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THE COMPETITION ADVOCACY
DEPARTMENT

METHODOLOGY FOR CNMC MARKET
STUDIES

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1. INTRODUCTION

1.1. Studies in the context of the CNMC's instruments for enforcement

1. The CNMC works to promote and preserve effective competition among economic operators in markets. This competition generates gains in efficiency, enabling consumers and users, businesses and the public sector itself to benefit from efficient prices, a greater variety and quality of products and services, and greater innovation in the market.
2. The Law 3/2013, of 4 June, on the creation of Spain's National Authority for Markets and Competition (LCNMC), maintaining the objectives of Law 15/2007, of 3 June, on the Defence of Competition (LDC), proposes a series of instruments that allows the Competition and Regulation Authority to fight restrictions on free competition. Broadly speaking, these instruments fall into three categories:
 - Combating prohibited conduct
 - Monitoring mergers.
 - Promoting competition.
3. The promotion of competition was one of the major new features of Law 15/2007, putting the former National Authority for Markets and Competition (CNC) at the same level as the most advanced competition authorities at the international level.
4. Under the provisions of the Article 5.1 of Law 3/2013, the CNMC's functions include promoting effective competition in the markets through Studies and market investigations on competition issues, as well as general reports on sectors which could include, where appropriate, proposals for liberalisation, deregulation or changes to regulations.
5. The CNMC assigns the initiative and proposal of the advisory function¹ of preparing Market Studies to the Competition Advocacy Department. This

¹ Article 5.2 of Law 3/2013: Spain's National Authority for Markets and Competition acts as an advisory body on matters relating to the maintenance of effective competition and the proper functioning of markets and economic sectors. Specifically, it may be consulted by Legislative Chambers, the Government, ministry departments, autonomous regions, local corporations, professional associations, chambers of commerce, business organisations, and consumer and user organisations.

allows achieving an objective and independent assessment of the level of competition in the markets analysed.

6. Given the advisory role of the CNMC in developing Market Studies, its content is not binding, it does not affect third party interests and cannot be challenged in court.
7. This makes it desirable to provide the Advocacy Department with a written methodology for drafting Market Studies. This methodology includes the strict procedure followed by the Competition Authority in this function, detailing the processes to be followed for the initiation, development, validation, proposal and monitoring of Market Studies.
8. The organisational structure of the CNMC facilitates an independent opinion and safeguards general interest in the development of studies. Promotion and coordination is assigned to a specialised unit: the Studies and Reports Unit under the Competition Advocacy Department. The Department, reporting directly to the President, is separate from the Competition Enforcement Divisions of the CNMC and the Secretary of the Council.
9. The structure of the CNMC improves, in this regard, the organisational structure of other competition and regulation authorities, which do not have a specialised advocacy units with resources exclusively dedicated to the development of Market Studies from the perspective of competition and efficient economic regulation.

1.2. What is a Market Study?

10. A Market Study is the most important tool for promoting competition, consisting of a comprehensive economic and regulatory analysis that analyses in depth the dynamics of competition in a market or productive sector, identifying existing restrictions in that market which may hinder or prevent efficient resource allocation. Lastly, a Study reaches conclusions and makes recommendations to reduce the effect of or eliminate such restrictions.
11. Studies are the first link in the advisory role of the Council, being among the greatest expressions of independence of the Authority, as they do not compulsorily respond to prior requests, as in the case of reports as stated

in Article 5.2. Likewise, it is not possible to appeal against CNMC Market Studies, since it is not an appellable administrative activity².

12. While as part of the advisory function of the CNMC these recommendations are not binding for external operators, they have the prestige of the Authority itself.
13. However, these recommendations are mandatory for the CNMC, as they link the opinion issued by the Council to all units of the Authority. The Studies reflect the criteria of the Council on the functioning of a given market, meaning that all reports and enforcement proceedings related to the said market, as well as other CNMC procedures, must meet the criteria and recommendations contained in the Study.
14. CNMC Studies analyse the situation of a sector or branch of economic activity from the perspective of competition and efficient economic regulation. These Studies combine the review of the regulatory framework with the analysis of market structure, behaviour and incentives of operators, and the economic conditions of the sector or sectors analysed.
15. Their purpose is to make recommendations to public administrations or stakeholders operating within the sector in order to encourage competition and obtain more efficient economic outcomes, in line with the general interest, and the benefit to consumers, businesses and public administrations.
16. In these Studies, the CNMC may also propose changes or revisions of the regulations or issue clarifications or warnings to economic operators and administrations with the aim to remove barriers to competition or to improve the economic efficiency.
17. The scope of the Study is a market or sector in the broad sense of the term. This means that the analysis covers the product (market sector or industry) and geographical dimension. For example, in recent years the Competition and Regulatory Authority has completed Studies on: [the market for the retail distribution of drugs](#), [the wholesale market for automotive fuels](#), [the airport sector](#), [the land market](#), [the market for the transport of goods by rail](#), [the market for the distribution of food products](#), *inter alia*.

² Supreme Court Decision [STS 4096/2015](#).

18. The Study is of a predominantly economic nature, and focuses on analysing how economic operators compete with each other: what are the main variables in which they compete (price, quality, differentiation, etc.), how intense is competition and how it is reflected in the market. To that end, the structural market conditions, the behaviour of the stakeholders and how both influence the level and evolution of the market variables are taken into account. Consequently, a thorough analysis of the applicable regulations and the restrictions that these regulations could generate in the market should be performed. The analysis of regulation also has an economic approach as it is based on the criteria of efficient economic regulation and the existence of market failures.
19. The economic and regulatory analysis should allow concluding on the restrictions that hinder or prevent effective competition in the market, or prevent regulation to achieve its objectives of economic efficiency.
20. The benefits derived from the Study may not be obtained in the short term; numerous improvements in efficiency in the markets are reflected in the medium or long term in the welfare of consumers and the general interest. It is also sometimes necessary to apply complementary measures in other markets for all the benefits to materialise.
21. Studies always include recommendations to promote greater competition in the market and/or a regulatory improvement through (i) the elimination or reduction of existing restrictions or (ii) recommendations on the behaviour of market operators, either in the short or long term.

1.3. What is not a Market Study?

22. A Study is not an infringement procedure, a merger or any other administrative procedure whose jurisdiction lies within the Enforcement Divisions of the CNMC. The starting point of a Market Study is not a conduct prohibited by competition or sector regulations, but an analysis of structural or behavioural traits (not contrary to the regulation in force) that are limiting competition in the market or hindering efficient economic outcomes.
23. A Market Study is also not a report on a specific draft regulation at the request of the proposing authority or *ex-officio*. For the analysis of regulatory changes in a particular sector there are other tools to promote competition devoted to the assessment of regulatory projects, such as:

reports on regulatory proposals (IPNs)³ and proposals for regulatory changes (PROs).

24. The Market Study may include among its recommendations a proposal for reforming existing regulations. However, this is not the exclusive or final purpose of the Study.
25. Moreover, a Market Study differs from a Guide, whose goal is to guide or instruct the market operators in an informative way on how to behave in the market to encourage greater competition. A Guide does not include a detailed analysis of economic indicators or structural elements of the market.
26. Lastly, a CNMC Market Study differs from an academic study. An academic study is usually valued for its methodologic analysis, for the instruments used and for its contribution to economic literature. A CNMC Study aims to promote more competition and efficient economic regulation in the markets. To do this, it must be technically as robust as possible, but its priority is not to contribute to economic science.

³ Article 5.2 of Law 3/2013, of 4 June, on the creation of Spain's National Authority for Markets and Competition.

2. IDENTIFICATION AND SELECTION OF MARKETS TO BE STUDIED

2.1. Who makes the decision?

27. This corresponds to the Advocacy Department which proposes a Study Plan for the short and medium term, carrying out any proposals it deems appropriate while taking into consideration the available resources and technical and legislative opportunity to analyse certain markets.
28. The Competition Advocacy Department may include Studies in the plan for various reasons:
 - At the proposal of the technical services of the Advocacy Department of the CNMC. For example, at a motivated proposal derived from CNMC economic reports that reveal shortcomings in the functioning of a specific market, which will present a high economic cost to society if they continue.
 - At the proposal of an Enforcement Division; for example, due to the detection of potential structural problems during the investigation of infringement proceedings that could affect effective competition or the economic regulation of a sector.
 - As a result of complaints to the CNMC by consumers or businesses. For example, a request received in the Studies suggestion box.
 - The result of a Study request by the Government, Ministry, Legislative Chamber, etc. Once the request, which is not confined to a particular regulatory project, is received, the Council acts independently to decide on the timing of the Study. Specifically, Article 5 of the LCNMC states the following:

"Spain's National Authority for Markets and Competition acts as an advisory body on matters relating to the maintenance of effective competition and the proper functioning of markets and economic sectors. Specifically, it may be consulted by the Legislative Chambers, the Government, ministry departments, autonomous regions, local corporations, professional associations, chambers of commerce, business organisations, and consumer and user organisations".

29. The President of the CNMC shall include the Study plan in the Action Plan or Strategic Plan of the CNMC
30. A plenary session of the CNMC Council shall approve the Action Plan and the Strategic Plan of the CNMC⁴.
31. The Council of the CNMC assembled in the Competition Chamber or in a plenary session (ex article 5.1 and article 21.2 of Law 3/2013) shall oversee the development of the Study that (ex article 30 of the Statute of the CNMC approved by Royal Decree 657/2013) the Advocacy Department has proceeded to submit to the Council.
32. The work of the Council of the CNMC culminates with the approval of the Study.
33. The publication of the Study is the responsibility of the President of the CNMC. This publication, along with all other appropriate communication tools, will seek to maximise social impact and increase the competition culture and efficient regulation of Spanish society. To achieve this objective the Advocacy Department, in coordination with the Communications Unit of the Cabinet of the President, will submit any proposals deemed technically appropriate to the President of the CNMC.

2.2. Criteria for identifying and selecting the markets to be analysed

34. The first step is the selection of markets or economic sectors to be analysed and included in the Study plan.
35. The selection of markets requires preliminary research to be carried out by the Studies and Reports Unit.
36. The initial objective of this research is to identify those markets whose structure and characteristics are linked to the existence of potential restrictions on competition or regulatory inefficiencies, and to determine the importance of these markets for the Spanish economy. This preliminary analysis aims to discard those markets with less relevance in

⁴ Article 20.9 of the LCNMC establishes among the functions of the CNMC “*To adopt the reports referred to in points a), b) and c) of Article 5.2 of this Law, reports, studies and projects on economic sectors and competition and reports on public assistance*”.

the overall economy or with characteristics which do not lead to the presumption of the existence of competition or regulation issues.

37. Carrying out and publishing Market Studies should be part of a planned well in advance process (annual or biennial) and should be supported by objective criteria. This way, Studies are carried out at the right moment, the most important markets for the economy are prioritised, and the resources of the CNMC are used efficiently.
38. However, the existence of windows of opportunity, at the proposal of the President and approved by the Council, can justify the initiation of a Study that was not previously planned.
39. Selection of the markets to be analysed using a top-down methodology that would allow for a horizontal screening of the economy as a whole is not the most suitable tool at present. The theoretical and practical difficulties in terms of resource use and performance explain that different competition and regulatory authorities have ruled out this strategy and adopted alternative approaches.
40. For this reason, a case by case, or bottom-up approach is adopted to identify markets that present restrictions on competition or regulatory inefficiencies that can affect public interest.
41. To support this approach, economic indicators and objective criteria are used to support the decision of which markets to analyse and when to do it. These criteria allow the President and the Council of the CNMC to assess the Study plan and prioritise the selection of markets to study.

2.2.1. Which markets should be analysed?

42. The CNMC should optimise the use of its resources to study those markets of the economy which present either restrictions on competition or regulations that are most relevant to the general interest.
43. Among other things, the importance of the market for the economy as a whole and for consumers can be estimated by:

- Production value.
 - Consumer value.
 - Gross added value.
 - Number of employees.
 - Weight in the total investment.
 - Weight in the total R+D.
 - Weight in the consumer basket of households.
 - Evolution of productivity.
 - Technological content.
 - Capacity for innovation.
 - Interrelationships with other sectors of the economy (the existence of upstream or downstream vertical links).
 - Social repercussions
44. Preliminary research is preferably carried out from already-developed and accessible data that does not involve formal requests of information. This preliminary research is to mainly be conducted relying on databases and internal documents of the CNMC, as well as publicly-available and free (when possible) reports and data.
45. During the preliminary research the CNMC would try to avoid contact with economic operators and third parties of an external nature. This contact will be made only in those cases where there is no other way to collect sufficient data, and fundamental information for preliminary market analysis is required.
46. The main sources of information are the following:
- Statistical sources, both internal and external (public).
 - Previous studies or studies from other institutions (whether they be national, international or from the EU, public institutions, sectoral regulatory bodies, regional competition authorities or those from other countries, business associations, recognised centres for economic studies, etc.).
 - Information derived from the proceedings of the Enforcement Divisions of the CNMC.
 - Academic articles, books, documentaries, podcasts, or other audiovisual information.

47. Available data stating the existence of competition problems or inefficient regulation will also be preliminarily taken into account. Among others:
- High levels of concentration.
 - Stability in market shares over time.
 - Non-existence of companies entering or exiting the market.
 - High entry and/or exit barriers.
 - Price trends or levels higher than other countries within our scope.
 - Price trends higher than the rest of the economy.
 - Restrictive regulation of competition.
 - Repeated enforcement decisions by the CNMC in said market.
 - Repeated complaints by consumers and users, associations or economic operators.
48. If during this preliminary analysis the CNMC were to detect evidence of the existence of practices that restrict competition in a market, it may turn to other sources of information generally coming from other public bodies in order to confirm the existence of such evidence.
49. If the signs were sufficiently solid, after further investigating this preliminary analysis, the Advocacy Department would inform the competent Enforcement Division of the detected practice for appropriate action.
50. After the preliminary research, the Council of the CNMC will assess the opportunity to conduct a Study on the market in question:
- because there is a "window of opportunity" for the recommendations to be implemented in future regulatory changes.
 - because the market is important to the economy as a whole.
 - because the possible restriction on competition affects a significant part of the market in question.
 - because the most suitable tool to correct the possible restriction is a Market Study.
51. It may also be of interest to the CNMC to conduct Studies on those markets that are strategic or that, due to their influence on other sectors and on consumers and users, have a significant impact on the value chain, as well as closely monitor their evolution. Such is the case with the major regulated sectors, including the energy, communications and transportation sectors, or markets that will be subject to a process of

liberalisation in the short term, or those in which liberalisation has been carried out recently and an analysis on the effect of such changes in the market is intended.

2.2.2. When should a Study be conducted?

52. The object of a Study is, ultimately, to make a series of recommendations whose application in the market reduces or eliminates the detected restrictions on competition or economically inefficient regulations. If, as usually happens, some of these recommendations affect aspects of the applicable regulations in the market, it is advisable that the Study be conducted at a time when it can influence the development of regulatory changes, especially in processes of liberalisation and opening of markets, or during the review of the regulation by the competent authorities.
53. In the case of recommendations for legal changes, there is a period prior to the development of the regulation and a period of assessment afterwards on its impact on the market, in which a Market Study by the CNMC may have special influence.
54. In the first case, the CNMC should monitor and analyse the documents in which the economic authorities indicate their intention to address medium-term structural reforms in economic sectors. Using these lines of action, the CNMC would have enough time to perform an analysis of the relevant markets in order to provide recommendations in their areas of competence to improve the new regulation from its beginnings.
55. Therefore, the CNMC should pay particular attention to announcements for reforms on the Regulations and Directives of the European Union and the National Reform Programme that the Spanish Government presents annually to the European Commission.
56. On the other hand, following the adoption of new legislation providing for significant changes in the market, it may be appropriate to conduct a Study to assess its effects and to what extent the new regulation has led to increased competition or regulatory improvement. In this case, the analysis should be carried out when the effects on the market can be technically assessed.
57. Moreover, it would be advisable to consider conducting a Study on markets that are to be subjected to processes of major structural reforms (e.g. markets where there have been a large number of economic mergers

or markets that are to go through a process of liberalisation), or new markets presenting disruptive characteristics which may have significant effects on the economy as a whole, or on some sectors in particular, and of which sufficient information is not available to assess their proper functioning from a regulation and competition perspective.

3. PLANNED PROCEDURES AND ACTIONS

3.1. Study plan and planned actions

58. Market Studies planned for the short and medium term should be included in the Study Plan, included in the Action Plan of the CNMC. This way, different stakeholders in the market and the public in general can be regularly informed on the Studies being planned by the CNMC. A brief summary is to be included detailing the reasons why the CNMC has decided to conduct a Study on that market. All this helps to provide greater transparency and information on the development of the Study, as well as to the Study as a policy tool to promote competition and a mechanism to promote society's understanding.

3.2. Collection and analysis of information

59. CNMC uses various tools to collect information directly from the stakeholders, institutions and operators in the market being studied.
60. Two of the main tools are meetings with market operators of interest to the CNMC and information requirements for such operators.

3.2.1. Meetings with operators and interested third parties

61. One of the regular tools of the CNMC for gathering information during the process of preparing a Study are the bilateral meetings between the CNMC and associations, institutions, operators and other market stakeholders that have a significant influence over the functioning of the sector, its regulation or its level of effective competition. Meetings are always held with each of the operators or institutions individually, without exchanges of information between competitors, and their content is not made available to other operators and/or institutions.
62. The initiative of such meetings can come from operators and be accepted due to interest on the part of the CNMC, or from the CNMC itself. In any

case, the CNMC will make the necessary and reasonable efforts to adjust as much as possible to the schedule of those individuals that come to their offices in order to meet with the technical team responsible for conducting the Study.

63. In the event that a public consultation is launched during the elaboration of a Study, in order to avoid possible impact on the results stemming from the consultation, the CNMC will not meet with any stakeholder involved in the market until the public consultation is finished.
64. It is also good practice to write up pre-meeting notes and the minutes of meetings held, containing the individuals who have attended as well as the fundamental content discussed in them. This information will be available internally and will not be publishable information as stated in Article 37 of Law 3/2013 on the creation of Spain's National Authority for Markets and Competition.
65. At the request of the attendees or the CNMC, and in the event that the minutes contain confidential information, non-confidential minutes of the meeting may be used and made available for internal use.

3.2.2. Information Requirements

66. With regard to information requirements, and under the provisions of art. 28 of the LCNMC:

“Any natural or legal person and bodies and agencies of any public administration are subject to the duty of collaboration with Spain's National Authority for Markets and Competition in the exercise of protecting free competition and are required to provide, at its request and on time, all kinds of data and information available to them which may be necessary for the development of the functions of the Commission.”

67. In this sense, and in relation to the function of Competition Advocacy, Royal Decree 261/2008 of 22 February in which the Regulation of the Defence of Competition is approved, provides that:

“1. Spain's National Authority for Markets and Competition, for the exercise of the function of promoting competition, may use the faculties of Law 15/2007 of 3 July, in the exercise of its powers. In

particular, it may seek data and information on the market situation from the economic sectors concerned.

2. For the purposes of the provisions of Article 39 of Law 15/2007 of 3 July, any natural or legal person and bodies and agencies of any public administration subject to the duty of collaboration with Spain's National Authority for Markets and Competition, are required to provide, at its request and on time, all kinds of data and information available to them which may be necessary to Spain's National Authority for Markets and Competition, in its role in promoting effective competition in markets as stated in Article 26.1 of Law 15/2007 of July 3.

3. Non-compliance of the duties of collaboration and information with Spain's National Authority for Competition and Markets referred to in this article shall be subject to the provisions of Article 21 of this Regulation.”

68. Moreover, article 67 of Law 15/2007 in conjunction with Article 21 of Royal Decree 261/2008 provides for the possibility that the CNMC may impose coercive fines of up to 12,000 euros per day for non-compliance with the commanded in a resolution, request or agreement of the Council.
69. Thus, every stakeholder, institution or operator is obliged to cooperate and answer to requests for information sent by the CNMC within 10 days⁵, unless due the nature of the requested information or certain characteristics as stated by the CNMC, a different period is established. If necessary, an extension could be requested⁶, which may not exceed half of the period defined in the first instance. The request for an extension must be put in well before the deadline in question.
70. With the information requirements, the CNMC aims to collect all information deemed relevant and necessary for the development of a Market Study. This way, the requirements can be sent to any market operator or stakeholder, and complement and extend the previously obtained information from the meetings held with the various operators. Given that information requirements may incur an administrative burden for market operators, especially for those smaller in size, information necessary for economic analysis shall be requested, without being

⁵ Article 39. 1 of Law 15/2007.

⁶ In accordance with the provisions of article 49.1 of Law 30/1992 of 26 November on the legal regime of public administrations and common administrative procedure

excessive and must be precise in order to facilitate understanding by the operator. Also, when that information already exists within the scope of the Public Administration, the CNMC shall contact it so it can provide it.

71. The information obtained from market operators and stakeholders through information requirements may be used for the development of the Market Study for which such information was requested. In addition, the information obtained will not be shared with other departments or divisions of the CNMC if there is confidential information, except as indicated in reference to the detection of conduct contrary to competition law or regulation.

3.3. Handling confidential information

72. Under article 42 of Law 15/2007 on the Handling of Confidential Information, the parties involved may, at any time during the procedure, request the confidentiality of data or documents considered confidential sent to the CNMC. For this purpose and in accordance with article 20 of the RDC, the request for the confidentiality of data and information shall be made to the competent body, stating clearly the reasons of confidentiality, and providing a separate non-confidential version of the documents.
73. Only those data and documents which contain trade secrets or whose public knowledge may seriously damage the affected individuals, even without constituting trade secrets, may be declared confidential. The CNMC shall review the reasons for the confidentiality of data and information and, in the event of a conflict in the criteria used by the party providing the information and the criteria for confidentiality of the CNMC, the latter will contact the relevant party in order to discuss the confidentiality of the information provided.
74. Additionally, the CNMC will treat as confidential the information that involves a business secret, even if the economic operator itself does not consider it as such. In any case, the handling of aggregate information may be public while the information of individual market operators is declared confidential.

4. THE IMPORTANCE OF STAKEHOLDERS IN THE DEVELOPMENT PROCESS OF THE STUDY

4.1. Definition and identification of stakeholders

75. In this section the importance of stakeholders in the process of developing Market Studies will be analysed. This requires, firstly, a definition of who these stakeholders are and their level of importance and contribution in the process of obtaining information for the elaboration of the Study.
76. A stakeholder refers to any person or group of persons (both internal, such as the Enforcement Divisions or other units of the CNMC, and external to the CNMC), company, organisation or group of organisations that have information of interest concerning the market which is the object of the Study and/or the possible impact of the Study on the level of competition or regulation in the market.
77. There are potential stakeholders in each of the markets which may vary considerably depending on the type of market being analysed. However, and without attempting to create an exhaustive list, the following may be considered stakeholders in most markets:
- i. Public Administrations (both at a European and a national, regional or local level), sectoral regulators not integrated into the CNMC and public entities.
 - ii. International organisations.
 - iii. Economic operators in the affected market as well as those present in related markets upstream or downstream, or those that offer additional or substitute goods.
 - iv. Professional organisations and sectoral associations.
 - v. Consumers, consumer associations and consumer groups.
 - vi. Unions and interest groups.
 - vii. Consultants and experts in the Study area.
 - viii. Academics.
 - ix. The media.
 - x. CNMC internal departments that have specific information or knowledge about the market to be analysed.

- xi. Other entities interested in the market.
 - xii. Any person or entity that may exercise significant influence over any of the interest groups.
78. For each of the Market Studies, the list mentioned *ut supra* should be checked and expanded upon. It is also considered good practice to gather information from other units of the CNMC that have information, databases and statistics or specific knowledge of the market to be analysed before resorting to external sources. This way, the internal synergies of the CNMC can be taken advantage of and the amount of information required from external operators through information requirements is limited.
79. Proper identification of all stakeholders is crucial for the development of the Study. Stakeholders that may have a role of interest in the market must be suitably identified so that the information collected is complete and the conclusions strong.
80. Identifying stakeholders should be carried out at the beginning of the Study in order to provide a global, complete, objective and rigorous analysis of the existing competition and regulation issues in the market.

4.2. The importance of involving stakeholders

81. The contributions of stakeholders can be crucial when conducting the Market Study. For example:
- in sectors where there is no public information or statistics on quantities, prices, costs, sales, etc., given that all contact is made bilaterally between economic operators and final consumers concerning their input, product or service.
 - newly created markets where there is insufficient data, or
 - markets where a process of disruptive innovation has brought profound structural changes whose scope should be analysed by the competition and regulation authority.
82. Information and knowledge that can be contributed by the different stakeholders to the CNMC will always be of interest and will help complete its vision of the market and potential competition problems. Among other contributions, stakeholders can offer the following information and knowledge about the functioning of the market:

- i. Quantitative information, both aggregated and disaggregated, on transactions between economic operators in the market as well as volumes, prices, origin-destination, customers, products, etc.
 - ii. Qualitative information on the market (type of products/services, quality, market segments, product/brand positioning, close substitutes, technical aspects of the market, information on competitors, etc.).
 - iii. Information on potential competition or regulation problems in the market or in related markets, their causes and possible solutions.
83. As for the CNMC, proper involvement of the stakeholders in the development of Studies can yield a number of benefits:
- i. Possibility of spreading the benefits of Market Studies among economic operators.
 - ii. Involving operators in the development of Market Studies.
 - iii. Establishing long-term information channels with operators in order to monitor the level of competition in the various markets, identifying potential problems of regulation or competition and/or facilitating the development of successive Market Studies.
 - iv. Obtaining a comprehensive overview of the functioning of markets and their level of efficiency and effective competition.
84. The effective commitment of stakeholders to the CNMC is an important requirement for a successful Study.
85. It should always be remembered that stakeholders have their own agenda, motivations and interests, which do not necessarily coincide with the ultimate goal of the CNMC, i.e. to promote effective competition and efficient economic regulation in markets.
86. The information provided by stakeholders must be used with caution, since it may be incomplete, inaccurate or biased to favour their interests in the market. A critical yet collaborative spirit is necessary when interacting with stakeholders.
87. The relationship established by the CNMC with stakeholders will have an impact on the reputation of the authority. The impact can be positive if it increases or guarantees:

- i. Compliance with the principles of competition, law and efficient economic regulation.
 - ii. Transparency and rigour of the actions of the CNMC.
 - iii. The possibility of addressing competition issues before the publication of the Study, or to identify potential non-compliance of competition law or regulations governing the sector.
 - iv. That stakeholders will voluntarily adopt the recommendations included in the Study and that they comply with market needs and existing economic problems within it.
88. There are, however, potential reputational risks that may arise from the collaboration and/or relationship between the CNMC and the various stakeholders of the markets: (i) potential capture of authority or members of the authority by stakeholders; or (ii) a risk of loss of credibility.
89. In order to mitigate these reputational risks, the team responsible for the development of Studies must maintain, at all times, their independence and objectivity. To do this, they must keep a distance from stakeholders and not establish closeness with them. Additionally, the CNMC will make all meetings with the various market operators public, in order to provide maximum transparency in its actions.

4.2.1. Methods for increasing the participation of stakeholders in the Study

90. Stakeholders may benefit from a relationship with CNMC.
- Consumers and consumer associations can gain a better understanding of the functioning of markets and level of competition, thereby facilitating their negotiating position *vis-à-vis* market operators.
 - Organisations can communicate competition or regulatory problems to the CNMC that they identify in their markets, and explain how these problems affect their activity.
 - Public administrations can increase their knowledge on competition law and incorporate these principles into the development of sectoral laws and policies so that they do not pose a restriction on competition in the markets, but rather a stimulus.

91. The CNMC is responsible for effectively communicating the benefits of their studies to Spanish society and, in particular, to consumers and users. Therefore, the CNMC must convey as clearly as possible the purpose and scope of the Study, its time frame and the documents that will be published (press releases, public consultations, preliminary results and the approved Study).
92. Depending on the nature of the Study, the possibility of submitting the preliminary results of the Study to public consultation will be assessed, in order to obtain more information on stakeholders concerning the proposed conclusions. Additionally, an initial public consultation could also have the beneficial effect of collaborating with unidentified stakeholders or those that possess information difficult to obtain otherwise.
93. The CNMC should effectively communicate the missed opportunity that not participating in a Market Study of the CNMC may represent. Economic operators with relevant information must have information that encourages them to express their views on the functioning of the market and the main obstacles to competition. Not collaborating with the CNMC should be seen as a missed opportunity to express the possibilities of improvement regarding market competition or its regulatory framework.
94. Once operators with information relevant to the CNMC are identified and the benefits of collaborating in the development of Studies have been communicated, the most effective way to interact with them should be established.
95. There are different levels of contribution for different types of stakeholders depending on the interests of the CNMC in developing the Study.
96. Generally speaking, there should be contact from the start of the Study with those market operators with greater market share. In this case, the CNMC can plan bilateral meetings. On the contrary, for those who are less related to the market or who have information more familiar to the CNMC, it may be sufficient to complete their contributions with the formal written information requirements. Lastly, for the more distant stakeholders, an invite to submit their contributions in writing and analyse their observations should be sufficient.

97. To sum up, and without being an exhaustive list, in order to increase the collaboration of stakeholders in developing CNMC Studies, it would be advisable to:

- Communicate the benefits of participation of stakeholders in the process of developing Studies.
- Develop standards of a clear and transparent exchange of information, to avoid misunderstandings and increase the level of stakeholder trust in the institution.
- Provide transparent information on the purpose and scope of the Studies, the tentative time frame and the various stages planned.
- Ensure, where appropriate, the confidentiality of any information and/or knowledge provided to the CNMC during the development of the Study.
- Explain the different relationship strategies or methods of the CNMC with stakeholders.

4.2.2. How to communicate: transparency and confidentiality

98. The CNMC must respect and protect the transparency of its actions and its relations with third parties and ensure the confidentiality of information provided by stakeholders, either through formal information requirements, bilateral meetings or other systems.

99. The transparency of the CNMC activity reinforces its legitimacy and helps to instil the necessary trust of citizens and the various stakeholders in the institution. In this regard, the Law requires the CNMC to publish all Studies issued, the annual report of activities and the annual or multi-annual plans, and the organisation and functions of each of its bodies.

100. The confidentiality of exchanging views and information on markets is also an important element of stakeholder relationships. The proper use of the information provided and the views expressed by stakeholders should be guaranteed, either in writing in response to formal information requirements, or orally in meetings with them. In all cases it must be guaranteed that confidential information provided in these exchanges shall

remain confidential; not only *vis-à-vis* with other interest groups, but also when handled in the public version of the Market Study. In this regard, the possibility of using confidential data anonymously and/or as aggregated data should be discussed. Only data or information that contains business secrets or could encourage anti-competitive behaviour are considered confidential. In either case, the confidentiality of the information provided should be justified in writing, with non-confidential versions of the information provided.

4.2.3. After the Study is published

101. The publication of the Study does not conclude the work of communicating it to administrations and stakeholders.
102. It is customary that after the publication of the Study, some stakeholders, public or private, express their opinion, favourable or critical, on the conclusions and recommendations of the Study (or on some specific aspect analysed in it) bilaterally or through the media.
103. It is helpful to prepare a brief document or arguments with the main ideas or positions in defence of the Study to encourage its impact on media
104. In the event that it is criticised, it would be helpful to prepare an internal counter-argument responding to the main arguments of critical operators.
105. It is also good practice to keep those stakeholders informed who have been in contact during the process of developing the Study of potential subsequent Studies on the same market, or of events, conferences, seminars and courses where the results of the Study are presented, or related activities.
106. If the CNMC or a stakeholder detects a factual error or error of omission in the Study, they shall inform the Presidency and the communication unit who will proceed as follows:
 - If the error is factual, it shall be corrected, indicating on the website the time and the reason for the correction.
 - If the error was of another type, how it is to be corrected shall be presented to the Presidency and the communication unit together with, if necessary, any additional measures deemed appropriate.

107. Lastly, it is advisable to make an assessment of the impact of the communication, the established relationships with various stakeholders, an analysis of any problems that have arisen, elements to improve, contributions made to the Study, etc., in order to improve the relationships that the CNMC establishes with stakeholders and correct imperfections.

5. STRUCTURE AND CONTENT OF A MARKET STUDY

108. The content of each Study must conform to the specific conditions of each market, given that the dynamics of competition and regulation can have specific characteristics for each sector, which would be difficult to replicate in a common structure.

109. All Market Studies should have common structural features that allow for the consistency and continuity of this tool, to benefit its final quality and influence.

110. These features or common elements refer to the structure in which the analysis is supported, and to a number of factors that must be considered and evaluated to characterise the competitive dynamics and the regulatory framework.

111. The basic structure of a Market Study is as follows:

- Executive Summary.
- Introduction.
- Legal nature of the market.
- Economic nature of the market.
- Analysis of the level of competition in the market.
- Conclusions.
- Recommendations.
- Bibliography.

112. Below is a brief, although not exhaustive, description of the content of each section included in the basic structure of a Market Study of the CNMC.

5.1. Section I: Executive Summary

113. The Executive Summary is found at the start of a Study although it is written last, and, in a sense, is an independent element to the rest of the document.

114. An Executive Summary is an accurate summary of the most relevant content of the Study. It includes information necessary for understanding the functioning of the market, its level of competition, a description of the identified restrictions or barriers to competition, conclusions and the main recommendations for correcting them.
115. Whenever possible, the use of overly technical terminology should be avoided, so that a reader not specialised in the area can easily understand the basis of the problems of the market and the position of the CNMC in terms of the problems observed in the market.
116. The Executive Summary is one of the parts of the Study with the greatest public impact and readership reach. The main points of the Study should be clearly and concisely summarised. Many recipients of the Study will not have the technical knowledge, the time or the interest to go into the details of the document and its assessment will strongly depend on the content of this section.
117. The Executive Summary is also useful for the preparation of the press release to be sent to the communication unit.

5.2. Section II: Introduction

118. The Introduction should include the CNMC's motivation for the Study, as well as its purpose and scope. Any national or international precedents must be presented. Lastly, it should offer a brief description of the organisation of the Study and its approach.

5.3. Section III: Legal nature of the market: regulatory framework and principles of efficient economic regulation

5.3.1. Regulatory framework

119. Firstly, an analysis of the national and, where appropriate, European regulatory framework will be conducted. Recent regulatory development in the market is to be analysed: regulatory changes that have taken place, the reasons for these changes and their impact on the market from the perspective of efficient competition and economic regulation.
120. This analysis is especially relevant in markets subject to intense intervention. The analysis of the regulation of these markets from the perspective of competition must identify:

- which market failures, if any, justify regulatory intervention or public participation in the market.
- if regulation leads to unnecessary restrictions that limit the level of effective competition in the market (principle of necessity) and
- if there are alternatives that generate less competitive distortion in the market (principle of proportionality).

121. This analysis is also essential for emerging markets, characterised by change or innovation. In such cases a concrete or specific regulation it may not be yet in place, so it could also be that a sectoral regulation is applied which is not adapted to the new context from a perspective of efficient competition and economic regulation.

122. In this case it is essential to review the regulatory framework for adaptation to the new economic reality. Otherwise a loss of welfare could come about that would mean inefficient economic regulation for society, where consumers do not get the potential benefits of regulatory improvement and greater competition.

5.3.2. Principles of efficient economic regulation

123. Public sector intervention in markets should be carried out based on the principles of efficient economic regulation⁷.

124. Public intervention is only justified:

- if there is proof of a fault or faults in the market that endanger imperative reasons of overriding public interest (IROPI) which must be protected
- if such an intervention has a causal link with the effective protection of IROPI which has been sufficiently justified (principle of necessity),

⁷ Current legislation mentions the principles of efficient economic regulation in different legal standards: Preamble of Law 3/2013, of 4 June on Spain's National Authority for Markets and Competition; Law 20/2013, of 9 December, on the guarantee of a single market (art. 5, 9 and 17); Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations (art. 129 and 130); Law 40/2015, of 1 October, on the Legal Regime of the Public Sector (art. 4).

- if it is proportionate to the objective pursued, i.e. introducing the minimum competitive distortion possible (principle of proportionality), and
- it is applied in a non-discriminatory manner; for example, between legal figures of economic stakeholders (principle of non-discrimination)⁸.

125. If the principles of efficient economic regulation are not applied, such an intervention does not take advantage of the social benefits derived from efficient market regulation and can be improved.

126. Even in the presence of a market failure, it is not always possible for public administrations to intervene in the practice. It can also incur a cost⁹ that, where appropriate, should be assessed.

5.4. Section IV: Economic nature of the market

127. In this section, the market is characterised from different perspectives. Firstly, a definition of the product market and geographic market should be included. To do this, the following can be used: the “*Commission Notice relative to defining the reference market*”¹⁰, resolutions of the CNMC and of previous authorities and the decisions of the European Commission on competition and regulation, as well as the resolutions and decisions of other authorities of competition and regulation, if deemed relevant.

128. Defining the market allows for determining and defining the terms of competition between economic operators and establishing the framework within which the Study analyses the level of effective competition in a particular market.

129. The reference market, in terms of competition, is defined by two key variables: the product market and the geographic aspect of the market.

⁸ According to the doctrine reiterated by the ECJ: Sentences of 23 November 1999, *Arblade and others*, C-369/96 and C-376/96, Rec. p. I-8453, section 33, and of 19 December 2012, *Commission/Belgium*, C-577/10, section 38.

⁹ Factors like the lack of information on market variables and social preferences by the regulator, income seeking and regulatory capture can result in public intervention leading to a sub-optimal equilibrium

¹⁰ *Commission Notice relative to defining the reference market for the purposes of EC regulations on competition* ([97/C 372/03](#))

130. The product market is defined in the “*Commision Notice relative to defining the reference market*”¹¹, 1997, as:

“The reference product market comprises all products and services that consumers consider interchangeable or substitutable due to their characteristics, their prices and their intended use.”

131. It defines the market or geographical area as:

“The reference geographical market comprises the area in which the companies concerned carry out activities in the supply of products and provision of relevant services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas specifically due to the conditions of competition being appreciably different in those areas.”

132. Overall, the reference market is the framework within which the Market Study will be carried out and the level of effective competition and existing potential restrictions will be analysed.

133. This does not stop the Study from including, on certain occasions and addressing specific competition issues, a comprehensive analysis which includes aspects that would initially fall outside of the definition of the reference market, but which are of particular interest when analysing competition difficulties identified during the development of the Study. Such is the case when analysing connected markets (vertically related), or closely related markets (whose relationship is not strictly horizontal or vertical to the market being studied)¹².

134. A Market Study should assess the demand in the market, its degree of elasticity and substitute products, among other topics. It should also study which companies can potentially access the market and introduce competition.

135. In developing Studies, it is recognised that one of the tools used by the competition authorities to define markets is the hypothetical monopolist

¹¹ Commision Notice relative to defining the reference market for the purposes of regional regulations on competition ([97/C 372/03](#))

¹² Guidelines 2008/C 265/07 for the assessment of non-horizontal mergers under the Council Regulation on the control of mergers between companies

test (Test SSNIP, “*Small but Significant Non-Transitory Increase in Price*”)¹³.

136. Unless justified for other reasons, the Study will use a SSNIP Test as its starting point in order to define the relevant market. Generally, a delimitation of the area of study, both product and geographical, is sufficient to study the dynamics of competition in the market.

5.4.1. Competition Indicators in the Market

137. In addition to the analysis of regulation in the market, the Study shall identify indicators which reveal a potential to improve the functioning of the market being analysed. The following elements, among others, may be analysed: market structure - the number and profile of operators, the Herfindahl-Hirschman Index (HHI)-, characterisation of demand, price level and changes, evolution in the volume of imports and exports, rate of innovation, productivity and profitability of businesses.
138. Where appropriate, comparisons of these variables with other neighbouring countries whose markets have similar characteristics may be included.
139. Using the analysis together with these indicators, a set of conclusions on the functioning of the market can be obtained.
140. Identifying restrictions on competition in the market can be related to the level and evolution of certain variables that reflect their functioning, such as price, quality, innovation or corporate profits.
141. It is unusual that an isolated analysis of each of these variables concludes that there is a problem with competition in the market. However, a joint analysis of several indicators can serve to support research on which structural or behavioural features are preventing more competition or a more economically efficient functioning of the market.

5.4.2. Supply and demand indicators

¹³ The SSNIP Test (introduced by the guidelines on mergers in the United States in 1982 and adopted in 1997 in the EU with the "Commission's Notice for the Definition of the Relevant Market") determines which set of products put competitive pressure on each other, through the analysis of substitutability on the demand side and the supply side.

142. The following elements, among others, can be analysed from a demand perspective:

- International comparisons of price levels: in the case of marketable products and services, persistent differences between countries may reflect barriers and different degrees of competition.
- Evolution of prices: prices in a competitive market and an oligopolistic market react differently to a change in demand or costs. Adjustment to the new break-even prices will follow a different pattern if companies behave in a coordinated or competitive manner.
- Elasticity of demand: elasticity of demand can be analysed to determine the substitutability of the goods or services of a market.

The elements to be analysed from a supply perspective could be:

- Production process: in the case of particularly technical markets, such as energy markets and some industrial product markets, a detailed explanation of the production process of the product or service should be included to better understand their characteristics and the technical difficulties faced by manufacturers. The aim is to assess the substitutability of supply and thereby also contribute to the definition of the relevant market. If logistics play a particularly important role, this should also be explained in a separate section.
- Profitability and earnings: in a competitive market, although there are differences in corporate earnings between companies and over time, there will be a tendency for profits to approach the cost of capital in the long term. A situation in which earnings are constantly maintained above the cost of capital, without entry of new companies into the market, could indicate that there are limitations to competition.
- Other indicators: the list of indicators may not be exhaustive, as it depends on the analysed market, the data available and even the technical innovation capacity of the Authority itself. However, other variables to be analysed could be consumer satisfaction, the rate of innovation, product differentiation and productivity. For example, low productivity may be indicative of a market with competition problems.

5.5. Section V: Analysis of the level of competition in the market

143. Once the scope of study, the functioning of the market and signs of a potential competition problem in the market are defined, the Study should analyse the competitive dynamics and technical, regulatory or other restrictions.
144. Competition in the market not only responds to free entry and the functioning of companies in it. It is also conditioned by the competitive pressure potential entrants can exert, due to the compensatory power of demand and even the conditions of competition in related or emerging markets.
145. Competition problems may be structural in nature or may be related to the behaviour of operators in the market.
146. Structural features determine the framework in which companies compete within the market. Companies may have market power due to the market structure in which they operate, the technical conditions of the offer, the current regulations or other economic or legal factors.
147. In addition to structural factors, companies, with their behaviour, can affect competition in the market in areas that do not constitute an anti-competitive conduct based on articles 1 and 2 of the LDC. Similarly, an analysis of consumer behaviour can lead to problems in the functioning of the market.
148. The use of indicators adds value to Market Studies:
 - They allow for a static and dynamic evaluation of competition in the market, showing an improvement or a worsening of competitive pressure.
 - They allow for a comparison with other similar markets in the economy or international markets, which reveals the existence of restrictions or a factor that may explain the restriction of competition.
149. However, their use also has practical and theoretical limitations that must be considered:
 - The possibility of using or developing indicators may vary from one market to another, depending on access to statistical and document sources.

- A reference threshold is needed to indicate at what level the indicator is 'high' or 'low'. In cases such as the Herfindahl-Hirschman Index (HHI), the guidelines of the EC competition authorities provide guidance, but with other indicators there are no predetermined quantitative criteria to facilitate the assessment.
- In general, no quantitative or qualitative indicator can by itself prove that there is a competition problem. Only an overall assessment of all the features of the market will reach a conclusion.

150. Appendix I analyses the main factors or indicators, without presenting an exhaustive list, that can be analysed in a Market Study in order to assess its competitive situation.

5.6. Section VI: Conclusions

151. This section should list the major restrictions on competition in the market, derived from the previous analysis: entry barriers, information problems, strategic behaviour, regulatory restrictions, etc. Each mentioned restriction must also include a brief explanation to allow understanding when read independently from the Study as a whole.

152. Conclusions must be sufficiently justified by the prior analysis, from which they should be logically extracted.

153. A Market Study shall not start with the existence of anti-competitive conducts based on articles 1 and 2 of the LDC or specific regulations of network sectors. However, it is possible that the analysis could exceptionally conclude that the restrictions on competition observed may be explained by a conduct constituting an infringement in the sphere of competences of the CNMC. In these cases, the Enforcement Division must be informed so that, in light of the available evidence and analysis, it may take the decisions that fall upon it within the framework of the relevant articles.

154. Likewise, the Council, in view of the evidence, may propose the opening of infringement proceedings regardless of when the Study was approved.

5.7. Section VII: Recommendations

155. Once unjustified restrictions on competition are indicated, the Study should present recommendations that eliminate or reduce their adverse effects on the public interest. In writing them, who they are directed to should be included, and their content should allow the addressee to act within their powers, in an advisory role.
156. The usual addressees of recommendations for increasing competition in the market are Public Administrations. This is because either their direct market intervention creates unjustified distortions in the competitive functioning of the market, or because the cause that limits market functioning is found in legislation that unjustifiably restricts competition or because the proposed remedy should take legal form to be effective.
157. In line with the administrative and territorial decentralisation of Spain, the Study should identify the administrative level to which its recommendations for legislative change are being addressed: the National Government, Autonomous Regions or Local Governments.
158. Recommendations may also be made so that companies participating in the market, public or private, keep recommendations in mind for future behaviour, even when a legal regulation does not require them to do so (soft law).
159. In general, the CNMC presents its recommendations in order to eliminate the causes of restrictions on competition, but it also may present proposals, simultaneously or alternatively, to eliminate or reduce their adverse impact on consumers.
160. Each recommendation proposed may have an independent effect on the market which should be identified. However, it is possible that the set of recommendations is designed in a way that simultaneous adoption is necessary to correct the competition problem which it is addressing. If synergies or conditionality exist between different proposed measures, they must be sufficiently explained.
161. The Study should indicate the problems that inefficient regulation may inflict on competition in the market, and indicate which principles an economically efficient regulatory framework must respect.

6. DISSEMINATION OF THE STUDY

162. The dissemination of the approved Study has a horizontal or generic dimension, to be carried out through different predetermined tools with an established and binding timetable to maximise the transparency, rigour and predictability of the CNMC.
163. Dissemination of the Study should allow it to reach different groups or institutions which the CNMC wants to influence.
164. There are basically three crucial moments in the dissemination of a report: (i) the start, or ex-ante communication; ii) public consultations that are technically appropriate, or intermediate communication; (iii) dissemination after the Study is approved, or ex-post communication.

6.1. Methods of communication at the start of the Study (ex-ante)

165. The first CNMC channel of communication should be its website, where the annual Action Plan of the CNMC is published, presenting the Market Studies that CNMC intends to carry out in the short and medium term.
166. In addition, the CNMC will present the start of the development of the Study through a press release. The press release will be published in both Spanish and English for wider dissemination. Another complementary channel is the following of CNMC activity through social networks like Twitter or blog entries.

6.2. Methods of communication during the Study (intermediate)

167. Depending on the nature of the Study, it may be subject to a public technical consultation, or a focal group for certain aspects of the Study or its main conclusions in order to receive contributions, suggestions or criticisms, so emerging issues can be identified or the analysis previously conducted may be additionally contrasted.
168. The Public Consultation depends on various factors. In the case of a highly fragmented market, either due to demand or supply (or both), where it does not seem plausible to gather enough information through conventional means, launching a Public Consultation can be an effective method for obtaining information from the various market operators and

stakeholders. In the case of emerging markets or those with a high component of innovation where little information exists, launching a public consultation could also be an interesting option.

169. Moreover, the CNMC may consider a Public Consultation on the preliminary results of a Study, as do other competition and regulation authorities, such as the English, French and German authorities. This way the various stakeholders would have the opportunity to comment on the conclusions and recommendations of the Study as well as raise questions or provide additional information that could strengthen the analysis and its impact on the level of competition in the market. It is particularly important to conduct this kind of Public Consultation on preliminary findings when the involvement of market stakeholders during the development of the Study has been particularly difficult or lacking.

6.3. Main methods of ex-post dissemination

170. Once the Study has been approved by the Council of the CNMC, a non-public version of the Study shall be communicated, as stated in Article 5.1. h) of the LCNMC and in compliance with Article 37 of the same Law, to the relevant government departments in the field of the Study and the Ministry of Economy and Competitiveness. This communication must be made within two business days after the approval.
171. Following this communication, the Study will be published on the website of the CNMC in both Spanish and English within a maximum period of 7 calendar days after the approval by the Council of the CNMC.
172. CNMC will publish Market Studies after resolving any issues regarding the confidential aspects of their content, which should not include any data or information considered confidential. For this reason, a non-confidential version of the Study must be created. In this case the publication could be delayed up to 3 calendar days more than the 7 indicated in the preceding paragraph.
173. After the publication of the Study the following will be taken into account to estimate its dissemination:
- Hits on the website of the CNMC: number of downloads of the Study and views of the press release.
 - Press articles mentioning the publication of the Study.

- Articles and papers written by officials of the CNMC regarding the content of the Study.
 - Opinion articles on the Study.
174. This generic dissemination should be complemented by personalised communication with the other entities and bodies over which the CNMC would like to have special influence.
175. On the one hand, it should communicate the publication of the Study to the most active participants in the public debate on the economy and competition policy: sectoral regulatory bodies, law firms and economic consultants specialised in competition, research services from other institutions, academics, etc.
176. On the other, in addition to formal communication, it should send out a copy of the Study to the addressees of the Recommendations, whether they be public Administrations, business associations, or private entities. Furthermore, in the event that meetings have taken place or questionnaires requesting information have been sent, those who have collaborated should be sent a copy of the Study.
177. Special mention should go to the European Commission, which through their own dissemination channels may release the Study to an even greater public, as well as the European Competition Network (ECN), which also has various channels, such as the ECN Brief and the Internal Newsletter of the ECN. Lastly, both the translated Study and its press release shall be sent to the International Competition Network (ICN) for inclusion on its website (specifically in the Market Studies Store of the ICN), and those international sector regulators identified as relevant during the development of the Study.
178. The scope of dissemination strategies for the Study is not exhausted by this generic and personalised list. Other channels available to the CNMC are:
- Reference to the Study's content in public interventions by CNMC personnel.
 - Meetings with the addressees of the Recommendations.
 - Entries regarding the Study on the CNMC blog.
 - Number of times it is retweeted.

179. Other alternative dissemination tools may be included, like, for example, the presentation of the Study at the headquarters of the CNMC to market stakeholders, participation in conferences and various events related to the market being studied, seminars, etc.

7. ASSESSING THE STUDY'S IMPACT

7.1. Why an assessment is necessary

180. An impact assessment of a Study is necessary not only to determine the effects of the Study, but to also correctly evaluate the use of this tool to promote competition. The impact analysis of Market Studies can shed light on the strengths and weaknesses of this tool to promote competition; strengths and weaknesses that must be analysed in order to improve how future Studies are conducted.
181. Regarding the impact assessment of a Market Study, the Study seeks a change in the market that fosters greater competition, which is the starting point for assessing the success of a Study. Even if this is its final objective, there are other intermediate goals whose achievement will help to understand the overall impact of the Study, such as the public impact generated.

7.2. Public impact generated by the Study

182. To analyse public impact, the discussion generated by the Study should be evaluated. The CNMC is interested in opening up discussions on competition in the markets, helping to create a culture of competition and encouraging the adoption of suitable policies. The measuring tool used should be the previously-mentioned dissemination data.

7.3. Mechanisms for monitoring the degree of acceptance and implementation of the proposed recommendations

183. Regarding the effect of the Study on the market and ultimately on consumers, the degree of acceptance and implementation of the proposed Recommendations should be monitored. In the case of recommendations for legislative change, whether or not the public Administrations concerned have carried out changes in the suggested law should be verified. As for recommendations to other institutions or private entities, the effect achieved on their behaviour should also be monitored.
184. Lastly, the effect of proposed and accepted recommendations on the market should be checked. It is important to remember that the ultimate goal of the Study is not the implementation of its recommendations, but to

eliminate or reduce barriers to competition, thus increasing general welfare.

185. In essence, the assessment should determine to what extent the recommendations have had the desired effect, in the context of the work involved in the assessment *ex-post*. Typically, this type of assessment is conducted some time after the recommendations have been implemented, as they may take time to take effect and this information is needed to perform the necessary quantitative exercises.
186. Since the objective of competition policy, and specifically these Studies, is to promote welfare, the purpose of the assessment is to study the impact of the recommendations implemented in different variables affecting welfare. In this sense, a fundamental variable is price, but also quality, variety and innovation, among others. Assessing the impact on non-price variables is always more difficult.
187. In developing this type of assessment, qualitative methodologies such as surveys or interviews, and quantitative methodologies are used, particularly those using comparative methods and differences in differences, or more sophisticated methods like simulation techniques. A key result in the use of these methodologies is to ensure the existence of a causal link between the implementation of recommendations and changes detected in the market.
188. As far as possible, the ideal outcome of the assessment would be to provide a quantitative measure of the change in welfare resulting from the implementation of the recommendations. In the event that the assessment is limited to measuring the effects on non-price variables such as quality or variety, calculating this quantification will always prove to be more difficult.

BIBLIOGRAPHY

OECD, 2016, OECD Secretariat Reference guide on ex-post evaluation of competition agencies' enforcement decisions: <http://www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf>

OECD, 2015, OECD Secretariat Report, Competition and Market Studies in Latin America: <http://www.oecd.org/daf/competition/competencia-y-estudios-de-mercado-en-america-latina%202015.pdf>

OECD, 2008, OECD Secretariat Report summarising the proceedings of the Round-table on Market Studies: www.oecd.org/daf/competition/abuse/41721965.pdf

ICN, 2012, Market Studies Good Practice Handbook, ICN Advocacy Working Group, International Competition Network: <http://www.internationalcompetitionnetwork.org/uploads/library/doc907.pdf>

ICN, 2010, Manual of Good Practices for Developing Market Studies (preliminary version), ICN Advocacy Working Group, International Competition Network: <http://www.internationalcompetitionnetwork.org/uploads/library/doc748.pdf>

ICN, Market Studies Information Store: <http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy/amsis.aspx>

European Commission (2007), "Guiding Principles for Product Market and Sector Monitoring", European Economy, Occasional Papers: http://ec.europa.eu/economy_finance/publications/publication5910_en.pdf

CMA, 2014, Market Studies and Market Investigations: Supplemental guidance on the CMA's approach, UK's Competition and Markets Authority, 2014: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270354/CMA3_Markets_Guidance.pdf

CMA, 2014b, Prioritisation principles for the CMA, UK's Competition and Markets Authority: <https://www.gov.uk/government/>

OFT, 2010, Market studies - Guidance on the OFT approach: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284421/oft519.pdf

OFT (2006), "Market Investigation Reference: Guidance about the making of references under Part 4 of the Enterprise Act.": https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284399/oft511.pdf

APPENDIX I: Degree of Competition Indicators in the Market

As a guideline, the following appendix gathers a series of indicators that may be taken into account when assessing the degree of competition in the market in the development of the Market Study.

Structural Features

Supply and Demand

Level of concentration of demand and bargaining capacity: concentrated demand means greater bargaining power against manufacturers, while scattered demand will, in general, lack bargaining power. Furthermore, it is also advisable to analyse the potential cost of switching suppliers for consumers or customers. The higher the cost of change, the less bargaining power of demand, and vice versa. A coordinated or concentrated demand could compensate the market power held by suppliers.

Product segmentation: an analysis of the various market segments, whether they involve goods or services, is essential when defining markets correctly and understanding their competitive dynamics. In markets where products have high differentiation, substitutability among them will be lower than in markets where all goods are practically homogeneous. Homogeneous products can generate greater price competition than those where there is a differentiation, given that the latter allows companies to compete in variety and quality. Substitutable products, on the other hand, exert competitive pressure on the market, so that their existence limits the market power of the supply companies.

Supply

A first element in assessing the market structure on the supply side is its degree of concentration. High market shares on their own do not indicate that companies do not compete with each other. However, company concentration is an element that, together with other market features, must be evaluated to understand the manner and intensity with which competition occurs.

In addition to determining market shares, it is important to analyse how they vary in time. Market shares that, as well as being high, remain stable over time may reflect a problem of competition.

Competitive pressure is not only the result of the behaviour of the companies established in the market, but can be derived from the possibility that other companies enter the market attracted by extraordinary profits.

The entry into a market usually has certain associated costs stemming from the construction of facilities, the acquisition of intellectual property rights, advertising costs, etc. Its effect is especially discouraging to entry when they are not recoverable in the context of a market exit, in which case they are called sunk costs and create barriers to entry.

These sunk costs may result from the acquisition of technical elements needed to manufacture, in which case they are imposed on the company by existing technology. But they also can be caused by the desire of the company to generate a perceived quality for its product; in these markets spending on R&D or advertising is high, and can be a barrier to potential entrants.

In markets with major economies of scale entry may not be feasible if a significant market share is not achieved. The same consideration can be applied to situations where there is a learning effect associated with production (*learning by doing*), or there are economies of scope that make the production of various goods or services necessary to compete in the market.

Legislation may be one of the limitations facing the ability to compete in the market. There are sectors and regulated markets where regulations determine production and the conditions of purchase and sale. More often, however, unregulated markets are subject to regulations that restrict competition in an unjustified manner.

Legal restrictions on market entry can take various forms:

- It can limit the number of market participants, through a concession system to provide services. In the event that it is justifiable to use this system, prior competition "for the market" and a non-excessive concession period must be guaranteed.
- In the case of prior license or authorisation for access to the market, even though conditions are equal for all concerned, they can favour those already implemented over potential entrants.
- The processing of licenses or authorisations may incur a cost for the applicant when it is too complex or time consuming, which may discourage entry into the market.

The existence of integrated companies in different vertically-related markets may also raise competition concerns. While this integration can generate

efficiency gains, it can also restrict competitors' access to essential inputs or distribution networks.

Similarly, vertical agreements such as exclusive distribution or price agreements can have an ambiguous effect on competition. On the one hand, they can generate efficiency by internalising externalities that arise from the decisions of companies found in different vertical areas. On the other, they can foreclose the market to competitors.

In general, the anti-competitive effects of integration and vertical restraints are more likely when market power exists in the companies involved.

Other elements that influence the dynamics of competition are as follows:

- Differences in cost structures.
- Available production capacity to increase supply to the market.
- Network effects or externalities: appear when the value of the product for the consumer increases as the number of consumers grows. In these markets an initial advantage can facilitate the creation of a dominant player (market tipping). The scope of competition is often then "for the market".

Company behaviour

In markets in which a small number of companies operate, strategic behaviour may arise between them that takes into account the reactions caused by the actions of each of them on their competitors. This context is compatible with a high degree of competition, but can also lead to behaviour that seeks to exercise market power. This may be the case with an increase in advertising expenses to increase the sunk costs of potential entrants or the announcement that a price war will rage in the sector with the arrival of new entrants.

The increased costs of switching providers (in monetary terms, time required, or issues generated) may be a strategy to prevent more attractive offers from other competitors leading to a loss of customers. The same objective can be achieved by providing inadequate information about prices or the effect of applied discounts. If these switching costs or information asymmetries exist and evidence that consumers do not change providers is found, we may be faced with a restriction on competition caused by the behaviour of companies.

Sometimes these practices could be considered as infringements according to Art.1 and 2 of the LDC, as is the case with predatory pricing or behaviours that exclude competitors. However, there may be other behaviours that are handled more effectively through the proposed recommendations in a Market Study.

Consumer behaviour

For there to be competition in the market it is necessary that consumers have adequate information regarding the products, varieties and qualities that they prefer. In the general context of asymmetric information, consumers must perform a search for information that can cause costs in terms of time and effort.

When this search is limited due to the excessive costs associated to it, companies have less incentive to compete. A business strategy can therefore be to raise these searching costs, for example by limiting or falsifying information on the product price or the cost of future maintenance.

Its effect on competition is greater when both searching costs and switching costs are found: this may be the case of a durable consumer good in which the consumer is not provided with information on the cost of the good's future maintenance or repair.

Other indicators

Related to demand and consumers:

- Elasticity of demand: indicates the loss of sales that an operator experiences when raising the price.
- Cross elasticity of demand: indicates which products the consumer moves towards when prices rise in the market analysed.
- Price dispersion: can be an indicator of the existence of searching costs. The existence of information problems that generate high searching costs can cause a dispersion of market prices.

$$\text{Test de dispersión de precios} = \frac{\text{Max}(p) - \text{Min}(p)}{\text{Media}(p)}$$

- Number of complaints to consumer institutions or associations.

Related to the existence of market power:

- Lerner index: the usual indicator of market power. In real markets there will always be some market power, which does not necessarily mean that there would be significant competition problems. It is therefore important to observe the evolution of this index for a market and its international comparisons.

- Expressed as a business mark-up (difference between price and marginal cost):

$$L_i = \frac{(p_i - C_i')}{p_i}$$

- Expressed in terms of elasticity of demand:

$$L_i = \frac{m_i}{\varepsilon}, \text{ where } m_i \text{ is the market share and } \varepsilon \text{ the elasticity of demand.}$$

Concentration ratios: a first measure of market structure which may indicate the ability of companies to exercise market power. In addition to the level of these ratios, the Study should pay particular attention to their evolution over time. The most commonly used indicators are market shares and the Herfindahl-Hirschman Index.

Related to the existence of entry barriers:

Churn rate: expressed as the ratio of companies entering and exiting the market. If this rate is too low, it may be indicative of the existence of barriers to market entry and exit.

- $$Churn = \frac{[N^{\circ} \text{ entries} + N^{\circ} \text{ exits}]}{N^{\circ} \text{ established}}$$

Relationship between advertising costs and turnover If this ratio is very high it may be an indicator of the existence of barriers to entry arising from the high cost of advertising that a potential entrant must incur to establish itself in the market.

Degree of innovation indicators in the market:

- Percentage of sales or profits from new products.
- Ratio between the number of patents and turnover or profits.
- Ratio between R&D and turnover or profits.

Overall, innovation is a source of economic growth and favours the consumer. However, markets with high levels of innovation have a very different competitive dynamic from other markets, and therefore must be taken into account.

- Fixed cost data necessary for implementation in the market: may indicate the existence of entry barriers for technological reasons.
 - Ratio between capital spending and turnover.
 - Minimum efficient scale for market entry.
- Data on switching costs.
 - Surveys: costs may relate to nuisance, time spent, etc.; elements that can hardly be quantified if not through surveys.
 - Churn rate: expressed in terms of gained and lost customers, it can be an indicator of the existence of such costs

$$Churn = \frac{[N^{\circ} \text{ clients gained} + N^{\circ} \text{ clients lost}]}{N^{\circ} \text{ clients}}$$

APPENDIX II: Summary of International Good Practices for conducting Studies by Competition and Regulatory Authorities

Sector Analysis by the European Commission

Market Monitoring

The European Commission proposes a methodology for Sector and Market Monitoring. Two phases have been established:

Phase 1: Market identification (Screening at the sectoral level).

Selection of the most important sectors for the economy showing signs of malfunctioning to later study the causes.

The result of this initial phase is a prioritisation of sectors in terms of their economic importance, strategic role in the economy and market malfunctioning. In addition, a first approach to the problems, their causes and extent of a possible public intervention can be obtained.

Once the deficiencies in the markets are determined, the causes of malfunctioning should be identified and classified as the absence of integration with cross-border trade, barriers to entry, insufficient innovative activity or information problems

It should end with a first approximation of diversity, effectiveness and success in the implementation of possible public intervention tools that can solve the aforementioned deficiencies.

Phase 2: In-depth analysis of the selected sectors from Phase 1, even if it is possible to disaggregate the analysis at a market level (Sector and Market monitoring). The structure, conduct, results and possible malfunctions that affect competition are identified and the combination of tools that can solve these malfunctions are determined.

Sector Inquiry

“*Sector inquiries*” by the *European Commission* (COM) are defined as a *Competition tool* at the same level as *Advocacy* or *Enforcement*. A *Sector inquiry* is opened when a market does not function as it should. Information and opinions are requested from the main players in a market, usually companies and regulatory authorities. In light of what has been compiled, the European Commission assesses the possibility of initiating an investigation or directly intervening to ensure compliance with articles 101 and 102 of the EU Treaty.

OECD

In 2008, the OECD Committee on Competition organised a Round-table on Market Studies that documented their use in a large number of countries, concluding that the Market Studies are a common component of the work portfolios for many competition agencies (OECD, 2008). The 2008 OECD Round-table listed a number of Market Studies as examples to show that their impact may greatly vary, as well as the methodology applied.

Also in 2015, the OECD Secretariat, in collaboration with representatives of the UK *Foreign and Commonwealth Office* in each of the countries analysed, and nine competition agencies of the six Latin American countries that participated in the study, published a study on "Competition and Market Studies in Latin America", where the use of Market Studies among competition agencies in six Latin American countries was analysed: Chile, Colombia, Costa Rica, Mexico, Panama and Peru. The objective was to assess how they worked and offer recommendations to improve their use as a tool to promote the better functioning of markets.

Lastly, the Competition Committee of the OECD has identified the ex-post assessment of interventions on competition, including compliance with the recommendations of Market Studies, as one of its strategic priorities. To this end, it has carried out a series of debates both on the purpose and use of the overall assessment, as well as on specific tools and techniques to carry out the assessment. In 2016 the OECD published a reference guide on how to conduct ex-post assessments¹⁴.

ICN

The ICN defines Market Studies as "*research projects conducted in order to achieve a deeper understanding of how sectors, markets and practices occurring in them work*". In 2012, the ICN published a Manual of Good Practices for the Preparation of Market Studies which presented a series of

¹⁴ <http://www.oecd.org/competition/evaluationofcompetitioninterventions.htm>

recommendations for the competition authorities to follow when conducting market research.

Specifically, the manual lists a series of good practices for proper project management when developing Market Studies, for selecting the markets for the study, collecting and analysing information, ensuring the study results, strengthening relationships with third parties and assessing the impact of the study.

The Advocacy Working Group of the ICN also maintains an information store of Market Studies on the ICN¹⁵ website which lists studies by sector and jurisdiction in order to share knowledge and best practices in market research.

United Kingdom

In the United Kingdom, the CMA ("Competition and Markets Authority") conducts Market Studies as stated under Section 5 of the Companies Law of 2002. This is one of the competition authorities that has most intensively used this tool to promote competition. Both the CMA and its predecessor, the OFT ("Office of Fair Trade",) have extensively used this tool on multiple occasions: a) when they suspected that a market was not working well, but there was no firm evidence of a violation of competition law and b) to analyse the underlying causes of a market malfunction, including, but not limited to, regulatory restrictions. A list of Market Studies conducted until now is available on the CMA website together with reference documents of agency policies in this area (www.gov.uk/competition/markets).

According to the OFT itself, now the CMA, Market Studies have a number of unique benefits, making them a very flexible tool with a good cost-benefit ratio for identifying and addressing the causes of a lack of competition and the existence of issues in the market in the various productive sectors. They are an effective way to handle regulatory restrictions in the markets.

The CMA, once it has selected the market, conducts a preliminary study in which the market is analysed in limited detail, and assesses the feasibility of the study, its scope, the resources needed, etc. If sufficient evidence of a lack of competition in a market is detected, the CMA takes the decision to carry out a comprehensive study on the market. Conversely, if important competition problems are not found, an additional study is not conducted and the analysis is stopped.

¹⁵ <http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy/amsis.aspx>

Market studies of the CMA can lead to a number of results, including: a stamp of good health, actions to improve the quality and accessibility of information to consumers, stimulating self-regulation, making recommendations to the Government to change regulations or public policy, or making the market accept a number of commitments in order to increase the level of competition in the market.

Studies by other competition authorities

Canada conducts two types of studies: one for evaluating the state of competition in an industry (Industry Studies) and one for markets (Market Studies).

The Federal Trade Commission (USA) performs research reports and reports on economic policy (policy reports). Reports can be initiated at the request of Congress using legislative authority, at the request of members of Congress without using legislative authority, or on its own initiative. The FTC often involves stakeholders before initiating a study, usually announcing publicly that it is considering studying a specific market and thus giving an opportunity for economic players, as well as the general public, to provide comments and suggestions.

The Japan Fair Trade Commission is one of the most experienced authorities in conducting Market Studies. The JFTC considers these studies as essential in implementing their obligations under the Anti-monopoly Law, which include *"handling matters related to the regulation of private monopolization, unreasonable restrictions on trade and unfair trade practices, as well as those regarding monopoly situations and other issues"*.

The French competition authority ("Autorité de la Concurrence") also carries out Market Studies, which allow for an in-depth analysis of the functioning of markets without having to open a formal inquiry. The French authority also announces when a study is undertaken, thus informing both operators in the market to be analysed, as well as their final consumers. Like the European Commission, the French authority conducts sector inquiries (or "enquêtes sectorielles") on a large scale that contribute to the detection of anticompetitive practices.

The Canadian Competition Bureau, like the French authority, also announces the launch of a new study and internally commits to completing its studies in a period of between 6 and 18 months. The Canadian Competition Bureau also, like the CMA, allows the parties concerned to review Market Study reports

before they are published, with the aim of identifying any confidential information contained in the study.

Lastly, in many jurisdictions, such as the UK, France, the USA and the European Union, economic players can send formal and informal suggestions to the competition authorities for markets to study.

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