

ashurst

Quickguides

The use of sector inquiries in EU competition law



The use of sector inquiries in EU competition law

Quickguide overview

In addition to its powers to sanction specific anti-competitive agreements and behaviour, the European Commission has powers to investigate whole markets which do not appear to be working well for consumers. This guide summarises the EU sector inquiry regime.

Topics covered include:

- The rationale behind EU sector inquiries
- The legislative framework
- Procedure
- Remedies
- The implications for businesses

For further information on any of these areas please speak to one of the contacts listed on the final page of this Quickguide, or your usual Ashurst contact.

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at London Fruit & Wool Exchange, 1 Duval Square, London E1 6PW T: +44 (0)20 7638 1111 F: +44 (0)20 7638 1112 www.ashurst.com.

Ashurst LLP is a limited liability partnership registered in England and Wales under number OC330252 and is part of the Ashurst Group. It is a law firm authorised and regulated by the Solicitors Regulation Authority of England and Wales under number 468653. The term "partner" is used to refer to a member of Ashurst LLP or to an employee or consultant with equivalent standing and qualifications or to an individual with equivalent status in one of Ashurst LLP's affiliates. Further details about Ashurst can be found at www.ashurst.com.

© Ashurst LLP 2022 October 2019

The use of sector inquiries in EU competition law

1. The rationale

EU sector inquiries allow the European Commission to investigate markets where it believes that competition might not be working as well as it should. There may be no wrongdoing by firms in terms of the prohibition-based rules on anti-competitive agreements and abuse of dominance contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), but there may still be adverse effects on competition which give rise to significant consumer detriment. As such, the focus of these inquiries tends to be upon industry-wide practices that appear to be harming competition, rather than the behaviour of a specific firm or firms. That said, the Commission can use sector inquiries to identify whether there are grounds for opening separate investigations under Article 101 and/or 102 TFEU into the conduct of individual market participants.

2. The legislative framework

Article 17 of Regulation 1/2003 provides the Commission with powers to conduct sector inquiries. The Commission is responsible for deciding whether to investigate a market, for the investigation itself and then for reaching conclusions on whether the market is distorted or restricted. The regime provides the Commission with extensive information-gathering powers, including the ability to conduct dawn raids. It does not, however, provide the Commission with powers to adopt measures aimed at remedying the situation under investigation. Nevertheless, it may prompt the Commission to initiate changes to regulation/legislation and, importantly (as noted above), may trigger the launch of investigations of suspected anti-competitive agreements or conduct of individual businesses under Article 101 or 102 TFEU. For example, the Commission's sector inquiries into energy markets (which reported in 2007) and the pharmaceutical sector (which reported in 2009) were followed by the opening of a number of separate investigations into specific alleged instances of anti-competitive agreements or abuse of dominance by individual businesses.

A key purpose of the sector inquiry tool is to allow the Commission to look at markets where competition and often also EU single market integration are weak and to investigate the reasons for this. Such a situation might be suggested by evidence such as limited trade between Member States, lack of new entrants on the market, the rigidity of prices, or other circumstances suggesting that competition may be restricted or distorted within the EU. For example, the 2008 decision to launch an inquiry into the pharmaceutical sector was influenced by the observation of a decline in innovation measured by the number of novel medicines reaching the market, and instances of delayed market entry of generic medicines.

The Commission is able to consider issues ranging from whether different tax or regulatory regimes in the Member States are restricting competition and/or single market integration, to whether structural issues and the conduct of market participants may be having similar effects.

Once the Commission has completed its sector inquiry, it can open antitrust investigations under Article 101 TFEU (prohibition of anti-competitive agreements) or Article 102 TFEU (prohibition of abuse of dominance) to deal with restrictions of competition it has identified relating to the conduct of particular market participants. In respect of other restrictions of competition or barriers to single market integration which cannot be looked at under Article 101 or 102 TFEU, such as different regulatory regimes in the various Member States, the Commission can propose EU legislation to deal with the issues.

3. Procedure

As noted above, EU sector inquiries are investigations that the Commission carries out into whole sectors of the economy (or particular types of agreement across various sectors), as opposed to antitrust investigations which are targeted at the actions of specific businesses. Under Regulation 1/2003, there have been investigations into the following sectors: pharmaceuticals, energy, retail banking, business insurance and the provision of sports content via new media. On 26 March 2015, the Competition Commissioner announced a proposal to launch an inquiry into the e-commerce sector, which will be the first EU sector inquiry since 2008.

The threshold which must be met in order for the Commission to commence a sector inquiry is relatively low: the Commission only requires a "suggestion" that competition may be restricted or distorted. There is generally no public consultation on the decision to launch an inquiry. However, the Commission will normally announce its formal decision to initiate an inquiry, which details why the Commission considers that the inquiry is necessary and the legal basis for the inquiry.

There is no specific legislation governing the procedure to be followed in a Commission sector inquiry. This no doubt partially reflects the fact that the Commission has no power to take any enforcement action on the basis of its findings and thus clear procedural rules and rights of defence are perhaps viewed as less important. Nevertheless, sector inquiries can impose very substantial burdens on businesses in the relevant sectors.

Sector inquiries are typically between 18 months and two years in duration. Article 17 of Regulation 1/2003 makes clear that the Commission is able to use the information-gathering powers which it has for its normal antitrust investigations for the purposes of a sector inquiry.

The first stage in a sector inquiry is typically a fact-finding phase where the Commission sends out questionnaires to market participants and other interested parties across the EU. It is possible, but still exception, for a sector inquiry to begin with unannounced inspections (dawn raids). This occurred at the outset of the pharmaceutical inquiry. Subsequently, requests for information were sent out to the companies. The Commission may request information by issuing a formal decision ordering the addressee to provide certain information or, more commonly, by issuing an informal request. The information demanded by the Commission usually relates to matters such as costs, prices, profitability, customers, barriers to entry and exit, production methods, sales methods and specific regulatory or other legal issues. The level of detail requested may be less than that demanded by national competition authorities under similar investigation procedures, reflecting the fact that the Commission will have to deal with responses from a large number of market participants and other interested parties across the 28 EU Member States.

There is no mandatory obligation to respond to an informal request for information, but in practice it is usually advisable to engage with the Commission and provide the information it has asked for. If a company does not reply voluntarily to questions put to it, the Commission may take a formal decision ordering the requested information to be provided. Failure to comply with that decision (including the supply of incorrect, incomplete or misleading information, or failure to respond within the required time limit) may incur penalties of up to 1 per cent of aggregate worldwide group turnover, even if the failure to comply was merely negligent and not intentional.

In addition to being able to request information from undertakings or associations of undertakings, the Commission can also:

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

During the course of an inquiry, a preliminary or interim report is typically produced, which sets out the Commission's preliminary findings. The timescale between opening an inquiry and producing a preliminary report varies. In previous sector inquiries, preliminary reports have been published after eight to 12 months. In the most recent sector inquiries, the Commission invited interested parties to a one-day public session of hearings/debate on the findings of the preliminary report. Parties are also able to submit further comments in writing. The Commission rarely holds private oral hearings with individual parties (in contrast to the approach adopted by some national competition authorities in similar procedures, for example market investigations in the UK).

After a further period (which may include more fact-finding), the conclusions of the sector inquiry will be published in a final report and interested parties are invited to submit their comments. There is typically little communication from the Commission during the course of the investigation.

4. Remedies

The Commission has no power to adopt measures aimed at remedying a situation under investigation in a sector inquiry. However, the information gathered can be used by the Commission to assess whether it should open specific investigations into practices which may infringe the prohibitions on anti-competitive agreements and abuse of a dominant position (Articles 101 and 102 TFEU). As noted above, both during and after the Commission's energy sector inquiry, the Commission used its understanding of market failings gained during the inquiry to commence a number of investigations under Articles 101 and 102 TFEU. These investigations have led to significant remedies in a number of cases, including the divestment of infrastructure and the imposition of large fines for market partitioning. Sector inquiries can also inform and guide proposals for legislation, and in the context of the energy sector inquiry, the Commission also noted that this allowed it to take an active role in the subsequent debate on unbundling in the third energy package and created political momentum for increased competition enforcement and efficient remedies.

5. Implications for business

Firms should be aware that EU sector inquiries require a significant level of input from relevant firms in terms of market and financial data and other analysis. Significant management and other resources normally need to be deployed merely to respond to the questions being put. Given the potentially far-reaching consequences of such investigations, it is normally worthwhile devoting sufficient internal resources to ensure that the legal team is appropriately supported, both in terms of gathering the necessary information and formulating the firm's position on the issues being considered. Both legal and economic expertise are normally required and should be involved from an early stage in order to present the firm's position in the best possible light and protect its commercial interests.

Ashurst Quickguides

Ashurst's Quickguides are a mini-library of short legal summaries on a range of key issues relevant to businesses. For a full list of current titles and the most up-to-date versions, please visit our Quickguide hub (<https://www.ashurst.com/en/news-and-insights/hubs/quickguides/>).

If you would like further information on this guide, please speak to your usual contact at Ashurst or one of our contacts listed below.



Gabriele Accardo
Counsel
Milan
+39 02 85423430
gabriele.accardo@ashurst.com



Irene Antypas
Counsel
Brussels
+32 2 641 9966
irene.antypas@ashurst.com



Rafael Baena
Partner
Madrid
+34 91 364 9895
rafael.baena@ashurst.com



Euan Burrows
Partner
London/Dublin
+44 20 7859 2919
euan.burrows@ashurst.com



Neil Cuninghame
Partner
London/Dublin
+44 20 7859 1147
neil.cuninghame@ashurst.com



Gil Even-Shoshan
Counsel
Brussels
+32 2 626 1907
ges@ashurst.com



Denis Fosselard
Partner
Brussels
+32 2 641 9976
denis.fosselard@ashurst.com



Maria Held
Counsel
Munich
+49 89 24 44 21 176
maria.held@ashurst.com



Michael Holzhäuser
Partner
Frankfurt
+49 69 97 11 28 50
michael.holzaeuser@ashurst.com



Christophe Lemaire
Partner
Paris
+33 1 53 53 54 62
christophe.lemaire@ashurst.com



Duncan Liddell
Partner
London/Dublin
+44 20 7859 1648
duncan.liddell@ashurst.com



Edward McNeill
Counsel
London/Dublin
+44 20 7859 2843
edward.mcneill@ashurst.com



Nigel Parr
Partner
London/Dublin
+44 20 7859 1763
nigel.parr@ashurst.com



Donald Slater
Partner
Brussels
+32 2 626 1916
donald.slater@ashurst.com



Javier Torrecilla
Counsel
Madrid
+34 91 364 9839
javier.torrecilla@ashurst.com



Steven Vaz
Partner
London/Dublin
+44 20 7859 2350
steven.vaz@ashurst.com



Annick Vroninks
Partner
Brussels
+32 2 641 9971
annick.vroninks@ashurst.com



Denis Waelbroeck
Partner
Brussels
+32 2 641 9963
denis.waelbroeck@ashurst.com



ashurst

www.ashurst.com