

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Global Forum on Competition**

**INVESTIGATIVE POWERS IN PRACTICE**

**-- Session IV -- Call for country contributions**

This document is a call for country contributions for Session IV of the Global Forum on Competition to be held on 29-30 November 2018. GFC participants are invited to submit their contributions by 29 October 2018 at the latest.

**JT03434973**

**TO ALL GLOBAL FORUM PARTICIPANTS**

**RE: Breakout Sessions on “Investigative Powers in Practice”**

**17th Global Forum on Competition (29 and 30 November 2018)**

Dear GFC participant,

In November 2018, the OECD Global Forum on Competition will hold breakout sessions on *Investigative Powers in Practice*. I am writing to you in order to provide you with some information on the theme and organisation of the session, and to invite you to submit a contribution of case studies.

All around the world competition authorities face significant challenges in seeking to deter anticompetitive conduct and mergers. Cartels are secret conspiracies, and cartelists go to great lengths in concealing their illegal activities; evidence of direct communications and agreements between competitors is hard to uncover. The assessment of the competition effects of unilateral conduct and mergers requires the collection of significant amounts of complex information, which is, to a large extent, in the possession of the investigated or third parties.

This session will focus on issues such as the use and limits of authorities’ investigative powers; recurring and new challenges faced by the authorities when investigating anticompetitive conducts and mergers; possible solutions for such challenges; and due process in evidence gathering.

There will be three parallel breakout sessions which will provide a forum for participants to discuss practical issues regarding the use of investigative powers:

- Breakout Session 1 “*Unannounced Inspections in the Digital Age*” will discuss the challenges of pursuing unannounced inspections in a world where information is mostly produced and stored digitally, and what best practices should be in this regard. The session will cover the use of forensic tools, legal issues arising from digital inspections, capacity building on how to best pursue unannounced inspections in such a context, and the outcomes of unannounced inspections in practice.
- Breakout Session 2 “*Requests for Information – Limits and Effectiveness*” will focus on requests for information, one of the most used investigative powers. The focus will be on the effective use and limitations of power to request information. The session may include the sharing of experiences and ideas regarding how to handle large amounts of complex information, how to prepare a questionnaire/request for information, or how to detect false or misleading information.
- Breakout Session 3 “*Due Process in relation to Evidence Gathering*” will be devoted to due process in the use of investigative powers. The session will focus on the rights of those parties that are subject to the investigative powers of a competition authority, and how competition authorities’ investigative tools can be effectively deployed in compliance with due process rights.

I strongly encourage you to provide case studies in your contributions which are particularly illustrative of the challenges, success stories in tackling these challenges or lessons learned about how to best deploy competition authority's investigative powers. In Annex I, we provide a list of indicative topics and questions that you may want to address when preparing your case study.

These topics and the issues mentioned above and in Annex I are non-exhaustive. Participants are encouraged to raise any other relevant points in their submissions or during the discussions regarding unannounced inspections, information requests and due process.

To ensure a lively discussion, two or three case studies will be presented in each breakout session. Please note that not every case study will be presented in the sessions, therefore I kindly ask you to indicate if you are interested in making a presentation in one of these three sessions.

*The OECD webpage on Investigative powers in practice ([oe.cd/invpw](http://oe.cd/invpw)) will be the primary vehicle for conveying documentation and related links on this subject. Unless explicitly requested not to do so, we will reproduce all written contributions on the site.*

*I would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. I invite you to submit such a short summary (no more than one page) together with your contribution. Alternatively the Secretariat will produce a summary, but given the time constraints you might not be in a position to check it before distribution on O.N.E.*

In order to ensure an effective preparation of the breakout session discussions, I would be grateful if you could inform the Secretariat **by Monday 24 September** at the latest on:

- which breakout sessions you intend to submit contributions for, including the description of relevant cases,
- and whether you would like to make a presentation in one of the breakout sessions, particularly focusing on your case experience.

Written submissions are due **by Monday 29 October 2018** and failure to meet this deadline may result in your contribution not being distributed to delegates via O.N.E. in a timely fashion in advance of the meeting.

All communications regarding the documentation for this roundtable should be sent to Ms Angélique Servin (Email: [Angelique.SERVIN@oecd.org](mailto:Angelique.SERVIN@oecd.org)). Please address all substantive queries relating to this discussion to Mrs Beyza Erbayat (Email: [Beyza.ERBAYAT@oecd.org](mailto:Beyza.ERBAYAT@oecd.org)) and Ms Lynn Robertson (Email: [Lynn.ROBERTSON@oecd.org](mailto:Lynn.ROBERTSON@oecd.org)).

## ANNEX I - QUESTIONS FOR CONSIDERATION

### Breakout Session 1: Unannounced Inspections in the Digital Age

1. Undertakings increasingly produce and store data in digital environment. In the context of the cases you are describing, what kind of issues did you encounter due to the digital storage of information? Were there any particular challenges related to the location of servers/access to third-party servers?
2. Digitalisation allows to access and store an increasing volume of data. In the context of the cases you are describing, how did you target your inspection and select which data to review? Did you need to invest in specialised IT staff, hard or software to pursue successful inspections? Has the digitalisation of data have an impact on the costs and duration of competition investigations? What has been the impact of digital inspections in terms of evidence gathering?
3. The volume and the storage of digital data pose different challenges in terms of confidentiality and privacy. In the context of the cases you are describing, please describe any challenges you faced regarding the seizing and reviewing of privileged or confidential digital data collected during an unannounced inspection.
4. Personal devices such as smartphones and tablets are now widely used for business purposes. Does the legal framework of your jurisdiction allow inspections on personal electronic devices? Does the inspection of personal devices raise any particular or additional challenges, particularly by comparison to the inspection of devices belonging to an investigated company?

### Breakout Session 2: Requests for Information – Limits and Effectiveness

1. In the context of the cases you are describing, how did you determine to issue a RFI to an undertaking or a person? How did you access the information needed to draft an effective RFI? While preparing a RFI in the context of the cases you are describing, did you use information gathered in the context of a previous separate investigation? Are there any limitations to the use of information collected in the context of a previous separate investigation?
2. Can you request information from third-parties? If so, are RFIs from third parties voluntary or compulsory? In the context of the cases you are describing, has professional obligation to secrecy/confidentiality of third parties been raised as an objection to your information request?
3. In your jurisdiction, are non-compliance to a RFI, late submission of information or provision of misleading, incorrect or incomplete information sanctioned? If so, what has been impact of the possibility of sanction on the respondents and cases so far? How did you verify the accurateness and corroborate the information collected – did you cross-check with information gathered in other RFIs/interviews/unannounced inspections? If so, how onerous was that exercise? If intent is a required condition to sanction provision of incorrect, incomplete or misleading information, in the cases you are describing, how did you assess the intent of the respondent?

4. In the context of the cases you are describing, have answers to RFIs produced large amounts of data, in digital or a different format? Did you need to invest in specialised IT staff /software to review that data? Did that have an impact on the costs and duration of competition investigations/inquiries? Have you had to adopt measures to narrow the scope of RFIs and/or adequately review the data provided in answers to them?

### **Breakout Session 3: Due Process in relation to Evidence Gathering**

1. In the context of the cases you are describing, was any investigative procedure or collected evidence challenged before the courts as breaching due process rights? Was this done separately or in the context of an appeal of a final decision? On what grounds (proportionality, the scope of the evidence gathering method, to the violation of legal professional privilege, confidentiality, business secrecy or the right of not-self-incrimination, territoriality) it has been challenged? What was the outcome of such challenges? Have such challenges led to changes in how you collect evidence? Have you adopted any internal mechanisms to review use of investigative powers or taken measures to ensure transparency in evidence gathering process?

2. In the context of the cases you are describing, are the seized documents during an on-the-spot inspection sifted at the premises of the undertaking or the authority? If sifting can be done at the premises of the authority, is attendance of lawyers or representatives of the investigated parties to the sifting of the seized evidence required? If so, was lack of compliance with such rules a potential ground for annulment of a final decision?

3. Disclosure of evidence to investigated parties is a crucial issue in terms of ensuring right of defence. In the context of the cases where you gathered very large amount of information or digital data, how did you manage the evidence disclosure processes? Did you disclose all the information on the file or only the exculpatory evidence? How did you ensure that all relevant evidence was made available to the parties and that they are given sufficient times to prepare their defence? Was the lawfulness of the practices you adopted challenged in court as breaching due-process rights?