

COMP/2016.05

8 February, 2016

OECD Submission on the New Zealand Issues Paper on Targeted Review of the Commerce Act 1986*

The Competition Division of the Organisation for Economic Co-operation and Development ('OECD') is pleased to submit the following observations to the Ministry of Business, Innovation and Employment ('Ministry') on the Issues Paper on Targeted Review of the Commerce Act 1986 ('Issues Paper').

1. Questions raised by the Issues Paper

The Issues Paper addresses three matters relating to the Commerce Act, namely:

- the prohibition against the misuse of market power (section 36);
- the cease and desist regime introduced in 2001 (Chapter 3); and
- the possibility of introducing a 'market studies' power.

In this submission we limit our comments only to the possibility of introducing a market studies power.

2. The question raised by the Issues Paper: is there a gap in the institutional setting of New Zealand?

The Issues Paper acknowledges that different public bodies in New Zealand (e.g. the Commerce Commission, the Productivity Commission and the Electricity Authority) have powers to undertake research that may be described as market studies. However, in New Zealand there is no formal power specifically directed at analysing competition across any market, for the purpose of improving market performance. Therefore, the Issues Paper asks the question of whether the absence of such a formal power could represent a gap in the institutional settings for promoting competition in the country.

When discussing the different policy options available, the Issues Paper explicitly refers to the OECD economic survey of New Zealand from 2011 ('Economic survey 2011'). The Economic survey 2011 suggested that a market studies power would help strengthening the competition culture among policymakers and the public, as well as reduce inconsistencies in New Zealand's policy approach to competition.

The Issues Paper specifies that the question of whether it is necessary to strengthen the market studies power in New Zealand depends on what is the main purpose of conducting market studies: i) diagnosing market problems; ii) removing regulatory barriers to competition or iii) building an evidentiary base as a precursor to enforcement. The Issues Paper identifies various advantages and disadvantages relating to all these models.

* This submission does not necessarily represent the consensus view of the Competition Committee or any of its Members.



3. Previous OECD work on market studies

The OECD has done extensive work over the years on market studies, and has recently performed a survey of members and non-member countries to collect more complete information on the scope, definition, applicable powers and institutional setting for market studies in a variety of jurisdiction. We hope that this work can be of assistance to the Ministry in the determination of the future organisation of market study powers in New Zealand.

OECD's work in the field of market studies can be summarised as follows:

- **The OECD's Competition Committee first discussed the topic of market studies** in a roundtable in June 2008,¹ which concluded that carrying out market studies is a good practice for competition authorities.
- Since April 2014, the OECD Secretariat has carried out a project to provide support to Chile, Colombia, Costa Rica, Mexico, Panama and Peru on market studies as an important competition tool. Through a detailed questionnaire and missions to these countries, the OECD collected information on their legal powers, the process for selecting markets to study, the methodology used, the results obtained and how these are evaluated.²
- More recently, the OECD **decided to launch a Survey on Market Studies (the 'Survey')**, with the purpose of obtaining initial information from competition authorities on some key features of market studies. The Survey was circulated in June 2015 and the responses³ provided the basis for a Secretariat Paper on Market Studies⁴.

4. OECD's Survey (2015)

The OECD would like to provide the Ministry with the main findings of its most recent Survey on market studies. **The OECD's contribution will follow the structure of the questions raised** by the Issues Paper in relation to market studies:

a) Definition and goals of market studies

Although market studies are used by an increasing number of competition authorities, there is no common definition of what a market study is, and there are considerable differences in terms of scope, legal powers and procedures, implementation, association with enforcement actions and constraints.

The Survey revealed that market studies refer, at a minimum, to assessments of market structures, or economic and competitive conditions in a given sector, beyond the behaviour of individual firms. Market studies involve the collection and analysis of data and information to contribute to market knowledge, advocacy efforts, enforcement actions and/or ex-post evaluations of the impact of policy interventions.

There are also differences regarding the goals for which market studies are pursued by competition authorities. These can be classified in four major groups: i) advocacy; ii) pre-enforcement; iii) information gathering; and iv) ex-post assessment.

¹ OECD Policy Roundtable on Market Studies (2008), available at: <http://www.oecd.org/daf/competition/sectors/41721965.pdf>.

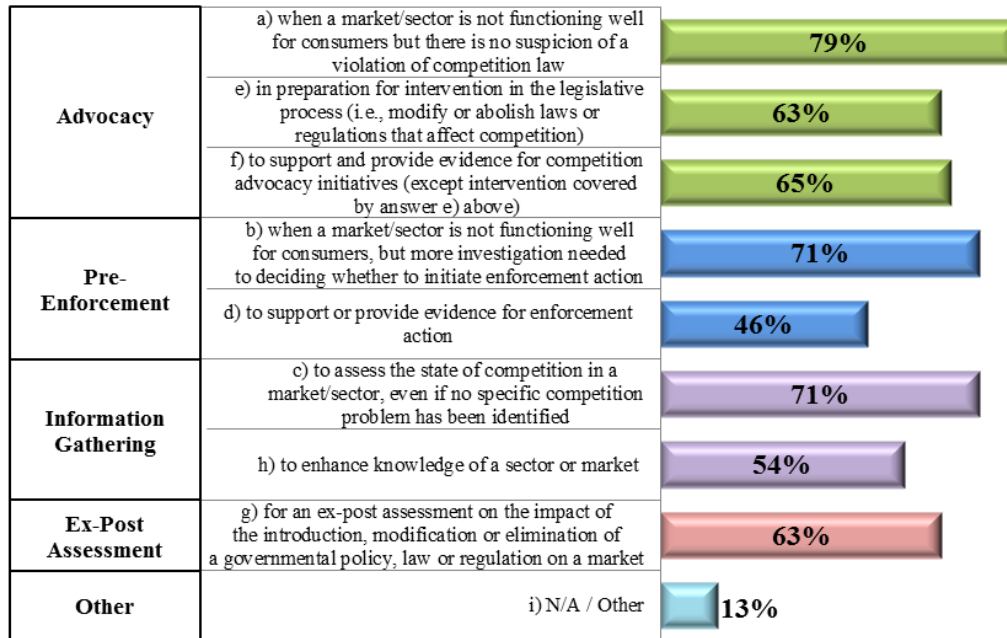
² Competition and market studies in Latin America: the case of Chile, Colombia, Costa Rica, Mexico, Panama and Peru. The report is available at: <http://www.oecd.org/daf/competition/competition-and-market-studies-in-latin-america-2015.htm>.

³ The Survey benefitted of the responses from 51 national authorities, of which 49 are competition authorities, from 48 jurisdictions.

⁴ The Secretariat report is annexed to this submission.



Figure 1. Primary Reasons for Competition Authorities to Conduct Market Studies



b) Powers and institutional setting to conduct market studies

The vast majority of competition authorities that conduct market studies enjoy specific powers for that purpose. Only approx. 1/3rd of the respondents perform market studies under their general powers to protect and foster competition, which they interpret as including powers to conduct market studies.

In several jurisdictions, competition authorities share the power to conduct market studies with other governmental bodies. Other governmental bodies have powers to collect and analyse data with respect to a particular sector, but are not specifically focused on assessing competition within that sector.

Few authorities resort to external experts or to collaborative work with other governmental bodies when carrying out market studies. A number of competition authorities have an internal department dedicated to market studies set apart from enforcement units. This is partially motivated by the intention to signal stakeholders that market studies are not carried out with a premeditated aim of initiating enforcement actions.

c) Initiating a market study

The level of independence of competition authorities in selecting which market studies they wish to carry out was also explored in the Survey. The level of independence of competition authorities was surveyed by asking respondents whether: i) competition authorities can receive requests to perform market studies from other public bodies and ii) competition authorities have the discretion to accept or refuse such requests.

Almost half of the competition authorities have declared that they have accepted or could accept requests to carry out market studies from other governmental bodies. On the other hand, almost the same responded that other parts of the government could not submit requests for competition authorities to carry out market studies.

Out of those authorities that have accepted or could accept requests from other public bodies, almost the half cannot refuse them. The remaining authorities, instead, indicated that they may refuse these requests, although refusals in some circumstances are possible only under certain conditions. In the case



of the latter, requests can be prioritized according to, among others, internal criteria, resource constraints, enforcement priorities by the competition authority.

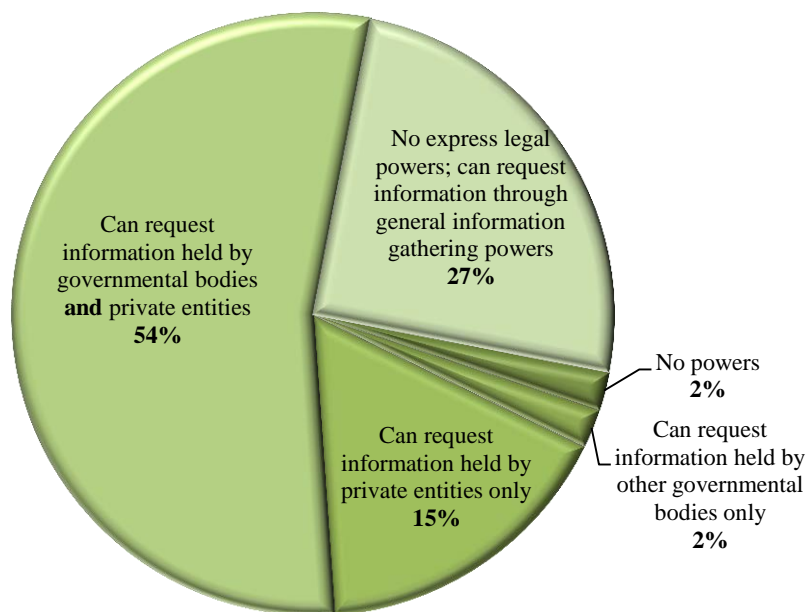
d) Information-gathering powers

The Survey sought to clarify the extent to which competition authorities have specific powers to request information from private and public stakeholders for market studies purposes and to use subsequently this information for other purposes (e.g. for enforcement purposes).

The vast majority of competition authorities which are entitled to carry out market studies enjoy some sort of power to request information. These powers are either specifically granted by law for that purpose or the requests are based on generic legal powers held by competition authorities for information gathering.

The extent to which stakeholders' responses to information requests can be compelled by competition authorities, rather than simply asked on a voluntary basis, is subject to legal provisions granting competition authorities the power to impose sanctions for non-compliance, either directly or upon requests to courts.

Figure 2. Information Request Powers Reported by Authorities



The survey revealed a parallel between the absence of specific powers by competition authorities to request information for the purposes of market studies and the lack of sanctions in case of non-compliance. Out of the ten competition authorities that can request information by resorting to more general information gathering powers, eight lack powers to impose sanctions.

e) Procedural safeguards available to protect the interest of stakeholders

The data relevant for performing market studies is often privately owned, rather than publicly available. As a result, it is necessary to provide minimum safeguards to information holders and to create incentives for them to co-operate with the agency during the course of a market study. Incentives can be



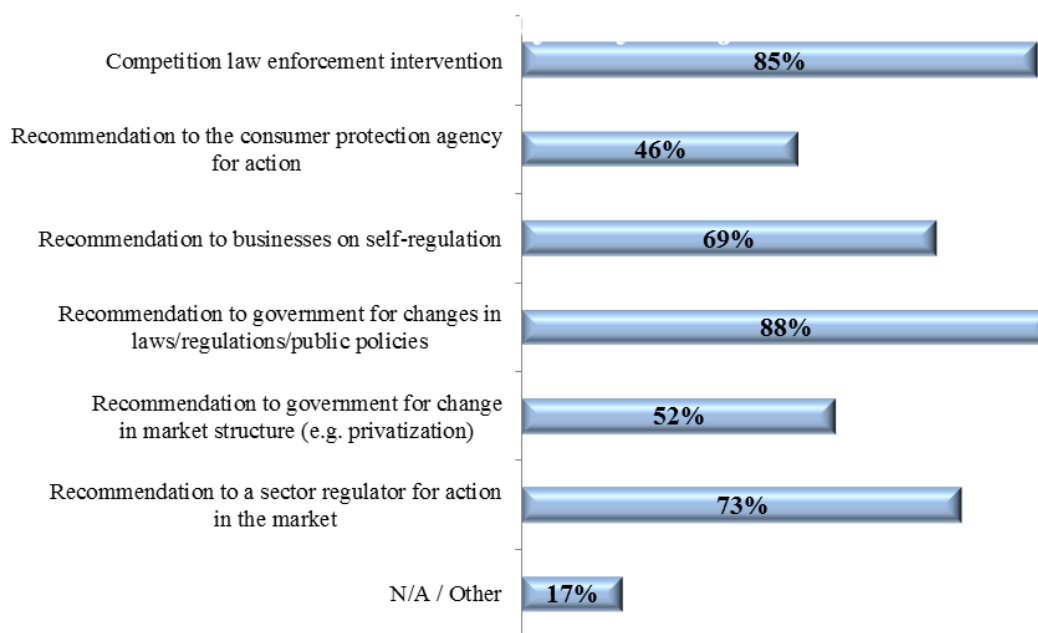
created by adopting rules for the protection of information provided by such stakeholders. The vast majority of OECD jurisdictions already offer some form of protection of confidential information, and about a third also protect non-confidential information.

Among the 35 competition authorities permitted to make use of confidential information initially obtained for purposes of a market study for subsequent enforcement actions, 30 have due process safeguards in place. Due process principles are primarily relevant for the protection of confidential information provided by stakeholders in the course of market studies. These may also include rules and procedures clarifying the intended use of such information, or allowing stakeholders to be heard, before competition authorities, to determine whether to disclose confidential information.

f) The nature of recommendations the market studies body could make

The following figure shows the possible outcomes of the market studies revealed by the Survey:

Figure 3. Potential Outcomes of Market Studies



5. Conclusion

The work of the OECD shows the importance of including market studies powers among the tools of a competition authority. While the purpose of market studies can vary there is a general consensus that market studies offer competition authorities the possibility to address concerns with competition in a sector that cannot be addressed through an enforcement action. They are perceived as a valuable advocacy tool that can bridge between competition and other policies, such as consumer policy and other regulatory policies. The OECD work has also emphasised the need to protect private interest at stake with clear rules about confidentiality protection, about the use of information for purposes other than those for which it was collected, and due process guarantees generally.

We remain at the disposal of the Ministry for any further information or clarification.