

Market Studies – An Overview

December 14, 2017

Summary

- Market study powers are likely to be granted soon to the Commerce Commission and the Minister of Commerce under a proposed amendment to the Commerce Act.
- The proposed amendment is currently being drafted and is yet to be introduced to the House and is unlikely to come into effect until late 2018.
- A market study is “detailed research by an agency into a particular market, or markets, where there are concerns that the market could be functioning “sub-optimally”.
- A market study would differ from a Commerce Act investigation (s36), as it would not be required to focus on a breach of the current law. It would instead focus on market structure, behaviour and profitability of market players, innovation rates, barriers to entry and consumer satisfaction etc.
- It appears as though the Commission and the Minister of Commerce will have a high level of discretion to initiate a market study and over what the market study will focus on.
- The information gathering powers that will be granted to the Commission are yet to be made clear.
- The study will likely be funded through additional Government appropriations to the Commission, which are estimated at approximately \$1.5m per year, per study.
- Some industry candidates for market studies include petroleum fuels, retail payments, supermarkets, dairy products and electricity.

Introduction

1. This note explains some of the key features of 'market studies', as will be permitted under an amendment to the Commerce Act 1986 that is likely to come into effect sometime in 2018. The new law is expected to give the Commerce Commission powers to conduct market studies of industries that it, or the Minister of Commerce, believes may not be operating optimally for consumers.
2. This proposed change to the Commerce Act was originally suggested by the Productivity Commission in 2014¹ and is supported by MBIE².
3. Having such market study powers conducted by the competition authority is considered common practice in the OECD. As of 2015, New Zealand and Chile appear to be the only OECD countries where competition authorities do not have market study powers.
4. Despite market study powers being common practice, there are substantial differences across OECD countries in how market studies are initiated and conducted. Most notably, the competition authority can generally initiate a market study and, in approximately half of the surveyed countries, government bodies can also initiate a market study. The new Government has indicated it would give the Commission, as well as the Minister of Commerce, initiation powers.

What is a market study?

5. A market study is "detailed research by an agency into a particular market, or markets, where there are concerns that the market could be functioning sub-optimally"³.
6. A market study would differ from a Commerce Act investigation (s36), as it would not be required to focus on a breach of the current law. It would instead focus on market structure, behaviour and profitability of market players, innovation rates, barriers to entry and consumer satisfaction etc.
7. A market study will look to either:
 - (a) alleviate concerns that a market is distorted or restricted; or
 - (b) confirm market problems and recommend potential solutions.
8. A 2015 OECD survey of competition authorities found that of 62 respondents, New Zealand and Chile were the only nations with competition authorities that did not possess market study powers. The OECD recognise market studies as good practice for competition authorities⁴.

Initiation of study

9. A 2017 Cabinet paper on the initiation and funding of market studies⁵ proposed that initiation should only be by the Minister of Commerce after receiving Cabinet approval. Cabinet approval was recommended due to the likely spillover effects across portfolios.

¹ <https://www.productivity.govt.nz/sites/default/files/services-sector-2nd-interim-report.pdf>

² <http://www.mbie.govt.nz/info-services/business/competition-policy/targeted-review-of-the-commerce-act/commerce-commission-letter-to%20Minister.pdf>

³ <http://www.mbie.govt.nz/publications-research/publications/business-law/cabinet-paper-initiation-financing-of-market-studies.pdf>

⁴ <http://www.mbie.govt.nz/info-services/business/competition-policy/targeted-review-of-the-commerce-act/submissions-received/OECD1-Redacted.pdf>

⁵ <http://www.mbie.govt.nz/publications-research/publications/business-law/cabinet-paper-initiation-financing-of-market-studies.pdf>

10. The newly appointed Minister of Commerce and Consumer Affairs, Kris Faafoi, has indicated that he would like to extend the legislation so that both the Minister and/or the Commerce Commission could initiate market studies⁶.
11. Within the OECD, almost half of all competition authorities with market study powers can accept requests from governmental bodies to conduct a market study, while almost half cannot receive requests. Of the approximately half who could accept requests, a further half could not reject requests.
12. The Cabinet paper proposed that initiation of a market study should only require meeting a high-level principle, such as whether the market study is in the public interest or for the long-term benefit of consumers, as opposed to a more prescriptive criteria. The stated justification for this non-restrictive approach is to avoid the likelihood of judicial review and to give the initiator a high level of discretion.

Scope of study

13. As the new provision is currently proposed, the scope of the study would be flexible and at the determination of the Minister via a terms of reference (and the terms of reference would be designed similarly to Australia⁷).
14. Across the OECD the information gathering power of the relevant competition authority varies significantly. In surveyed countries: 54% allow competition authorities to request information from government bodies and private entities; 15% can request information from private entities only; 2% can request information from government bodies only; 27% had no expressed legal powers but could request information under general information gathering laws; and 2% had no powers.
15. The information gathering powers under the proposed amendment have not yet been made clear. However, MBIE has recommended that the Commission be granted full information-gathering power as it believes the benefits (to consumers) will outweigh the costs (largely to firms).

Funding of study

16. The Cabinet paper on initiation and funding of market studies (under the previous Government) proposed to fund market studies through additional appropriations to the Commerce Commission of \$1.5m per annum beginning in 2018/19 (although the funding will be dependent on the initiation of a market study).
17. These estimates are based on a midpoint between the average New Zealand Productivity Commission study of \$2.2m (broader in scope than probable market studies) and Commerce Act Part 4 inquiries of \$1m (narrower in scope than probable market studies).
18. Taxpayer funding seems appropriate as the beneficiary of market studies is supposedly consumers as a whole, who are in general reasonably well proxied by taxpayers. The industry in question will not be responsible for funding the study through any type of fee, although there will inevitably be costs to the industry through information gathering and other costs in working with the Commerce Commission.

⁶ See: <http://business.scoop.co.nz/2017/12/06/comcom-to-get-market-studies-powers-by-end-of-2018/>

⁷ The Australian Competition and Consumer Commission (ACCC) has in recent years undertaken market studies of the cattle and beef, communications and new-car-retailing industries.

Likely industry targets for market studies

19. Given the funding proposals outlined thus far it would seem that the Commission would undertake no more than one market study per year. However, there is scope for changes to the current proposals under the new Government.
20. Industries that could well be early candidates for market studies are petroleum fuels⁸, retail payments⁹ and supermarkets¹⁰. Other possibilities include dairy products and electricity.

⁸ See <http://www.mbie.govt.nz/info-services/sectors-industries/energy/liquid-fuel-market/fuel-market-financial-performance-study-2017>

⁹ See MBIE <http://www.mbie.govt.nz/info-services/business/competition-policy/retail-payment-systems/document-image-library/cabinet-paper-update-on-retail-payment-systems.pdf>

¹⁰ See <https://www.consumer.org.nz/articles/supermarket-power>