

# **Sector Inquiry**

## **Definition and Commentary**

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### **DEFINITION**

A sector inquiry is an examination into why a particular sector or market may experience restricted or distorted competition – taking into account regulatory and economic factors as well as business and consumer behaviour – and how to reduce such restrictions or distortions.

### **COMMENTARY**

"Sector inquiries" as performed by competition authorities are focused on first, identifying regulatory, behavioural or structural problems in a market that can explain perceived failures of competition and second, suggesting solutions for improving competitive outcomes or processes. This note focuses on sector inquiries (or market studies), in the context of competition.

Most OECD competition authorities have either an informal or legally granted power to prepare and release sector inquiries. These studies are generally performed as an activity that supplements competition law enforcement duties related to mergers, abuse of dominance and cartels. Sector inquiries do not target individual companies nor arise from specific evidence of a cartel, thus distinguishing them from typical competition law enforcement. Such inquiries provide reasoned support for advocacy activities of competition authorities. The advocacy activities flowing from a market study can, for example, focus on changing government behaviour and regulations, changing private sector behaviour, and changing standards. Some market studies conclude that no changes are needed, either because they find that there is no problem with competition or that there is no reasonable solution for a problem that is identified. In some jurisdictions, market studies can at times result in opening of competition law investigations.

Competition authorities such as the US FTC have carried out sector studies for more than 50 years (and have addressed sectors varying from contact lenses to car fuel, for example). Other authorities such as the European Commission, Chilean, French, German, Mexican and UK authorities have performed multiple sector-focused market studies (including for notaries (Chile), payments and insurance (EC), long-distance coach transport, hearing aids, Fintech, food retailing (France), milk, gas transmission, and district heating (Germany), ride-hailing, tortillas (Mexico), airports, classified directories, and groceries (UK)).

The opening of a sector inquiry is often based on “own-initiative” by competition authorities. The opening may also arise from other sources. Governments (e.g., France, Mexico), legislatures (e.g., U.S.) or even specifically identified bodies may have an ability to request a market study (e.g. in France with local authorities, courts, trade unions, professional or

consumer associations, or the U.K. with a “super-complaints” process). In Mexico demands by government to open a market examination require substantial reasons including detailed explanation of indicators of the presence of a competitive restraint. Such reasons ensure that externally requested studies are started for reasons clearly related to lack of competition. The existence of a sector inquiry request by external parties does not necessarily guarantee that such an inquiry will be performed, as the competition authority could, in some jurisdictions (e.g., Mexico) determine that the reasons for requesting a study are not sufficient, the remedial actions are unlikely to work or that resources may be better used for other work.

The OECD notes that a high percentage of competition authorities carrying out market studies have powers to request information about the sector in question. Nonetheless, the information gathering powers of authorities for such inquiries are often more constrained than for the most serious competition law investigations. For example, the information gathering powers of a competition authority for market studies would typically not extend to unannounced inspections.

The use of sector inquiries to examine government restrictions on competition can be performed using the OECD’s Competition Assessment Toolkit methodology, which is focused on identifying general principles for finding regulatory restrictions that are valid across sectors. These restrictions focus, in particular, on identifying rules and regulations that: (1) create unduly strict entry barriers, (2) limit the actions that businesses take in competition with each other, (3) restrict companies’ incentives to compete with each other (all three of these addressing supply side restrictions) and (4) affect consumer information and consumer ability to switch (demand side restrictions). This methodology has been adopted and adapted by many countries and is available in translation in more than fifteen languages. The European

Commission used the OECD approach as the basis of its own competition assessment of new regulations, as did Korea. Other jurisdictions, such as ASEAN economies, Brazil, Greece, Iceland, Portugal, the Philippines, Romania and Tunisia have successfully applied this approach to develop sector-specific recommendations for pro-competitive regulatory revisions.

A small number of governments (including France, Iceland, Mexico, and the UK) have supplemented the sector inquiry powers of competition authorities with further powers for competition authorities to perform market investigations. Outcomes of such investigations can include the ability to impose remedies. Remedies in such cases can be behavioural or structural, affecting private actors, or can include obligations on government to change rules and procedures, including to implement price regulation or regulatory oversight of an activity. Behavioural remedies can include, e.g., unbundling, limiting restrictions in agreements, disclosure requirements, measures to improve consumer engagement and switching. In one example of structural remedies, UK airports in London that were commonly owned were separated from each other as a result of a market investigation. Other remedies can include limits on referral incentives, market share limits and market redesign. The possibility for a competition authority to impose remedies in the context of a market investigation is considered a particularly invasive government intervention when applied to the private sector. Consequently, the procedures of competition investigations provide due process opportunities for parties that would be affected by the investigation to access and challenge evidence, enter their own arguments into the process and appeal decisions.

## **CASE REFERENCES**

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