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## **A Tale of Two Sector Inquiries: Comparing and Contrasting Experiences in the U.K. and EU**

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**T**he European Commission and the U.K. Competition Commission (“CC”) both have powers to carry out sector inquiries (or “market investigations” in the U.K. terminology) to investigate apparent restrictions or distortions of competition in particular markets within their jurisdictions. In each case, the statutory basis for inquiries has been reinforced within the past five years (Article 17 of Regulation (EC) No. 1/2003<sup>1</sup> for the European Commission and Part 4 of the Enterprise Act 2002<sup>2</sup> for the CC). Each authority has carried out a number of inquiries under its revamped legislation (three by the European Commission;<sup>3</sup> nine by the CC<sup>4</sup>) and each authority can, and does, request an enormous amount of information from companies in the course of an inquiry. However, the similarities between the two types of sector inquiries pretty much end there.

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<sup>1</sup>Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p.1-25.

<sup>2</sup>Enterprise Act 2002 (c. 40).

<sup>3</sup>Energy, Financial Services (Business insurance and retail banking) and Pharmaceuticals. Previous sector inquiries (e.g. Telecoms) were carried out on the basis of Regulation 17/62.

<sup>4</sup>Store card credit services, Domesticated bulk liquefied petroleum gas, Home credit, Classified directory advertising services, Northern Irish personal banking, Groceries, Payment protection insurances, BAA Airports, Rolling stock leasing market. Previous market investigations by the Monopolies and Mergers Commission were carried out on the basis of the Fair Trading Act 1973.

This article draws on experience of recent inquiries by the European Commission and the CC to compare the purpose and scope of their market inquiries, as well as to contrast the approach of the two authorities.

## **I. PURPOSE AND SCOPE**

The primary aim of the European Commission's sector inquiries and the CC's market investigations is to investigate wider competition problems in the market, with the Enterprise Act expanding on earlier monopoly investigation provisions in the Fair Trading Act 1973, and Regulation 1/2003 enlarging the scope of sector inquiries as set out in the old Regulation 17/62 to cover "particular types of agreements across sectors."

Neither type of inquiry aims to target individual companies' infringements of Article 81 or 82 (EC) or the equivalent Chapter I and II infringements under the U.K. Competition Act 1998. Both types of inquiry can of course result in subsequent enforcement proceedings against individual companies if infringing behavior is discovered during the course of the market-wide investigation.

However, it is worth noting that, in contrast to a European Commission sector inquiry, a CC market investigation is an in-depth "phase II" procedure, following a referral from the Office of Fair Trading (or equivalent sectoral regulator) which will already have carried out a more limited market study. Section 134 of the Enterprise Act sets out the task of the CC:

The Commission shall, on a market investigation reference, decide whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or service in the United Kingdom or a part of the United Kingdom.

If the CC finds that there is such an “adverse effect on competition” (“AEC”), the CC must decide whether it should take any action (or recommend action be taken by others) to remedy, mitigate, or prevent the AEC, or any detrimental effect on customers resulting from the AEC, and what action should be taken.

The CC has a huge range of enforcement tools available to it to address any restriction of competition that it identifies in a market. It can issue orders or seek undertakings from parties, for example, to prohibit a refusal to supply, prohibit price (or other) discrimination, prohibit or restrict an acquisition, require divestments, impose price control, or require publication of specific information. In addition, the CC can make recommendations to any body (usually the government) that it considers capable of taking action to remedy the adverse effect on competition. For example, in the groceries market investigation, the CC recommended that the U.K. government include a competition test in planning decisions relating to larger grocery stores; and in the ROSCO (leasing of rolling stock) inquiry, the CC is considering making a number of recommendations to the government about the structure and operation of the passenger rail franchise process.

The focus of a European Commission sector inquiry is slightly different. Article 17 of Regulation 1/2003 provides that:

Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors.

However, there is no requirement on the European Commission (other than a

general obligation to act as the guardian of the EC Treaty) to take specific action to remedy any sector-wide distortion that it may discover during its inquiry, and no mention in Regulation 1/2003 of possible industry-wide remedies that could be imposed as the result of a sector inquiry. The European Commission does in fact take remedial action as a result of its sector inquiries, as can be seen from the raft of individual enforcement cases and legislative proposals that were issued as a result of the energy sector inquiry. But it does not have the statutory power to make similar recommendations to Member States to get them to revise structural or operational features of a market at a national level which give rise to restrictions of competition. In a regulated industry such as the pharmaceutical sector, where national policies have a critical impact on EU-wide competition, the absence of a truly sector-wide remedy puts the European Commission at a distinct disadvantage.

Consequently, while a CC market investigation is driven by the need to identify and implement solutions to market-wide distortions of competition, a European Commission sector inquiry is merely an initial information-gathering exercise, described by Neelie Kroes in the financial markets inquiry as a “first step in allowing the Commission to identify ways to improve competition.”

## **II. APPROACH**

This fundamental difference in the aims of the two types of market inquiry perhaps explains the contrasting approaches of the CC and the European Commission: the “solution-focused” nature of the CC’s market investigations has led it to adopt a more

methodical approach to investigations than is the case in Brussels. But recent experience suggests that the techniques of the CC could nonetheless be put to good effect by the European Commission.

***A. Face-to-Face Contact***

It is clear that dawn raids do not fit into the framework of a CC market investigation, largely because a market investigation is a second-phase procedure. This does not mean to say that on-site visits are not carried out by the CC. Nevertheless, this approach does reflect the fact that the CC's market investigations generally appear to be quite conciliatory.

The non-adversarial approach is also reflected in the CC's hearings which, while formal, are carried out as fact-finding missions rather than cross-examinations.

***B. Transparency***

On transparency, the CC's practices deserve praise. Non-confidential versions of all parties' submissions and hearings are published on the CC's website within a reasonable timeframe. In the groceries market investigation, this meant publishing over 700 submissions on-line, in addition to hearing summaries, economic roundtable transcripts, and experts' reports.

The European Commission also publishes public responses to the consultation it invites on its interim reports and, in the business insurance inquiry, uploaded videos of the public hearing on its website. However, prior to the publication of its interim report, comparatively little is made available to the public.

Another example of good practice by the CC is at the outset of the investigation. Having requested a certain amount of “off-the-shelf” information from the parties (i.e. information that is readily available), the CC issues draft market and financial questionnaires to the parties in order to target its questions as appropriately as possible. This approach enables the parties to identify questions that are disproportionately burdensome to answer or suggest better methods of providing the information requested by the CC.

The European Commission apparently does market-test its questionnaires at a draft stage with one or two companies. However, the experience of many companies touched by recent sector inquiries is that many questions were either difficult to understand, repetitive, or resulted in the submission of a large volume of information that may never be used. The practice of systematically issuing draft questionnaires to all parties to kick off the process should be seriously considered.

The use of “putbacks” (lengthy tables of excerpts from draft reports by the CC given to the parties to review for inaccurate material) by the CC is a helpful, if imperfect, exercise which enables parties to correct glaring errors or misunderstandings before they are published. The CC also gives parties the opportunity to correct hearing draft transcripts and hearing summaries. These practices undoubtedly increase the accuracy of the CC’s reports in the face of a potentially overwhelming mass of data. Given the thousands of individual answers and data sets from hundreds of companies in the pharmaceutical sector that the European Commission is currently attempting to analyze,

it will be a challenge to assimilate all of the responses into the preliminary and final findings. Put-back papers may be useful means of double-checking the accuracy of the final reports.

The CC's transparent approach also applies to the organization of an inquiry. There is a statutory two year deadline, a published timetable (revised if timing slips, as it has twice in the ROSCO market investigation), forewarning given of the next steps in the process, and a central contact person who generally effectively coordinates questions from the case team and queries from parties. All this helps to give perspective to the investigation and enables parties to manage internal resources and expectations appropriately.

By contrast, the European Commission's recent practice of issuing weekly questions ties up internal resources over a protracted period.

### **III. CONCLUSION**

The above comparison suggests that EU sector inquiries would be more effective in identifying and addressing sector-wide competition problems if they were more than just fact-finding exercises. This inevitably raises the question of whether Regulation 1/2003 is the most appropriate legal vehicle for sector inquiries. It is, after all, the implementing regulation for the rules on competition laid down in Articles 81 and 82, which address the behavior of undertakings, rather than any features of a market which may contribute to a restriction or distortion of competition. Perhaps a new regulation is required—one which would give the European Commission a sharper tool to address any



market-wide (including national) competition problems it suspects may exist. Carrying out a sector inquiry without thoroughly reviewing the regulatory framework, for example, makes no sense, especially in sectors such as energy, pharmaceuticals, and financial services. And there should be no distinction in this regard between European and national legislation.; both should be subject to scrutiny. The European or national legislators may well ignore any recommendations made by the European Commission, but the Commission will have discharged its duty as competition “advocate” in regulated sectors.

Ultimately, despite the lack of a clear mandate in Regulation 1/2003 to promote regulatory changes designed to stimulate competition at the European or national level, the Commission may nonetheless assume this role, and hopefully will. However, if the general aim of sector inquiries is to identify competition problems across the whole industry, then taking sector inquiries outside the scope of Regulation 1/2003 may enable the Commission to achieve that goal more effectively. If, on the other hand, such a wholesale rethink of EC sector inquiries is too much to hope for in the current review of Regulation 1/2003, DG Comp should nonetheless consider the best practices developed across the Channel when launching its next sector inquiry.