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# **Promissories and pharmaceutical patents: Agencing markets through narratives<sup>1</sup>**

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Special Issue on Agencing Markets**

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## **RESEARCH ARTICLE**

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## **Abstract**

We investigate a body of data emanating from the 2008/9 EU Pharmaceutical Sector Inquiry, interpreting the collection of submissions to it as a concerted attempt at market innovation that becomes fraught with challenge and contest. In the pharmaceutical market, interests associated with patient concerns, government budgets, global "Big Pharma", and local "small pharma" coalesce and compete with patent law, technological innovation and drug lifecycles. Our research question is: What role do market narratives play in shaping the market's sociotechnical *agencements*? By introducing market narratives, we focus on the performative effects of temporality and iteration. Our argument is that by acting as (contested) promissories, market narratives contribute to "agencing" a market, such that actors are engaged continually in juxtaposing and adjusting their representations of it and putting in place those sociotechnical agencements that make the markets resemble those narratives. Narrating a market becomes a collective and iterative task of equipping actors to shape the markets that they desire.

**Key words:** market agencement, performativity, promissory, market representations, narrative, Sector Inquiry, pharmaceutical industry, market studies

## Introduction

*"It is very important that pharmaceutical markets function properly. Europe's citizens, including all of us here today, need access to safe, innovative and affordable medicines."* Neelie Kroes, European Commissioner for Competition Policy, at the presentation of the preliminary findings of the Pharmaceutical Sector Inquiry in Brussels, 28 November 2008

Previous research in market studies has demonstrated that markets are not stable back-cloths of market actors' activities, but that markets and market activities stand in a reciprocal relationship: Markets allow, encourage, or hinder market actors' activities at the same time as these activities shape the markets in which they take place (e.g. Slater 2002; Callon and Muniesa 2005; Kjellberg and Helgesson 2006; Çalışkan and Callon 2010). Market studies research has also pointed to a reciprocal relationship between market representations and market activities (Kjellberg and Helgesson 2006), but has arguably failed to explore this link in greater detail. In this paper, we investigate the role of the regulator, via the mechanism of a European Sector Inquiry, in shaping or, more specifically, innovating a market, defined here as "disrupting how actors carry out their market activities." We ask the question: What role do market representations, such as the competing narratives emerging from these Inquiries, play in innovating and shaping a market's sociotechnical *agencements*?

We seek answers to this question by tracing how, through the means of public narratives, market actors attempt to defend, draw attention to, distract

from, condemn, or implicate others in certain market practices. The purpose of such narratives, of course, is to represent market practices and the market to which they relate in a manner most advantageous to the narrating actor. But, as Kjellberg and Helgesson (2006) have highlighted, representing market practices is first and foremost a means of shaping these practices, and this emerges clearly in narratives.

A critical feature of narratives is that they are "promissory" in that they mobilize future states, invoking these descriptions in current disputes to support some practices and discredit others. Narratives also depict past happenings as events, interpreting these as being either favorable or unfavorable to how a market is shaped at present. We assert that narratives, supporting narratives, and counter-narratives about market practices act twofold: One, by claiming stakes in a market with a view to justifying and solidifying existing practices or proposing new ones; two, by bringing into being the market as narrated through creating what Butler (2010, 147) calls "socially binding consequences". In turn, these consequences shape the market's sociotechnical *agencements*, which we define, with Cochoy (2014), as textual and material assemblage with the power of agency. In keeping with this idea, we define market narratives as emplotted market representations that participate in mobilizing a market's future socio-technical *agencements*. Moving conceptual discussions in market studies beyond market representations, our paper sees market narratives as promissories that invoke and enable future markets and thus as powerful tools in innovating

markets, or indeed, in defending markets and their practices against others' innovative plans.

As our opening vignette indicates, the market in question is the pharmaceutical market. At the risk of simplifying what are highly complex issues, this market is caught between two broad discourses in the economics of innovation (eg, Nelson and Winter, 1982): The first discourse revolves around enhancing welfare through firms' research and development (R&D) activities and novel medicines being made available through market entry, imitation and price competition, so becoming affordable. The second discourse is one of firms' R&D activities being subject to the incentives of expected monopolistic rents, supported by patents that protect intellectual property from imitation for a period of time. Davis and Abraham (2013) explain that pharmaceutical regulation is aimed primarily at reconciling these two discourses by balancing the pharmaceutical producers' commercial and monopolistic interests with the welfare and health interests of consumers and society. Simply put, the regulator has to ask "if I give a pharmaceutical firm monopolistic protection through a drug patent now, how certain is it that the firm will reinvest these monopolistic rents into more socially beneficial R&D activities? And how can competition be encouraged to help make this drug affordable and accessible in the long run?" In doing so, regulation has to anticipate the future effects of current socio-technical *agencements*.

Davis and Abraham see pharmaceutical innovation as the quintessential "promissory science", "mak[ing] promissory claims about the social/health value

of the new technology/drug, which create powerful expectations about (and hence demands for) that technology within wider society, including patients” (ibid., p. 14). Finch and Geiger (2011) investigate the material bases of market innovations in the pharmaceutical industry, demonstrating the pressures in this particular industry to continually destabilize its own markets. Thus, fundamentally, the industry’s economic, technological, and societal *raisons d’être* point toward the future; a future beset by uncertainties, but nonetheless a future that market actors have to anticipate and agree on in the present in order to make it happen.

As promissories, the two discourses on pharmaceutical innovation come to the fore in the narratives that market actors deploy. They emerge over the questions of, for instance, “how much regulation,” “how much patent protection,” and “what is “good” innovation.” As we examine in this paper, the ways in which actors work out answers to these questions shape the socio-technical *agencements* put in place in the pharmaceutical market.

Our study is based on the document trail from the European Commission’s recent attempts to introduce innovation among the market practices of originator pharmaceutical companies – those companies which are R&D intensive – in relation to the “lifecycle management” of their drugs. The EU Commission did so by way of a Sector Inquiry into suspected anti-competitive practices in the pharmaceutical industry. The aim of the Sector Inquiry was to ascertain whether there existed any evidence of systematic practices of delaying market entry of generic pharmaceuticals through agreements between competitors. The European Commission suspected that if such agreements existed, they would

deter innovation in the pharmaceutical industry and cause substantial costs to tax payers by extending the breadth and duration of the patent protection awarded to producers.

In the remainder of this paper, we will investigate, through the examples of the controversy emanating from this Inquiry's texts, what role market narratives play in agencing markets. Our conceptual approach draws from theories of performativity and markets as sociotechnical *agencements*, as developed by Callon and others, as well as from the sociology of expectations (Brown and Michael 2003). We use this conceptual background to analyze the body of documents available regarding the Sector Inquiry in order to assess how narratives shape a market and its practices. We analyze narratives that support and that contradict the EU's suspicion that producers had developed practices in the pharmaceutical market to exploit patent law by utilizing a "patent management toolkit." We compare and contrast the narratives of the Preliminary Report (November 2008) and those emerging from the submissions to the subsequent Consultation Period of two months with the narrative emerging from the Final Report six months later. The former two are broadly representative of the rival discourses on welfare in the industry, of welfare derived by means of entry and price competition in market, and of welfare derived from producers investing in research and development, reflecting the incentives for securing rents under patent. We conclude the paper by considering the role of market narratives as promissories.



## **Narratives and their worlds**

Narratives play a central role in our understanding of how humans apprehend and attempt to shape the socio-material world. Scholars working in fields as diverse as sociology, anthropology, management, literary studies, and economic history have highlighted the role of discourse, narration, and story-telling in creating what we know as "the economic" (e.g. Beckert 2013; Khaire and Wadhvani 2010; Maurer 2006; Czarniawska 1998; 2004; McCloskey 1998). This body of research indicates that in economic and organizational life, narratives are ubiquitous. Narratives and texts are also translocational: they have the capacity to travel, be it in written or oral form. Moreover, narratives and texts are networks of their own, referring to others through what literary theorists call intertextuality (e.g. Keenoy and Oswick 2004).

While often used interchangeably, there is a certain hierarchical relationship among texts, narratives, and discourses. For the present purpose, we take texts to be carefully constructed material representations that can, either individually or with reference to other texts, build narratives and represent relatively coherent choices of who, where, when, what, why, and how. These choices often have consequences far beyond the texts themselves. Cooren (2004), for instance, examines what mundane texts in organizations "do," and concludes that "texts are not foundational; however, they participate, like other agents, in the daily production of organizational life" (p. 374). Narratives provide a temporal sequence and unfold in a plot; they are connected to modes of knowing and communicating and to positioning actors and actions in social life

generally (Czarniawska 2004). Texts and narratives in turn contribute to discourses, or ways of understanding and explaining the world, including "ruling in" and "ruling out" certain ways of talking about a topic or object and of conducting oneself in relation to the topic or object (Grant and Hardy 2003). Discourse is often associated with institutionalization (Philips, Lawrence and Hardy 2004) and coalition building (Jones and McBeth 2010). Narratives, discourses, texts, and their inter-textual connections thus participate in the shaping of social practices, institutions and activities (Potter 1996; Czarniawska 2004).

### *Narratives and Performativity*

Pursuing narratives further, we can assess their performative role in enacting markets. Callon (1998) draws upon performativity in arguing that scientific theories and models are implicated in making and shaping markets out of "possible worlds" (Callon 2010). Callon (2002) reflects that performativity first referred to language, or more precisely to Austin's (1962) treatise on "How to Do Things with Words", before entering the vocabulary of Actor-Network Theory. This reminds us that market discourses or narratives are rarely constative, or descriptive of a reality 'out there'. Instead, they work in and on the market realities that they describe: "The discourse of economics contributes to establishing the reality that it analyses and explains" (Callon 2010, p. 168).

Drawing on the Austinian tradition of performativity, Butler (2010) emphasizes the role of perlocutionary performativity in economic life, where

discourses draw their power from being spread and repeated – what she refers to as iteration and citation. However, this necessity for repetition also introduces space for reflexivity and change (Butler 1999). For Butler, “performativity never fully achieves its effect, and so in this sense ‘fails’ all the time; its failure is what necessitates its *reiterative* temporality, and we cannot think iterability without failure” (2010. p. 153, original emphasis). Thus, and of direct relevance to this paper, statements gain power through iteration, but iteration also makes them ‘brokering failure’, which in turn creates space for political debate. As Callon (2010) highlights, Butler’s observation points to the plurality of theoretical frameworks accounting for aspects of market functioning and to the fact that any performance produces overflows, or, in Austin’s words, “misfires”. These misfires give rise to what Callon (2007, 2010) calls “performance struggles,” where the constitution of markets is “constantly tested, criticised, debated, reconstructed and consequently subjected to endless redefinitions and reconfigurations” (Callon 2010, p. 165) when narrated. Thus both Callon and Butler question strongly whether there can ever be a definitive “master narrative”.

Following research into performativity, we can expect market representations and narratives to be deployed as part of the normal contests over shaping economic practices, and we find some evidence of this in the research of the fields of market studies and organization studies. Broadly, extant research addressing this issue falls into two categories: studies proximate to the sociology of expectations stream, examining how actors use stories to create a market; and those that examine how market representations are used to justify

past market behaviors or actions. The temporality that is so crucial in market narratives' performative power emerges predominantly in the first category of studies, where markets' future effects are debated.

Beckert, (2013) for instance, has highlighted how stories told in the present about the future are creative in paving the way for this future to become possible. For Beckert, (2013, p. 222) economic actors often cope with uncertainty through fictionality, or "present imaginaries of future situations that provide orientation in decision-making despite the uncertainty inherent in the situation." Fictions can be made to become self-fulfilling prophecies, but this requires considerable concerted investments in the specified futures. Miller and O'Leary (2007) show this in the example of Moore's Law in the semi-conductors industry, in concert with the planning technique of technology road mapping. Doganova and Equiem-Reynault (2009) see business plans as an important tool in narrating a bright future for a start-up enterprise, to be achieved by securing investment. Likewise, Simakova and Neyland (2008) observe the creation and narration of "tellable stories" – "a story which narrates boundaries, relations, agency and identities for entities" (ibid., p. 96) - about a new product in order to develop both a material and imagined world into which that product can be launched. The stories refer to some point of ending, of settling, or of actors being able to halt and also step away from the narrative as an envisaged setting in the future. But this end point is another instance of contest. Pollock and Williams (2010, p. 528) observe a "competition between expectations" in organizing the promissory among industry analysts, where the most successful account is the one that

succeeds in helping to convincingly narrate and then create that “new world” (p. 542).

Market representations can help enact futures, but when directed towards solidifying practices they can also be used to contest change, innovation, or disruption. Future- and past-directed narratives thus often work in tandem. Working from an institutional perspective, Suddaby and Greenwood (2005) observed the discursive struggle between proponents and opponents of a new organizational form (multidisciplinary partnerships between law and accounting firms). In their case, market representations are used to defend the institutional status quo and thus thwart a particular new future. Simultaneously, the justificatory and legitimizing roles of representations emerge often in locations where collective sensemaking of past or present market practices acts as signposts for future collective action. Examples include accounts of tribunals or inquests (e.g. Brown 2004) and media controversies (e.g. Patriotta, Gond and Schultz 2011). Kjellberg (2010), for instance, recounts the struggles over a ten-year period in market representations of airline markets, both for those with or without frequent flyer points, between the Swedish airline SAS and the Swedish Competition Authority. He sees these representational struggles as part of a normalizing process that not only works by justifying extant practices, but that also shapes future exchange practices. Patriotta et al. (2011) take up Boltanski and Thévenot's (2006) notion of orders of worth in their analysis of media discourses in the wake of a nuclear accident and trace the discursive resources actors mobilized during that time. Boltanski and Thévenot's framework of orders

of worth is closely related to the interest of the current paper, as they see these orders unfolding in the public domain predominantly through discourse. Orders of worth in this sense are publicly available "political grammars" (ibid.), often with material consequences.

To summarize, extant literature across the sociology of expectations, market studies, and institutional theory has regarded stories, rhetorics, representations, and fictions as playing an important role in shaping markets. Extending these arguments, and combining them with Butler's focus on iteration and citation in performativity, we anticipate that narratives as deployed in markets take part in "performance struggles" (Callon 2007) in two ways: First, through organizing the passage from one state of affairs to another, they build temporality and causality into the realities they describe, which Czarniawska (2004) calls "emplotment." Second, by weaving a material network of intertextuality, narratives allow for coalition building and claiming stakes, mediating between individual and collective market action, between the economic and the political, and ultimately between futures enacted and futures unfulfilled. It is this aspect of market narratives that we describe in more detail next.

### *Power, performance struggles and market narratives*

Market representations come into being when actors parse, make and offer sense of, or otherwise frame the 'soup' of economic practices – Callon (2009, p. 20) has referred to this as "explicitation." However, as we have been arguing above, market representations are much more than sensemaking

devices. In order to become "successful" (that is, representational), a statement requires investments in the market's materialities: "To make a formula or auction system work, one has to have tools, equipment, metrological systems, procedures, and so on." (Callon 2007, p. 333). In turn, the formula or auction system rests on a certain way of thinking about the economic and, crucially, of mobilizing its effects, for instance in the context of "fair and efficient markets" (Muniesa 2003). By extension, struggles over how to narrate a market do not only happen discursively; the possible worlds that the different narratives evoke will be subjected to "trials of strength" that are often material in nature. As part of a socio-technical *agencement*, a narrative can literally and materially succeed or fail. Thus, narratives go far beyond a representational idiom. Narrating a market goes hand in hand with efforts to equip that market to correspond to the narrated world.

If narrative practices are involved in performance struggles, they necessarily position their authors in relation to power and authority. Brown (2004) notes, with reference to Michel Foucault's body of work, that master, or what he calls authoritative, narratives can be used to silence alternatives. However, authoritative narratives are not likely to emerge ready-made. More likely there will be a certain amount of public jostling and recruitment among rival narratives. Discursively, the emphasis in the struggle is enrolment among texts, seen as a particular pattern of intertextuality. A contemporary example of narratives jostling for authority can be seen in the network of tweets and retweets that often emerges around public controversies (e.g. Poell and Bora 2012). This is not to

deny epistemic challenges, which can undermine the authority of a particular text or cluster of texts, but we expect these too to be mediated intertextually.

More broadly, the struggle is between entire sociotechnical *agencements*, where narrating a market means qualifying its objects and actors' behaviours, thus enabling collective (future) action – or what Pollock and Williams (2010, p. 543) call "world-building activity." Maguire's (2004) study of the substitution of DDT shows such a co-construction of discourse and object through discursive struggles and actor enrolment over time in four related areas: artifact-making, fact-making, opinion-making and rule-making. In relation to the latter, it is worth noting that the role of the law and of national or international regulators in crafting authoritative narratives about and enrolling actors to perform in these markets is a particularly interesting though neglected subject of market studies (Christophers 2013).

In summary, the point of departure of our current study is in exploring the struggles involved in producing an authoritative narrative of a market and that struggle's consequences on the market's sociotechnical *agencements*. To do so, we trace the assemblage of an authoritative narrative from its initial drafts through the various supporting or counter-narratives produced for it to its mature form and finally to its performative effects. As illustrated in Figure 1, we focus on temporality and recruitment in relation to the narratives presented. We assess how these narratives describe and contest past and present market practices, and project and thereby enroll actors into future market practices. The future becomes a vital reference point, referring to ideas of how that future can be a



settled one with knowable characteristics, allowing others to tie those descriptions of futures to present understandings of past activities.

(INSERT FIGURE 1 ABOUT HERE)

## **Examining market narratives**

The analyzed body of talk and texts emanates from the EU Pharmaceutical Industry Sector Inquiry, which was launched by the Directorate General Competition (DG Comp) on 16 January 2008 (the chronology of events is graphically presented in Figure 2 below). Unusually, the Sector Inquiry commenced with unannounced inspections:

*‘A series of unannounced inspections started immediately after the Commission decision, at 3pm, at the premises of a number of both innovative and generic pharmaceutical companies operating in Europe. The raids were co-ordinated with the competition authorities of those member states where the inspections took place’.*

<http://www.euractiv.com/en/competition/big-pharma-groups-raided-eu-antitrust-probe/article-169598>, January 16 2008<sup>1</sup>

On 28 November that same year, after some ten months of investigations, DG Comp published a Preliminary Report and thus opened up the Inquiry to a statutory two-month period of Public Consultation, during which interested parties and members of the general public had an opportunity to respond to the Preliminary Report. By the time this Public Consultation period closed on 31 January 2009, 74 contributions had been received by five broadly distinguishable

groups of organisations or individuals (as laid out in Table 1 below). The Final Report was published by DG Comp on 8 July 2009. The Preliminary and the Final Reports, all comments to the Preliminary Report, DG Comp press releases, fact sheets, the speeches during the launch of the Preliminary Report as well as a number of follow-up monitoring reports are publicly available at

<http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html> (last accessed on 23 January 2015). These 96 texts, ranging in size from a few pages to over 500, formed the main body of analyzed documents for this study. We also analyzed a range of newspaper clips, internet texts, ancillary policy documents, and others as secondary data sources.

(INSERT FIGURE 2 ABOUT HERE)

(INSERT TABLE 1 ABOUT HERE)

Fairclough (1995) argues that discourse should be analysed at three levels: the textual, the discursive (what people do with texts), and the social (how they represent and are used in cultural and institutional contexts). While being mindful of the first and second levels, our analysis below focuses on the third level, that of social practices, with a particular view to the texts' material consequences. We leaned heavily on Potter (1996)'s exploration of how texts appear to produce facts and how these factual descriptions produce action, and on Czarniawska's (2004) "narrating as organizing." Thus, we probed the question of how the texts became involved in, represented and shaped the market in question; that is, how they became part of the market's sociotechnical *agencements*.<sup>2</sup>

We closely read the body of texts several times before sketching emergent individual narratives and examined how the market in question is portrayed in each, following Czarniawska's (2004) notion of "inspired reading." We viewed individual submissions as practical accomplishments as they include "choices... of where to start and where to finish, what to include and what to leave out, what to put next to what, and so on" (Potter 1996, 172), and we first plotted and then compared these choices across submissions. Leaning on Potter's (1996) insights into fact-making in texts, we paid particular attention to the invoking of market actors, the attributions made of market practices to particular actors, stake management, and what Potter calls category entitlement, or how a text builds the credibility of its producer. Rather than assessing the veracity of the statements made in the various texts, we looked for evidence of how the texts were constructed to become "successful", both in fact-making and in using this fact-making to change or stabilize the pharmaceutical market's sociotechnical *agencements*.

Related to this point, we took account of Potter's distinction between texts' epistemological orientation (those elements in a text that work to establish things as factual) and their action orientation (elements that are oriented to some action or range of actions, with an appreciation that action can produce further facts). We also noted what Potter calls "offensive" and "defensive" orientations of discourses, where the former is concerned with undermining alternative descriptions and the latter with resisting such discounting. Finally, we traced intertextuality. As formal responses, all submissions referred directly to the

Preliminary Report by the EU's Directorate General for Competition, but they also spun a much wider "textscape" (Keenoy and Oswick 2004) across regulatory, legal, and scientific realms. This intertextuality, in particular, allowed us to draw connections between the narratives that individual texts emplotted, to use Czarniawska's (2004) phrase, the broader realm of discourse emerging from the web of texts examined, and the market's *agencements*.

## **Analysis**

Sector Inquiries are investigations that the European Commission carries out into sectors of the economy and into types of agreements across various sectors, pursuant of Article 17 of Council Regulation 1/2003. The Commission may decide to start a Sector Inquiry when a market does not seem to be performing as well as it should from an antitrust and competition perspective. As a regulatory means, they are of great interest to market studies researchers because rather than identifying wrongdoings of individual companies, their focus is on analyzing and questioning established market practices common across a number of market actors. Hence, the EU establishes a text in order to both guide the use of a Sector Inquiry as a formal device, and to bestow a particular, though as we shall see below, qualified form of authority to the Inquiry process and reports. The EU Sector Inquiry into anti-competitive practices in the pharmaceutical industry was not the first of its kind; it followed previous Inquiries in the energy, financial services, and telecommunications industries. The aim of the Pharmaceutical Sector Inquiry was to ascertain whether any evidence of a

systematic practice of delaying market entry of generic pharmaceuticals through agreements between competitors could be found. The European Commission suspected that if such agreements existed, they would not only act as a deterrent for innovation in the pharmaceutical industry, but they could also cause substantial additional costs to tax payers by prolonging the period of protection awarded to pharmaceutical companies through patents for medical innovation.<sup>3</sup>

### ***The Narrative of the Preliminary Report***

The Directorate General for Competition (DG Comp) published its Preliminary Report (PR) into anticompetitive practices in the pharmaceutical industry in Europe in November 2008<sup>4</sup>. The Report's foundational justification lay in an observed decline in innovation in the pharmaceutical industry in Europe, as measured by the decline of new chemical entities reaching the market over the past decade. While acknowledging the rights of firms to intellectual property, its main allegation was that companies that created new medicines applied defensive patenting strategies "*primarily aimed at blocking competitors in the development of new medicines,*" which resulted in a decline in innovation "*as evidenced by the decline of new chemical entities reaching the market*" (PR pp. 330-332). From the outset, the inquiry was couched in the rival discourses of market competition and of intellectual property rights and innovation as ways of enhancing consumer welfare:

*"The Commission's action will therefore complement, not challenge, intellectual property law, as both systems share the objectives of fostering*

*innovation, and increasing consumer welfare.*" (Press release on the launch of the Inquiry, IP/08/49)

The substantial findings of the Preliminary Report pointed to market practices where originator companies, which developed and sold new medicines, delayed the market entry of cheaper generics and blocked other originator companies' innovations and thus, potentially, the discovery of new drugs through a "patent management tool kit:" *"Originator companies use a variety of strategies to extend the commercial life of their medicines for as long as possible"* (PR p. 9). Originator companies were also found to have concluded agreements through litigations, in particular concerning the marketing and commercialization of drugs.

The report suggested that originator companies used *"a variety of methods"* with the objective of delaying or blocking market entry of generic companies in order to ensure continued revenue streams for their medicines. The main practices of *"life cycle management strategies"* (PR) identified included:

- Launching multiple patent applications for the same medicine, with filing for up to 1,300 patents EU-wide in relation to a single medicine (so-called patent clusters): *"Patent clusters can lead to uncertainty for generic competitors as to whether and when they can start to develop a generic medicine without infringing one of the many (new) patents, even though patent holders admit internally that some of these patents might not be strong."* (PR p. 10),

- Increasing patent applications for blockbuster medicines throughout the life cycle of a product, and particularly toward the end of the protection period conferred by the first patent,
- Filing “*divisional patent*” applications. Divisional patent applications are instruments allowing the applicant to split an initial (parent) application,
- Initiating disputes and litigation with generic manufacturers (over 700 cases observed in relation to the 219 medicines investigated between 2000 and 2007),
- Concluding patent settlements which constrain the market entry of generic companies, often with accompanying “*value transfer*”, extending to direct payments, from the originator to the generic company,
- Intervening before national authorities when generic companies ask for regulatory approval: “*Originator companies claimed in their interventions that generic products were less safe, less effective and/or of inferior quality.*” (PR p. 12),
- Engaging in extensive sales and marketing campaigns aimed at health care professionals, often with a view to putting in question the safety and efficacy of potential generic competitors: “*... originator companies spent on average 23% of their turnover on marketing and promotion activities for their products. As part of their commercial strategies, originator companies do not simply promote their own medicines to doctors and other healthcare professionals. There are also indications of practices seeking to put into question the quality of generic medicines.*” (PR p. 12),

- Launching second-generation medicines late in the patent period:  
*“Originator companies undertake intensive marketing efforts with the aim of switching a substantial number of the patients to the new medicine prior to market entry of a generic version of the first generation product. If they succeed, the probability that generic companies will be able to gain a significant share of the market decreases significantly. ... Whilst it is generally accepted that innovation is often achieved in incremental steps, patents relating to second generation products are sometimes criticised as weak by other stakeholders who argue that they show only a marginal (if any) improvement or additional benefit to the patients.”* (PR p. 13),
- Influencing the distribution and supply chain channels.

In many instances, the Preliminary Report finds that originator companies engage in several or even all of these practices simultaneously. On average, these practices saw generics enter the market about seven months after the expiry of a compound's main patent, though with considerable variations across Member States and across medicines. If generic entry had taken place without these delays, savings across the EU, according to the Preliminary Report, could have been an estimated € 3 billion over the seven year period studied, reducing expenditure for these medicines by more than 5%. While acknowledging the difficulties and bottlenecks that the EU patent regime and national regulator and payer practices present to pharmaceutical companies, the narrative of the inquiry strongly suggests that the originator companies' market practices under investigation *“contribute to this”* (PR p. 6).<sup>5</sup>



Taken in the round, the narrative of the Preliminary Report is one of a group of market actors – originator companies – using a host of practices allowing each of them to evade competition for their lucrative branded drugs. They are also cast as a group of companies that are purportedly more concerned with protecting on-going revenue streams than with pharmaceutical innovation or any other notion of public good. In the Preliminary Report, this is a master narrative, which fundamentally is a claim of anticompetitive behavior, its adverse consequences for welfare in society, frustrating market entry, and with little trade-off of the monopolists undertaking additional socially-beneficial innovation.

The narrative comprises significant epistemic content, which develops by triangulation in great detail over 430 pages, through the use of graphs, statistics, case vignettes (often acting as mini-narratives within the narrative), direct quotes from originator companies' internal briefings, emails and strategy documents, as well as interview sources in originator and generic companies. The Preliminary Report is careful not to single out any individual originator company; even the vignettes do not feature identifiers. This is part of the conditions of use established by the EU for Sector Inquires. The market practices described are those of a group of companies, not of individual firms. Likewise, generic companies, described in the Report as often smaller and regional players, were broadly cast as victims of these market practices<sup>6</sup>. The main victims, however, are identified as consumers, who are said to be missing out on or having delayed access to innovative and affordable drugs, and of course the national payers of

pharmaceuticals, who have to contend with substantial financial losses calculated in terms of delays in generic market entry:

*The combined use of life cycle instruments may increase the likelihood of delays to generic entry; delays due to the use of several instruments may sometimes be cumulative. More generally, it may significantly increase legal uncertainty to the detriment of generic entry and can cost public health budgets and ultimately consumers significant amounts of money. (PR, p. 13)*

### **Counter- and Supporting Narratives**

In keeping with Commission protocol, a consultation period of two months followed the Preliminary Report, during which over 70 interested parties - including consumer associations, national regulators, originator companies, generic companies, insurance associations, and others - voiced their perspectives on the issues raised (see Table 1). All of the submissions claimed to be based on the same epistemic premises as the Preliminary Report: that innovation is vital for European Citizens' welfare and can only be achieved through constant innovative activity protected by strong patent law. Yet, in some of these contributions, very different narratives of pharmaceutical market practices in general, and of the question of whose activities are blocking innovation in the pharmaceutical market, emerged. What is more, potential consequences of interfering with existing practices are also conjured up in many

of these counter-narratives. As an example, one major European pharmaceutical company asserted:

“The Preliminary Report does not in our view address the issues of real concern within the pharmaceutical sector. ... Any empirical study of the pharmaceutical sector should take into consideration market distortion caused by national regulatory regimes, which dictate competitive conditions on both the supply and demand side. The research and development of new drugs is getting more difficult and costly, with increasing regulatory hurdles such as larger and more complex trials. We are particularly concerned that the Commission, in its preliminary report, has singled out the filing, prosecution and enforcements of patents as a focus for criticism. Any action by the Commission that weakens the patent system or causes uncertainty in the industry as to the feasibility of patenting inventions will have a chilling effect on research and innovation within the European Union to the ultimate detriment of patients.”

[http://ec.europa.eu/competition/consultations/2009\\_pharma/bayer.pdf](http://ec.europa.eu/competition/consultations/2009_pharma/bayer.pdf)

(our emphases)

Here, the very players that stand accused of activities that worked against innovation turn the table on the Commission. They state that it is the regulators who are working as market actors against patient interests by making pharmaceutical innovation difficult and costly, rather than anything that could be construed as *"reprehensible practice"* (ibd.) on the originator companies' part. In this narrative it is the Commission that perpetuates the very status quo that

seems unsatisfactory to consumers, regulator and drug companies alike. Originator companies, on the other hand, are portrayed as stalwarts of fostering innovation: *"Without the research and the funding of the development of new medicines by the top-20 pharmaceutical companies, not many medicines would see the light of day"* (Johnson & Johnson).

Many of the originator companies' submissions also draw attention to generics companies as perpetrators rather than passive victims. To quote an industry representative at the Preliminary Report's Presentation, *"The Commission has not addressed the main problem [of cost to the tax payer]"*, which is, in the eyes of the originator companies, the problem posed by generics companies. Submissions state, for instance, that these companies launch generic medicines "at risk," that is before the end of a medicine's patent period, or engage in price collusion to keep prices artificially high post-entry.<sup>7</sup> Rather than accepting the position of villain in the Preliminary Report's narrative, the originator companies point to their own share of injustice suffered: *"although the Preliminary Report is clearly influenced by generic claims as to the alleged potential harm that may be suffered if an interim injunction is granted, it makes nothing but passing reference to the harm that is suffered by an innovator if no injunction is granted."*

At the same time as they attribute wrongdoings to players and practices elsewhere in the market, the originator companies attempt to discredit the narrative emerging from the Preliminary Report on substantial and methodological - that is, epistemological - grounds:

*"Whatever the precise words used in the report were, the media took away the impression that company behaviour was a very significant – indeed perhaps the sole - cause of the extra cost to payers ...This is wholly misleading as at no point does the Preliminary Report identify what, if any, delay in generic entry was in fact caused by innovator company behaviour. Indeed, it contains no evidence, as opposed to conjecture, that company behaviours caused delay, far less that they did so wrongfully." (our emphases)*

[http://ec.europa.eu/competition/consultations/2009\\_pharma/gsk.pdf](http://ec.europa.eu/competition/consultations/2009_pharma/gsk.pdf)

In parallel with questioning the legitimacy of the Preliminary Report's narrative on epistemological grounds, the counter-narratives also redefine and reframe a number of the defamed market practices, thus attacking the report on action grounds. For instance, where the Commission interprets certain practices as anticompetitive and potentially libellous, originator companies see them as "sound commercial practice" (EFPIA submission) and assert that "no conclusions whatsoever can be drawn from any theory of harm"

[http://ec.europa.eu/competition/consultations/2009\\_pharma/gsk.pdf](http://ec.europa.eu/competition/consultations/2009_pharma/gsk.pdf)

Overall, three issues are noteworthy across the originator companies' submissions: One, individual submissions, though varying in tone and length, are very much in unison in their criticism against the Preliminary Report and in their projections of what any disturbance of existing practices would mean for the European health consumer's future. Indeed, the phrasing encountered in the quote above, of changes potentially having a "chilling effect on pharmaceutical

R&D in Europe," is repeated across several submissions. All individual submissions also either directly flag their support or take their cue from the lengthy response of their industry association, the EFPIA (European Federation of Pharmaceutical Industries and Associations), to the Preliminary Report, thus ensuring that the industry's narrative is a concerted one, with the potential of becoming authoritative in itself. The responses knit a heavy intertextual web weighing down on any purported attempt to disrupt these practices. Note that the two discourses invoked in the narratives are the same as those invoked in the EU's report: those of fostering innovation and increasing consumer welfare.

Two, the originators' counter-narrative is supported by lawyers, law associations, and patent attorneys, whose submissions mostly point to the fact that none of the alleged practices the Preliminary Report accused the originator companies of are illegal. The involvement of law and legal professionals adds in a further master-narrative and intertextuality, describing what counts as a fair legal process and outcome.

Three, though originator companies assert that they share the DG Comp's overarching objective of safeguarding consumer welfare and industry innovativeness, attributions differ diametrically from those of the Preliminary Report. They do so mainly by ascribing the final decision power to parties who, in the Preliminary Report, were mainly cast as passive victims, namely the patients and their doctors who in the last instance will decide over issues of innovativeness or otherwise of the products used. The narrative concludes quite simply that until such time as the system appears broken in these market actors'

eyes, *"changes to improve the functioning of the pharmaceuticals market need to avoid unbalancing the framework constructed and refined over many years."*

([http://ec.europa.eu/competition/consultations/2009\\_pharma/pfizer.pdf](http://ec.europa.eu/competition/consultations/2009_pharma/pfizer.pdf)).

What of the other narratives, those of consumer associations, the European Patent Office, and the generics companies and their associations? Unsurprisingly, the generic companies strongly welcomed the Sector Inquiry and the Preliminary Report's findings and urgently called for the Commission to follow up on these findings with legal and regulatory actions. They also called upon a number of additional cast members' behaviors to come under DG Comp's scrutiny, chiefly amongst them the large national payers, who often agree to long-term contracts with originator companies that seem impenetrable to competitors. Consumer associations, though their submissions were notably small in number, also voiced their support for DG Comp's perspective of the market, and equally called on the Commission to follow words with action, both with regard to its own failings (particularly what some identify as a 'soft' approach to granting patent rights) as to those of originator companies. Finally, national health buyers, payers and reimbursers of medicines, who often act on behalf of patients, used their voice to counter the many points of criticism they incurred in the originator companies' narratives. Instead of therapeutic reference pricing, health technology assessments, or payback mechanisms causing delays, national payers portrayed these as sound scientific and management practices.

Despite their various disagreements, all those contributing to the Consultation were unanimous on one point: that a unitary European patent system would accelerate the time it takes for pharmaceutical companies to gain a patent, decrease the associated administrative and financial burdens, and bring greater unity into a fragmented and overly complex system. The unitary patent thus acted as a unifying end point or utopian object in which all narratives overlapped.

### ***Reconciling the narratives***

Six months later, one commentator remarked that "DG Competition's release of its long-awaited Final Report on its Pharmaceutical Sector Inquiry on 8 July 2009 was somewhat of a damp squib compared to the fireworks surrounding the publication of its Interim [Preliminary] Report some eight months earlier." (Hull 2009, p. 14). The Final Report's key narrative veered away somewhat from the Preliminary Report's original focus on pharmaceutical companies' business practices and replaced that emphasis with one on regulatory shortcomings and the need for patent reform, as well as the development of a single patent court system. To summarize, it stated that:

- A Community patent and a unified specialised patent litigation system in Europe would reduce administrative burdens and uncertainty for companies.
- Recent initiatives of the European Patent Office (EPO) to ensure a high quality standard of patents granted and to accelerate procedures were



welcomed. This included measures taken in March 2009 to limit the possibilities and time periods during which voluntary divisional patent applications could be filed (a so-called "raising the bar" exercise).

While attributing future action imperatives mainly to its own institutions, the Commission also urged member states to streamline pricing and reimbursement policies and to significantly accelerate approval procedures for generic medicines.

In many stakeholders' (especially the originators') view, the 2009 Final Report was more "balanced" than the Preliminary Report; toning down the "emotive rhetoric" (Hull 2009) some had perceived, and found offence at, in the Preliminary Report. For instance, the uses of the terms "defensive," "secondary," or "weak" patent, which in the Preliminary Report were used to highlight and deconstruct the market practices associated with these market objects, were in the Final Report aligned with the dispassionate language of European patent law, which only knows of "patents" as awarded on the basis of technical novelty rather than patient value. Unsurprisingly, the Commission's shift in tone was welcomed by EFPIA, the trade group representing large pharmaceutical companies. In a statement, the group found that its counter-narrative's objective of refocusing the discussion from potential industry wrongdoings towards streamlining the EU patent system was adequately reflected in the Final Report. EFPIA also noted that the Final Report "*failed to substantiate*" earlier allegations that patenting strategies of some pharma companies dampened innovation.

### ***Narratives and performances***

So through the Final Report, were narratives reconciled and the *status quo ante bellum* re-established? Not quite. As mentioned, we can expect an authoritative narrative to include an elaboration of some end point, be it legal or economic, to which a majority of actors can subscribe. An impetus towards reconciling opens up the questions of maintaining what has become an expanded and complex intertextuality, and of actors enacting this now-reconciled future. In launching the Final Report in July 2009, Commissioner Nelly Kroes asserted that the Report reiterated that company practices were a significant factor behind "competition problems" in the pharma sector, revealing that the trajectory that had led to the Final Report and to the more critical narrative of the Preliminary Report had not necessarily vanished<sup>8</sup>. This message was also to be translated into action. On the day of the Final Report's launch, Commissioner Kroes announced a fresh antitrust investigation against a French pharmaceutical firm for suspected breaches of rules on restrictive businesses practices and on the abuse of a dominant market position, and a two to three year monitoring exercise to probe further into on-going patent settlements between originator and generics companies. She also announced further legal cases arising from the material collected by the Sector Inquiry. Thus, while the final narrative proved to be consensual in its broad coalition building, the ensuing regulatory actions agenced parts of the Preliminary as well as the Final Reports.

The Sector Inquiry's Final Report and the yearly monitoring reports commissioned and published subsequent to the Inquiry (2010–2013) showed

that narratively emplotting certain market practices can indeed change the market's *agencements*. Patent settlements considered potentially problematic from the perspective of competition law<sup>9</sup> fell from representing 22% of all originator-generic patent settlements in the period from 2000 to 2007 to 10% in 2009 and as low as 3% in 2010, having, according to the last of the monitoring reports, "stabilized at a low level" of around 7% in 2012. By July 2012, three years after the publication of the Final Report, the Commission had taken out or announced proceedings against at least five sets of companies for possible violations of EU competition rules, including practices involving generic companies. Finally, the Commission itself took a significant step forward in the reordering of the market, a step that had been decades in the making: "In 2012 Member States and the European Parliament agreed on the 'patent package' – a legislative initiative consisting of two Regulations and an international Agreement, laying grounds for the creation of unitary patent protection in the EU." ([http://ec.europa.eu/internal\\_market/indprop/patent/](http://ec.europa.eu/internal_market/indprop/patent/)).

While the unitary patent and the European Patent Court are yet to be ratified by most member states, at least on paper the unifying future state envisaged in the shared master narrative of the Final Report has been reached with the institutionalization of this narrative end point on 1 January 2014. Though far from providing closure to the rival innovation discourses in the pharmaceutical industry, the Sector Inquiry and its narratives have decisively changed the powers (and obligations) to act in this market.

## Discussion

Tracing a market controversy through its public textscape, as we have done in the analysis above, gives an insight into the role narratives play in agencing markets. While we could not access the private processes of narrative construction (cf. Abolafia 2010) beyond the public texts themselves, we have traced how the development of the Inquiry's initial, counter, and authoritative narratives shape the market's *agencements*. The pharmaceutical market is a prototypical "concerned" market (Geiger, Harrison, Kjellberg and Mallard 2014), where regulatory concerns, patient interests, government costs, "big" and "small" pharma, global and local agendas coalesce and compete with patent law, scientific innovation, and drug lifecycles. Such concerned markets are shaped by a multitude of actors, voices, interests and values, and while changing their sociotechnical *agencements* is bound to be fraught with difficulty and challenge, they are also spaces where dissenting voices can be made audible.

As market representations that highlight temporality, market narratives are implicated in these markets' *agencements* and simultaneously contribute to their reordering. As claimed by Callon (2007, p. 320), there is "nothing left outside the agencement", and a change in narrative will inevitably lead to changes elsewhere in this textual and material assemblage. In our case, the process of juxtaposing rival narratives and reaching the compromise narrative moved the European Union a step closer to bringing the Unitary Patent to reality. It also compelled that same actor to follow up on some of the potential misconducts unearthed during the Inquiry. Finally, it likely prompted the pharmaceutical industry to ensure that

its future actions were consistent with how they had been narrated during the Inquiry. Representations, in our case as narratives, have agency, but as Butler (2010) claims, they act in a perlocutionary rather than illocutionary sense; that is, only if market actors buy into and invest in the "possible worlds" they emplot.

In some contrast to Beckert (2013), whose concern lies with mental representations and collective beliefs rather than with socio-technical *agencements*, we contend that not every "fiction" has the potential to become performative. As we showed in our analysis, the contests around "whose narrative" would succeed were partly fought out in terms of the (material) accountability of their claims and partly in terms of how they enrolled supporting actors and their narratives. Pollock and Williams (2010) examine "successful" promissory organizations, such as Gartner, in relation to how they mobilize promises about new technologies and how they organize the promissory space. The narratives we traced in this paper acted in a similar manner: They emplotted (widely known) past and existing market practices by mobilizing the sector's two opposing discourses of innovation – societal welfare and innovative rents. They then emplotted changes in the market's *agencements* into the intertextual narrative with a fictional end point where both discourses are more or less in balance; an end point that, as a compromise narrative, is preferable to the market's *status quo*. Narrating market practices in this context opened up the possibility of economic reordering and market innovation.

It is a relatively small step from this analysis of the performative role of narratives to the issue of power, or "which narrative" will be invested in and

prevail, and associated questions of what role regulation has in providing public space for alternative market narratives to be "agenced." These questions lead us from the realm of report writing to that of the political, where market stakeholders, public actors with interests in civil society discuss rules and contest market representations (e.g. Callon 2009; Callon, Lascoumes and Barthe 2009, Overdevest 2011). Callon (2009) presents the idea of "democratizing markets," where market innovation becomes a collective task, and where the question to be resolved is one of equipping market actors to shape the markets that they promote. In the context of EU biofuel sustainability schemes, Laurent (2014) suggests the term "European agencements" instead of "market agencements" to highlight how the political lies within the qualification of economic objects and spaces.

We demonstrated one case where a public inquiry "problematized" (Callon 1986) an existing sociotechnical *agencement* and opened up a forum for discussion and contestation around different ways of reordering the *agencement* in question. In our case, narratives and counter-narratives were fused into a carefully framed hybrid master or authoritative narrative, to which ostensibly all interested actors could subscribe. As with any attempt at framing, though, the spillovers of those alternative or suppressed narratives are still visible and lurking behind the master narrative (cf. Callon 1998; 2002). The controversy may be closed down for now, but concerned publics remain, and their rival narratives are still circulating and enrolling others.

As devices, narratives bring their own processes, and temporality is critical. A narrative becomes a way of reconstructing the past, as through inferences of causality, and of envisaging a future end-point to a process, which is often abstract, as in the equilibrium of neoclassical economics, or the conditions that allow it to reach an end point, such as of a legal process. But these narratives inform and shape the visions and materialities of a market, and so provide a basis for sorting out current practices into helpful and unhelpful, fair and unfair. Simply put, once debated in the open, things could just not remain unchanged – after all, “discourse produces the effects that it names”, albeit in a reiterative manner (Butler 1999, p. 236). Narratives and counter-narratives are powerful devices of political and economic action because they offer a temporal shape to a market and identify, contest, and provide a critique of the uses of some practices and tools.

## **Conclusion**

Our overarching concern in this paper lies with how markets come to be innovated, by exploring in more detail the hitherto under-researched link between market representations and market *agencements*. Moving from market representations to market narratives allowed us to trace how, in a market, existing practices become emplotted and related to "possible worlds" or futures that then become mobilized in socio-technical *agencements*. The narratives described in this study link into broad discourses around the pharmaceuticals industry, of innovation, welfare, and public good.

Fundamentally, these discourses attempt to resolve whether society is better off having producers earning monopoly profits so as to facilitate significant research and development, or whether it is preferable to subject producers to market entry and price competition. Both possibilities are beset by uncertainty: Will the companies actually invest in novel research and development projects? Will lower cost products produced in more competitive markets be of comparable quality to those produced presently? What else needs to be in place so as to militate against any unfavorable outcomes?

As we have shown, narratives are not self-fulfilling prophecies that in and of themselves produce realities. Rather, as with Butler (2010), it is precisely by emplotting such uncertainties, relating them to existing and future market *agencements*, juxtaposing and opening them up to the possibility of misfires, that these narratives become performative. Market narratives become promissories – but only if and when they remain open to being wrong. We hope that our study will inspire researchers to further develop the complex relationships between *agencements*, expectations, futures, representations, performativity, and representations in markets that we have started to trace.

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Table 1: Submissions received during the Consultation Period (classified as per EU DG Comp website)

Submissions received by	Number of Individual Submissions
Associations of sickness funds, consumers and related organisations	8
Generic companies and associations of generic companies	9
Government bodies	3
Individual citizens and academics	5
Law firms, economic consultants, patent attorneys and their associations	12
Originator companies and associations of originator companies	26
Other business associations	11

Figure 1: Narratives affect market practices past, present and future

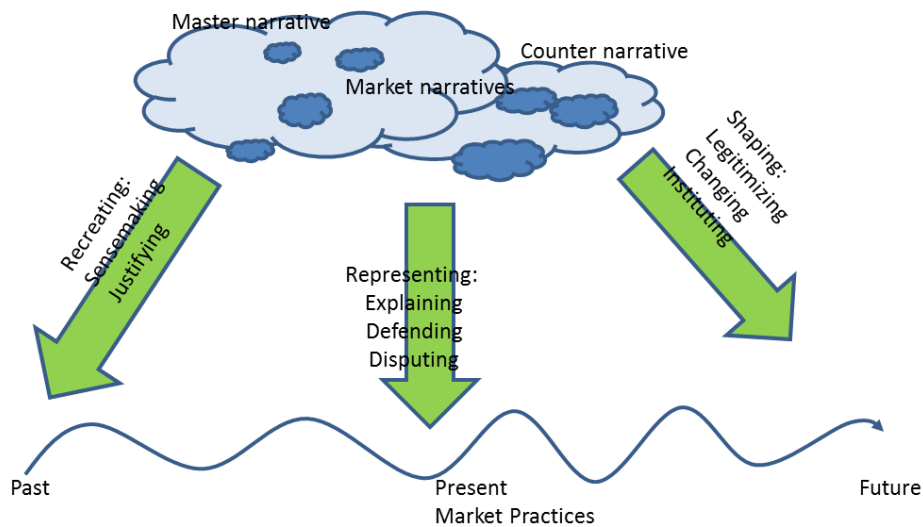
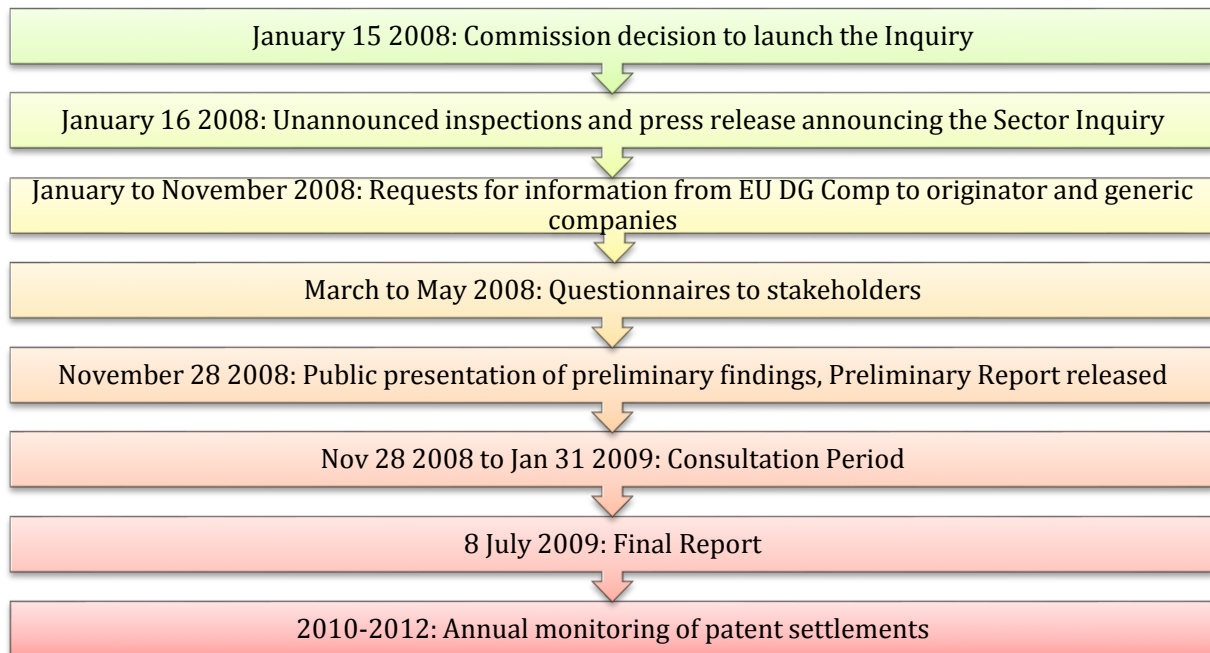


Figure 2: Chronology of Events



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1

It was the first time that a Sector Inquiry opened with such raids, and for many commentators they represented an application that was unprecedented in its force and signalling value of the EU's antitrust regulations. To justify this approach, the FAQ Section of the DG Comp website reads: "The kind of information the Commission will be examining in this inquiry, notably concerning the use of intellectual property rights, litigation and settlement agreements covering the EU, is by its nature information that companies tend to consider highly confidential. Such information may also be easily withheld, concealed or destroyed. The Commission is keen to have immediate access to all such company information and has therefore ordered unannounced inspections."

2

A disclaimer is necessary at this point. In 'Representing Reality', Jonathan Potter (1996) points out that any attempt at analysing or deconstructing discourse within a conventional textual narrative such as a scientific text - as with the present one - is essentially a self-referential exercise. (Social) scientific texts use the same procedures as other texts when they "separate descriptions from their own interests and produce them as neutral and external; that is, to give them a quality of out-there-ness" (p. 15) are used. As a narrative in itself, the scientific text is always partial and incomplete. So too, by extension, is this article.

3

It is noteworthy that this Inquiry was from the outset couched in terms of



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safeguarding competition rather than public welfare, though the narratives constructed referred to both discourses.

4

The publication of this report followed a large-scale investigation by DG Comp including the analysis of more than 20,000 pages of texts obtained during the January 2008 inspections, interviews with a range of stakeholders, surveys of pharmaceutical companies and other stakeholders and requests for information.

5

One may note that the Rt. Hon. Sir Robin Jacob, Court of Appeal of England and Wales, found none of these market practices to be either remarkable or novel in his speech at the Commission Presentation of the PR.

6

It needs to be mentioned that some originator companies are also manufacturers of generic medicines and that many generic firms are large global entities, so this separation is not quite as clear-cut as made out here.

7

The Inquiry Report specifically excludes generic price competition from its purview.

8

This throws up interesting reflections on the reach and longevity of reports, as well as on the fact that the intertextuality is both synchronous and diachronous – older versions do not necessarily disappear when they are replaced with newer ones, such that the making of these texts remains visible.

9

So-called pay-for-delay transactions or those which limit market entry for generic companies and include value transfers from originator to generic company.