

Market Studies Guidelines

Commission of Defence of the Free Competition

2016

(ENGLISH VERSION)

1 INTRODUCTION

The goal of this guidance is to help stakeholders – i.e. businesses, trade associations, consumers, consumer bodies and public entities (including ministries, independent regulators and all other public bodies) -understand what market studies are, what they intend to achieve, how they are performed and what their outcomes can be. This document also explains how stakeholders can contribute to market studies.¹

This guidance is divided into four chapters. This chapter explains its goal and content. The second chapter describes the specific features of market studies and explains how they differ from other tools available to the *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Industrial* (INDECOPI). The third chapter clarifies how markets are selected and prioritised, while the fourth chapter describes the different phases of a market study.

2 WHAT MARKET STUDIES ARE

2.1 Key characteristics of market studies

Market studies are in depth assessments of how markets work. They are performed by a competition authority when there are reasons to believe that a market, or even a sector,² is not working well for consumers, but there is no evidence that the cause lies in a violation of the competition law. Market studies are usually undertaken to address sources of concerns such as:

- behaviours of firms, usually widespread in the market, that are not in violation of competition law, but are causing consumer detriment;
- market structures that prevent firms from effectively competing with each other;
- patterns of consumers' behaviour – such as inertia or other non-rational sub-optimal behaviours – and information failures that limit the ability of consumers to make an informed choice;
- public sector interventions, including public policies, laws and regulations, that are creating unnecessary obstacles or distortions to competition; and
- behaviours of public bodies, when these supply or acquire commercial services that are distorting or limiting competition.

¹ This guidance will be updated in case of any change to the procedures in order to ensure that stakeholders are informed in a timely manner.

² The choice of whether to examine only a specific market or a whole sector depends on where the type of concerns that have led to the decision to undertake a market study lies. Examining a whole sector is more complex, because the object of the analysis is much wider but in some cases it is possible that a number of inter-related markets are apparently not working well and the analysis has to take into account these inter-relations and look at the whole sector.

Market studies examine a market in its entirety. They look at its legal and regulatory framework, its structure, and the behaviour of market players, including consumers, businesses and public bodies. Through this analysis, market studies determine whether the market is malfunctioning as suspected, and if so, they identify the causes of this malfunctioning as well as the solutions that can be proposed to address them.

Market studies are intended to promote competition by making markets work better and more efficiently. Greater competition brings benefits to consumers through lower prices, higher quality, greater choice and variety, and more innovation, and leads to increased productivity³ and economic growth.

Box 1: Legal basis for performing market studies

INDECOPÍ's power to conduct market studies is based on the power of the *Comisión de Defensa de la Libre Competencia* to issue an opinion, or to recommend to authorities of Public Administration the implementation of measures to restore or promote free competition. Recommendations can include the removal of barriers to entry, or the introduction of economic regulation in markets where effective competition is not possible, among other measures.⁴

2.2 Possible outcomes of market studies

Market studies can lead to two types of outcomes: (i) the finding of no competition concern, or a “clean bill of health”; or (ii) the identification of competition problems that do not allow the market to function properly and have a negative impact on consumers. A market is given a “clean bill of health” when competition in the market investigated appears to work effectively and there is no evidence of consumer harm, or when the problems that affect the market investigated are not competition-related and fall outside the remit of the INDECOPÍ. In this case no action will be taken.⁵This conclusion, however, does not preclude from studying the market again in the future, or from opening an enforcement investigation in that same sector later on - markets are subject to constant changes and new causes of concern may always arise.

³ See OECD (2014) Factsheet on competition and growth. Available at: <http://www.oecd.org/daf/competition/factsheet-macroeconomics-competition.htm>

⁴ Article 14.2 paragraph e) of the *Decreto Legislativo No 1034“Ley de Represión de Conductas Anticompetitivas”* modified by the *Decreto Legislativo No 1205*.

⁵ Concluding a market study by giving a ‘clean bill of health’ does not means that the study was unnecessary and that consumers will not benefit from it. For example such an outcome may dispel unnecessary public concerns about that market and this can enhance consumer confidence or it may show that there is a problem but that this should be addressed by a different public body.

In case the market study reveals competition concerns a range of options are open to the INDECOPI:

- it can start an enforcement action, if the nature and source of the competition problems presumably lies in a violation of the *Ley de Represión de Conductas Anticompetitivas*⁶; or
- it can issue non-binding recommendations to the government, including all ministries, public bodies and independent regulators, to change laws, regulations or public policies, when these are at the root of the competition problems identified; or
- it can issue non-binding recommendations to the government, including all ministries, public bodies and independent regulators, to change the manner in which public bodies operate, when these are major customers or suppliers in the market and their behaviour is restricting or distorting competition; or
- it can recommend a consumer enforcement action, if consumer legislation is presumably being violated, or
- it can encourage businesses to self-regulate, when some of their practices are causing the competition problem, but do not constitute a violation of the *Ley de Represión de Conductas Anticompetitivas* that can be addressed through enforcement action; or
- it can urge government, businesses and/or consumer associations to improve the quality and accessibility of information available to consumers; or
- it can undertake competition advocacy campaign or a consumer education campaign; or
- it can undertake a new study in a related market, if the study just concluded has shown that this related market may not be working well.

All the options listed above show that market studies cannot lead to any direct intervention in the market. The INDECOPI can only issue non-binding recommendations, or can undertake a follow-up action based on its enforcement powers. This follow-up action will be a separate investigation that will be subject to all the normal procedures followed for enforcement purposes.

Box 2:- The use of the information collected during a market study in a subsequent enforcement action procedure

The information obtained to carry out a market study can also be used as an input for other competition advocacy activities and, in the case of violations of the *Ley de Represión de Conductas Anticompetitivas*, it can be used as evidence in an enforcement procedure by INDECOPI.

⁶ See Box 2 about the use of information and documents collected during a market study as evidence in an enforcement action.

2.3 Main differences with other types of actions

Market studies are a competition advocacy tool⁷ and not an enforcement tool. They do not investigate the behaviour of specific firms to determine if these have breached the *Ley de Represión de Conductas Anticompetitivas*; rather they examine markets in their entirety to understand if they work well, and, if not, why and what could be done to address the malfunctioning.

Since market studies are not an enforcement tool, their outcomes are not legally binding, and cannot lead to the imposition of any sort of sanction or remedy⁸, but only to the issue of recommendations.

Hence, where there is clear evidence that suggests a violation of the *Ley de Represión de Conductas Anticompetitivas*, the INDECOPI will undertake an enforcement action rather than a market study. Nevertheless, it should be stressed that market studies can subsequently lead to enforcement actions, if a study finds evidence of a breach of the *Ley de Represión de Conductas Anticompetitivas*, that had not been identified at the outset. Any fine or remedy that may then be imposed, will be the outcome of the enforcement action, and not of the initial market study.

The INDECOPI can also undertake other types of advocacy activities, which are different from market studies. In particular it can advocate for less distortive public interventions by issuing targeted opinions. Opinions are different from market studies, as opinions only consider the impact that a specific law or regulation is having on the competitive process in one or more markets, while a market study looks at a market in its entirety to determine if competition is working effectively.

In addition, market studies also differ from research studies that INDECOPI performs to understand the characteristics and the effects on competition of specific business practices or consumer behaviours in one or more markets. These studies are meant to increase knowledge of how markets work, to inform its future advocacy and enforcement activities, but they do not lead to any recommendations. As such they are research tools and not advocacy tools.

⁷ Competition advocacy refers to those activities related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, such as increasing public awareness of the benefits of competition and ensuring that the government does not introduce any unnecessary restrictions or distortion to competition through laws, regulations and public policies in general.

⁸ However, as will be discussed later, sanctions could be imposed for failure to comply with formal information request.

3 SELECTION AND PRIORITISATION OF MARKETS TO STUDY

3.1 Selection of possible markets to study

The INDECOPI identifies possible markets to study through:

- research on its own initiative,
- information acquired in the course of its enforcement and advocacy work,
- complaints received from businesses, consumers, trade associations and other stakeholders, or
- formal requests from designated bodies.

Box 3: Designated bodies that can formally request INDECOPI to start a market study

Any public or private entity may request INDECOPI to undertake a specific market study. However, these requests are not binding and INDECOPI will independently decide whether or not to undertake such a study considering its operativity capacity and its selection criteria.

Factors that may raise concerns about a market not working well for consumers could be:

- prices that seem high when compared with other geographic markets;
- a supply shortage;
- no or very limited entry by new firms;
- perceived low quality of goods and/or services;
- a high level of consumer dissatisfaction;
- considerable public concern regarding the working of that market;
- low rates of consumer switching.

This list provides just some examples and is by no means exhaustive - many other factors may lead an agency to open a market study.

Further, the presence of these factors does not necessarily imply that a market is not working properly, as these circumstances could have different explanations. For example, prices could be high because specific inputs have become very costly, occasional shortages of a product could be normal in certain circumstances, the quality of agricultural products may fall after an unexpected drought, or public concerns may be unjustified. Hence, any suggestion that a market may not be working well must be cross-checked with other information before considering a specific market as a candidate for a market study.

To this end, the INDECOPI will collect preliminary information about these markets and verifies if there is a solid ground for suspecting that competition may not be working well. This preliminary information can vary depending on the nature of the market and on the potential problem. It can include, among others, indicators of concentration and

profitability, information regarding barriers to entry and expansion, the level of consumer switching, the number of complaints received by consumer bodies, and productivity levels.

3.2 Prioritisation of markets to study

Since the resources of the INDECOPI are limited, it cannot pursue market studies in all the market selected (following the procedure discussed above) and it has to determine which ones it should give precedence to. This final selection is done on the basis of a set of prioritization criteria that ensure the best and most efficient use of the agency's limited resources.

Box 4: Prioritisation criteria for selecting markets to study

To prioritise among possible markets studies, INDECOPI considers the following factors: (i) the structure of the market, (ii) the value of the market, (iii) the size and importance of the market, (iv) the level of concentration in the market, (v) the expected impact of the study on consumers, and (vi) the need to increase the understanding of how the market works.

4 THE DIFFERENT PHASES OF A MARKET STUDY

4.1 Pre-launch

Once the INDECOPI decides to start a market study, it will undertake some preliminary activities before officially announcing the start of the study. The duration of these preliminary activities may vary from case to case depending on the information available. This work includes the following activities:

- Defining the scope of the study

The first step before opening a study is to define the scope of the project. This involves: (i) identifying the geographic and product boundaries of the market (or markets) that will be studied, (ii) outlining the nature of the alleged problem(s) that is suspected to be preventing the market from working effectively, and (iii) specifying the features of the markets and the issues on which the study will focus. The scope of the project will guide the team in its work.

The scope of the project, however, is based on working hypotheses, and the INDECOPI may alter them during the course of the study if the information and the analysis show that some of them were not correct. This would be the case, for instance, if the market features turn to be different from those initially identified. Since the scope of the study will be described in documents released publicly when the study is officially launched, any major change in the scope that may happen during the course of the study will be

announced publicly via the INDECOPI's website. The reasons behind these changes will be also clearly explained.

Sometimes, in order to correctly define the scope of the study and to better identify the possible concerns, some stakeholders could be informally consulted to hear their views and concerns, and to test its preliminary hypotheses regarding the nature of the competition problems.

- Selecting the team that will perform the study

Selecting the team that will undertake the market study is a very important step. By doing so the INDECOPI ensures that the necessary resources are committed to the project. The size and skills of the team will depend on the nature and scope of the market to be studied, as well as on the complexity of the issues that it may have to deal with.

- Producing a project plan and a time line with key milestones

The INDECOPI will develop a project plan that sets out the time necessary to undertake all the phases of the study, given the resources available and the complexity of the issues, and identifies key milestones.

- Identifying all relevant stakeholders and planning how to involve them in the study

The INDECOPI will also identify all the stakeholders relevant to that market. These may include: producers active in the market, as well as their upstream suppliers, consumers (whether firms, individuals or public bodies), trade associations, consumer bodies, economic regulators, and ministries and other public bodies that issue laws and regulations that shape the way the market operates. This step is extremely important because it ensures that all market players are correctly identified and that their views will be considered. A correct identification of the stakeholders is also important to determine who should be involved in the implementation of any recommendations that may arise as a result of the study.

The INDECOPI will also try to understand the role that each stakeholder plays in the market and the interests that they may have in the outcomes of the market study. This will help to plan how to involve each one in the development of the study (e.g. create a working group, ask for submissions, send information requests, inform them directly or rely on the press-announcement and the website, etc.). This process aims to ensure that the views of all stakeholders can be taken into account and their knowledge used to improve the quality of the analysis as well as the final outcome. The INDECOPI is aware that the quality, as well as the success of a market study, lies in the involvement of all relevant stakeholders.

- Conducting a risk assessment

Last but not least, the INDECOPI will identify the possible risks that may affect the study, and define a strategy to manage them to prevent their jeopardizing the team's ability to respect the time line set out in the project plan.

4.2 Launch

Having completed the preparation outlined above, the INDECOPI will officially launch the study. This is done by publishing on its website a press release and a short document that provide:

- the reasons or concerns that have led to the market study;
- the scope of the market study and the main issues that will be investigated;
- a timetable of the study that outlines its overall duration, the key milestones and their timing;
- an invitation to all stakeholders to make submissions; and
- contact points for any enquiry related to the study.

The press release and the accompanying document are aimed at informing all stakeholders about the market study and to encourage them to participate in it by providing information and views that can help illustrate the analysis.

4.3 Information gathering

As the study is launched, the INDECOPI will start gathering all the quantitative and qualitative information necessary to determine if the concerns that gave rise to the study are justified, to understand their causes, and to identify possible solutions that address them.

This information will mostly concern the market under investigation, but to support its assessment, the INDECOPI may also collected data on similar markets in other sectors or in other countries.

The information will concern the main characteristics of the market and the outcomes of the competitive process. This includes, but is not limited to, market shares, barriers to entry, level of entry and exit, level of consumer switching, characteristics of goods and services, recent supply and demand shocks, nature of customer based, industry practices, legal and regulatory framework, level and patterns of prices and profitability, product range, quality indicators and levels of innovation.

Information is first collected through all available public sources, such as free websites, databases and publications. Depending on its budgetary capacity, the INDECOPI may want to consider purchasing data from commercial providers. If the market is regulated

by another body, the relevant body will be contacted in order to obtain all available data. In some cases it may also run a survey of businesses or consumers, directly or via external consultants.

If necessary, this information will be integrated with data obtained from the stakeholders through meetings and interviews, or via written questionnaires. All these requests will be done on a voluntary basis. Unsolicited voluntary submissions from stakeholders are also very welcome, as they can provide further useful material.

If some stakeholders are reluctant to cooperate, and the information needed cannot be easily obtained from other sources, the INDECOPi may consider making use of its formal information gathering powers and send statutory requests for information.

Box 5: The legal basis for requesting information, and the sanctions that it can impose in case of non-compliance.

The INDECOPi has the power to request information from private or public entities for the purposes of conducting market studies and can impose fines of up to US \$ 1.13 millions on private entities or individuals in case of failures to comply.⁹

All information requests, whether compulsory or voluntary, will be carefully designed in light of the purpose for which the information is sought.

If the information collected is not public, the INDECOPi will treat it with the outmost care and will ensure appropriate protection against possible disclosure.

4.4 Analysis and preliminary conclusions

The information thus collected is then examined. In general terms, qualitative and quantitative analysis will be undertaken. If appropriate, data may be analysed during advanced statistical and econometric techniques which can vary depending on the nature of the market and the complexity of the issues addressed.

Through this analysis the INDECOPi will first try to understand if the market is really malfunctioning and if consumers are harmed as a result. It is sometimes possible that the competition problems identified differ from the supposed problems that initially led to the opening of the study.

⁹ *Decreto Legislativo 1034* modified by the *Decreto Legislativo 1205*. It's considered a value of Tax Unit of S/. 3,950 for 2016 and an exchange rate of 3.5 soles per dollar. The amount indicated is a cap or legal maximum if not exceed 10% of the sales or gross revenue of offender, or his economic group, in the year immediately preceding the decision of INDECOPi. The fine is calculated case-by-case considering proportionality and reasonableness principles according to legally protected interest and adverse effects of the illegal practice.

The INDECOPI will then determine which specific features of the market are causing the problems, if any, and how they could be addressed.

4.5 Finalisation of the outcome

Once the INDECOPI has reached some preliminary conclusions on the presence and nature of competition problems affecting the market (or lack thereof), as well as on potential solutions, the INDECOPI will test them with stakeholders. This may be done in a variety of ways, including through individual meetings with key stakeholders or via a workshop open to all stakeholders. Alternatively, in some cases a preliminary report may be published for consultation.

The aim of this stage is to ensure that the initial findings from the study are indeed correct and that no element has been overlooked in the analysis. In addition, when the outcome of a market study involves the formulation of recommendations, testing them allows to promote acceptance and support of these recommendations among stakeholders. In addition it ensures that recommendations are:

- effective, i.e. they will solve the problems identified;
- feasible, i.e. they can be implemented; and
- proportionate, i.e. they are not too onerous to implement compared to the detriment caused by the problems they address.

The INDECOPI will consider, though not necessarily adopt, all the feedback and suggestions it will receive from stakeholders while formulating its final conclusions, deciding on the most appropriate outcome and drawing up its final recommendations (if these are deemed necessary).

4.6 Publication

Once the study is completed, a report that describes the market assessed, the reasons why it was assessed, the information and data gathered, the analyses carried out, and the conclusions reached, including the solutions proposed will be published. The INDECOPI will guarantee that the report provides the greatest possible transparency regarding the assessment performed, while ensuring that non-public information is not disclosed.

This final report will be published on the INDECOPI's website.

Box 6: Publication of final reports

INDECOPI publishes the final report of all its market studies on its website:
<http://www.indecopi.gob.pe/web/defensa-de-la-libre-competencia/abogacias>

A press release will be issued to communicate the completion of the study and its outcome, to ensure that all stakeholders, as well as the media, are properly informed.

For more important studies, a press conference or newspaper or TV interviews could take place in order to publicise and promote the outcomes of the study.

4.7 Follow-up work

After the publication of the report, the work will not stop, unless the market study has led to a “clean bill of health”. Any follow-up work will depend on the nature of the outcome of the study. If the study concluded that the INDECOPI should take action itself by opening a competition enforcement investigation, it will do so. If the outcome involved issuing recommendations to one or more stakeholders, the INDECOPI will endeavour to ensure that these recommendations are understood and implemented by the relevant stakeholders.

The INDECOPI will promote the implementation of the recommendations in a number of ways. It can actively assist relevant stakeholders with the practical implementation of the recommendations. When stakeholders to whom the recommendations are directed seem reluctant to accept them, can also build support among stakeholders that would benefit from the recommendations so that the latter will put pressure on the former. This can be done through large workshops and/or targeted meetings, to explain why it has issued the specific recommendations, what they intend to achieve and what benefits they will bring about and for whom. In some cases, it can also develop and put in place a communications strategy to raise the profile of the study and create public and media support for the recommendations. Such a communication strategy can put pressure on the addressees of the recommendations and increase the likelihood that they will accept the recommendations or that they will explain why they are not planning to accept them.

4.8 Ex-Post Evaluation

In due course¹⁰ the INDECOPI could undertake an assessment of how effective it has been in addressing the competition problem that affected that market and in improving consumer welfare. This assessment could consider:

- i. to what extent the recommendations have been implemented and, if not, what has prevented their complete take-up (for example, lack of willingness on the part of the relevant stakeholders or implementation difficulties linked to the design of the recommendations); and
- ii. the impact of the recommendations on the market, estimating the actual benefits and costs associated with the recommendations and comparing them with those expected when the recommendations were proposed.

¹⁰ Before performing an ex post evaluation, enough time should have elapsed for any recommendations to have had an impact on the market, but not so much that there is no ‘memory’ in the market of the impact of the study’s recommendations, which would impact information gathering.

This exercise can help to better design future studies by testing the validity of its analyses performed, the robustness of its conclusions and the effectiveness of the recommendations proposed. In addition, it allows to estimate the effective benefits brought to consumers by the study and thus to raise awareness about the value and importance of market studies.

The selection of which market studies to evaluate ex post will be based on a number of criteria that include: i) the study represented a significant resource commitment; ii) the study focussed on topics or markets of strategic significance for the INDECOPI and iii) there is scope to estimate the impact of interventions in order to demonstrate the value added by the work done by the INDECOPI.