



ECN RECOMMENDATION ON INVESTIGATIVE POWERS, ENFORCEMENT MEASURES AND SANCTIONS IN THE CONTEXT OF INSPECTIONS AND REQUESTS FOR INFORMATION

By the present Recommendation the ECN Competition Authorities (the Authorities) express their common views on the minimum set of: (i) powers to effectively conduct inspections and request information; (ii) means to effectively enforce these investigative powers; and, (iii) powers to impose effective sanctions on undertakings for non-compliance with these investigative powers. It contains the general principles which the Authorities consider relevant to ensure the effective enforcement of the EU competition rules within the ECN.

This Recommendation may serve as guidance to all those involved in shaping the legal framework for enforcement of Articles 101 and 102 TFEU. It is without prejudice to the legal frameworks of those ECN jurisdictions which already provide for these general principles or which go beyond the scope of the present Recommendation.

A. GENERAL INTRODUCTION

1. It is essential that competition authorities are given the necessary powers to investigate effectively suspected competition law infringements. To that end, the Authorities must have appropriate fact-finding tools at their disposal which enable them to require such information to be supplied and to undertake such investigations as are necessary to bring to light an infringement of the competition rules. Furthermore, in order to ensure compliance with these tools, the Authorities should have at their disposal effective and appropriate means of enforcement and powers to

sanction. Such means of enforcement and powers to sanction may be provided for in the respective competition law or another legal instrument.

2. Powers of inspection are essential tools to fight anticompetitive practices (anticompetitive agreements and abuses of dominance). In particular, inspections are an important way to gather documentary and other evidence about alleged anticompetitive practices which is kept in business premises and/or non-business premises and thus detect infringements of competition law. Business premises are the most common place where inspections take place. Requests for information are a key tool to gather information about alleged infringements.
3. ECN jurisdictions have powers to conduct inspections of business premises, conduct inspections in non-business premises, and request information, although the extent of these powers varies. There may also be differences in approach, for example, in order to conduct an inspection either a court warrant or a decision granted by the Authority may be required. Moreover, the categorisation of premises and moveable property which may be subject to inspection may differ between jurisdictions. That being said, irrespective of the categorisation used, the inspection powers of the Authorities should cover those premises and moveable property where evidence of competition law infringements can potentially be found in order to enable the Authorities to conduct effective inspections.
4. The exercise of the powers outlined in this Recommendation should be in accordance with the general principles of EU law (such as the principle of proportionality, respect for the rights of defence and legal certainty) and the observance of fundamental rights, including those enshrined in the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights where applicable.
5. This Recommendation applies insofar as undertakings and associations of undertakings are concerned. The scope and type of powers to investigate in a procedure that may lead to the imposition of sanctions on natural persons may be different across the various jurisdictions and may entail a higher level of protection of rights of defence, in particular with regard to the privilege against self-incrimination.

B. INSPECTIONS OF BUSINESS PREMISES

I. INTRODUCTION

6. An important investigative power of the Authorities under competition law is the ability to conduct inspections of undertakings and associations of undertakings.
7. Inspections of business premises allow Authorities access to the books and other records related to the undertaking(s) under investigation, irrespective of the medium in which they are stored. Inspections are generally conducted without warning and give no opportunity to the undertaking under investigation to destroy or manipulate books or records or interfere with the evidence gathering process.
8. Inspections are often used to detect evidence of cartel activity, abuse of dominance and other anticompetitive practices. Inspections are particularly relevant in the context of cartel activity as obtaining evidence of price fixing, market sharing and other prohibited concerted practices between competitors can be very difficult. Fighting cartels is one of the Authorities' priority action areas, given the particular gravity of their consequences for competition and for consumers.
9. In all jurisdictions, the Authorities have the power to inspect business premises. However, there is a certain degree of divergence among jurisdictions in respect of the scope of the inspection powers, particularly in respect of the Authorities' ability to seal premises and the ability to seize incidental evidence.
10. Further convergence on inspection powers among ECN jurisdictions will help to ensure the coherent and efficient enforcement of Articles 101 and 102 TFEU not only when the Authorities conduct inspections by themselves but also when they work in close cooperation (i.e. carrying out inspections on behalf of another Authority under Article 22 of Council Regulation (EC) No 1/2003).
11. Effective inspections of business premises require the use of specific powers by the Authorities to enter premises, make copies or seize documents, collect digital

information, seal premises and ask for clarifications, to allow the Authorities to gather all relevant evidence located at these premises.

12. It is not only undertakings or associations of undertakings which are the subject of the competition proceedings which may be in the possession of evidence relevant to the Authorities' investigations. For instance, in many cases it is important to obtain evidence from other market players. It is therefore recommended that the power to inspect business premises is not limited to undertakings or associations of undertakings which are the subject of the competition proceedings.
13. If an Authority carries out an inspection on behalf another Authority pursuant to Article 22 of Council Regulation (EC) No 1/2003, it is desirable that the officials and authorised persons of the latter Authority could attend and assist therein, where appropriate, to enhance the effectiveness of such inspections.
14. The Authorities also need to have effective means to collect evidence which is found incidentally in the course of an inspection which relates to suspected infringements of competition rules which are not covered by the inspection decision authorising that inspection. In some jurisdictions, incidental evidence can be secured or seized if it relates to an infringement of the competition rules, whereas in others the Authority needs a new authorisation to inspect which can be obtained on the basis of intelligence gathered in the course of the original inspection.
15. In addition, many ECN jurisdictions provide for measures to effectively enforce their powers to inspect business premises, such as assistance afforded by the police or an equivalent enforcement agency, so as to enable Authorities to conduct an inspection and overcome opposition on the part of an undertaking. Certain Authorities have themselves been vested with such enforcement powers.
16. Similarly, most Authorities have the power to impose sanctions on undertakings and associations of undertakings that do not comply with powers to inspect business premises. Many Authorities have the power to impose sanctions in instances where undertakings refuse to submit to an inspection of business premises. Many Authorities have additional powers to impose sanctions, for instance, if undertakings

fail to produce required books or records during an inspection in a complete form, breach the seal and/or give incorrect, misleading or incomplete answers with respect to questions asked during the inspection. In several jurisdictions, the possibility to compel compliance through the imposition of periodic penalty payments is also foreseen. Moreover, in some jurisdictions, non-compliance with powers to inspect business premises may be taken into account as aggravating circumstances when setting the fine to be imposed for a breach of EU or national competition law.

17. To ensure further convergence within the ECN, it is important that the Authorities have at their disposal effective means of enforcement, such as the assistance of the police or an equivalent enforcement agency to overcome opposition to inspections of business premises, including as a precautionary measure.
18. The effectiveness of inspections also needs to be assured by equipping all the Authorities with powers to effectively impose sanctions on undertakings that do not comply with powers to inspect business premises, in particular, by refusing to submit to an inspection (for instance, by denying entry into the business premises); refusing access to required books or other records related to the business during an inspection; breaking the seals affixed in the course of an inspection and to the extent possible in the respective jurisdictions; and, providing incorrect, misleading or incomplete answers with respect to questions asked during the inspection. Additional means to compel compliance with inspections of business premises, such as periodic penalty payments, may also be desirable.
19. The effectiveness and efficiency of the procedures for conducting inspections of business premises and enforcing compliance and sanctioning non-compliance therewith needs to be ensured.

II. ECN RECOMMENDATION

20. The ECN recommends that all the Authorities have an effective set of inspection powers for business premises. These powers should apply to undertakings and

associations of undertakings which are the subject of competition proceedings, as well as to other market players which may be in the possession of evidence which is relevant to the investigation.

21. In particular, the ECN recommends that the Authorities and/or its officials and other persons authorised by the Authorities have, as a minimum, the power to:
 - a) Conduct all necessary unannounced inspections in business premises, land and means of transport of undertakings and associations of undertakings.
 - b) Enter premises and examine books and other records related to the business irrespective of the medium on which they are stored.
 - c) Make copies of, or extracts from, books and other records related to the business, irrespective of the medium on which they are stored and/or seize original documents during inspections.
 - d) Collect digital and/or forensic evidence (see further the ECN Recommendation on the power to gather digital evidence, including by forensic means).
 - e) Seal premises and books and records for the period and to the extent necessary for the inspection. This is particularly useful when the inspection continues for more than one day.
 - f) Ask for explanations or information in the course of an inspection from representatives or members of staff of the undertaking under investigation present and record the statements made, subject to the privilege against self-incrimination as interpreted under the law of the respective jurisdiction.
 - g) Where appropriate, allow staff from another EU Member State to attend or assist particularly in the context of Article 22(1) of Council Regulation (EC) No 1/2003 (see further the ECN Recommendation on assistance in inspections conducted under Article 22(1) of Regulation (EC) No 1/2003).
 - h) Have effective means to secure or seize incidental evidence.

22. The ECN recommends that the Authorities and/or its officials and other persons authorised by the Authorities have effective means to enforce the powers to inspect business premises and, as a minimum, are able to obtain the effective assistance of the police or an equivalent enforcement authority, as appropriate, and to overcome opposition to inspections of business premises, including as a precautionary measure.
23. The ECN recommends that the Authorities have at their disposal effective sanctions if undertakings or associations of undertakings subject to an inspection of business premises do not comply with their legal obligations. In particular, during inspections of business premises, Authorities should have as a minimum powers to impose sanctions on undertakings and associations of undertakings that refuse to submit to an inspection; fail to allow access to required books or other records related to the business in a complete form; breach seals affixed during the course of an inspection; and, to the extent possible in their respective jurisdictions, give incorrect, misleading or incomplete answers with respect to questions asked. Additional means may be provided for to compel compliance with inspections of business premises, such as effective periodic penalty payments set at an appropriate level.
24. The ECN recommends that the procedures for conducting inspections of business premises, enforcing compliance and sanctioning non-compliance therewith, as appropriate, should be effective and efficient.

III. LIMITATIONS

25. Without prejudice to the principles and rights referred to in paragraph 4, the ECN recommends that limitations on the powers to inspect business premises set out in paragraph 21 c), d), and f) should be strictly circumscribed and not extend beyond the relevant legislation and case law on Legal Professional Privilege and the privilege against self-incrimination as interpreted under the law of the respective jurisdiction.

C. INSPECTIONS OF NON-BUSINESS PREMISES

I. INTRODUCTION

26. Experience shows that there are cases where books or other records related to the business or the subject matter of the inspection are kept in non-business premises (for instance, homes and means of transport of directors, managers and other members of staff of the undertaking or associations of undertakings) and, therefore, the Authorities should have the power to conduct inspections therein. The decision to launch an inspection in non-business premises is commonly subject to the existence of a reasonable suspicion that records related to the business and the subject-matter of the inspection are being kept in premises other than those of the undertaking.
27. In most jurisdictions, the Authorities have the power to inspect non-business premises. However, there is a certain degree of divergence among jurisdictions in respect of this power. The divergences mainly relate to the procedural requirements and the scope of the inspection powers (in particular, the ability to seal premises).
28. Effective inspections of non-business premises require the use of specific powers to gather information located at these premises –i.e. to enter non-business premises, land and means of transport, including homes of members of the staff of undertakings and associations of undertakings concerned, to make copies or seize documents, to collect digital information, and to ask for clarifications -in order to enable the Authorities to gather relevant evidence when investigating infringements of competition law.
29. If an Authority carries out an inspection on behalf of another Authority pursuant to Article 22 of Council Regulation (EC) No 1/2003, it is desirable that the officials and authorised persons of the latter Authority could attend and assist therein, where appropriate, to enhance the effectiveness of such inspections.
30. The Authorities should also have effective means to collect evidence which is found incidentally in the course of an inspection which relates to suspected infringements

of competition rules which are not covered by the inspection decision authorising that inspection.

31. In addition, in terms of the enforcement measures and sanctions which can be imposed, there is a variety of approaches within the ECN. In several jurisdictions, the Authorities have similar enforcement measures and powers to sanction to those as for business premises, whereas for others this is not the case. In terms of enforcing powers to inspect non-business premises, some Authorities rely on the assistance afforded by the police or an equivalent enforcement agency, whereas other Authorities have themselves been vested with such powers.
32. To ensure further convergence within the ECN, it is important that the Authorities have at their disposal effective means of enforcement, such as the assistance of the police or an equivalent enforcement agency to overcome opposition to inspections of non-business premises, including as a precautionary measure.
33. To ensure compliance with the power to inspect non-business premises, powers should be available to effectively sanction failure to submit inspections of non-business premises.
34. The effectiveness and efficiency of the procedures for conducting inspections of non-business premises and enforcing compliance and sanctioning non-compliance therewith need to be ensured.

II. ECN RECOMMENDATION

35. The ECN recommends that all Authorities have an effective set of inspection powers for non-business premises. In particular, the ECN recommends that the Authorities and/or the officials of the Authorities and other persons authorised by the Authorities have, as a minimum, the power to:

- a) Conduct binding inspections in non-business premises, land and means of transport including the homes of directors, managers and other members of staff of undertakings and associations of undertakings.
- b) Enter non-business premises and examine books and other records related to the business irrespective on the medium of which they are stored.
- c) Make copies of, or extracts from, books and other records related to the business irrespective of the medium on which they are stored and/or seize original documents during inspections.
- d) Collect digital and/or forensic evidence (see further the ECN Recommendation on the power to collect digital evidence, including by forensic means).
- e) Ask for explanations or information in the course of a non-business inspection from persons related to the undertaking under investigation present and record the statements made, subject to the privilege against self-incrimination as interpreted under the law of the respective jurisdiction.
- f) Where appropriate, allow staff from another EU Member State to attend or assist particularly in the context of Article 22(1) of Council Regulation (EC) No 1/2003 (see further the ECN Recommendation on assistance in inspections conducted under Article 22(1) of Council Regulation (EC) No 1/2003).
- g) Have effective means to secure or seize incidental evidence.

36. The ECN recommends that the Authorities and/or the officials of the Authorities and other persons authorised by the Authorities have effective means to enforce the powers to inspect non-business premises, and, as a minimum, are able to obtain the effective assistance of the police or an equivalent enforcement authority, as appropriate, to overcome opposition to inspections of non-business premises, including as a precautionary measure.

37. The ECN recommends that failure to submit to inspections of non-business premises should be subject to effective sanctions.

38. The ECN recommends that the procedures for conducting inspections of non-business premises and ensuring compliance should be effective and efficient.

III. LIMITATIONS

39. Without prejudice to the principles and rights referred to in paragraph 4, the ECN recommends that limitations on the powers to inspect non-business premises set out in paragraph 35 c), d) and e) should be strictly circumscribed and not extend beyond the relevant legislation and case law on Legal Professional Privilege and the privilege against self-incrimination as interpreted under the law of the respective jurisdiction.

D. REQUESTS FOR INFORMATION

I. INTRODUCTION

40. Requests for information are an important source for gathering information when investigating infringements of competition law and can be an essential investigative tool at any stage of the investigative process. Requests for information are any form of request addressed by an Authority, including for the provision of documents and for responses to questions raised by an Authority. In most jurisdictions, requests for information can be sent to an undertaking and/or association of undertakings, irrespective of whether they are subject to the competition proceedings. In other jurisdictions, requests for information may also be sent to natural persons, consumer associations, public administration and/or local government bodies. Requests for information are usually made in writing but in some competition enforcement systems, they may also be made orally.¹ Some jurisdictions make a distinction between simple, informal requests for information and formal, compulsory requests for information.

¹ In most jurisdictions, there are separate provisions for conducting interviews.

41. To ensure the effectiveness of the enforcement of competition law and to facilitate cooperation between the Authorities it is recommended that all the Authorities have a broad set of minimum powers to request information.
42. The possibility to request information is used by Authorities in the vast majority of investigations. It can be essential for example when investigating highly complicated markets in order to develop a full market analysis. Thus it is important that the Authorities have this investigative tool and can apply it in an effective manner. It is not only undertakings or natural persons which are the subject of the competition proceedings which may be in the possession of information relevant to the Authorities' investigations. For instance, in many cases it is important to receive information from other market players to enable the Authority to determine the relevant market and/or the effect of an infringement. It is therefore recommended that the power to request information is not limited to undertakings or natural persons which are the subject of the competition proceedings.
43. The power to request information would be restricted if it could not be exercised on a compulsory basis. In all jurisdictions the Authorities have the power to apply enforcement measures or impose sanctions in case of non-compliance or for failure to provide the required information within the time limit set. Most ECN jurisdictions also provide for sanctions when the addressees supply incomplete, inaccurate or misleading information. The nature of the sanctions, the form they take and their amount varies across jurisdictions. Sanctions typically take the form of a fine, which is calculated either by using the percentage of the annual turnover of an undertaking or by reference to a fixed sum. A number of jurisdictions also provide for periodic penalty payments as a mean to enforce compulsory requests for information.
44. Given the essential role of requests for information as investigative tools, it is important that all Authorities have at their disposal effective means for the enforcement of requests for information and sanctions for non-compliance. Sanctions should also be available for providing incorrect or misleading information, irrespective of whether the request for information was made on a compulsory or voluntary basis. It is further desirable to provide for additional means to compel

compliance with compulsory requests for information, such as effective periodic penalty payments.

45. It is important to ensure that the procedures for issuing requests for information and for ensuring compliance therewith are effective and efficient.

II. ECN RECOMMENDATION

46. The ECN recommends that all Authorities have effective powers to request information. In particular, the ECN recommends that the Authorities have, as a minimum, the power to:

- a) Issue requests for information to undertakings and/or associations of undertakings at any stage of the investigation.
- b) Request information on a compulsory basis.
- c) Request all necessary information from undertakings and/or associations of undertakings, irrespective of whether they are the subject of the competition proceedings.
- d) Request information in a written form, and to the extent that this is in accordance with the respective system of competition enforcement, have the power to do so orally.

47. The ECN recommends that all the Authorities have effective means of enforcement and powers to sanction for non-compliance in the context of requests for information. In particular, the ECN recommends that the Authorities have, as a minimum, the power to:

- a) Impose effective sanctions for non-compliance with a compulsory request for information by failing to provide the required information or by failing to comply with the time limit set.

- b) Impose effective sanctions for providing incorrect or misleading information in response to a request for information.
- c) Compel compliance with compulsory requests for information through additional means, such as effective periodic penalty payments set at an appropriate level.

48. The ECN further recommends that the procedures for issuing requests for information and imposing sanctions for non-compliance therewith should be effective and efficient.

III. LIMITATIONS

Without prejudice to the principles and rights referred to in paragraph 4, the ECN recommends that limitations on the powers to request information set out in paragraph 46 b), c) and d) should be strictly circumscribed and not extend beyond the relevant legislation and case law on legal professional privilege and the privilege against self-incrimination, as interpreted under the law of the respective jurisdiction, with regard to compulsory requests for information.

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