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INTERNATIONAL DEVELOPMENTS

The New World of Proactive EC Antitrust Enforcement? Sector Inquiries by the European Commission

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WITH THE ENTRY INTO FORCE of the "modernization" regulation (Regulation 1/2003[1]) on May 1, 2004, the European Commission (Commission) was released from the burden of administering the notification and authorization regime for potentially anticompetitive arrangements that had been a defining feature of EC competition law enforcement for the previous forty years.[2] As a result, the Commission was given the freedom and resources to set a fresh enforcement agenda and focus on the detection and punishment of serious infringements of competition law.

However, abolition of the notification system also meant that the Commission no longer enjoyed the same steady stream of market information. In light of the change, then Competition Commissioner Mario Monti signaled a new direction for the Commission:

> In the absence of notifications, the DG will rely more on complaints and own initiative investigation. In order to find infringements, the DG will have to be further involved in the gathering of market information and the monitoring of markets. DG Competition will thus have to move from a re-active to a more proactive attitude.[3]

Three years on, we examine in this article the most visible manifestation of the Commission's more proactive stance: the conduct of sector inquiries under Article 17 of Regulation 1/2003.

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At one level, Commission sector inquiries are similar to research and policy reports undertaken by the U.S. Federal Trade Commission, either acting on its own initiative or at the request of Congress, sometimes in conjunction with the Department of Justice.[4] Both are, in principle at least, highly beneficial mechanisms for gathering information and developing a broad base of expertise to aid decisions on policy and the possible initiation of enforcement action. However, there is a concern in Europe that the proactive use of the sector inquiry tool may mature into something other than a method for capturing factual information. In particular, does the use of sector inquiries to achieve certain Commission objectives risk undermining the integrity of the process? Whatever may transpire, sector inquiries have the clear ability to affect, directly and materially, those subject to them. Given that this is the case, the current fluid structure and the absence of defense protections in the conduct of sector inquiries is of genuine concern.

The Legal Basis for Sector Inquiries

The specific power to initiate a sector inquiry is not new—it has been available to the Commission for over forty years. The genesis lies in Article 211 of the EC Treaty, which bestowed the Commission with a general supervisory role to ensure that the Treaty provisions are applied. This role is more specifically expressed in the duty imposed on the Commission under Article 85 to ensure the application of the principles laid down in the competition law provisions contained in Articles 81 and 82 of the Treaty. Under Article 83, the Council (being the main decision-making body of the European Union) is given the power to establish the appropriate regulations or directions to give effect to those principles including, amongst other things, to define the functions of the Commission (Article 83 (2) (d)) and "to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 81 and 82" (Article 83 (2)(c)).

Initially, the Commission's powers were set out in Council Regulation (EC) No. 17 of 1962 (Reg. 17), made under Article 83. Article 12(1) of Reg. 17 included an express power to conduct sector inquiries, but Article 12 was sparingly used.[5] Examples under the stewardship of Commissioner Monti are the 1999 Article 12 inquiry opened by the Commission into the telecommunications sector (conducted in three phases: leased lines, mobile roaming, and the residential local loop), and the January 2004 inquiry opened into the sale of sports rights to Internet and 3G mobile operators.

The present legislative basis for Commission sector inquiries is contained in Art 17 (1) of Regulation 1/2003 which states:

> 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. In the course of that

inquiry, the Commission may request the undertakings or associations of undertakings concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

Article 17 provides the Commission with a low threshold requirement for the initiation of a sector inquiry. There need be no prima facie evidence of a specific antitrust infringement; it is simply enough if the "circumstances suggest that competition may be restricted or distorted within the common market." In selecting appropriate subjects for sector inquiries, Commissioner Neelie Kroes stated that the Commission needs to focus on areas where:

(a) there appear to be durable competition problems;
(b) these problems may be due to competition infringements;
(c) there are implications for better regulation; and
(d) the sector is key for consumers and/or competitiveness.[6]

Importantly, sector inquiries were not envisaged as a means of direct competition law enforcement. The provisions empowering the Commission to initiate sector inquiries do not provide any additional ability to impose remedies. If the Commission wishes to take enforcement action, it must follow on with specific proceedings against the relevant alleged infringers under either Article 81 or Article 82 of the EC Treaty. The sector inquiry should consequently be properly viewed as a form of "phase one" review in which a market is examined in order to identify the existence of potential competition concerns, in preparation for enforcement action.

The sector inquiry procedure therefore differs from certain market investigation regimes in European Member States, such as that operating in the UK under Part 4 of the Enterprise Act 2002. While the Commission may act where there is no more than a suggestion that there is a restriction of competition, the UK Office of Fair Trading (OFT)[7] must have reasonable grounds for suspecting that a feature or combination of features in a market restricts competition.[8] Thus, the UK procedure is a two-stage process under which the OFT must first formally determine whether an investigation is warranted before the UK Competition Commission is engaged. The potential scope of the UK investigation is constrained by the language of the test, which requires the identification of features in a relevant market (there being no similar constraint under the test for a sector inquiry). The UK Competition Commission has the ability to impose remedies if it determines[9] that any such features prevent, restrict, or distort competition.

The sector inquiry regime, therefore, mainly facilitates the enforcement of Articles 81 and 82, whereas the UK market investigation model provides a stand-alone means of applying competition law to situations which may be better addressed by reform aimed at the industry as a whole, rather than through individual enforcement action.

There is a concern in Europe that the proactive use of the sector inquiry tool may mature into something other than a method for capturing factual information. In particular, does the use of sector inquiries to achieve certain Commission objectives risk undermining the integrity of the process?

Notwithstanding this structural limitation, the Commission appears keen to leverage the use of sector inquiries to achieve its objectives. As explained further below, it is the potential expansion of purpose beyond the basic "phase one" role of the sector inquiry that may give rise to unease.

Interestingly, there are some parallels between the Commission's use of sector inquiries and the increased use of "market studies" by the OFT. These are studies initiated by the OFT, under the general powers contained in Section 5 of the UK Enterprise Act 2002, for the purposes of identifying and addressing perceived market failure, covering not only competition issues and consumer detriment but also the effect of government regulations. OFT market studies are outside of the framework and protections of the formal UK market investigation route, although they may lead to such an investigation.

The Purpose of Sector Inquiries

It is apparent that recent sector inquiries were initiated not simply to gather and assess market information in industries of potential interest for competition law enforcement but also, perhaps more significantly, to focus attention on specific Commission objectives in those sectors. In 2005, the Commission launched inquiries in the energy and financial services sectors,[10] and two final reports were published in January 2007 concerning (a) gas and electricity; and (b) retail banking, comprising payment cards and current accounts. The Commission is presently finalizing its conclusions on business insurance, the last part of the financial services inquiry, and a final report is expected to be published in September.[11]

A perceived failure to achieve an effective single European energy market appears to have been a main driver for the energy sector inquiry. As noted by Commissioner Kroes, "We launched the sector inquiry because it was clear that there was no such thing as a competitive Single Market for energy in Europe. We weren't seeing the consumer benefits expected from liberalisation in terms of lower prices and better choices of services . . ."[12] At the same time as the energy sector inquiry, the Commission was engaged in a strategic review of EU energy policy, including a review of liberalization

activity. While the energy sector inquiry is focused on competition aspects alone, its conduct should not be viewed in isolation from the Commission's wider objectives in this sector.

Similarly, the Commission indicated that its sector inquiry into financial services was central to its strategy for implementing the Financial Services Action Plan (FSAP) seeking, among other things, to break down obstacles to cross-border retail banking.[13]

The fact that sector inquiries may be launched as part of an overall objective should not be problematic in itself. However, it is important to ensure that the sector inquiry is conducted with an open mind and genuinely used as an objective means of providing material that will better inform decision making. The sector inquiry must not become simply an exercise in gathering information to support a preconceived conclusion or achieve a pre-determined goal.

In the United States, the FTC is able to conduct wide-ranging economic studies on its own initiative without needing an antitrust enforcement purpose. However, in relation to such a general, industrywide investigation, it is interesting to note that the FTC must first seek clearance from an external body (the Government Accountability Office) if it wishes to send information requests to ten or more persons which are not under investigation. Requests for clearance are published in the *Federal Register*, and interested parties may submit written comments in relation to the request within the prescribed timeframe. There is no equivalent provision in the EC regime.

Studies have also been conducted jointly by the FTC and DOJ in recent years, to provide increased guidance and transparency and to examine the impact of developments in the relevant industry from an antitrust perspective. These inquiries are relatively informal, generally involving a series of public hearings in which various interested parties such as legal, business, academic and governmental experts may participate, following which a report summarizing the views presented may be published.

Other industrywide investigations are mandated by Congress, and tend to detail specific areas that Congress wishes the FTC to consider. Although they may reveal areas in which subsequent antitrust enforcement by the agency may be required, their primary purpose is to provide the requested data and conclusions, which inform legislative decisions.

While the European Commission's investigations may also contribute to legislative reform, no external body in Europe has an equivalent right to require the Commission to conduct an investigation. Sector inquiries in Europe are therefore solely reflective of the Commission's interests, priorities, and objectives.

Recent Experience

The Energy Sector Inquiry. The inquiry into the gas and electricity sectors was initiated in June 2005, following rises in gas and electricity prices in 2005 (with forward prices indicating further rises in the future) and also on the basis, inter alia, that cross-border trade between Member States appeared to have had a limited effect on constraining prices, and integration between many national markets had been slow. The Commission additionally noted that there was limited new entry in the markets, concerns had been expressed regarding the ability to obtain competitive offers from different suppliers, and market concentration remained high. It was stated that the inquiry would complement the Commission's parallel reporting on the development of the internal market, forming "an important part of the Commission's strategy to ensure that consumers and industry benefit from a really competitive European energy market."[14]

The issues paper published in November 2005 identified key issues concerning

- market concentration: allowing incumbent operators to exercise market power;
- vertical foreclosure: in particular an unacceptable level of bundled network and supply activities;
- lack of market integration: barriers to the cross border supply of gas and electricity preventing the development of integrated markets. The issues paper claimed that there was insufficient cross border capacity and existing capacities were not well used;
- lack of transparency, to the benefit of incumbents; and
- price formation: current price formations were viewed with unease by industry and consumers. Prices were claimed to have increased significantly.

These items were confirmed in the Commission's preliminary report published on February 16, 2006, as the five main barriers to a fully functioning internal energy market.

Public consultation ended on May 1, 2006, and the inquiry's final report was published in January 2007. The general conclusion was that European energy markets were not working as they should, despite efforts at EU liberalization. Four areas requiring urgent attention were identified, namely:

(1) achieving effective unbundling of network and supply activities;
(2) removing gaps in the regulatory regime—especially for cross-border issues;
(3) addressing market concentration and barriers to market entry; and
(4) increasing transparency in market operations.

The Commission has already initiated certain individual competition cases, recognizing the need for more proactive enforcement of competition law (under Articles 81 and 82, as well as under merger control and the state aid laws). In the period between publishing its preliminary report and the final report of the energy sector inquiry, the Commission initiated a series of individual enforcement actions, which Commissioner Kroes claimed "strike at the heart of the problems of market concentration, vertical integration and cross-border integration."[15] In May 2006, the Commission undertook dawn raids of gas companies in Germany, Italy, France, Belgium, and Austria, and of electricity companies in

Hungary. These investigations concerned possible foreclosure and collusion activities. In December 2006, the Commission also commenced investigations into the withholding of electricity production capacity and possible abuses on electricity balancing markets. It is expected that these investigations will lead to decisions in 2008.

The sector inquiry report recognized that some remedies would need to be implemented by further legislative measures requiring Member State agreement. Others could be addressed through the full implementation of existing legislation. Competition enforcement alone was viewed as insufficient to address the problems identified by the Commission, and therefore achieve its objectives. As Commissioner Kroes stated: "We therefore need to complement the enforcement through an improved legal framework . . . ."[16]

Commissioner Kroes has lobbied for structural reform, especially the unbundling of network and supply activities (either by way of ownership separation or requiring fully independent system operators). Noting the European Council's agreement, she stated that "the evidence that we have uncovered shows that fully unbundled operators have clearer incentives for investment" and also that "we do need to ensure that the structure of our large companies is in the best interest of all their customers."[17] She concluded by noting that such unbundling would deliver more investment, protect the EU against any potential dominance from external suppliers, and improve security of supply, and that these factors should also lead to more competitive prices. Interestingly, only the last point would appear to fall within the usual focus of a competition authority.

The Financial Services Sector Inquiry. The inquiry into financial services, specifically retail banking, demonstrates some of the ways in which the Commission may seek to use sector inquiries in order to achieve its reform objectives. For example, one of the aims of the inquiry into retail banking was to provide a blueprint for the Commission's vision of pan-European enforcement. The Commission viewed it as "a framework for National Competition Authorities (NCAs) and the Commission, to ensure that the many ongoing competition procedures are coherent."[18] The Commission also noted the broader intention that the inquiry would make a significant contribution to the Commission's future implementation of the White Paper, *Financial Services Policy 2005–2010*.

Further, by generating media coverage and the threat of additional action either directly or indirectly, the sector inquiry was intended to place pressure on companies within the industry to change their behavior to meet with the Commission's expectations. In this way, a sector inquiry may be used as an enforcement weapon in its own right; as Commissioner Kroes noted, sector inquiries " shine a spotlight on anti-competitive practices which sometimes is enough to get the companies themselves to solve the problems."[19]

The Commission made the decision to launch an inquiry into the retail banking and business insurance sectors on June 13, 2005. It claimed that the markets were fragmented with entry barriers and a lack of effective choice on the demand side. In relation to insurance, the Commission noted that there were indications that in certain areas the joint setting of standard policy conditions offered only limited possibilities for demand-side negotiation. Additionally, distortive forms of cooperation could arise within the framework of insurers' associations and in relation to co-insurance arrangements between insurers, and certain distribution arrangements could give rise to competition concerns.

An interim report was published in relation to payment cards on April 12, 2006, and in relation to current accounts and related services on July 17, 2006. Both reports alleged that potential entry barriers existed in each sector. For payment cards, these were stated to include both structural barriers and behavioral barriers, such as payment system membership requirements and allegedly high joining fees. The report also stated that the inquiry had not confirmed the justifications for interchange fees. In relation to current accounts and related services, possible barriers related to payment systems (e.g., the level of joining fees and membership rules), access to credit databases, and factors that discouraged customer switching.

The final report on retail banking claimed competition concerns in relation to (1) payment systems, including card payment systems; (2) credit registers; (3) cooperation between banks; and (4) the setting of prices and policies. The report suggested that antitrust enforcement may be able to address many of the concerns, and that the Commission would use its powers in this regard to ensure compliance with the competition rules in retail banking, and with respect to the various payment markets and the Single European Payment Area project, in particular. It was also noted that "The European Commission will also continue its efforts in fields other than competition law to further increase the benefits of the internal market in retail banking to its citizens."[20]

The Commission observed that the inquiry itself had resulted in banks in Austria and Portugal taking steps to "modify the structures and the rules, and remove entry barriers" in relation to payment cards, and that "These initiatives in Austria and Portugal are welcome first steps."[21]

The interim report relating to the business insurance sector was published in January 2007. This focused on five areas, and highlighted the need for further investigation in relation to each: (1) financial aspects of the sector (in particular potential links between profitability and possible barriers to competition); (2) duration of contracts in the sector (and associated risks of foreclosure); (3) reinsurance (with a focus on certain common contractual clauses); (4) the structure, function, and remuneration of distribution channels (and potential conflicts of interest that brokers may have); and (5) horizontal cooperation (and justifications therefore).

The publication of the report opened the public consultation, and the Commission noted that it would also be sending additional questionnaires and conducting further inter-

views. The public consultation ended on April 10, and the final report is scheduled for publication in September 2007.

The Application of Sector Inquiry Findings

The varied and significant applications of the inquiries' findings underscore the importance of ensuring that sector inquiries are motivated by the right considerations and conducted in the right way. In addition to the primary use in relation to possible enforcement action under Articles 81 and 82, the findings may inform the Commission's decisions in the context of state aid and merger cases. In a broader context, the findings may also be applied as a foundation for work by other sections of the Commission and may prove instrumental in legislative and regulatory reform.

The Commission's ability to consider the entire European market enhances the overall value of the work. As Commissioner Kroes recently made clear:

> Although a sector inquiry gathers evidence that may be relevant for antitrust enforcement, as I said at the start, this must not be the end of the story. The knowledge gained can fruitfully be used to guide our thinking in merger and state-aid cases. But just as importantly, it can inform and guide proposals for legislation, embedding competition principles and sectoral knowledge in the wider policy work of the Commission.[22]

DG Competition does not have a purely passive role in this wider context, as indicated by Commissioner Kroes's lobbying for structural reform in the energy sector, following on from the Commission's findings.

Moreover, Commission sector inquiries set the agenda for action by national competition authorities that may seek to a greater or lesser extent to "piggyback" on the findings of the sector inquiry. In this way, sector inquiries provide a useful tool for not only the coherent functioning of the Commission but also in facilitating consistency in approach across Europe.

The integrity of the sector inquiry model and its primary purpose as a resource of useful and reliable information will be undermined if it is used for political or lobbying purposes, particularly if the exigencies of the latter are permitted to dominate. Questions may legitimately be raised as to the extent to which such objectives may have an impact upon the conduct of the investigation and the content and presentation of the Commission's findings. While sector inquiries are ostensibly prepared as an objective review, there is obvious unease if they may be conceived as a means of securing specific Commission goals or putting pressure upon stakeholders.

To this end, the robust language adopted to date by the Commission in announcing the results of the inquiries may fuel any fears that the Commission is at risk of prejudging the outcome of any enforcement action.[23] Such concerns are heightened when the subject matter of the sector inquiry strays into cases already under active review by the Commission or national competition authorities. For example, the Commission's findings on payment cards in the retail banking sector inquiry were published while the Commission and national competition authorities have ongoing investigations into the interchange arrangements of four-party card schemes.[24] Although the Commission has indicated that no evidence collected in the framework of the ongoing cases was used for the purposes of the sector inquiry (and vice versa), it was stated that "[e]xperience and knowledge gained by the Commission in these and other cases has enabled more effective scrutiny of specific aspects of the payment card markets."[25]

The Conduct of Sector Inquiries

The decision to undertake a sector inquiry can result in serious consequences. Therefore, checks should be placed on both the decision to launch an inquiry and the way in which it is conducted. Aside from the enormous commitment of resources on all sides, there can be major adverse reputational and other consequences for companies implicated in a sector inquiry, resulting often from the publicity attendant upon the inquiry and its outcome. Indeed, the mere initiation of a sector inquiry is likely to lead to adverse inferences being widely drawn in relation to competitive conduct in the industry. The presentation of the Commission's preliminary and final conclusions during and following an inquiry may also raise questions whether the rights of the defense are sufficiently protected throughout the process.

In conducting a sector inquiry, Regulation 1/2003 provides the Commission with many of the same investigative powers as those available in the investigation of individual cases of alleged breach of Articles 81 or 82. In particular, the Commission may formally require firms to provide all necessary information,[26] it may conduct dawn raids or other inspections of firm premises (but notably not the homes or private vehicles of officers or employees),[27] and take statements.[28] Failure to comply, or the provision of incorrect, incomplete, or misleading information, may lead to fines of up to 1 percent of the firm's total annual sales.[29] There is also an ability to impose a periodic penalty payment of up to 5 percent of a firm's average daily sales to compel compliance with a requirement to supply information or to submit to an inspection.[30]

Despite the burdensome nature and potential adverse impact of sector inquiries upon undertakings, however, there is little formal protection for the firms at the sharp end of the investigation. In particular, none of the safeguards set out in Article 27 of Regulation 1/2003 apply. Thus, there is no formal right for firms to be heard before the Commission reaches its conclusions. There is also no requirement that the Commission only base its findings on objections on which the firms have been able to comment and no right of access to the Commission's file. Again, this may be contrasted with the general obligation under section 169 of the UK Enterprise Act, which formally requires the OFT and the Competition Commission to consult if the relevant decision (including

the decision to refer) "is likely to have a substantial impact on the interests of any person."

It is also helpful by way of contrast, to consider the defense protections available under FTC investigations. The FTC is provided with a variety of powers for use in any matter under investigation, including issuing subpoenas for documents and/or testimonies and civil investigative demands, requiring the filing of written reports and responses to questions. Its compulsory process powers, however, are generally used only when the agency is conducting antitrust enforcement investigations, or wider investigations mandated by Congress. The latter follow a timeframe prescribed by Congress, and the rights of the defense are protected as they would be in the course of an antitrust enforcement investigation.

In conducting own-initiative investigations which do not seek specifically to enforce the antitrust rules, the FTC tends to obtain information using the provisions of Section 6(b) of the FTC Act,[31] rather than compulsory process. As noted above, in certain circumstances the FTC is required to obtain clearance from the Government Accountability Office prior to sending information requests. Once clearance is obtained, and the requests dispatched, a party in receipt of an order under Section 6(b) may file a petition to quash it. The FTC can seek a court order to obtain compliance. Other investigations may be conducted on a less formal basis still, the agencies simply inviting participation by interested parties.

The approach in European sector inquiries also contrast with the measures provided for protection of the fundamental rights of the defense in the context of individual investigations under Articles 81 and 82. The sector inquiry framework is largely unconstrained as to the issues the Commission may address, the conduct of the investigation and the applicable burden, and standard of proof to be applied. In particular, there is no requirement that the Commission must establish its findings on the balance of probabilities or indeed any recognized standard of proof.

While it may be argued that the Commission is indirectly constrained by the need to establish through the investigation whether there may be grounds for follow up action under Articles 81 or 82, this only goes so far. As already noted, the Commission views sector inquiries as also providing findings which may be used as a basis for action stretching beyond antitrust enforcement, to which the parameters relating to Articles 81 and 82 investigations bear little or no relevance.

Moreover, the actual structure applied to the sector inquiry process is not enshrined in legislation. Therefore, there can be no certainty for participants that the inquiry will follow a predictable path. Through the two post-modernization sector inquiries, a two-to-three stage structure for the conduct of the inquiry has emerged lasting for a total period of around eighteen months. Upon launch of the inquiry, stage one commences with the issuing of detailed information requests to stakeholders (firms operating in the sector, suppliers, and customers). Results are assimilated in a Preliminary Report (perhaps preceded by publication of an Issues Paper) which is issued for public consultation (stage two). After the submission of written observations, a public hearing may possibly be held where stakeholders present their views. The third stage involves preparation of the final report including recommendations.

Notably, the Commission is constrained from using information collected by the Commission pursuant to its formal powers for purposes other than that for which it was acquired.[32] This is stated to be subject to the ability of the Commission to provide national competition authorities and national courts with information gathered for the purposes of applying Articles 81 and 82 and in respect of the subject matter for which for it was collected.[33] An interesting question is the extent to which this exception applies to information collected in the context of a sector inquiry. Moreover, to the extent that the sector inquiry reveals specific areas for follow up that may extend beyond its original scope, relevant information will need to be regathered for that purpose.

In addition to the physical transmission of information obtained during an inquiry, thought must be given to knowledge held by the Commission officials involved. As regards the team handling the sector inquiry in Europe, Commissioner Kroes stated that "it is crucial that the team that runs the inquiry should follow it up with individual cases if suspected infringements are uncovered. Hitting the ground running saves substantial re-education time, and the team has an incentive to be practical, not academic and ambitious, not unrealistic."[34] Although the advantages from a regulatory perspective are undeniable, here again a note of caution should be sounded. While it is clearly desirable to avoid unnecessary duplication, it must also be borne in mind that there is a danger that the sector inquiry may have been undertaken with less objectivity and rigor than is required in the handling of individual enforcement actions. There is therefore an inherent risk that the case team will carry over and taint the conduct of any individual case with pre-conceptions and evidence gathered in less disciplined conditions.

Summary

Sector inquiries are a feature of the European antitrust landscape that is likely to continue to grow in prominence. While they were originally designed to act as a "phase one" review for individual action under Article 81 and 82, it seems that the role of sector inquiries is evolving. We must anticipate that the results of the inquiries will be employed more broadly and not only for purposes within the realm of antitrust enforcement.

The significant resources required to conduct an inquiry are likely to act as a constraint upon their initiation, as will the practical concern, from the Commission's perspective, that the conduct of a sector inquiry will put all companies in the relevant industry on notice as to the Commission's competition concerns, and subsequently may make it more difficult to gather relevant information in individual enforce-

ment actions. However, once commenced, at present the Commission enjoys almost free rein in the conduct of the investigation and there is little protection of the rights of defense. If the sector inquiry and its direct impact upon industry participants expands, greater attention must be paid to these areas. In the meantime, one thing is certain—firms that treat sector inquiries lightly will do so at their peril. ■

[1] Council Regulation (EC) No.1/2003, O.J. (L 1) 1.

[2] Prior to 1 May 2004, the Commission had sole competency to grant individual exemptions for agreements which fell within the prohibition on anti-competitive agreements under Article 81 of the EC Treaty but which did not benefit from the safe harbor of a Block Exemption Regulation. Parties were therefore required to notify potentially restrictive agreements to the Commission in the hope of obtaining exemption. The system was administratively burdensome and led to a significant backlog of cases, especially as the EU increased in size. With the introduction of Regulation 1/2003, national competition authorities and national courts in the EU were given the ability to apply the individual exemption conditions contained in Article 81(3) of the EC Treaty, and the cumbersome notification and authorization system was abolished. Parties are now encouraged to engage in a self-assessment of the likely application of the exemption conditions in a manner broadly similar to the self assessment of the rule of reason analysis that parties undertake to assess compliance with U.S. antitrust laws.

[3] Mario Monti, European Competition Commissioner, Remarks Before the 20th International Forum on European Competition Policy, European Competition Policy: Quo Vadis? (Apr. 10, 2003), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/03/195&format=HTML&aged=0&language=EN&guiLanguage=en.

[4] *See, e.g.*, Federal Trade Comm'n, Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases (2006), *available at* http://www.ftc.gov/ftc/oilgas/competn_reports.htm; *see also The Energy Market Competition Task Force, Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy Pursuant to Section 1815 of the Energy Policy Act of 2005 (Apr. 6, 2007)*; U.S. Dep't of Justice & Federal Trade Commission, Competition in the Real Estate Brokerage Industry (2007), *available at* http://www.ftc.gov/bc/realestate/workshop/index.htm.

[5] Article 12 had similar language to Article 17 of Council Regulation (EC) No.1/2003. Although, notably, Article 17 differs from Article 12 in that it expressly provides that the Commission may publish a report on the results of the sector inquiry and invite comments from interested parties.

[6] Neelie Kroes, European Competition Commissioner, SPEECH/07/186, Fact Based Competition Policy—The Contribution of Sector Inquiries to Better Regulation, Priority Setting and Detection, 13th International Conference on Competition and the 14th European Competition Day (Mar. 26, 2007) [hereinafter Fact Based Competition Policy], *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/186&format=HTML&aged=0&language=EN&guiLanguage=en.

[7] The OFT is the primary UK competition authority, charged with investigating and imposing sanctions for breaches of UK and EC competition law. In the case of mergers and market investigations, it is required to consider whether to refer the matter for in-depth review by a separate competition authority, the UK Competition Commission.

[8] Section 131, UK Enterprise Act 2002.

[9] Following a reference under section 131 of the UK Enterprise Act 2002.

[10] European Commission, Communication to the Spring European Council: Working Together for Growth and Jobs, A New Start for the Lisbon Strategy (Feb. 2, 2005), COM (2005) 24, *available at* http://ec.europa.eu/growthandjobs/pdf/COM2005_024_en.pdf.

[11] *Id.*

[12] Neelie Kroes, European Competition Commissioner, SPEECH/07/63, A New European Energy Policy; Reaping the Benefits of Open and Competitive Markets, Energy Conference: E-World Energy & Water (Feb. 5, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/63&format=HTML&aged=1&language=EN&guiLanguage=en.

[13] Interim Report I Payment Cards, Sector Inquiry Under Article 17 Regulation 1/2003 on Retail Banking (Apr. 12, 2006) [hereinafter *Interim Report I Payment Cards*], *available at* http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/financial_services/interim_report_1.pdf.

[14] Press Release, IP/05/716, European Commission, Competition: Commission Opens Sector Inquiry into Gas and Electricity (June 13, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/716&format=HTML&aged=0&language=EN&guiLanguage=en.

[15] Neelie Kroes, European Competition Commissioner, SPEECH/07/4, On Final Report of Energy Sector Competition Inquiry, Press Conference (Jan. 10, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/4&format=HTML&aged=0&language=EN&guiLanguage=en.

[16] Press Release, MEMO 07/61, Competition: Commissioner Kroes Presents Results of Energy Sector Inquiry to Energy Council (Feb. 15, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/61&format=HTML&aged=0&language=EN&guiLanguage=en.

[17] Neelie Kroes, European Competition Commissioner, SPEECH/07/212, More Competition and Greater Energy Security in the Single European Market for Electricity and Gas, High-Level Workshop on Energy Organized by German Presidency (Mar. 30, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/212&format=HTML&aged=0&language=EN&guiLanguage=en.

[18] *Interim Report I Payment Cards*, *supra* note 13.

[19] Kroes, Fact Based Competition Policy, *supra* note 6.

[20] Communication from the Commission, Sector Inquiry Under Article 17 of Regulation 1/2003 on Retail Banking (Final Report) (Jan. 31, 2007), COM(2007) 33 final.

[21] European Commission, MEMO/07/40, Competition: Final Report on Retail Banking Inquiry—Frequently Asked Questions" (Jan. 31, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/40&format=HTML&aged=0&language=EN&guiLanguage=en.

[22] Kroes, Fact Based Competition Policy, *supra* note 6.

[23] See, for example, Competition: Commission Energy Sector Inquiry Confirms Serious Competition Problems, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/26&format=HTML&aged=0&language=EN&guiLanguage=en; Competition; Commission Sector Inquiry Finds Major Competition Barriers in Retail Banking, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/114&format=HTML&aged=0&language=EN&guiLanguage=en.

[24] *See* European Commission Case No. COMP/34.579—Europay (Eurocard-MasterCard); Press Release, OFT, OFT Launches New Mastercard Investigation (Feb. 2, 2006), *available at* http://www.oft.gov.uk/news/press/2006/20-06. The authors' firm, Jones Day, represents MasterCard in these matters.

[25] Press Release, Final Report on Retail Banking Inquiry—Frequently Asked Questions, *supra* note 21.

[26] *See* Regulation 1/2003, *supra* note 1, art. 18.

[27] *See id.* art. 20.

[28] *See id.* art. 19.

[29] *See id.* art. 23.

[30] *See id.* art. 24.

[31] 15 U.S.C. § 46. Section 6(b) empowers the FTC to require the submission of "annual or special reports or answers in writing to specific questions."

[32] *See* Regulation 1/2003, *supra* note 1, art. 28.

[33] *Id.* arts. 12 and 15.

[34] Kroes, Fact Based Competition Policy, *supra* note 6.