



**INTERNATIONAL COMPETITION NETWORK**

**Market Studies Project Report**

*Prepared by*

**ICN ADVOCACY WORKING GROUP**

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# 1 EXECUTIVE SUMMARY

## Introduction

1.1 The ICN Advocacy Working Group's Market Studies Project (the Project) was proposed in June 2008. The aim of the Project was to survey and analyse ICN members' market studies experience, with a view to considering further work by the ICN in this field, possibly including:

- a guidance document for ICN members on market studies practice and process, and
- an examination of ICN members' experience in specific sectors of the economy.

1.2 In some countries, market studies have a long history. In the United States, they were initiated at the beginning of the 20<sup>th</sup> century, and in Japan, they have been conducted since 1947. Worldwide at least 40 competition authorities (out of the 100 plus ICN members that enforce some kind of competition law) use market studies as part of their portfolio of tools. For many of these authorities, market studies are a relatively new tool.

1.3 There has been one significant worldwide comparison of market studies, conducted by the OECD by way of a Roundtable on Market Studies in June 2008.

1.4 The OECD Roundtable concluded that market studies were generally performed for one of two reasons: either as a lead-in to enforcement action when anticompetitive behaviour is suspected in a sector but competition authorities do not know the exact nature and source of the competition problem; or as a lead-in for competition advocacy, where no violation of competition laws is suspected but it appears that the market is not functioning well for consumers. This may be due to public restrictions on competition or inefficient market equilibria. In such cases a market study can identify the root causes of any dampening of competition and formulate appropriate remedies. These can include recommendations to government or other decision makers for regulatory or policy change, or encouraging market participants to take voluntary action to stimulate competition.

1.5 Other possible purposes for conducting market studies may be:

- to build technical expertise about markets – this may be particularly useful for markets that are new or fast-moving, or to take account of recent developments

- to address public interest or concern about markets, for example, where there are allegations of anticompetitive conduct or agreements that a market study can reveal to be unfounded
  - to reduce uncertainties about how the authority will apply competition principles – again this may be particularly useful in new or fast moving markets, or those where there have been recent changes
  - to develop thinking about proposals for future regulation so as to be able to advocate to minimise adverse effects on competition.
- 1.6 For those countries with combined competition and consumer authorities, market studies can also be a good way to develop the link between consumer and competition policy.
- 1.7 Internationally, market studies have been used in a variety of ways, including all of the purposes mentioned above. They are a flexible tool that can, when used efficiently and effectively, address a wide range of needs.
- 1.8 Building on the work of the OECD, this Project gathered data on market studies practice among ICN members on the basis of a set of directly comparable datasets relating to the definition and purpose of market studies, powers to conduct studies, their selection, process, and outcomes, and measurement of their impact.
- 1.9 The Project proceeded by way of a questionnaire sent out to ICN members. A total of 39 responses were received from 37 jurisdictions. One of these responses indicated that the jurisdiction concerned does not undertake market studies work, so it is not reflected in the report. The remaining 38 responses were analysed and are summarised in this report.
- 1.10 This report concludes with a number of suggested areas for further ICN work in this field.
- 1.11 Headline findings of this Project are that:
- there are varying formulations of powers to conduct market studies, and to gather information for studies, but there seems no clear need, or appetite, for greater convergence of legislative powers
  - most authorities find that market studies are useful for collecting information and developing thinking that informs their enforcement work

- there is scope for greater transparency on the process and findings of market studies – and being more transparent may help authorities make the most of their studies and any advocacy that comes out of them
- where the success of a study is dependent on follow-up advocacy, it pays for authorities to make smart decisions about the topics they choose to study and the way that they seek to influence decision-makers – a commitment by government to consider market study recommendations may be useful for some authorities
- there may be more scope for authorities to use studies to advocate voluntary changes in business practice where conduct falls short of infringement of competition law
- advocacy may be more successful if authorities have clearly identified the benefits, or have estimated the likely costs and benefits of their recommendations – experience of actually doing this appears largely non-existent or relatively new and this may be a fruitful area for experience sharing.

1.12 The findings of the Project are summarised in more detail below.

#### **Definition and purpose of market studies**

1.13 The Project proposed a draft definition of market studies. Responses indicated broad support (79 per cent) in favour of the draft definition.

1.14 Members were asked to state the purposes for which they conduct market studies, selecting from a list of possible purposes.

1.15 The highest scoring responses were for use of market studies:

- as preparation for intervention in the legislative process
- to enhance knowledge of the sector
- to investigate suspected market failure that cannot be assigned to a specific undertaking.

Use to define markets for enforcement action scored lowest, followed by use for assessing the state of competition in the market.

#### **Powers to conduct market studies**

1.16 Members were asked a series of questions about their overall powers to conduct market studies, and their powers to collect information for market studies.

Satisfaction levels with existing powers were tested, and comments sought as to what additional powers, if any, would be useful.

- 1.17 We learned that there are a range of formulations of powers to conduct studies. Some members have clearly spelled-out statutory powers. Others rely on a general function, or conduct studies without any specific legislative function. Despite this variation, members seem to be broadly satisfied with their powers to conduct market studies, including information gathering powers.
- 1.18 Most respondents (76 per cent of those that responded to the question) can compel the supply of information, but those that cannot seem content with seeking information on a voluntary basis. In addition, some jurisdictions with compulsory powers noted that they do not always use them for market studies.

### **Selection of market studies**

- 1.19 Members were asked about the sources of their ideas for market studies, and the factors that influence selection of a market or practice for study. They were asked to select from a list of possible sources and factors.
- 1.20 Responses indicated a range of sources for ideas for market studies. Just over half of the respondents can be instructed by others to conduct studies. For a few, this is their only source of study ideas, but most are also free to select markets to study on their own initiative.
- 1.21 The two highest scoring factors that influence market study selection were 'impact on consumers' and 'market importance'. The two lowest scoring factors were 'degree of product differentiation' and 'product life cycle'.

### **Market studies process**

- 1.22 Members were asked a series of questions about their market studies process.

Questions covered:

- information gathering
- stakeholder engagement and communication
- timeframes for market studies
- use of third parties to undertake market studies work
- whether members have a standardised process for conducting market studies, and guidance covering this process

- numbers of market studies conducted and resource dedicated to conducting studies
- overall satisfaction with the process for conducting studies.

#### 1.23 Responses indicated that:

- existing market research, administrative data, in-depth interviews and large statistical surveys are the most common ways to collect information, and focus groups and mystery shopping are the least common ways to collect data
- the majority of respondents have used information obtained in their market studies work to inform their enforcement work
- most respondents provide stakeholders with information on the reasons for selecting markets for study, the purpose and scope of the study, and the reasons for recommendations
- fewer give details of the stages involved in the study, the study timetable, any progress reports and the names of members of the study team
- the most common ways to engage with stakeholders are to issue press releases, put information on web sites, hold private meetings with stakeholders and to issue questionnaires
- far fewer respondents hold a public consultation before publishing their findings, or hold public stakeholder meetings, workshops or seminars
- few respondents have to complete market studies within a specified time frame
- just under half of respondents commission consultants to carry out market studies work
- less than half of respondents have a standardised process for market studies, and only about a quarter of those that responded have published guidance
- the level of resource devoted to studies varies quite widely - teams for each study range from one person to 15 to 25 people. Most authorities do not have dedicated market study resource
- the number of studies produced annually varies quite widely from one per year to over 50 per year. The majority of respondents have an average figure of under five per year

- process for carrying out market studies and lack of resources seem to be particular problems for some respondents
- there is a reasonably high satisfaction rating for market studies processes.

### **Outcomes of market studies**

1.24 Members were asked:

- whether they take into account the costs and benefits of any recommendations before deciding on them
- about the range of outcomes that can and do result from their market studies
- whether governments have any obligation to respond to recommendations coming out of their market studies
- to indicate their level of satisfaction with implementation of any recommendations
- to list their techniques for seeking to ensure that any recommendations are adopted
- whether they ever work collaboratively with third parties to help achieve desired outcomes.

1.25 Sixty-six per cent of respondents confirmed that they do take into account whether benefits would exceed costs to business and others when deciding on market study outcomes.

1.26 The outcomes (recommendations and/or other actions) most often identified for market studies were 'recommendations to government for changes to the law', closely followed by 'recommendations to government for changes to policy' and 'competition enforcement'.

1.27 Only 25 per cent of respondents said that government is required to respond to any recommendations coming out of market studies.

1.28 Responses as to how often government implements recommendations, and how satisfied respondents are with implementation, indicate scope for improvement.

1.29 Among the most common ways of seeking to increase implementation levels are government advocacy, using public speaking opportunities, and using the press.



- 1.30 Fifty-eight per cent of respondents have used third parties, on some occasions at least, to help achieve the desired outcomes.

### **Evaluation of individual market studies**

- 1.31 Members were asked whether they evaluate the effect or impact of individual market studies and if so, whether they have a formal process and dedicated team for doing so and what costs and benefits this takes into account.
- 1.32 Most respondents (86 per cent) said that they do review the effect of their market studies work, but most (70 per cent of those that responded) said that they do not explicitly estimate the monetary value of changes in market outcomes coming out of market studies.
- 1.33 Most respondents do not measure or estimate the costs and benefits of individual market studies, though a minority do.

### **Assessment of the market studies tool**

- 1.34 Members were asked to list their three most successful, and three least successful, market studies, and to reflect on the reasons for success or lack of it. They were also asked to list the top three benefits of market studies and to provide details of any stakeholder feedback on market studies process.
- 1.35 Studies were most likely to be considered successful when they led to changes in law or policy that improved competition and/or delivered other consumer benefit. Also important as an indicator of success was that studies led to successful enforcement action.
- 1.36 Studies were least likely to be considered successful when recommendations were not or largely not implemented.
- 1.37 The most commonly acknowledged benefits of market studies were:
- to identify and address market failures
  - to build the authority's knowledge base
  - to address public restrictions on competition by means of advocacy
  - to reach better and more targeted enforcement decisions
- 1.38 Forty per cent of respondents said they had received stakeholder feedback about their market studies work. The feedback provided was mixed, ranging from

positive comments from industry and other bodies about the process followed, quality of analysis and results, to complaints about the cost and time that studies take, criticism of the level of transparency, and outcomes, and queries about the rationale for conducting studies.

### **Markets studied over the last three years**

1.39 Members were asked to list the studies they have conducted over the last three years, providing details of the:

- market studied
- source of the idea
- reason for studying that market
- duration of the study
- value of the sector
- study outcomes
- assessment of outcomes.

1.40 A wide range of topics have been studied over the last three years. Studies in the financial services sector are the most common.

1.41 The commonest sources of ideas for studies over the last three years are:

- authorities' own idea (including complaints received)
- the work or suggestion of other bodies
- external market conditions.

1.42 Among reasons given for studying particular markets over the last three years the most common were:

- to understand market structure (including market power and barriers to entry or expansion)
- to examine the competition effects of conduct or agreements.

- 1.43 The number of studies conducted by individual authorities in the last three years ranged between one and 20, with an average of seven studies conducted each year.
- 1.44 Sectoral values (where provided) were in a wide range from 2.5 million Euros to hundreds of billions of Euros.
- 1.45 The most common outcomes for studies over the last three years were
- recommendations to government for changes in policy
  - recommendations to government for changes in the law
  - initiating competition enforcement action.
- 1.46 Most studies were given no overall rating of satisfaction. Of those that were given a rating, 81 per cent were marked at the higher end of satisfaction.

#### **Suggestions for further work**

- 1.47 There is a diverse wealth of experience in conducting market studies across the ICN membership, and a wide range of practice used to do so. It is hoped that the insights in this report will provide a useful tool for greater convergence, and informed divergence, in what appears to be an expanding field. There is clearly scope for cross-fertilisation of ideas, including on:
- ideas for markets and topics to study – a list of markets studied in the last three years by respondents that supplied this data is attached at Annexe 4
  - the approach to selecting and carrying out studies (and use of study powers)
  - ways to conduct studies efficiently and effectively.
- 1.48 In addition, this Project has identified some areas for possible future work for the ICN on market studies. It has identified a high degree of consensus for future work in two areas:
- Best practice – there appears to be scope for outlining best practice in relation to a number of aspects of the conduct of market studies. The ICN might therefore consider producing a document setting out best practice on these aspects. It could also consider creating a web-based database of market studies carried out and/or being carried out by member authorities.
  - Estimating or measuring impact – few authorities have yet taken steps to estimate or measure the specific impact of their market studies. This may be an

area where those that have developed, or are developing, evaluation programmes could share best practice.

Two further areas have been identified for further discussion as to whether they should be the subject of future work:

- Definition of market studies – this Project has identified broad agreement on the definition of market studies, albeit that there exists a degree of diversity in the purposes for which studies are carried out. This diversity may be such as to make it not worthwhile to seek consensus on a detailed and prescriptive definition at this stage. It is suggested, however, that there is scope for further discussion on the benefits of seeking to achieve greater convergence by means of an agreed definition.
- Sectoral studies – a wide range of markets have been the subject of market studies, reflecting the diversity of the economies of those countries whose authorities conduct studies and the different competition problems which may emerge depending on local circumstances. There may, however, be scope for discussion as to whether there are any sectors that member authorities might, collectively, focus on, and consider the possibility of sharing best practice relating particularly to the study of markets in those sectors.

## 2 INTRODUCTION

2.1 This chapter describes the context for the Project. It discusses the connection between market studies and competition advocacy, gives details of the jurisdictions whose competition authorities are known to conduct market studies, summarises past comparative work on market studies, and sets out the purpose of this Project in the light of that work.

### **Market studies and competition advocacy**

2.2 Market studies are typically a mechanism for competition advocacy. The ICN's Advocacy Working Group has defined competition advocacy in the following terms:

'Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.'<sup>1</sup>

2.3 Competition advocacy is widely recognised as a useful component of a competition authority's work. For example, the World Bank has recognised the importance of competition advocacy in addressing governmental interventions in markets:

'[C]ompetition may be lessened significantly by various public policies and institutional arrangements as well. Indeed, private restrictive business practices are often facilitated by various government interventions in the marketplace. Thus, the mandate of the competition office extends beyond merely enforcing competition law. It must also participate more broadly in the formulation of its country's economic policies, which may adversely affect competitive market structure, business conduct, and economic performance. It must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace.'<sup>2</sup>

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<sup>1</sup> International Competition Network (undated) *A Statement of Mission and Achievements, Up Until 2005*, page 11.

<sup>2</sup> The World Bank, OECD: *A Framework for the Design and Implementation of Competition Law and Policy*, Chapter 6, at 93, 1998, quoted in Clark, J. (2004) Competition advocacy: challenges for developing countries. *Journal of Competition Law & Policy*, 6(4), pages 69 to 80.

2.4 Competition advocacy has been noted as having a particular role in transition and developing countries where many state assets may be privatised and where interest groups may have a stronger lobbying voice in relation to recent, or proposed, liberalisation.<sup>3</sup> Other commentators, however, have highlighted competition advocacy as an indicator of the success of any system of competition law, and speculated that the benefits of competition advocacy to the economy and to consumers can be as significant as those arising from traditional enforcement activity.<sup>4</sup>

2.5 It has also been noted that advocacy and enforcement work are interrelated, and indeed mutually reinforcing:

'[e]nforcement is strengthened by active advocacy, and advocacy is less effective in the absence of enforcement powers, or when enforcement lacks credibility.'<sup>5</sup>

2.6 The ICN Advocacy Working Group identified two main branches of competition advocacy:

'(i) activities directed at other public authorities in charge of regulation or rule making and (ii) activities directed at all constituencies of the society with the aim of raising their awareness of the benefits of competition and the role competition policy can play in the promotion and protection of competition.'<sup>6</sup>

2.7 In 2008 the OECD conducted a Market Studies Roundtable.<sup>7</sup> The work of the Roundtable demonstrates that market studies can combine work under both these branches, for example when addressing 'inefficient market equilibrium.' In cases where there is no clear anticompetitive conduct, but where the market is nonetheless

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<sup>3</sup> International Competition Network Conference, Naples, Italy (2002) Advocacy Working Group Report *Advocacy and Competition Policy*, Executive Summary, page iii.

<sup>4</sup> See, e.g. Dabbah, M. M., (2000) Measuring the success of a system of competition law: a preliminary view. *European Competition Law Review*, 21 (8), page 369.

<sup>5</sup> International Competition Network Conference, Naples, Italy (2002) Advocacy Working Group Report *Advocacy and Competition Policy*, Executive Summary, page iv.

<sup>6</sup> International Competition Network Conference, Naples, Italy (2002) Advocacy Working Group Report *Advocacy and Competition Policy*, Executive Summary, pages i to ii.

<sup>7</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008. *Policy Roundtables: Market Studies 2008*.

not as competitive as it could be, whether due to information asymmetries, regulatory or other barriers to entry, consumer inertia, barriers to switching or for some other reason, market studies can diagnose the root causes of any dampening of competition and formulate appropriate remedies. These may include recommendations to government or other decision makers for legislative or policy changes, as well as encouraging voluntary action by industry and consumers to stimulate increased competition. The newly merged, and independent, Spanish competition authority<sup>8</sup> described this function in the following terms:

'Market studies can be more appropriate than pure enforcement activities where competition problems identified are not due to specific anticompetitive behaviours of operators and affect the whole of the industry. Through market studies we can detect market flaws and evaluate regulations that may be unjustifiably distorting competition i.e. by establishing unnecessary entry barriers.'<sup>9</sup>

2.8 The OECD Roundtable also shows that market studies can fulfil a wider function than pure competition advocacy. Some competition authorities that also have a consumer protection jurisdiction use market studies as a means of joining up their competition and their consumer work.<sup>10</sup> As the OECD's paper noted:

'Market studies can be an excellent vehicle for such integration because market studies can readily accommodate a wider perspective than a competition authority would be allowed to take in litigation.'<sup>11</sup>

### **Competition authorities that conduct market studies**

2.9 Market studies, as a practice of some competition authorities, have a long history. In the United States market studies were initiated at the beginning of the 20<sup>th</sup> Century,<sup>12</sup> and in Japan market studies have been conducted since 1947.<sup>13</sup> Other

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<sup>8</sup> The Comisión Nacional de la Competencia.

<sup>9</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 110.

<sup>10</sup> For example the UK's Office of Fair Trading, OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 120.

<sup>11</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 7.

<sup>12</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 7.

authorities have introduced market studies more recently. For example in Italy, market studies were first conducted in 1990<sup>14</sup> and in Ireland in 1997<sup>15</sup>, and other authorities have introduced market studies, or secured strengthened market study powers, more recently still.<sup>16</sup>

2.10 The table below shows the countries whose competition authorities reported, in the course of the OECD Roundtable<sup>17</sup> and in the course of this Project, or in both, that they use market studies (in one form or another). At least 40 authorities out of the more than 100 competition authorities in the world enforcing some kind of competition law responded to the OECD and/or ICN projects, reporting that they use market studies as part of their portfolio of tools.

**Table [2.1]: Jurisdictions whose competition authorities reported using market studies as part of their portfolio, in the OECD Market Studies Roundtable, in this Project, or in both**

<b>Jurisdiction</b>	<b>Reported on market studies in the OECD Policy Roundtable on Market Studies</b>	<b>Reported on market studies in the ICN Market Studies Project</b>
Brazil		X
Canada	X	X
Chile	X	X
Colombia		X
Croatia		X
Czech Republic	X	X

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<sup>13</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 61.

<sup>14</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 57.

<sup>15</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 47.

<sup>16</sup> For example in France recent reforms transforming the Conseil de la Concurrence into the Autorité de la Concurrence have led to a strengthening of competition powers related to non-enforcement action, including market studies.

<sup>17</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*.



Denmark		<b>X</b>
Estonia		<b>X</b>
European Community	<b>X</b>	<b>X</b>
France	<b>X</b>	<b>X</b>
Germany		<b>X</b>
Honduras		<b>X</b>
Hungary	<b>X</b>	<b>X</b>
India		<b>X</b>
Indonesia	<b>X</b>	
Ireland	<b>X</b>	<b>X</b>
Israel		<b>X</b>
Italy	<b>X</b>	<b>X</b>
Jamaica		<b>X</b>
Japan	<b>X</b>	<b>X</b>
Jersey		<b>X</b>
Korea	<b>X</b>	
Lithuania	<b>X</b>	<b>X</b>
Mexico	<b>X</b>	<b>X</b>
Mongolia		<b>X</b>
Netherlands	<b>X</b>	<b>X</b>
Norway	<b>X</b>	<b>X</b>
Poland	<b>X</b>	<b>X</b>
Romania	<b>X</b>	
Russian Federation	<b>X</b>	<b>X</b>
Serbia		<b>X</b>
Singapore		<b>X</b>
Slovak Republic		<b>X</b>
South Africa	<b>X</b>	<b>X</b>
Spain	<b>X</b>	<b>X</b>
Chinese Taipei	<b>X</b>	
Turkey		<b>X</b>
United Kingdom	<b>X</b>	<b>X</b>
United States	<b>X</b>	<b>X</b>

Zambia		X
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### **Past work on market studies**

- 2.11 The only significant worldwide comparison of market studies conducted to date appears to be the 2008 OECD Roundtable. As such, it is worth highlighting a few of its findings that supplement the data collected during this Project.
- 2.12 The OECD Roundtable demonstrated that there is significant variation in the purpose competition authorities ascribe to market studies. There appear to be two broad categories of market study: those that are, or can be, used as a precursor to enforcement action, and those that tend not to be. For example, the Canadian Competition Bureau reported that it does not, and would not, use a market study in a case that could lead to enforcement action:

'If the nature of the market problem is most appropriately considered under one of the enforcement provisions, the Bureau will deal with the issue as an enforcement matter and will not commence a market study with respect to the same matter.'<sup>18</sup>

Similarly, the Irish Competition Authority noted that the main purpose of market studies is to identify and evaluate restrictions on competition stemming from laws, regulation or administrative practices, with a view to advocating that government and its agencies remove any unnecessary distortions of competition.<sup>19</sup>

- 2.13 The United Kingdom's Office of Fair Trading also noted that it has not conducted market studies in circumstances where there is a clear case for competition enforcement action at the outset of a study – though it listed enforcement action under its competition or consumer protection powers as one of the possible outcomes of a market study. In practice so far it has not needed to take competition enforcement action following a market study. The antitrust authorities in the United

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<sup>18</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 21.

<sup>19</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 47.

States also noted that they do not typically use market studies as the basis for enforcement actions.<sup>20</sup>

- 2.14 On the other hand, some authorities reported using market studies as part of the process of investigating in order to take enforcement action in competition or merger cases. For example the Federal Antimonopoly Service of the Russian Federation reported using 'antitrust market studies' to define markets, market share and market power as part of the process of investigating violations of competition legislation, though it also uses market studies to inform its annual presentation to the Government of the Russian Federation on competition in the economy of Russia.<sup>21</sup>
- 2.15 The European Commission, and several competition authorities of EU member states,<sup>22</sup> have a model of market studies known as 'sector inquiries'. The trigger for conducting such inquiries is frequently similar to that for conducting enforcement action,<sup>23</sup> and the inquiries themselves are primarily a tool to better understand the market with a view to taking later (separate) enforcement cases.<sup>24</sup>
- 2.16 The European Commission has, with the members of the European Competition Network, adopted the following agreed definition of 'sector inquiry':

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<sup>20</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 146.

<sup>21</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 190.

<sup>22</sup> Including Poland, Hungary, Romania, Czech Republic.

<sup>23</sup> The European Commission's power to conduct sector inquiries, in Article 17 of Regulation 1/2003/EC, is predicated on the trend of trade between Member States, the rigidity of prices or other circumstances suggesting that competition may be restricted or distorted within the common market. If a sector inquiry is opened, the European Commission has at its disposal the same investigative powers that it uses in taking enforcement action.

<sup>24</sup> For example, Poland describes one of the aims of market studies as being to 'assess the market position of enterprises or to define the relevant market. Often it happens that the evidence gathered during the studies is the basis to initiate antitrust proceedings against some entities.' Poland appears to conduct two forms of study. One in relation to existing enforcement actions, and the other, a broader form of study, for the purpose of analysing competition across an entire industry – which may later inform enforcement action. OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, pages 97 and 103.

'an inquiry into a particular sector of the economy or into a type of agreement across various sectors...that considers that there are indications of competition being restricted or distorted but where it is not clear whether and to what extent problems can be attributed to the behaviour of particular undertakings. Generally, a S[ector] I[nquiry] is the basis for future investigation in the relevant industry sectors, notably, for proceedings of infringement pursuant to Articles 81 or 82 or equivalent national legal provisions against particular undertakings.'<sup>25</sup>

- 2.17 Some authorities have attempted 'top down' reviews of areas of the economy, or of regulation. An example is the US Federal Trade Commission's 'Line of Business' programme.<sup>26</sup> Another example is the Australian regulatory review, in which the Australian National Competition Council coordinated a comprehensive review by Australian states of all existing regulation that imposed a significant restriction on competition.<sup>27</sup>
- 2.18 In relation to powers, some authorities have formal powers to request information that are coextensive with their enforcement investigative powers. This can lead to confusion on the part of market participants as to whether the authority is conducting an enforcement case, or a market study.<sup>28</sup> It can also lead to concerns from business that authorities may be using studies to conduct 'fishing expeditions' that subvert the usual rights of the defence.<sup>29</sup> Two authorities reported having a legislative power to challenge, or to require the revision of, anticompetitive administrative acts and regulations.<sup>30</sup>

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<sup>25</sup> European Competition Network Working Group "Cooperation Issues", 8 November 2007. *Meeting of Directors General for Competition: Cooperation on Sector Inquiries within the Network, prepared by: PT, UK, DG COMP, reflecting comments made by the Working Group members*, page 11.

<sup>26</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 144.

<sup>27</sup> Amato, G. & Laudati, L. L. Eds (2001) *The Anticompetitive Impact of Regulation*, pages 344 to 350.

<sup>28</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, pages 44 to 45.

<sup>29</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, pages 8 and 204.

<sup>30</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, Spanish submission, page 108, Lithuanian submission, page 182.

2.19 The success of competition advocacy can be difficult to measure,<sup>31</sup> and market studies, as a tool of competition advocacy, are no exception. However, the OECD Roundtable noted several factors that may increase the likelihood of success. These include careful selection of studies that have a higher probability of success,<sup>32</sup> ensuring that analysis is technically sound,<sup>33</sup> engaging transparently and openly with interested parties,<sup>34</sup> and effective follow-up to promote results and recommendations, recognising that it may take some time for results to emerge.<sup>35</sup>

2.20 It has been asserted in relation to competition advocacy in general that:

'it is effective if and perhaps only if it is backed by legal or political power. Details of statutory authority, authority structure and management matter little; what really matters is whether the very idea of competition has a significant constituency. One of advocacy's functions is building that constituency.'<sup>36</sup>

Market studies can clearly be a useful tool to build support for competition.

### **Looking forward – market studies and this Project**

2.21 One of the conclusions of the OECD Roundtable was that there was scope to:

'consider identifying best practices in conducting market studies to improve the general effectiveness of this work of competition agencies.'<sup>37</sup>

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<sup>31</sup> Michael O. Wise notes several of these difficulties in his chapter 'Country experiences with targeted advocacy and enforcement programmes' in Amato, G. & Laudati, L. L. Eds (2001) *The Anticompetitive Impact of Regulation*, page 397.

<sup>32</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 8.

<sup>33</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 77.

<sup>34</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 77.

<sup>35</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, pages 10, 54 and 76.

<sup>36</sup> Wise, M.O. in Amato, G. & Laudati, L. L. Eds (2001) *The Anticompetitive Impact of Regulation*.

<sup>37</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, Overview.

2.22 This was supported by the Business and Industry Advisory Committee to the OECD, which considered that a best practice approach that led to greater convergence across jurisdictions would help to minimise the burdens on business.<sup>38</sup>

2.23 The OECD Roundtable identified the following possible areas for agreed best practice:

- transparency
- formalising the process of conducting market studies, including restraint in the use of formal powers to minimise cost
- setting timelines and sticking to them
- involving market participants.<sup>39</sup>

The Business and Industry Advisory Committee also called for use of published guidelines on how market studies are selected.<sup>40</sup>

2.24 In line with the ICN's goal of promoting convergence in competition laws and practices and cooperation between authorities<sup>41</sup> this Project built on the work of the OECD Roundtable by gathering data on market studies practice, on the basis of a set of comparators relating to purpose, selection, process, outcomes and evaluation.

2.25 This Project differed from that of the OECD in its methodology, in that it was based on a standard form questionnaire, aiming to collect directly comparable datasets. It is not anticipated that this Project would necessarily lead (or would lead directly) to ICN recommended practices,<sup>42</sup> since practice and process on market studies is so

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<sup>38</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 201.

<sup>39</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 9.

<sup>40</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008, *Policy Roundtables: Market Studies 2008*, page 204.

<sup>41</sup> International Competition Network (undated) *A Statement of Mission and Achievements, Up Until 2005* [online]. [Ottawa]: International Competition Network, page 1.

<sup>42</sup> The ICN produces a variety of different kinds of products and outputs, including recommended practices, case-handling and enforcement manuals, reports, templates on legislation and rules in different jurisdictions, databases and toolkits. International Competition Network (undated) *A Statement of Mission and Achievements, Up Until 2005*, page 3.

variable. However it could form the evidential basis for discussion and development of a set of 'best practices' to which ICN members could refer in developing and refining their market studies policy, and for sharing experience in selected areas.

- 2.26 Chapter 3 of this report describes the methodology for this Project. Chapters 4 to 11 present and analyse the data collected. Chapter 12 sets out suggested possible ideas for further work, including a suggested list of topics that market studies best practice might cover.

### **3 METHODOLOGY**

3.1 This chapter sets out the methodology followed in conducting this Project. It also describes the broad functions of the 38 ICN member authorities that responded to the questionnaire.<sup>43</sup>

#### **Project organisation and aims**

3.2 The Market Studies Project was conducted under the aegis of the ICN Advocacy Working Group, co-chaired by the United Kingdom's Office of Fair Trading (OFT) and the Russian Federal Antimonopoly Service.

3.3 The Project was proposed in June 2008 and was approved by the ICN Steering Group in July 2008.

3.4 The Project was led by an OFT team (the Project Team) together with the Market Studies Working Group (the Working Group). A full list of the Working Group members is attached at Annexe 1 to this report.

3.5 The aims of the Project, as set out in the Project proposal, were to:

- conduct a stock-taking exercise of existing work about market studies to inform the development of a questionnaire
- develop a questionnaire that examines member experience with market studies focusing on three themes:
  - selection (how are markets selected and what measures can be employed to increase appropriateness of selection process; role of stakeholders in selection process);
  - procedure (agency powers, resource evaluation, developing a work plan, including goals, consultations, etc); and
  - outcomes (success of particular initiatives in terms of impact on consumers and market processes, follow up and evaluation processes)

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<sup>43</sup> Thirty-nine authorities responded in total, but one response indicated that market studies are not carried out in the jurisdiction concerned, so it is not included in the analysis.



- evaluate the questionnaire responses, identifying what works and what has not worked well.

3.6 The Project proposal also suggested that the Project should:

- consider examining member experience with specific sectors, either as part of the questionnaire or as a follow-on activity
- consider developing a guidance document with procedure and evaluation criteria for the market studies work described above.

### **Project methodology**

3.7 The Project Team, in consultation with the Working Group, proposed a Project plan to address the aims of the Project. The Project's goal was to collect, analyse and present data on members' market studies experience, and to make recommendations for any further work that appears to be useful. Recommendations for further work will be considered by the ICN at its annual conference in June 2009, following presentation and discussion of this report.

3.8 The methodology of the Project followed the aims of the Project proposal. The stages of the Project, and steps taken were as follows:

- In August and September 2008 the Project Team reviewed existing literature on market studies and prepared a draft Bibliography. Materials reviewed consisted primarily of submissions to the OECD Roundtable on Market Studies in June 2008. The draft Bibliography was circulated to the Working Group and discussed in a Working Group conference call on 8 September 2008. The Bibliography is at the end of this report.
- In August 2008 the Project Team prepared a draft definition of market studies for use in the later questionnaire. This was circulated to the Working Group for written comment. Written comments were incorporated, and a further draft was discussed in a Working Group conference call on 8 September 2008. A final draft was circulated to the Working Group for written comment on 9 September 2008.
- In September and October 2008 the Project Team developed a questionnaire to explore a proposed definition of market studies, and to examine member experience in market studies selection, process, outcomes and evaluation. Attached to the questionnaire was an annexe, asking for details of authorities' market studies for the last three years: the markets studied, the reasons for studying them, the duration of each study, the value of the sector, the outcomes

achieved and an assessment of how satisfied authorities were with the results achieved, and why. The draft questionnaire was circulated to the Working Group on 17 October 2008 for written comment. It was also piloted informally with a small number of ICN members in October 2008.

- The questionnaire was sent to members of the Working Group and the wider ICN membership on 19 November 2008. Responses were sought by 31 December 2008. A copy of the questionnaire, and its annexe, is attached at Annexe 2 to this report.
- In December 2008 and January 2009 members submitted responses to the questionnaire. A total of 39 responses were received.
- In January 2009 the Project Team prepared a draft outline of a report to analyse the findings from the responses to the questionnaire. The draft outline was circulated to the Working Group on 16 January 2008, and discussed in a conference call on 29 January 2009.
- In February 2009 the Project Team wrote up the findings set out in Chapters 3 to 11 of this report. These draft chapters were circulated to the Working Group on 9 March 2009 for written comment. Drafts of Chapters 1, 2 and 12 of this report were circulated on 9 April. The draft report was discussed in a conference call on 16 April 2009, following which the report was finalised.
- The findings will be presented at the ICN conference in Zurich, on 3 June 2009.

3.9 It was agreed that responses to the questionnaire would not be attributed to individual authorities. For this reason, the results that are presented in the following chapters do not identify the responding authorities.

### **Questionnaire respondents**

3.10 The Project Team received replies from 39 member authorities of the ICN. A full list of respondents is attached at Annexe 3 to this report. One respondent noted that market studies are not carried out in its jurisdiction, though their use is under serious consideration. Accordingly, save where noted otherwise, the base for the chapters that follow is 38 respondents. It should also be noted that for the US and the UK two authorities responded for each jurisdiction. For the US these were the US Department of Justice, Antitrust Division and the Federal Trade Commission. For the UK these were the OFT and the Competition Commission. In both these countries there are two bodies that conduct work that falls within the definition of market study. Accordingly the 38 responses represent 36 jurisdictions in which market studies are carried out.

- 3.11 To understand the broad functions of the responding authorities, the questionnaire asked authorities to state whether they are a competition and consumer body, or a competition body, and whether certain sectors of the economy are regulated by sectoral competition authorities.
- 3.12 Twenty-five authorities that responded reported that they are competition bodies. Twelve authorities reported that they are both competition and consumer bodies.
- 3.13 In 22 cases (representing 20 jurisdictions), authorities reported that there are separate regulators applying competition law in one or more sectors such as utilities, transport and telecoms – in some cases they do so concurrently with the responding authority. In 16 cases authorities reported that, whether or not there are separate sectoral regulators, these do not have concurrent powers to apply competition law. These authorities are responsible for applying competition law in the regulated sectors themselves.
- 3.14 The range of sectors in which competition law is applied by sectoral regulators includes telecoms, broadcasting, energy (gas and electricity), oil or petroleum products, water and sewerage, transport (rail, air traffic, airports, shipping, ports, trucking, taxis), waterways, financial services (including banking, pensions, securities), fisheries and aquaculture, healthcare, postal services, and armed security services. In some cases, the existence of sectoral regulators with exclusive or concurrent competition functions in one or more of these areas may affect the range of topics that authorities choose to address by way of market studies. Topics studied in the last three years are considered in Chapter 11.

### **Thanks**

- 3.15 The Working Group is indebted to the member authorities that responded to the questionnaire.

## 4 DEFINITION AND PURPOSE OF MARKET STUDIES

- 4.1 This chapter considers the way respondents define market studies, and what they see as the purpose of studies.

### Definition of market studies

- 4.2 As noted in the introduction, there is no universally recognised definition of market studies. Indeed there is not even any consistency of terminology. Respondents to our questionnaire spoke variously of 'market monitors', 'fact-finding surveys', 'research projects', 'sector inquiries', and 'market scans' as well as of market studies.
- 4.3 With the aim of securing some degree of consensus around what would be reported in the responses to the questionnaire, for the purposes of this Project, authorities were presented with the following draft definition of market studies:

*'For the purposes of this project, market studies are distinguished from enforcement action against individual undertakings.*

*Market studies are research projects conducted to gain an in-depth understanding of how sectors, markets, or market practices are working.*

*They are conducted primarily in relation to concerns about the function 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 (whether by way of policy or regulation, or direct participation in the supply or demand side of 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. This may find that the market is working satisfactorily or set out the problems found. Where problems are found the market study report can include: (i) recommendations for action by others, such as legislatures, government departments or agencies, regulators, and business or consumer bodies; and/or (ii) commitments by the competition (or competition and consumer) authority itself to take advocacy and/or enforcement action.'*

- 4.4 Authorities were asked to comment on the draft definition, and to state in what respects it is similar to, or different from, how they define market studies.
- 4.5 Of the 33 authorities that responded to this question, roughly 79 per cent agree wholly or mostly with the draft definition. This includes four authorities whose practice differs slightly, for example because they do not address consumer policy

issues, or they focus on distortions and restraints of competition rather than the consumer detriment that can arise out of it, or because they do not necessarily publish a final market study report.

- 4.6 This figure also includes three authorities that said that they also carry out other forms of study or work that do not fit clearly within this definition. Comments here were:

*'There are two kinds of studies that the [Authority] makes, on one side is the kind of study that is described in the above definition. On the other side, the [Authority] often makes economic analysis of the likely impacts of legislation projects that are being studied by legislatures. These studies are shorter, might not include quantitative studies and are done in a much faster way, though they are a very important part of our work.'*

*'The [Authority] agree with the above draft definition. However, the [Authority] also distinguish between ex ante or ex post market studies. Ex ante market studies are used to learn more about a specific market, identify potential competitive concerns and, if so, discuss and suggest remedies. Ex post market studies will be used to study a market after intervention, and to evaluate the impact of a particular intervention. In addition, the competition Authorities in the [Geographical area] countries also undertake annual market studies in collaboration. The actual market or competition issue is decided by the [heads of relevant authorities, annually]. Following that, a working group is appointed being responsible for each study.'*

*'In general we would use the same definition, with a slightly weighted focus on examining government restraints, as a lot of our work is in this area. Also, our answers include selected industry-specific public hearings and workshops within the meaning of 'research projects'.'*

*'[Following recent changes to legislation] the [Authority] now has the power to deliver on its own motion, and not only upon Governmental, Legislative or private request, public opinions on any competition issue, including legislation and draft legislation but also issues relating to market structures, behaviour, competitive environment, etc. It is now also entitled to make recommendations to the Government. The [Authority] can also publish market studies on any such topic,*

*as it regularly does for instance in its annual report.'*

- 4.7 One authority responded that the definition fits its understanding of market studies, but that it rarely conducts them.
- 4.8 It emerged from the subsequent answers of another authority that it conducts studies *'both as a competition advocacy tool and investigative tool in the formal proceeding'* that is, in the course of enforcement action.
- 4.9 Of the 21 per cent of respondents that said their definition of market studies was different from the proposed draft, reasons included that:
- market studies do not result in enforcement action (one authority)
  - market studies do not arise from firm behaviour (two authorities)
  - market studies are conducted solely at the request of the relevant government Minister for the purpose of advising that Minister (one authority)
  - market studies are conducted primarily to assist the authority in its understanding and/or for public information (two authorities)
  - market studies are conducted primarily as a means of informing enforcement action, either during the course of enforcement action (one authority) or on a stand-alone basis, to inform understanding and enforcement priorities (one authority).
- 4.10 Included in these comments, there was one more instance of an authority that conducts studies for more than one purpose:

*'The [Authority] has conducted two types of studies: "industry studies", which assess the state of competition in an industry and are usually undertaken in response to unusual market events; and, more recently, "market studies", which are conducted as part of the [Authority's] legislated mandate to intervene before government tribunals and other decision-makers to advocate in favour of competition and a greater reliance on market forces.'*

- 4.11 There was also one instance of an authority reporting that it has powers directly to impose remedies following in depth investigations:

*'The [Authority] has extensive powers to take competition enforcement action directly to address the outcomes of a [market study]. If the [Authority] finds an adverse effect on competition it has a duty to remedy it and any damage to customers as comprehensively as possible. The [Authority's] remedy powers are extensive, ranging from the making available of more information to consumers, to changing the terms of agreements or requiring the divestment of whole businesses.'*

- 4.12 Responses to the question on the definition of market studies indicate a significant consensus around the draft definition proposed in the questionnaire, but quite a lot of variation within that consensus. There is also a large minority that adopt other approaches to defining market studies, ranging from studies primarily to support enforcement action that are used to educate the authority and the public, to studies used as the basis for advocacy in the context of proposals for legislative reform.

#### **Purpose of market studies**

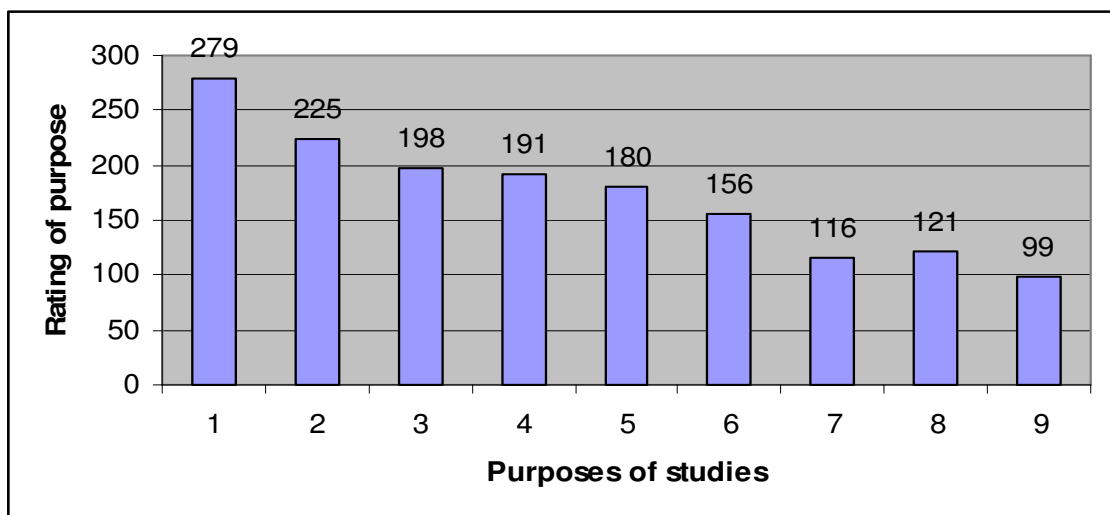
- 4.13 Authorities were asked about the purpose(s) of market studies. Authorities were given nine possible purposes and asked to rank them in order of importance with one being the most important, and nine being the least important. The nine possible purposes were:

- to help set internal priorities for the market or sector
- to enhance knowledge of the sector
- as a preparation for intervention in the legislative process
- to assess the state of competition in the market/sector
- to obtain understanding of the market to take enforcement action
- to decide which of a range of further tools to employ if a problem is found
- to investigate suspected market failure that cannot be assigned to a specific undertaking
- to define a market for the purposes of enforcement action
- to assess the impact of government policy/regulation on a market.

- 4.14 In responding to this question, some authorities gave each purpose a numerical ranking, ensuring that each number (between one and nine) was used only once.

Others ranked according to importance, repeating numbers where purposes were of equal importance. Some ranked only those purposes that were applicable to them. To represent these responses graphically – so that the most important purposes are displayed as scoring the highest – the scores were reversed (i.e. a score of one (being the most important) became a score of nine, a score of two (the second most important) became a score of eight and so on). The scores for each criterion from all respondents were then totalled and are presented in bar chart form, in the chart below.

**Chart [4.1]: Which of the following does your Authority consider to be the purpose[s] of market studies? Please rate your answers in order of importance, with [9] being the most important and use (N/A) where this applies**



**Key to Chart 4.1**

1. Preparation for intervention in the legislative process.
2. Enhance knowledge of the sector.
3. Investigate suspected market failure that cannot be assigned to a specific undertaking.
4. Assess the impact of government policy/regulation on a market.
5. Decide which of a range of further tools to employ if a problem is found.
6. Obtain understanding of the market to take enforcement action.
7. Help set internal priorities for the market or sector.
8. Assess the state of competition in the market/sector.
9. Define a market for the purposes of enforcement action.



4.15 This shows the highest level of consensus for use of market studies as a preparation for intervention in the legislative process. The second most important purpose, among all respondents, is to enhance knowledge of the sector. Investigating market failure that cannot be assigned to a specific undertaking emerges as the third most popular purpose for studies, with assessing the impact of government policy/regulation following closely behind. There was less consensus on the use of market studies for setting internal priorities for the market or sector, and for assessing the state of competition in the market.

4.16 The score for use of market studies to define a market for the purpose of enforcement action was the lowest. This reflects the broad consensus on the proposed draft definition of market studies, which separates studies from enforcement action. The score for use of market studies to obtain an understanding of the market for taking enforcement action was also rather low, (this purpose scored as sixth most important out of the nine possible purposes) suggesting that many authorities do not consider studies to be an appropriate tool for gaining intelligence for enforcement action. It is interesting to compare these scores with the data collected in the annexe to the questionnaire, in particular the reasons given for conducting studies that authorities have carried out over the last three years. In relation to actual studies recently conducted, use of market studies as a lead-in to, or to inform, later enforcement action emerged as more common. However, the data in the annexe to the questionnaire were analysed for these purposes on a study by study basis (rather than on a country by country basis) so variations in the results would have been affected by the number of studies reported by authorities. See Chapter 11.

4.17 Authorities were also asked to list any other purposes for which they conduct market studies. Additional purposes included:

*'To gather data on specific markets which could be relevant for other cases'*

*'To gain in-depth knowledge on priority sectors i.e. those of particular relevance for consumer welfare'*

4.18 In a case where the authority contracts all of its market study work to outside agencies, an additional purpose given was:

*'Capacity building of researchers, and advocacy'*

4.19 One authority described its market studies as:

*'an additional and parallel means of competition enforcement alongside the "prohibition" systems of Article 81/82 of the EC Treaty and their national counterparts... Being directed against whole markets, rather than the conduct of individual players, [market studies] can concentrate on identifying and remedying market conditions without the need to ascribe fault or to impose penalties.'*

#### Summary of Key Findings

##### Key findings of this chapter:

- 1) There seems to be broad consensus (79 per cent) around the definition of market studies proposed for the purpose of the Project [see paragraph 4.3]
- 2) Authorities were asked to identify the purposes of market studies. The highest and lowest scores, as shown below, support the broad consensus on the definition of market studies, which separates studies from enforcement action.
- 3) Purpose of Market Studies – highest scores:
  - as preparation for intervention in the legislative process
  - to enhance knowledge of the sector
  - investigate suspected market failure that cannot be assigned to a specific undertaking.
- 4) Purpose of Market Studies – lowest scores:
  - to define a market for the purpose of enforcement action
  - for assessing the state of competition in the market
  - to help set internal priorities for the market or sector.
- 5) There appear to be differences between what authorities say<sup>i</sup> are the main purposes of market studies in Chapter 4 and the results of some authorities market studies work over the last three years as detailed in Chapter 11. However, the findings in Chapter 11 may be less reliable as the number of

respondents was overall lower and unlike the rest of the questionnaire the results are on a 'per study' rather than 'per authority' basis.

## 5 POWERS TO CONDUCT MARKET STUDIES

- 5.1 Authorities were asked whether they have formal powers to carry out market studies. This question was aimed at the provision of formal powers to conduct studies per se, rather than formal information gathering powers. All 38 respondents answered this question. Of these, 89 per cent (34 authorities) said that they do have formal powers.
- 5.2 Those authorities that have formal powers were asked to describe the form that these powers take. It is clear from the responses that these powers are contained in a range of different types of legal provision.
- 5.3 Some responses indicated a specific legislative power to carry out studies. In some cases the power is linked to particular purposes. In other cases it is not. For example:

*'The [Authority] shall have, in addition to the functions assigned to it by any other provisions...the following functions: (a) to study and analyse any practice or method of competition affecting the supply and distribution of goods or the provision of services or any other matter relating to competition (which may consist of, or include, a study or analysis of any development outside the [State])...'*

*'One of the [Authority's] functions under the [name of the Act] is to 'undertake studies and publish reports and information regarding matters affecting the interests of consumers'.'*

*'According to the [name and section of the Act] the [Authority] shall analyse the competitive situation, propose measures to promote competition, make recommendations to improve the competitive situation, make proposals for legislation to be passed or amended, and develop cooperation with the competition supervisory authorities of other states and associations of states.'*

*'The [Authority] has the power to issue public opinions regarding policies, regulations or other factors that could affect market performance.'*

*'the [name of the Act] obliges the [Authority] to 'undertake studies and make available to the public reports.'*

*'The [Authority] has the formal power to institute a general fact-finding investigation at its own initiative.'*

- 5.4 In one case the response suggested that the model partially followed was Article 17 of Regulation 1/2003/EC, the European Commission's power to conduct sector inquiries:

*'...sector inquiries are formal proceedings under the [name of the Act] which are started by an order and have to be finished with a report...'*

- 5.5 In other cases, responses suggested that the formal powers used to conduct studies are more general evidence and information gathering powers. For example:

*'The term market study came into general use with the entry into force of the [name of the Act], section [x] of which gives the [Authority] general powers to obtain information and conduct research, and provides the statutory basis for market studies.'*

*'According to [section numbers and name of the Act] [Authority] gathers data and information from the undertakings which are relevant for market studies and stating of market positions, irrespective of the proceedings conducted by the [Authority]...'*

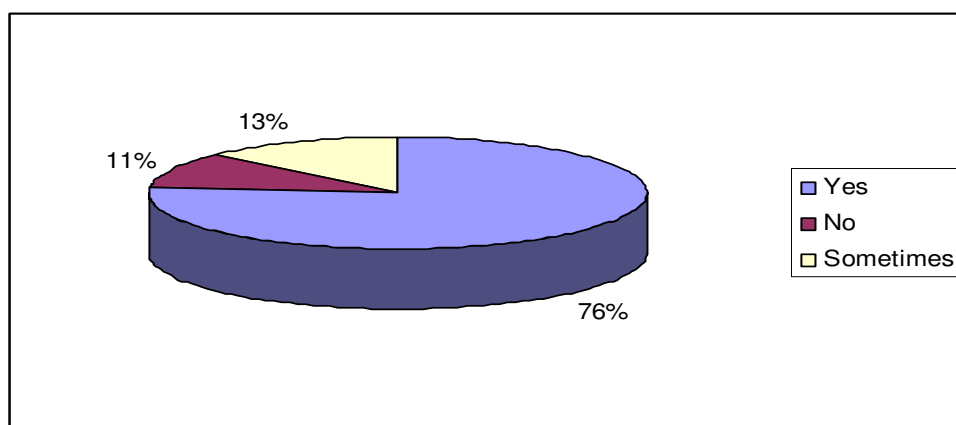
*'The [name of the Act] does not include special provisions specifically adjusting market studies and powers of the [Authority] within completing these studies. For market studies the [Authority] uses general provision of the [name and section number of the Act], according to which the [Authority] may conduct investigation in the relevant market.'*

- 5.6 The descriptions suggest that roughly half of all authorities (52 per cent of those giving any description) have formal powers specifically to conduct studies. Around 35 per cent of the descriptions indicated that the respondents have formal powers to gather information which can be used to conduct studies. The remaining descriptions were not sufficiently detailed to reach a view on whether there are formal powers to conduct studies specifically, or formal powers to gather information that can be used to conduct studies.
- 5.7 A minority of respondents (four out of the 38 authorities that responded to this question) reported having no formal powers to conduct market studies. There appeared to be no pattern here in terms of the level of development of the country in question. Nor did the absence of formal powers appear to prevent the authorities from conducting studies. In all four cases, studies were conducted, though in one case, rarely.
- 5.8 It is clear that authorities manage to conduct studies under a range of types of formal powers, and sometimes without formal powers at all.

#### **Powers to compel the supply of information**

- 5.9 Authorities were asked whether they have formal powers to compel the supply of information for market studies purposes. All 38 authorities responded to this question. A large majority (29 authorities, or 76 per cent) confirmed that they do have powers to compel the supply of information for market studies purposes. Four authorities said they have such powers sometimes, and five that they have no such powers.
- 5.10 This data is represented in the chart below.

**Chart [5.1]: Does your Authority have formal powers to compel the supply of information for market study purposes?**



- 5.11 One authority, that answered ‘sometimes’ to this question, explained that a bill was going through the legislature which would, if passed, ‘*introduce more clarity regarding the circumstances with which the competition authority may compel the supply of information for conducting market studies for purposes other than investigations.*’
- 5.12 Another authority that answered ‘sometimes’ explained that it had formal powers when conducting studies pursuant to specific statutory duties to:
- monitor markets in which there has previously been a problem, and
  - scan partially regulated markets, but not in other cases.
- 5.13 What was striking in this set of responses was the large majority of authorities that have some form of power to compel the supply of information for market study purposes.
- 5.14 Those authorities that have formal compulsory powers were asked to describe the form that they take, whether their use is subject to any constraints, and what sanctions exist for non-compliance.
- 5.15 Five noted that although they have formal powers to compel the supply of information, they do not use them, or at least think carefully about using them for market studies:

*'The [Authority] has the formal right to apply sanctions for not providing information, but never has used it and hardly would use it in the future for the purpose of market studies. Large companies always meet the requirements of the [Authority] to provide information benevolently, whereas some small undertakings sometimes fail to provide information. In such cases the [Authority] has never used its formal powers to compel the supply of information, but always would use this power in the case of investigations related to the breach of the [competition prohibitions].'*

*'[having described the compulsory powers to require information for market studies]...However, it is commonly recognised that whether to exercise this power in [market studies] should be carefully decided since the power is binding based on the penal provision. In general the [Authority] conducts [market studies] today by obtaining voluntary cooperation from survey targets. We are, in practice, confronting no particular problem in [market study] activities.'*

*'The [Authority] is very careful to see that [the compulsory power to require information] is not misused because the agency does not want to unnecessarily burden industry.'*

*'The [Authority] is...mindful of the burdens its processes place on businesses. In general parties respond to informal requests for evidence in the knowledge that [the Authority] has the power to compel production.'*

*'Exercising formal powers generally achieves greater compliance [and]...enhances the reliability of the information provided. However, we use formal powers much less frequently than informal/voluntary.'*

- 5.16 In one case an authority reported a specific legislative provision designed to prevent unnecessary business burden:

*'If an information request is to be directed to ten or more recipients, approval must be sought from [another government agency, with oversight for budgets] under the terms of the [name of the relevant Act].'*

- 5.17 Sanctions for failure to provide information in response to a formal request ranged from administrative fines to criminal fines and imprisonment. In all, 19 authorities (66 per cent of the 29 authorities with compulsory powers) reported having the power to impose, or to sue or prosecute for, some form of fine, and seven specifically mentioned criminal sanctions, including imprisonment.
- 5.18 Several authorities reported sanctions not only for failure to comply with a request but also for supplying false, incomplete or misleading information.
- 5.19 In five cases, authorities said they have power to fine up to one per cent of annual turnover or income. In four cases daily rates are payable (in three cases this is in addition to the fixed penalty for non-compliance).



- 5.20 In one case an authority reported that the statute sets out a 10 day time limit for supplying information *‘unless given the nature of the request or the circumstances of the case a different justified deadline is set.’*
- 5.21 One authority reported that its sanctions for non-compliance are low. Two authorities reported that although they have formal powers to require the supply of information there are no penalties for not doing so. In one of these cases, the penalties for refusal to supply information, or supplying false or misleading information, appear to have been specifically disapplied in respect of market studies.
- 5.22 Authorities were then asked to give their view as to whether it is better to have formal powers to compel the supply of information for market studies purposes. Thirty of the 38 authorities that replied to this question (80 per cent) said they thought having the power to compel the supply of information is preferable. Six (16 per cent) said that it is not.
- 5.23 Two authorities responded that there are pros and cons of each. Formal powers to compel the supply of information are:
- useful in cases, where the market study is intended as a leverage for possible enforcement action or deterrence purposes, or where there is a risk that companies will not comply with a request
  - not useful in cases where the best strategy is to build a cooperative dialogue with market players.
- 5.24 Authorities were asked to explain why it is better either to have, or not to have, formal powers to compel the supply of information.
- 5.25 Of those 30 authorities that said that formal compulsory powers are better (or, in the words of some respondents *‘essential’* or *‘useful’* ), reasons given included:
- to guarantee the ability to obtain the necessary information, for example *‘[w]e believe that without formal powers the [Authority] would lose relevant market data and up-to-date information. Undertakings are not always willing to provide all requested information’*
  - to ensure that processes are robust, transparent and fair
  - to improve the legitimacy of decision or findings, ensuring they are based on the best available information

- to ensure information is submitted in a suitable time frame
- as a means to address the limited number of expert staff in companies who can provide the data
- because businesses will only tend to act if they are legally required to do so
- because without formal powers, there would be legal problems securing information
- formal powers encourage cooperation even when not used
- formal powers give respondents a basis for providing information which otherwise they might find difficult to provide
- may result in more, and more useful, information
- to make market studies more efficient: information can be collected more quickly, in greater detail, and using less authority resource.

5.26 Of those that said it was better not to have formal powers, reasons included:

- such powers are not needed because market studies are not about acquiring evidence of specific infringements, but rather about competition advocacy
- extensive use of formal powers to conduct market studies, and calls to use them frequently, can distract an authority from its core enforcement mission
- use of formal powers can be a burden on business and other sources
- use of formal powers for market studies can compromise the integrity of the enforcement procedures, and lead to confusion among stakeholders.

5.27 Some examples of the specific comments are:

*'Having formal powers to compel the supply of information would fundamentally change the nature of [the Authority's] market studies work. [The Authority] sees market studies as a flexible tool of advocacy, rather than a means of taking enforcement action. In practice, this lack of formal powers has not been a problem. Many businesses want the [Authority] to understand their perspective, whether motivated by self-interest or otherwise, such that they will readily answer questions and consider and present their views.'*

*'We consider having formal powers for general market studies not to be necessary. The main goal of market studies is to enhance our knowledge of a given market. This is achievable by accessing public sources and by a healthy cooperative relationship with the private agents involved'*

5.28 Even some authorities that have formal powers recognised some of these drawbacks, or said they rarely use them:

*'One drawback is... that strong powers on information gathering and the fact the [Authority's market studies] are formal procedures often causes misunderstandings among parties, who tend to confuse [market studies] with normal enforcement'*

*'In general it is not necessary to have formal powers to compel the supply of information because the investigation of the [Authority] has the objective to increase the general knowledge of a market and the factors which limit its functioning, not to acquire specific evidence of antitrust infringements. In this view, it constitutes a tool of advocacy, not a means to take antitrust action.*

*For this reason, the supply of information by the requested subject (generally undertakings, but not only) has generally a voluntary character... there is awareness that the request of information is intended to guarantee the institutional mission of the [Authority] (not to collect evidence to enforce the law); this facilitates the cooperation and data collection. '*

*'Our powers as they are now are very useful and are used cautiously. We prefer to encourage firms to comply with our requests, stressing confidentiality and transparency in the conduct of investigations and research work; and relying on our history of independence and integrity to preserve the information. This has worked well for us.'*

5.29 Authorities were also asked what additional powers they would like for gathering information.

- 5.30 One authority noted that it was content with its powers of on-site inspection which it had used only in one case to date. Another authority said it would like on-site inspection powers. A third said it would like its powers revised so that they clearly defined the places that can be searched, including domestic premises and vehicles. Two authorities said they would like clear powers to access banking data.
- 5.31 Three authorities that have formal information gathering powers, backed up with penalties for non-compliance, reported that they would like the ability to impose administrative sanctions directly themselves. One reported it would like stronger powers, but did not specify how it would like them strengthened.
- 5.32 Of those that did not have compulsory powers to require information, two authorities said having these would be beneficial:

*'We would like the [Authority] to be able to fine firms in case they do not provide basic information regarding their activity.'*

*'While the [Authority] does not have access to formal powers to conduct market studies, it envisions that such powers could be highly beneficial in certain circumstances. For example in cases where parties are reluctant to provide information voluntarily for fear of reprisals or key information is known to be available but is not being provided voluntarily, compulsory powers might be beneficial. Greater access to information and data could be a clear benefit of having compulsory powers in the context of market studies, and could lend the [Authority's] findings greater credibility. Recommendations stemming from market studies that have had the benefit of more complete information are also likely to be more specific and pointed. Insufficient information might sacrifice the quality of the study, and the impact that the study's findings might ultimately have on addressing problematic restrictions on competition.'*

- 5.33 One of these two authorities, however, recognised that such powers, if granted to it, would not necessarily be frequently used:

*'That being said, it should be noted that compulsory powers are not necessarily the only way to obtain the required volumes of information, as sufficient data may already be available from third parties, such as sector experts, industry associations or regulators. Therefore, the need for, and utility of, compulsory powers would have to be determined on a case-by-case basis. It should not be assumed that compulsory powers, if available, would be regularly used for market*

*studies.'*

5.34 Other authorities without compulsory powers were content not to have them for market studies:

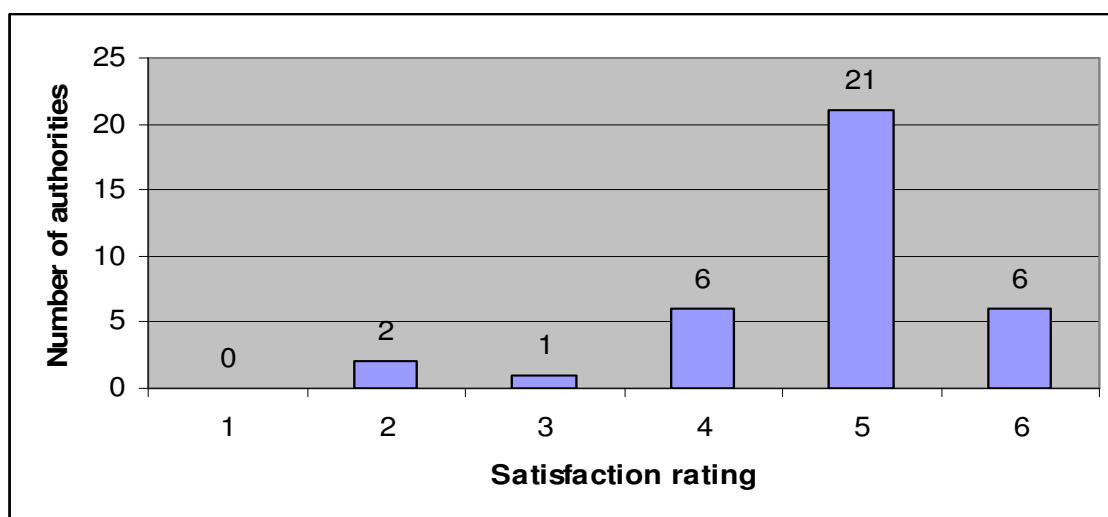
*'It is useful to be in a position to compel the supply of information. However in the absence of any suspicion of competition law infringement, such power is unnecessary. We consider our powers adequate in this regard.'*

### Overall satisfaction with market study powers

5.35 Finally, in this section, authorities were asked to rate, on a scale of one (very dissatisfied) to six (very satisfied) how satisfied they were with their market studies powers.

5.36 Thirty-six out of the 38 total respondents answered this question. The responses are set out in the chart below.

**Chart [5.2]: Using a scale of 1 (very dissatisfied) to 6 (very satisfied) please rate how satisfied your Authority is with its powers**



5.37 The average satisfaction rating was 4.8. Interestingly, the authorities that answered that they do not have, or only sometimes have, formal powers to compel the supply of information had the same average satisfaction rating (calculated on the basis of eight of the nine authorities without formal powers that also provided a satisfaction

rating). This suggests that those without formal powers to compel the supply of information are, on the whole, just as satisfied with their powers and their ability to produce useful market studies overall as those that have them.

- 5.38 Authorities were asked to explain their rating, to identify whether, and if so how, they consider their powers to be excessive, and what additional powers they would like and why.
- 5.39 Reasons for being satisfied included:
- powers are sufficient to accomplish goals
  - power of on-site inspection prevents evidence from being destroyed in cases where this may be likely
  - powers allow for flexibility and efficiency – stronger powers would lengthen procedures and increase the risk of legal challenge.
- 5.40 Those giving slightly lower satisfaction ratings identified the following factors as influencing the lower score:
- difficulties securing information from undertakings (in spite of formal powers to compel)
  - lack of a clear requirement for government to take on recommendations
  - lack of a commitment from government to update the authority on progress when recommendations are accepted by government
  - a requirement to get clearance from legislators for studies in a particular sector.
- 5.41 One authority said it was pursuing legislation to introduce a new power to impose binding remedies in respect of oligopolistic markets. It said the proposed amendment to the law was inspired, inter alia, by the UK Competition Commission.
- 5.42 An authority that can only conduct market studies on the instruction of Ministers noted potential scope for introducing a power to conduct own initiative studies – though this would require a change in the law.
- 5.43 One authority noted that its powers were quite new and it would need further time to evaluate them.

- 5.44 One respondent, with market study powers modelled on the EC sector inquiry, reported that the formality of this approach often caused misunderstandings with market participants, who would confuse sector inquiries with enforcement action.
- 5.45 One authority that appeared to have undefined market study powers pointed out that, although its use of these powers for market studies purposes had never been challenged in law, it might be safer to have defined powers.
- 5.46 In spite of these points, the overriding flavour of responses was one of satisfaction with existing overall powers to conduct studies.

#### Summary of Key Findings

##### Key findings of this chapter:

- 1) 89 per cent of authorities have formal powers to carry out market studies.
- 2) Formal powers vary – between clearly spelled out statutory powers and relying on a general function to conducting studies without any specific legislative function to do so.
- 3) 76 per cent of authorities can compel the supply of information, some of whom choose not to use this power (or only to use it infrequently). Of these, 66 per cent can apply sanctions for not supplying information.
- 4) The majority of authorities believe it is better to have the power to compel the supply of information, largely to ensure required information is submitted in a timely fashion.
- 5) Those not in favour of a power to compel the supply of information cite a key reason as being possible stakeholder confusion in distinguishing market studies from enforcement action.
- 6) Despite the variations, authorities seems to be broadly satisfied with their powers to conduct market studies, including information gathering powers.

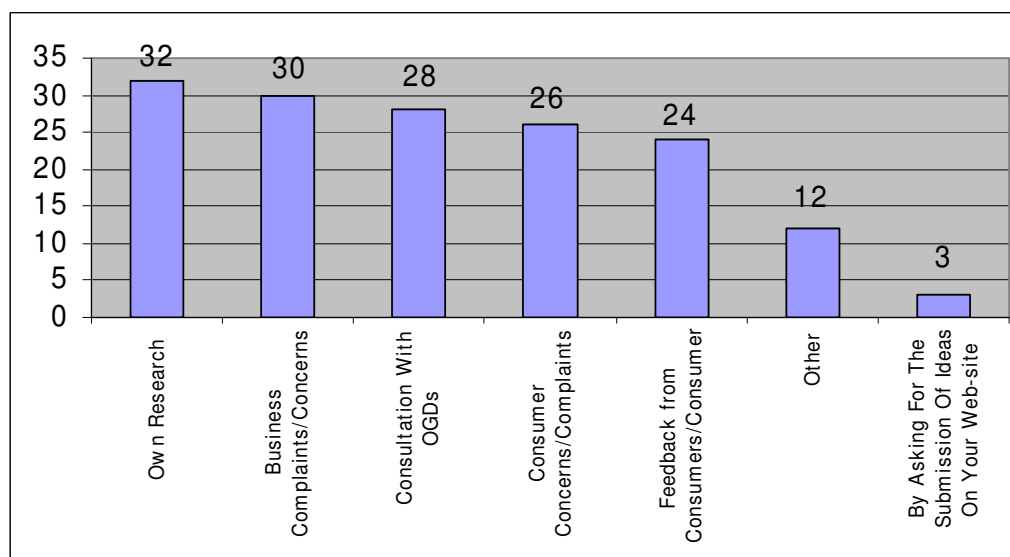
## 6 SELECTION OF MARKET STUDIES

6.1 This chapter considers how authorities select market studies, in particular how ideas for studies are identified and the factors that influence the choices made.

### Gathering ideas

6.2 Authorities were asked how they gather ideas for potential market studies and were given a list of options to mark in the questionnaire. Most indicated more than one source of ideas. Of the 38 authorities that responded to this part of the questionnaire two advised that they are solely directed by third parties to carry out studies and hence play no part in the selection process. The chart below shows the responses received from the remaining 36 authorities.

**Chart [6.1]: How does your Authority gather ideas for market studies?**



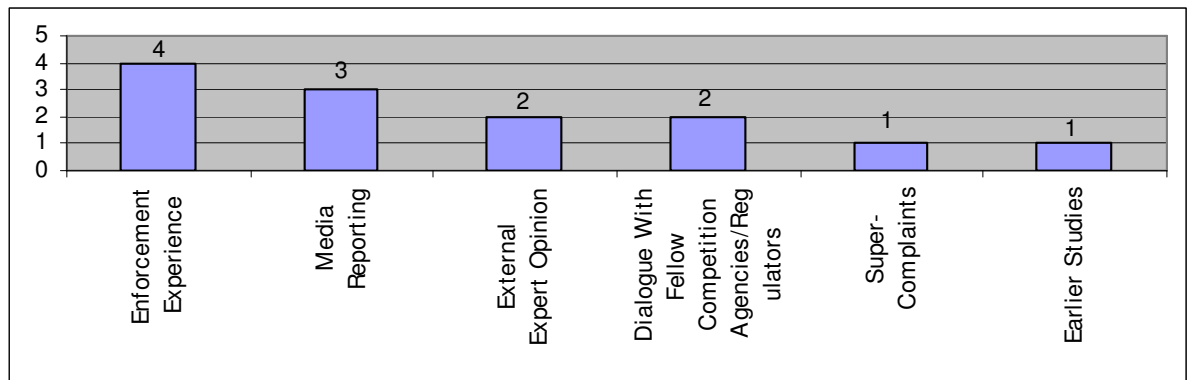
6.3 In addition to the options shown above, 12 authorities advised that they have other sources of ideas, most notably their own enforcement experience. One authority describes a process whereby designated consumer bodies have the power to make what is called a 'super-complaint' which sets out how a feature or combination of features in a market seems to be significantly harming the interests of consumers. When such a complaint is received the authority must, by law, consider the complaint and publish a reasoned response within 90 days setting out what action, if



any, it will take. One of the possible outcomes of a super-complaint could be a market study.<sup>44</sup>

6.4 The additional sources of ideas are noted in the chart below.

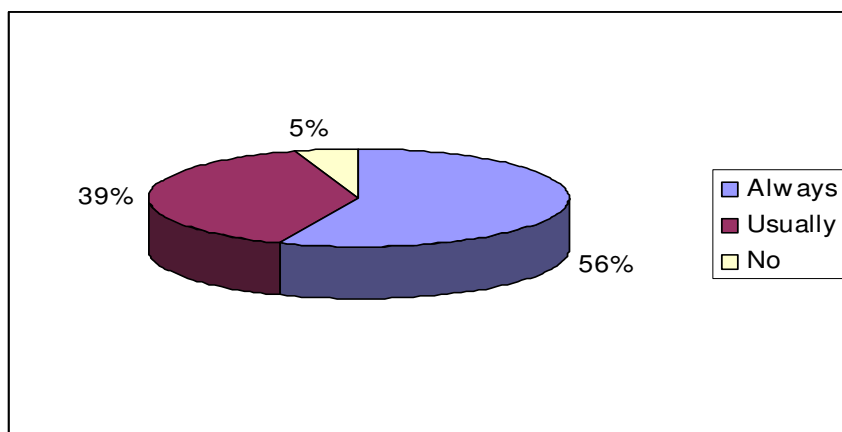
**Chart [6.2]: Additional sources of ideas**



### Choosing studies

6.5 Authorities were asked if they choose which markets to study or if others can and have instructed them (i.e. compelled or required them) in this respect. The chart below shows that the majority of the 37 respondents advised that they always select their market studies.

**Chart [6.3]: Does your Authority choose which markets to study?**



<sup>44</sup> Other possible outcomes include: taking competition or consumer enforcement action, referring the market to a concurrent regulator, referring the market for a more detailed investigation by the second tier competition Authority, finding the complaint requires no action, finding the complaint is unfounded.

6.6 As to whether 'others' can instruct (i.e. require) authorities to carry out market studies 54 per cent of the 37 respondents advised that they can be so instructed.

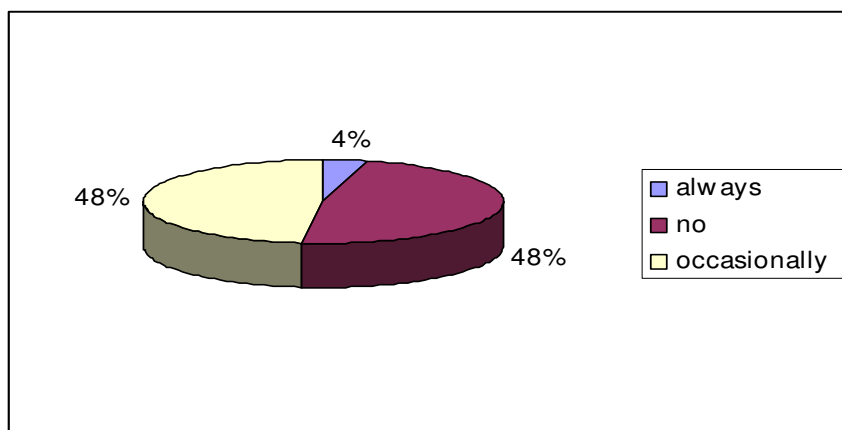
6.7 Where authorities are instructed to carry out market studies such instructions had been received from government, government agencies, other regulators or a combination of these. Two authorities advised that whilst it is possible in theory to receive a direction to undertake a market study it has never happened to date or is very infrequent.

*'Section 125 of the [title of Act] stipulates that the [Authority] is authorized to make representations before federal boards and tribunals in respect of competition. This section also provides that the [relevant Minister] may direct the [Authority] to make such a submission. While this has never occurred, it is possible (although unlikely) that the [relevant Minister] could rely on this provision to direct that the [Authority] undertake a market study.'*

*'The legislative branch can enact legislation mandating a study. This is done extremely infrequently.'*

6.8 Leaving aside whether 'others' can in theory instruct authorities to carry out market studies, authorities were asked whether they had ever been so instructed. Of the 31 authorities that responded the results were evenly split, as indicated in Chart 6.4 below, between those that had never received such instructions and those that had only occasionally received such instructions to date.

**Chart [6.4]: Has your Authority been instructed to carry out market studies?**



- 6.9 Authorities were then asked if third parties had ever asked them voluntarily to carry out market studies and if so to identify the third parties concerned. Of the 38 respondents that replied to this question 54 per cent advised that they had received such requests. Requests were identified as coming from a variety of sources including: other regulated bodies, business groups, consumer groups, complainants, government and in a few cases trade unions. An example of such a response is below.

*'When asked to give opinion on general competition issues related to the competitive state of a market; such opinions may be prompted by the Parliament, the Government, local authorities, professional organisations and trade unions, consumer associations, chambers of agriculture, chambers of commerce and industry and chambers of trade.'*

- 6.10 A few of the 46 per cent of respondents that had never received such requests from third parties advised that there was nothing to stop such requests being made; they had just never received any to date.

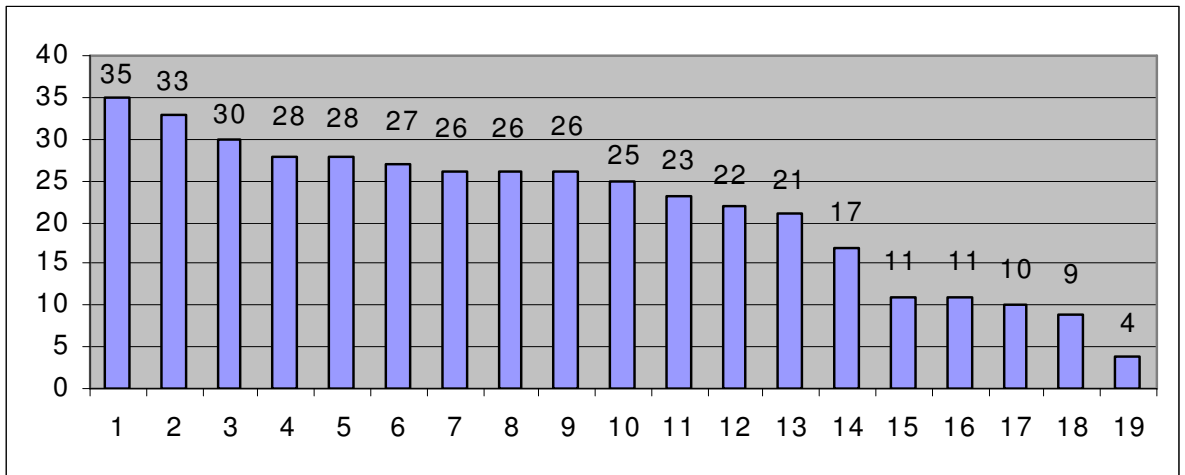
*'It would be possible for the [Authority] to be asked to voluntarily carry out market studies, however, so far we did not have such situation.'*

*'To date sector inquiries were conducted to look into market situations which came to the [Authority's] notice on the basis of complaints by stakeholders, among others. Stakeholders are free to prompt [the Authority] to carry out sector inquiries.'*

### **Factors that influence the selection of studies**

- 6.11 Authorities were given a number of options relating to factors that may influence their market study choices and were asked to indicate which of them influenced their decisions. Of the 37 authorities that responded the two factors that scored the highest were 'impact on consumers' and 'market importance'. The two lowest scores related to 'degree of product differentiation' and 'product life cycle'.
- 6.12 One authority advised that it is usually the combination of more than one factor that influences its choice. This statement is likely to be true of other authorities, given the many responses that indicated several influences.

**Chart [6.5]: What factors influence your selection of a particular market study?**



**Key to Chart 6.5**

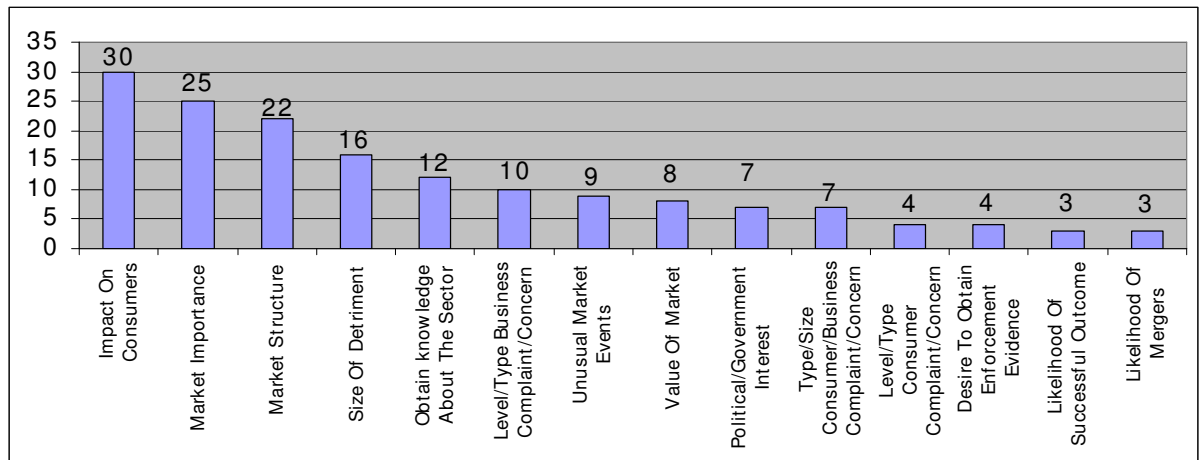
1. Impact on Consumers.
2. Market Importance.
3. Market Structure.
4. Level/Type of Consumer Complaint/Concern
5. Entry Barriers
6. Desire to Obtain Knowledge.
7. Degree of Concentration.
8. Level/Type Business Complaint/Concern.
9. Size of Detriment
10. Value of Market
11. Unusual Market Events
12. Political Interest/Attention
13. Type of Detriment
14. Desire to Obtain Enforcement Evidence
15. Likelihood of Mergers
16. Likelihood of Successful Outcome
17. Profile of Consumer Vulnerability
18. Degree of Product Differentiation
19. Product Life Cycle

6.13 Authorities were given the opportunity to highlight other factors that may influence why they choose particular markets to study. A total of 11 authorities identified additional factors, which broadly fall into the headings below:

- resource implications/availability
- fit with authority priorities/strategy/portfolio
- whether another body would be better placed to conduct the study
- the degree of public regulation in the market involved
- work done by other national authorities or the EU Commission
- impact on all market players (not just consumers)
- availability of a ready forum to present information
- ability to bring a unique perspective to bear in a useful way
- belief that advocacy efforts will have clear benefits
- ability to gauge or measure the effects of advocacy efforts
- assessment that the benefits are likely to exceed the costs
- belief that the study is likely to yield useful recommendations
- opening up of markets and emerging markets.

6.14 Of all the factors identified that influence choices, authorities were asked to rate the five most important. The chart below shows those factors that featured in most of the 37 respondents' top five selection reasons. By far the three highest scoring factors are impact on consumers, market importance and market structure. Likelihood of successful outcomes along with likelihood of mergers scored the lowest.

**Chart [6.6]: Most popular top five factors that influence authorities' selection of a particular market study.**



6.15 The remaining less common top five factors that scored two or less votes each are shown below.

- fit with wider strategy/priorities (2 votes)
- impact on tariffs and competition (1 vote)
- damage to small enterprises (1 vote)
- public interest (1 vote)
- market failure (1 vote)
- ability to provide unique perspective (1 vote)
- profile of affected economic agents (1 vote)
- whether success can be easily measured (1 vote)
- to order the market (1 vote)
- opening up of markets and emerging markets (1 vote).

#### Summary of Key Findings

Key findings of this chapter:

- 1) The majority of authorities get their ideas for market studies from a range of sources and choose which markets to study.
- 2) Fifty four per cent of respondents can be instructed by others to conduct studies and 48 per cent have been so instructed.
- 3) A range of factors influence market study selection. The two highest scoring factors are 'impact on consumers and market importance'. The two lowest scoring factors are 'degree of product differentiation' and 'product life cycle'.

## 7 MARKET STUDIES PROCESS

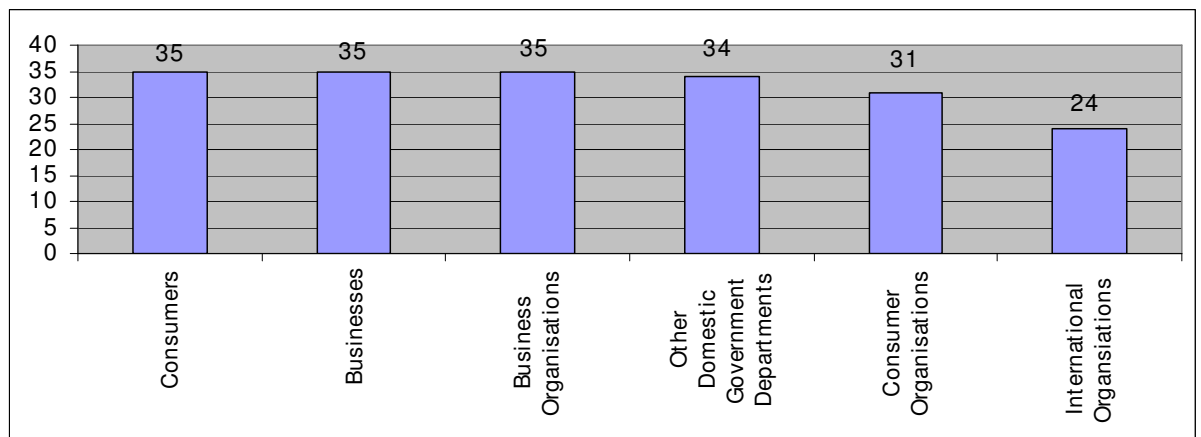
7.1 This chapter considers the procedural aspect of market studies work. Authorities were asked a range of questions on this subject including the type of information they use for studies, how they staff their market studies teams and the duration of the average study.

### Types of information obtained for market studies

7.2 Authorities were asked if they collect and use anecdotal and empirical information for market studies. Of the 37 authorities that responded, only one does not collect empirical information and only seven (19 per cent) do not collect anecdotal information.

7.3 Authorities were asked about sources of information and were given a range of options to select. Of the 37 authorities that responded, all confirmed that they collect information from at least three different sources. Indeed, as Chart 7.1 below indicates, most authorities collect information from all the sources identified in the questionnaire.

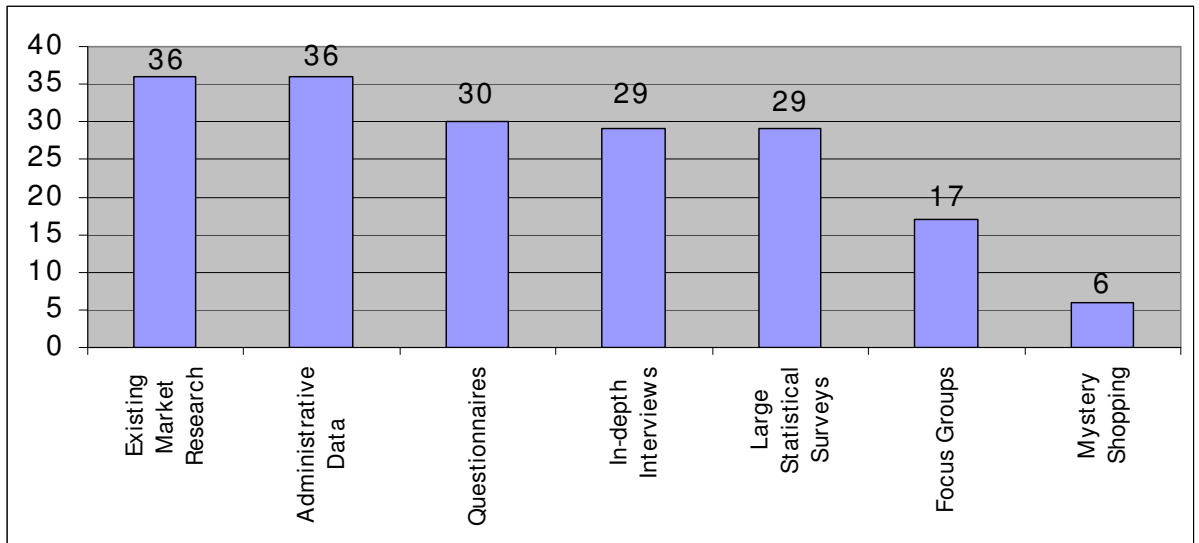
**Chart [7.1]: Who does your authority collect information from? Please mark whichever apply**



7.4 Authorities also use a number of means to conduct both quantitative and qualitative market research. The results are shown in Chart 7.2, where the categories of questionnaires, focus groups and in-depth interviews are qualitative research tools and the categories of large statistical surveys and mystery shopping are quantitative research tools.

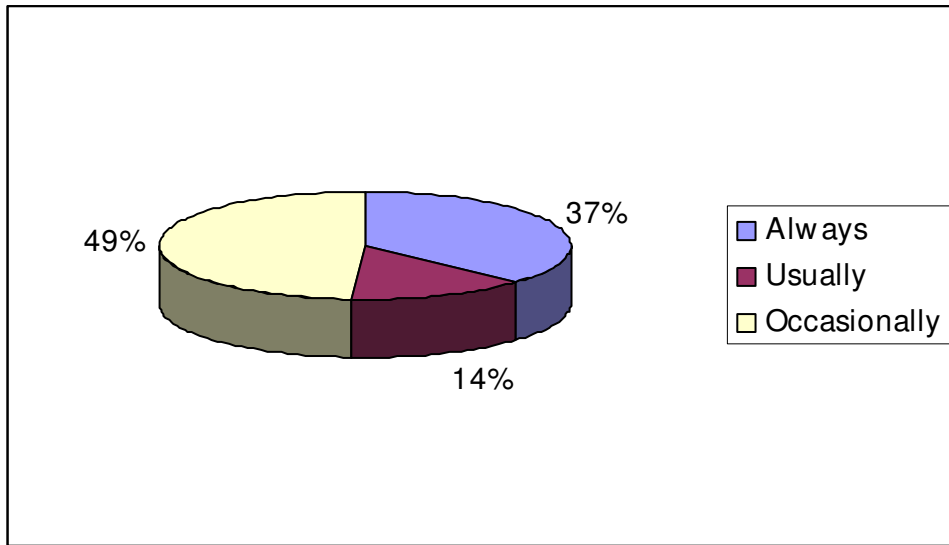


**Chart [7.2]: Does your authority use any of the following? Please mark whichever apply**



- 7.5 Two authorities also noted their frequent use of public invitations for written comments and public hearings or workshops to gather information for market studies.
- 7.6 Slightly more than half (53 per cent) of the 36 respondents always or usually carry out external research by contacting third parties in the course of a market study, and another 42 per cent of authorities do so occasionally.
- 7.7 Authorities were asked how they undertake their external research. Of the 34 authorities that responded, eighteen authorities (53 per cent) both carry out their own external research and use external contractors. The remaining results were evenly split with eight authorities advising they carry out all external research in-house and eight authorities advising they contract all such work out to agencies, academics or consultants. Authorities were then asked how often external research is undertaken as part of their market studies work. The results are shown in Chart 7.3 below.

**Chart [7.3]: How often is external research undertaken as part of your Authority’s market studies work?**



**Use of information obtained in a market study for enforcement work**

7.8 Authorities were asked if they could use information obtained during a market study for enforcement action. Only two (5 per cent) of the 37 authorities that responded to this question answered that they could not. One authority advised that there are limitations as to whether it can use information provided for enforcement action as detailed below:

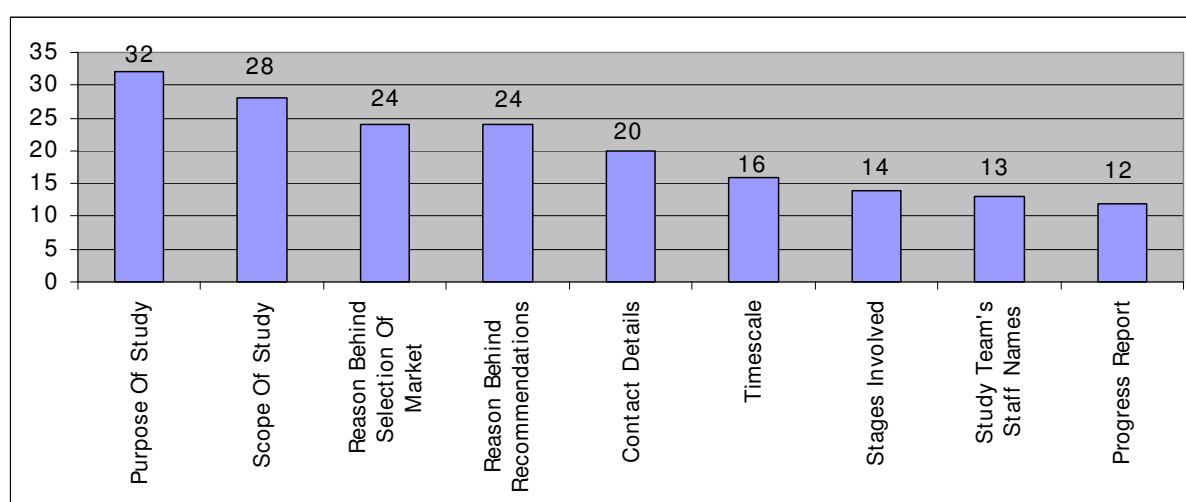
*‘[We] can only use information for enforcement action if it is public (i.e. it has been declared non confidential) or it has been obtained in respect of all defence rights of the parties providing the information for the market study (for example, where for the purposes of a market study a party is asked whether it meets with competitors in order to agree on prices or exchange information on commercial conditions, the party has to be warned that such conducts could amount to illegal conducts under the Competition Act).’*

7.9 Authorities were then asked if they had ever used information obtained during their market studies work to take forward their enforcement work. Of the 36 authorities that responded, 30 (83 per cent) confirmed that they had used information obtained during a market study to inform enforcement work.

## Stakeholder engagement

- 7.10 Authorities were asked to identify what information they provide to stakeholders on their market studies work and were given a range of options to select. One authority advised that this question was not applicable to them and another authority advised that it does not engage with or inform stakeholders about its market studies work. Neither authority explained their answers further.
- 7.11 Details from the remaining 34 authorities that responded are illustrated in Chart 7.4 below. Responses provided show that all these authorities provide at least three or more of the options identified. With one exception, all of the 34 respondents provide information on the purpose of their market studies and 29 (85 per cent) provide information on the scope of studies. Twenty-six (76 per cent) provide information on the reasoning behind recommendations and twenty two (65 per cent) provide market study teams' contact details. Providing progress reports and market study team member names were shown to be the least used of the options, being used by 13 (38 per cent) and 14 (41 per cent) of respondents respectively.

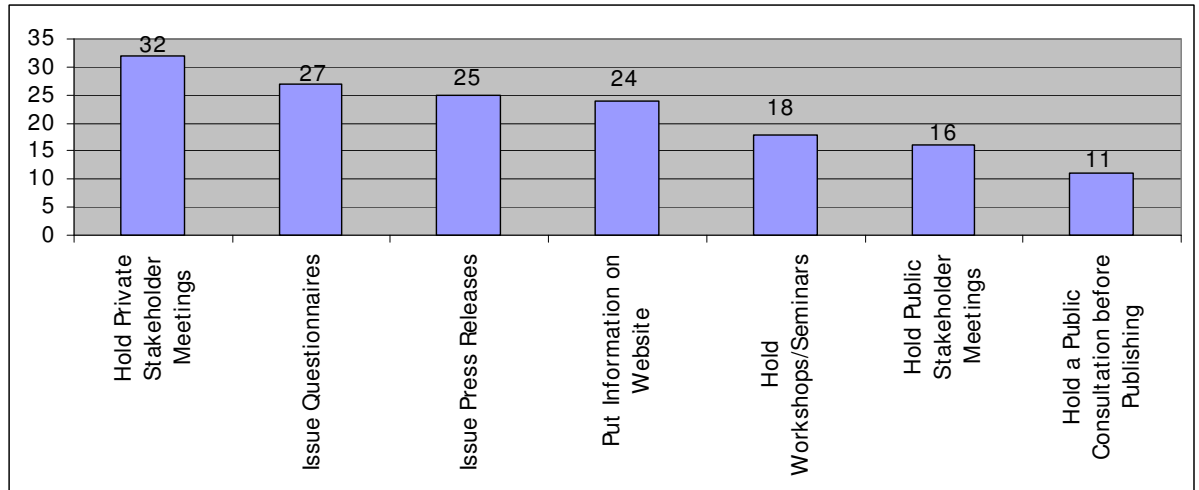
**Chart [7.4]: Does your authority communicate with stakeholders on any of the following? Please mark whichever apply**



- 7.12 Authorities were then asked how they communicate with stakeholders and were again given a range of options. Responses were received from 37 authorities and the results are illustrated in Chart 7.5 below. Only one authority uses only one means of communication and only seven authorities use only two means of communication. Twenty four respondents (65 per cent) use four or more means.
- 7.13 Holding private meetings is the most common means of communicating with stakeholders, with 86 per cent of authorities that responded indicating that they engage in this practice. However, the general comments about stakeholder

communication do not reveal why one to one stakeholder contact is used by most authorities in preference to, say, publishing information, or holding public meetings.

**Chart [7.5]: How do you communicate/engage with stakeholders? Please mark whichever apply**



7.14 Of the 36 authorities that answered the question as to whether they publish a final report at the end of a market study, the majority (69 per cent) advised they either always or usually do so. Only four authorities (9 per cent) do not publish final reports. Twenty (56 per cent) of the authorities that publish reports, be it always, usually or occasionally, publish supporting material. This material can include associated research, feedback from stakeholders, evidence obtained, and results of consultations. One authority noted that it created a sector-specific web page on its web site containing the results of a market study and supporting materials.

7.15 Authorities were asked to identify the pros and cons of their approach to engaging/communicating with stakeholders. Responses were received from 32 authorities. Comments can generally be categorised as below; some of the comments made are more about the pros and cons generally of engaging with stakeholders rather than their specific approach.

7.16 Approach to engaging/ communicating with stakeholders - **pros**

- stakeholders willingly supply information
- market studies are informed by stakeholder information/feedback/ knowledge
- transparency – stakeholders are not taken by surprise and are more likely to engage in and inform the debate

- engaging with stakeholders assists the handling of the study
- engaging with parties is seen to be fair
- stakeholders may change their behaviour as a result of engagement
- public proceedings have proved to be an effective way for stakeholders to share views.

7.17 Approach to engaging/ communicating with stakeholders - **cons**

- engaging with stakeholders can delay the process
- stakeholders can have over optimistic views about their degree of influence
- stakeholders may have vested interest and opinions may not be balanced
- some stakeholders are reluctant to provide information fearing it may be used for other purposes, such as enforcement
- the risk of regulatory capture.

7.18 Authorities were asked if they are required to make any or all information public or is it left to their discretion what information to disclose. Two authorities advised that they are required by law to make certain information publicly available and a third authority advised information is public unless confidentiality has been requested. The remaining 30 authorities advised that disclosure is left to their discretion. A few respondents highlighted that they may receive and have to deal with freedom of information requests.

7.19 Authorities were asked if they have a process for the handling of sensitive or confidential information obtained from stakeholders during a market study. One of the 37 respondents specified that it imposes responsibility for maintaining information confidentiality on to its researchers through formal agreement prior to commencement of the work. Of the remaining 37 authorities all advised that they have a process for handling sensitive or confidential information.

7.20 Authorities were then asked what, if any, are the legal consequences if they fail to protect sensitive or confidential information. Of the 36 respondents one authority advised that the question was not applicable to them whilst another advised that there are no legal consequences for their authority. For the remaining 34 authorities, the disclosure of confidential information can result either in civil or criminal action against the member of staff who disclosed the information or in a

claim for damages against the authority itself if confidential information is disclosed.

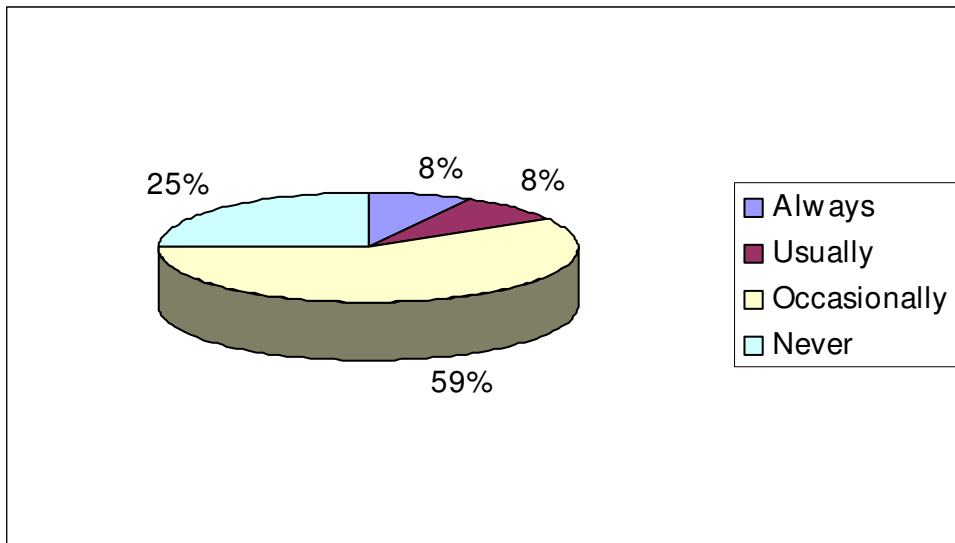
### **Timing of market studies**

- 7.21 Authorities were asked if they have to carry out market studies within a statutory timeframe. Of the 38 authorities that responded, only two (5 per cent) advised that they do have to work within a statutory timeframe, with one advising that *'the statutory timeframe for market studies is set annually.'* Of the 36 authorities that do not have to adhere to a statutory timeframe, thirty one (82 per cent) set their own defined timeframe and milestones for their market studies. However, few authorities publish information about their timeframes and milestones. Of the 36 authorities that answered this question, nine (19 per cent) publish information on timeframes and six (17 per cent) publish information on defined milestones, although one authority advised it only does so 'sometimes'. Authorities were asked if the timeframe and defined milestones can then be subsequently altered. Only two authorities (6 per cent) out of 36 respondents advised that they cannot.
- 7.22 There was a significant range in the average length of a market study reported by the 37 authorities which responded to this question. A few authorities gave a range band rather than an average figure. Of those that did provide an average the shortest was one month and the longest was two years. Most respondents indicated an average duration of less than one year (forty one per cent). This response reflects the actual duration of studies reported in the annexe to the questionnaire, discussed in Chapter 11.

### **Using third parties to do market studies work**

- 7.23 Authorities were asked if they ever commission third parties to undertake their market studies work and if so to indicate how frequently they do so. Of the 38 authorities that responded, three quarters just under half (48 per cent) do commission third parties to undertake market studies work. In relation to frequency, only 24 authorities responded and the results are illustrated below in Chart 7.6 below.

**Chart [7.6]: How frequently does your authority commission third parties?**



7.24 Authorities were asked to explain the circumstances under which they would commission third parties to carry out their market studies work. The two reasons most frequently identified by the 22 authorities that responded are:

- the specialised market knowledge or expertise that third parties can bring to market studies
- that the authority lacks the human resources to do all or part of the study.

7.25 One authority advised that it sometimes outsources studies intended to gather general knowledge on specific antitrust themes and sectors to third parties. Another authority advised that it has only commissioned a third party to carry out a market study on two occasions. In both cases these were technical studies with a narrow focus and limited stakeholder engagement.

7.26 Two authorities pointed out that any third parties they may use would not be able to use the statutory investigatory powers available to the authorities themselves. No doubt this would apply to other authorities as well.

### **Process of market studies**

7.27 Authorities were asked if they have a standardised internal process on how to carry out market studies and if so to describe it. Out of the 37 authorities that responded to this question, only 15 (41 per cent) of authorities confirmed that they do have such a process. Two authorities advised that they are in the process of developing guidance and one authority acknowledged that it is aware that its processes will need to be refined and elaborated upon once it has more experience of market

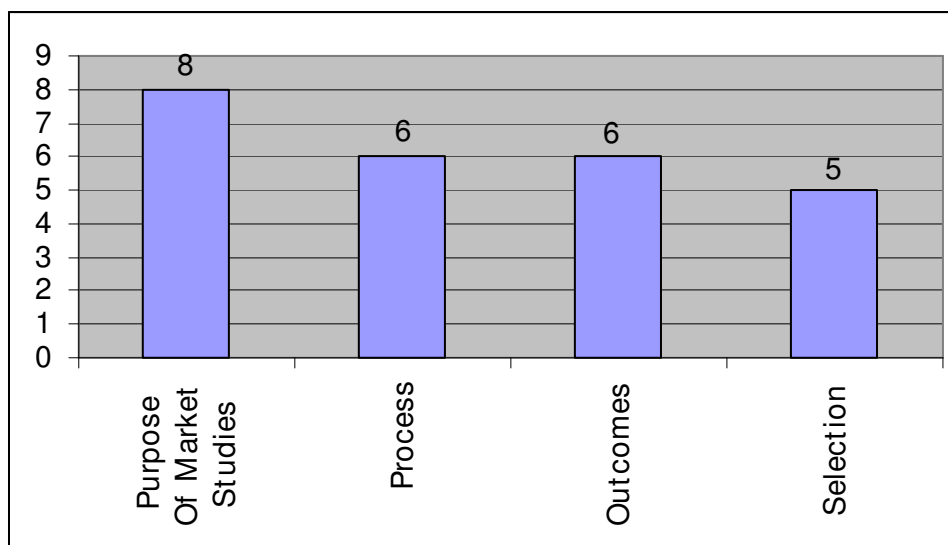
studies work. One authority advised that its internal processes can vary greatly depending on the complexity of the market, the issues and the number of parties involved.

7.28 Six respondents described a standardised process with the following general sequence:

- identification of the market to study
- scoping the project
- data collection and analysis
- publication of report and recommendations.

7.29 Authorities were asked if they have guidance for external stakeholders about their market studies work. Only 9 authorities (27 per cent) of the 38 authorities that responded have such guidance. Authorities that have guidance were asked to indicate what areas the guidance covers and were given four options to select. The results are shown in Chart 7.7 below. The guidance of only two out of the nine authorities (22 per cent) covers all four options shown below. The guidance of four authorities covers three of the options, the guidance of two authorities covers two of the options and the guidance of one authority covers just one of the available options.

**Chart [7.7]: What areas does this guidance cover? Please mark whichever apply:**





7.30 Authorities were asked to identify their top three areas of procedural best practice. The 33 responses were wide ranging and there was no one area that was highlighted by the majority of respondents. However, several authorities identified transparency and stakeholder engagement in relation to businesses and other government agencies. How authorities identify markets for study and research techniques also featured in a number of responses. The following comments are a representative sample:

*'Before finalising its reports, the [Authority] conducts a fact-checking exercise with relevant stakeholders. This kind of transparency both ensures that the results of the studies are factually correct and also that they are highly credible, which in turn boosts their impact.'*

*'Constructive and creative engagement with stakeholders to deliver voluntary remedies to market problems. Increasingly, we have adopted innovative approaches to securing stakeholder input on remedies such as publishing draft findings and evidence early. This provides a basis for discussion with the industry, consumer groups and other stakeholders.'*

*'The ability to conduct large scale workshops/roundtables to gather information on markets.'*

*'Obtaining data or other information necessary to conduct the study in a way that is statistically unbiased and procedurally correct.'*

*'Structured and Scientific processes in information gathering, interviews and data analysis.'*

*'The selection of the market to be studied is done in a way that it allows us to prioritise sectors according to their relevance, so those that are more important for the economy performance or those in which damage to consumer is significant are chosen.'*

7.31 Authorities were also asked to identify procedural challenges and/or problems for their market studies work. Thirty-one authorities responded to this question. Again, answers were quite varied, but a few common themes emerged as follows:

- the challenge in not having an effective process in place for carrying out market studies
- insufficient resources, covering a lack of staff, staff expertise and/or budget
- making the right selection and prioritisation decisions
- information gathering, covering the problems of not getting information, not getting enough information, the insufficient quality of the information provided and/or assessing the information in a limited time period.

7.32 The latter point above contrasts with the general satisfaction levels in relation to powers to conduct studies, including information gathering powers, reported in Chapter 5. Other less common themes included a lack of remedial powers, limitations on measuring the impact of studies and coordination with other regulatory authorities. The following comments are a representative sample:

*'Without a clear plan, focus, and timeframe, market study work may languish and its completion can be delayed as it competes for resources with enforcement.'*

*'Usually only one person is assigned to work on a particular market study and this person may also be a case handler. A large workload will prevent them from being able to perform a large scale and very comprehensive market study.'*

*'Ad hoc approach to selecting markets for research - markets for examination are often selected upon request of authority management or by the Government who are concerned with a particular situation in markets that are of vital economic and/or social significance. This may lead to considerable differences in scope and time frame of research in various markets, subject to character of particular request.'*

*'As an enforcement body, stakeholders tend to be concerned when approached for information, and hence they may not be so receptive in providing the information needed for the market study.'*

*'We have limited authority once the market study is published. There are no requirements on governments or private parties to implement or comply with market study recommendations.'*

*'All market studies will offer proposals aimed at improving the functioning of the market under study. These proposals often include actions to be taken by the policy-makers. Staff have experienced difficulties in convening discussions with policy-makers and ensuring that our proposals are given adequate consideration at the appropriate levels of formal authority.'*

*'We have found that it can be easy to publish a report and then let recommendations slide. This jeopardises our ability to secure maximum impact from our studies. We now ensure that responsibility for follow-up on market studies is clearly allocated either to the project team that worked on the study, or, after an appropriate follow-up period, to our advocacy team.'*

### **Resources devoted to market studies**

7.34 Authorities were asked how many market studies are conducted in a twelve month period. Three authorities advised they were unable to provide this information as they either contract all their market studies work out to third parties, their experience in doing market studies is too recent to say or it can vary due to the number of requests, available resources and other priorities. Of the 32 authorities that did provide details, a number of them pointed out the difficulties in doing so. These difficulties were due to:

- the number of studies per year having changed
- the authority having only recently started market studies work
- the variance in size and scope of different studies.

- 7.35 The majority (56 per cent) of authorities which responded to this question gave an average figure of under five studies per year. Fourteen authorities (40 per cent) produce on average one to two studies per year. One authority advised that it does over 50 studies per year, whilst another gave a number of approximately 40 per year. The third highest number of studies per year was 11. These variances could in part be due to differences in how some authorities define their market studies work.
- 7.36 Authorities were asked how many people (full time equivalents) on average typically work on a market study. Two authorities were unable to provide this information for the reasons that they contract all their market studies work out to third parties and their experience in doing market studies is too recent to say. Of the 35 authorities that did provide details, responses were varied. The largest teams comprise 15 to 25 full time equivalents, whereas the smallest involve only one member of staff. A number of responses confirmed that the size of the team changes over the course of the market study. Forty three per cent of respondents indicated that the teams are usually made up of two to three full time equivalents. There was more consistency in responses to the associated question on team members' skills and qualifications. Most authorities confirmed that teams are made up of either economists or a combination of economists and lawyers.
- 7.37 Authorities were asked how many people (full time equivalents) they have allocated to working on market studies at any one time. One authority advised this can vary tremendously depending on the study being undertaken. Of the 28 authorities that provided details the results were again diverse. Of those that did provide details one authority advised that it has 40 to 60 members of staff allocated, whilst six authorities have just one person. The most common response (29 per cent) gave a figure of between two and five full time equivalents.
- 7.38 Only 19 per cent of the 37 authorities that responded confirmed that they have dedicated teams who only do market studies. The responses from the four authorities that provided more detail to their answers indicate some interesting differences as shown below.

*'We have dedicated teams who undertake work on all advocacy-related functions which include market studies. We believe that there is merit in ensuring that all case officers do a range of activities. Focussing on market studies only would adversely affect the human capital of the organisation.'*

*'Based on our workload and the number and type of industries which exist it would be very useful if we could have a department dedicated to conducting market studies. Having such a department would improve our process by sharpening our*

*skills, reducing the time taken to complete studies, and allow us to use the information in more beneficial ways.'*

*'We do not have any experience in that field since, as mentioned, employees do not conduct market studies, however in the forthcoming period, establishment of a dedicated team to deal with market studies is planned.'*

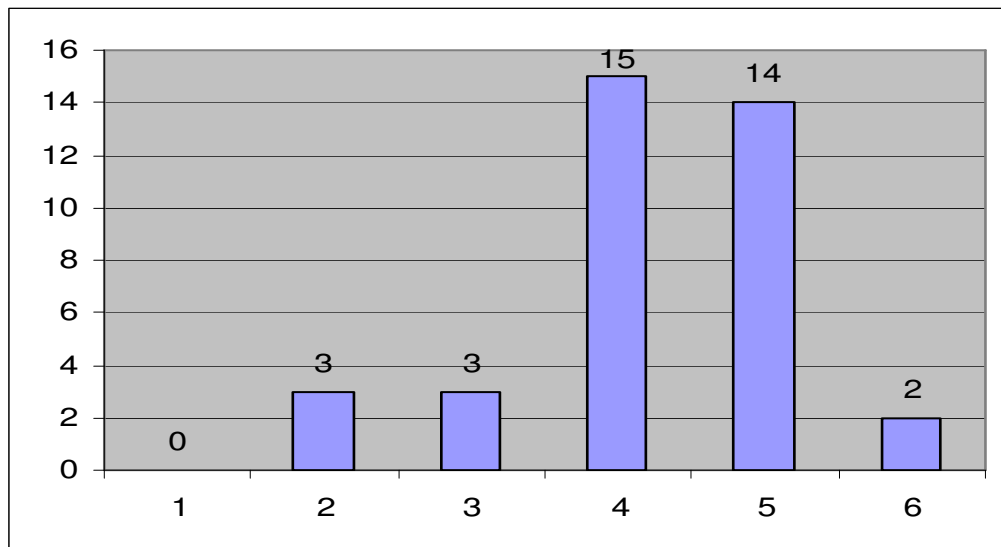
*'Until 2 years ago we had a separate team dedicated to working on market studies. We then reorganised our delivery teams. We now carry out enforcement work and markets projects, including market studies from three market groupings which are: Goods, Services and Infrastructure.'*

- 7.39 Authorities, that do not have dedicated market study team resource, were asked what their process is for creating a market study team. Two authorities advised they have no special process. Many of the remaining 24 respondents advised that teams are created on the basis of previous experience of the market or expertise and capacity.

#### **Authorities' level of satisfaction with their processes for market studies**

- 7.40 Authorities were asked to rate their satisfaction with their processes for carrying out market studies using a scale of one (not satisfied) to six (very satisfied). As Chart 7.8 indicates, the satisfaction ratings of the 37 authorities that responded are reasonably high.

**Chart [7.8]: Using a scale of 1 (not satisfied) to 6 (very satisfied), please rate below how satisfied your authority is with its process for carrying out market studies work.**



- 7.41 There were just two authorities that rated their satisfaction level at six. Even then one of these cited as a problem the *‘lack of any formal follow up of the [Authority’s] recommendations and of any system to measure the success of the finding enquiry.’*
- 7.42 Four authorities, that gave satisfaction ratings of four, mentioned their relative inexperience in carrying out market studies work, with some saying that they still have lessons to learn. Some authorities with greater experience also highlighted the need for further learning and an associated desire to improve.
- 7.43 One of the authorities that gave a satisfaction rating of two indicated its rating would have been higher if it had dedicated resources to work on market studies.

#### Summary of Key Findings

Key findings of this chapter:

- 1) Most respondents collect evidence for studies from several sources.
- 2) Existing market research, administrative data, in-depth interviews and large statistical surveys are the most common ways of collecting information. Focus groups and mystery shopping are the least common way.
- 3) The majority of respondents have used information obtained in their market

studies work to help enforcement work.

- 4) Most respondents provide stakeholders with information on the reason for selecting markets for study, the purpose and scope of the study, and the reasons for recommendations.
- 5) Fewer give details of the stages involved in the study, the study timetable, any progress reports and the study team's names.
- 6) The most common ways to engage with stakeholders are to issue press releases, put information on web sites, hold private meetings with stakeholders, and to issue questionnaires.
- 7) Far fewer respondents hold a public consultation before publishing their findings, or hold public stakeholder meetings, workshops or seminars.
- 8) Few respondents have to complete market studies within a specified time frame.
- 9) Just under half of those that responded commission consultants to carry out market studies work.
- 10) Less than half of those that responded have a standardised process for market studies, and only about a quarter of those that responded have published guidance.
- 11) The level of resource devoted to studies varies quite widely - teams for each study range from one person to 15 to 25 people. Most authorities do not have dedicated market study resource.
- 12) The number of studies produced annually varies quite widely - numbers of studies produced in a year range from one per year to over 50 per year. The majority of respondents have an average figure of under five per year.
- 13) Process for carrying out market studies and, lack of resources seem to be particular problems for some respondents.
- 14) There is a reasonably high satisfaction rating for market studies processes.

## 8 OUTCOMES OF MARKET STUDIES

- 8.1 This chapter considers the outcomes of market studies, in particular the different types of recommendations made, the nature of the response to them by government and business, and their implementation.

### Assessment of costs and benefits

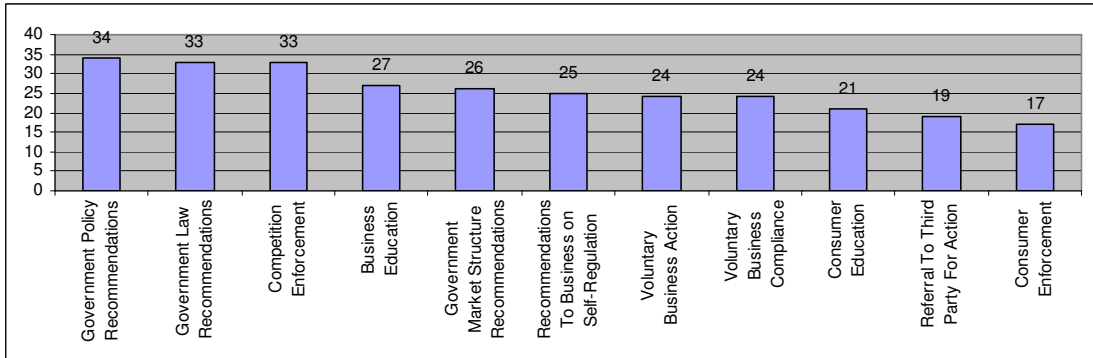
- 8.2 Authorities were asked whether it is standard procedure to take into account, when deciding on the outcomes of market studies, whether the benefits of implementing the recommendations would exceed the costs to business and others. A clear majority (66 per cent) of the 36 authorities that responded to this part of the questionnaire said that it is. One authority advised that *'this has not been a relevant factor in the sector inquiries conducted so far.'*
- 8.3 A number of authorities explained that a cost-benefit analysis or impact assessment is carried out, if not at the time of making the recommendations, then before any recommendations to government are implemented. Some authorities that do not make such an assessment made the point that their studies do not impose such costs, either because the studies are purely fact-finding in nature, or because their recommendations entail the removal of restrictions on competition.
- 8.4 One authority pointed out a primary reason for taking costs to business into account in deciding on a study's recommendations is to ensure that *'the overall benefits to consumers exceed any costs to business, because business costs would just be passed on to consumers.'*

### Types of recommendation

- 8.5 Authorities were asked firstly what types of recommendation (from a list of options set out in the questionnaire) could **potentially** result from their market studies, and secondly what types of recommendation **actually** have been made.
- 8.6 The chart below lists the types of potential recommendation, and the number of authorities (of the 37 which responded to this part of the questionnaire) that said that each type of recommendation is available to them.

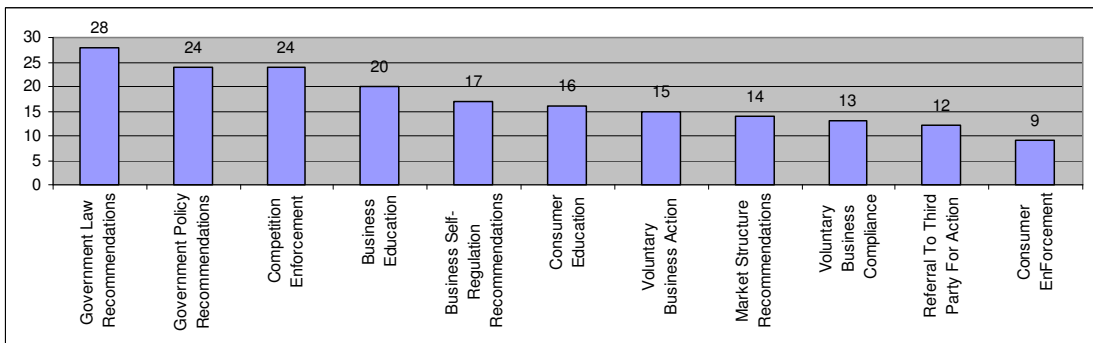


**Chart [8.1]: Can your studies result in any of the following recommendations and/or actions?**



8.7 The chart below summarises the types of recommendation which have actually been made in these authorities' market studies, again with the number of authorities mentioning each type of recommendation.

**Chart [8.2]: Have your studies actually resulted in any of the following recommendations and/or actions?**



8.8 The most prominent types of recommendation, in terms of both availability and use, are proposals to government for changes either to policy (available to 34 authorities, used by 24) or to the law (available to 33 authorities, used by 28), and the use of competition enforcement powers (available to 33 authorities, used by 24).

8.9 The use of consumer enforcement powers is among the least prominent types of recommendation, in terms of both availability and use (available to 17 authorities, used by nine). This is likely to be a consequence of the fact that only around a third of the authorities that responded to the questionnaire have responsibility for both competition and consumer issues. It is, however, notable that relatively wide use is made of consumer education as a recommendation (available to 21 authorities, used by 16).

- 8.10 Education for business is also relatively widespread in terms of availability and actual use as an outcome of market studies (available to 27 authorities, used by 20). Other types of action targeted at business are in the middle rank in terms of both availability and use.
- 8.11 Authorities were asked whether any other types of recommendation, beyond those identified in the questionnaire, are available to them as outcomes of market studies. No specific additional types of outcome were mentioned, although one authority reported that there are no legal limits on the scope of the recommendations from its market studies.

### **Government response to market studies**

- 8.12 Authorities were asked:
- whether government is required to respond to recommendations made by them as a result of market studies
  - if so, whether the government response is required to be made within a set timescale
  - whether government is under a legal obligation, or has made a policy commitment, to act upon recommendations made as a result of market studies.
- 8.13 Of the 36 authorities that responded to this part of the questionnaire, only 9 (25 per cent) said that government is required to **respond to** their recommendations, and in only one jurisdiction is government obliged to **act on** them.
- 8.14 Where there is a requirement on government to respond, a timescale is set in five of the nine jurisdictions concerned. Where specific times are set, they vary from 90 days to four months. In one jurisdiction the deadline for a response is set on a case by case basis by the authority carrying out the study, while in another responses must be made 'in a reasonable time'. One authority said that its government has recently announced that it intends in future to pursue a policy of responding to recommendations within nine months, although it was unclear whether this would have retrospective effect.
- 8.15 The fact that most authorities operate in a context where their government is not required to respond to market study recommendations emphasises the importance of accompanying market studies with effective competition advocacy efforts.

8.16 Authorities were asked if government is under a legal obligation and/or has given a policy commitment to act upon the authority's recommendations. Only one of the 37 respondents confirmed this to be the case.

### **Business response to market studies**

8.17 Authorities were asked whether business is under a legal obligation to act upon recommendations made to them as a result of market studies. Of the 37 authorities that responded to this part of the questionnaire, only five (14 per cent) said that there is such an obligation.

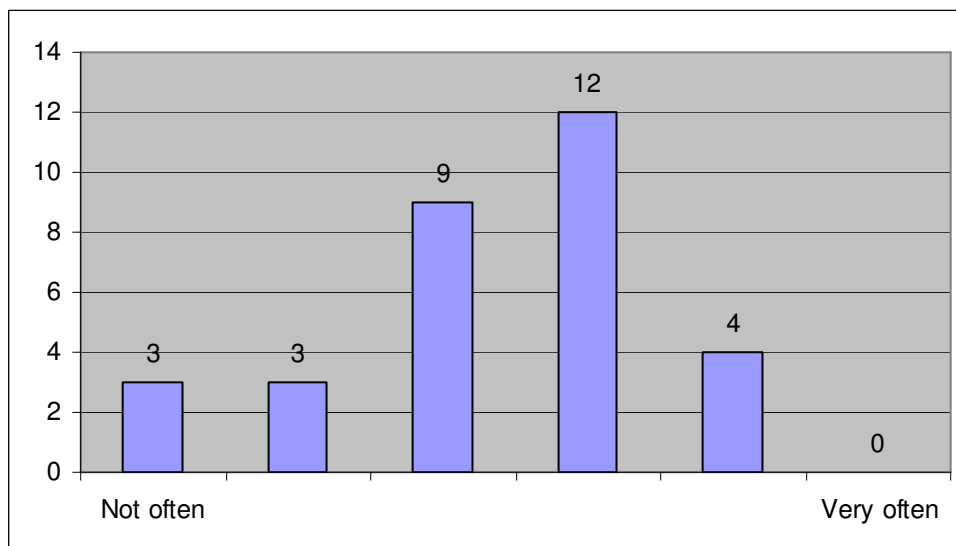
### **Implementation of market study recommendations**

8.18 Authorities were asked to rate:

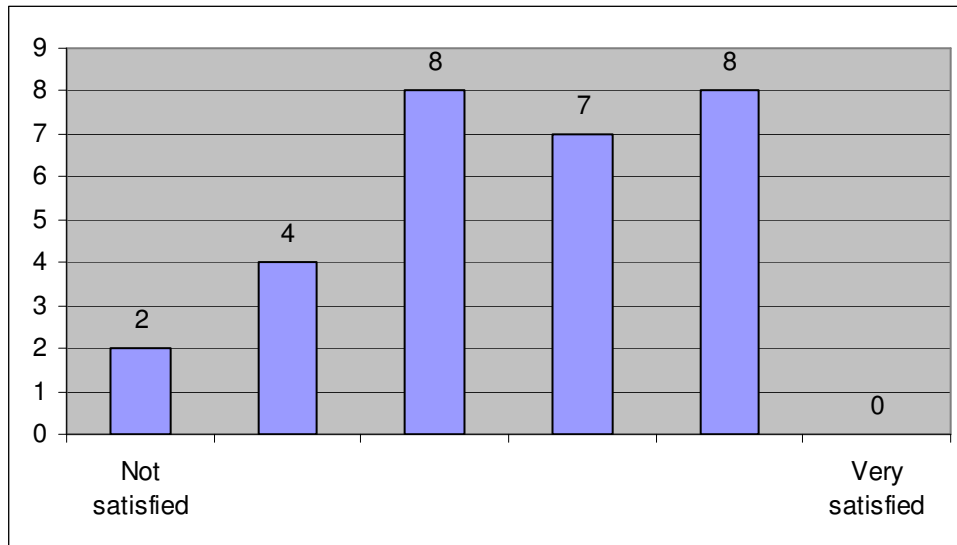
- how often their recommendations have been implemented by government and/or business, on a scale of one (not often) to six (very often)
- how satisfied they were with the level of implementation of their recommendations on a scale of one (not satisfied) to six (very satisfied).

The responses are set out in the Charts 8.3 and 8.4 below.

**Chart [8.3]: Using a scale of 1 (not often) to 6 (very often) please rate how often your Authority's recommendations have been implemented by government and/or business**



**Chart [8.4]: Using a scale of 1 (not satisfied) to 6 (very satisfied) please rate how satisfied your Authority has been with the level of implementation in respect of its recommendations**



8.19 The responses shown in Chart 8.4 would appear to indicate significant scope for improvement in the level of adoption of recommendations made as a result of market studies by the 29 authorities that responded. Nevertheless, given that (as indicated in the two previous sections) there is no obligation on the part of either government or business to adopt recommendations in a large majority of the jurisdictions covered by the questionnaire, the level of implementation would seem to indicate that successful outcomes can be achieved without such an obligation using other approaches, such as advocacy to government or seeking compliance by business on a voluntary basis. Some of the measures adopted to try to ensure that recommendations are adopted are considered later in this chapter.

8.20 A small number of authorities drew a distinction between the level of implementation by government and business respectively: in all cases recommendations addressed to business had fared better than those directed at government.

8.21 Some authorities reported that their recommendations, even if not accepted outright, can nevertheless contribute to change:

*'The government has indicated that it uses our recommendations as well as recommendations and/or information from other sources in making their final decisions.'*

*'Action has been taken (by government and by business) as a result of the market studies, but this action is not always the exact action recommended.'*

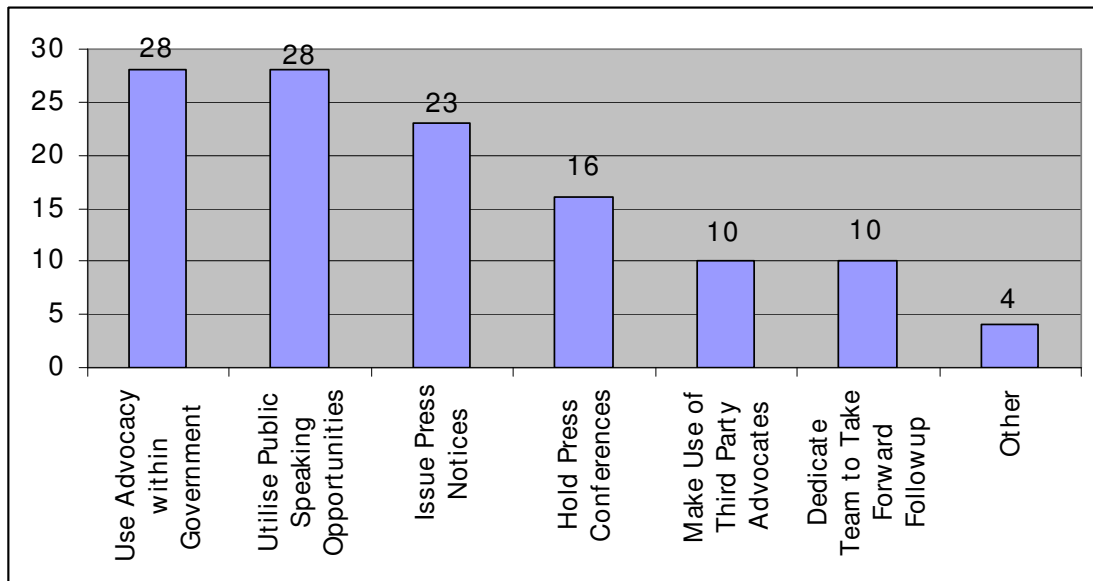
*'Generally the Government and business ... follow ... recommendations, although the [Authority] [has] debates with both of them in order to justify and advocate its recommendations. Sometimes the [Authority] alters its recommendations as a result of their discussion with Government or business.'*

*'In general, recommendations ... are implemented in a satisfactory way, however, not always to the full extent.'*

### **Measures taken to secure adoption of recommendations**

- 8.22 As explained above, in only a small number of jurisdictions is there a legal obligation for government and/or business to act on recommendations arising as a result of market studies. Therefore, the success of many market studies may depend on their promotion through effective competition advocacy. Authorities were therefore asked what other approaches they used to try to ensure that their recommendations were adopted. The chart below summarises the approaches mentioned by the 33 authorities that responded to this part of the questionnaire.

**Chart [8.5]: What does your Authority do to try and ensure recommendations are adopted?**



8.23 These responses indicate widespread use of both advocacy within government, and various means of achieving publicity, and thus hopefully support, for recommendations.

8.24 Other tools mentioned in response to this question include engagement with business and government stakeholders both before and after recommendations are published. One authority also referred to a provision in its competition legislation authorising it to bring legal actions '*against administrative acts and regulations from which obstacles to the maintenance of effective competition in markets are derived*'. The following are a sample of the comments made:

*'Although public speaking opportunities have been used by past administrations to procure the application of recommendations, these were rather rare.'*

*'We attempt to identify allies who will promote and support our recommendations both publicly and privately.'*

*'We believe that a few critical recommendations were not implemented mainly because the Government did not appreciate/recognize the Competition effects of the recommendations within the relevant markets. Over time we have steadily*

*increased our competition advocacy efforts to assist in ‘educating’ policy makers.’*

*‘We have sometimes been disappointed with the take up and/or delay in implementing our recommendations. Nevertheless, we understand that it would be unrealistic to expect that all of our study recommendations would be accepted and implemented quickly. We acknowledge that change can take time and that a study that is influential may help to change minds and/or contribute meaningfully to a wider debate. We also think that studies that simply shine a light on how a market works can bring wider benefits in terms of educating consumers and business and building confidence in the market process.’*

### **Working with third parties to help achieve desired outcomes**

- 8.25 Authorities were asked whether they had ever worked collaboratively with third parties to help achieve the desired outcomes from their market studies – examples given were working with consumer groups on a consumer education campaign, or with businesses or business groups to secure voluntary changes to behaviour.
- 8.26 Of the 36 authorities that responded to this part of the questionnaire, 21 (58 per cent) said that they have adopted such an approach on at least some occasions. Authorities gave a number of examples of the kind of organisations with which they have worked, of which the majority were either consumer groups or industry associations. As well as playing a part in the actual implementation of recommendations, in some instances cooperation with third parties took the form of seeking support from organisations with similar objectives.

### **Summary of Key Findings**

#### **Key findings of this chapter:**

- 1) 66 per cent of respondents confirmed they do take into account when deciding on outcomes whether benefits would exceed costs to business and others.
- 2) The three most chosen outcomes identified are:
  - recommendations to government for changes to the law
  - recommendations to government for changes to policy

- competition enforcement.

3) The three least chosen outcomes are:

- consumer enforcement
- referral to third party for action
- voluntary business compliance

4) Only 25 per cent of respondents said government is required to respond to their market studies recommendations.

5) Responses as to how often government implements recommendations, and how satisfied respondents are with implementation, indicate significant scope for improvement.

6) Among the most common ways of seeking to increase implementation levels are: government advocacy; using public speaking opportunities; and using the press.

7) 58 per cent of respondents have used third parties, on some occasions at least, to help try and achieve the desired outcomes.



## 9 EVALUATION OF MARKET STUDIES

9.1 This chapter describes how authorities evaluate their market studies work, in particular their processes and methodologies for measuring impact.

### **Is evaluation work undertaken?**

9.2 Authorities were asked whether they look back and reflect on the effect of their market studies work. Of the 37 authorities that responded to this part of the questionnaire, 32 authorities (86 per cent) advised that they do.

9.3 Authorities were then asked if they measure the impact of their market studies work. We explained that by this we meant measuring the changes in market outcomes following the market studies work. The majority, 70 per cent of the 37 respondents, advised that changes in market outcomes following their market studies work are not measured.

9.4 Authorities were asked if they have published criteria for measuring impact. The majority, 85 per cent of the 20 respondents to this question, advised they have not. One authority advised that it does have such criteria but only for merger reviews. A few authorities commented that they are only in the early stages of establishing meaningful criteria for measuring impact, or that such criteria have only recently been established. The following are a sample of the comments made:

*'[The Authority's]' experience in market studies is still fairly nascent, and hence it is still in the process of formulating meaningful criteria for measuring the effectiveness of its market studies.'*

*'[The Authority's] experience in tracking the impacts of its work is relatively recent. While all market study proposals must include performance measures by which their impact can be measured, the tracking of these is in its infancy.'*

*'The[Authority] is committed to undertake such systematic impact evaluations in the near future. In fact, our Strategic Plan for 2008-2009 states that the [Authority] will lay the groundwork for carrying out ex post evaluations of the work of the [Authority], identifying possible quantitative and qualitative indicators for monitoring performance in its different areas of action [including advocacy work], and analysing effective techniques and*

## **Costs and benefits**

9.5 Authorities were asked what aspects of costs and benefits are taken into account when measuring the impact of their market studies work. Only seven authorities responded to this part of the questionnaire and only one respondent provided substantive detail. This indicates that for many, at present, measuring the costs and benefits of their market studies work after completion is relatively new, not fully developed, or non-existent. This contrasts with the results, in paragraph 8.2, that show the majority of authorities do take into account costs and benefits before they make their study recommendations.

9.6 On the substantive response received, the authority concerned reported that it:

- Has a performance framework which states that it will deliver measurable benefits to consumers of five times its annual budget over the financial years 2008-11. In order to embed outcome focused performance monitoring, all projects are encouraged to develop impact estimation plans that clearly state:
  - what outcomes the project is designed to achieve
  - an estimate of their scale of impact, and
  - a description of how to monitor it.

At the time of project completion, teams use their plans to provide an estimate of project impact.

- Estimates the direct financial benefits to consumers. These may arise from actions to remedy price raising anticompetitive activity, as well as from market studies that facilitate switching, enforcement of consumer law, or educate consumers. Included in its calculations are: decreases in prices, monetised improvements in quality, range or service, monetised time savings, and the benefits that consumers gain from making better informed choices. Where problems are in an upstream market and benefit arises in the first instance to business customers then it is assumed that the benefits will be passed on in full to final consumers, unless there is strong evidence to the contrary.
- Does not explicitly calculate business costs of authority action. But it is assumed that costs to business will be passed on to consumers in increased

prices, and the aim is to ensure that the direct financial benefits to consumers of any authority intervention far exceed costs to business.

- Draws on information from ex-post evaluations carried out by independent parties. So far two ex-post evaluations have been carried out. Methods used in ex-post evaluations will depend on the market study in question. For example in the evaluation of a taxi market study, the contractor calculated the estimates of impact by comparing waiting times and taxi utilisation before and after the study recommendations were implemented.

9.7 One authority advised that for reports initiated internally, it examines the number of staff hours needed to complete the study and any data or other purchased input costs. Its recommendations on competition reports usually entail the removal of restrictions to competition, and thus do not entail imposing costs on business. The same authority mentioned the difficulties in quantifying costs and benefits for market studies work.

*'Although there are large benefits from our studies, they are much more difficult to quantify. The benefits are:*

- *greater knowledge and understanding of the industry affecting our enforcement efforts; and*
- *informing legislative, judicial, or regulatory agencies about the functioning of the particular industry as an input to their policy making decisions.'*

9.8 One authority advised that its methodology in each case is highly specific to that case. Where adverse findings are found these relate to features of the market that already exist, and calculations of the detriment arising are typically related to the last few years. This information is used when considering whether to take remedial action and the proportionality of the remedies under consideration.

9.9 One authority advised that it does *'not see the direct relationship between the costs and benefits of its market studies work, which is intangible in its nature and cannot therefore be directly and reliably measured in financial terms. Conversely, the costs of enforcement action can be compared to the benefits resulting from it through, for example, the amount of fines imposed.'*

9.10 Another authority advised that the final report of a sector inquiry may contain no recommendation or formal decision aimed at market players. Therefore, from its

point of view, *'the purpose of the sector inquiry itself is not necessarily to achieve a certain measurable 'impact'.*

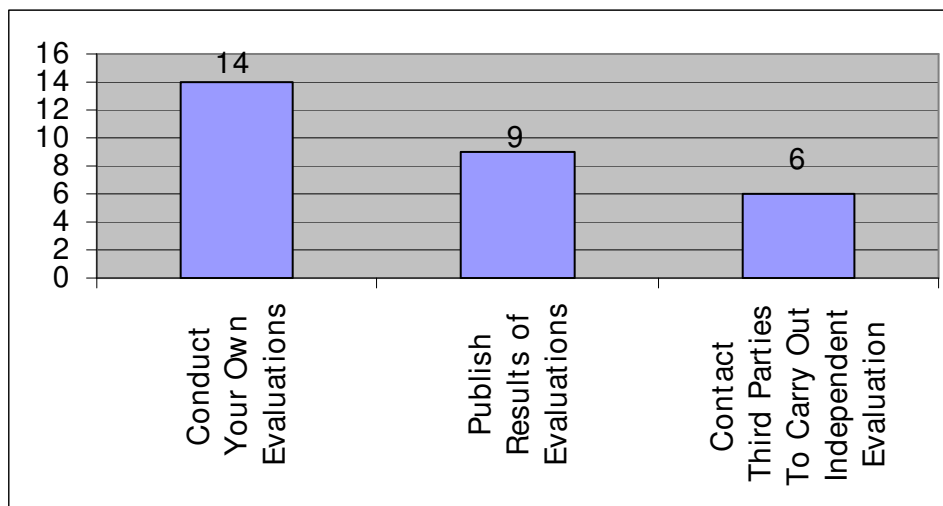
### Measuring the impact of market studies work

9.11 Authorities were asked how they measure the impact of their market studies work and were asked to confirm whether they do any of the following activities:

- contact third parties to carry out independent evaluation
- conduct their own evaluation
- publish the results of evaluations.

9.12 The majority (87 per cent) of the 16 respondents to this question confirmed that they carry out their own evaluations. A smaller majority of 56 per cent advised they publish the results of their evaluations. Only 37 per cent of respondents advised that they commission third parties to carry out independent evaluations. Four authorities, representing 25 per cent of respondents, advised that they do all three activities.

**Chart [9.1]: How does your Authority measure the impact of its market studies work?**



9.13 Authorities were then asked if they have a dedicated team to measure impact. Of the 22 authorities that responded only three authorities (14 per cent) advised that they do.

9.14 The final question of this part of the questionnaire asked authorities to describe the pros and cons of their process for measuring impact. A few authorities commented

generally about the benefits. Only seven authorities responded specifically about their process and there was very little consensus in the answers provided. A summary of the pros and cons provided is listed below.

9.15 Process for measuring impact **- pros**

- having performance measures in place before the study starts
- helps inform future market studies work (which market to choose, how to evaluate market, how to conduct studies, lessons learned etc)
- ensures the budget is spent adequately
- having the measure based on both internal and external opinion helps to ensure and show objectivity
- having impact assessments done by an independent service provider
- the flexibility of our process
- helps demonstrate value for money
- helps prove, by comparison with other forms of intervention, that market studies stand up well to scrutiny in terms of costs and benefits
- tailoring the methodology to apply to each case
- subsequent market observation guarantees that knowledge of the specific market is put to further use
- informality of procedures means it is less burdensome and time consuming to measure impact.

9.16 Process for measuring impact **- cons**

- our inexperience – measuring impact is quite new to us
- it is not always easy to measure impact, especially when recommendations are long term
- lack of an explicit cost for studies
- lack of a formal process for measuring impact and therefore reliance on simple counts and heuristic approaches

- whether there is more that could be done to support recommendations by providing more detail, when it is reasonable to do so, on their likely impact.

### Summary of Key Findings

#### Key findings of this chapter:

- 1) Eighty-six per cent of respondents review the effect of their market studies work
- 2) The majority of those that responded carry out their own evaluations. Thirty-seven per cent commission independent evaluations.
- 3) Seventy per cent of respondents do not measure changes in market outcomes coming out of market studies.
- 4) For many, measuring the costs and benefits of market studies work is a relatively new, not fully developed or non-existent concept at present.
- 5) Only three authorities have dedicated resource for measuring the impact of their work

## **10 ASSESSMENT OF THE MARKET STUDY TOOL**

10.1 This chapter seeks to draw some conclusions about how respondents assess market studies as a tool. It draws from responses provided about the top three benefits of market studies, the most and least successful market studies, and details provided about stakeholder feedback about market studies.

### **Most and least successful market studies**

10.2 Authorities were asked to list their three most successful and three least successful studies, and to comment on why they consider them to be successful or unsuccessful.

10.3 Thirty-one authorities responded to the request to list the three most successful studies, and 20 responded to the request to list the three least successful studies.

10.4 It is difficult to discern any pattern in the topic areas of those studies that were considered most successful versus those that were considered least successful. Studies in the following sectors featured in both lists:

- health care (e.g. dentistry, health insurance, hospitals, and health care more generally)
- financial services (e.g. pension funds, banking, credit) – banking and retail banking appeared several times on the ‘most successful’ list but also featured (though only once) on the ‘least successful’ list
- pharmaceuticals (including pharmaceuticals, generic drugs, commercial medicine, and pharmacies)
- basic industries (e.g. mining, steel, wood)
- energy (including gas and electricity)
- telecoms (including mobile telephony and network access)
- transport (including passenger transportation, railways, buses, airports, ports, freight transport, taxis)
- retail (supermarkets, chain stores)
- basic food products (milk, bananas, sugar, beer, staple foods, poultry, dairy, beef, agri-food distribution, wine)

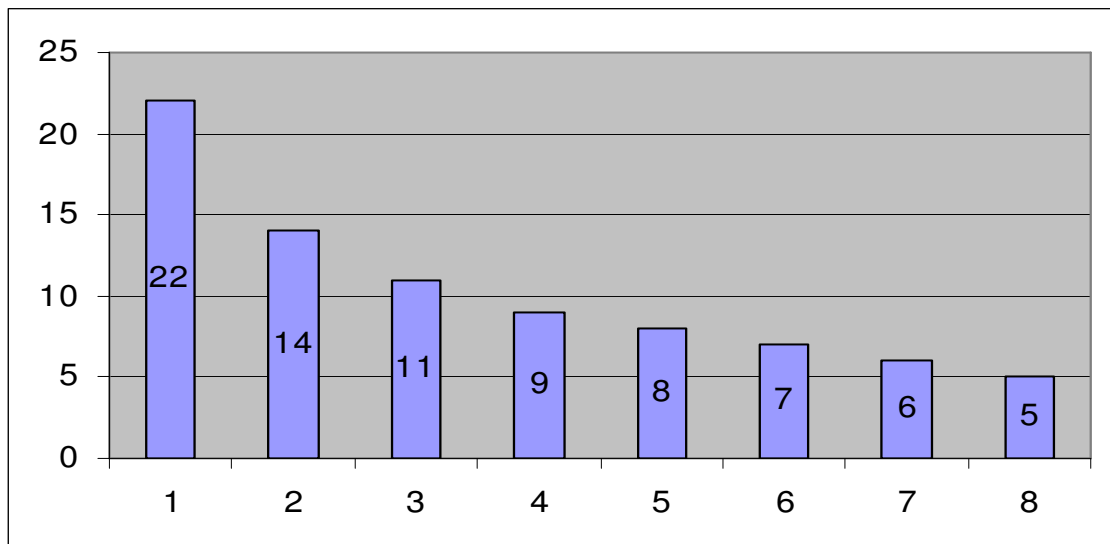
- professions (especially regulatory entry barriers)
- construction (including brick-making, cement, chipboard, building codes, home building)
- real estate (including sale and rent back).

10.5 Studies on fuel and petroleum featured only on the ‘most successful’ list. In the ‘most successful’ there were also studies on competition compliance and on the system of competition regulation – neither of them sectors per se, rather policy areas. Studies on media and publishing featured only on the ‘least successful’ list.

10.6 Other sectors listed as ‘most successful’ included: driving schools; car distribution; and outdoor advertising, and as ‘least successful’ included: defence; flowers; tourism; tobacco; and international trade.

10.7 There are, however, discernable trends in the reasons listed as to why authorities considered studies more or less successful. The reasons most frequently listed for studies being considered most successful are represented in the chart below.

**Chart [10.1]: [Three most successful market studies] Why do you consider these market studies to be successful?**



**Key to Chart 10.1**

1. Led to change in law/policy [that improved competition and benefited consumers in the market].
2. Led to successful/on-going enforcement action.
3. Led to change in industry rules/practice.



4. Gave authority understanding of market structure and how market works [useful for subsequent work].
5. Gave authority understanding of competition problems in market [useful for subsequent work].
6. Provoked useful discussion of competition problems in the market.
7. Led to competition advocacy for change in law/ policy.
8. Led to recommendations for change in law/policy [under consideration and likely to be implemented].

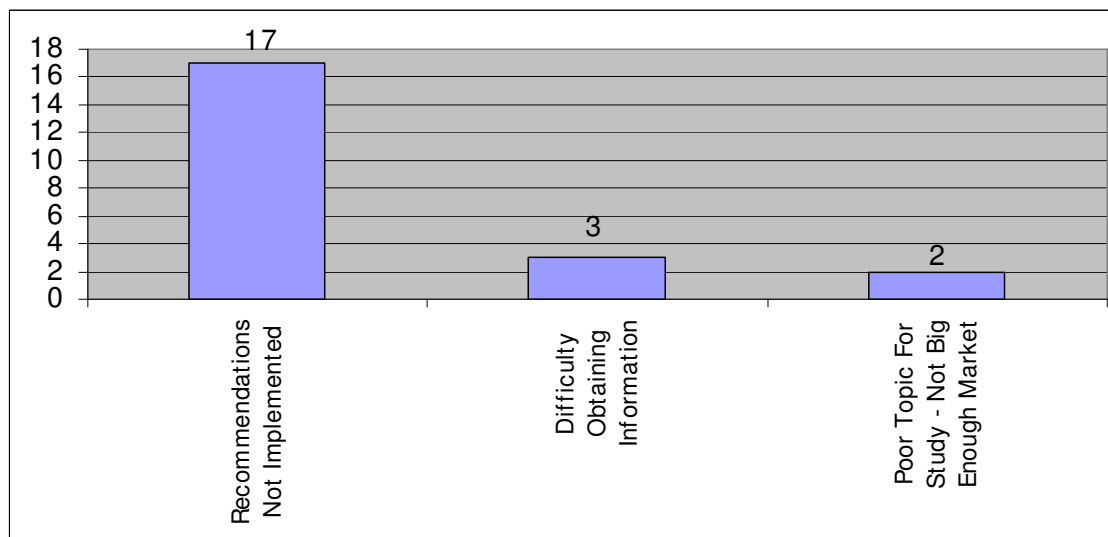
10.8 The most common reason for studies being considered successful was that they led to a change in law or policy that improved competition and benefited consumers in the market. Next most common were that the study had led to or informed successful, or on-going, enforcement action, and that it had led to changes in industry rules or practice. In the mid range of the chart above are a group of reasons connected with increasing the authority's understanding of the market and/or its competitive problems, which proved useful for subsequent work. Other frequently cited reasons were that the study provided an opportunity to recommend or advocate for changes in law or policy, or provoked useful discussion of competition problems in the market.

10.9 Other, less common, reasons for considering a market study a success included:

- that it led to action by the industry regulator
- that it allowed the authority to reject a complaint seeking competition enforcement action
- that it improved policy makers' understanding of competition issues
- that it provoked useful public debate about the regulatory regime, or policy issues
- that it was a large scale exploratory study.

10.10 The reasons most frequently listed for studies being considered least successful are represented in the chart below.

**Chart [10.2]: [Three least successful market studies] Why do you consider these market studies to be least successful?**



10.11 By far the most common response to this question was that the recommendations coming out of the study had not been implemented. Other reasons listed include those in the chart above – difficulty obtaining the information on which to base the study’s findings, and that the topic selected was poor because the market was not big enough – as well as the following:

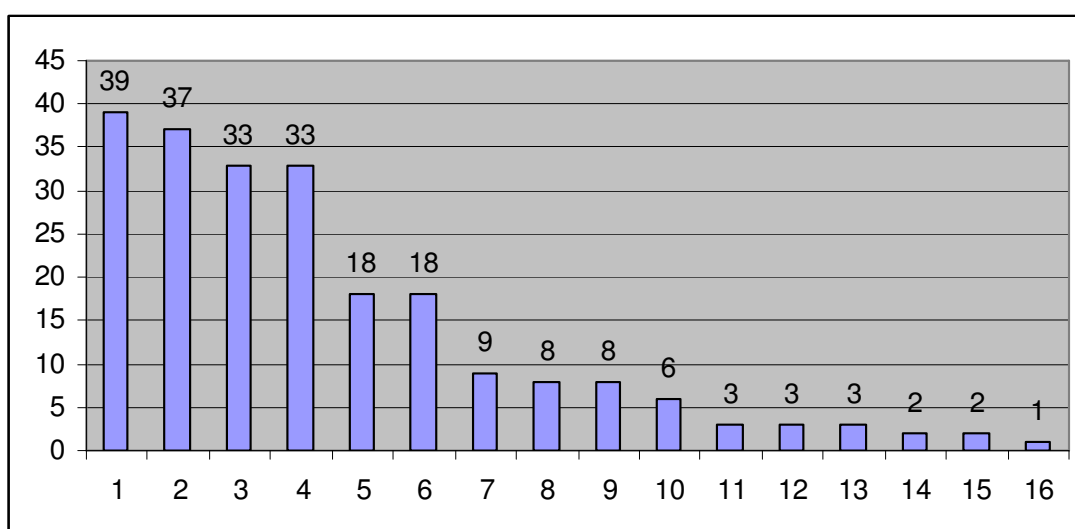
- the recommendations were not well specified, or failed adequately to address the problems found
- lack of resource
- too much resource was allocated to the study in relation to the relatively low impact that it had
- the study did not result in enforcement action
- the study was poorly timed in that the problem diminished before it was published, or other reports published around the same time diminished its impact, or the findings were published too late to influence the debate
- the study took too long
- there was not enough investment at the time the study was published in advocating for its recommendations to be accepted.

- 10.12 There are no discernable linkages between the sectors studied and the reasons why studies were considered successful or unsuccessful.

### Top three benefits of market studies

- 10.13 Authorities were asked to list the top three benefits of market studies. Thirty-seven out of 38 authorities responded to this question. There were a range of different answers. To analyse the responses, the answers were grouped into categories. Answers were scored in reverse order (i.e. the top benefit was given a score of three, the second most important benefit was scored as a two, and the third most important benefit a score of one). Where answers covered more than one category of response, the corresponding score was added to both categories (for example, a three in each category, where the first listed benefit covered two categories). The results are as follows:

**Chart [10.3]: What does your Authority see as the top three benefits of market studies?**



#### Key to Chart 10.3

- 1) As a way to identify and address market failures. Allows authority to react to market irregularities/identify market failures and competition problems in markets/identify remedies for market problems or the best ways to intervene in markets.
- 2) Builds authority knowledge base/capacity/competency: Improves detailed knowledge of whole market rather than specific transactions or conduct/ Provides sound evidence base for public policy decisions.
- 3) As a means to address public restrictions on competition: Allows authority to address market structure and entry barriers through recommendations to government/ identifies topics for competition advocacy and legislative change/ addresses public restrictions on competition - which couldn't be addressed by

enforcement action.

- 4) Interaction with enforcement action: Improves ease of authority's work/better enforcement decisions/ efficiency of enforcement work/ informs market participants about authority's strategy e.g. in defining markets, for the purpose of other tools/ helps authority make a competition assessment of market power/ identifies agreements and practices/ allows understanding of the market for enforcement action/ allows understanding of economics underlying competition and consumer protection policies and enforcement decisions.
- 5) Educating market participants: Educates market participants and consumers about the effects of restrictions and benefits of competition/ helps promote competitive markets/ encourages market participants to consider competition effects of action/ improves transparency of the market.
- 6) Educating government: Encourages government to consider competition effects of policy/ promotes understanding of the economic consequences of governmental acts/ educates government about competition concerns/ helps assess impact of government/regulation on markets.
- 7) Allows for voluntary remedies saving money on costly ex post enforcement action.
- 8) Addresses markets where competition and consumer issues overlap (if consumer powers as well as competition powers)/to gather information that is not limited to competition.
- 9) Helps set authority's priorities including on enforcement/decide which markets to monitor/helps determine sector-specific strategy.
- 10) Improves the credibility of the authority/ demonstrates the impartiality of the authority/ improves the transparency of the authority.
- 11) To reduce consumer detriment.
- 12) Helps the authority carry out its function of promoting competitive markets/ advising Government and Parliament.
- 13) Allows understanding of the challenges faced by business/ builds trust from market players.
- 14) Develops relationships with sector regulators.
- 15) Allows analysis of emerging legal and economic issues and understanding of dynamic industries.
- 16) Non-adversarial nature.

10.14 From these results it is evident that the four most important benefits of market studies, broadly speaking, appear to be that they are a means to:

- identify and address market failures
- build the authority's knowledge base

- address public restrictions on competition by means of advocacy
- reach better and more targeted enforcement decisions.

10.15 Other key benefits are studies' educational value, both in educating market participants about the benefits of competition and promoting competitive markets and in educating government about the competition effects of policy and regulation.

### **Stakeholder feedback on market studies**

10.16 Authorities were asked whether stakeholders had expressed opinions about how they conduct market studies. Thirty-seven out of the 38 respondents answered this question. Of these, 40 per cent (15 authorities) replied that stakeholders have provided such feedback. The balance (60 per cent, 22 authorities) said that they have not.

10.17 Authorities that said stakeholders have given feedback were asked to briefly outline the issues raised. Twelve out of the 15 authorities that answered yes gave some indication of stakeholders' views. Key views included:

- (from sectoral regulators and industry) good quality of analysis
- (from industry) supportive of the way inquiries are conducted
- (from industry) generally supportive of the results of market studies
- support for market studies as core to the authority achieving its mission
- studies too slow and expensive (twice)
- more to be done to secure implementability (consider impact and practicality of recommendations), and implementation of recommendations to government
- government should have an obligation to respond, as it does in the UK
- querying reasons for launch of study/source of ideas (twice)
- (from consumer stakeholders) formal mechanisms to feed in ideas for studies are not sufficient
- (from legal community) critical that studies are used in cases where enforcement action would be more appropriate
- querying possible outcomes (including enforcement action)

- (from industry) resistance to being studied – no competition problems here
- (from government) resistance to recommended changes
- (from industry) insufficient transparency/stakeholder engagement (three times), inaccuracies in data/industry knowledge, and conclusions (twice)
- (from industry) concern about spill over effects
- (from industry) views not properly taken into account
- market studies are viewed with suspicion by stakeholders because the culture of competition is not advanced.

### **Additional comments**

- 10.18 One authority stressed that it views market studies as critical to addressing governmental restrictions on markets, and to enhancing economic growth. It noted its support for the ICN working group to produce procedural and technical guidance on market studies.

#### Summary of Key Findings

##### Key findings of this chapter:

- 1) Studies were most likely to be considered successful when they led to changes in law or policy that improved competition and/or delivered consumer benefit.
- 2) Studies were most likely to be considered unsuccessful when recommendations were not implemented.
- 3) The most commonly acknowledged benefits of market studies are as a way to:
  - identify and address market failures
  - build the authority's knowledge base
  - address public restrictions on competition by means of advocacy
  - reach better and more targeted enforcement decisions.
- 4) 40 per cent of respondents advised they have received stakeholder feedback

about their market studies work. Feedback provided was mixed.

## **11 MARKETS STUDIED OVER THE LAST THREE YEARS**

- 11.1 Authorities were asked to complete an annexe to the questionnaire, listing the market studies they have completed over the last three years, and setting out for each study (where possible) the market studied, the reason for studying it, the duration of the study, the value of the sector, the outcomes achieved, and an assessment of the outcomes in terms of how satisfied authorities are with the results achieved, and why.
- 11.2 This chapter considers the information provided under each of these headings. The findings represent what authorities have actually done over the last three years. Where this appears to differ significantly from authorities' general responses to questions covering the same issues in the rest of the questionnaire, we have sought to bring these differences out.
- 11.3 The findings in this chapter are based on responses from 27 authorities (out of the overall 38 that responded to the questionnaire), reporting on 195 studies in total. On the whole, the findings in this chapter may be less reliable than those in other chapters, because:
- the number of respondents was overall lower, and was significantly lower on some items
  - results in this chapter are recorded on a per study rather than a per authority basis
  - there was a large variation in the number of studies reported by each authority, and
  - authorities may have taken different approaches to recording the outcomes of, and to assessing, particular studies.
- 11.4 Results show that there is a high volume of studies reported that are connected with enforcement action. It is not always possible to tell whether these were studies that were conducted separately from enforcement action (though intended to provide information that will facilitate it), or as part of the process of conducting enforcement action.

### **Number and duration of studies conducted**

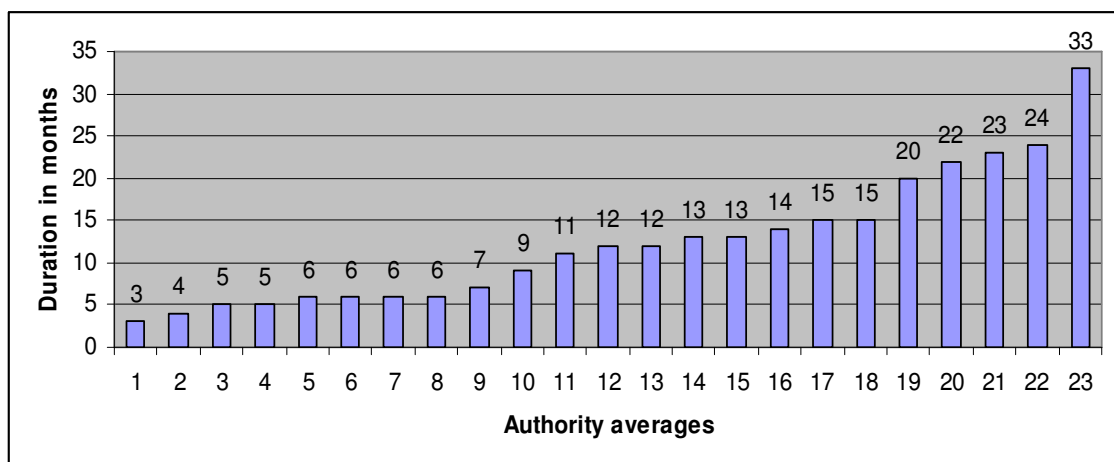
- 11.5 The number of studies reported as having been conducted in the last three years ranged between one and 20, giving an average of seven studies conducted over the three year period. Some of the authorities that had not conducted many studies



noted in their questionnaires that they were new authorities and/or that they had only recently been given legal powers to conduct market studies or otherwise started to use them.

11.6 In terms of duration of studies, not all data were available, but there was wide variation between the authorities that did respond. At the extremes, some reported having completed studies within four months. Others took up to four years. For some authorities, duration of individual studies varied widely, for example between one and 30 months for one authority. Most showed significant variation in the duration of individual studies, suggesting flexibility in dealing with different kinds of markets and market problems, entailing varying levels of resource. For others duration was more homogeneous, for example all studies took between four and six months, or all studies took between 21 and 24 months. Twenty-three authorities gave durations for some, or all, of the studies they listed. Of those studies for which duration was given (137 studies in all) the average was around 12 months. This fits quite well with the durations that authorities reported in response to the questionnaire, considered in Chapter 7. The range of averages per country of those studies where a duration was given are represented, anonymously, in the following chart (the names of the authorities are replaced, along the x axis of the chart, by the numbers one to 20).

**Chart [11.1]: Average duration of market studies, by Authority, for those Authorities that completed the annexe to the questionnaire, and for those studies for which a duration was given**



11.7 There seems little discernable pattern in the average duration of different authorities though there is, perhaps, a slight bias towards shorter studies in those authorities with the newer competition regimes.

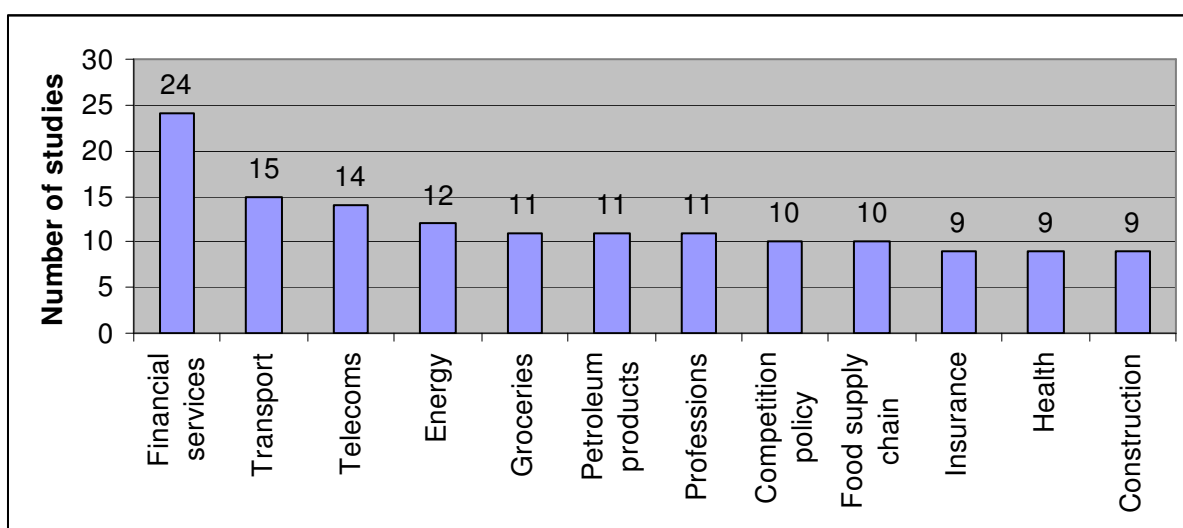
11.8 Data on duration of studies, however, present only a partial picture, since a study can be shortened if it has more resource devoted to it, and may take longer if it is staffed with minimal resource.

### Markets studied

11.9 Authorities were asked to list the markets they had studied and to give an estimate of the value of the sector.

11.10 In terms of the markets studied, a number of common sectors for study emerged. In the data that follows on market sectors there are some very minor overlaps where three or four studies fitted into more than one category. The top 12 sectors (and number of studies conducted in each one over the last three years) are shown in the chart below. A complete list of study topics reported is attached at Annexe 4.

**Chart [11.2]: Top 12 sectors for studies in the last three years**



11.11 In this chart, the ‘competition policy’ sector is made up of more theoretical studies that were conducted in order to explore, or raise awareness of, particular aspects of competition policy, or ways to analyse competition problems, or the interface of competition policy with other issues, such as regulation.<sup>45</sup> The other sectors are relatively self-explanatory.

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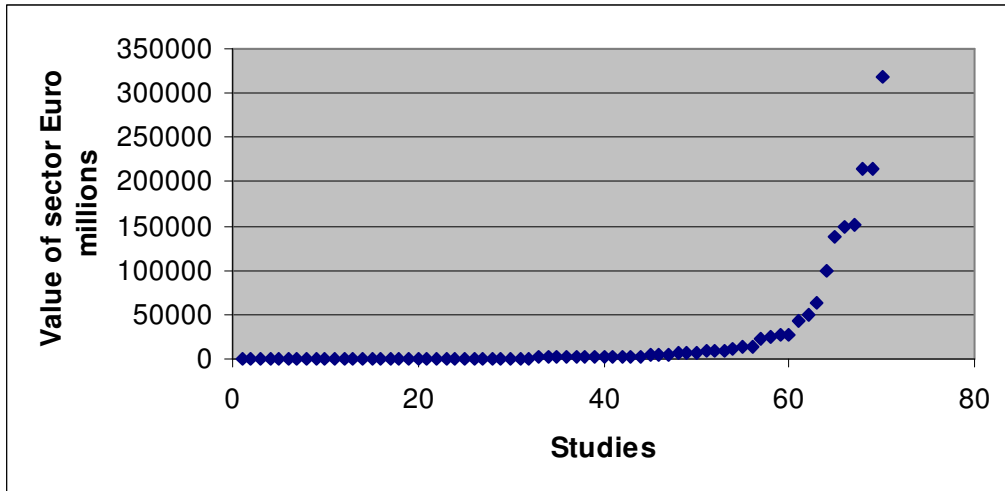
<sup>45</sup> Topics included: exchange of information by trade associations; interface between competition authority and regulators; guidelines for competition compliance by business; anti-dumping and competition law; avoiding competition restrictions in regulation; public subsidies and competition policy; biases in demand analysis due to variation in retail distribution; technological tying and competition; cartel case law in select jurisdictions; and patent dispute settlements and market entry and consumer welfare.

- 11.12 What stands out from this chart is the importance of the financial services sector as a topic for market studies. There were over a third more studies in this sector than any other, including nine studies into retail banking in different countries, nine studies of consumer credit, or payment cards of various types, and two studies of pensions.
- 11.13 Other sectors studied that fell outside the top 12 were: pharmaceuticals (seven studies); housing (six studies); media and media rights (seven studies); housing (six studies); utilities (other than energy – i.e. post and water) (five studies); chemicals (four studies); e-commerce (four studies); manufacturing, non-grocery retail; education (studies on school books and school uniforms) and leisure (each with three studies).
- 11.14 Markets or sectors in which there were one or two studies were: advertising; travel and tourism; public procurement; sport; waste; international trade (studies on tariffs and bilateral agreements); basic industries; and information markets.

### **Value of sector**

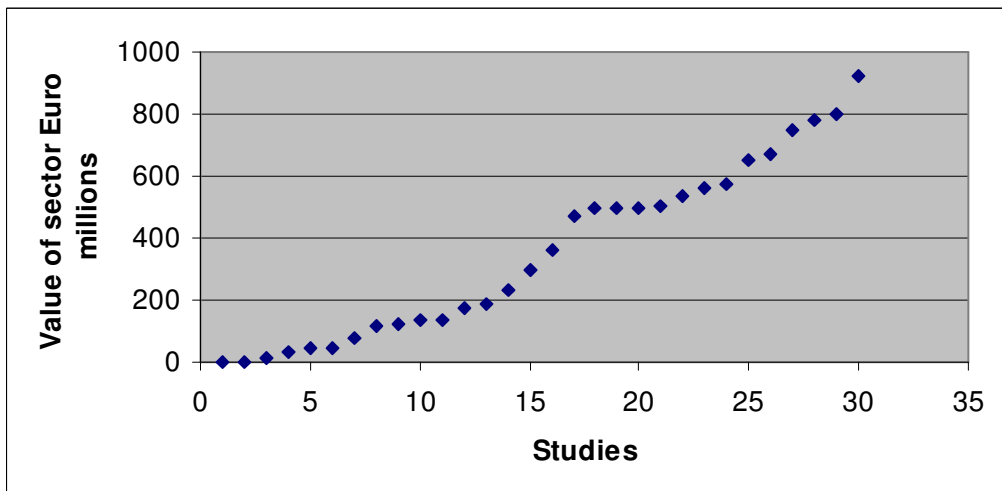
- 11.15 Authorities were asked to give an estimate of the value of the sector for each market study. Sectoral values were provided for 75 out of the 195 studies reported on. Values ranged from €2.5 million, in respect of a generic drugs market study, to markets or sectors that were in some cases worth hundreds of billions of Euros, including: financial services; groceries; telecoms; energy; and construction.
- 11.16 A small minority of respondents (two) gave market value as a percentage of GDP. This may be a useful measure of the importance of a sector in the relevant national market, but it was not possible to compare these data with the other monetary values. The five studies reported in this way ranged between 1.3 per cent of GDP and 8.95 per cent of GDP.
- 11.17 A graph showing the distribution of the remaining 70 studies across the range of market or sector values is set out below. In order to prepare this graph, monetary values given in currencies other than the Euro were converted into Euros using an internet currency converter, at the rate applicable at the time of conversion. Exchange rate fluctuations and changes in sector value over time will affect the accuracy of the values presented in the graph, but the data give a picture that is sufficiently accurate for the purposes of understanding the range and spread of sectoral values of markets studied in the last three years.

**Chart [11.3]: Sector or market values reported for 70 studies**

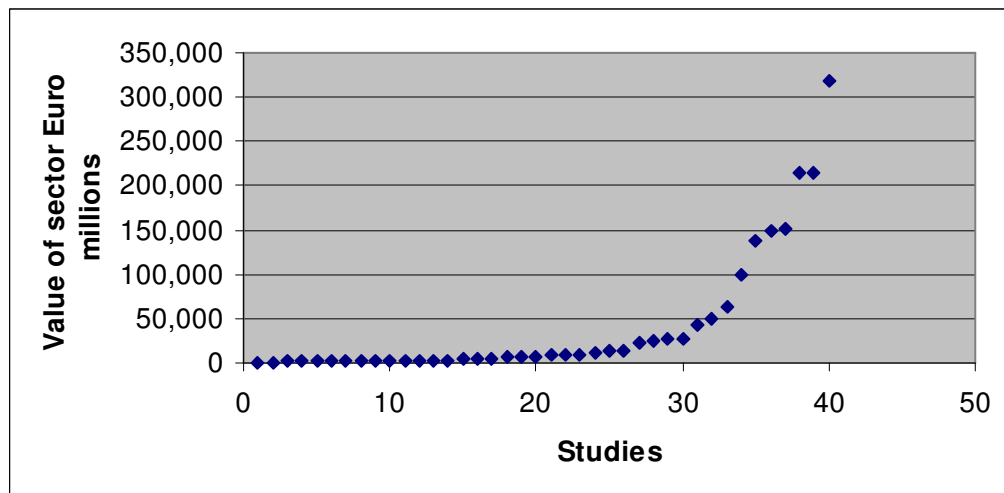


11.18 To give a clearer breakdown of the spread of market or sector values, graphs showing the distribution of studies above and below €1 billion are set out below.

**Chart [11.4]: Sector or market values reported for studies below €1 billion**



**Chart [11.5]: Sector or market values reported for studies above €1 billion**



11.19 These graphs show that in the €0 to €1 billion range, the value given for the markets or sectors was fairly evenly spread, but in the €1 billion to €350 billion range, the majority of studies were of markets or sectors valued at €50 billion or less.

11.20 Overall the findings show that authorities use market studies to look at markets or sectors covering a very wide range of values. This demonstrates very flexible use of the market studies tool.

### Source of ideas

11.21 For each study listed, authorities were asked to give the source of their idea.

11.22 The results were quite disparate, presented in different ways, and not all authorities responded to this question. In some cases they responded for some studies but not for others, and in some cases they noted more than one source.

11.23 These data were analysed by creating a number of categories and sub-categories of source, and counting each time each category and sub-category of source was noted. This means that some studies are counted more than once. Categories of source are:

- internally generated source
- externally generated source – based on market conditions
- externally generated source – based on legal reasons
- externally generated source – coming from other bodies.

11.24 The sub-categories were more detailed and are noted in the table below. There will be some overlaps between the categories and sub-categories, but hopefully they give a flavour of the kinds of sources for ideas that authorities listed.

**Table [11.1]: Source of ideas for study**

<b>Internal</b>	Own initiative	Internal competition concerns	Internal consumer protection concerns	Business complaints	Consumer complaints	Earlier study or advocacy	Own enforcement or advocacy	Internal priorities	<b>Total</b>
Sub total	47	13	1	18	14	4	11	1	<b>109</b>
<b>External – market conditions</b>	Price/cost trends	Business conduct	Market functioning badly	Press reports					
Sub total	11	2	6	7					<b>26</b>
<b>External legal reasons</b>	Legal challenge of authority	Changes in law	Required by law						
Sub total	1	6	11						<b>18</b>
<b>External other bodies</b>	OECD report identifying country specific productivity problem	Referred by other competition body	Collaboration with/ information from Sectoral Regulator	Collaboration with overseas competition authority	Suggested by advisory body	Government request, suggestion or instruction	Work of other authorities internationally		
Sub total	1	10	2	1	11	19	5		<b>49</b>

11.25 This suggests that the commonest sources of ideas are from internal thinking, complaints that authorities receive, or other work that they have done (complaints for this purpose are treated as internal because they are information already in the authority’s possession). The second most common source of ideas is from other bodies in the field – for example government and other competition bodies. However an individual subcategory that also scored highly is ‘required by law’ in the ‘external – legal reasons’ category. A number of authorities are under a legal duty under particular statutes to look at particular markets or to undertake a study when asked to do so by government or another body. In the ‘external – market conditions’ category, the commonest sub-categories were press reports and price or cost trends. This suggests that it is useful for an authority to keep a watching eye on trends and press coverage as a potential source of ideas for markets that may be worth studying.

## **Reasons for studying**

- 11.26 For each study listed, authorities were asked to give the reasons for conducting the study. As with data on sources, the results were quite disparate, presented in different ways and not all authorities responded to this question. In some cases they responded for some studies but not for others, and in some cases they noted more than one reason.
- 11.27 These data were analysed by creating a number of categories and sub-categories of reason, and counting each time each category and sub-category of reason was noted. This means that some studies are counted more than once.
- 11.28 Categories of reason are:
- defining the market
  - understanding market structure, market power and barriers to entry/expansion
  - examining competition effects of conduct and agreements
  - examining consumer protection issues
  - remedying problems in the market
  - advocacy goals
  - competition policy goals (i.e. defining competition policy in some way)
  - economic or productivity goals.
- 11.29 The sub-categories are more detailed and are noted in the two tables set out in the pages that follow. There will be some overlaps between the categories and sub-categories, but hopefully they give a flavour of the kinds of reasons authorities provided.

**Table [11.2]: Purpose of studies – Part I**

<b>Defining the Market</b>	Consider market definition									<b>Total</b>
Subtotal	9									<b>9</b>
<b>Understanding market structure, market power, barriers to entry/ expansion</b>	Understand and explain how competition works in the market	Examine the market structure, market shares, and concentrations	Examine barriers to entry and expansion	Examine network effects	Examine the effects of regulation on the market	Examine public sector participation in the market	Examine information failures and problems for consumers	Examine consumer switching	Examine developing markets	
Subtotal	36	10	10	1	26	1	5	7	4	<b>100</b>
<b>Examining competition effects of conduct and agreements</b>	Understand the terms of contracts operating on the market	Collect information on possible cartels /collusion	Look at vertical agreements /distribution chain	Look at IP rights, licensing issues, tying and exclusivity in contracts	Look at conduct /practices of market players	Review prices, price differences and price trends and costs	Review profitability of market players	Review trends in service provision	Conduct case studies	
Subtotal	1	13	10	5	21	29	3	4	1	<b>87</b>
<b>Examining consumer protection issues</b>	Examine consumer protection issues in market	Examine consumer satisfaction								
Subtotal	10	1								<b>11</b>
<b>Remedying problems in the market</b>	Make recommendations to address competition failures	Seek the removal of regulatory restrictions	Leading to enforcement action	Conduct international comparisons						
Subtotal	13	6	1	2						<b>22</b>



**Table [11.3]: Purpose of studies – Part II**

<b>Advocacy goals</b>	To look at market before deregulation or legislation	To fend off legislation that would have anti competitive effects	Advocacy about competition effects of regulation	Advocacy about competition effects of subsidy	Advocacy about competitive tendering	To raise business awareness of competition principles	To formulate guidelines for competition compliance	<b>Total</b>
Sub total	8	2	1	1	1	1	1	<b>15</b>
<b>Competition policy goals</b>	To analyse the interface between anti-dumping legislation and competition law	To analyse the relationship with sectoral regulators	To analyse case law	To assess the competition provisions in bilateral international agreements				
Sub total	1	1	1	1				<b>4</b>
<b>Economic or productivity goals</b>	To facilitate regional development	To examine markets that are important to the economy						
Sub total	1	1						<b>2</b>

11.30 The data suggest that the most common reasons for conducting studies are to understand the market structure, market power and barriers to entry or expansion (100 studies), and to examine the competition effects of conduct and agreements (87 studies). It is notable that 13 studies were described as being for the purpose of collecting information on possible collusion or cartels. There appears to be a degree of divergence of approach among some authorities as to the extent to which market studies are used specifically to collect evidence for enforcement action. This emerges from other data supplied in response to the questionnaire: compare, for example the relatively low rating given for use of studies to obtain an understanding of the market to take enforcement action (shown in Chart 4.1 and discussed in paragraph 4.16) with the higher score given to 'competition enforcement' as an outcome of market studies (Charts 8.1 and 8.2, discussed at paragraph 8.8), and with the high score given for reaching better and more targeted enforcement decisions as a benefit of market studies (Chart 10.3, discussed at paragraph 10.14).

11.31 There were a relatively lower number of studies (22) that were described as being for the purpose of remedying problems in markets.

11.32 Only 11 studies were described as being for the purpose of examining consumer protection issue in markets. This may reflect the fact that, as we saw in Chapter 3,

around two-thirds of the authorities that responded have competition, rather than competition and consumer functions.

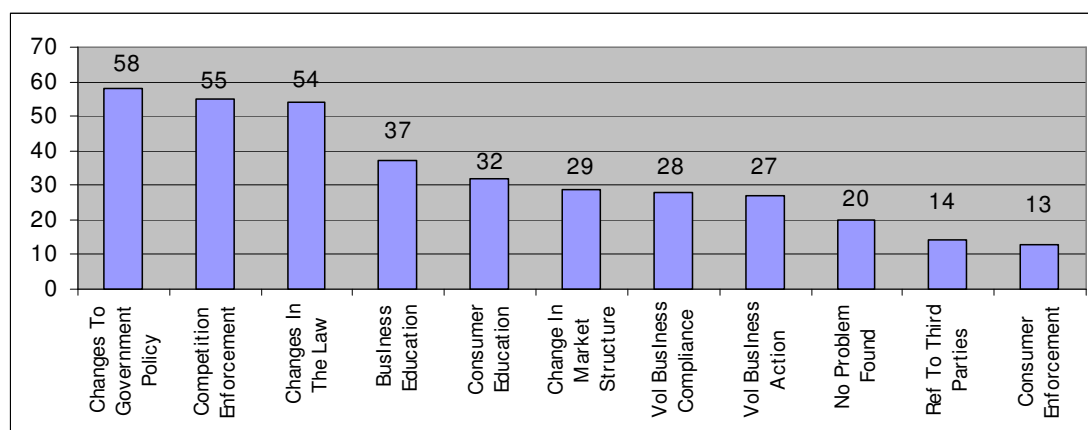
- 11.33 Fifteen studies were noted as having a specific competition advocacy purpose. As we saw in Chapter 4 (Chart 4.1), competition advocacy related purposes for market studies scored high in the ranking of possible purposes of market studies.
- 11.34 A small number of studies (four) were noted as being for the purpose of defining competition policy positions on specific issues.
- 11.35 A very small minority of studies (two) were noted as having an economic or productivity goal. It seems likely, however, that this goal would underlie many more (if not all) of the studies listed even though authorities did not explicitly name it.

### **Outcomes of studies**

- 11.36 Authorities were asked to tick, for each study, what outcomes it had. The choices given were as follows:
- competition enforcement
  - consumer enforcement
  - consumer education
  - business education
  - voluntary business compliance
  - voluntary business action
  - recommendations to government for changes in the law
  - recommendations to government to change market structure
  - recommendations for changes to government policy
  - referral to third parties
  - no problem found.

11.37 In many cases, authorities noted that more than one of the above outcomes had resulted from individual studies. The results of this exercise are presented in the chart below:

**Chart [11.6]: Outcomes of studies**



11.38 This demonstrates that recommendations to government to make changes to government policy is the most common outcome of the studies that have been conducted over the last three years. This is followed by outcomes that resulted in competition enforcement action and recommendations to government to change the law. The use of studies to gain information about markets that can lead to competition enforcement action was also considered in Chapters 4 and 8 as noted above. Business and consumer education are the next most common outcomes of market studies. This confirms the strong advocacy role for market studies. Seeking voluntary business compliance or voluntary action by business is less common, and perhaps an area that authorities could exploit more in the future. Consumer enforcement action was the least common outcome of market studies. As noted above (paragraph 11.32) this may reflect the fact that around two thirds of the authorities responding to the questionnaire have competition only, rather than both competition and consumer, functions.

### **Assessment of outcomes**

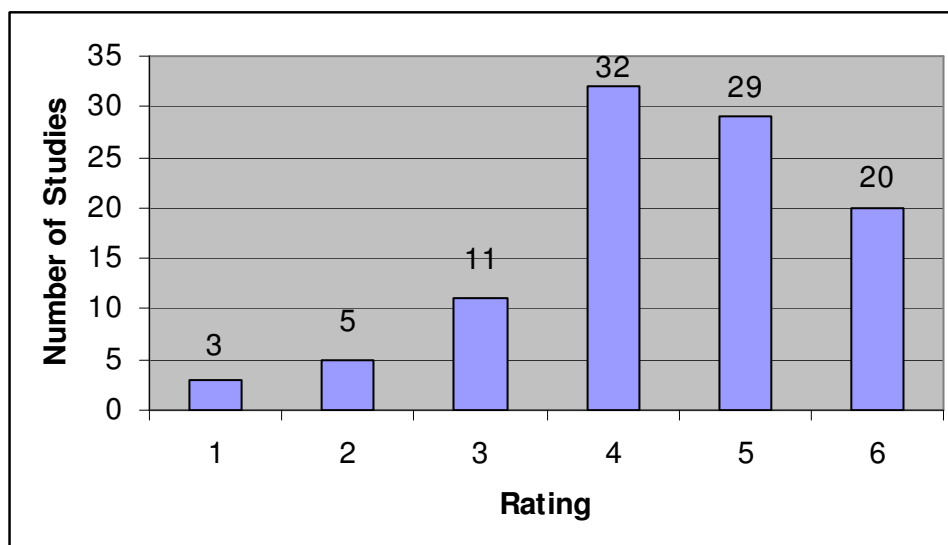
11.39 Authorities were asked to rank the outcome of each study overall, using a scale of one (not satisfied) to six (very satisfied) and to provide a brief narrative assessment of their rating to include details around for example:

- acceptance of recommendations
- evidence of business compliance
- results of any formal evaluation.

## Ratings

- 11.40 Ninety-five of the 195 studies in the annexe were given no overall rating. There were 23 studies where authorities advised that it was too soon to give a rating because studies had only recently completed and/or action was still being considered or implemented. One authority advised that it was unable to provide a ranking for its studies as its experience in tracking results is relatively recent. In addition there were three studies where the authority advised that it was impossible to measure the results with any certainty. One authority gave individual satisfaction ratings, for three of its studies, for the outcomes on each problem investigated rather than an overall rating for each study.
- 11.41 Of the 100 studies that were given a specific overall rating, a large majority (81 per cent) were at the higher end of the satisfaction ratings – with scores of six, five or four.

**Chart [11.7]: Using a scale of 1 (very dissatisfied) to 6 (very satisfied) please rank the outcome of each study**



- 11.42 Of the 100 studies that were given a rating, not all authorities provided the requested narrative assessment of their ratings. In addition some of the narratives provided did not explain the ratings but instead listed the outcomes of the studies. The number of narrative explanations, that could be analysed, amounted to 76 of the 100 studies concerned (76%). A summary of the main explanations is provided below.

## Summary of narrative for ratings

11.43 The main reasons, for the 20 studies that scored six and for the 29 studies that scored five (the two highest satisfaction ratings), fall into the categories shown below.

- recommendations fully or largely accepted
- influenced government policy
- led to regulatory change
- used successfully to advocate the importance of competition
- led to voluntary business action
- led to more competition in the market.

Other less popular reasons that were cited included finding no problems in the market studied, leading to improved market structure and leading to enforcement action.

11.44 Eleven of the 49 studies given a rating of either six or five were instigated at the request of government, so it is perhaps not surprising that they were successful given that government concern, and potentially also appetite for change, existed at the start of these studies. There was no pattern or series of patterns in the sectors that scored the highest satisfaction ratings, so success does not seem to correlate to choice of sector to study.

11.45 The main reasons, for the 48 studies that scored ratings of between four and two, fall into the categories shown below. In the majority of cases the ratings given largely reflect the degree to which recommendations have been accepted and implemented by government and/or industry:

- government adoption of most recommendations
- government adoption of some recommendations
- legislation was substantially altered
- led to change in business practice
- established market shares

- led to government debate/consultation
- led to agreement with other government bodies on market direction
- found potential anticompetitive practices
- guidance produced but not binding
- led to business/consumer education
- provided knowledge about market/market share
- led to antitrust proceedings.

11.46 For the three studies which scored the lowest satisfaction rating of one, it was noted that this was due in two cases, to government not having adopted the recommendations despite evidence of an abuse of market power and in the remaining case to very little progress having been made in implementation of recommendations.

#### Summary of Key Findings

##### Key findings of this chapter:

- 1) A wide range of topics have been studied over the last three years.
- 2) Studies in the financial services sector are the most common.
- 3) The commonest sources of ideas for studies over the last three years are:
  - authorities' own idea (including complaints received)
  - the work or suggestion of other bodies
  - external market conditions.
- 4) Among reasons given for studying particular markets over the last three years the most common are to:
  - understand market structure (including market power and barriers to entry or expansion)
  - examine the competition effects of conduct or agreements.

- 5) The number of studies conducted in last three years ranged between one and 20, giving an average of seven studies per year.
- 6) The most common outcomes for studies over the last three years closely correspond to those identified in Chapter 8, namely:
  - recommendations to government for changes in policy
  - recommendations to government for changes in the law
  - competition enforcement.
- 7) Of the 195 studies, 95 were given no overall rating of satisfaction. Of the 100 that were given a rating 81 per cent were marked at the higher end of satisfaction.
- 8) Satisfaction ratings on the whole were based on the degree to which recommendations had been accepted/implemented.

NOTE: The findings in this chapter may be less reliable as the number of respondents was overall lower and was significantly lower on some items. In addition the findings in this chapter are on a 'per study' rather than 'per authority' basis

## 12 SUGGESTIONS FOR FURTHER WORK

12.1 There is a wealth of experience in conducting market studies across the ICN membership, and a wide range of practice used to do so. It is hoped that the insights in this report will provide a useful tool for greater convergence, and informed divergence, in what appears to be an expanding field. There is clearly scope for cross-fertilisation of ideas, including on:

- ideas for markets and topics to study – a list of markets studied in the last three years by respondents that supplied this data is attached at Annexe 4
- the approaches to selecting and carrying out studies (and uses of study powers)
- ways to conduct studies efficiently and effectively.

12.2 In addition, this chapter suggests some areas for possible future work for the ICN on market studies. This Project has identified a substantial degree of consensus for future work in two areas:

- There appears to be scope for outlining best practice in relation to a number of aspects of the conduct of market studies. The ICN might therefore consider producing a document setting out best practice on these aspects. It could also consider creating a web-based database of market studies carried out by member authorities (paragraphs 12.3 to 12.7).
- Few authorities have yet taken steps to estimate or measure the specific impact of their market studies. This may be an area where those that have developed, or are developing, evaluation programmes could share best practice (paragraph 12.8).

Two further areas have been identified for further discussion as to whether they should be the subject of future work:

- This Project has identified broad agreement on the definition of market studies, albeit that there exists a degree of diversity in the purposes for which studies are carried out. This diversity may be such as to make it not worthwhile to seek consensus on a detailed and prescriptive definition at this stage. It is suggested, however, that there is scope for further discussion on the benefits of seeking to achieve greater convergence by means of an agreed definition (paragraphs 12.9 to 12.16).
- A wide range of markets have been the subject of market studies, reflecting the diversity of the economies of those countries whose authorities conduct studies



and the different competition problems which may emerge depending on local circumstances. There may, however, be scope for discussion as to whether there are any sectors that member authorities might, collectively, focus on, and scope to consider the possibility of sharing best practice relating particularly to the study of markets in those sectors (paragraph 12.17).

### **Best practice on market studies process**

- 12.3 The OECD Roundtable on Market Studies noted scope for greater formalisation of, and transparency about, the general process of market studies, the powers that will be used, and how market participants will be involved. In addition, the Business and Industry Advisory Committee to the OECD noted that it would aid transparency to business if authorities provided greater clarity on the basis on which they select market studies.
- 12.4 Echoing the work of the OECD, this Project revealed that authorities select market studies on the basis of a range of factors, that a minority of authorities publish general guidance on the processes they will follow in conducting market studies, and that market studies outcomes can be improved by increased levels of stakeholder engagement.
- 12.5 There appears to be scope for ICN thought leadership in developing a set of best practices in relation to the conduct of market studies. Possible practices to consider in any future ICN document outlining market studies best practice include:
- publishing the criteria which authorities use to select markets to study
  - publishing guidance setting out the processes for conducting market studies, including the mechanisms for consulting with, and involving, market participants
  - publishing the approach to the use of formal powers to compel the supply of information, where these exist, together with recognition that these should be exercised with constraint, and that any information requests should be appropriately tailored
  - publishing the likely timing of each market study
  - publishing the findings of studies
  - evaluating the likely costs and benefits of a study, in terms of costs to business and benefits for competition and consumers, before it is formally commenced

- using appropriate project planning techniques to manage scope, analysis and delivery of market studies
- ensuring that there is a plan, and resource, to conduct follow-up advocacy and other work in order to maximise the likelihood of a successful outcome from the study
- any other suggested mechanisms to maximise the likelihood that recommendations coming out of market studies will be adopted by government or other decision makers and/or by market participants.

12.6 Some authorities noted that securing a government commitment to respond to the recommendations of their studies could be a useful adjunct to their powers. While this would not be in the control of ICN member authorities themselves, a best practice document could include this as a possibility for further exploration with their governments by those authorities that consider it could be useful.

12.7 It may also be helpful to create a web-based database of markets studied by ICN members, and outcomes of each study, to facilitate cross-fertilisation of ideas and approaches to particular market problems.

### **Market studies evaluation**

12.8 A minority of authorities reported that they have, or are developing, a formalised impact estimation programme for their market studies work. Those authorities that have an existing, or nascent, impact estimation programme could share their experiences, perhaps through a workshop for the ICN membership.

### **Clarity on market studies definition and purpose**

12.9 In the course of the OECD Roundtable, the Business and Industry Advisory Committee to the OECD noted that greater convergence across jurisdictions would help to minimise the burdens on business.<sup>46</sup> This Project has therefore considered the benefits of seeking greater consensus on the definition and purpose of market studies.

12.10 While there was broad support for the definition of market studies proposed at the outset of the Project, analysis of the information provided by member authorities in response to the questionnaire indicated some areas of divergence.

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<sup>46</sup> OECD Directorate for Financial and Enterprise Affairs Competition Committee, 21 November 2008. *Policy Roundtables: Market Studies 2008*, page 201.

- 12.11 In particular, there appears to be a divergence between authorities that can or do use market studies for the purpose of gathering information for specific enforcement action and those that do not. It would be difficult to agree on a definition of market studies that did not include this purpose within its scope, in particular because the European Commission's sector inquiry process, and the parallel process of several EC member states, is expressly predicated on the possibility of infringements of competition prohibitions.
- 12.12 It might, however, be possible, to agree that market studies are not a tool that is used:
- as the sole basis for gathering evidence on which authorities will later rely in subsequent enforcement proceedings, or
  - in the course of pre-existing enforcement proceedings.
- 12.13 During the OECD Roundtable, the European Commission clarified that it does not rely on information gathered in the course of its sector inquiries in later enforcement proceedings. If it uncovers information in the course of a sector inquiry that could be used in evidence in an enforcement proceeding, it must re-collect that information under its formal enforcement process, before it can rely on it in evidence in an enforcement case. Agreeing this basic principle could help guard authorities against accusations that they will use market studies as 'fishing expeditions' for later enforcement actions.
- 12.14 In some cases, responses to the questionnaire suggested that certain authorities consider that the investigative work that they conduct in the course of existing enforcement cases constitutes a market study. This does not correspond to other authorities' general concept of market studies, and risks confusion on the part of stakeholders and business.
- 12.15 The existence of these differences of view, which this Project has not so far sought to resolve, suggests that further discussion of the benefits of seeking to agree on a precise definition, as well as on what that definition should be, might be worthwhile.
- 12.16 Regardless of the outcome of any such discussion, given the significant number of authorities that appeared wholly or mainly to use market studies as the basis for informing their enforcement work, and recognising the importance of competition advocacy as a mechanism for addressing market problems that cannot be addressed by enforcement action alone, and that competition advocacy and enforcement work are mutually reinforcing, there may be scope for authorities to consider using studies for competition advocacy purposes more frequently in future.

## Sectoral focus in market studies work

- 12.17 A wide range of markets have been the subject of market studies, reflecting the diversity of the economies of those countries whose authorities conduct studies and the different competition problems which may emerge depending on local circumstances. While it is recognised that member authorities must be free to determine their own priorities, there may, nevertheless, be scope for members to discuss whether there are any sectors that they might, collectively, focus on, and scope to consider the possibility of sharing best practice relating particularly to the study of markets in those sectors. For example, the financial services sector has already been an important source of market study topics for a number of authorities, and is likely to remain so in the light of current economic circumstances. Such discussion could be taken forward in the first instance by a workshop at which areas of potential common interest could be explored. Sharing of best practice could also be facilitated by means of an ICN database of information about market studies carried out by member authorities, which others could use to inform thinking on their own market studies work.

### Questions for the ICN

For discussion at the ICN conference, and beyond, therefore, are the following questions:

1. Should the ICN conduct further work to identify best practices in conducting market studies?
2. If so, what are members' views of the suggested areas that such best practice might cover?
3. Would members find it useful to share experience on developing a programme of evaluation of market studies?
4. Should the ICN conduct further work to seek greater consensus on the definition and purpose of market studies?
5. Would members find it useful to explore the possibility of discussing sectors on which their future market studies work might focus, and sharing experience of previous work in such sectors?

## **ANNEXE 1 – FULL LIST OF WORKING GROUP MEMBERS**

### **ICN Members**

Armenia: State Commission for the Protection of Economic Competition

Australia: Competition and Consumer Commission

Brazil: Secretariat for Economic Monitoring (SEAE)

Brazil: Conselho Administrativo de Defesa Econômica (CADE)

Canada: Competition Bureau

Chile: Fiscalía Nacional Económica

Croatia: Croatian Competition Agency

Egypt: Egyptian Competition Authority

El Salvador: Superintendencia de Competencia

Estonia: Estonian Competition Authority

European Commission

Germany: Bundeskartellamt

India: Competition Commission of India

Ireland: The Competition Authority

Italy: Autorità Garante della Concorrenza e del Mercato

Japan: Fair Trade Commission

Jersey: Jersey Competition Regulatory Authority

Jordan: Ministry of Industry and Trade, Competition Directorate

Mexico: Comisión Federal de Competencia

Mongolia: Authority for Fair Competition and Consumer Protection

Netherlands: Netherlands Competition Authority

Poland: Office of Competition and Consumer Protection

Romania: Competition Council

Russian Federation: Federal Antimonopoly Service

Singapore: Competition Commission

South Africa: Competition Commission

Turkey: Turkish Competition Authority

UK: Competition Commission

UK: Office of Fair Trading

US: Antitrust Division, Department of Justice

US: Federal Trade Commission

Uzbekistan: State Committee on Demonopolization and Competition Development

Zambia: Competition Commission

### **Non Governmental Advisors**

Australia: Allan Fels, Australia and New Zealand School of Government

UK: David Aitman, Freshfields Bruckhaus Deringer LLP

UK: John Holmes, Which?

UK: Atilano "Jorge" Padilla, LECG LLC

US: Abbot "Tad" Lipsky Jr, Latham & Watkins LLP

US: John C. Hilke, Independent Consultant

US: Maureen Ohlhausen, Business Software Alliance

## ANNEXE 2 – PROJECT QUESTIONNAIRE

### INTRODUCTION

**Questionnaire Purpose:** The 2008-2009 Work Plan of the International Competition Network’s Advocacy Working Group includes a project on Market Studies. The Office of Fair Trading is leading this work. The purpose of this questionnaire is to gather information about members’ experiences conducting market studies as part of their advocacy efforts. We intend to analyse and report on the results, and to consider developing a guidance document on procedure and evaluation criteria for market studies work. We would very much welcome your input.

**Confidentiality Statement:** For research and dissemination purposes, the Advocacy Working Group would like to be able to use and report all of the data collected on this survey. Most of the data will be reported in aggregate form, but in some cases we may want to report results in such a way that it will be possible to identify the responding agency or jurisdiction – for example we would like to be able to highlight particular areas of best practice. The report will not identify individual respondents. If there are responses in this questionnaire that you want us to report only in aggregate form, if at all, please indicate which by noting the relevant questions in the box below.

The time taken to complete this questionnaire will vary depending on how much authorities have to say on the subject. We estimate though, based on OFT experience, that this questionnaire will take no longer than 3 hours to complete.

**A. ABOUT YOUR AUTHORITY**

**A1. Which of the following describes your Authority?**

- A competition and consumer body
- A competition body
- Other, if so please provide further detail below

**A2. Are there any sectors in your country, such as utilities, transport, telecoms, which are regulated by other competition Authorities?**

- Yes
- No

**If so, what sectors are regulated by other Authorities? Please provide details below.**

**If you do not have a function similar to the definition of market studies below you need not complete any of the remaining questions. Please go straight to G3 and complete contact details. Thank you.**



## **B. PURPOSE OF MARKET STUDIES**

### **B1. Draft Definition of Market Studies (discussed in the Working Group):**

For the purposes of this project, market studies are distinguished from enforcement action against individual undertakings.

Market studies are research projects conducted to gain 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 (whether by way of policy or regulation, or direct participation in the supply or demand side of 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. This may find that the market is working satisfactorily or set out the problems found. Where problems are found the market study report can include: (i) recommendations for action by others, such as legislatures, government departments or agencies, regulators, and business or consumer bodies; and/or (ii) commitments by the competition (or competition and consumer) authority itself to take advocacy and/or enforcement action.

**Please use the box below to comment on the above definition: in what respects is it the same as/different from the way your Authority defines market studies?**

**B2. Which of the following does your Authority consider to be the purpose(s) of market studies? Please rate your answers in order of importance, with 1 being most important and use (N/A) where this applies:**

<b>Rating</b>	<b>Purpose of market studies</b>
	<b>To help set internal priorities for the market or sector</b>
	<b>To enhance knowledge of the sector</b>
	<b>To assess the state of competition in the market/sector</b>
	<b>As a preparation for intervention in the legislative process</b>
	<b>To obtain understanding of the market to take enforcement action</b>
	<b>To decide which of a range of further tools to employ if a problem is found</b>
	<b>To investigate suspected market failure that cannot be assigned to a specific undertaking</b>
	<b>To define a market for the purposes of enforcement action</b>
	<b>To assess the impact of Government policy/regulation on a market</b>

**Any other purposes? If so please provide further detail below.**

**C. SELECTION**

**C1. How does your Authority gather ideas for market studies? Please mark whichever apply:**

- Feedback from consumers/consumer groups
- Consumer complaints/concerns
- Business complaints/concerns
- Consultation with Other Government Departments
- Own research
- By asking for the submission of idea on your web-site
- Other, if so please provide further detail below

**C2. Does your Authority choose which markets to study?**

- Always
- Usually
- Occasionally
- No

**C3. Can others instruct your Authority which markets to study?**

Yes (please proceed to question C4)

No (please proceed to question C6)

**C4. Please detail below who can instruct your Authority and in what circumstances**

**C5. Has your Authority been instructed to carry out markets studies? Please mark whichever applies:**

Always

Usually

Occasionally

No

**C6. Do others ask your Authority to voluntarily carry out market studies? For example organisations representing consumers or businesses.**

Yes

No

If so, please provide details below of who the “others” are.

**C7. If your Authority chooses the studies, what factors can influence selection of a particular market study? Please mark whichever apply:**

- Value of market
- Size of detriment
- Type of detriment
- Market importance
- Likelihood of mergers
- Unusual market events
- Likelihood of a successful outcome
- Impact on consumers
- Entry barriers
- Degree of concentration
- Market structure
- Political interest/attention
- Degree of product differentiation
- Product Life Cycle
- Level/type of consumer complaints/concerns
- Level/type of business complaints/concerns
- Profile of affected consumers e.g. vulnerable through age/disability
- Desire to obtain knowledge about the market
- Desire to obtain evidence for enforcement purposes
- Other, if so please provide further detail below

--

**C8. Of the options you have marked in response to question C7, please detail below the 5 most important factors that influence your Authority's selection choices.**

<b>1</b>	
<b>2</b>	
<b>3</b>	
<b>4</b>	
<b>5</b>	

**D. PROCESS**

**D1. Does your Authority have formal powers to carry out market studies?**

Yes

No

**If so, what form do these powers take? Please provide detail below.**

--

**D2. Does your Authority have formal powers to compel the supply of information for market study purposes?**

- Yes
- Sometimes
- No (please proceed to question D4)

**D3. What form do these powers take, is their use subject to any constraints and what sanctions exist to deal with non compliance? Please provide detail below.**

**D4. For market studies purposes, is it better to have formal powers to compel the supply of information?**

- Yes (please proceed to question D4.1)
- No (please proceed to question D4.2)

**D4.1. Please explain why it is better to have formal powers and identify what, if any, additional powers your Authority would like. Please proceed to question D5.**

**D4.2. Please explain below why it is not better to have formal powers.**

**D5. Using a scale of 1 (very dissatisfied) to 6 (very satisfied), please rate below how satisfied your Authority is with its powers.**

1     2     3     4     5     6

**D5.1 Please explain your rating below and identify whether, and if so how, you consider the powers you have to be excessive and what, if any, additional powers your Authority would like and why.**

**D6. Information gathering: the following questions are about the information your Authority uses when undertaking market studies.**

**D6.1. Does your Authority collect anecdotal evidence?**

Yes

No

**D6.2. Does your Authority collect empirical evidence?**

Yes

No



**D6.3. Who does your Authority collect evidence from? Please mark whichever apply:**

- Consumers
- Businesses
- Other domestic Government Departments
- Business organisations
- Consumer organisations
- International stakeholders
- Other, if so please provide further detail below

**D6.4. Does your Authority use any of the following. Please mark whichever apply:**

- Existing market research
- Administrative data<sup>47</sup>

**Qualitative research:**

- Questionnaires to small numbers of respondents (less than 50 respondents)
- Focus groups
- In-depth interviews

**Quantitative research:**

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<sup>47</sup> Administrative data is information already held by the Authority perhaps as a result of case work, enquiries etc.

- Large statistical surveys
- Mystery shopping<sup>48</sup>

**D6.5. Does your Authority ever undertake external research by contacting third parties for information?**

- Always
- Usually
- Occasionally
- No (please proceed to question D7)

**D6.6. How is your external research undertaken? Please mark whichever apply:**

- You undertake it yourselves
- Through external contractors (for example, market research agencies, academics, economic consultants)

**D6.7. How often is external research undertaken as part of your Authority's market studies work?**

- Always
- Usually
- Occasionally
- Never

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<sup>48</sup> Mystery shopping is when external contractors, or an Authority's own staff, pose as customers making enquiries about a purchase in order to see how they are dealt with by businesses.

**D7. Can your Authority use evidence obtained during a market study for enforcement actions?**

Yes

No

**D8. Has your Authority used evidence obtained during a market study to help take forward enforcement work?**

Yes

No

**D9. Stakeholder<sup>49</sup> information/engagement: the following questions are about how your Authority communicates with stakeholders when undertaking market studies.**

**D9.1. Does your Authority communicate with stakeholders on any of the following. Please mark whichever apply:**

Reasoning behind the selection of the market

Purpose of the study

Scope of the study

Stages involved

Timescale

Reasoning behind recommendations

Progress updates

---

<sup>49</sup> Stakeholders are those with an interest in the work being undertaken because of the potential impact it has or could have on them.

- Market study staff names
- Market study contact details

**D9.2. How do you communicate/engage with stakeholders. Please mark whichever apply:**

- Issue press releases
- Put information on your web-site
- Hold private meetings with stakeholders
- Hold public meetings with stakeholders
- Hold workshops/seminars
- Issue questionnaires
- Issue public consultations before publishing final study
- Other, if so please provide further detail below

**D9.3. At the end of the market study does your Authority publish a final report?**

- Always
- Usually
- Occasionally
- No

**D9.4. Does your Authority publish anything else at the end of a market study. Please mark whichever apply:**

- Associated research
- Feedback from stakeholders
- Evidence obtained
- Results of any consultations
- Other, if so please provide further detail below

**D9.5. What are the pros and cons of your Authority's approach to engaging/communicating with stakeholders?**

**D9.6. Is your Authority required to make any or all information public or is it left to your discretion what information to disclose? Please answer below.**

**D9.7. Does your Authority have a process for the handling of sensitive or confidential information obtained from stakeholders during a market study? For example do you give assurances or are you under any legal obligations to protect the information supplied?**

- Yes

No (please proceed to question D10)

**If so, please provide detail below.**

**D9.8. What, if any, are the legal consequences if your Authority fails to protect sensitive or confidential information? For example could your staff be prosecuted? Please provide detail below.**

**D10. Do your Authority's market studies have to be carried out within a statutory timeframe?**

Yes

No

**If so, what is the timeframe?**

**D11. If there is no statutory timeframe, does your Authority set its own defined timeframe and milestones?**

Yes

No (please proceed to question D15)

**D12. Are the timeframes published?**

Yes

No

**D13. Are the defined milestones published?**

Yes

No

**D14. Can the timeframe/defined milestones subsequently be altered?**

Yes

No

**D15. On average what is the length of your Authority's market studies?**

**D16. Does your Authority ever commission third parties to undertake its market studies work?**

Yes

No (please go to question D19)

**D17. How frequently does your Authority commission third parties?**

Always

- Usually
- Occasionally
- Never

**D18. Under what circumstances would you commission a third party to carry out a study on your Authority's behalf? Please explain below.**

**D19. Does your Authority have a standardised internal process on how to carry out market studies?**

- Yes
- No (please proceed to question D20)

**If so, please describe the process below.**

**D20. Does your Authority have guidance for external stakeholders about its market studies work?**

- Yes
- No (please proceed to question D22)

**D21. What areas does this guidance cover? Please mark whichever apply:**

- Purpose of market studies



- Selection
- Process
- Outcomes
- Other, if so please provide further detail below

--

**D22. What do you consider to be the top three areas of procedural best practice in your Authority's market studies work? What is the reasoning behind your choices? Please insert detail below.**

<b>1</b>	
<b>2</b>	
<b>3</b>	

**D23. What do you consider to be the biggest three procedural challenges/problems for your Authority's market studies work? What is the reasoning behind your choices? Please insert detail below.**

<b>1</b>	
<b>2</b>	
<b>3</b>	

**D24. How many studies does your Authority typically do in a twelve month period? Please insert detail below.**

**D25. On average, how many people (Full Time Equivalents) at your Authority typically work on a particular market study? Please answer below and provide details relating to whether these people are specialists such as competition lawyers, economists, consumer lawyers, financial analysts etc.**

**D26. How many people (Full Time Equivalents) does your Authority have allocated to working on market studies at any one time? Please answer below.**

**D27. Does your Authority have dedicated teams who only do market studies work?**

- Yes (please proceed to question D29)
- No (please proceed to question D28)

**D28. If you do not have dedicated teams, what is your Authority's process for creating a market study team? Please describe below.**

**D29. Using a scale of 1 (not satisfied) to 6 (very satisfied), please rate below how satisfied your Authority is with its process for carrying out market studies work.**

1     2     3     4     5     6

**Please explain your rating below.**

**E. OUTCOMES**

**E1. Before deciding on a study's recommendations is it standard procedure for your Authority to take into account whether the benefits will exceed any additional costs to for example business or others?**

Yes

No

**Please use the box below if you wish to comment on your answer.**

**E2. Can your studies result in any of the following recommendations and/or actions (i.e. which of these outcomes are possible)? Please mark whichever apply:**

- Competition Enforcement
- Consumer Enforcement
- Consumer Education
- Business Education
- Voluntary business compliance
- Voluntary business action
- Recommendations to business on self regulation
- Recommendations to Government for changes in the law
- Recommendations to Government to change market structure
- Recommendations for changes to Government policy
- Referral to third parties for action
- Other, if so please provide further detail below

**E3. Have your studies actually resulted in any of the following recommendations and/or actions? Please mark whichever apply:**

- Competition Enforcement
- Consumer Enforcement
- Consumer Education
- Business Education
- Voluntary business compliance
- Voluntary business action

- Recommendations to business on self regulation
- Recommendations to Government for changes in the law
- Recommendations to Government to change market structure
- Recommendations for changes to Government policy
- Referral to third parties for action
- Other, if so please provide further detail in the box below. Please also use this box if you wish to comment further on your answers to this question.

**E4. Do your Authority's recommendations to Government have to be responded to?**

- Yes
- No (please go to question E6)

**E5. Does the Government response have to be submitted within a certain timescale?**

- Yes
- No

**If so please provide details below.**

**E6. Is your Government under a legal obligation, or has it given a policy commitment, to act upon your Authority's recommendations?**

Yes

No

**E7. Is Business under a legal obligation to act upon your Authority's recommendations?**

Yes

No

**E8. Using a scale of 1 (not often) to 6 (very often), please rate below how often your Authority's recommendations have been implemented by Government and/or Business.**

1     2     3     4     5     6

**Please explain your rating below.**

**E9. Using a scale of 1 (not satisfied) to 6 (very satisfied), please rate below how satisfied your Authority has been with the level of implementation in respect of its recommendations?**

1     2     3     4     5     6

**Please explain your rating below**

**E10. What does your Authority do to try and ensure recommendations are adopted? Please mark whichever apply:**

- Dedicate a team to take forward follow up work
- Issue press notices
- Hold press conferences
- Utilise public speaking opportunities
- Make use of third party advocates
- Use advocacy within Government
- Other, if so please provide further detail below or use this box to comment further

**E11. Has your Authority ever worked collaboratively with third parties to help achieve your desired outcomes? For example working with consumer groups on a consumer education campaign or business or business groups on voluntary action?**

- Yes
- Sometimes
- No (please proceed to question F1)

**E12. Please explain briefly how you have worked with third parties in the past to help achieve your desired outcomes.**

--

**F. EVALUATION**

**F1. What are your Authority’s most successful market studies? Please list up to three examples and say why you consider them to be successful.**

	<b>Market Study</b>	<b>Most successful why?</b>
<b>1</b>		
<b>2</b>		
<b>3</b>		

**F2. What are your Authority’s least successful market studies? Please list up to three examples and say why you consider them to have been unsuccessful.**

	<b>Market Study</b>	<b>Least successful why?</b>
<b>1</b>		
<b>2</b>		
<b>3</b>		

**F3. What does your Authority see as the top three benefits of market studies? Please insert detail and explain your answer below.**



<b>1</b>	
<b>2</b>	
<b>3</b>	

**F4. Does your Authority look back and reflect on the effect of its market studies work?**

Yes

No

**F5. Does your Authority measure the impact<sup>50</sup> of its market studies work?**

Yes

No (please go to question F11)

**F6. Does your Authority have published criteria for measuring impact?**

Yes

No

**F7. What aspects of cost/benefit does your Authority take into account when measuring the impact of its market studies work? Please explain below.**

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<sup>50</sup> By impact we mean measuring the changes in market outcomes following your market studies work.

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**F8. How does your Authority measure the impact of its market studies work?  
Please mark whichever apply:**

- Contract third parties to carry out independent evaluations of your work
- Conduct your own evaluations
- Publish the results of evaluations
- Other - if so please provide further detail below

--

**F9. Does your Authority have a dedicated team to measure impact?**

- Yes
- No

**F10. Please describe below the pros and cons of your Authority's process for measuring impact.**

<b>Pros</b>	
<b>Cons</b>	

**F11. Have stakeholders expressed opinions about how your Authority conducts market studies?**

Yes

No

If so, please briefly outline the main issues raised.

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**G. FINALLY**

**G1. Please use the box below if you wish to provide any additional information or comments not covered by the questions.**

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**G2. Would you please complete the attached annexe, as far as you are able, so that we have a summary table of the market studies work undertaken by your Authority over the last three years.**

**G3. Please provide your contact details below.**

<b>Authority name and address:</b>	
<b>Contact Name:</b>	
<b>Telephone:</b>	
<b>E-mail:</b>	

<b>Date:</b>	
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**Thank you for completing this questionnaire.**

# Annexe to ICN Market Studies Questionnaire: Market Studies Summary Table

Please insert below details of your Authority’s market studies, conducted over the last three years. Please use one line to record the details of each market study.

Market	Assessment of Outcomes <sup>1</sup>											
	Competition Enforcement	Consumer Enforcement	Consumer Education	Business Education	Voluntary Business Compliance	Voluntary Business Action	Recommendations to Government for Changes in the Law	Recommendations to Government to Change Market Structure	Recommendations for Changes to Government Policy	Referral to Third Parties	No Problems Found	
Source of idea for study												
Reason for study (What were the problems)?												
End Date / Duration												
Value of Sector												

<sup>1</sup> Please tick one or more columns to indicate the type of outcome(s) from each study, and (in the final column) rank the outcome of each study using a scale of 1 (not satisfied) to 6 (very satisfied) and provide a brief narrative assessment to include details around for example acceptance of recommendations, evidence of business compliance, and the results of any formal evaluation of outcomes.

Source of idea for study		
Reason for study (What were the problems)?		
End Date / Duration		
Value of Sector		
		Competition Enforcement
		Consumer Enforcement
		Consumer Education
		Business Education
		Voluntary Business Compliance
		Voluntary Business Action
		Recommendations to Government for Changes in the Law
		Recommendations to Government to Change Market Structure
		Recommendations for Changes to Government Policy
		Referral to Third Parties
		No Problems Found

### **ANNEXE 3 – FULL LIST OF RESPONDENTS**

Brazil: Conselho Administrativo de Defesa Econômica (CADE), Secretaria de Direito Econômico (SDE), Secretariat for Economic Monitoring (SEAE)

Canada: Competition Bureau

Chile: Fiscalía Nacional Económica

Colombia: Superintendencia de Industria y Comercio

Croatia: Croatian Competition Agency

Cyprus: Commission for the Protection of Competition

Czech Republic: Office for Protection of Competition

Denmark: Danish Competition Authority

Estonia: Estonian Competition Authority

European Commission

France: Autorité da la Concurrence

Germany: Bundeskartellamt

Honduras: Commission for the Defense and Promotion of Competition

Hungary: Hungarian Competition Authority

India: Competition Commission of India

Ireland: The Competition Authority

Israel: Israel Antitrust Authority

Italy: Autorità Garante della Concorrenza e del Mercato

Jamaica: Jamaica Fair Trading Commission

Japan: Fair Trade Commission

Jersey: Jersey Competition Regulatory Authority

Lithuania: Competition Council

Mexico: Comisión Federal de Competencia

Mongolia: Authority for Fair Competition and Consumer Protection

Netherlands: Netherlands Competition Authority

Norway: Norwegian Competition Authority

Poland: Office of Competition and Consumer Protection

Russian Federation: Federal Antimonopoly Service

Serbia: Commission for the Protection of Competition

Singapore: Competition Commission

Slovak Republic: Antimonopoly Office of the Slovak Republic

South Africa: Competition Commission

Spain: Comisión Nacional de la Competencia

Turkey: Turkish Competition Authority

UK: Competition Commission

UK: Office of Fair Trading

US: Antitrust Division, Department of Justice

US: Federal Trade Commission

Zambia: Competition Commission



## **ANNEXE 4 – COMPLETE LIST<sup>51</sup> OF STUDY TOPICS REPORTED IN LAST THREE YEARS**

### **Advertising**

Classified Directory Advertising Services  
Outdoor advertising

### **Basic industries**

Steel

### **Chemicals**

Pesticides sold commercially  
Manufacturing pesticides and cement  
Chemical products  
Manufacturing paint and tyres

### **Competition policy**

Trade associations exchange of information  
Interface between competition authority and regulators  
Guidelines for competition compliance by business  
Anti-dumping and competition law  
Avoiding competition restrictions in regulation  
Public subsidies and competition policy  
Biases in demand analysis due to variation in retail distribution  
Technological tying and competition  
Cartel case law in select jurisdictions  
Patent dispute settlements and market entry and consumer welfare

### **Construction**

Cement (3 studies)  
Manufacturing pesticides and cement  
Roof covering market, especially tin  
Production and distribution of chipboard  
Production and sale of lime for cement  
Homebuilding

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<sup>51</sup> The following studies are listed twice under two separate sector headings: Manufacturing paint and tyres (listed under both Chemicals and Manufacturing); and Homebuilding (listed under both Construction and Housing). Manufacturing pesticides and cement is listed three times under the Chemicals, Construction, and Manufacturing headings.

Brick production

### **E-Commerce**

E-commerce (2 studies)

Debit cards on the internet

Internet shopping

### **Education**

Schoolbooks

School uniforms

Textbook distribution

### **Energy**

Retail electricity

Gas and electricity markets

Energy (3 studies)

Wood raw materials in heating supply

Electric energy (5 studies)

Wholesale natural gas

### **Financial Services**

Store cards

Home Credit

Personal banking (2 studies)

Investment funds

Retail banking (4 studies)

Pensions (2 studies)

Payment cards (3 studies)

Banks fees and commissions

Consumer credit contracts

Tying of bank products

Sale and rent back

Consumer mortgage disclosure

Debit cards on the internet

Trade practices in commercial banking

Switching in retail banking

Interchange fees

Business loans for real estate development

### **Food supply chain**

Food supply chain bread, milk, butter

Processed milk

Sugar (3 studies)  
Agri-food distribution  
Milk and milk derivatives  
Milk  
Food processing  
Dairy processing, wholesale and retail

### **Groceries**

Groceries (5 studies)  
Bakery services  
Grocery monitor  
Retail trade in food (3 studies)  
Retail in beef, poultry and dairy

### **Health**

Primary health care  
Private health insurance  
Hospitals  
Switching in health insurance  
Contact lenses  
Children and TV advertising and obesity  
Hospital merger retrospective  
Heart health claims in advertising  
Hospital competition and charity care

### **Housing**

Council housing  
Homebuilding  
Sale and rent back  
Scottish property managers  
Real estate brokerage (2 studies)

### **Insurance**

Payment protection insurance (2 studies)  
Insurance against loss or damage  
Business insurance  
Private health insurance  
Insurance  
Switching in health insurance  
Insurance of mortgaged property  
Credit scoring on auto insurance

**Leisure**

On-trade beer distribution  
Green Assignments  
Pet trades (dogs and cats)

**Manufacturing**

Manufacturing pesticides and cement  
Manufacturing paint and tyres  
Manufacturing

**Media**

Television and media rights  
Media content rights  
Collecting societies  
Production and distribution of recorded music  
Football broadcasting rights  
Electronic Media (content and content aggregation)  
Wholesale and retail sale of books

**Petroleum products**

Liquid Petroleum Gas  
Petroleum products  
Wholesale and retail gasoline  
Gasoline prices (3 studies)  
Vertical relationships in retail gasoline  
Fuel  
Retail motor fuel  
Wholesale motor fuel  
Wholesale oil-shale oil

**Pharmaceuticals**

Generic drugs  
Benefiting from generic drugs  
Pharmacies  
Opium derivatives  
Pharmaceutical Price Regulation Scheme  
Medicines distribution  
Ethical drug distribution

**Professions**

Self-regulated professions  
Architects

Optometrists  
Barristers and solicitors  
Dentists  
Vets  
Legal professional entry barriers  
Professional services (2 studies)  
Audit services  
Liberal professions

### **Public procurement**

Municipalities – competitive tendering  
Public procurement

### **Retail**

Retail malls  
Doorstep selling  
Consumer fraud

### **Telecoms**

Telecoms (3 studies)  
Mobile recharge fees  
Stationary telephony  
Telecoms (6 small studies)  
Telecoms symposium and report  
Broadband  
Provision of wireless broadband

### **Transport**

Rolling stock leasing  
Airports (2 studies)  
Driving schools  
Car retailing  
Taxis  
Road goods transport  
State policy in passenger transport  
Harbours and inland transport and terminals  
Freight transport (especially rail)  
Intercity passenger buses  
Road freight transport  
Airlines  
Competition at [Harbour name] Harbour  
Distribution of new motor vehicles

## **Travel and Tourism**

Tour Operators

## **Utilities**

Postal services (3 studies)

Water

Water supply and sewerage

## **Waste**

Recyclable packaging waste

Waste and packaging

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