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## **When markets are failing**

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# When markets are failing

The first in a two-part article looking at the use of market investigations and sector inquiries in competition law

by *Philip Marsden and Peter Whelan\**

Both the European Commission and the UK authorities have legislative powers to examine a market that they feel is not working properly in order to investigate if there are any competition or other problems that require remedying. Such powers include the ability to initiate and/or undertake market studies, market investigations or sector inquiries. Although the EC and UK investigatory regimes are not identical, noteworthy similarities exist. Both of them, of course, inevitably place a burden on the firms at the centre of the study, investigation or inquiry, as well as on the authorities themselves. Consideration of the relative usefulness or otherwise of these investigatory powers is therefore an extremely important exercise.

This is true for the UK and EC authorities as well for the authorities of many more jurisdictions: following modernisation and enlargement, many other member states may be interested in introducing these sorts of tools into their own systems. Given this fact, the need for a cost-benefit analysis concerning the use of these types of tools is arguably quite pressing. Furthermore, as new member states attempt to develop such regimes, it is imperative that they receive guidance, in the form of best practices on, for example, how – and, of course, when – to use those tools to their advantage.

This article aims to identify: (1) the main benefits (and costs) of market investigations and sector inquiries from an EC and UK perspective; and (2) any methods or practices that will likely ensure the optimal realisation of the specified benefits.

In this first part of the article, we will look at the main benefits (and costs) of market investigations and sector inquiries from an EC and UK perspective. The second part (which will be published in February) will examine: (1) the similarities and differences between the EC and UK approaches to market investigations/sector inquiries; and (2) best practices that aim to maximise the benefits and minimise the costs of market/sector investigatory tools.

## Preliminary points

This article concentrates on the use of both EC sector inquiries and UK market investigations; it does not examine in any detail the use of market studies by the UK authorities or the relationship between market studies and market investigations.

## Legislative framework

■ **European Community.** Even before modernisation, the European Commission enjoyed a wide discretion under article 12(1) of Regulation 17/1962 to undertake sector-wide investigations into markets it believed were not functioning as

they ought to be. Now, under article 17 of Regulation 1/2003, the Commission may conduct an inquiry into a particular sector of the economy or particular types of agreements across various sectors when the trend of trade between member states, the rigidity of prices, or other circumstances suggest a distortion or restriction of competition within the common market.

During its inquiry, the Commission may ask the undertakings or associations of undertakings concerned to supply any information needed to give effect to the EC competition laws. In particular, the Commission may request the undertakings concerned to disclose all agreements, decisions and concerted practices. Although it has no obligation to do so, the Commission can publish a report on its findings and invite comments from interested parties.

Article 17(2) of Regulation 1/2003 expressly gives the Commission all the powers necessary to conduct sector inquiries. Consequently, besides being able to request information from undertakings or associations of undertakings, the Commission can:

- take statements from consenting natural or legal persons;
- conduct all necessary inspections of undertakings or associations of undertakings;
- ask national competition authorities to conduct inspections on its behalf; and
- impose fines and other penalties for certain behaviour (for instance, failure to provide information).

The Commission may also conduct dawn raids on the undertakings concerned, although it cannot enter non-business premises for the purposes of its inquiry. More importantly, however, it has no power to adopt measures aimed at remedying the situation under investigation, although it may take cases against undertakings that have infringed articles 81 or 82 EC.

■ **The United Kingdom.** In the UK, there are two steps to a market investigation: (1) the making of a reference; and (2) the determination of the substance of a reference. Under section 131 of the Enterprise Act 2002, the OFT may make a reference to the Competition Commission (CC) if it has “reasonable grounds” for suspecting that “any feature, or combination of features” of a market in the UK for goods or services “prevents, restricts or distorts competition” in connection with the supply or acquisition of any goods or services in the UK (or a part of it). The sectoral regulators – and, in exceptional cases, the Secretary of State – may also make a reference to the CC.

The concept of “feature” is widely defined in the legislation. It includes both the structure of the market and the conduct of market players. More specifically, “conduct” refers to both (1)

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the behaviour of the suppliers and the acquirers of goods or services who act in the market concerned, whether or not such behaviour occurs in the market; and (2) the behaviour of the customers of such market players, providing it relates to the market concerned.

Under section 154 of the Enterprise Act, the OFT may (instead of making such a reference) accept – from such people as it considers appropriate – undertakings to take such action as it considers suitable. These promises must have the purpose of remedying, mitigating or preventing any adverse effect on competition concerned; or any detrimental effect on customers resulting from (or which may be expected to result from) the adverse effect on competition.

The UK Competition Commission is the body charged with determining whether any feature or combination of features of each relevant market referred to it prevents, restricts or distorts competition. Both the OFT and the Competition Commission have the power to conduct any necessary investigations. They may, for example, compel the attendance of witnesses at hearings and the presentation of documents. Unlike the European authority, though, the Competition Commission has the power to adopt measures aimed at remedying the situation under investigation.

### Rationale and risks

#### *Benefits*

It is self-evident that free markets do not always operate in the best interests of consumers. Competition law rules exist to correct this – by addressing anticompetitive mergers, abuses of a dominant position and cartel and other agreements – and are backed up by various fines and punishments imposed on undertakings (and, in the UK, on individuals).

From time to time, however, the particular behavioural and structural features of a given market lead to unintended harmful effects. It may be the case in certain markets that structural or behavioural features engender conduct which – if analysed under the article 81 or 82 EC competition rules or under the Chapter I or Chapter II prohibitions of the Competition Act 1998 – would not in fact be unlawful. In short, inefficiency may be present in the market for which no-one could or should be punished. Indeed, there are at least five examples of different situations where market inefficiency can exist without any one firm doing anything wrong according to the current EC or UK antitrust rules:

- (1) markets with a dominant firm with a high market share but which is not abusing its position;
- (2) vertical cases, with foreclosure below levels needed for abuse;
- (3) a non-collusive oligopoly;
- (4) government-imposed barriers to entry; and
- (5) information failures.

There may also be cases where a breach of competition law can be established but where it is not possible to find a remedy that is compatible with the correct implementation of the rules dictated by those laws.

In both of these categories of cases, despite market failure and thus the existence of significant consumer detriment, the traditional antitrust rules (ie the prohibitory rules on anticompetitive agreements or abuse of dominance) will not be

the most appropriate tool to deal effectively with the problem presented. Some other enforcement tool may be needed. It is here that one can argue that investigatory techniques represented by market investigations in particular may have a role to play. (The UK is not the only member state that thinks so: although there is no express legislative provision for sector inquiries in France, inquiries can be launched to search for and establish “any practices which are anticompetitive or which restrain competition”; and Germany recently introduced the concept in its law with its 7th Amendment.)

The OFT in its guidelines acknowledges that market investigations have a different role to play than traditional competition law enforcement. Under paragraph 2.3 of OFT 511, the OFT will only make a market investigation reference:

- (1) when the legal test is fulfilled but there has been no breach of the Competition Act 1998 provisions; or
- (2) when action under the Competition Act has been or is likely to be ineffective for dealing with the adverse effect on competition identified.

An example of an ineffective action under the competition rules would be when there has been an abuse of a dominant position but it is clear that only a structural remedy going beyond what is appropriate under the competition rules would be effective in remedying the consequential adverse effect on competition. As detailed below, the remedies that can result from a market investigation are varied and profuse; they represent an extremely useful kitbag of different means of rectifying market failure that are independent of investigations taken under the EC or UK competition law rules.

The type of sectoral inquiry employed at EC level can only be used to enforce the competition law rules enshrined in articles 81 and 82 EC. In other words, the EC Commission is not empowered to adopt any remedies that would aim to resolve the particular market failure in question; rather, it must bring competition law-based cases against undertakings if it wishes to use its administrative powers to solve the problem identified. It is obvious then that the above arguments concerning potential benefits are more relevant for the UK market investigation regime. Nonetheless, the EC approach to sector inquiries also has a number of important benefits:

■ **Promoting a proactive approach.** First, sector inquiries stimulate competition authorities by promoting a proactive approach to locating particular anticompetitive behaviour in any given market or sector. If the authorities feel that something is not right in the market, that there are inefficiencies which may be the result of anticompetitive practices but they have no direct evidence of such practices and therefore cannot open a case against any particular undertaking, what can they do in such a situation? There are two obvious options: they can (1) hope that they receive a complaint (and with it some evidence of an anticompetitive practice); or (2) do nothing and hope that the problem goes away somehow. With the ability to launch sectoral inquiries, however, the Commission can develop a more proactive approach: it may initiate an investigation in order to establish the anticompetitive practices responsible for the inefficiency and thus bring cases under the antitrust rules.

■ **A broader market view.** Second, by using the mechanism of a sector inquiry the Commission can obtain a much broader view of the markets potentially affected by anticompetitive

behaviour than by concentrating solely on individual agreements. Once it has established a firm understanding of the dynamics of the market – and the inefficiencies and/or anticompetitive practices that may be present – it can take further action if necessary under the competition law rules. The EC sector inquiry into the sale of sports rights to internet companies and to providers of 3G mobile phone services is a good example of this particular benefit of the system in practice.

■ **Acting on information revealed.** Third, although the Commission is confined to using the sector inquiry to initiate formal competition law cases, nothing is stopping another authority (for example, the government of a member state) from using its own powers to act on the information revealed in the Commission's report and take more direct action against the market failure. The adoption of laws aimed to combat information asymmetry is an obvious example. This argument can also be made in favour of the use of both market studies and market investigations in the UK.

### *Potential drawbacks*

There are several potential disadvantages and costs associated with market investigations and sector inquiries. If a jurisdiction wishes to introduce or use these techniques, then it must be aware of such costs.

Before taking action, the authorities must weigh both the potential benefits and the potential costs against one another. The decision to initiate a market investigation or a sector inquiry in effect involves placing emphasis on one particular value (ie the desire of the general public for a functioning market economy with tangible benefits for consumers) at the cost of another (namely, the freedom of undertakings to employ their resources as they wish). The importance each of these values should be given depends on cultural and social factors; in other words, the decision to launch an investigation reflects a particular value judgment, and thus the outcome of a cost-benefit analysis of the decision to investigate may depend on the jurisdiction undertaking the particular inquiry.

In any case, a number of the costs and disadvantages associated with market investigations and sector inquiries will now be briefly detailed; some suggestions on how they can be minimised will be made in the concluding part of this article next month.

As with any activity that involves the use of limited resources, there is always an opportunity cost that must be borne. Here it is carried by both the undertakings in the market or sector under review and by the authorities that are leading the investigations. The opportunity cost in this case arises from the time and energy spent on (among other things) drafting questionnaires, filling in questionnaires, searching for relevant information, organising hearings, attending hearings and lawyers' costs. The point is obvious: market investigations and sector inquiries take up time and consume resources. Consequently they should be used sparingly and only when a clear objective is to be served, one that is plainly worth all of the potential effort and costs involved.

Not only are these sorts of investigations costly in terms of resources but they can also have a negative impact in terms of their effects on the reputation of the undertakings that form the actual market under review. Current and potential customers of these undertakings, as well as consumers more generally, might

interpret the initiation of a market investigation or a sector inquiry as enough evidence that something sinister is occurring in the market – for example, price collusion or an abuse of a dominant position. There may thus be a risk of public exposure for the undertakings involved. This is all the more unfair perhaps when one considers that no-one is alleging that anyone has done any wrong and that in any case there would often be no evidence to support such a claim in the first place.

One could also argue that these types of investigations, particularly sector inquiries, lead to information overload for the EC and UK authorities and that they engender badly drafted, overly taxing questionnaires that are designed for the business community and not other parties who may be useful to the inquiry in question (for instance, consumer advocate groups). These arguments, however, relate to problems with the design of the investigation rather than to the utility of the device per se.

A final possible disadvantage of these types of investigatory tools relates to the possibility of their being overused. Some fear that they may be used as an unrestrained alternative to enforcement of the competition law rules rather than as a valuable complement. Central to this argument is the fact that there is a certain discipline when it comes to actions taken under articles 81 and 82 or under the Competition Act prohibitions; concepts such as “dominance” or “appreciable effect on competition”, for example, must be established. This is not the case with market investigations or sectoral inquiries. With these particular tools, the threshold for intervention is very low. A certain amount of restriction or distortion of competition is something that could arguably be located in most (if not all) markets, for example.

That said, it could also be argued in response that the large burdens feared by the business community as resulting from such inquiries actually place a limitation on their use. Put simply, resource constraints, especially those imposed on the authorities leading an inquiry, may help to ensure that market and sector investigatory tools are not abused and only employed when other less resource-intensive methods would be ineffective. Regardless of how one stands on these two conflicting arguments, one thing is sure: market investigations and sector inquiries should be seen as an instrument of last resort and only used in the most appropriate circumstances. Such tools are unquestionably doomed to failure if they are used in an unsuitable manner and for inappropriate reasons.

### References

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