The move by the European Commission in June last year to launch a general inquiry into business insurance and reinsurance in Europe has clearly highlighted that the Commission has antitrust concerns regarding current practices. These concerns are understood to be based on the Commission’s preliminary view that measures to set standard policy conditions on a joint basis may be depriving customers of real choice. They have been compounded by the various types of co-operative arrangements which are common to the industry and in particular co-insurance.

As a result, a series of sweeping questionnaires have been addressed to companies and industry associations. While the recipients of those questionnaires were under no legal obligation to reply – a fact which may not have been appreciated by all - most appear to have concluded that it made sense to do so. This reflects the fact that refusal to co-operate would not only have carried with it the danger of creating a poor impression within the Commission, but also might have resulted in a decision requiring compliance.

As the next step, the Commission case team will analyse the responses received to draw up preliminary conclusions regarding the state of competition in the sector. This is likely to be followed by a further round of questionnaires as Commission officials begin drilling down into those issues of most concern. During this process there will remain many opportunities other than the questionnaire process itself to influence the thinking of the inquiry. These include the substantial scope which exists to lobby both the Commission and those others, such as national governments and the European Parliament, which have input into the process.

No special treatment

Either way, it is probably fair to say that the launch of the current inquiry has brought with it for many the first real realisation that the insurance industry is subject to European competition law, so dispelling previous assumptions that due to its complexity commercial insurance was accorded special treatment under the competition rules.

Nor, to be fair, have such assumptions necessarily been misplaced. For instance, there has for some time been a special regulation giving a ‘block exemption’ (or effectively a form of safe harbour) for agreements in the insurance industry. While the scope of this exemption was narrowed when it was renewed by regulation in 2003, the Commission is still prepared to allow information exchanges between insurers for the purposes of quantifying risk. It also allows insurers to draw up standard policy terms and conditions providing there is no compulsion to use those standard forms. However, the Commission has made it explicit that any agreement on actual policy conditions or premiums is prohibited.

But whatever the position in the past, there is no doubt that Europe is now seeing an increasingly vigorous application of competition law in relation to the insurance and reinsurance sector both by the Commission and in the Courts. This in part appears to be fuelled by growing scepticism over whether many of the industry’s traditional practices are either necessary or are in the interests of the consumer. Just as with recent developments in the US, the age old defense of “this is the way we have always done business” is looking increasingly vulnerable.

In this context, the 30 July 2006 ruling by the European Court of Justice in the Manfredi case must be seen as a judgment of potentially major importance for the sector.

At the heart of that case was a finding by the Italian Competition Authority that insurance companies Lloyd Adriatico Assicurazioni, Fondiaria and Assitalia had agreed to exchange detailed information which enabled them to fix civil liability motor insurance premiums at levels which the Italian authority believed to be significantly – i.e. at least some 20 percent – higher than they should have been. The information exchanged included details of prices, discounts, receipts, costs of claims and other expenses.

The European Court ruled that any individuals who could show they had been harmed by having to pay those higher premiums could sue for damages, including recovery of loss of profit or interest, and that national laws must be formulated to make such claims possible.

Civil claims

As such, this case reinforces the potential for companies which engage in restrictive practices in the insurance sector to not only be exposed to possible fines from the European Commission, but also be open to a large number of civil claims.

This risk is likely to be even more extreme in jurisdictions which provide for representative, or even class, actions – a move which is being considered by a number of EU member states. Indeed, it is not hard to imagine a time in the not too distant future when every press report or rumour of an infringement of the competition rules could be followed by lawyers filing speculative claims on behalf of large numbers of unidentified plaintiffs.

The enhanced risk in terms of competition law related issues has also been seen in other areas of the insurance industry. For instance, in March last year the leading providers of airline insurance agreed to reform their practices in return for the European Commission agreeing to close its file on an investigation into the sector’s practices post-9/11.

That investigation was triggered by allegations that the Lloyd’s Market Association and the International Underwriting Association of London had reached an agreement to restrict the level of terrorism cover available in response to the perceived increase in risk. One of the reforms was that in the future, standard wording for aviation insurance policies and clauses, which had previously been entrusted solely to committees
of insurers, would be made open to input from customers. Critically, what that situation underlined was that even if good reasons existed for their actions, insurers had to take a pragmatic view regarding the potential positives and negatives of defending themselves against the European Commission – and in doing so risking an adverse decision – or of making certain changes in order to reach a settlement.

The benefits of reaching this settlement were substantial. Theoretically, any customer that felt he had suffered would still have been able to pursue a case in the national courts for damages along the lines of the subsequent Manfredi case. However, with the Commission having closed its file without making any formal finding of infringement, the burden of proof on potential plaintiffs (and therefore the associated risks and costs of litigation) remained much higher.

**Domestic scrutiny**

Separately, the developing antitrust challenges facing insurers in Europe are also being further fuelled by an increased level of scrutiny by national competition regulators. Recent examples include Italy’s investigations regarding motor insurance and the UK inquiry into payment protection insurance. Such situations can throw up their own very specific problems because national regulators, while in principle applying similar competition laws, understandably have different priorities.

Further adding to the seriousness of the shift in the antitrust climate for insurers and reinsurers, is the fact that the increasing focus on such issues has been matched by a dramatic increase over the years in the incentives to stay on the right side of the such laws. First, the European Commission has not only levied very high fines on companies found to have infringed the rules, but also has recently indicated its intention to increase those fines in future. Given the maximum limit for such fines is 10 percent of the total annual turnover of the entire corporate group in question, this is not an insignificant factor.

A second strong incentive is provided by the fact that an adverse ruling from the Commission could mean that insurance agreements needed to be terminated or renegotiated.

Third, not only are we are seeing an increase in the number of civil lawsuits brought in Europe but also, as underlined by the Manfredi ruling, it is now clear that customers and third parties would have a claim for damages.

Finally, as if the risk of European Commission action were not enough, national competition authorities are flexing their muscles and some of them have criminal as well as civil powers. Indeed, it is generally accepted that it cannot be too long now before an executive finds him or herself facing a prison term for engaging in anti-competitive practices in Europe.

So, while nobody is suggesting that any of these consequences will flow directly from the European Commission’s ongoing investigation of business insurance and reinsurance, there is no doubt those in the sector are going to need to pay more attention to antitrust issues. The complexity of these issues – and the consequences of getting them wrong – also means a good, clear compliance policy would be a prudent investment, especially given the increased risk of criminal penalties for company officers.