2013, the DO had 58 employees.²⁵ SIC's market studies are carried out by the *Grupo de Estudios Económicos* (from here on the GEE), which sits within the DO.

The GEE was established in April 2012 to support institutional activities and to interact with the academic world. One of GEE's main functions is to prepare sector and market reports to support SIC's employees in evaluating concentrations in the sectors studied, issuing opinions as part of the SIC's competition advocacy work and investigating possible anti-competitive practices. In addition, they serve as input for recommendations on public policy in different sectors.

Current legal framework for market studies

According to Article 7 of Law 1340 of 2009²⁶ and its implementing Decree 2897 of 2010,²⁷ the DO's responsibilities include competition

²⁵ Presentation "Annual Report on Competition Policy in Colombia" by Mr. Juan Pablo Herrera Saavedra, SIC Head Advisor on Economic Studies, June 19, 2014.

²⁶ The SIC has used this power to issue an opinion on different regulatory proposals. In 2012 the OECD and the IDB reported that, since 2009, the SIC had issued 75 technical opinions evaluating the anti-competitive effects of regulatory proposals in various markets such as financial services, energy, gas, healthcare, communications and aeronautics (OECD, 2012b). It also noted that the SIC meets regularly with regulators to explain in greater detail why a given regulatory proposal would have adverse effects on competition. The SIC has exercised this power to issue an opinion on regulatory proposals in sectors that included energy and gas, telecommunications, water and sewage services, transport, healthcare and public procurement. It has also played an important role in the process of allocation of the radio spectrum (4G). For further information, see OECD, 2013.

²⁷ See www.sic.gov.co/recursos_usuario/documentos/normatividad/Decretos/2010/Decreto_2897_2010.pdf.

advocacy. In addition, Colombia's National Development Plan²⁸ stipulates that the SIC must have a unit for economic studies to monitor the functioning of the economy's most sensitive markets to allow timely detection of competition concerns. Article 9, 18) of Decree 4886 of 2011 establishes that the DO must, among its other functions, “*prepare the economic and technical studies necessary for fulfilment of [its] functions (...)*”.

Access to information

Point 5, Article 3 of Decree 4886 of 2011 defines the functions of the Superintendent's Office, which include the power to “*issue instructions on matters relating to consumer protection, protection of competition, industrial property rights, protection of personal data and the other areas inherent to its functions and to establish criteria that facilitate compliance and to indicate the procedures for their full application*”. SIC uses this power to require market agents to provide the information necessary for its studies. However, the SIC does not have the authority to compel other public institutions to provide information nor has the power to impose sanctions on private or public agents who refuse to respond to its information request.²⁹

Evolution of the legal framework

Most of Colombia's present economic legislation has its origin in the early 1990s in what was known as the “state modernisation process”. The legislative reforms followed the 1991 constitutional reform which gave the country a new economic model. During this process, the SIC was restructured under Decree 2153 of 1992 and was for the first time given the power to “*prepare the economic and technical studies necessary for fulfilment of the functions of the Delegate Office for the Promotion of Competition*”.³⁰ The powers granted at that time remain largely in force today.

²⁸ See the Appendix of Chapter III “Bases del Plan Nacional de Desarrollo 2010-2014: Prosperidad para todos” of Law 1450 of 2011.

²⁹ If a request for information is made in the context of an administrative investigation, article 25 of the Law 1340/2009 establishes that omissions to duly comply with such a request can result in fines of up to 100,000 times the minimum monthly wage in force or, if greater, up to 150 % of the profits arising from the infringing party's conduct (USD 27 million). However, if the request for information is not in the context of an investigation, the legal authority to impose a fine is less clear.

³⁰ Decree 2153 of 1992, Point 8, Article 12.

Experience in carrying out market studies

The DO has carried out a number of market studies, including the following:³¹

- “Study of the Automotive Sector in Colombia”, which describes the sector together with an analysis on consumer protection policy, industrial property rights and competition in the light of the country's free trade agreements;
- “Study of the Telecommunications Sector in Colombia”, which describes the sector's dynamics and identifies the effects on competition of the rules employed for the allocation for 4G radio spectrum;
- “Study of the Cacao Sector”, which examines this market in Colombia through an analysis of departmental production, the purchase of cacao by Colombian chocolate producers and the foreign trade involved, specifically in cacao beans;
- “Study of the Housing Sector in Colombia”, which presents and examines some stylised facts about the country's housing sector;
- “Study of the Fertiliser Sector in Colombia”, which examines the levels of concentration in the fertiliser market and analyses the weight of fertilisers as inputs in agricultural costs;
- “Study of Pesticide Sector in Colombia” which presents a general view in terms of production, consumption prices and concentration of the sector using a data base of the Ministry of Agricultural and Rural Development;
- “Study of the Coffee Sector in Colombia”, which presents an analysis of the last 10 years in the sector, using dominance, stability and concentration indexes.

³¹

The studies listed by SIC do not necessarily include policy recommendations to the government or suggestions for further action by the agency or other stakeholders. In that respect, they lack an important element of a “market study” as understood in the context of this report.

Objectives and outcomes of market studies

When asked to identify what are its main objectives when carrying out market studies, the SIC highlighted the following (in descending order of importance):

- Assess the level of competition in a market or sector;
- Understand how markets operate;
- Assess the impact of government policies/regulation in a market;
- Increase the general knowledge of the sector.

When asked to identify the market studies it considers most successful, SIC provided the following examples:

- “Study of the Fertiliser Sector” and “Study of the Pesticide Sector” which analyse the prices of inputs in Colombia's agricultural sector. The two studies were produced in order to participate in a discussion about the price of agricultural inputs, led by the Agriculture and Rural Development Ministry and for which an Inter-Sector Input Commission was created in which the SIC participated. In this case, the studies served as a reference for discussion of a possible regulatory mechanism.
- “Study of the Telecommunications Sector in Colombia”, which analysed the possible anti-competitive effects of the process of spectrum allocation for 4G technology. This study provided support for important technical discussions with regulators and other bodies responsible for the allocation process. SIC identifies specific recommendations for restructuring the auction. As a result of this process, three new operators were encouraged to enter the market, enhancing competition in the country's mobile telecommunications sector.³²

Characteristics of market studies

Selection and priorities

According to the SIC, the selection of the markets or sectors of the economy to be reviewed in a market study is based essentially on its own

³² The work supported by this economic study was recognised by the World Bank which awarded the SIC a prize as the winner of its First International Competition Advocacy Contest for promotion pro-competitive reforms.

research, or on consultation with other agencies or government bodies and on complaints filed by economic agents.

Ministries, the National Planning Department and other public bodies can request the SIC to prepare a study of a particular market. The SIC, however, remains independent in determining the markets and industry sectors that it wishes to analyse. One example of this is the case of the financial sector about which the Congress of the Republic, through Law 1607 of 2012,³³ requested that the SIC prepare “a study with the purpose of determining the level of competition and the existence or not of failures in the relevant markets attended by financial institutions. The results of this evaluation will be presented half-yearly to the National Government and the Congress of the Republic”.

Business associations can also request the SIC to carry out market studies to address sector specific concerns. However, the SIC is independent in planning its studies, giving priority to sectors that it considers more important. In this regard, the SIC has indicated that key factors in prioritising are the importance of the market, its structure, its relative propensity to concentration and the level of concentration that exists, the existence of entry barriers, the expected impact of the study on consumers and the sector visibility in the public debate.

Stages

SIC normally informs potentially interested parties about key aspects of a new study, including its scope, the reasons for selecting the market. SIC also provides the contact details of the market studies unit. However, it does not provide information on the timeline for finishing the study.

Although there are no legal or regulatory requirements as to the period within which a study must be completed, SIC's annual work plan must include a list of each ongoing study with a specific schedule for completion. This will largely depend on the complexity of the work and the availability of the necessary information. In practice, it also means that studies cannot take longer than one year.

The SIC has internal manuals and guidelines for market studies but it has no guidelines for external stakeholders that explain what market studies are, what powers the agency has to undertake them, not what their outcome can be.

³³

See www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=51040.

Use of information

The proper use of the information gathered by the SIC for market studies are regulated by the Code of Administrative Procedures and Administrative Disputes contained in Law 1437 of 2011, which establishes criteria to determine which information must be considered restricted.³⁴ In addition, Law 1581 of 2012, known as the Personal Data Protection Law, is also applicable to the SIC in the case, albeit so far rare, that the information requested for its studies includes sensitive personal data.

The SIC also undertakes to present any results containing sensitive information, only in an aggregate form.

Publication

All market studies are published on the SIC's website, as part of the series “Documentos elaborados por la Delegatura de Protección de la Competencia”.³⁵

Results, government measures and follow-up

The recommendations that emerge from the SIC's market studies are not binding, but are usually taken into account by the central government and by other public bodies, including sector regulators, when defining public policies.

³⁴ Article 24 of Law 1437 states that: “Restricted information and documents. The only restricted information and documents are those expressly indicated as such by the Constitution or the law and, particularly, 1. Those protected by commercial or industrial secrecy. 2. Those related to national defence or security. 3. Those protected by professional secrecy. 4. Those which involve individuals' right to privacy and intimacy, including their criminal record, labour history, pension documents and other personal records held by public or private institutions such as their medical history, except when these are requested by the parties themselves or their representatives expressly empowered to access this information. 5. Those relating to the financial conditions of public borrowing and Treasury operations carried out by the Nation as well as technical studies for the valuation of the Nation's assets. These documents and this information will be considered restricted for a period of six (6) months as from the date of the corresponding operation.

³⁵ See www.sic.gov.co/drupal/documentos-2013-ee.

The results of the SIC's studies are normally used in the general application of competition law as well as in the preparation of opinions to the government for reforming laws, to raise awareness on the functioning of markets or to define public policies.

Before publishing a study, the SIC considers what could be the possible costs of the proposed recommendations, but it has not developed a standard procedure for such an assessment.

4. COSTA RICA

There are two competition authorities in Costa Rica that can conduct market studies: the *Comisión para Promover la Competencia* and the *Superintendencia de Telecomunicaciones*.

Comisión para Promover la Competencia

The *Comisión para Promover la Competencia* (from here on the COPROCOM) is a public body attached to Costa Rica's Ministry of Economy, Industry and Trade. Its key purpose is to safeguard and promote competition and free market participation, investigating and sanctioning monopolistic practices and other impediments to the efficient functioning of the market.³⁶

COPROCOM was created by law on the terms established in Article 21 of Law N° 7472 of 1994 (hereafter Law 7472) on Promotion of Competition and Effective Consumer Protection, which came into force in January 1995 (OECD, 2014).

In 2014, COPROCOM had a budget of USD 740,000³⁷ and it had 15 employees, of which 12 are professionals (economists, lawyers and administrators). COPROCOM told the OECD that it does not have sufficient resources for a specialised team for market studies, hence these are prepared by the staff of its Technical Support Unit, who also initiate antitrust proceedings and deal with general enquiries.

COPROCOM has prepared market studies in sectors that include cement, sugar and seeds. However, due to resource limitations, most studies have been carried out with the collaboration of international organisations which funded the work of external consultants. For certain studies, the Ministry of Economy, Industry and Commerce has put its Economic and Market Research Department at COPROCOM's disposal.

³⁶ See www.coprocom.go.cr/quienes_somos/index.html.

³⁷ See www.hacienda.go.cr/docs/529f42a483cd4_Ley2014_Tit208.pdf.

Current legal framework for market studies

Costa Rican legislation does not expressly refer to market studies as a specific function of the competition authority. However, based on its extensive interpretation of the law (Law 7472 that came into force in January 1995) COPROCOM considers that it has the powers to conduct market studies.³⁸

Access to information

COPROCOM has the legal power to require information in antitrust investigations. It has also used this power to obtain relevant data and information for the preparation of market studies.

In addition, Article 67 of Law 7472 gives COPROCOM the power to require information from economic entities in the form of a sworn statement. The information supplied is considered confidential and any violation of the duty of secrecy by a COPROCOM employee constitutes a serious offence.³⁹

Under Article 28, sections c) and d) of Law 7472, COPROCOM can impose a fine on economic agents of up to 65 times the lowest minimum monthly wage, (equivalent to USD 32,310) for making a false declaration or for submitting false information. COPROCOM can also impose a fine of up to 50 times the lowest minimum monthly wage (equivalent to USD 24,856) for delays in submitting the requested information.

³⁸ COPROCOM refers to the provisions of Article 27, sections c) and e) of Law 7472 which establish that it may: “c) Investigate the existence of monopolies, cartels, practices or concentrations forbidden by this law; to this end, it may require from individuals and other economic agents the relevant information and documents and, in the corresponding cases, impose sanctions; (...) e) Establish the co-ordination mechanisms for sanctioning and preventing monopolies, cartels, concentrations and illicit practices.” In addition, COPROCOM refers to the provisions empowering it to publish the studies it prepares and the opinions and resolutions it issues, subject to the respect of the parties’ confidentiality rights (Section k) of Article 27 of Law 7472).

³⁹ Section a) of Article 67 of Law 7472 establishes that: “The information supplied is confidential and the employee who violates the secrecy of confidential data commits a serious offence in the exercise of his or her functions”. According to COPROCOM such an infringement may even result in dismissal.

Experience in carrying out market studies

Since January 2010, COPROCOM has prepared a number of studies including the following:⁴⁰

- “Impact of RTCR 383:2004 Technical Regulation of Hydraulic Cement”, which concluded that the regulation created barriers to entry for new agents into what was a duopoly market;⁴¹
- “Impact of Internal Regulation of the 100% Grown and Harvested in Costa Rica Coffee Seal”, which concluded that the regulation created barriers to the entry for imported products; following COPROCOM's opinion, these barriers were eliminated;⁴²
- “Radiotherapy Services in Costa Rica”, in which the highly concentrated market structure led COPROCOM to make recommendations to the Costa Rican Social Security Fund;⁴³
- “Requirement of ISO and other Certification in Public Procurement”, which concluded that tender participation requirements were unduly restrictive and allowed only very few companies to qualify thus unnecessarily restricting competition;⁴⁴
- “Beef Market”, which made recommendations to the Agriculture Ministry for improving the way in which products are supplied to the market and for improving the market's structure;
- “Road Marking Services in Public Works”, which made recommendations for improving the way in which these services are procured by the State;

⁴⁰ The studies listed by COPROCOM include recommendations to modify regulations as well as suggestions for the stakeholders. However, such studies have been derived after the express request of economic agents.

⁴¹ See www.coprocom.go.cr/resoluciones/2010/acta-09-2010-reglamento-cemento-articulo-tercero.pdf

⁴² See www.coprocom.go.cr/documentos/boletines/2010/edicion_141.pdf

⁴³ See www.coprocom.go.cr/resoluciones/2011/acta-30-2011-acelerador-lineal-articulo-tercero.pdf

⁴⁴ See www.coprocom.go.cr/resoluciones/2012/acta-04-2012-consulta-camara-industria-sobre-articulo-cuatro-sesion-03-2011.pdf and www.coprocom.go.cr/resoluciones/2012/acta-04-2012-consulta-inteco-en-relacion-con-las-normas-iso-articulo-quinto.pdf

- “RTCR: 452-2011 Technical Regulation of Specifications for Reinforced Steel Bars and Wire for Concrete”, which concluded that this regulation created entry barriers.⁴⁵

Objectives and outcomes of market studies

COPROCOM highlighted the following as the principal objectives that it pursues when carrying out market studies, (in descending order of importance):

- Increase knowledge about the sector;
- Assess the level of competition in the market or sector;
- Understand how markets operate;
- Prepare for inputting into legislative reforms.

When asked to identify the market studies that it considered most successful, COPROCOM indicated as a good example the study on the Costa Rican coffee regulation, because all the observations made were taken into account and the regulation was quickly modified.

Among the successful studies, COPROCOM also pointed at the study on ISO certification requirements in public procurement. This work allowed COPROCOM to train staff of the Finance Ministry and the Comptroller General's Office on the competition principles applicable to public procurement processes.

Concerning studies that may have proved less successful, COPROCOM mentioned the study on road marking in public works, since at least initially, COMPROCOM's recommendations were not taken into account.

⁴⁵

See www.coprocom.go.cr/resoluciones/2014/acta-12-2014-criterio-reglamento-tecnico-barras-acerto-articulo-cuarto.pdf

Characteristics of market studies

Selection and priorities

COPROCOM selects the markets or sectors to study on the basis of a number of suggestions that include feedback from consumers and consumer groups, complaints or concerns expressed by consumers or economic agents, and its own research.

COPROCOM indicated that it carries out extensive research before deciding whether to initiate a particular market study. This preliminary analysis involves among other things an assessment of the resources required, the possible outcomes of the study and their likely impact.

COPROCOM chooses the markets to study independently and it cannot be compelled by others to carry out market studies. Nevertheless business or consumer organisations, as well as any other stakeholder, may request COPROCOM to carry out a particular study, but COPROCOM remains free to decide whether the study is justified or not.

Use of information

COPROCOM reported that it does not have internal guidelines on the use of information received to prepare a market study. However, competition law, as well as the general regulation governing the actions of the public administration, stipulate that confidential information must be held in a separate file which can only be accessed by those responsible for the study, the members of COPROCOM and the legal representatives of the company in question.⁴⁶

COPROCOM also explained that, in order to ensure confidentiality, interested parties must request protection of the data when supplying it to COPROCOM. COPROCOM then decides whether this request is justified or not and, if it does not accept it, it must inform the interested party before making the information public. The party can file an appeal for reconsideration against COPROCOM's decision. As a general rule, however, information about sales, financial statements, strategic plans and other similar company information are treated as confidential and no person

⁴⁶ According to Article 273 of the General Public Administration Law: "Access will not be permitted to those parts of the file whose knowledge could compromise State secrets or the counterpart's confidential information or, in general, when examination of the said parts would give the party an undue privilege or an opportunity to illegitimately harm the Administration, the counterpart or third parties included or not in the file."

outside COPROCOM or the company in question has access to such documents.

Publication

COPROCOM makes its market studies available to the public through its website or the newsletter it publishes every two months. The conclusions from the studies are also used as inputs into COMPROCOM's various advocacy activities.

Results, government measures and follow-up

In accordance with Article 27, point f) of Law 7472, the opinions that COPROCOM may issue on matters relating to competition are not binding and the government is, therefore, free to decide whether to take them into account.

Market studies usually culminate with recommendations to the government⁴⁷ to reform laws or modify public policies.

COPROCOM does not carry out any systematic assessment of the costs and benefits of the recommendations it puts forward in its market studies.

Superintendencia de Telecomunicaciones

As in other jurisdictions (such as Peru and Mexico), Law N° 8660 of 2008 on the Strengthening and Modernisation of Public Entities in the Telecommunications Sector created the *Superintendencia de Telecomunicaciones* (from here on the SUTEL) to regulate, apply, supervise and control the sector's legal framework. In addition, Law N° 8642 of 2008 (from here on the Law 8642), the General Telecommunications Law, subjected the operation of telecommunications networks and the provision of telecommunications services to a regime of sector competition which is governed by the terms of this Law and, in supplementary form, by the criteria established in Chapter III of Law 7472. This law gives SUTEL the exclusive power to investigate and, where appropriate, to impose sanctions on telecommunications network operators or providers of telecommunications services that engage in monopolistic practices with the aim or effect of restricting, reducing or eliminating competition in the telecommunications market.

⁴⁷

As a result of market studies, recommendations have been made to the Administration on matters such as the reduction of tariffs and the elimination of unnecessary official bureaucracy.

SUTEL is a public body attached to the Public Services Regulatory Authority that was created by Law N° 8660 of 2008 on the Strengthening and Modernisation of Public Entities in the Telecommunications Sector.⁴⁸ It is responsible for applying regulation in the telecommunications sector and ensuring efficiency, equality, continuity, quality, greater and better coverage, information and better alternatives in the provision of telecommunications services. Its principal functions relevant for this report include compelling operators to provide free access to networks and services; encouraging investment in the sector and standardising contracts between service providers and users.⁴⁹

SUTEL has a Council that acts as its senior administrative body and, in 2014, had a budget of USD 18.8 million⁵⁰ and 123 employees. Under the internal regulation of the organisation, the power to carry out market studies corresponds to the General Directorate of Markets, which has a multi-disciplinary team composed of 28 economists, engineers and lawyers and a budget of USD 3.3 million.⁵¹

Current legal framework for market studies

SUTEL does not have express powers to conduct market studies. However, SUTEL indicated that the powers to carry out market studies arise indirectly from Article 73, section i) of Law N° 7593 of 2008, the Law on the Public Services Regulatory Authority,⁵² which establishes that one of the functions of the Council is to “determine the existence of important operators or providers in each of the relevant markets and take into account the criteria defined in (...) the Law on the promotion of competition and effective consumer protection, N° 7472 (...) and its reforms.”

⁴⁸ See http://sutel.go.cr/sites/default/files/normativas/fortalecimiento_y_modernizacion_de_las_entidades_publicas.pdf.

⁴⁹ See <http://sutel.go.cr/pagina/quienes-somos>.

⁵⁰ The total budget it is up to USD 43.9 million of which USD 25.11 million correspond to the National Telecommunications Fund in accordance with the provisions of the letter DFOE-IFR-0694 issued by the Comptroller General of the Republic in December 2, 2013.

⁵¹ It is worth to mention that not all the resources of the General Directorate of Markets is devoted for competition matters or for the conduction of studies.

⁵² See http://sutel.go.cr/sites/default/files/normativas/ley_de_la_autoridad_reguladora_de_los_servicios_publicos_aresep_ley_7593.pdf.

In addition, Article 2, section e) of the General Telecommunications Law⁵³ establishes that one of the law's objectives is to “promote effective competition in the telecommunications market as well as mechanisms to increase the availability of services, enhance their quality and ensure accessible prices”. Article 52 of this law also adds that “the operation of networks and the provision of telecommunications services will be subject to a sector regime of competition which will be governed by the provisions of this Law and, in supplementary form, by the criteria established in Chapter III of Law N° 7472.” To this end, it assigns to SUTEL the tasks of:

- Promoting the principles of competition in the national telecommunications market;
- Analysing the effective level of competition in markets.

Access to information

Under Article 75, section a), sub-section ii) of Law N° 7593, SUTEL can require operators and service providers to submit information and documents that are essential for the fulfilment of its responsibilities and duties as established in the Law. In addition, Article 67, section a), sub-section 8) of the General Telecommunications Law stipulates that a refusal to supply information to SUTEL as well as concealing or falsifying this information is considered a very serious offence under Article 68, section a) of the same law and SUTEL can impose a fine of between 0.5% and 1% of the operator's or service provider's gross revenues in the previous fiscal year.⁵⁴

⁵³ See http://sutel.go.cr/sites/default/files/normativas/ley_general_de_telecomunicaciones.pdf.

⁵⁴ In case of infringements which, in SUTEL's view, are particularly serious, it can levy a fine of between 1% and 10% of the offender's annual sales in the previous fiscal year or between 1% and 10% of the offender's assets. The General Telecommunications Law makes a distinction between serious and very serious conduct and that the latter include both monopolistic practices and the refusal to provide information. There is, however, not a specific penalty for these specific offences.

Experience in carrying out market studies

SUTEL has not carried out any market study so far, although it considers that it has the powers to do so. However, as part of its general regulatory functions, it has gathered information on the performance of the telecommunications sector, which it uses for analysis of specific cases that require regulatory interventions.⁵⁵

Objectives and results of market studies

When asked to identify what are the main objectives that market studies should have, SUTEL highlighted the following (in descending order of importance):

- Assess the level of competition in the market or sector;
- Understand how markets operate;
- Increase the general knowledge about the sector;
- Define a market for the purpose of applying the law;
- Investigate an alleged market failure that cannot be attributed to a specific economic agent.

Characteristics of market studies

SUTEL indicated that, in selecting the markets or sectors of the economy to study, it will take into account feedback from individual consumers or consumers groups, complaints by market players and its own research.

SUTEL is independent in taking decisions and cannot be compelled to carry out market studies in specific areas. Telecom operators, the Vice-Ministry of Telecommunications, the Commission for the Promotion of Competition, the Public Services Regulatory Authority, business associations and the Habitants' Defence Service may ask SUTEL to perform

⁵⁵ Regarding the management of the spectrum, these studies contain recommendations to the Government, and although the criterion of SUTEL is not binding, the government must justify if reject the recommendations. This, in accordance with Article 39 paragraph d) of the Act 8660 Strengthening and Modernization of Public Entities of the Telecommunication Sector.

a market study but SUTEL remains free to decide whether to follow up on these requests.

SUTEL reported that it is subject to the general legislation and regulation governing the actions of the public administration,⁵⁶ which provision establishes that confidential information must be protected. In addition, SUTEL's Council has issued general guidelines for the treatment of sensitive, confidential or restricted information (Resolutions RCS-341-2012 and RCS-332-2012).

⁵⁶

See above.

5. MEXICO

There are two competition authorities in Mexico: the *Comisión Federal de Competencia Económica* and the *Instituto Federal de Telecomunicaciones*⁵⁷. Both of them can conduct market studies.

On 7 July 2014, the new Federal Law on Economic Competition was enacted.⁵⁸ As it establishes the operational features and concrete limits of the provisions of the 2013 constitutional reform, it grants to both authorities the powers to guarantee and defend free market participation and competition in Mexico.

Comisión Federal de Competencia Económica

The *Comisión Federal de Competencia Económica* (from here on the COFECE) is an independent constitutional body, with its own legal personality and assets, created in accordance with the provisions of the Constitutional reform published in June 2013. This new institution is the successor of the Federal Competition Commission (from here on the CFC) created in 1993 with the enactment of the LFC 93.

COFECE is the authority responsible for enforcing the Federal Law for Economic Competition in all sectors, but telecommunications and broadcasting. It is committed to guarantee free competition, market participation and to prevent, investigate and combat monopolies, monopolistic practices, anticompetitive mergers and other restrictions on the efficient functioning of markets.

⁵⁷ Before these two authorities were created, the only entity that oversaw economic competition was the Federal Competition Commission (CFC) created in 1993 with the enactment of the Federal Law on Economic Competition (LFC, 93), which was drawn up in the context of the signing of the North American Free Trade Agreement (NAFTA).

⁵⁸ Available at www.diputados.gob.mx/LeyesBiblio/pdf/LFCE.pdf.

As of the end of the first quarter of 2014, COFECE had 285 employees and a budget of USD 22 million for fiscal year 2014.⁵⁹

Within COFECE, the General Directorate of Economic Studies is the area that specialises in market studies.

Instituto Federal de Telecomunicaciones

The *Instituto Federal de Telecomunicaciones* (from here on the IFT) was created in lieu of the Federal Telecommunications Commission (from here on the COFETEL) as the regulator for the broadcasting and telecommunications sector but was provided with a much broader power than its predecessor. COFETEL was an administrative agency with delegated powers within the Executive Branch and was financially dependent from the Communications and Transport Ministry, although it had technical and operational autonomy to regulate and promote the efficient development of telecommunications in Mexico.⁶⁰

IFT is an independent constitutional body, with legal standing and an independent budget, whose mandate is to promote the efficient development of the broadcasting and telecommunications sectors in Mexico in accordance with the terms of the Constitution and the implementing laws. IFT is responsible for regulating, promoting and supervising the use and exploitation of the radio spectrum and networks and the provision of broadcasting and telecommunications services as well as access to active and passive infrastructure and other essential facilities. It is also the competition authority with exclusive powers for guaranteeing and promoting competition within the broadcasting and telecommunications sectors. In other words, IFT is the telecommunications and broadcasting regulatory and competition authority.

IFT's budget for the fiscal year 2014 was of USD 149 million and it had 1002 employees.⁶¹ The IFT has an Investigative Authority and an Economic Competition Unit that deal with issues relating to the enforcement of the

⁵⁹ See www.cofece.mx/phocadownload/Normateca/Informe/COFECE1erinformetrimestralfinal.pdf.

⁶⁰ COFETEL was created by an executive decree in 1996 under the provisions of Transitory Article 11 of the Federal Telecommunications Act. This law underwent several reforms before it was replaced by the Federal Telecommunications and Broadcasting Act on 15 July 2014, as a result of the constitutional reform of June 2013.

⁶¹ See www.ift.org.mx/iftweb/wp-content/uploads/2013/10/180214_Informe_PEF_2014_POT_vFINAL.pdf.

Federal Law for Economic Competition. The budget assigned to the Investigating Authority for 2014 was USD 3.7 million, and it had 61 employees. The Economic Competition Unit's budget for 2014 was USD 3.8 million and it had 36 employees. These two units account for 8% of the IFT's total budget and 12% of its total staff.

IFT also includes a Research Centre, which prepares studies and analyses of the telecommunications and broadcasting sectors.⁶² The Investigative Authority and the Economic Competition Unit are also empowered to carry out and co-ordinate market studies.

Current legal framework for market studies

Under Section XXIII of Article 12 of the Federal Law for Economic Competition, COFEC and IFT have powers to “carry out or order the preparation of market studies,[...] with proposals for liberalisation, deregulation or modification of regulation when it detects risks to the process of free market participation and economic competition, identifies a problem of competition or is requested to do so by other Public Authorities”.⁶³ In addition, Section XXXIX of

⁶² In accordance with the Organic Statute of IFT (in force since 26 September 2014).

⁶³ The Federal Law on Economic Competition provides two tools to conduct “market assessments”. One is considered as an enforcement tool, and could be named as “market investigation”. The market investigations are based on Article 94 of the Federal Law on Economic Competition and are conducted by the Investigating Authorities of the Competition Commissions, that can use all the powers that the Federal Law on Economic Competition grants for conducting enforcement investigations, with the objective of determining the existence of barriers to competition or essential facilities that may generate anticompetitive effects and issuing: (i) recommendations to the Public Authorities so that, in the case of legal provisions impeding or distorting free competition in the market, within its competence and in accordance with the procedures provided by law they determine what is appropriate; (ii) issue an order to the corresponding Economic Agent to remove a barrier that unduly affects the process of free competition; (iii) determine the existence of essential facilities and issue guidelines to regulate, as applicable, the access modes, prices or rates, technical and quality conditions, as well as an implementation schedule; or (iv) order the divestiture of assets, rights, partnership interests or shares of the Economic Agent involved to eliminate the anticompetitive effects in the needed proportions, when other remedies are not sufficient to address the identified competition issues. Market investigations should not be confused with the “market studies” addressed in the present chapter that are considered as an advocacy tool.

Article 15 of the Federal Telecommunications and Broadcasting Act empowers IFT it to carry out studies and research about the telecommunications and broadcasting sectors.

The Federal Law on Economic Competition does not explicitly define what a market study is or what should be its characteristics. As a result, COFECE and IFT enjoy certain flexibility in deciding the timing of these exercises and the resources that they wish to invest in it. This is in contrast to investigations on monopolistic practices, anti-competitive mergers, barriers to free market participation and economic competition and other restrictions of the effective functioning of markets whose instigations, timeline and other procedural aspects are fully regulated by the law. COFECE reported that it seeks to take advantage of this flexibility in order to apply best international practices in preparing its market studies.

Neither COFECE nor IFT have the powers to take direct measures in the market based on the conclusions of a market studies. These studies are, however, considered a useful tool to advocate for competition advocacy before other regulatory authorities, the Mexican Congress and the public opinion at large. Their conclusions can also help both competition authorities to identify problems in markets where an anti-competitive practice or conduct is suspected or when possible essential facilities or barriers to competition could have a negative impact on the competition process, and may result in the launch of an *ex officio* investigation.⁶⁴ As far as IFT is concerned, being also a regulator, it may use the conclusions of a market study to identify areas that require regulatory intervention.

Access to information

Under the Federal Law on Economic Competition and their respective regulatory provisions,⁶⁵ COFECE and IFT can request both the public and private sector the information necessary for conducting market studies, including subpoena those economic agents related with the study and any other act that consider appropriate for this end. This information may be

⁶⁴ Investigations may refer to enforcement procedures, for example, to fight absolute monopolistic practices (cartels), relative monopolistic practices (abuse of dominant position), and anti-competitive mergers or market investigations in order to regulate essential facilities or to eliminate barriers to competition.

⁶⁵ Article 152 Section V of the COFECE's Federal Law on Economic Competition Regulatory Provisions (from here on the COFECE Regulatory Provisions), and Article 156 Section V of the IFT's Federal Law on Economic Competition Regulatory Provisions for the Telecommunications and Broadcasting Sectors (from here on the IFT Regulatory Provisions).

considered confidential at the request of the economic agents or sources supplying the information.⁶⁶

The Federal Law on Economic Competition provides for the possibility to impose sanctions in case of failure to comply with information requests. Articles 126 and 130 state that COFECE and IFT may impose fines of up to the equivalent of USD 15,200 for each day of non-compliance.⁶⁷

Sections XXVIII and XXIX of Article 15 of the Federal Telecommunications and Broadcasting Act also give IFT the power to request information and documents from regulated parties and any other person, and to co-ordinate with other public authorities to gather this information and documents if it is not already in their possession.

Evolution of the legal framework

From the entry into force of the LFC 93⁶⁸ through to the 2011 reform, the CFC was empowered to issue opinions (see Box 1) and undertake other procedures that had some elements in common with market studies (such as analysis of markets and recommendations) but were not considered market studies as such.⁶⁹

⁶⁶ In this case, COFECE and IFT must order the measures necessary to protect the confidential information, classifying it as restricted or confidential under the regulation of the Federal Law on Economic Competition.

⁶⁷ Articles 126 and 130 of the Federal Law on Economic Competition states that: (126) *“For the exercise of the functions given to it by this Law, the Commission may indistinctly apply the following coercive measures: (...) II. A fine of up to the equivalent of three thousand times the general daily minimum wage in force for the Federal District, an amount which may be applied for each day of non-compliance with the order”*; (130) : *“In applying fines, the elements to determine the seriousness of the infraction must be considered such as the harm caused, indications of intent, the market share of the party committing the infraction, the size of the market affected and the duration of the practice or market concentration as well as the party's payment capacity and, in the corresponding cases, the impact on the exercise of the Commission's powers.”*

⁶⁸ The LFC93 envisaged mechanisms for issuing opinions. It, however, lacked clarity on the powers to issue an opinion about Federal sector regulation and provisions adopted by states and local governments.

⁶⁹ Article 24 of the LFC, 93 in force at that time, states that: *“The Commission will have the following powers: (...) IV. To issue opinions on adjustments to the programmes and policies of the federal public administration when these would have effects that could be contrary to competition and free market participation; (...) V. To issue opinions, when so requested by the Federal Executive, on*

In 2006, when the first round of reforms to the first LFC 93 was approved, the CFC was given new powers to issue binding opinions on secondary regulation issued by Federal government bodies to ensure that competition criteria were taken into account. Although the Federal government could object to the CFC opinions, this power was rarely used. The new Federal Law on Economic Competition does not currently include the power to issue binding opinions.

Explicit powers to carry out market studies were given to the CFC for the first time by the 2011 reform under the LFC 93. Article 24, section XVIII bis 2 established that the Commission could “undertake market studies, [...] with proposals for liberalisation, deregulation or modification of regulation when it detects risks of harming the process of competition or free market participation or when it identifies price levels that could indicate a problem of competition or actions that result in a significant increase in prices or when it is notified to this effect by other authorities.”

adjustments to bills and proposed regulation in matters relating to competition and free market participation; (...) VI. When it deems it appropriate, to issue opinions on matters relating to competition and free market participation with regard to laws, regulation, agreements, circulars and administrative acts, without these opinions having legal effects, nor can the Commission be obliged to issue such an opinion; (...) VIII. To participate along with the corresponding services in the signing of international treaties or agreements on competition and free market participation regulation and policies of which Mexico is or aims to be a partner.”

Box 1. Non-binding opinions under previous Mexican legislation

Although market studies were non-compulsory “opinions” by the Chairman of the Commission, they had a distinct purpose and a more detailed level of analysis than “regular opinions”, which are also issued by the Chairman but generated on a regular basis by the Planning and International Affairs Unit of the Commission. “Regular opinions” are drafted in response to legislative proposals or drafts of executive acts that are considered to have an effect, either positive or negative, on the process of competition.

In contrast, market studies were in-depth opinions which contained detailed analyses of competition conditions in specific goods or services markets and which elaborated on a particular industry’s structure and its regulation. They included a set of recommendations aimed at the Executive (regulator or Ministry in charge), the legislative branch (possible changes in legislation that could be enacted either by the Chamber of Deputies or the Senate) and observations on the industry’s structure and behaviour. General observations were sometimes added with the aim of improving competition conditions in the industry, and may have also included a diagnosis of existing problems which could lead to the opening of investigations and result in subsequent enforcement actions.

However, the CFC’s experience has mostly been the opposite: while pursuing enforcement actions it has become aware of more pervasive competition problems in a particular market. These problems were not always limited to conduct by particular economic agents, but arose from an anticompetitive regulatory framework, and market characteristics conducive to anticompetitive behaviour (e.g. information asymmetries, high barriers to entry, etc.). These observations prompted a market study to look into the market or industry in greater detail and which may be conducted in parallel to enforcement actions with the aim of making proposals to improve the structural conditions of markets.

Source: OECD, 2008, Mexico’s Contribution, p. 76, available at 76, www.oecd.org/regreform/sectors/41721965.pdf

Experience in carrying out market studies

Since the 2011 reform and until his abrogation, CFC conducted six market studies:

- “Investigation and Recommendations on Conditions of Competition in the Financial Sector and its Markets”, which produced non-binding recommendations for fostering competition in the sector;

- “*International Tenders in the Procurement Prices of the IMSS*” in which COFECE analysed the impact of international tenders on the prices of procurement by the Mexican Social Security Institute (IMSS);
- “*Liberalisation of Foreign Investment and the Passenger Air Transport Market in Mexico*” which analysed the impact that foreign investment has had on Mexican airlines in recent years;⁷⁰
- “*Informative Note on the Mexican Pasteurised Milk Market, 2000-2011*” which presented an analysis of competition conditions in some branches of the Mexican dairy sector in recent years;
- “*Elimination of the Restriction on Foreign Participation in Telecommunications in Mexico*”, which analysed the impacts of the restriction on foreign participation in Mexico's telecommunications and broadcasting sector in recent years;
- “*Bid Rigging in Public Procurement of Generic Drugs in Mexico*”, which analysed on a regional basis the impact of different types of generic drug auctions in Mexico.⁷¹

COFECE has worked on two market studies, one on financial markets,⁷² and one (which is still ongoing) on the agro-food sector. Since its creation, the IFT has been working on four market studies that are still in progress.⁷³

Objectives and outcomes of market studies

COFECE indicated that it has five principal objectives in carrying out market studies (in descending order of importance):

- Assess the level of competition in the market or sector;
- Evaluate the impact of government policies/regulation on the market;

⁷⁰ See www.oecd.org/daf/competition/IEDreporteOCDECFC.pdf.

⁷¹ See <https://www.competitionpolicyinternational.com/file/view/6961>.

⁷² “*Investigation and Recommendations on Conditions of Competition in the Financial Sector and its Markets*” available at: www.cofece.mx/index.php/prensa/historico-de-noticias/trab-inv-recom-sec-fin.

⁷³ These market studies are focused on effective competition; the use of the 700 MHz band of the spectrum; infrastructure state and availability and demand and supply of radio and TV contents for children.

- Understand how markets operate;
- Investigate an alleged market failure unrelated to a behavioural conduct;
- Prepare for inputting into legislative reforms.

As for IFT, its principal objectives are the following (in descending order of importance):

- Increase knowledge about the sector;
- Assess the level of competition in the market or sector;
- Understand how markets operate;
- Define a market for the purpose of applying the law.

COFECE indicated that it is possible to identify market studies that had important results for pro-competitive reforms. These include:

- “*Investigation and Recommendations on Conditions of Competition in the Financial Sector and its Markets*”⁷⁴ prepared in 2014. The recommendations from this study have been widely welcomed and have had important repercussions in the media and among sector regulators and public bodies as well as among members of the Federal legislature. COFECE’s recommendations seek to foster competition in the light of low mobility (switching) among users of financial services and the lack of incentives for financial intermediaries to attract clients through quality, innovation and lower prices. The study provided the legislator and sector regulators with the necessary elements to improve the rules governing the financial sector's operation.
- “*Importance of Convergence in the Competition Process*”⁷⁵ prepared in 2005. This study resulted in changes to a number of aspects of the telecom regulation and also had an effect on approval of the Federal Telecommunications and Broadcasting Act, which incorporated the convergence principles recommended by the CFC.

⁷⁴ See www.cofece.mx/images/Estudios/ENTREGADEFINITIVO_PROTEG.pdf.

⁷⁵ See www.cfc.gob.mx:8080/cfcresoluciones/Docs/Mercados%20Regulados/V2/7/1381001.pdf#search=PRE10-096-2005-117.

In Mexico's contribution to the 2008 OECD Roundtables, the CFC described a strategy for the successful implementation of recommendations, based on four pillars:

- Designing a communications strategy and working with the media to create awareness among the general public and trigger a public debate about the issues identified in the market study;
- Building awareness among market participants and consumers through outreach and advocacy efforts, either before (e.g. through public fora) or after the study is published;
- Co-ordinating with other regulators to identify and resolve the problems detected through the market study. Initial co-ordination involves collaboration to gather information and possibly obtain technical assistance from sector regulators, to better understand the functioning of the market;
- Lobbying with the executive and legislative branches. At times lobbying efforts occur prior to the publication of the market study, particularly when there is collaboration with sector regulators in the information gathering stage. Mostly, however, lobbying efforts occur once the study is public and are aimed at convincing regulators and law makers of the need for reforms (OECD, 2008).

Although this represents the essence of the strategy, there are also other elements that have contributed to the successful implementation of recommendations:

- Ensuring that the analysis in these studies is technically sound and that recommendations are also based on the technical elements contained in the study;
- Isolating political issues from public discussion of CFC's proposals;
- Fostering transparency about the subject matter being analysed and demonstrating openness to hear opinions from all interested parties;
- Building a reputation for independent decision-making. In the past this has meant that the CFC had to elaborate all of its opinions "in-house". This is changing, however, as the Commission is experimenting with partial outsourcing of its

market studies.⁷⁶ The Toolkit project, which was implemented in conjunction with the OECD;

- Building momentum to push for rapid change (OECD, 2008).

As regards studies that may have proved less successful, COFECE indicated the following:

- Study on the airport sector issued in 2007 in which the CFC expressed its view on the Airports Law of that same year, urging the application of the principles of competition and free market participation in the provision of airport services.⁷⁷ In its opinion, CFC made a number of recommendations, including the need to have an independent sector regulator, to promote greater efficiency in the allocation of flight times at saturated airports and to introduce competition in the supply of fuel carried out exclusively by a state company. To date, these recommendations have not been implemented.
- Study on the tortilla market issued in 2010 in which the CFC identified provisions of municipal regulation that had or could have the effect of unjustifiably restricting both the access of new participants and the growth of those already engaged in the production, marketing and/or distribution of tortilla dough and retail tortillas.⁷⁸ This opinion, addressed to municipal authorities, contained guidelines designed to avoid the most common regulatory barriers to competition in this market. However, the CFC recommendations were not fully incorporated into the regulatory framework.

⁷⁶ The “*Investigation and Recommendations on Conditions of Competition in the Financial Sector and its Markets*”, described above, is an example where COFECE has relied on academic experts for the analysis of the industry and of the sector regulation. Technical recommendations in this project and in future market studies on competition issues have remained with the competition authority.

⁷⁷ See www.cfc.gob.mx:8080/cfcresoluciones/Docs/Mercados%20Regulados/V2/7/1382537.pdf#search=aeropuertos.

⁷⁸ See www.cfc.gob.mx/0docs/comentarios/optortilla.pdf.

- Study on foreign trade⁷⁹ issued in 2008 in which the CFC made five recommendations with a view to increasing international competition within Mexico. Only three elements of these recommendations were incorporated in the legal framework, but other aspects related to the strengthening infrastructure and the institutional regulatory framework for foreign trade were not taken into account.⁸⁰

Characteristics of market studies

Selection and priorities

The selection of the markets or sectors of the economy for analysis in a market study is based on a number of factors that include consultation with other government agencies or services, COFECE's own research and complaints by consumers or market players.

Other government authorities (public sector authorities, Congress and the Federal Executive) can request COFECE or IFT to prepare a specific market study.⁸¹ Representatives of the private sector cannot do so, except in the case of opinions on bills, regulation, decrees, adjustments to programmes or policies, circulars and other administrative acts. In such cases, COFECE or IFT can issue an opinion also at the request of consumer organisations and/or business associations.

In its 2014-2017 Strategic Plan, COFECE defined five criteria for determining priority sectors for its work: economic growth, generalised consumption, transversal impact, lower-income households and regulated markets.

⁷⁹ See www.cfc.gob.mx:8080/cfcresoluciones/DOCS/Mercados%20Regulados/V3/8/1509579.PDF#search=comercioexterior.

⁸⁰ COFECE's view is that this study demonstrated that, in order to increase market competition, a solid study does not suffice and it is also necessary to implement an effective communications plan that promotes a culture of competition and co-ordination with other regulatory agencies.

⁸¹ Article 12, sections XII, XIII, XIV, XV, XVIII, XIX and XXIII of the Federal Law on Economic Competition.

Stages

As indicated above, differently from the detailed regulation governing investigations on monopolistic practices, anti-competitive mergers, barriers to free market participation and economic competition and other restrictions on the effective functioning of markets, COFECE and IFT have considerable autonomy in deciding the form and ways in which they carry out market studies.

COFECE normally informs potentially interested parties about the subject and scope of a study, its reasons for selecting that market and the contact information of its market studies unit, including the names of the individuals involved. It does not provide information the timeline of the study, its different stages or progress. Moreover, accordingly with articles 152 Section IV of the COFECE Regulatory Provisions and 156 Section IV of the IFT Regulatory Provisions, they may publish an extract of the decision to initiate the market study on its website so that anyone can submit information on the market subject of study.

Use of information

Neither COFECE nor IFT currently have a guideline for stakeholders on market studies.

COFECE and IFT do not have internal guidelines on treatment of confidential or restricted information obtained from interested parties during preparation of a market study additional to the legal provision in the Federal Law on Economic Competition.⁸² Moreover, under the Federal Law on the Responsibilities of Public Servants and the Federal Law on Transparency and Access to Public Government Information, government employees who handle information considered confidential are held responsible if this information is unduly disclosed.

COFECE's and IFT's Commissioners can be removed by the Senate if they use confidential or restricted information to which they have access as a result of their function for their own benefit or for that of third parties.⁸³

⁸² Articles 124 and 125 of the Federal Law on Economic Competition states how to classify the information and documents obtained during the investigations and verifications diligences.

⁸³ Article 23, Section V of the Federal Law on Economic Competition.

Publication

COFECE and IFT publish the final report of their market studies.⁸⁴ In addition, and according with their regulatory provisions, the recommendations issued as a result of market studies are notified to the relevant public authorities and have to be posted on their websites.⁸⁵

Information used to prepare market studies is considered public, unless the parties that submitted it requested to restrict access to it and justify the need to do so.⁸⁶ In this case, the COFECE and IFT must order the necessary measures to protect the information, classifying it as restricted or confidential under the regulation of the Federal Law on Economic Competition.

Results, government measures and follow-up

The results of market studies prepared by COFECE very frequently include direct actions to apply competition or consumer law, campaigns to educate consumers or companies, voluntary compliance by companies and recommendations to the government to reform laws or government policies.

⁸⁴ Opinions issued under the previous regulation were also made public. Article 2 of Regulation of the Federal Law on Economic Competition.

⁸⁵ See Articles 153 of the COFECE Regulatory Provisions and 157 of the IFT Regulatory Provisions.

⁸⁶ As regards the confidentiality of the information contained in the studies, Articles 124 and 125 of the Federal Law on Economic Competition refer to the different types of information and their handling. Information may be: (i) public, (ii) restricted or (iii) confidential. Article 125 establishes that "For the purposes of this Law, Confidential Information can only be such when the Economic Agent so requests, accredits that it is of this nature and presents a summary of the information to the satisfaction of the Commission so that it can be added to the file, or presents the reasons for not being able to prepare the said summary in which case the Commission may prepare the corresponding summary. The Commission will in no case be obliged to provide Confidential Information, cannot publish it and must keep it in the safe it has for this purpose. The Commission's public servants must refrain from publicly referring to or revealing information related to files or proceedings before the Commission and that cause damage or direct harm to those involved until the Economic Agent being investigated has been notified of the Governing Council's resolution, respecting at all times the obligations that arise from the present Article."

Box 2. First approach on ex-post evaluations on market studies

COFECE recently finalised a first follow-up review of the outputs of a market study. This was the review of the market study on the competition conditions in the financial sector, released in July 2014. This is considered as a preliminary evaluation and has been focused on the reaction of the sector regulators to the recommendations. The review concluded that some of the regulators and governmental agencies agree with the analysis performed by the COFECE and that they are willing to assess the feasibility of implementing some of the recommendations. Among these are CONSAR, FOVISSSTE and INFONAVIT.

Source: COFECE 2014 Third Quarterly Report, P.50.

In the near future, COFECE is expected to evaluate the costs and benefits of its market studies, going beyond a general estimate of the social benefits of penalising anti-competitive practices. It also expects to implement mechanisms for case-by-case estimation of the benefits of the recommendations generated by these studies as well as their impact or how they are perceived by interested parties.

6. PANAMA

Autoridad de Protección al Consumidor y Defensa de la Competencia

The *Autoridad de Protección al Consumidor y Defensa de la Competencia* (from here on the “ACODECO”) is a decentralised public body, with its own legal personality, autonomy with regard to its internal organisation and independence in the exercise of its functions. It is attached to the Ministry of Commerce and Industry, and it is subject to supervision by the Office of the Comptroller General of the Republic.

ACODECO's statutory objective is to “protect and ensure the Rights of the Consumer and the process of free economic competition and free market participation, eradicating monopolistic practices and other restrictions on the efficient functioning of markets for goods and services in order to preserve the supreme interest of the consumer”.⁸⁷ ACODECO is headed and legally represented by an administrator. The law establishes that, in addition to the administrator, ACODECO must have two directors, one responsible for competition policy and the other for consumer protection, as well as a number of administrative and technical units.

The part of ACODECO that is responsible for competition is the National Directorate for Free Competition. This Directorate includes three departments: the Department for Competition Investigations, the Price Information and Verification Department and the Analysis and Market Studies Department. The head of the Market Studies Department serves as ACODECO's chief economist. The Market Study Department is a multi-function technical team formed by eight of the Directorate's 42 employees (2014 figures) and prepares studies on the functioning of markets that are aimed at detecting any distortion in the economy that could affect consumers. It also prepares economic reports for court cases and investigations.⁸⁸ In 2014, ACODECO had a budget of USD 10.6 million and 582 employees;⁸⁹ the National Directorate for Free Competition had a budget of USD 780,680 and the Market Study Department had a budget of USD 199,608 out of the Directorate's total budget.

⁸⁷ See www.acodeco.gob.pa/conocenos.asp.

⁸⁸ OECD, 2010, p. 46.

⁸⁹ www.acodeco.gob.pa/Transparencia/Memoria2014.pdf

Current legal framework for market studies

ACODECO's power to carry out market studies is established in Article 86 of Law N° 45 of 2007⁹⁰ on consumer protection and defence of competition. Points 5 and 11 of this Article stipulate that ACODECO may:

- “5. Undertake free competition advocacy before economic agents, associations, educational institutions, non-profit organisations, civil society organisations and the Public Administration through which it may recommend, based on technical-legal reports, the adoption or modification of any procedure or requirement in any sector of the economy or carry out studies in order to promote and strengthen market competition;”
- “11. Carry out studies of market behaviour in order to detect distortions in the market economy system and foster the elimination of such practices through their disclosure or the recommendation of legislative or administrative measures designed to correct them.”

The promotion of competition is, therefore, a priority for ACODECO. It pursues this objective by drawing the attention of stakeholders to the importance of competition and by issuing recommendations to the government on how to modify policies and regulations that unduly restrict or distort competition.

An important part of its mandate to promote competition consists in the preparation of sector studies that lead to recommendations for the government and regulatory agencies (OECD, 2012a).

Access to information

ACODECO cannot compel market players to provide information for purposes of market studies.

Evolution of the legal framework

The powers to carry out market studies that are, as indicated above, currently contained in Law N° 45 of 2007 were originally granted to

⁹⁰

See

www.autoridaddelconsumidor.gob.pa/uploads/pdf/legislacion_normativas/Ley45_autoridaddelconsumidor_31octubre2007.07_21_2009_08_47_56_a.m..pdf.

ACODECO under Law N° 29 of 1996 and have not changed significantly since then.

Experience in carrying out market studies

ACODECO habitually prepares market studies which it posts on its website.⁹¹ Recent examples include:

- “Study of Stockbrokers in Panama”, prepared in May 2013, through which it sought to gather information about stockbrokerage activities in order to rule out possible distortions in the market for financial intermediation which seemed at odds with effective competition;
- “Preliminary Evaluation of the International Prices of Maize, Wheat, Oil, Soya and Fortified Flour”, prepared in September 2012, which looked at the way in which these products' prices adequately reflect or not fluctuations in output due to acts of nature in their markets of origin;
- “Study of the Cement Sector in Panama”, prepared in October 2012, in which ACODECO compiled statistical information about grey and white cement producers in order to define the relevant market for antitrust purposes, assess the existing level concentration and review its structure;
- “The Cost of Electricity in the Production and/or Marketing of Meat and Dairy Products in the Basic Food Basket”, prepared in October 2011, which carried out a comparative analysis of the electricity costs incurred by some market players in order to produce and/or market dairy and meat products included in the basic food basket and the behaviour of electricity costs in 2007-2009;
- “Technical Report on Micro-Credit in Panama”, prepared in September 2011, which studied the micro-credit market and its role in financing small and mid-sized businesses.

⁹¹ The studies listed by ACODECO do not necessarily include policy recommendations to the government or suggestions for further action by the agency or other stakeholders. In that respect, they lack an important element of a “market study” as understood in the context of this report.

See www.acodeco.gob.pa/nuestra_labor.asp?area=17 and www.acodeco.gob.pa/publicaciones_estudios.asp.

Objectives and results of market studies

When asked to identify the main objectives pursued in carrying out market studies, ACODECO highlighted the following (in descending order of importance):

- Understand how markets operate in order to decide which measures to take under the competition law;
- Assess the level of competition in a market or sector;
- Define a market for the purpose of applying the competition law;
- Investigate an alleged market failure that cannot be attributed to the behaviour of a specific market player;
- Increase the general knowledge of a sector.

ACODECO has identified the following as the market studies that it considered most successful:

- “Effective Interest Rate”, prepared in 1998,⁹² whose importance lay in that it explained the concept of effective interest rate, the way it is calculated and the different ways in which banks and other financial institutions calculate loan repayments. This report was much consulted by the banks and their customers and served as the basis for the development of the consumer information system currently applicable to different types of loans.
- “Privatisation of Sugar Mills”, prepared in 1997,⁹³ which analysed the privatisation of state sugar mills from the standpoint of competition. The study recommended that the new owners of these mills be different from those of the private mills already active in the national market. This recommendation was accepted by the government's Privatisation Unit.
- “Considerations on the Establishment of a Uniform Valve for Liquefied Gas Canisters”, prepared in 2000,⁹⁴ which was considered

⁹² See [www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_10 - TASA DE INTERES EFECTIVA.09 04 2009 09 31 49 a.m..pdf](http://www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_10_-_TASA_DE_INTERES_EFECTIVA.09_04_2009_09_31_49_a.m..pdf).

⁹³ See [www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_1_privatizacion ingenios azucareros.09 04 2009 09 39 37 a.m..pdf](http://www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_1_privatizacion_ingenios_azucareros.09_04_2009_09_39_37_a.m..pdf).

⁹⁴ See [www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_16 VALVULA UNICA.09 04 2009 09 07 36 a.m..pdf](http://www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_16_VALVULA_UNICA.09_04_2009_09_07_36_a.m..pdf).

successful in that, through the harmonisation of the technology for gas canister valves, it permitted competition between suppliers.

ACODECO has indicated the following as studies that were less successful:

- “Exit Barriers in Mobile Telephony”, prepared in 1999,⁹⁵ which was carried out when there were only two mobile telephony operators and analysed the clauses for early termination of contracts. The recommendations were not taken into account at the time.
- “Pesticides”, prepared in 1999,⁹⁶ which analysed the use of pesticides in Panama and the risk that food production processes could pose a threat to consumers' health or life. ACODECO indicated that the State has made efforts towards prohibiting some pesticides but that much remained to be done.
- “Funeral Services”, prepared in 2005,⁹⁷ which showed the diversity of funeral services available but also highlighted a lack of consumer guidance and education.

Characteristics of market studies

Selection and priorities

ACODECO bases its selection of markets or sectors of the economy suitable for a market study on a number of factors that include: consultation with other government agencies, its own research, and feedback from consumers or consumer groups.

ACODECO's Advisory Council, which is formed by the Minister of Commerce and Industry, the Minister of Economy and Finance and the Minister of Health, can suggest the preparation of market studies.⁹⁸ Other

⁹⁵ See [www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_13 -
_BARRERAS_A_LA_SALIDA_EN_LA_TELEFONIA_CELULAR.09_04_2009_09_30_39_a.m..pdf](http://www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_13_-_BARRERAS_A_LA_SALIDA_EN_LA_TELEFONIA_CELULAR.09_04_2009_09_30_39_a.m..pdf).

⁹⁶ See [www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_19 -
_PLAGUICIDAS.09_04_2009_09_12_00_a.m..pdf](http://www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_19_-_PLAGUICIDAS.09_04_2009_09_12_00_a.m..pdf).

⁹⁷ See [www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_36_Servicio
s_Funerarios.09_04_2009_09_24_03_a.m..pdf](http://www.acodeco.gob.pa/uploads/pdf/publicaciones_estudios/NT_36_Servicio_s_Funerarios.09_04_2009_09_24_03_a.m..pdf).

⁹⁸ OECD, 2010, p. 48.

public and private bodies, including consumer organisations and business associations, can also ask for market studies, but ACODECO remains independent in deciding whether to accept these requests.

ACODECO reported that its main criteria for defining priority sectors are: the importance of the market, its structure, the existence of entry barriers and the level of concentration, the detection of unusual events that may affect the functioning of the market, the impact on consumers, the number of complaints received, the degree of political interest in a market, and the desire to deepen the understanding of how the market works.

Stages

According to ACODECO, when the request to prepare a market study comes from a public body, ACODECO informs it about the start of the work, the scope of the review and the identity of the personnel involved. However it does not provide information about its timeline, stages or progress. Similar information is not disclosed to private stakeholders.

ACODECO does not currently have guidelines for stakeholders on what market studies are and what their outcomes can be.

Use of information

Under Article 103 of Law N° 45 of 2007, information of a confidential nature supplied to ACODECO by private parties for the preparation of a market study cannot be disclosed without explicit authorisation, except when this is required in accordance with the law by the courts or the State Prosecution Service.⁹⁹ In this latter case, ACODECO could face lawsuits if it fails to comply.

Publication

ACODECO publishes its reports and studies on its website¹⁰⁰.

⁹⁹ Article 103 of Law N° 45 of 31 October 2007 states that: “Confidentiality. The information that the Authority receives from companies and organisations for the exercise of its functions may not be disclosed without the explicit authorisation of the persons who have supplied the corresponding information or documents, providing that the said information or documents have been supplied on these terms. An exception is made in the case of information that is required by the authorities of the State Prosecution Service or the Judiciary in the form established by the corresponding norms. The fact of being confidential does not restrict the investigated party's access to the proofs that may exist against it.”

¹⁰⁰ See www.acodeco.gob.pa/publicaciones_estudios.asp

Information used to prepare the studies is considered public unless, as indicated above, the provider of the information requires to keep it confidential. There is, however, no policy or general provision requiring the disclosure of the data used in the studies.

Results, government measures and follow-up

In general, the results of ACODECO's market studies include direct action points such as the application of competition or consumer laws, the launch of campaigns to educate consumers or companies, and recommendations to the government.

Recommendations issued by ACODECO are not binding for any of the stakeholders to which they may be directed.

ACODECO reported that it does not carry out systematic and structured measurement of the results of its market studies and that it does not have a methodology for calculating the benefits of its recommendations. It clearly identified these as areas that it would like to develop in the future. In addition, it indicated that the current design of its market studies does not envisage a specific mechanism for obtaining information on how these studies are perceived by interested parties.

7. PERU

There are two competition authorities in Peru, the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* and the *Organismo Supervisor de Inversión Privada en Telecomunicaciones*. Both of them can undertake market studies.

Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual

The *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* (from here on the INDECOPI) was created in November 1992 by Legislative Decree N°25868.

INDECOPI is a specialised public body attached to the Presidency of the Council of Ministers. It has legal personality under internal public law. According to Legislative Decree N° 1033, INDECOPI also has functional, technical, economic, budget and administrative autonomy and its functions are to promote the free and efficient development of markets and to protect consumer rights. In addition, INDECOPI has a duty to foster a culture of free and fair competition in the Peruvian economy and to safeguard intellectual property rights.

Within INDECOPI there are several functional bodies responsible for competition enforcement, consumer protection and IP law enforcement. Within INDECOPI the *Comisión de Defensa de la Libre Competencia* (hereafter "CLC") is responsible for ensuring compliance with Legislative Decree N° 1034 (Act on Repression of Anti-Competitive Conduct) and Law N° 26876 (Anti-Monopoly and Anti-Oligopoly in the Electricity Sector Act). INDECOPI also includes the *Gerencia de Estudios Económicos* (from here on the GEE), which is responsible together with CLC for carrying out market studies. In addition, INDECOPI includes a Tribunal which reviews on appeal the decisions made by INDECOPI.¹⁰¹

¹⁰¹ For this purpose, the Tribunal has four specialised chambers of which the Chamber Specialised in Defence of Competition (from here on the "SDC") is responsible for reviewing the CLC's decisions on competition matters as

In the fiscal year 2014, INDECOPI had a budget of USD 53,54 million¹⁰² and 1,315 employees while CLC had a budget of USD 816,000 and 23 employees, four of which were partially dedicated to market studies, and the GEE had a budget of USD 631,400, only a fraction of this was devoted to market studies¹⁰³.

Current legal framework for market studies

According to Article 15.2, paragraph g) of Legislative Decree N° 1034, the CLC is the body responsible to “prepare studies and publish reports”. According to Article 15.3, this body is entitled to request information.

The power to perform market studies for the purposes of competition advocacy is granted to CLC by article 14.2, paragraph e) of the same Decree. This states that CLC has the power to “*suggest to the Presidency of the Governing Council of INDECOPI to issue an opinion, urge or recommend that the legislative, political or administrative authorities implement measures to re-establish or promote free competition such as the elimination of entry barriers and the application of economic regulation to a market where competition is not possible*”.

Access to information

INDECOPI has the power to request information from private parties on preparation for its studies (see Legislative Decree N° 807 and 1034).¹⁰⁴ In particular, Legislative Decree N° 807 envisages fines of up to USD 65,500 in case of refusal to submit the information required.

Regarding information held by other public agencies, Article 76 of Act N° 27444 on General Rules applicable to Administrative Proceedings establishes that inter-agencies requests are to be governed by the principle of “collaboration among entities”, and there are no penalties or fines in case of failure to respond.

Evolution of the legal framework

The power to carry out market studies was introduced with the establishment of INDECOPI. Article 5, paragraph b) of Legislative Decree N° 25868 of 1992, established that one of the functions of the President of INDECOPI's Board is to “*propose to the relevant government authorities the*

well as decisions on fair competition (mainly on advertisement), dumping, subsidies and bureaucratic barriers.

¹⁰² INDECOPI's modified budget for 2014 is 155,274,614 nuevos soles.

¹⁰³ 5 GEE employees are devoted to market studies.

¹⁰⁴ See www.indecopi.gob.pe/repositorioaps/0/0/par/legislacion/DL807.pdf.

adoption of the legal or regulatory measures it deems necessary to guarantee protection of the rights referred to in Article 2 of this Decree Law.”¹⁰⁵ Article 14, paragraph c) of the old Act on Free Competition, Legislative Decree 701, established the power of the CLC “to perform studies and publish report”. These legal provisions were subsequently replaced by Legislative Decree N° 1033 of 2008 which redefined INDECOPI's organisation and functions and by Legislative Decree 1034. However, the power of the Technical Secretariat to perform studies and to promote competition through advocacy was confirmed.

Experience in carrying out market studies

INDECOPI views market studies as a tool for promoting competition and only in 2014 it has released six of them. Among are some examples of the market studies conducted by INDECOPI in the past 5 years:

- In 2010, INDECOPI prepared a market study and made recommendations to the city of Trujillo's Municipal Government on how promote competition in public procurement.
- In 2011, INDECOPI recommended that the State Procurement Supervisory Body promote bidders' participation in public procurement of medical contrast agents by including them on the Principal Register of Medicines.
- In 2012, INDECOPI carried out a study of competition conditions in the domestic market for commercial airline where price heterogeneity reflected entry barriers and market segmentation.
- In 2013, INDECOPI and the Health Ministry's General Directorate of Medicines commissioned a study to evaluate the effects of tax exemptions on the prices for cancer drugs in public procurement.
- In 2013 and 2014, INDECOPI prepared an empirical evaluation of the possible effects of the number of competitors in the country's public notary services market, using an econometric model of variations in the prices of six services in different geographic markets.
- In 2014, INDECOPI carried out two studies to analyse and measure administrative barriers in the mobile communications market and

¹⁰⁵

Article 2 of Decree N° 25868 of 1992: “INDECOPI is the body responsible for application of the legal norms in force to protect: a) the market from monopolistic practices that seek to control and restrict competition in the production and marketing of goods and the provision of services as well as practices that generate unfair competition and those that affect market agents and consumers (...)”

in the market form local distribution of natural gas. Both studies served as tools for facilitating the development of infrastructure to foster competition in both sectors.

- In December 2014, INDECOPI released a comprehensive study on the notaries market, which is highly regulated. The study found that existing regulations limited competition and recommended a significant deregulation.
- In December 2014, INDECOPI issued an advocacy report as the result of a study on entry barriers in the market of drivers' accreditation in Lima. The study established that legal barriers resulted in a *de facto* monopoly in the provision of the service of accreditation of new drivers, in spite of the continuously growth in the demand for such service.

Objectives and outcomes of market studies

When asked to identify the main objectives of its market studies, INDECOPI indicated the following (in descending order of importance):

- Increase the general knowledge about the sector;
- Assess the level of competition in the market or sector;
- Define a market for purposes of applying the competition law;
- Investigate an alleged market failure that cannot be attributed to the conduct of market players;
- Prepare for inputting into legislative reforms.

INDECOPI listed the following two as the market studies that it considers to have been successful:

- “*Market Study to Identify and Analyse Bureaucratic Barriers in the Mobile Communications Industry*”, prepared in February 2014, whose results were presented to Congress to support a bill to facilitate investment in base stations. The bill was approved and the law is now in force.
- “*Market Study to Identify and Analyse Bureaucratic Barriers in the Local Natural Gas Distribution Market in the Lima and Ica Regions*”, prepared in June 2014, which analysed the rationale and costs of municipal procedures that inhibit the investment required to deploy a distribution network. In response, some municipal governments have voluntarily eliminated these procedures.

Characteristics of market studies

Selection and priorities

INDECOPI bases its selection of the markets or sectors of the economy to be analysed in a market study on different factors, such as consultation with other government agencies, complaints received from market players, as well as information from its own investigations.

In addition any sector authority or business association can ask INDECOPI to prepare a market study, but the final decision on whether carrying out these studies lies with INDECOPI.

In order to define its priorities on market studies, INDECOPI analyses the structure, value, size and importance of a market, its level of concentration, and the type of harm and the expected impact on consumers, as well as the need to increase its understanding of a market.

Stages

There are no specific provisions that INDECOPI must follow when carrying out a market study. Similarly, INDECOPI does not have guidelines for stakeholder explaining what market studies are and what outcomes they can lead to.

When it carries out market studies, INDECOPI does, however, inform interested parties about its reasons for selecting the market, and the scope of the study, but it does not usually provide information about the various stages in the study or about the team responsible for its preparation.

Use of information

Interested parties can request that INDECOPI classify any information presented to the CLC as confidential. CLC must take measures to guarantee confidentiality.¹⁰⁶ If the duty of confidentiality is breached the person responsible can be subject to criminal sanctions.

Article 31 of Legislative Decree N° 1034 stipulates that, during an administrative prosecution, the information contained in the file is considered as restricted and only the investigated parties, or third parties involved in the proceeding with a legitimate interest, can access it. This rule applies also to information received in the context of a market study.

¹⁰⁶ Legislative Decree N° 1034 establishes an exception to the principle of transparency to protect companies or individuals from the irreparable harm caused by the disclosure of sensitive information during enforcement proceedings or by the disclosure of information that could distort the functioning of the market through, for example, reputational effects.

Publication

The final results of market studies are made public. According to Law N° 27806 of 2002 (Law on Transparency and Access to Public Information), all information related to the preparation of the study must be public, except information that classified as confidential by the CLC.

Results, government measures and follow-up

Market studies prepared by INDECOPI generally conclude with recommendations to the government for legal and policy reforms. However, these recommendations are not binding.

INDECOPI does not carry out regular ex-post evaluation of the impact of its recommendations nor does it receive feedback from interested parties.

Organismo Supervisor de Inversión Privada en Telecomunicaciones

Like in Costa Rica and in Mexico, Peru has a sector regulator, the *Organismo Supervisor de Inversión Privada en Telecomunicaciones* (from here on the OSIPTEL) which has exclusive powers to enforce the Competition Act in the telecommunications sector.

OSIPTEL is a decentralised public body responsible for regulating and supervising the market for public telecommunications services. Attached to the Presidency of the Council of Ministers, it was created on 11 July 1991 under Legislative Decree N° 702 but began its activities on 26 January 1994.¹⁰⁷ Under Article 17 of Legislative Decree N° 1034, OSIPTEL is responsible for the application of competition law to the market for public telecommunications services.

In the second quarter of 2014, OSIPTEL had 261 employees¹⁰⁸ and a budget of USD 27.2 million for the fiscal year 2014.¹⁰⁹ 32 persons work on competition issues, with a budget of USD 1.81 million.¹¹⁰

¹⁰⁷ See <http://www.osiptel.gob.pe/categoria/quienes-somos>

¹⁰⁸ Personnel Information Table (2nd quarter 2014), available at Osiptel's website.

¹⁰⁹ Detailed Institutional Budget, available at Osiptel's website.

¹¹⁰ This information is an estimate since only a fraction of the personnel of the Regulatory Policies and Competition Division and the Technical Secretariat works on market studies. The figure of USD 1.81 million was reached by estimating the total percentage of the budget of each of these areas associated to the number of employees involved in preparing market studies.

In its twofold function of competition authority and sector regulator, OSIPTEL can carry out different types of market studies. Under its regulatory powers, OSIPTEL can adopt measures to prevent practices that affect or might affect competition. These measures include the adoption of regulatory rules to which telecommunications companies must comply.

The Regulatory Policies and Competition Division (GPRC) is the technical unit responsible for proposing to OSIPTEL's Board of Directors the regulatory framework for telecommunications services. The Technical Secretariat is responsible for providing administrative, technical and logistics support to the different Committees of OSIPTEL which are in charge of resolving disputes between companies. It acts as a bridge between the Committees and the Agency.¹¹¹

Current legal framework for market studies

The powers to do market studies were granted to OSIPTEL by the Regulation of Organisations and Functions, approved under Resolution N° 032-2002-CD/OSIPTEL of the Board of Directors and modified by Resolution N° 036-2005-CD/OSIPTEL. A new regulation was approved through the Decree N° 104-2010-PCM.¹¹²

Access to information

OSIPTEL can compel telecom operators to provide information. The information provided must be truthful, accurate and complete and it must be presented in the requested format.

The sanctions for failure to comply with a request for information are established in Chapter III of the Regulation of Supervision, Infractions and Sanctions, approved under the Resolution of the Board of Directors N° 087-2013-CD-OSIPTEL. OSIPTEL can impose a fine of up to USD 19,625 for failure

¹¹¹ It also serves as an examining body in proceedings related to aspects of relations between telecommunications service operators such as infringements of competition rules, technical, economic and legal aspects of the interconnection of networks and access to and shared use of infrastructure for public use in the provision of public telecommunications services.

¹¹² See www.peru.gob.pe/docs/PLANES/7/PLAN_7_Reglamento%20de%20Organizaci%C3%B3n%20y%20Funciones%20-%20ROF_2010.pdf.

to submit the requested information or for submitting late information and of USD 45,792 for submitting false information.¹¹³

Concerning the information in possession of other public entities, under the Law of Transparency and Access to Public Information (Law N° 27806), all information in possession of public entities is considered public (with the exception of sensitive information as specified by Law), and must be provided when requested. This applies to information required by private or public entities or individuals. However, in practice, when OSIPTEL has required information to other public entities, this has not always been provided in the terms established or with the required detail.

Experience in carrying out market studies

OSIPTEL carries out market studies as part of the agency's work on assessing market conditions, designing new regulatory policies, evaluating the impact of regulations, and general competition work. Some market studies might also have academic or informative purposes. In recent years, OSIPTEL carried out eleven market studies.

Objectives and results of market studies

When asked to identify its principal objectives in carrying out market studies, OSIPTEL highlights the following (in descending order of importance):

- Understand how markets operate in order to decide which measures to take under the competition law;
- Assess the level of competition in the market or sector;
- Increase the general knowledge about the sector;
- Define a relevant market;
- Evaluate the impact of government policies/regulation on the market.

Market studies can give rise to recommendations or actions concerning the application of competition law, regulation or deregulation of specific market segments, and recommendations to the government to

¹¹³ See Chapter III, Infractions relating to Information of the Regulation on Supervision, Infractions and Sanctions.

issue or change particular laws that have an impact on market structure and competition levels.

Characteristics of market studies

Selection and priorities

According to OSIPTEL, the selection of the telecommunications markets for a market study is based on different factors including consultations with other government agencies, complaints from market players, as well as on the basis of OSIPTEL's own investigations.

To prioritise between market studies, OSIPTEL analyses the structure, size and importance of markets, the level of market concentration and entry barriers, the type of damage and impact of certain practices on consumers and on the competitive process, as well as the desire to improve its understanding of a particular market.

Stages

In case of market studies whose purpose is to assess market conditions, design new regulatory policies, or of market studies for academic or informative purposes, no time period is established in the law.

Use of information

OSIPTEL does not make public any information that it is considered confidential because of a specific request by the company that submitted it or that is declared confidential under the following provisions:

- Organised Single Text of OSIPTEL's Regulation of Confidential Information, approved by the Resolution of the Board of Directors N° 178-2012-CD/OSIPTEL;
- List of Public and Restricted Information, approved by Resolution of the Board of Directors N° 053-2004-CD/OSIPTEL and modified by Resolution of the Board of Directors N° 041-2011-CD/OSIPTEL.

All OSIPTEL employees who have or may have access to information declared confidential must sign a confidentiality agreement with OSIPTEL, which indicates: (i) that they know the rules on confidentiality and the sanctions for non-compliance; and (ii) that they agree to comply with these rules. In case of failure to comply, an administrative sanction can be imposed under the Internal Work Regulation.

Publication

The publication of studies depends on the subjects addressed and the level of sensitivity of the information analysed and presented in the reports.

Results, government measures and follow-up

OSIPTEL does not directly measure the results of its market studies. These, however, tend to lead to the issue of new rules and regulations. An example of a successful market study is the one on “*Sim unlock in the mobile telecommunications market*”, which analysed the mobile telecommunications market and determined that the sale of cell phones with locked Sim Cards increased consumers’ switching costs and thus, constituted a restriction to competition. This report led to the modification of OSIPTEL’s regulation and starting from January 2015 mobile operators must sell “unlocked” cell phones (i.e. cell phones that accept Sim Cards from any operator).¹¹⁴

OSIPTEL may, issue non-binding recommendations to the legislative, political or administrative authorities on measures to restore or promote competition.

¹¹⁴

Resolution N° 138-2014-CD/OSIPTEL of the Board of Directors from November the 11th, 2014: Modification of the Terms of Use of Public Telecommunication Services Regulation.

8. GOOD PRACTICES

The purpose of this chapter is to synthesise key features of market studies in jurisdictions which have made regular, if not extensive, use of this tool. The Chapter will refer to these experiences as “good practices”. The policy recommendations that are developed in the next chapter are largely based on a comparison between these good practices and the existing legal and institutional framework and practice in each of the six countries analysed in the first part of this report.

The use of market studies

Identifying good practices

In 2008, the OECD Competition Committee organised a Roundtable on Market Studies that documented the use of market studies in a large sample of countries and concluded that they are a common component of the work portfolios of many competition agencies (OECD, 2008).

In 2009, the ICN launched a project building on the work of the 2008 OECD Roundtable. It aimed at gathering information among its members on a number of issues, including the definition and purpose of market studies, powers to conduct these studies, their selection, process, and outcomes, and measurement of their impact. The report resulting from that project (ICN, 2009) concluded that there is a diverse wealth of experience in conducting market studies across the ICN members, and that there was scope for outlining best practices in relation to a number of aspects of market studies.

As a result the ICN produced the ICN Market Studies Good Practice Handbook (ICN, 2012). A preliminary version of this document was translated into the Spanish language by the competition authorities of Mexico and Chile and is available on the ICN website (ICN, 2010).

In addition to the OECD and ICN work, there is a significant amount of information on the websites of individual competition authorities on policy and methodological approaches to market studies and on actual market studies. This information, together with specific comments received by the US, the EU, Spain and the United Kingdom on earlier drafts of this report, has served as basis for collecting the good practices described in this chapter.

A flexible and powerful competition tool

The ICN Report defines market studies as “research projects aimed at gaining an in-depth understanding of how sectors, markets, or market practices are working.” They are conducted primarily in relation to concerns about the functioning of markets arising from one or more of the following:

- firm behaviour;
- market structure;
- information failure;
- consumer conduct;
- public sector intervention in markets; and
- other factors which may give rise to consumer detriment.¹¹⁵

The 2008 OECD Roundtable and the ICN Report both highlighted that some jurisdictions have a particularly long and rich tradition of conducting market studies. In the US, they were initiated at the beginning of the 20th century and, in Japan, market studies go as far back as the late 1940s. The UK has accumulated considerable experience in undertaking markets studies, as well as in carrying through with the recommendations of such studies, despite having started conducting them only in 2002.¹¹⁶

In the US, market studies are one of the antitrust agencies’ most important policy tools. As expressed by a former Federal Trade Commission (form here on the FTC)¹¹⁷ Chairman “empirical research facilitates the creation of what might be called ‘economic precedents’ – economic studies that demonstrate the validity of a hypothesis and, like legal precedents, can be invoked over time to support specific policy interventions.”¹¹⁸ In the view of the FTC, while market studies provide valuable information to the agency and to the public, they also require

¹¹⁵ ICN (2009), p. 122.

¹¹⁶ The OFT was given the power to perform market studies with the 2002 Enterprise Act.

¹¹⁷ See www.ftc.gov/.

¹¹⁸ William E. Kovacic, Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development, 72 ANTITRUST L.J. 861, 865 (2005).

significant resources and must be conducted rigorously in order to produce useful results.

The Japan Fair Trade Commission (from here on the JFTC) has been conducting ‘fact-finding studies’ since 1947, and has completed more than 30 of them. JFTC sees such studies as essential to carrying out its duties under the Antimonopoly Act, to “take charge of matters relating to regulation on private monopolisation, unreasonable restraints of trade and unfair trade practices, as well as pertaining to monopolistic situations and other issues (Article 27-2 of the AMA).”

In the UK, market studies are conducted by the newly created Competition Markets Authority (from here on the CMA).¹¹⁹ In 2014, the CMA took over the functions previously conducted by the Competition Commission (from here on the CC) and the Office of Fair Trading (from here on the OFT). According to the OFT’s market studies guidance, market studies are “examinations into the causes of why particular markets are not working well for consumers, leading to proposals as to how they might be made to work better. They take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour.”¹²⁰

Market studies were introduced in the UK as a means of identifying and addressing all aspects of market failure, from competition issues to consumer detriment and the effect of government regulations. As well as looking at particular economic markets, market studies in the UK may also relate to practices across a range of goods and services, e.g., doorstep selling. In this sense, their scope is not limited to the boundaries of markets in the economic sense.

In the EU, “sector inquiries” are the equivalent of market studies and are conducted by the Directorate-General for Competition of the European Commission (from here on the DG COMP).¹²¹ The Commission uses sector inquiries to get a better understanding of the obstacles to competition that may exist in a given sector with a view to identify if there is scope for own initiative interventions, such as *ex-officio* investigations.¹²² Sector inquiries

¹¹⁹ See <https://www.gov.uk/government/organisations/competition-and-markets-authority>.

¹²⁰ OFT, 2010, p.2.

¹²¹ See http://ec.europa.eu/dgs/competition/index_en.htm.

¹²² According to article 17 of Council Regulation (EC) 1/2003, the Commission may conduct general inquiries into a particular sector of the economy or a particular type of agreements across various sectors where a trend of trade between EU Member States, price rigidity or other circumstances

allow the Commission to gain an in-depth understanding of the dynamics and functioning of competition within a market as a whole, rather than on specific companies or practices. DG COMP is responsible for conducting sector inquiries, but it closely co-operates with other Directorate Generals, which can be considered the equivalent to sector regulators at national level.

Box 3. The use of market studies in the UK

In the UK, Market studies are conducted under the CMA's general review function in Section 5 of the Enterprise Act of 2002.

Market studies are one of a number of tools at the CMA's disposal to address competition or consumer protection problems, alongside its enforcement and advocacy activities. They are examinations into the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour. They may lead to a range of outcomes, including: a clean bill of health, actions which improve the quality and accessibility of information to consumer, encouraging businesses in the market to self-regulate, making recommendations to the Government to change regulations or public policy taking competition or consumer enforcement action, and making a market investigation reference, or accepting an undertaking. In the UK, other regulators can refer markets to the CMA for further investigation and the Financial Conduct Authority has the power to conduct market studies in the markets they regulate.

In the experience of the OFT, and now the CMA, market studies have a number of unique benefits that make them a very flexible and cost effective tool, including that they enable it to identify and address the root causes of market failure and that they are an effective way of tackling regulatory and other government restrictions on competition. The OFT has made extensive use of market studies in specific circumstances: a) when it suspected that a market was not working well, but there was no strong evidence that firms were breaking competition law and b) when it wanted to understand better in the causes that led a market not to work well including, but not limited to, regulatory restrictions. A list of all the market studies so far undertaken is available on the web site of the CMA together with the agency's policy documents on this area (<https://www.gov.uk/competition/markets>).

suggest that competition may be restricted or distorted within the Common Market. This provision replaced article 12 of Regulation (EEC) 17/62 that granted the EC authority to conduct these studies over 50 years ago.

Key characteristics

Market studies involve a wide variety of practices and institutional environments, from very formal studies based on exacting hypothesis-testing, to quite informal inquiries. Some market studies may appear to be not very detailed, but they provide enough information to get a general idea of the conditions affecting market performance that in some cases can be sufficient for the aim the agency had. In contrast, other studies involve sophisticated quantitative analysis on large data sets, which are demanding for the authorities but necessary to reach precise conclusions in some markets.

In some jurisdictions market studies are almost entirely carried out by staff of the competition agency. In others consultants are regularly retained to conduct markets studies or elements thereof. Using agency staff helps retaining the training benefits and the specific knowledge acquired in-house, but consultants can substitute for lack of specific expertise or may be better suited to address politically sensitive issues where the agency may be accused of taking a position.¹²³ In practice, it often happens that competition authorities ‘buy-in’ particular pieces of analysis or evidence gathering, such as consumer surveys, with the internal team maintaining ultimate responsibility for the overall delivery of the study.

In terms of the powers that competition authorities have to conduct market studies, there are agencies that have clear statutory powers, while there are some other agencies that only rely on their general competition advocacy functions.

Market studies distinguished from other actions

First of all, not every market study results in recommendations for removing policy and regulatory restrictions on competition, although such outcome is common. But advocating for less distortive public interventions can be done without the need for a market study. For example, an agency can assess the competition effects of forthcoming legislation through a formal competition impact assessment,¹²⁴ or by issuing a targeted opinion,

¹²³ When consultants have great industry-specific expertise or credibility, their involvement may also enhance the reception of the market study by decision makers.

¹²⁴ While a market study looks at a market in its entirety and hence identifies all distortions to competition that are preventing that market from working effectively, a regulatory impact assessment only considers the impact that a specific law and regulation is having on the competitive

or by developing competition principles applicable to government policy more generally.

In the UK, for example, general advocacy reports are different from market studies. General advocacy reports are practical guides for government on how to apply competition principles. They do not involve surveys of industry players and collection of evidence. Because of their more specialist nature they are more likely to be outsourced to economic consultancies. Advocacy reports may also be jointly released with other government departments and they do not trigger any obligation on the part of the government departments to whom they are addressed.¹²⁵

There is also a clear distinction between market studies and market investigations. Market investigations are more detailed examinations into whether there is an adverse effect on competition in a market(s). Should there be a finding of such an adverse effect on competition the agency can impose a wide range of legally enforceable remedies. This is present, as far as we are aware, only in three jurisdictions: the UK, Mexico and Iceland. It is worth flagging, however, that whilst these two instruments are quite distinct, a market study can also lead to a market investigation. This is the case in the UK if the threshold for opening a market investigation is met and the CMA believes that a market investigation is the most appropriate course of action to remedy the problems identified by the market study.

Further, market studies are not a form of enforcement. They are employed when there are signs that a market is not working well, but there is no evidence that the cause lies in a breach of competition law. Nevertheless they could lead to enforcement actions, if the study actually identifies breaches of competition law.

Outcomes of market studies

The output of a market study is a report containing findings based on the research, which may conclude that the market is working satisfactorily or may set out the problems found. Market studies serve mainly two primary purposes: as a prelude or precursor to litigation, or as an advocacy tool.

Market studies can lead to enforcement actions (investigations by the competition authority or litigation) when the nature and source of the competition problem they identify requires an enforcement intervention.

process in one or more markets. Hence though the approach is similar, the scope of a market study is much wider.

¹²⁵

See UK contribution to the 2008 OECD Roundtable, OECD (2008) p. 119.

Alternatively, market studies can constitute a spearhead for competition advocacy. This is the case when the causes why the market is not working well for consumers turn out to be public restrictions on competition or inefficient market equilibria. In such cases, market studies may lead to proposals to deregulate, to reform market institutions, or to improve information dissemination to consumers or suppliers.

In the ICN survey (ICN,2009) the most typical outcome of a market study has been identified as a set of recommendations to the government for changes to the law or to government policy. Other possible uses for market studies include:

- building technical expertise about markets – particularly for new or fast-moving markets, or to take account of recent developments in markets in general;
- addressing public interest or concerns about the functioning of markets;
- reducing uncertainties about how the authority will apply competition principles – particularly for new or fast moving markets, or those where there have been recent changes; and
- developing thinking about proposals for future regulation in order to facilitate advocacy that minimises adverse effects on competition.

In a number of countries, market studies are used both for competition and for consumer policy, as these two topics are often within the competence of the same agency and market studies are a natural vehicle to highlight the synergies between the two policy areas (Box 4). For jurisdictions with separate consumer protection and competition agencies, integrating the two closely related mission areas can be a challenge. But, even in those cases, market studies can be an excellent vehicle for such integration as they can accommodate a wider perspective than a competition agency would be allowed to take in a competition enforcement investigation. From this broader perspective, recommendations for activities in the consumer protection area could be made. In the UK, for example, where the CMA is also a consumer protection agency, a market study can also result in: consumer campaigns, guidance to industry, agreements/codes of practice with industry, or work with other regulators.

Box 4. Market studies serving both competition and consumer protection in the UK

In the UK, the CMA believes that in well-functioning markets strong, confident consumers, in possession of clear and accurate information about products and services, drive competition on price choice and quality, by choosing the goods and services that best meet their needs. Consumer protection law enforcement may be needed to ensure that consumers are getting accurate information and that businesses are not engaging in misleading or unfair trade practices. Competition law enforcement is needed to ensure that undertakings in a dominant position do not restrict market entry and expansion by, for example, margin squeezing and to ensure that agreements between businesses do not restrict competition.

As an agency with both competition enforcement and consumer protection powers, market studies enable the CMA (previously the OFT) to understand the problems in a market more fully before deciding whether to take enforcement action under either its competition or its consumer powers, or whether voluntary action on the part of business, or changes to laws or policy will better address market problems. Studies where the CMA has considered both competition and consumer protection issues include: PCA banking and ticket agents.

Source: OECD, 2008, UK Contribution, p. 120.

Examples

The 2008 OECD Roundtable listed a numbers of market studies as examples to show how their impact can be very different and that the differentiating factors may have several sources. They may be related with different methodologies or changes of circumstances between the time the study began and the time that it was released. In a few instances, market studies have been so compelling that they galvanised proponents of the *status quo* enough to delay reforms. In contrast, some market studies have been very influential in promoting major regulatory changes or legislative reforms that benefit competition and consumers.

The ICN Advocacy Working Group maintains a market studies information store in the ICN website¹²⁶, which lists studies per sector and

¹²⁶

See www.internationalcompetitionnetwork.org/working-groups/current/advocacy/msis.aspx

jurisdiction, with the aim of facilitating the sharing of knowledge and best practices on market studies.

Below we provide some examples of market studies from the most experienced jurisdictions.

The UK market study of the dentistry market

In September 2011, the OFT launched a study into the UK dentistry market. This study was prompted by a significant level of consumer complaints and concerns raised by stakeholders in relation to local pockets of concentration in the NHS dentistry sector. The study encompassed both NHS-funded dental treatment and private dental treatment.

In May 2012, the OFT published the result of the assessment of the market. The evidence gathered during the study suggested that dental patients are largely satisfied with the services provided by their dentist. However, the market study also identified a number of concerns with the operation of the UK dental market.

The main concern was that the existing NHS dental contract acts as a barrier to entry and expansion in the market. Having a contract to provide NHS dental treatment is crucial to the commercial viability of most dental practices, but at the time of the study most NHS dental contracts were allocated to incumbent dental practices and only a small volume of new contracts were put out to competitive tender each year. This meant that potential new, innovative dental practices trying to enter the market faced limited opportunities, while good practices offering higher quality services to patients face high barriers to expansion, and poor performing dental practices face limited incentives to improve in order to retain and attract new patients.

Other significant concerns were also identified:

- patients were provided insufficient information, in particular on charges, which prevented them from making the most cost efficient choice regarding their dental treatment;
- patients were often subject to undue pressure during the sale of dental payment plans;
- complaints and redress were difficult to obtain because responsibilities were unclearly divided among multiple bodies;
- patients face unnecessary restraints to access dental care professionals directly, as a referral from a dentist is always necessary even though there is no objective justification for these restrictions.

The report also indicated the bodies that should consider these concerns, which ranged from public bodies (such as the Department for Health) to business associations (such as the British Dental Association) and suggested ways to address them. In addition, it outlined the steps that the OFT has already undertaken with many stakeholders, during the consultation phase, to identify, and, in many cases, agree on the implementation of a package of measures that addressed most of concerns identified.

The EC sector inquiry on pharmaceuticals

In January 2008, following indications that competition in the pharmaceutical market might not be working well, the Commission launched a sector inquiry into pharmaceuticals. The inquiry focused on understanding the reasons for the delays in the entry of generic medicines and the apparent decline in innovation (as measured by the number of new medicines coming to the market). Hence, it looked at originator companies' practices to determine if and when these could be used to block or delay generic competition and, as the industry is strongly regulated, it also looked in broad terms at the regulatory framework within which originator and generic manufactures operate.

To perform the inquiry the Commission carried out inspections and gathered data and other information from a wide range of stakeholders. It then presented its preliminary results at the end of 2008 and received, as a result, over 70 submissions commenting on them. The final report was published in July 2009.¹²⁷

The inquiry identified certain areas of concern. It confirmed that generic entry does not always take place as early as it potentially could and showed that company practices are amongst the causes for these delays. It also confirmed a decline of novel medicines reaching the market and points to certain company practices that might, amongst other factors, contribute to this phenomenon.

As a result of the inquiry the Commission gained a better understanding of the sector and of its dynamics, which it employed in its enforcement work. As far as the regulatory framework was concerned, the Commission identified areas for improvement at community and national level, and in particular it affirmed the urgent need for the establishment of a Community patent and of a unified specialised patent litigation system in Europe.

¹²⁷

All the relevant documentation is available at:
<http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/>.

The FTC's report on authorised generic drug competition

In 2011, the Federal Trade Commission (FTC) reported on the effect of authorised generic (AG) drugs on competition in the United States prescription drug market.¹²⁸ The Federal Trade Commission conducted this study upon a congressional request to examine the competitive effects of authorised generic drugs.¹²⁹

The FTC used its statutory authority¹³⁰ to compel production of data from 59 branded pharmaceutical companies, 59 generic drug companies, and two AG only companies, including all major firms involved in marketing AG products.¹³¹ Staff identified 119 different AG products that were first marketed between January 1, 2001, and December 31, 2008. It required companies to provide detailed data submissions on AGs as well as the brand-name and generic drugs. Staff supplemented this quantitative data with pricing and sales information purchased from commercial sources, as well as information obtained from United States Food and Drug Administration databases.¹³² In addition, the FTC compelled production of existing planning and strategy documents.¹³³

Upon analysing this information, the FTC concluded that: (1) competition from AGs during the 180-day marketing exclusivity period has led to lower retail and wholesale drug prices; (2) AGs have a substantial effect on the revenues of competing generic firms; (3) lower expected profits could affect a generic company's decision to challenge patents on products with low sales, however, the reduced revenues resulting from AG competition during the statutory 180-day exclusivity period have not substantially reduced the number of challenges to branded drug patents by generic firms; and (4) there is strong evidence that agreements not to compete using AGs have become a way that some branded firms compensate generic firms for delaying entry to the market.¹³⁴

¹²⁸ FTC (2011)

¹²⁹ *Id.* at n. 1.

¹³⁰ The US Congress empowered the FTC to use its compulsory process authority to “gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any person, partnership, or corporation engaged in or whose business affects commerce. . . .” 15 U.S.C. § 46(a).

¹³¹ FTC (2011) at 5-6.

¹³² *Id.* at 7.

¹³³ *Id.* at 7-8.

¹³⁴ *Id.* at i-vii.

The Canadian market study on generic drugs pricing

The Canadian Competition Bureau was aware retail prices of generic drugs were high in relation to those of other developed countries, so the objective of the study was to look into the possible causes for these high prices. The final goal was to determine whether provincial regulators could change provincial regulatory regimes to benefit from competition. A first phase of the study conducted a detailed examination of the Canadian generic drug sector, starting from the acquisition of ingredients for manufacturing generics, proceeding through their production, approval process, and wholesale and retail distribution, including reimbursement by public and private insurance plans.

To perform the study, the Bureau acquired and analysed data, retained outside experts and conducted interviews with participants and interested parties at all levels of the sector. Before finalisation, a draft of the report was circulated to over 100 sector participants and interested parties for fact-checking purposes. The final report, arising from this first phase, found that there was considerable competition among generic drug manufacturers for shelf space in Canadian pharmacies and that this resulted in rebates of up to 40 % on the retail price of generics. However, in many provinces, the benefits of this competition were not passed on to provincial drug plans, consumers or insurance companies. A key-contributing factor to this finding was the design of public drug plans which gave pharmacies limited incentives to pass rebates on to consumers and insurers. The second phase of the project made concrete recommendations to regulators on ways to design provincial drug programs that would allow to pass the benefit from competition among generic manufacturers on to consumers.¹³⁵

Procedural Aspects

Selection of markets to study

Effective selection of the markets to study is essential, as it allows the competition agency to focus on the sectors that most require its attention.

In some jurisdictions a major proportion of market studies are chosen by the legislature or the national executive, while in others the competition agency has nearly total discretion in the selection. Competition agencies generally prefer the latter, but agencies may have a duty to conduct market

¹³⁵

The study is available on the Competition Bureau's website at www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02495e.html.

studies when requested, and doing such studies may present a major opportunity to gain credibility and support from the legislature or the executive.

Other than official requests made from the government, authorities make use of a number of different external and internal sources to select candidate markets to be subject to market studies. The CMA, for example, selects which markets to study drawing upon information received from a diverse set of sources, including:

1. complaints from businesses and trade associations;
2. suggestions from organisations representing consumer interests;
3. consumers complaints;
4. super-complaints¹³⁶ from consumer bodies;
5. suggestions made by government departments and regulatory bodies;
6. information acquired in the course of enforcement and advocacy work that has raised internal concerns;
7. intelligence gathering from publicly available sources, and
8. its own research.¹³⁷

Recently the CMA has conducted its first Strategic Assessment of risks to consumers, the efficient functioning of markets and their contribution to economic growth.¹³⁸ The Strategic Assessment is a systematic approach to the identification of markets and sectors that would deserve closer attention. The primary objective of this exercise is to inform the agency medium term (one to three year) priorities and to help focus its pipeline of discretionary work. The CMA plans to repeat this exercise regularly.

¹³⁶ A super-complaint is a complaint submitted by a designated consumer body that ‘any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers’. The super-complaint process is intended to be a fast-track system for designated consumer bodies to bring their concerns to the attention of the competition authority and the regulator bodies (OFT, 2003).

¹³⁷ These leads are then collected into a database and cross-checked against other information about the markets in question, such as productivity levels, concentration, or the history of the entry and exit, to refine the possible areas of study (See OFT, 2010 and OECD, 2008).

¹³⁸ See <https://www.gov.uk/government/publications/cma-strategic-assessment>.

Since in many jurisdictions, e.g. UK, Spain, France, the US and the EU, economic actors can provide formal and informal suggestions to the competition agencies on markets to study, informing them about what markets studies are, can increase their willingness to identify problematic areas to study. Often economic agents are more aware of problems in markets that affect competition than competition agencies themselves; hence their suggestions can be very fruitful. For this reason many agencies have guidelines that explain what market studies are, what outcomes they can lead to and what benefits they can generate.

The discussion and selection of possible market studies need not be conducted behind closed doors. Stakeholders can help identify which markets might be worth studying, so public discussion of possible candidate markets can help bring forth information on possible problems. The US agencies often involve stakeholders before initiating a study, usually by announcing publicly that they are considering studying a specific market, thus providing an opportunity for economic actors, as well as for the general public, to provide comments and suggestions.

In the UK, for example, the CMA (and the OFT before it) can conduct what are called “calls for information” which help the authority to determine whether a market study is justified. Through these calls for information the CMA engages with stakeholders by seeking their views and requesting information.

Prioritisation

The selection process identifies the markets that could be studied. Among these agencies have to select those that they will actually study, so as to allocate efficiently their limited resources.

The ICN report provides a long list of factors used in this process and shows that among the factors that most influence the priorities of competition authorities on the selection of which studies they will develop are: “impact on consumers”, “market importance” and “market structure” (ICN, 2009).

Many authorities would like to be able adopt a mechanical approach to the selection or the prioritisation of the markets to study. In 2004 the OFT commissioned an economic consultancy to generate an empirical tool that could be applied in a top-down way such that available and relevant data across all markets or sectors could be screened to identify problem markets. The consultancy produced a set of indicators and a methodology to aggregate them, but noted that a top-down approach based on cross-industry databases has a number of severe limitations. While top-down indicators could play a part in selecting and prioritising markets, such

information needs to be used alongside the more traditional bottom-up approach based on other sources of intelligence and analysis.¹³⁹

Hence, following the above attempt, in the UK, the process is now based on the initial selection described in the previous section, whose results are then considered against the CMA's prioritisation principles, which are: (i) expected impact on consumer welfare and the expected additional economic impact on efficiency, productivity and the wider economy, (ii) strategic significance - in the sense that it ties in with its strategy and objectives and the possible impact on other lines of work is considered, (iii) likelihood of a successful outcome, (iv) resource implications, namely whether the human and financial resource requirements of the work are proportionate to the benefits it is likely to yield.¹⁴⁰ This analysis is not based on high level opinions, but on actual evidence, i.e. the calculation of the expected impact.

Pre-launch

Once the market studies have been prioritised the resources to be allocated to the project are chosen and assigned. Market studies may either be performed fully in-house or be contracted out to consultants or academics in total or in parts.¹⁴¹ The latter may have the advantage that a specialised pool of knowledge possessed by experts in a particular field, area or sectors (such as very theoretical study), which the competition agency might not have is made available, leading to a more informed market study outcome. A disadvantage of engaging external personnel is that the acquired know-how will not all remain within the agency. Issues of confidentiality of the data collected and of possible conflicts of interest (actual and potential) may also have to be considered in this context. Given

¹³⁹ OFT (2004). See also OECD Report, Ex officio cartel Investigation and the Use of Screens to Detect Cartels, Paris (2013), available at [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2013\)14&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2013)14&docLanguage=En).

¹⁴⁰ CMA (2014b), pp. 5 - 6.

¹⁴¹ In some cases, one can also consider bringing in the agency expertise from other parts of the government which hold relevant knowledge. For example, the European Patent Office (EPO) delegated a member of its staff to help the European Commission with the analysis of patent-related issues in the EC sector inquiry into pharmaceuticals. These cases may be rare but are a way to obtain specialised expertise to avoid some of the potential drawbacks discussed in the text.

the wide range of issues covered any team dedicated to a market study should include both legal and economic staff.¹⁴²

When time and resources are available, some agencies do additional analyses during the pre-launch phase, including: (i) further consideration of the scope of the project - setting out the theory of harm, identifying the issues that need to be answered and outlining the work to be undertaken to answer these issues; (ii) risk assessment – developing an analysis of the risks affecting the study and ways to mitigate them; (iii) stakeholder assessment – mapping stakeholders and developing a stakeholder management strategy; and (iv) making a recommendation on governance and quality assurance structures.

Launch

In general, market studies are launched with a public announcement (as the aim is to encourage stakeholders to come forward with information). For example, at launch the CMA publishes a notice, which includes information on the scope of what it intends to study, the period during which representations may be made, and the timeframe within which the study will be completed.¹⁴³ Such a launch raises the profile of the market study and may widen the pool of stakeholders actively interested in participating in the study. This has also the further advantage of increasing transparency.

When an authority has the powers to inspect the premises of companies to gather information for purposes of a market study, as is the case of the European Union and there is a suspicion that undertakings are likely to withhold important information,¹⁴⁴ it may decide to launch a market study with a dawn-raid.

¹⁴² In larger authorities, it is also possible to bring into the project a varied set of expertise and skills. As today's markets are often highly sophisticated, the team can also include experts in the field of the inquiry. The IT strategy, both for collecting data and for keeping the stakeholders informed throughout the process, must be reflected upon from the very early stages of the process. IT and data collection experts may also need to be part of the team involved in the market studies.

¹⁴³ See CMA (2014) and OFT (2010).

¹⁴⁴ Article 17 of Council Regulation 1/2003, which lays down the legal framework for the Commission to apply the EC Treaty's antitrust rules, provides that the Commission can undertake a sector inquiry when the trend of trade, price developments or other circumstances suggest that competition in a given sector might be distorted. The investigative powers available under this inquiry include the authority to undertake

Also agencies in the EU, France and Canada publish a notice when a new study is launched. However, unlike the UK authority, they do not make any external commitment with respect to the duration of the study. Nevertheless all these agencies commit internally to complete their study in a period that lasts between 6 and 18 months. They all agree that it is not possible to keep stakeholders actively engaged and interested for longer periods of time, and this may compromise the success of the study. In addition, market conditions can change over time and a market study that lasts for too long can risk becoming quickly obsolete.

The CMA is the only authority, of which we are aware, that has a statutory obligation to complete a market study (i.e. to publish a market study report setting out its findings and the action, if any, it proposes to take) within 12 months of the publication of the notice of its launch, and a market investigation within 18 months (though the latter limit can be extended by 6 months).

Hypotheses

Just as competition authorities typically set out theories of harm in competition enforcement cases, a market study should normally start with some hypotheses on what sort of problems might exist in the market under study. It is rarely useful to simply collect information without considering what questions the information should help to answer. Such hypotheses need not be definitive and new hypotheses can emerge during the course of the investigation, particularly in response to information (especially complaints) provided by market participants.

In establishing hypotheses on how competition might be restricted in a market as a result of government policy (particularly as a result of badly-designed regulation), the OECD's Competition Assessment Toolkit¹⁴⁵ provides a checklist and examples of ways in which regulations could exert anti-competitive effects. The checklist identifies the main ways in which the regulatory context can restrict or distort competition: (i) by limiting the

inspections of business premises in the framework of the inquiry. Article 18 of this Regulation specifies how the Commission can get information, either by means of a simple request on the basis of Article 18(1) or by requiring undertakings to provide information on the basis of Article 18(3).

¹⁴⁵ See www.oecd.org/competition/assessment-toolkit.htm for information about the OECD's Competition Assessment Toolkit, which was designed to help governments to eliminate barriers to competition by providing a method for identifying unnecessary restraints on market activities and developing alternative, less restrictive measures that still achieve government policy objectives.

number or range of suppliers; (ii) by limiting the ability of suppliers to compete; (iii) by reducing the incentive of suppliers to compete; or (iv) by limiting the choices and information available to customers.

Explicitly or implicitly, a hypothesis that competition might not be working well requires a comparison to a market in which competition is working well. In general, this should not be a ‘perfectly competitive market’ that reflects the ideal in economic theory. Real markets rarely exhibit those characteristics, but the competition authority should identify how it would expect a “well-functioning market” to work. For example, one in which customers face low costs to switch suppliers, where there are low barriers to entry, where no firm earns persistently high profits, and the like.

Information collection

Not all competition authorities have the powers to request data and other information for market studies. However, a general consensus seemed to arise during the 2008 OECD Roundtable on the desirability to have formal investigative powers, as these allow for the collection of important information that might otherwise not be obtained.¹⁴⁶

The US FTC, the CMA, the French and the Spanish authority, all have the powers to compel individuals and businesses to provide information and documents within a specified timeframe and can impose fines if their requests are not appropriately satisfied.¹⁴⁷ These agencies claim that they employ these information-gathering powers rarely, and always try first to obtain any information on a voluntary basis. They argue that voluntary participation underlines the difference between market studies and competition law investigations and helps to keep a constructive and collaborative relationship with stakeholders. However, they maintain that having these powers is very useful, because the threat of their use and of possible imposition of the ensuing sanctions, acts as a powerful deterrent and enhances co-operation.

¹⁴⁶ The UK submission does acknowledge this lack of formal investigatory powers, however, as a possible explanation for why it does not have any enforcement actions resulting from market studies. See p.126 of OECD, 2008.

¹⁴⁷ Note that the CMA have been given these statutory powers only recently, while the OFT could only rely on voluntary compliance with its requests. The CC instead was empowered to require information and the attendance of witnesses, and the provision of false or misleading information to the CC was treated as a criminal offence, regardless of whether that information had been provided voluntarily or in response to a statutory notice.

One warning that comes from the most experienced agencies is that information requests, whether compulsory or voluntary, should be carefully gauged. Indeed they impose a burden on stakeholders that, if excessive, can render stakeholders uncooperative with, even hostile to, the agency with respect to the study and to its activities more generally. Similarly, ill-designed questionnaire can backfire and overburden not only the stakeholders but also the agencies, which need to process the information gathered. Hence, when possible other sources of information should be used before sending out a request to businesses, such as publicly available information or information already held by other public bodies. Sometimes dataset can be purchased from commercial providers.¹⁴⁸

Designing information requests can require at times some collaboration/engagement with recipients to determine whether they have the information, in what form it is held and how burdensome it would be to gather it. Box 5 explains how in the US information requests are regulated to ensure that they are not too burdensome.

An important factor to consider when making a request for information is that some of this information can be confidential and that the risk that it may be divulged to third parties can refrain economic agents, in particular businesses, to voluntarily provide it. To avoid such an outcome and ensure maximum co-operation, agencies should provide appropriate assurance about the protection provided to confidential information.

All the most experienced agencies provide protection against public disclosure of confidential information. Further, some agencies (e.g. Canada and UK) often allow affected parties to review the market study reports before publishing them, in order to allow them to identify any confidential information, as well as any factual errors.

¹⁴⁸

OECD 2008, p. 147.

Box 5. The US Paperwork Reduction Act

The studies conducted by the [US] Antitrust Agencies may be subject to the Paperwork Reduction Act, 44 U.S.C. §§ 3501-20, which requires federal agencies to inform the public about the nature of the study and requires agencies to “maximise the practical utility of and public benefit from information collected.” 44 U.S.C. § 3504(c)(3)-(4). The Act also requires federal agencies to consider methods of collecting data that reduce the burden on industry members or other suppliers of data. The Act is intended to reduce the burden on companies and individuals of (1) collecting information, including training employees if applicable, (2) preparing information in the format required by the agencies, and (3) if applicable, consulting with a company’s legal department regarding the collection requirements.

If the Paperwork Reduction Act applies, the agency must submit its plans for collecting the information to the Office of Management and Budget (“OMB”), which is part of the Executive Office of the President and has a role in supervising executive branch agencies. OMB has issued guidelines that cover a wide range of issues such as the agency’s choice of methods for conducting the survey, sampling techniques, modes of data collection, questionnaire design and development, and statistical standards.

The OMB guidelines include criteria for determining when a study will “maximise public utility.” According to those criteria, the agency must “justify why the information is needed and how it furthers the agency’s goals.” When appropriate, the agency should “highlight the knowledge gaps that the information collection is designed to address,” and must demonstrate a “direct connection between the information needs and specific research questions.” The agency must also ensure that the information collected does not duplicate other information available to the agency.

The Paperwork Reduction Act imposes a number of procedural requirements on federal agencies. The agency must publish an initial public notice announcing that OMB clearance is being sought, and include a discussion of the general design of the study, the benefits to the public, and an estimate of the anticipated burden in terms of hours and cost. The public has an opportunity to submit comments to the agency on these topics. The agency then publishes a second notice responding to any comments submitted and seeks further comment from the public. At the same time, the agency submits to OMB the sample requests for information, notices, comments, and additional documentation. OMB has up to 60 days to render its decision on the agency’s proposed collection of information and often will provide input on the method of collecting data, the design of the survey, and other issues covered by its guidelines.

Source: OECD, 2008, US Contribution, pp 149-150.

Jurisdictions also differ on whether authorities are allowed to use for one purpose (e.g. to investigate an enforcement case) information collected for another one (e.g. to support a market study). Then ICN Report showed that most jurisdictions use information from market studies to conduct enforcement (ICN, 2009). But in some jurisdictions this link is subject to some additional safeguards, at least on the admissibility as evidence of information collected for market studies from private agents. In such cases, some jurisdictions require the collection of new evidence under the enforcement actions' procedural rules. This guarantees a fair trial, without preventing the competition authority to act to remedy the failures detected by the market study.

Just as in an enforcement exercise, information can be obtained from many sources. Obviously, existing suppliers in the market will hold important information. New entrant suppliers can often be particularly useful sources of (possibly self-interested) information about barriers to entry and to expansion, and about the behaviour of incumbent. Customers represent the constituency that is often of greatest interest to the competition authority, as do large individual customers. If time and resources permit, market studies can provide scope for customer surveys, whether carried out informally (in-house for example) or designed and run by professional market research organisations¹⁴⁹. Finally, in some cases suppliers who have exited the market (or who have tried to enter but failed) might be particularly informative.

Analysis and hypotheses testing

Once the information has been collected, the team conducting the market study should assess it to determine if it is sufficient for the analysis and if it is reliable. In particular, the possible presence of a response bias might be taken into account, as certain respondents may have an interest to influence the outcome of the market study.

Data on market outcomes – particularly pricing and profitability – should be interpreted with great care. Politicians and the media often appear to believe that competition assessment is primarily a matter of measuring the gap between revenues and costs, but competition experts are well aware that neither of these can easily be measured unambiguously, and that, even if a firm has been making high profits, there can be reasons for this that do not imply a failure of competition (e.g. the firm is particularly innovative or benefits from superior management). The

¹⁴⁹ OECD, 2008, p. 125.

OECD's roundtable discussion on Excessive Prices (OECD, 2011) provides a detailed discussion of the complexities of pricing and profitability analysis.

Any investigation of possible problems in a market is implicitly comparing that market to an alternative market that works well. This can be made quite explicit by collecting data on a related market that is deemed to be performing well. The comparator market can be a separate geographic market in which products and demand characteristics appear to be similar to one under exam – such as a market for the same products in a different region of the authority's jurisdiction.

Often markets are national in extent, so comparisons can only be made with foreign markets. These can still be highly informative, but authorities should be aware that many factors can vary between markets in different countries, such as tax regimes, laws and regulations. Hence a proper comparison must take account of these (or at least leave some margin for unobserved differences). In particular, a simple comparison of international prices that shows a differential should not be taken to demonstrate a competition problem, although a large gap does indicate that further research to understand its causes is called for.

It is also important to consider the dynamics of a market, i.e. how it changes over time. A snapshot of a market at a specific point in time might be misleading, especially if the products or service sold change quickly as a result of innovation, or customer tastes vary frequently. In contrast, stable market shares or the continued presence of large incumbents – especially in the face of changing technology – could indicate that competition is not effective.

There has to be an iterative process between information collection and hypothesis testing. For example, a finding that there is little new entry should lead to an examination of barriers to entry, and a finding of low switching rates should induce to consider the existence of switching costs as well as to determine the level of customer loyalty and/or the presence of other behavioural reasons that may explain these rates.

In general, the analysis involved in a market study should require the same tools that competition authorities employ in investigating enforcement cases. Market definition, for example, is usually a tool, as without it, it is hard to assess market power and it is hard to say which set of products or customers would be affected by a particular set of circumstances. The OECD's roundtable discussion on Market Definition (OECD, 2012d) provides a detailed discussion of this analytical tool. Similarly, it will normally be important to understand whether any of the market participants is likely to have market power.

Design of recommendations

Once the analysis is completed, the appropriate outcome has to be identified. Unless the result of the study is a “clean bill of health”, or a reference to undertake a market investigation, all the other outcomes involve the formulation of a set of recommendations.

These recommendations suggest solutions to address the causes of the competition problem(s) that have been identified during the study. Hence, in order to design recommendations it is necessary to have reached clear conclusions on what are the causes of the problems and on who can resolve them, i.e. who should be the recipients of the recommendations.¹⁵⁰

The identification of the appropriate recommendations is highly dependent on the fact and the context of the market study and requires an exercise of judgement on the part of the agency. Nevertheless there are some general criteria that should be taken into account when developing recommendations. The UK suggests the use of these criteria for the choice of remedies for market investigations, but they are general enough that they can also be followed in the design of recommendations issuing from market studies:

- Recommendations should be as comprehensive as possible, so that all the causes of the competition problem(s) are fully eradicated.
- Recommendations should be effective, which implies that they should have an impact on the problem identified within a limited timeframe - since there are no obligations on the recipients to act upon the recommendations, it is important to consider not just their effectiveness in terms of ability to address the problem, but also the likelihood that they have of being accepted and applied.
- Recommendations should be proportionate; hence they should not produce disadvantages or costs that are disproportionate to their aim, and should always be the least onerous, if there is a choice between several effective options.¹⁵¹

¹⁵⁰ A study can lead to numerous recommendations that can be directed all to one recipient, or to different ones.

¹⁵¹ Taking no action should always be considered among the possible alternative options.

Consultation

Before deciding on the recommendations it would be prudent to do some road-testing. This can be done through, for example, economic modelling or tests under controlled circumstances. This helps to reduce unintended consequences to the extent possible. The preliminary results of the analysis and the ensuing recommendations should be exposed to internal debate and challenge within the competition authority, and should be shared with the stakeholders.

The consultation of stakeholders at an advanced stage of the market study is very important, as it allows the agency to verify the workability and effectiveness of the recommendations by exploiting the market knowledge and expertise that many stakeholders have.

When the agency has no powers to impose the recommendations that emerge from its market studies, it has to rely on the stakeholders' willingness to accept and implement them, or to put pressure on others for the recommendations to be accepted. Preparing stakeholders for the outcome, as well as discussing its feasibility with them, can help to create the right climate and support.

Roundtable discussions or workshops may be a good way to share and debate findings and potential recommendations. Some authorities have found publishing an interim, or draft, report to be a useful means by which both obtain feedback from stakeholders.

The CMA is a good example of an agency that tests the recommendations of its market studies with key stakeholders before finalising them. The authority's experience is that an early interaction with stakeholders on this important element, conducted with an open-mind and willingness to change the course of action imagined by the team, has a number of advantages. First, it allows the authority to identify potential problems with the recommendations it is suggesting, such as costs it had not considered, or practical problems related to their implementation. Second, it is a way to identify better alternative solutions that the team may not have identified. Third, if the authority must rely on the co-operation of some stakeholders to achieve its desired outcome, it helps it to understand the degree of acceptance for the proposed recommendations, and to prepare, if necessary, for opposition and critiques (or may lead the authority to moderate its recommendations). Fourth, it prepares all stakeholders for the recommendations and can thus contribute in building support for them.

DG Competition also carries out an extensive consultation on the preliminary findings of its sector inquiries. For example, in the case of the pharmaceutical sector inquiry, more than 70 submissions were received.

Respondents represented a wide variety of stakeholders, including producers of originator and generic medicines, business associations, business confederations, public bodies (such as the European Patent Office), associations of sickness funds, associations representing intellectual property lawyers, law firms and academics.

Publication

The final report should be drafted with the review of both lawyers and economists, checked to ensure it does not include any confidential information, and then published. The publicity that may be given to the study may depend on strategic considerations on the part of the authority, as in certain instances more publicity may better further the goals of the agency.

The UK considers very important the engagement with the press, as it sees public opinion as one of the key drivers of change. The experience of the agency suggests that how the study is portrayed by the press can “make or break” a study. Careful press handling, in their view, is therefore very important. Hence they hold a detailed press briefing every time a market study is completed and its results announced.

Follow-up work

Except for the case of market investigations, agencies have no power to enforce their recommendations and have to rely on the stakeholders’ willingness to implement them. This implies that stakeholder engagement should not end with the study and that some resources have to be devoted to follow up work once the results are published. For example the Competition Bureau in Canada:

- Dedicates a team to take forward follow up work;
- Issues press notices;
- Holds press conferences;
- Utilises public speaking opportunities;
- Makes use of third party advocates;
- Uses advocacy within government; and
- Maintains contact with key stakeholders.

Other agencies, such as the US FTC, do not always have a team that follows up the recommendations of each specific study, but their staff still exploits all speaking opportunities to put pressure for the realisation of

their recommendations. The CMA also works actively with stakeholders to ensure that the recommendations they have issued are accepted. They handle requests for clarifications from the affected stakeholders – some of which may be official, such as appearing in front of government commissions and committees – keep the press interested in the topic and respond to any negative press coverage, and work with stakeholders interested in the outcome to put pressure on those that should implement the recommendations. Often some stakeholders, such as trade associations and consumer associations, have the means to create considerable pressure in favour of recommendations and the UK tries to exploit this whenever possible.

Ex-post evaluation

The ex-post assessment aims to determine if the study reached the objectives it was aimed to achieve. This permits better design of future interventions by testing the validity of the analyses performed, the robustness of the conclusions reached and the effectiveness of the solutions proposed, and learning from past experiences.

Agencies are increasingly undertaking ex-post evaluation of their work as they understand the value of these exercises, but also because more tools and techniques to perform them are being developed. The OECD's Competition Committee has identified ex-post evaluation of competition interventions – enforcement and market studies alike – as one of its strategic priorities. It has held a series of discussions both on the overall purpose and use of evaluation and also on specific tools and techniques to use in conducting such evaluations. In 2015, the OECD will publish a reference guide on how to conduct ex-post evaluations that encapsulates and builds upon this advice¹⁵².

The UK has been one of the pioneers of ex-post evaluations and they commit to evaluate at least one market study every year. They have found this exercise to be very useful because it allows them to estimate the effective benefits brought to consumers by their recommendations and thus to raise awareness about their value and importance.

¹⁵² All of the OECD's publications relating to evaluation of competition interventions are available on its web site, at www.oecd.org/competition/evaluationofcompetitioninterventions.htm. The Manual on ex-post assessment will also be available on this page, once it is published in 2015.

9. CONCLUSIONS AND AREAS FOR IMPROVEMENT

On the basis of the information collected on the legal and institutional framework, as well as on the practice, of the six Latin American countries and of some of the most experienced jurisdictions, the OECD has identified a number of areas where improvements could be made. These areas concern:

- The legal powers of the competition agencies;
- The resources of the agencies;
- The importance of prioritisation;
- The relationship with stakeholders;
- The role of the government in ensuring that market studies are useful and successful;
- The ex-post assessment of market studies.

The legal powers of the competition agencies

The powers to perform market studies

Agencies should have the legal power to undertake market studies and issue recommendations to address any obstacle to the correct functioning of markets they may identify. This power should be clearly stated in the law that determines their role, duties and responsibilities.

However, some of the nine agencies examined do not have such powers. As a result, either these agencies do not undertake any market study, or they perform them under their general powers to ensure free market competition, but the latter engenders confusion with their more traditional enforcement activities and should be avoided. This situation creates uncertainty on the powers of the agency, and exposes the activities of the agency to challenges in court.

Hence, we recommend that the related laws in Chile and Costa Rica should be amended to introduce a clear provision that allows their

competition agencies to undertake market studies and issue recommendations to remove any obstacle to the functioning of the markets studied.

Costa Rica and Chile should grant to COPROCOM, SUTEL and FNE express legal powers to undertake market studies and issue recommendations.

The powers to request information

Agencies should also have the legal power to compel the provision of the information that is necessary to perform the analysis of the selected markets from private firms and public bodies (including ministries, local authorities, government agencies and sector regulators). Without such powers performing market studies may prove difficult, as agencies have to rely on the willingness of market players to co-operate, or on publicly available information. This, at best, slows down their work and, in many cases, actually impedes a thorough assessment of the state of competition in the selected market(s). The experience of many experienced agencies, as described in Chapter 8, shows that even if these powers are rarely used, their existence acts as a strong incentive on market players to be co-operative.

Only COFECE and IFT in Mexico and, INDECOPI and OSIPTEL in Peru have express information gathering powers for conducting market studies. Almost all other authorities, with the exception of the FNE, can request this information under their general investigatory powers, which are not necessarily related to their authority to conduct market studies. This weaker legal framework creates a risk of judicial challenge. We thus recommend that the related laws in Costa Rica, Colombia, Chile and Panama should be amended to grant competition agencies the power to compel the provision of information necessary to undertake market studies from private firms and public bodies.

The power to compel the provision of information, in order to be effective, should be supplemented with the power to impose sanctions if the information is not provided, or not delivered within the timescale set by the agency, or it is false or misleading. These sanctions should be proportionate to the gravity of the behaviour, but nonetheless adequate to ensure compliance with the information requests. If sanctions are too small, they do not deter agents from not providing complete and accurate information in a timely manner, thus obstructing the work of the competition agencies. We recommend that all agencies should have clear and express legal authority to impose adequate sanctions if information requests for market studies are not complied with.

Agencies, on their part, should commit to make adequate and proportionate use of their information gathering power and send information requests only when necessary. For example, they should consider whether informal requests are sufficient before issuing formal ones. And they should also commit to undertake every effort to ensure that compulsory information requests are not too burdensome for the recipients.

To limit the use of compulsory information requests and to favour a co-operative approach, competition agencies should consider setting up appropriate agreements with other public bodies (especially sector regulators) with respect to information sharing.

Clearly, as a counterbalance to this power, agencies should ensure that appropriate rules and procedures are in place against any public disclosure of confidential and sensitive information that may be provided by market players during market studies. Most agencies have them in place, but they should all ensure that stakeholders are appropriately informed about their existence to encourage co-operation.

Panama, Costa Rica, Chile and Colombia should provide clear and express legal powers to their respective competition authorities to compel the provision of the information from private firms and public bodies for the purpose of conducting market studies.

The competition agencies of Panama, Costa Rica, Chile and Colombia should be granted the express power to impose adequate sanctions if compulsory information requests for market studies are not complied with.

All agencies should ensure that they have in place rules and procedures against any public disclosure of confidential and sensitive information that may be provided by market players and by other government agencies, as part of a market study, and ensure that stakeholders are appropriately informed about their existence to encourage co-operation.

Resources

In order to make an effective use of this advocacy tool, agencies should have enough financial and human resources to be able to regularly undertake market studies without this having a negative impact on their essential work on merger control and competition law enforcement.

Two of the nine agencies have a small budget relative to the size of their economy, COPROCOM and ACODECO (see Annexe).¹⁵³ Governments should consider the allocation of resources with a view to the relevant role competition agencies play in the functioning of a market economy. We recommend that these two agencies should receive adequate financial resources to undertake market studies.

SIC has a dedicated team for market studies, but this team is rather small and it would benefit from increased resources. We recommend that SIC receives resources to strengthen its ability to perform market studies.

While it is not necessary that the agencies' resources are used to create a unit dedicated solely to market studies, the establishment of a separated and dedicated unit to market studies may have the advantage of generating the necessary institutional focus towards this activity and to develop the skills required to perform the studies. Each agency, therefore, should choose the organisational set-up it prefers.

Regardless of the institutional setting, it is key to the success of market studies that staff, who will be responsible for delivering market studies, receives regular trainings on the procedures and methodologies involved with market studies.

All countries should commit enough financial and human resources to allow their competition agencies to regularly undertake market studies

SIC, ACODECO and COPROCOM would benefit from having more resources to employ for undertaking market studies.

All agencies should regularly train the staff responsible for performing market studies.

The importance of prioritisation

Resources have to be appropriately used and in order to do so it is necessary to have an adequate process of selection and prioritisation of the markets to study. Since not all markets raising concerns can be studied,

¹⁵³ The OECD's 2014 Peer Review of Competition Law and Policy in Costa Rica highlights, among its main recommendations on how to strengthen the country's competition institutions, the need to increase COPROCOM's budget. "The main weakness of Costa Rica's competition regime has been COPROCOM's lack of sufficient financial and human resources to effectively enforce competition law. Therefore, it is advisable to significantly increase said resources so that they are similar to other economic regulatory agencies in Costa Rica" (OECD, 2014 p. 61).

agencies have to set up a system for setting priorities among all the problematic markets they may have identified. This system ensures that the best use is made of agencies' limited resources.

All agencies appear to employ some criteria for prioritising the studies to undertake, but not all of them use these criteria in a systematic way. Hence, it would be advisable that all agencies have in place a clear set of criteria to determine which markets they will study. To ensure legal certainty and to improve relationships with stakeholders, it is advisable that the agencies make these prioritisation criteria public.

All agencies should ensure they have in place a clear set of criteria for setting priorities among all the problematic markets they may have identified.

Relationship with stakeholders

Market studies are a competition policy tool that complements the more traditional ones – i.e. merger control and investigations of competition law violations – but that also differs from the latter in their objectives and outcomes.

It is important that all possible stakeholders, as well as the public opinion and the media, understand these differences in objectives and outcomes. Clarity about the purpose and the possible outcomes of market studies allows stakeholders to be better engaged, while studies are being carried out, and information or feedbacks are sought. Greater awareness about the non-binding nature of the recommendations allows stakeholders to form appropriate expectations about the outcome of the studies and helps to better involve the media, consumer associations and business organisations, whose support and influence can help in ensuring that recommendations are implemented.

The first step that can be undertaken to increase awareness about market studies is to release publicly clear and simple guidelines on what market studies are and what they can lead to. Ideally this should be made available on the agencies' websites. This short non-technical document should explain why market studies are undertaken, how the markets to be studied are selected, what legal powers the agency has, how stakeholders can be involved, and what outcomes can studies lead to.

An additional step can consist in issuing a press release when a new study is started. This press release can inform stakeholders, the media and public opinion at large, about: i) the market(s) covered by the study, ii) the concerns that have led the agency to start the study, and iii) the possible outcomes. Ideally the notice should also include a tentative timetable, to give some clarity on the timeframe, and an indication of a point of contact

in the agency for all those who wish to provide feedbacks, comments or information.

None of the nine agencies has published guidelines on market studies to inform stakeholders. Some of the agencies publish a press notice or an extract of the decision to initiate the market study when they launch a new study, but the information therein provided tends to be very limited. It is advisable that agencies publish a set of guidelines for stakeholders and the general public on what market studies are and that they undertake to publish a press notice at the start of each market study, which includes the information listed above.

Since recommendations arising from market studies are usually not binding, agencies have to build consensus around them to increase the likelihood that they will be adopted. This can be achieved by assessing both the likely benefits and costs of possible recommendations, to show that only the recommendations that generate expected net positive benefits are proposed. Further, consulting with the relevant stakeholders on the benefits, costs and feasibility of possible recommendations permits to consider the views of those who know the market and who will have to implement the recommendations or will benefit from them. This interaction with the stakeholders should help to ensure that the recommendations are designed in the most effective and least costly way. However, sufficient distance should always be kept to avoid being captured by the interest of specific stakeholders.

All agencies should publish guidelines to inform stakeholders about what market studies are and their possible outcomes.

All agencies should undertake to publish a press notice when they launch a new market study, unless this may jeopardise the success of the market study itself. The notice should indicate the market(s) studied, the concerns that have led the agency to start the study, and the possible outcomes. Ideally the notice should also include a tentative timetable and an indication of a point of contact in the agency for all those who wish to provide feedbacks, comments or information.

All agencies should undertake to involve stakeholders in the design of the recommendations arising from market studies and should evaluate the expected cost and benefits of each recommendation before deciding the ones to propose.

Role of government

Sometimes it is possible that policies, laws or regulations in place in a given market create unnecessary obstacles to the working of competition and generate consumer detriment. Independent market studies by the competition authority are very effective in identifying this type of obstacles and, through their recommendations, can suggest effective ways to remove these obstacles. However, the recommendations arising from market studies are usually not binding¹⁵⁴ and if the governments do not seriously consider them, an opportunity to increase competition and to make markets work better is lost.

To ensure recommendations are taken into consideration and acted upon in a timely manner, governments should consider committing to respond to the recommendations directed to them as a result of market studies within a period of maximum six months. The commitment should bind the government to publicly respond to any recommendation directed to it, stating whether and when it intends to adopt the recommendation, and, if it does not, to provide a clear explanation of the reasons that have led it to reject the recommendation.

It might be useful to consider identifying someone in central government that can be made responsible for co-ordinating government responses to recommendations arising from market studies and, ideally, for tracking their progress over the longer term. Such a role may naturally emerge if the government binds itself to responding to recommendations. However, identifying formally someone responsible for playing such a co-ordination role can be very beneficial and can ensure that the process works smoothly and effectively.

In none of the six countries involved in the study governments have made such a commitment. Therefore we recommend that governments should commit to provide a clear public response to any recommendations issued to them as a result of a market study.

The governments of Costa Rica, Chile, Colombia, Mexico, Panama and Peru should commit to publicly respond to any recommendations directed at them arising from market studies, within a period of six months from the date when these are issued. Their response should clearly state for each recommendation whether and when they intend to adopt it and, if they do not, explain the reasons for rejecting it.

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See Chapter on Mexico and Chapter on Costa Rica for cases in which recommendations may be binding.

Ex-post Assessments of market studies

Agencies should consider the benefits of undertaking ex-post evaluations of a set of their market studies, sometime after these have been completed and their recommendations implemented. By examining the impact that the recommendations have had on the relevant markets, it is possible to determine the actual benefits and costs these have brought about and compare them with those expected when the recommendations were proposed. This exercise can provide useful feedback for the future design of recommendations. In addition it can be a useful advocacy tool to show the beneficial effects these studies can have for society. The OECD advocates the systematic ex-post evaluation of policy interventions as a means to improve their quality.

We recommend that all competition agencies, as they gain experience in the field of market studies and their recommendations begin to be implemented, endeavour to regularly perform the ex-post assessments of some of their market studies. The frequency and number of these ex-post assessments will have to be determined by each agency on the basis of the number of studies it undertakes whose recommendations are, at least partially, implemented and of its resources.

All agencies, as they gain experience in the field of market studies and their recommendations begin to be implemented, should endeavour to perform the ex-post assessment of some their market studies.

Box 6. Summary of areas for improvement**The legal powers of the competition agencies**

- Costa Rica and Chile should grant COPROCOM, SUTEL and FNE express legal powers to undertake market studies and issue recommendations
- Panama, Costa Rica, Chile and Colombia should provide clear and express legal powers to their respective competition authorities to compel the provision of the information from private firms and public bodies for the purpose of conducting market studies.
- The competition agencies of Panama, Costa Rica, Chile and Colombia should be granted the express power to impose adequate sanctions if compulsory information requests for market studies are not complied with.
- All agencies should ensure that they have in place rules and procedures against any public disclosure of confidential and sensitive information that may be provided by market players and by other government agencies, as part of a market study and ensure that stakeholders are appropriately informed about their existence to encourage co-operation.

Resources

- All countries should commit enough financial and human resources to allow their competition agencies to regularly undertake market studies.
- SIC, ACODECO and COPROCOM would benefit from having more resources to employ for undertaking market studies.
- All agencies should regularly train the staff responsible for performing market studies.

The importance of prioritisation

- All agencies should ensure they have in place a clear set of criteria for setting priorities among all the problematic markets they may have identified.

Relationship with stakeholders

- All agencies should publish guidelines to inform stakeholders about what market studies are and their possible outcomes.
- All agencies should undertake to publish a press notice when they launch a new market study, unless this may jeopardise the success of the market study itself. The notice should indicate the market(s) studied, the concerns that have led the agency to start the study, and the possible outcomes. Ideally the notice should also include a tentative timetable and an indication of a point of contact in the agency for all those who wish to provide feedbacks, comments or information.
- All agencies should undertake to involve stakeholders in the design of the recommendations arising from market studies and should evaluate the expected cost and benefits of each recommendation before deciding the ones to propose.

Role of government

- The governments of Costa Rica, Chile, Colombia, Mexico, Panama and Peru should commit to publicly respond to any recommendations directed at them arising from market studies, within a period of six months from the date when these are issued. Their response should clearly state for each recommendation whether and when they intend to adopt it and, if they do not, explain the reasons for rejecting it.

Ex-post Assessments of market studies

- All agencies, as they gain experience in the field of market studies and their recommendations begin to be implemented, should endeavour to perform the ex-post assessment of some their market studies.

ANNEXE.

Comparative information on the 6 countries

	Chile	Colombia	Costa Rica		Mexico		Panama	Peru	
	FNE	SIC	COPROCOM	SUTEL	COFECE	IFT	ACODECO	INDECOPI	OSIPTEL
Resources of the Competition Authority in 2014									
Agency budget (USD MM)	10.1	49	0.7,4	18.8	22	149	10.6	53.5	27.2
Staff (professional and support)	100	x	15	123	285	1022	582	1315	261
Budget of division in charge of market studies (budget also cover other activities)	x	8.8	x	3.3	x	7.5*	0.78	1,4**	1,8
Staff of division in charge of market studies		58	x	28	x	97	8	x	32
Staff dedicated mainly to market studies	8	4	4	x	7	x	x	9	x
Specific legal authority for market studies (excluding enforcement and investigation powers)									
Express authority	x	✓	x	x	✓	✓	✓	✓	✓
Date of introduction	n.a	1992	n.a.	n.a	2011	1995	1996	1992	2002
Authority to request information from public sector for market studies	✓	✓	x	x	✓	✓	✓	✓	✓
Authority to request information from private agents for market studies	x	✓	x	x	✓	✓	✓	✓	✓
Authority to compel such private agents	x	x	x	x	✓	✓	x	✓	✓
Applicable maximum fines (USD)	-	-	-	-	15,200/day	15,200/day	-	67,857	19,625
Experience conducting market studies									
Number of studies in last 5 years	7	11	7	0	6	0	5	9	11
Availability of guidance for stakeholders	x	x	x	x	x	x	x	x	x
Defined term or timeline for studies	x	x	x	x	x	x	x	x	x
Studies are public	✓	✓	✓	-	✓	✓	✓	✓	✓

ANNEXE

	Chile	Colombia	Costa Rica		Mexico		Panama	Peru	
	FNE	SIC	COPROCOM	SUTEL	COFECE	IFT	ACODECO	INDECOPI	OSIPTEL
Results, follow-up and government commitments regarding market studies									
Systematic cost/benefit evaluation of recommendations	x	x	x	-	x	x	x	x	x
Evaluation of studies' actual impact	x	x	x	-	x	x	x	x	x
Opportunity for stakeholders' feedback	✓	x	x	-	x	x	x	x	x
Government commitment towards recommendations	x	x	x	x	x	x	x	x	x

Source: Information provided by the Competition Agencies

n.a. Not applicable

*Human and financial resources of the Investigating Authority and the Economic Competition Unit combined. The resources from the Research Centre are not included.

** Human and financial resources of the CLC and GEE combined. The resources from the SDC are not included.

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