



ECN RECOMMENDATION ON ASSISTANCE IN INSPECTIONS CONDUCTED UNDER ARTICLE 22(1) OF REGULATION (EC) No 1/2003

By the present Recommendation the ECN Competition Authorities (the Authorities) express their common views on assistance in inspections conducted under Article 22(1) of Regulation (EC) No 1/2003. It contains general principles which the Authorities consider are relevant to ensure the effective enforcement of the EU competition rules within the ECN.

This document may serve as guidance to all those involved in shaping the legal framework for enforcement of Articles 101 and 102 TFEU to the extent possible in their respective jurisdictions. 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.

I. INTRODUCTION

1. According to Article 22(1) of Regulation (EC) No. 1/2003, a National Competition Authority (NCA) may carry out inspections (as well as other fact-finding measures that its national law provides for) on its territory on behalf and for the account of another NCA, for the purpose of investigating suspected infringements of Article 101 and/or Article 102 TFEU. Generally for the purposes of this document, the NCA that carries out the inspection is referred to as the “assisting NCA”, while the NCA that conducts the investigation of the suspected infringement and requests the assisting NCA to carry out the inspection on its behalf is referred to as the “requesting NCA”.

2. Article 22(1) is an important cornerstone of the ECN: It provides NCAs with the possibility to commission investigatory measures across the EU, thus extending their investigatory toolkits beyond their respective territories.
3. Article 22(1) does not expressly regulate whether the assisting NCA can permit officials of, and other persons authorised by, the requesting NCA (officials of the requesting NCA) to attend and assist its own officials when conducting the requested inspection. Whether or not the assisting NCA can permit such attendance and assistance is left to national law. Attendance and assistance of officials of the requesting NCA may, however, be an important tool to make inspections under Article 22(1) more effective and thus contribute to the effective enforcement of Articles 101 and 102 TFEU by the NCAs.
4. At present there is a great degree of divergence among the Member States concerning the participation of officials of the requesting NCA in inspections conducted under Article 22(1). The divergence concerns three areas in particular: (i) the possibility to permit officials of the requesting NCA to attend and/or assist in the inspection; (ii) the nature of the basis for such attendance/assistance; (iii) the extent of the powers that the officials of the requesting NCA have when attending/assisting in an inspection.
5. Currently, only some national legal frameworks provide for an explicit legal basis (including soft law regulations such as guidelines) which permits the attendance and/or assistance of officials of requesting NCAs in inspections conducted under Article 22(1). Other NCAs have been able, or consider that they would be able, to permit attendance and/or assistance on an ad hoc practical basis, most frequently by appointing the officials of the requesting NCA as experts. At the same time, some NCAs consider that the lack of an explicit basis in their national legal frameworks prohibits them from permitting attendance or assistance of officials of the requesting NCA.
6. Experience has shown that where officials of the requesting NCA participated in inspections conducted under Article 22(1), their powers varied to a great extent: some Member States granted a mere right of attending the inspection, without conferring

actual investigative powers. Many Member States went further than that and granted officials of the requesting NCA investigative powers to search business premises and IT systems. In addition, in some cases individual Member States granted the right to lead inspection teams, search non-business premises and ask questions to representatives or members of the staff of the undertaking subject to inspection.

7. A higher degree of convergence would facilitate cooperation during inspections and enhance their effectiveness. The requesting NCA has a detailed knowledge of the case that may not be otherwise available to the assisting NCA. The assistance of the requesting NCA can be helpful when assessing whether or not a document found during an inspection is useful for the investigation.
8. Experience also shows the assisting NCA may benefit from the assistance of the staff of the requesting NCA in cases where it has limited resources or expertise. Moreover, a NCA with limited experience in FIT searches may be able to use the knowledge of the requesting NCA during the inspection and gain experience. Officials of the requesting NCA can also help with interviews. Moreover, their assistance may benefit undertakings insofar as they contribute to carrying out targeted inspections.

II. ECN RECOMMENDATION

1. It is recommended that an assisting NCA, when conducting an inspection on behalf and for the account of a requesting NCA further to Article 22(1) of Regulation (EC) No. 1/2003, should allow the attendance and assistance of officials of, and other persons authorised by, the requesting NCA.
2. To this end, acting within the framework of the inspection carried out by the assisting NCA, the officials of, and persons authorised by, the requesting NCA should, to the greatest extent possible, enjoy investigative powers equivalent to those of the officials of, and persons authorised by, the assisting NCA under its national law.

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