

***Market Inquiries and Market Studies:
The view from the Clapham Omnibus****

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1 July 2005

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Introduction

Europe has a fairly well-defined competition policy regime built up around a set of merger control rules, and Articles 81 and 82 of the EC Treaty. The recent modernisation programme has put in place the framework for harmonised application of Articles 81 and 82 across national competition authorities in Europe, and paved the way for a substantial decentralisation of their application from Brussels to the various member states. Most people agree that Articles 81 and 82 are a reasonable basis on which to build a competition regime, and that harmonisation is an impressive achievement.

It is, therefore, extremely interesting that the Competition Directorate at the European Commission (DG Comp) has recently announced that it intends to initiate several “sector studies” (the first of which will be in financial services and energy), investigations which will differ in a number of fundamental ways from Article 81 or 82 investigations. Further, the Office of Fair Trading (OFT) in the UK has pursued a number of “market studies” in recent years which have not in all, or even in most cases, led to action under the Competition Act (which is the legislation that has brought UK law in this area into line with EC law), as has the Irish Competition Authority (which calls them “sector studies”). As if this were not confusing enough, the Competition Commission (CC) in the UK is currently undertaking four “market inquiries”, investigations which are neither “market studies” nor Competition Act or Article 81/82 investigations. Further, many of these were sent to the CC by the OFT as the result of “market studies” that it had undertaken. And, last but not least, these “market inquiries” are not quite the same as the 154 “monopoly inquiries” which the CC and its predecessor body, the Monopolies and Mergers Commission (MMC), carried out over the 50-odd years of their joint history.

The proverbial person on the Clapham Omnibus is entitled to feel just slightly confused by all of this. For a start, it is not clear just how a “market study” might differ from a “sector study”, nor why “market inquiries” replaced “monopoly inquiries”, and whether either (or both) of them really are different from “market studies”. And, even more puzzling, it is not clear why any of this activity ought to occur at all given the existence of Articles 81 and 82: what exactly is the value added here and why are competition authorities bothering with these things?

My goal in what follows is to clamber aboard the Clapham Omnibus and give an upper deck view on these questions. I will start where I am most comfortable, namely with the market inquiries carried out by the CC. I will distinguish them from the “monopoly inquiries” which we previously carried out, and from the “market studies” being undertaken by the OFT, the Irish Competition Authority and the sector studies undertaken by DG Comp in Brussels. I will also address the “why bother?” question, applying it both to “market inquiries” and “market (or sectoral) studies”. Last, but by no means least, I will move on to the much more speculative question of how (if at all) the practice of conducting “market inquiries” is likely to change in the near future.

Monopoly inquiries and market inquiries

The current “market inquiry” regime was put into place in the UK by the Enterprise Act 2002 (which refers to “market investigations” rather than “market inquiries”). These inquiries are designed to focus on “adverse effects on competition” which arise where “features of a market” singly or in combination “prevent, restrict or distort competition”. In the event that the investigation uncovers such problems, the CC is mandated to remedy the adverse effects on competition or any detrimental effect on customers flowing from them. The Act defines “features” of the market as market structure, or the conduct of suppliers, or consumers. It gives the CC extensive powers to collect the information that it needs for its investigations, and powers to implement those remedies which it believes are necessary. These

investigations are time limited (we are allowed up to two years) and the decisions of the CC can be appealed only by way of judicial review. The CC has developed a set of procedures summarised in published guidelines that explain how it conducts these inquiries¹, and it is committed to making such investigations as open and transparent as possible.² Finally, it is worth noting that the CC cannot initiate a market inquiry on its own – it can only act if the OFT or one of the sectoral regulators sends a particular market to it for further investigation.

“Market inquiries” evolved from the “monopoly inquiries” which the CC used to conduct under the Fair Trading Act 1973. The main differences between the two, other than the obvious difference in legal framework, are in our procedures (we are far more open and transparent than we ever were before), and in our powers (monopoly inquiries resulted in recommendations to the Secretary of State, while the Enterprise Act made the CC determinative). The “complex monopoly” provisions of the Fair Trading Act have also disappeared, eliminating the strong distinction between “main parties” (those who are part of the complex monopoly) and “third parties” (those who have an interest in the case, but are not main parties) which used to be a feature of monopoly inquiries. The combined effect of these changes is that market inquiries are more inclusive (it is easier for all parties to participate when the vast bulk of the evidence is published on the web), more efficient (all of the parties know what issues to focus on) and, I believe, shorter (not least because the remedies process follows more quickly and more straightforwardly from the investigation than before) than monopoly investigations were.

Why bother with market inquiries?

There are probably three main reasons why market inquiries are an important complement to the Article 81/82 prohibition system.

First, market inquiries focus at the level of the market rather than at the level of the individual firm and, for this reason, they are often a more sensible way to investigate and attack the underlying causes of particular agreements/practices, or abuses of dominance. Agreements or positions of dominance do not occur in all market settings and they do not occur at random. Rather, they typically rest on features of the market (like economies of scale, network effects, switching costs or barriers to entry) or market imperfections (informational asymmetries, weak or fragmented buyers or suppliers, inappropriate regulation), and it is usually these features of the market which sustain them. Thus, for example, an agreement amongst one or two leading firms in a market to fix prices cannot, in general, be sustained in the absence of barriers to entry, or if suppliers or buyers are active, powerful and well-informed. Clearly, attacking an agreement without, at the same time, attacking the features of the market which sustain it may have little long run effect on the nature of competition in that market. While prohibition systems – like Article 81/82 – try to be tough on the consequences of agreements and practices, market inquiries are designed to identify and, if possible, eliminate the underlying causes of such things.

Second, the Articles 81/82 prohibition system tends to focus on the conduct of particular firms, singly or taken in groups. They call attention to agreements or concerted practices, or they try to identify exclusionary or exploitative practices by firms with significant market

¹http://www.competition-commission.org.uk/rep_pub/rules_and_guide/index.htm

²Largely by publishing the evidence it receives on the web, holding regular hearings with the various parties concerned with the investigation and communicating extensively with the parties, through a series of published documents and unpublished letters. Confidential exchanges remain unpublished when the legitimate business interests of the parties might be harmed.

power or dominant positions. Market inquiries, by contrast, examine markets that do not seem to be working well, and this is worth doing because there are many reasons why markets might not be working well which have little to do with breaching certain prohibitions. Market inquiries, therefore, focus on industry-wide features of a market rather than on particular forms of behaviour and, in doing so, they typically examine a rather broader range of competition matters than an Article 81/82 investigation would. One obvious example of this arises when legislative regulations adversely affect competition in particular markets. Such regulations should be put under the scrutiny of competition authorities and market inquiries are a good way to do this.³

Third and finally, the Article 81/82 prohibition-based system is designed to eliminate particular practices or agreements which have developed in a particular market. By contrast, market inquiries have as their goal the task of ensuring that markets which are not very competitive will be more so in the future than they have been in the past. Of course, to the extent that Article 81/82 cases create deterrence effects, they too can transform the pattern of competition in markets. But, the goal of bringing specific breaches of prohibition or abuses of dominance to an end is a narrow one, and the use of fines (the typical, but not the only, remedy applied in Article 81/82 cases) may or not be enough to eliminate abuses in particular markets or deter firms in other markets from behaving anti-competitively. Market inquiries enable competition authorities to directly address – and act on – those features of a market that inhibit competition.

Market studies and market inquiries

“Market inquiries” differ from “market studies” in a number of ways, most notably in their motivation, the method by which they are undertaken and in their consequences. To appreciate these points, it is worth starting by just describing the practice of market (or sectoral) studies as conducted by three leading competition authorities.

The OFT have conducted market studies for some years and, since the middle of 2002, they have completed 18 such studies. At the time of writing, there are four still ongoing. These market studies are designed to examine a sector which the OFT believes might not be working well for consumers. There is no specific statutory basis for these studies in the Enterprise Act, and, except where the OFT is specifically deciding whether to make a market investigation reference, the OFT has only general information gathering powers to use for Competition Act and Article 81/82 investigations. These studies can result in one of seven outcomes: the market is given a clean bill of health, information is published to help consumers, firms are encouraged to take voluntary action, a consumer code of practice is recommended, recommendations are made to regulators or government, enforcement actions are undertaken (under the Competition Act or Articles 81/82) or a reference is made to the CC (only four of the 18 completed studies have resulted in a CC reference).⁴ The resourcing of such cases is modest as compared to market inquiries undertaken by the CC, and, as I have already noted, the OFT has more limited powers to gather information from parties than the CC. The OFT has no powers to remedy any competition problems that it

³As noted by the Department of Trade and Industry in its White Paper, *A World Class Competition Regime*, July 2001, paragraph 6.37, Cm 5233: “*The government is keen that the Competition Commission should recommend changes to laws and regulations which it judges undermine the effective working of markets during the course of its inquiries. The final decision on how to proceed will be for Ministers who will need to balance competition considerations against other public policy considerations. The Government is committed to making a public response to such recommendations within 90 days.*”

⁴<http://www.of.gov.uk/Business/Market+studies/cases.htm>

encounters in these studies, and must either transform them into Article 81/82 cases or refer them to the CC for a market inquiry if it believes that it has encountered a competition problem that needs to be remedied.

As far as I can tell, much the same applies in Ireland (although there is no option of transforming market studies into a market inquiry in Ireland). The Irish Competition Authority (ICA) is empowered by its Competition Act (2002) to undertake to study “any method or practice of competition ... or any other matter relating to competition”, and it can be requested to carry out such an investigation by the Minister for Enterprise, Trade and Employment. As I understand it, they see their market studies as: tackling state restrictions on competition, looking at situations where little competition exists but no firm is unilaterally misbehaving, and informing the public about competition. To date, the ICA has completed four studies (liquor licensing laws, transport, casual trading and insurance) and has several further under way (the professions and banking).⁵

The newest entrant onto this stage is DG Comp, which has not to date undertaken many market or sector studies.⁶ During the modernisation programme, it was argued that DG Comp should be empowered to launch inquiries into, and take measures in, sectors that it considers are not functioning satisfactorily. Article 17 of the Modernisation Regulation (which largely reproduces Article 12 of Regulation 17) states that “...*the Commission may conduct a general inquiry into ... (a) ...economic sector and in the course thereof may request undertakings in the sector concerned to supply the information necessary for giving effect to the principles formulated in Articles 81 and 82 of the Treaty...*”. In part, the inclusion of power to conduct sector inquiries may reflect a concern that, post-modernisation, DG Comp will no longer get a regular supply of notifications and complaints which, in the past, have given it information on particular market sectors. Further, these sector inquiries are also seen as a stimulant to more focussed measures or studies that might be undertaken at a national level. Finally, these market studies will, it is hoped, contribute to achieving one of the goals of the Lisbon Agenda, namely increasing the competitiveness of firms and sectors in Europe. As I understand it, DG Comp has limited powers to gather information for these studies, has limited resources to devote to particular studies, and such studies must be transformed into Article 81/82 investigations if remedial action is to be undertaken on any competition problems that are uncovered.

Why bother with market studies?

As should be evident, market studies are rather different from market inquiries. They are less well-resourced, and the authorities that conduct them have limited information gathering powers; they also have limited powers to remedy any competition problems they uncover. More fundamentally, there is clearly some tension between these two types of investigation. On the one hand, they are highly complementary. Market inquiries are major operations, as are Article 81/82 investigations, and it would be foolish in the extreme to launch such an operation unless there were at least reasonable grounds for believing that a competition problem actually exists in a particular sector. Market studies are an excellent way of

⁵<http://www.tca.ie/> – ‘section 30 studies’; for information on the criteria used, see <http://www.tca.ie/advocacy-studies.html>. I understand that these are being re-examined with a view to increasing efficiency.

⁶DG Comp has recently conducted studies into sectors such as the liberal professions, but did not make full use of its powers under Article 17 (Article 12 of Regulation 17). In the distant past, the Commission undertook an inquiry into margarine prices (which reported in 1970) and into beer distribution (started in 1965 and resulting in a block exemption in 1984), but both of these studies were focussed on the possible anti-competitive behaviour of specific dominant firms. More recently, inquiries have been made into parts of the telecoms and music sectors; in January 2004, DG Comp began an inquiry into the sale of sports rights to internet companies, and 3G mobile phone service providers.

answering this question. On the other hand, market studies do run the risk of overlapping with Article 81/82 or market inquiries which they can lead to. The limited resourcing and information gathering powers available to those who do market studies often means that follow-on investigations will almost certainly involve at least some duplication. The problem is at its worst when a market study is narrow and focussed on a competition issue which it cannot, in the end, remedy. However, broad based market studies that raise consumer issues not caused by competition problems, or which lead to narrower, more focussed Article 81/82 investigations or market inquiries seem unlikely to create problems of duplication.

That said, market studies are, like market inquiries, complementary to the Article 81/82 regime. They can have a broader focus and take in consumer issues or legislative regulations that inhibit competition, and they can shine the investigative spotlight on sectors where competition is just not working very well and where Articles 81/82 do not seem to offer much bite. They also have the further virtue of building up sector-specific expertise in competition authorities, knowledge that is helpful in other market studies (by providing cross sectoral perspective) and also in merger control. Finally, to decide which sectors are worth market studies, a competition authority must take a broad, cross-economy view of where competition problems might be present. Taking such a strategic view contrasts with the usual complaint driven process that drives many competition inquiries, and it is worth doing to regain some perspective.

It is worth trying to put the relationship between market studies and market inquiries in a nutshell. In merger investigations, we are used to the distinction between “Phase I” and “Phase II”: phase I tries to answer the question “does this merger require further investigation?” and the case goes to Phase II if the answer is “yes”. Yet, despite the easy analogy, I have begun to think that this distinction does not really accurately capture the relation between market studies and market investigations. One might describe market studies as “first phase” investigations. They identify and explore a problem and can, in certain circumstances, remedy it – eg by exposing the adverse effects on competition of particular pieces of legislation, by naming and shaming particular parties or practices or by obtaining voluntary undertakings from the parties. “Second phase” investigations – which can take the form of market inquiries or Article 81/82 investigations – only occur in this regime when competition problems uncovered in a first phase investigation cannot be resolved without access to statutory powers. The transition from Phase I to Phase II in mergers turns on whether further investigation is required; the transition from “first phase” to “second phase” market investigations turns on this, but even more it seems to turn on whether further action is required.

Where are we going with all of this?

What is, I hope, clear from the foregoing is that market inquiries and market studies are two different types of exercise. They have different purposes and lead to different types of decisions and, for at least this reason, they utilise different types of procedures and require different levels of resourcing. The two types of investigations are not substitutes for each other, and they both are complements to the Article 81/82 investigations which are the staple of European anti-trust. Useful as they are, Articles 81 and 82 do have some limitations, and both market studies and market inquiries help to address many of these. For this reason alone, they are likely to be here to stay.

What is less clear is where all of this is going. As the Chairman of an organisation which only does market inquiries, I feel less than qualified to talk about how market studies ought to be conducted, and how they are likely to evolve in the near future. Let me, therefore, close with a few remarks about the future of market inquiries.

There seem to me to be three areas where we at the CC will be focussing our efforts to improve the work we do in market inquiries. First, although we have yet to approach anything like the statutory deadline for the market inquiries that we are currently doing, it does seem to me that we ought to be able to focus our inquiries more quickly than we sometimes do, and reduce the time that they take. In part, this requires improving the simple administrative logistics of communicating with a large number of parties on a regular basis, but it also requires us to begin the process of thinking about the source (if any) and size of competitive harm sooner than we do. There are, of course, limits to the streamlining we can do in very complex cases with large numbers of parties, but we hope to push these limits back whenever possible.

Second, modernisation has brought new challenges. Since the requirement to act consistently with Article 81/82 may have an effect on what we do in market inquiries, and how we do it. We have already begun the process of reviewing our procedures in the light of modernisation. One change that we have introduced is an “emerging thinking” document. It is designed to bridge the gap between our issues letter and the provisional findings, identifying the main sets of concern, the theories of harm that might emerge and the key evidence on which these concerns/theories are based. The “emerging thinking” document is not a “statement of objections”, but it has some purposes in common. It will be interesting to see how it evolves overtime.

Third, we need to spend more time thinking about remedies. This is, for us, a new responsibility, and it turns out that there has been little systematic examination of the appropriateness and effectiveness of different types of remedies in different circumstances. With the power to impose remedies on parties (if necessary) comes the responsibility to act responsibly, and this, in turn, requires one to act with as full an appreciation of the consequences of one’s actions as possible. We have begun to use our investigative and reflective capabilities on ourselves and what we do – after all, one might as well lead with one’s strengths – and I have no doubt that as time goes on, our thinking about and our approach to remedies will evolve, and do so for the better. Watch this space.