

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

**Global Forum on Competition**

**INVESTIGATIVE POWERS IN PRACTICE – Breakout session 1 and Breakout  
session 3 - Contribution from the European Commission**

- Session IV -

**30 November 2018**

This contribution is submitted by the European Commission for the Breakout session 1 *Unannounced Inspections in the Digital Age* and the Breakout session 3 *Due Process in relation to Evidence Gathering* under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: [oe.cd/invpw](http://oe.cd/invpw).

Please contact Ms. Lynn Robertson [E-mail: [Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)], if you have any questions regarding this document.

**JT03440398**

## *Investigative Powers in Practice*

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

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

**-- European Commission --**

1. The European Commission applies an administrative system that allows it to organise unannounced inspections at target companies' premises in the 28 Member States of the EU and, in cooperation with the EFTA Surveillance Authority, in Norway, Iceland and Liechtenstein. Unannounced inspections typically occur on the basis of a Commission decision obliging the company to submit to the inspection. With the prior authorisation of the national judiciary, unannounced inspections can also take place in other premises, including the private home of managers.

2. The European Commission has no power to seize original documents, but it copies relevant documents to put them on the Commission's case file. Typically, the review and selection of these relevant documents takes place at the company's premises in the presence of company staff and/or its lawyers.

**1. 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.**

**1.1. 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?**

- Archiving: once you find a paper document back in the archive, you can read and copy it. On the other hand, for electronic back-ups, the company may no longer have the hardware available to read them or it may take a while to set-up such an IT environment.
- Location of servers: the Commission has never had any legal challenges related to the location of servers and/or access to third party servers. The Commission applies the 'access principle' implying that the Commission inspectors have the right to access information which is accessible to the entity subject to the inspection, regardless the location or ownership of the servers on which these data are physically stored. Article 6(1)(b) of the draft ECN+ Directive would enshrine this

principle in legislation<sup>1</sup>. A practical issue can be the 'download speed' at which data to be inspected can be made available by the inspected company (for copying them on the Commission search infrastructure set up at the inspected location). The Commission inspection staff will rely on the company's duty of active cooperation during an inspection<sup>2</sup> to ensure that its data requests are dealt with as a matter of priority for the inspected company and that the best available capacity is put to use for the Commission's download requests.

**1.2. 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?**

- Selection of data to review: Just as for paper searches, the issue of prioritisation of target data for review remains essential during any unannounced inspection. This involves the targeted selection of custodians, the IT environment (servers with individual and shared data; desktops, laptops, mobile phones) and storage media (e.g. CD-ROMs, DVDs, USB-keys, external hard disks, backup tapes, cloud services) on which their data may be stored, the time frame of the data, the kind of data (emails, office suite, PDFs) and so on.

3. This selected data pool is then reviewed, typically but not exclusively by means of keywords and search queries by Commission inspectors. The inspector will then judge whether the individual document that is responsive to the keyword/search query is relevant for the case or not, typically following a review of some details of the documents. All possible relevant documents are submitted to the company for review to provide them an opportunity to argue possible out of scope or LPP issues, even though it is clearly established in the case law that it is up to the Commission to establish the relevance of a document<sup>3</sup>.

4. This selection is an adaptable and iterative process during the entire inspection, based on information available to the Commission before the inspection, inputs

---

<sup>1</sup> Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

Article 6(1)(b) states: "Member States shall ensure that national administrative competition authorities can conduct all necessary unannounced inspections of undertakings and associations of undertakings for the application of Articles 101 and 102 TFEU. Member States shall ensure that the officials and other accompanying persons authorised by national competition authorities to conduct an inspection are at minimum empowered: [...]"

b) to examine the books and other records related to the business irrespective of the medium on which they are stored, including the right to access information which is accessible to the entity subject to the inspection"

<sup>2</sup> Case T-34/93 *Société Générale v Commission* [1995] ECR II-545 paragraph 72.

<sup>3</sup> Case C-155/79 *AM & S Europe v Commission*, paragraph 17; Case 374/87 *Orkem v Commission* [1989] ECR 3283, paragraph 15.

received/found during the inspection at the target company or other companies inspected simultaneously.

5. During the inspection, the company is entitled to 'shadow' the Commission inspectors, including when they are reviewing the digital documents. The Commission does not discuss the keywords and/or search queries with the company representatives and neither does the Commission provide the list of all such keywords or search queries used as they only constitute preliminary steps in the identification of possible relevant documents<sup>4</sup>. As indicated above, all possible relevant documents are submitted to the company to review.

- Specialised staff, hard- and software: the Commission has, since the emergence of digital data in the early nineties, always had a trained IT professional as part of a typical inspection team. However, until 2006 the Commission did not use any specific hard- or software. This changed when the Commission set up its internal Forensic IT ('FIT') team and started to use dedicated forensic software and performant hardware. In addition to ensuring a chain of custody and evidence, the main added value was that it enabled the Commission to restore 'deleted data' that were not yet overwritten by the user<sup>5</sup>. A further significant change in the operation of a digital search occurred in 2013. Since then, the review of digital data is done by the Commission inspectors on a central review platform that indexes all data copied out of the target company's IT network and thereby allows for an immediate response to any search query on the entire data set. Also, all data that are considered relevant to the Commission's case are copied out of the company in electronic format to be added to the Commission's file in their original format.

6. In addition to a 'permanent FIT team', the Commission invests considerable time and effort to train an important number of its staff so that it has a sufficient number of well-trained staff that is able to perform the different IT related tasks (collecting data from the server; making forensic copies of stand-alone data carriers, running the Commission's review network) during the numerous inspections the Commission does every year. And all inspectors are obviously trained to use the review platform during the inspection.

- Cost and duration of competition investigations: the purchase and maintenance of forensic software and performant hardware, the permanent FIT staff and the training of the other staff implies a considerable investment from the European Commission. But it provides very good value for money to the European tax payer as it has enabled the European Commission to effectively and efficiently deal with the current predominance of digital data at numerous unannounced inspections. This in turn has allowed the Commission to find key evidence which served to prove anticompetitive behaviour and put an end to it.

7. The Commission selects the relevant data to be put on the file during the inspection at the company's premises, which typically lasts less than a working week. If the selection of documents relevant for the investigation is not yet finished at the envisaged end of the on-site inspection at the undertaking's premises, the copy of the data set still to be searched

---

<sup>4</sup> This differentiates the Commission to the practice of certain other NCAs where these keywords are discussed. However, in those systems and contrary to the Commission's approach, all the 'hits' responding to the keywords are considered relevant and put in the NCA's file.

<sup>5</sup> As occurred, for instance, during the inspection at Nexans, as described amongst others in recital 12 of the General Court's judgment of 14 November 2012 in Case T-135/09.

may be collected to continue the inspection within a reasonable time limit at the Commission's premises ('continued inspection'). In those circumstances, the electronic data carriers are sealed in an envelope, a date for the continued inspection is agreed with the company's representatives, the sealed envelope is opened in the presence of the company and the inspection occurs in the Commission premises in the same manner as during the inspection at the company's premises: all officials reviewing the documents and/or involved in the technical set-up are identified in a Commission mandate, the review takes place in the presence of company representatives if they so wish, the room is sealed over-night, the (provisional) list of relevant documents to be added to the file is provided to the company and the Commission hardware on which company data were stored for the review process is totally wiped at the end of the inspection.

- Impact of digital inspections: it is fair to say that most relevant data copied out of the inspected company and added to the Commission's investigation file are nowadays digital data. Whilst the review of paper files is still systematically done during every inspection and is still resulting in important documents, including 'smoking guns' in the form of 'handwritten notes' or notebooks, the Commission has made its first experiences with genuine paperless working environments at some inspected companies.

**1.3. 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.**

8. The European Commission does not consider that there are different challenges in terms of confidentiality and privacy whether one deals with paper (analogue) or digital data. The Commission applies the same principles with regard to Legal Professional Privilege<sup>6</sup> or privacy or data protection regardless the source of the data, but adapted to the specific environment.

9. For instance with respect to LPP, the Commission allows company representatives to 'shadow' its inspectors so that they can raise any potential LPP issue that they might see immediately to the inspectors. In addition, as illustrated by the Alcogroup case<sup>7</sup>, the Commission may agree to exclude from its search a complete folder that contains documents for which a LPP claim is sufficiently justified, put in a separate folder documents that are responsive to (a set of) keywords and/or search queries that may indicate possible LPP documents and also create a 'tag' identifying all possible LPP documents for separate review of these documents by the Commission team leader and a company representative<sup>8</sup>.

10. In the Alcogroup case, the Commission was nevertheless faced with a challenge allegedly concerning a LPP concern. However, the General Court rejected the appeal as inadmissible. In doing so, the Court confirmed its existing case law that incidents during

---

<sup>6</sup> For a summary of the Commission's practice with respect to LPP, see the separate paper for the OECD Working Party No 3 on Co-operation and Enforcement – Roundtable on the Treatment of Privileged Information in Competition Proceedings.

<sup>7</sup> Judgment of the General Court of 10 April 2018 in Case T-274/15.

<sup>8</sup> It can be noted that the company choose not to 'shadow' the Commission inspectors during the digital review.

an inspection need to be challenged upon appeal against the final decision or via an extra-contractual liability claim against the Commission. Alcogroup appealed the judgment before the European Court of Justice (C-403/18 P). This appeal is ongoing.

**1.4. 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?**

11. Yes, the Commission inspectors are entitled to examine personal electronic devices if they contain data "related to the business". The inspectors are also allowed to have a look at a device allegedly only used for private purposes in order to verify that there are no business-related records stored on them.

12. Article 20(2)(b) of Regulation 1/2003<sup>9</sup> specifies that the inspectors are empowered "to examine the books and other records related to the business, irrespective of the medium on which they are stored". This formulation does not contain any limitation as to the ownership of the medium on which the records are stored.

13. And, according to the case-law, it is in principle for the Commission to decide which documents have to be produced (Judgment of 18 May 1982, Case C-155/79, AM&S, paragraph 17).

14. This is also clarified in point 10 of the Commission's Inspection Explanatory Note that sets out the Commission's interpretation on the rights of the inspected companies; this note is handed over to the company at the start of every inspection and is available on the [Commission's website](#).

**2. 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.**

**2.1. 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**

---

<sup>9</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1), last amended by Council Regulation No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

**evidence? Have you adopted any internal mechanisms to review use of investigative powers or taken measures to ensure transparency in evidence gathering process?**

15. Article 20(4) of Regulation 1/2003 stipulates that "Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. [...]"

16. The inspection decision can thus be challenged before the European Courts, and this is indicated in the authentic copy of the decision that is notified to the undertaking in the following manner: "Proceedings against this Decision may be brought before the General Court of the European Union in Luxembourg in accordance with Article 263 of the Treaty. As provided by Article 278 of the Treaty, such proceedings shall not have suspensory effect."

17. The decision can thus be appealed immediately, without the need to have to wait for a final decision. On the other hand, an appeal against specific actions that took place during the inspection has to occur in the context of an appeal of a final decision. This constant case-law was repeated most recently in recital 61 of the General Court judgment of 10 April 2018 in the *Alcogroup* case (T-274/15; judgment under appeal before the European Court of Justice). In case the Commission closes the investigation without a decision, making an appeal against a final decision impossible, the undertaking can raise an extra-contractual liability claim against the Commission (see recital 92 of the *Alcogroup* judgment).

18. Over the years, an extensive body of case law of the European Courts has been developed with respect to both the requirements for an inspection decision and the conduct during the inspection. That case law has clarified many relevant issues such as the scope of Legal Professional Privilege. Another issue relates to purpose and proportionality of an inspection decision. Here, the Courts have confirmed that the Commission does not need to indicate precisely in its inspection decision all the information it has at its disposal to establish sufficiently precise the reasonable grounds of a possible infringement. However, the Commission has to limit the subject-matter of the investigation to the areas of possible infringements for which it has these reasonable grounds and indicate the possible infringements. In applying this case law, the European Courts have confirmed many inspection decisions, but also reduced the scope of a few, for example in Cases T-325/16 – *Czech Railways* (20 June 2018) and T-135/09 and T-140/09 – *Nexans* and *Prysmian* (14 November 2012). It is fair to say that with respect to these cases, the annulment of part of the inspection decision did not have any practical consequence with respect to the documents put on the Commission file as all these documents were responsive to the narrower subject matter of the inspection that was upheld by the Courts.

19. The case law has also confirmed the developing administrative practice of digital evidence gathering, the 'continued inspection' and so on.

20. The transparency of the Commission's inspection practice is established by the content of the inspection decision that sets out the possible infringements the Commission will investigate (the subject matter of the inspection), the Explanatory Note on inspections that is handed over at the start of every inspection and available on the Commission's internet, a demo CD on the Commission's internet that provides an example of the manner in which documents are made available to company representatives during Commission

inspections<sup>10</sup> and numerous publications and speeches by Commission staff on the subject. As an example, reference can be made to the presentations to the legal community in several Member States in 2013 when the Commission updated its Explanatory Note and started the operation of its digital review platform used during inspections.

**2.2. 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?**

21. The European Commission does not seize original documents, it only copies documents of relevance for the subject-matter of the investigation to add to the Commission case file. Hence, the originals always stay with the inspected company.

22. Typically, the sifting of the relevant documents is done at the premises of the undertaking.

23. If the selection of documents relevant for the investigation is not yet finished at the envisaged end of the on-site inspection at the undertaking's premises, the copy of the dataset still to be searched may be sealed to continue the inspection within a reasonable time limit at the Commission's premises ('continued inspection'). The General Court has dealt in great detail with the continued inspection procedure in its Power Cable judgments of 12 July 2018<sup>11</sup> (under appeal before the European Court of Justice). In a factual context where the parties were informed that their disagreement with the continued inspection procedure could be considered by the Commission as 'obstruction', the General Court could not have been any clearer that the continued inspection procedure is legitimate.

24. The General Court found that Article 20(2)(b) of Regulation No 1/2003 does not provide that the examination of the books or records related to the business of undertakings under inspection must be carried out exclusively at their premises if, as in the instant case, that inspection could not be completed within the timeframe initially envisaged. It merely requires the Commission to offer, when examining documents at its premises, the same guarantees to undertakings under inspection as those required of the Commission when conducting an on-the-spot examination.

25. The Court also considered that the typical intermediate step of copying or copy-imaging files is part of the process by which the Commission officials operated the FIT, the purpose of which was to search for information relevant to the investigation and that it fell within the scope of the powers provided for in Article 20(2)(b) and (c) of Regulation No 1/2003.

26. As the inspection was not required to be conducted exclusively at their premises, the Court considered that the inspection decision did not rule out the possibility of the Commission continuing the inspection in Brussels. Even though there is no date in the decision by which the inspection had to be completed, this does not mean that the inspection

---

<sup>10</sup> In essence, the Demo provides a "mock" electronic report that contains a description of certain files and a hyperlink to directly access the files. In addition, there is also a file that contains the 'hash value' of the data set.

<sup>11</sup> Cases T-449/14 – *Nexans* and T-475/14 – *Prysmian*.

could go on indefinitely, since the Commission is required to observe a reasonable time limit in accordance with Article 41(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). The Court noted that the applicants did not argue that a time period of one month between the inspection being conducted at the companies' premises and the continuation of that inspection in Brussels was unreasonable.

**2.3. 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?**

27. As a challenge to the way access to file is provided is a feature of many of the appeals against Commission decisions finding an infringement and imposing fines, the Courts have established clear case-law on the issue that is, nowadays, grounded in Article 41 of the Charter of Fundamental Rights of the EU.

28. According to the case law and Charter, an addressee of a statement of objections (SO) is in principle entitled to access the entirety of the file as existing on the date of the SO, with only two exceptions: the first (absolute) exception being internal documents, and the second (not absolute) exception being business secrets and other confidential information of the information provider or other persons. The second exception is not absolute, but requires conciliation of the fundamental right to protection of business secrets with the fundamental rights of defence, for instance through non-confidential summaries or by giving access through special modalities such as data rooms. Also according to the case-law, it is not for the Commission to make a selection of those documents which it considers useful for the defence; access must be given to all documents; it is for the defendant to judge what is useful for its defence.

29. In sum, the European Commission does therefore provide access to all documents, regardless of whether it has collected them in analogue (paper) or digital format (subject to the two exceptions mentioned above).

30. In our administrative process, the parties do get the necessary time to prepare their defence and can address any concern with respect to all 'rights of defence'-issues, including the deadline for reply to a Statement of Objections, to the Hearing Officer.