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Session III: Unannounced Inspections in Antitrust Investigations

Issues Paper by the OECD Secretariat

3-4 September 2013, Lima, Peru

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session III: Unannounced Inspections in Antitrust Investigations

Issues Paper by the OECD Secretariat *

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Executive Summary

1. Unannounced inspections, surprise searches or raids are one of the most powerful and effective investigatory tools available to competition authorities to gather evidence on suspected antitrust infringements. Compared to other investigatory tools, such as information and document requests and the taking of voluntary statements, inspections are considerably more invasive, disruptive and costly for firms, but may increase the likelihood of uncovering valuable evidence. Surprise inspections are sometimes the only means of obtaining the necessary evidence for sanctioning a cartel, as cartel members go to great lengths to hide their behaviour and to remain secret.

2. Many competition agencies have the power to search business premises and, in some cases, non-business or private premises and to copy or seize paper or digital documents as evidence. In most jurisdictions, a warrant issued by a judge or a court is required to conduct a surprise search. Some competition authorities, however, have the power to issue search authorisations. In the case of inspections of non-business premises, greater concerns on the right to privacy normally impose the need for a competition authority to obtain a judicial warrant to conduct the search.

3. Some competition authorities still lack the necessary authority to conduct unannounced inspections. Other competition authorities have only recently acquired those powers. Even in those countries where competition laws provide adequate powers to conduct unannounced inspections, there may be difficulties in making use of those powers, which may result from a lack of awareness of the harm of antitrust infringements.

4. The substantive requirements to conduct unannounced inspections may vary across jurisdictions, but most commonly a sufficient degree of suspicion is required to conduct a search. The power to carry out surprise inspections is typically limited to cases where competition authorities can base their decisions on sufficient preliminary evidence justifying the inspection.

5. The scope or extent of the inspection powers at the disposal of competition authorities varies across jurisdictions. For example, not all competition agencies which have the power to search business premises have been empowered with ability to conduct surprise searches in non-business or private premises. There are also differences regarding the powers to copy or seize paper or digital documents, the time available to conduct the search and to collect or process evidence, the powers to seal premises, the ability to ask questions during the inspections, the seizure or copying of documents subject to legal privilege, protection of privacy, of data, of correspondence or of banking secrecy, amongst others.

6. Organising unannounced inspections involves meticulous planning and preparation and is a resource intensive tool for investigating antitrust infringements. Having the necessary human and financial resources to conduct inspections is determinant for a successful use of the legal powers. Whilst carrying-out an inspection, competition agencies are often assisted by police forces or other public bodies, particularly when resistance or refusal to co-operate is anticipated.

7. Leniency or amnesty programmes may prove extremely important to obtain information and evidence to justify conducting surprise inspections and for the success of the inspections. The information and evidence brought through leniency applications plays an important part in competition authorities' decisions to conduct unannounced inspections. On the other hand, when coupled with the threat of severe sanctions, the power to carry-out unannounced inspections is not only an effective investigative measure in itself, but it may also reinforce the success of leniency or amnesty programmes, contributing to the instability of cartels and serving as a deterrence mechanism on anticompetitive conduct.

8. In order to keep a balance between the public interest in competition law enforcement on the one hand, and the rights of those affected by such enforcement action on the other, competition authorities' powers to conduct unannounced inspections are typically circumscribed or limited. Moreover, competition agencies normally follow certain procedures aimed at ensuring that the targets' rights are not arbitrarily or excessively violated.

9. The specification of the subject-matter and the purpose of the inspection may be considered as a fundamental requirement of the rights of defence, as it may allow targeted firms to examine whether the inspection is justified and to assess the scope of their duty to co-operate, when such duty exists. The right to legal consultation is also an important right of the parties, but may be restricted in certain cases, to avoid obstruction and interference with the inspection. Most jurisdictions protect legal professional privilege ("LPP"), which safeguards the confidentiality of exchanges between attorneys and their clients, although this protection may vary across jurisdictions. Generally recognised is the privilege against self-incrimination. In some jurisdictions, however, this may not necessarily correspond to an absolute right to remain silent, as individuals and firms may have to co-operate fully and actively with the inspection. Decisions to perform surprise inspections are normally subject to either *ex ante* or *ex post* independent judicial review. This is another important element to guarantee the protection of parties' rights.

10. Successful enforcement against cartels with international dimension most often requires different jurisdictions to engage in international co-operation. Information sharing, joint-planning and co-ordination of investigations may be crucial in the fight against cartels with international dimension. By keeping the element of surprise, co-ordinated inspections increase the likelihood of success. Co-operation in preparing and conducting an inspection may prove important to gather valuable evidence of a suspected antitrust infringement.

1. Introduction

"Parties to hard-core cartels go to great lengths to hide their behavior and indeed, in response to recent enhanced enforcement in several countries, are using increasingly elaborate strategies to remain secretive. Competition authorities have thus strived to enhance their ability to detect cartel behavior. A number of agencies resort to sophisticated investigative techniques such as dawn raids and wire-tapping, very often in cooperation with the police and prosecutors of these countries and also with each other", Mariana Tavares de Araújo, 2010¹.

11. Many competition agencies have the power to search business premises and, in some cases, non-business or private premises, to verify and check for business records which may be kept there and to copy or seize paper or digital documents so as to collect evidence of suspected infringements of the competition rules.

12. When considering whether to conduct an unannounced inspection, competition agencies are generally aware that this investigatory tool is considerably more invasive, disruptive and costly for firms than other tools at their disposal. However, unannounced inspections, surprise searches or raids are sometimes the only means of obtaining evidence on suspected antitrust infringements, particularly cartels. The surprise element is crucial to minimise the risk of evidence being hidden, altered, removed or destroyed.

¹ Araújo, M. (2010), "Improving deterrence of hard-core cartels", Competition Policy International, Vol. 6 No. 2, available at <https://www.competitionpolicyinternational.com/file/view/6382>.

13. This issues paper will discuss:

- the importance of unannounced inspections as an investigatory tool, providing a brief overview of the grounds normally required to conduct such inspections and the scope of the inspection powers, which vary across jurisdictions;
- the relationship between leniency or amnesty programmes and the power to conduct unannounced inspections;
- the issue of rights of defence and procedural fairness, as competition authorities' powers to conduct unannounced inspections are typically limited in order to keep a balance between the public interest in competition law enforcement on the one hand, and the rights of those affected by such enforcement action on the other;
- and, finally, the relevance of international co-operation to successfully carrying out surprise inspections, particularly in the fight against international cartels.

14. This paper is organised as follows. Section 2 discusses unannounced inspections as an investigatory tool, in particular the substantive requirements to conduct inspections in different jurisdictions, the scope of the inspection powers, the role of police forces and other public bodies and how the power to conduct surprise inspections and leniency programmes influence each other. Section 3 introduces the importance of the rights of defence and procedural fairness in the context of conducting unannounced inspections. Section 4 approaches international co-operation and surprise inspections.

2. Unannounced inspections as an investigatory tool

15. Unannounced inspections, surprise searches or raids are one of the most powerful and effective investigatory tools available to competition authorities to gather evidence on suspected antitrust infringements. Surprise inspections are sometimes the only means of obtaining the necessary evidence to uncover a cartel, as cartel members go to great lengths to hide their behaviour and to remain secret.

16. To effectively halt and deter hard core cartels, in particular, competition laws should provide for “enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance”².

17. Competition agencies have different tools at their disposal to conduct antitrust investigations. These tools may differ across countries, but the main and most recurrent investigative tools are: “(i) *on-site inspections in business premises*; (ii) *inspections in non-business premises*; (iii) *compulsory requests for information*; (iv) *voluntary interviews*; (v) *compulsory interviews*; (vi) *voluntary submission of information*; and (vii) *wiretaps or recording of conversations*”³.

18. Compared to other investigatory tools, such as information and document requests and the taking of voluntary statements, inspections are considerably more invasive, disruptive and costly for firms, but may increase the likelihood of uncovering valuable evidence. When considering whether to conduct an unannounced inspection, given the available investigatory tools at the competition agency's disposal, the risk of evidence being hidden, altered, removed or destroyed must be taken into account. Unannounced inspections usually serve as a first means of investigation, particularly when the investigation is still at the covert stage. To secure the evidence, the element of surprise proves extremely relevant.

² OECD (1998), “Recommendation of the Council Concerning Effective Action Against Hard Core Cartels”.

³ ICN (2013).

19. A lack of awareness of the harm of antitrust infringements, in particular cartels, may affect the effectiveness of this investigatory tool. “Other parts of the government may not co-operate in investigations of private anticompetitive conduct. For example, the police force may be unwilling to assist in ‘dawn raids’”⁴. Where a judicial warrant is necessary to conduct an inspection, the competition authorities may, for instance, face the reluctance of judges to provide it.

20. The powers to conduct unannounced inspections, their scope and limitations, as well as the rights of the targeted parties vary widely across jurisdictions. Some competition authorities still lack the necessary authority to conduct unannounced inspections. Other competition authorities have only recently acquired those powers. Changes in legislation and in jurisprudence allow for an evolution in the use of this investigatory tool.

“The third major improvement [in the amendments to Mexico’s Competition Law in 2011] is the lifting of restrictions for on-site searches that, until now, forced the commission to announce its visits and to limit them to previously requested documents. Searches were practically useless. We will now be in a position to conduct surprise searches of all information relevant to competition, which should make our investigations much more effective, in line with international best practice”, Eduardo Perez Motta, 2011⁵.

21. In 2011, the reform to Mexico’s Federal Law on Economic Competition significantly improved the investigative powers at the disposal of CFC (Comisión Federal de Competencia), introducing the ability to conduct unannounced inspections⁶. The search is limited to information which might be relevant to competition issues. Prior to the reform, any visits to a company’s premises by the CFC would have to be preceded by a notice. Such advance notice would increase the risk of evidence being hidden, altered, removed or destroyed⁷. Moreover, any search was limited to documents which had been previously requested by the CFC to the company.

22. In Chile, the Competition Act was amended in 2009, providing stronger powers of investigation to the FNE (Fiscalía Nacional Económica), including the power to conduct dawn raids⁸. The power to conduct unannounced inspections, coupled with wiretapping powers, the introduction of a leniency programme and an increase in the maximum sanctions, brought about by the 2009 law, facilitate obtaining direct evidence to prove antitrust infringements and contribute to a more effective enforcement.

⁴ OECD and IDB (2005).

⁵ Global Competition Review (2011), “An Interview with Eduardo Pérez Motta”, by Rosalind Donald, May 3, 2011, available at <http://www.globalcompetitionreview.com/news/article/30068/an-interview-eduardo-perez-motta>.

⁶ See Secretaría de Economía (2011). See also Decreto de la Ley Federal de Competencia Económica, del Código Penal Federal y del Código Fiscal de la Federación [LFCE], Diario Oficial de la Federación [DO], 10 de Mayo de 2011, available at <http://www.cfc.gob.mx/images/stories/Noticias/Comunicados2011/decretoreformaslfce.pdf>.

⁷ See, e.g., Diego-Fernández, M. (2010).

⁸ See OECD (2010), “Chile: Accession Report on Competition Law and Policy”, available at <http://www.oecd.org/regreform/sectors/47950954.pdf>.

23. In 2000, the Brazilian Competition Policy System (BCPS)⁹ was given important new powers to conduct investigations, such as the power to conduct dawn raids¹⁰.

Box 1. Crushed rock cartel - Brazil

The crushed rock cartel case was the first cartel case condemned by CADE (Conselho Administrativo de Defesa Econômica) in 45 years of history. Dawn raids were conducted for the first time in Brazil's history, following the reinforcement of investigatory powers introduced in 2000.

“In 2002, SDE [Secretaria de Direito Econômico] received an anonymous tip of an alleged cartel involving crushed rock companies in São Paulo. The companies took part in a cartel to fix prices, allocate customers, restrict production, and rig public auctions in the market for crushed rock, an essential raw material in the civil construction industry. The companies also used sophisticated software in order to steer sales and check compliance with the agreement. In July 2003, an administrative proceeding was initiated against 21 companies and one trade association in order to investigate the alleged cartel violations. The anonymous tip provided the authorities with plenty of information which enabled SDE and the Public Prosecutors to run the first antitrust dawn raid in Brazil's history. The procedure was conducted at the offices of the industry association Sindipedras. Seized evidence showed that there was, in fact, an illegal and sophisticated cartel in place”¹¹.

“[T]he companies (a) maintained pricing data and daily sales figures in a central computer file at Sindipedras; (b) met on the association's premises to set cartel policies; (c) levied fines for failure to comply with group decisions; (d) divided customers and allocated sales quotas (including sales arising from bids tendered in public competitions); and (e) required a surcharge on sales made to customers assigned to other companies”¹².

Source: Araújo, M. (2010), “Improving deterrence of hard-core cartels”, *Competition Policy International*, Vol. 6 No. 2, available at <https://www.competitionpolicyinternational.com/file/view/6382>; CADE Informa, November 2007, available at <http://www.cade.gov.br/news/n011/noticias.htm>; and OECD (2006).

24. Organising unannounced inspections involves meticulous planning and preparation and is a resource intensive tool for investigating antitrust infringements. Having the necessary human and financial resources to conduct inspections is determinant for a successful use of the legal powers. For example, without sufficient resources, competition authorities may have difficulties conducting simultaneous inspections in different locations, which is of particular importance where there are a number of firms which may be involved in a cartel. Co-operation with police forces and other investigatory bodies with expertise in conducting searches may contribute to a more effective use of the powers to conduct unannounced inspections.

2.1 Substantive requirements: grounds to carry-out unannounced inspections

25. The substantive requirements to conduct unannounced inspections may vary across jurisdictions, but most commonly a sufficient degree of suspicion based on preliminary evidence is required to conduct a search, as a means of protection against arbitrary or disproportionate intervention.

⁹ The Brazilian Competition Policy System (BCPS) was at the time composed by three agencies – CADE (Conselho Administrativo de Defesa Econômica), SDE (Secretaria de Direito Econômico) and SEAE (Secretaria de Acompanhamento Econômico).

¹⁰ See OECD and IDB (2010), “Competition Law and Policy in Brazil – a Peer Review”, available at <http://www.oecd.org/daf/competition/45154362.pdf>.

¹¹ Araújo, M. (2010).

¹² OECD (2006).

26. Whilst in some jurisdictions the competition agency has the power to issue a search authorisation, in most cases a warrant issued by a judge or a court is necessary to enable the authority to conduct a surprise search.

27. In the United States, the Department of Justice (DOJ) may apply to a magistrate in the judicial district where the property is located for a search warrant, supported by an affidavit and other evidence showing “there is probable cause to believe that a crime has been committed, that documents or other items evidencing the crime exist, and that such items to be seized are at the premises to be searched”¹³. “The elements of probable cause are the same for an antitrust crime as for other crimes”¹⁴.

28. The Commissioner of Competition of the Competition Bureau in Canada, in order to justify the issuance of a search warrant, must submit to a judge of a superior or county court information which substantiates the existence of “reasonable grounds to believe that a person has contravened any order made pursuant to the Act, an offence has been or is about to be committed, or grounds exist for the making of an order under the civil provisions of the Act; and that there are, on the specific premises to be searched, records that will afford evidence relating to one of the three above specified situations”¹⁵.

29. According to the Competition Law in Chile, precise and serious grounds regarding the existence of collusive acts must be gathered by the Fiscalía Nacional Económica (FNE) prior to the request for authorisation to conduct searches and seizures¹⁶. FNE will have to submit a well-founded petition to the Court of Appeals, having to obtain a prior approval from the Tribunal de Defensa de la Libre Competencia (TDLC).

30. In Colombia, the Superintendencia Industria y Comercio (SIC) may carry out surprise inspection visits¹⁷ by decision of the competition agency, not requiring a judicial authorisation. The applicable legislation does not, however, establish a legal standard which must be met by the competition agency to conduct a surprise inspection. SIC has discretionary powers concerning the use of this investigatory tool (under the respect of constitutional fundamental rights). Surprise inspections can only be conducted with the permission of the targeted parties, who must, nonetheless, co-operate with SIC or risk facing the same sanctions which would have been imposed for the antitrust infringement under investigation.

31. In the Member States of the European Union, “the most common ground for launching inspections is generally the existence of elements pointing towards reasonable grounds for suspecting an infringement”¹⁸.

32. In case of inspections ordered by decision of the European Commission¹⁹, the “EC law does not contain any explicit rule on the exact level of suspicion the Commission needs to have for a decision

¹³ DOJ (2012).

¹⁴ Idem.

¹⁵ Idem.

¹⁶ See article 39 of Decree-Law 211/73.

¹⁷ See article 1, number 62, of Decree 4886 of 2011.

¹⁸ ECN (2012).

¹⁹ The European Commission may conduct inspections either through an authorisation from the Commission (article 20 (3) of Council Regulation (EC) No. 1/2003 of 16 December 2002) or under a formal decision (article 20 (4) of Council Regulation (EC) No. 1/2003 of 16 December 2002), with or without prior notice. Under an authorisation, the targeted party is entitled to refuse to submit voluntarily to inspection. Under a decision, undertakings are required to submit to inspections.

ordering surprise investigations to be lawful”²⁰. Indications on this level of suspicion may be drawn from Council Regulation 1/2003 and the case law of the European Court of Justice (ECJ). The European Court of Justice’s jurisprudence has established that the European Commission is empowered to perform unannounced inspections where there exist “reasonable grounds for suspecting an infringement of the competition rules by the undertaking concerned”²¹.

33. In the decision to conduct inspections, the European Commission must “specify the subject matter and purpose of the inspection”²². The ECJ attaches great importance to this obligation, considered a fundamental requirement of the rights of defence²³. The Commission must clearly indicate the presumed facts which it intends to investigate²⁴, although the Commission is not required to communicate all the information at its disposal concerning the alleged infringements to the targeted firms.

34. The requirement to specify the subject matter and purpose of the inspection aims at avoiding “fishing expeditions”, i.e., the possibility of carrying out inspections in the hope of finding evidence of an antitrust infringement without a prior reasonable suspicion. The targeted firms must be able to examine whether the inspection is justified and to assess the scope of their duty to co-operate. Furthermore, the European Court of Justice recognises that protection against arbitrary or disproportionate intervention is a general principle of Community law²⁵.

²⁰ Friederiszick and Maier-Rigaud (2008).

²¹ Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes*, and Commission of the European Communities, para 54-55; *Nexans*, para. 43.

²² Article 20 (4) of Council Regulation (EC) No. 1/2003 of 16 December 2002. See also European Commission (2013), “Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20 (4) of Council Regulation No 1/2003”, Revised on 18/03/2013, available at http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf.

²³ See Judgment of the Court of Justice of 21 September 1989, *Hoechst AG v Commission*, joined cases 46/87 and 227/88, ECR 1989, 2859, para. 41; See also Judgment of the Court of Justice of 17 October 1989, *Dow Chemical Ibérica SA and Others v Commission*, joined cases 97/87, 98/87 and 99/87, ECR 1989, 3165, para. 45.

²⁴ “The suspicion of cartel activity must therefore be sufficiently specific as to enable the Commission to name (i) the behavior in question, (ii) the competition rules violated, and (iii) the (groups of) products or services concerned” (Friederiszick and Maier-Rigaud, 2008). Friederiszick and Maier-Rigaud consider that “[c]learly an economic methodology can generate that information and is therefore at least as good as complaints”. They argue that investigations triggered ex officio through, for instance, a proactive market monitoring policy, are an important complementary enforcement tool to other passive instruments at the disposal of competition authorities.

²⁵ See Judgment of the Court of Justice of 21 September 1989, *Hoechst AG v Commission* joined cases 46/87 and 227/88, ECR 1989, 2859, para. 19.

Box 2. Nexans Case – European Commission

The recent Nexans case brought the scope of the European Commission’s inspection powers into question. The General Court noted that the Council Regulation 1/2003 requirement for the Commission to “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 “is a fundamental requirement in order both to show that the investigation to be carried out at the premises of the undertakings concerned is justified, enabling those undertakings to assess the scope of their duty to cooperate, and to safeguard the rights of the defence”²⁶.

The Court also stated the decision should “identify the sectors covered by the alleged infringement with which the investigation is concerned with a degree of precision sufficient to enable the undertaking in question to limit its co-operation to its activities in the sectors in respect of which the Commission has reasonable grounds for suspecting an infringement of the competition rules, justifying interference in the undertaking’s sphere of private activity, and to make it possible for the Court of the European Union to determine, if necessary, whether or not those grounds are sufficiently reasonable for those purposes”²⁷.

Following a review of the evidence the Commission had before conducting the inspection, the Court found that the Commission had sufficient evidence to perform an unannounced inspection at Nexans’ premises, but only insofar as it concerned high voltage underwater and underground electric cables and the material associated with such cables. Finding the Commission had insufficient preliminary evidence of unlawful conduct regarding other types of cables, the court annulled the decision subjecting Nexans to inspection insofar as it concerned such cables²⁸. Note that this decision is the subject of an appeal before the Court of Justice.

Source: Judgment of the General Court of 14 November 2012, Nexans France SAS and Nexans SA v European Commission, T-135/09, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=129701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2643934>.

2.2 *Scope of inspection powers*

35. Many competition agencies have the power to search business premises and, in some cases, non-business or private premises and to copy or seize paper or digital documents as evidence. Unannounced inspections are on-the-spot investigations which may include “(i) the power to enter premises, land and means of transport of undertakings and individuals, independent of whether they are suspected of an infringement, (ii) the power to verify or check for business records that may be kept there and (iii) the power to copy or seize any records, with a view to permit the competition authorities to collect evidence of infringements of the competition rules”²⁹.

36. The scope or extent of the inspection powers at the disposal of competition authorities varies across jurisdictions. For example, not all competition agencies which have the power to search business premises have been empowered with ability to conduct surprise searches in non-business or private premises. There are also differences regarding the powers to copy or seize paper or digital documents, the time available to conduct the search and to collect or process evidence, the powers to seal premises, the ability to ask questions during the inspections, the seizure or copying of documents subject to legal privilege, protection of privacy, of data, of correspondence or of banking secrecy, amongst others.

²⁶ Judgment of the General Court of 14 November 2012, Nexans France SAS and Nexans SA v European Commission, T-135/09, para. 39.

²⁷ *Idem*, para. 45.

²⁸ *Ibidem*, para. 91-92.

²⁹ ECN (2012).

“Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power should be subject to the authorisation of the judicial authority”³⁰.

37. The European Commission was only granted the power to inspect non-business premises with the entry into force of Council Regulation 1/2003. Article 21 of the Regulation establishes the powers of the European Commission to inspect “any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned”³¹. “However, because of the heightened concerns about invasion of privacy in the case of a ‘dawn raid’ on a domestic residence, inspection of such ‘other premises’ requires a formal Commission decision and can be executed only with the authority of a court in the Member State concerned”³².

38. In Portugal, the new competition law of 2012 granted the Competition Authority the power to search private premises³³. In its substantiated request for a judicial warrant, the Competition Authority “must mention the seriousness of the infringement under investigation, the relevance of the evidence being sought, the involvement of the undertaking or association of undertakings and the reasonableness of the suspicion that evidence is being kept on the private premises for which a search warrant has been requested”. The judge shall “control the proportionality of the action requested”³⁴.

39. In the case of inspections of non-business premises, greater concerns on the right to privacy normally impose the need for a competition authority to obtain a judicial warrant to conduct the search. Commonly, a degree of suspicion must exist that business records related to the subject-matter of the inspections are kept in the non-business premises to be searched³⁵. In some jurisdictions non-business premises can be searched only during criminal investigations³⁶.

40. In conducting a surprise search, either in business or non-business premises, competition agencies normally have the authority to copy or seize any business records. Not all competition agencies can seize original documents. Those which may are generally bound to return those original documents to the company within a certain, normally short, period of time. Parties are normally entitled to obtain copies of seized records either during or after the search.³⁷

³⁰ Recital (26) to Council Regulation (EC) No. 1/2003 of 16 December 2002.

³¹ Article 21 of Council Regulation (EC) No. 1/2003 of 16 December 2002.

³² Bellamy and Child (2012).

³³ “Where there is a well-substantiated indication that evidence of a serious infringement of articles 9 or 11 of this law or articles 101 or 102 of the Treaty on the Functioning of the European Union may be found at the private premises of partners, members of the board of directors, employees or anyone who works with the undertaking or association of undertakings, a search of private premises can be made, duly authorized by the judge responsible for procedural safeguards in response to a request of the Competition Authority” (article 19 of Law 19/2012, 8 May).

³⁴ Note that “[w]here the search is carried out in the offices of a lawyer or in a doctor’s surgery, the judge responsible for procedural safeguards must be present, or otherwise it would be null and void, and must previously inform the local president of the Bar Association or of the Medical Association, respectively, so that this person or an official representative can be present” (article 19 of Law 19/2012, 8 May).

³⁵ See ICN (2013).

³⁶ *Idem*.

³⁷ ICN (2013).

“In an increasingly paperless world often no hardcopies of relevant evidence can be found; many emails might never have been printed out and relevant paper documents might have been destroyed”, Saller, 2013.

41. Digital/forensic evidence gathering is becoming increasingly important in antitrust investigations, as electronic means are widely used by companies to generate, store and distribute information. This type of evidence may be relevant on its own or may serve as a complement to the more traditional methods of evidence gathering.

42. Digital evidence is also valuable due to the additional information which it may provide for the investigation. Unlike hard-copy documents, where the information is limited to the pure content of the documents, digital information contains metadata, such as “the author of a file and the date when it was created, last altered, accessed or deleted. It may also give detailed information about the revisions of a document. Information can also be obtained concerning the exchange of information, the identity of the sender and receiver of the digital information and what actions individuals have undertaken with this information”³⁸.

43. Competition authorities equipped with the adequate forensic IT tools may also be able to restore any documents which may have been deleted, unlike the case with paper documents which may have been destroyed³⁹.

44. The extent of the inspection powers concerning digital evidence varies across jurisdictions. “Several competition agencies have the power to take digital copies/forensic images of the evidence found at the premises investigated, (...) whereas others have the possibility to copy all the digital data to which they have access from the location of the investigation”⁴⁰. Some competition authorities do not have to sift the data at the premises of the company, but may collect the data on-site and examine it later at their offices.

45. In the process of collecting and examining digital evidence, competition agencies normally work on duplicates to preserve the digital information, ensuring the chain of custody and chain of evidence⁴¹. To minimise the disturbance caused to the normal business operation of companies, some jurisdictions face a time-limit to collect and process the data.

46. Competition agencies use forensic IT tools to index, search, sort and extract files. Data is normally filtered using search terms and keywords. However, when competition authorities copy the whole data of hard-drives or servers, issues of privacy may arise, as it may be impossible to ensure that the data will not contain personal information, information containing banking and other business secrets, or information protected by legal professional privilege. Moreover, copying an entire hard drive also raises the issue that the scope of the information being gathered might be too wide and may go beyond the subject-matter or purpose of the inspection, as defined by the court warrant or the decision issued by the competition authority.

47. When entire data carriers are copied, the review of the content may be conducted at the agency’s office, to avoid unnecessary business disruption. In some cases, the company and its legal counsel may be present when the information is examined and may claim certain documents to be private or legal

³⁸ ICN (2010).

³⁹ See, e.g., Saller (2013).

⁴⁰ ICN (2013).

⁴¹ Chain of custody refers to “the record of the custodial history of the evidence”. “Chain of evidence or authentication is the record of the collection, processing and analysis of the digital evidence, It proves that the presented evidence is unequivocally derived from the acquired digital information” (ICN, 2010).

privileged. The assessment on those claims is in some jurisdictions conducted by the officers on the case, while in other jurisdictions the records are reviewed by someone unrelated to the case. Pending an agreement on the claims put forward by the company, some competition agencies copy and keep those records sealed in a separate media. The records which are identified as private or privileged may be destroyed or returned to the company. In case of disagreement on the claims put forward by the company, the dispute is typically settled by a court, but some jurisdictions allow for such a decision to be taken by an independent third party which may be part of the competition agency but unrelated to the case⁴².

Box 3. STANPA case – Imaging of entire hard disks (Spain)

The Spanish Cosmetic Toiletry and Perfumery Association (STANPA) lodged an appeal with the National Appeal Court (Audiencia Nacional) after the CNC raided its premises and copied most of the information from the employees' computers, imaging entire hard disks, including documents unrelated to the investigation. The scope of the investigation was an alleged exchange of commercially sensitive information and price-fixing involving Stampa and nine companies.

The National Appeal Court acknowledged the search powers of the CNC, but emphasised that all documents gathered during the inspection should not go beyond the scope of the practice investigated. The Court stated that the CNC had gathered evidence outside the subject-matter of the inspection, considering there had been a violation of domicile, and should return the evidence not related to the subject-matter of the inspection to STANPA.

The CNC appealed the decision and the Supreme Court rejected the interpretation of the National Appeal Court. The Supreme Court emphasised that limiting the investigative powers is not in line with the European Case Law. The protection of free competition and the need to avoid obstacles which may unjustifiably limit the CNC's power to conduct a successful investigation must prevail over the right to inviolability of domicile. The Supreme Court confirmed that STANPA's rights were not violated due to the imaging of entire hard disks by CNC.

Sources: Rosalind Donald: Spanish court limits CNC's evidence gathering, *Global Competition Review*, 2009 <http://globalcompetitionreview.com/news/article/19160/>; Institute of Competition Law <http://www.concurrences.com/The-Spanish-Competition-Commission-38159>; Miguel Odriozola, Carlos Vérguez, Belén Irissarry, and Ana Latorre, "The Supreme Court partially revokes the High Court's judgment in the STANPA case, and confirms the full powers of the CNC during dawn raids", 5 November 2012, available at http://www.cliffordchance.com/publicationviews/publications/2012/11/the_supreme_courtpartiallyrevokethehigh.html.

Box 4. Water Utility Company - Gathering of emails as evidence (Colombia)

In 2012, the Superintendencia de Industria y Comercio (SIC) carried out inspections at the premises of the Water Utility Company of Bogotá (Empresa de Acueducto y Alcantarillado de Bogotá – EAA) on two different investigations on alleged antitrust infringements. As part of its inspection, SIC asked for emails of some of the company's staff.

The Water Utility Company challenged the inspections, by initiating an "Acción de Tutela" as a means to seek a constitutional protection of fundamental rights. In 15 April 2013, the Superior Tribunal of Bogotá issued a decision in one of the cases, supporting the plaintiff's position and ordering SIC not to take the gathered emails into account in its investigation. On the second case, however, the Superior Tribunal of Bogotá issued a decision in 30 April 2013 confirming that emails may be subject to inspection, even without a judicial warrant, when such information may be relevant to the investigation. The Tribunal also considered that "institutional" emails of employees could not be qualified as private correspondence and that the examination of those emails by SIC did not breach the rights of due process or privacy.

Given the contradictory nature of the two decisions on these two separate cases by the Superior Tribunal of Bogotá, a final decision to establish a uniform approach can only be taken by the Constitutional Court.

Sources: Press Release by SIC, 2 May 2013, available at <http://www.sic.gov.co/sala-civil-del-tribunal-superior-de-bogota-confirma-facultades-de-la-superintendencia-de-industria-y-comercio-para-acceder-a-correos-electronicos-en-todas-sus-investigaciones-administrativas1?>

⁴²

See ICN (2010).

48. When inspections last for more than one day, competition agencies may have to seal premises to guarantee that no documents are removed or destroyed during the absence of the search team. In several jurisdictions there are time-limits to the period the premises can remain sealed. In some jurisdictions, breaching the seals is considered a criminal offence, whilst in others competition agencies may adopt decisions to impose fines for the breach of seals.

Box 5. E.ON case: breach of a seal during an inspection – European Commission

In 2008, the European Commission (EC) imposed a fine of € 38 000 000 on E.ON Energie AG (E.ON) for a breach of a seal on the company premises. The seal had been affixed during an unannounced inspection concerning an alleged anticompetitive practice in the German electricity market in 2006.

To secure the evidence, the officials of the Commission sealed the premises overnight. The next day, they found that one of the seals had been breached, with a “VOID” sign clearly visible. As the documents in the sealed room had not been listed yet, the Commission was unable to ascertain whether any documents had been removed.

E.ON denied breaking the seal, bringing forward different explanations for the appearance of the “VOID” sign like the humidity, the use of an aggressive cleaning product, the age of the seal and so on. The Commission used outside experts to refute the allegations and the experiments did not corroborate E.ON’s arguments.

When determining the fine it imposed on E.ON, the Commission took into account that this was the first time that a company had breached a seal during an inspection by the Commission⁴³.

E.ON appealed the decision to the General Court which concluded that the breach of the seal was at least negligent. The European Court of Justice (ECJ) upheld the General Court’s judgement and confirmed the Commission’s decision.

Source: Press Release IP/08/108, European Commission, 30/01/2008, available at http://europa.eu/rapid/press-release_IP-08-108_en.htm?locale=en, and ECN (European Competition Network) Brief, Issue 5/2012, available at http://ec.europa.eu/competition/ecn/brief/05_2012/ec_seal.pdf.

49. During the inspection, most competition agencies are entitled to ask questions related to the inspection and to the investigation. These questions normally arise from the books and records being examined and most often have the purpose to assist in the conduct of the inspection and to clarify evidence. The power to ask questions from employees during an unannounced inspection should be distinguished from voluntary interviews or the hearing/interrogation of witnesses which are carried-out under separate legal basis.

50. Typically, the ability to ask questions to individuals is limited by the privilege against self-incrimination⁴⁴, which normally excludes questions directly related to the suspected infringement, unless individuals are willing to voluntarily answer such kind of questions or make voluntary statements. Competition agencies are generally cautious in the type of questions posed, as individuals may not be fully aware of their rights and the answers provided may later be considered inadmissible in court on unfairness grounds.

⁴³ A second case in which the European Commission imposed a sanction for breaching a seal was the case COMP/39.796 - Suez Environment - Breach of seal. The European Commission imposed a fine of EUR 8 million to Suez and its subsidiary for breaking a seal. The companies admitted that one of their employees broke the seal, so no appeal was lodged against the decision (the decision is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:251:0004:01:EN:HTML>).

⁴⁴ See ICN (2009a, 2013) and ECN (2012).

51. In some jurisdictions, the privilege against self-incrimination may not correspond to an absolute right to remain silent, as individuals and firms may have to co-operate fully and actively with the investigation. According to the jurisprudence of the European Court of Justice, undertakings must provide the European Commission “with documents which relate to the subject-matter of the investigation (...). The privilege against self-incrimination has only relevance with respect to answering the Commission’s questions: while an undertaking is obliged to answer factual questions, it cannot be forced to answer questions which would involve an admission on its part of an infringement (so-called «leading questions»)”⁴⁵.

52. Most often, during inspections, individuals are questioned: “to assist in the identification of the locations of relevant documents; to provide explanations of written entries or symbols in documents such as calendars or initials and acronyms found in documents; or to assist with the search, for example, by providing the combinations to a locked safe, or passwords to access computer records or electronic devices”⁴⁶.

Box 6. Trioplast case - Permissible scope of questions (European Commission)

Trioplast Nyborg A/S, a Danish plastic manufacturer, was dawn raided in 2001 at the request of the European Commission, based on a suspicion of a cartel in the European packaging industry. The Competition Authority requested a court warrant which enabled the authorities to ask questions during the inspection.

The validity of some of the questions posed was contested by Trioplast, considering they called for self-incrimination. The Supreme Court of Denmark considered that the questions asked were permissible. However, the Supreme Court also stated that questions should not be formulated on the presumption that the company is guilty.

Source: Subiotto and Snelders (2004).

53. Competition authorities are typically not authorised to examine or seize documents which are covered by legal professional privilege or which are simply unrelated to the subject-matter of the investigation. These relate to the rights of defence and procedural fairness which will be further discussed below.

54. The investigation may also have to be carried out in a certain time after the issuance of a court warrant, or there may be restrictions on the time available to conduct the search and to collect or process evidence, so as to minimise the costs the use of this investigatory tool may impose on businesses. “Other limitations may also play a role in certain very limited circumstances, such as privacy, data protection, the protection of commercial correspondence and banking secrecy”⁴⁷.

⁴⁵ Van Gerven (2006).

⁴⁶ ICN (2009a).

⁴⁷ ECN (2012).

Box 7. Question of privacy concerning the seizure of garbage bags - Canada

In the context of a joint investigation of the Royal Canadian Mounted Police, the Competition Bureau, the Sûreté du Québec, the Department of Homeland Security, the Federal Bureau of Investigation and several other agencies, to potential violations of the Competition Act, in connection to allegedly fraudulent telemarketing schemes, three garbage bags from unlocked garbage bins next to the office of a company were seized. The information obtained from the seizure of the garbage bags was used as source to request search warrants.

The three garbage bags were in common garbage bins “23 feet from the street” on a property belonging to a third party, easily accessible by the garbage collector and other individuals such as employees of other companies operating in the building.

The companies involved in the case challenged the seizure, alleging that the warrantless search was unreasonable and violated the right to privacy. In their view, the content of the documents was subject to a privacy interest of such a magnitude that a court warrant was required. Moreover, the information seized could not be subsequently used to obtain search warrants.

The Superior Court of Quebec dismissed the appeal and emphasised that the companies retained no interest of privacy in their abandoned garbage. The Quebec Court of Appeal, although considering there was no right of appeal of the Superior Court’s judgement, also considered that any privacy interest was abandoned when the documents were placed for collection in the common unlocked garbage bins adjacent to a public street.

Source: Decision of the Quebec Court of Appeal in case Express Transaction Services Inc v Canada (Attorney General), Canada, No. 500-10-004172-084, 13 June 2012.

Box 8. Seizure of documents in the office of an attorney-at-law, a doctor or a credit institution – 2012 Competition Law in Portugal

The Portuguese Competition Law of 2012 allows for the search of offices of attorneys-at-law, doctors or credit institutions. Notwithstanding, it imposes limitations on the competition authority’s powers of search and seizure.

The judicial authority must authorise, order or confirm the seizure of documents. In the case of searches in the office of an attorney-at-law or doctor, a judge responsible for procedural safeguards must be present. The seizure of documents subject to professional secrecy (covered by legal or medical privilege) is not permitted unless such documents are the object or an element of the infringement, otherwise the seizure will be null and void.

Documents covered by banking secrecy, during a search in a credit institution, can only be seized when there are well-substantiated grounds to believe that such documents are related to an infringement or are of major importance to establish the facts. The seizure, in this case, must be carried out by a judge responsible for procedural safeguards.

Source: Article 18, 19 and 20 of Law 19/2012, of 8 May 2012; GCR (2013), “Portugal”, Cartel Regulation 2013, available at http://lbrcdn.net/files/gtdt/pdfs/books/5/editions/193/193_20.pdf.

2.3 Police forces and other public bodies

55. Whilst conducting unannounced inspections, it is common for competition agencies to have the possibility of being assisted by police forces, particularly when resistance or refusal to co-operate is anticipated.

56. In some jurisdictions within the European Union, police assistance is compulsory⁴⁸. However, in most EU countries, “police assistance is requested at the discretion of the competition authority only at the moment of entering the premises, or when suspicion exists that opposition is envisaged or danger will be faced”⁴⁹. In Canada, the Bureau may be accompanied by a peace officer, following a request for authorisation, where the “Commissioner has reasonable grounds to believe that access to a premises may be denied, or where access to a premises has been denied or otherwise obstructed”⁵⁰. In the United States, “[w]hen seeking a search warrant, staff must obtain the assistance of an investigative agency, usually the FBI”⁵¹. The search is conducted by a team of agents, but no staff attorneys should be present during the search. In Brazil, given the criminal nature of cartel investigations, unannounced inspections are carried-out in collaboration with Public Prosecutors’ Offices, at the Federal and the State level. Inspections normally have the support of police forces and experts. To enable international notifications of firms or individuals that do not in the national territory, CADE holds a partnership with the Ministry of Justice Department of Asset Recovery and International Legal Cooperation (DRCI).

Box 9. Alleged salt cartel in Rio Grande do Norte (Brazil)

In 2012, nine search and seizure warrants against companies and union headquarters were carried out by CADE as part of an investigation against an alleged salt producers’ cartel in the state of Rio Grande do Norte. The dawn raids of documents and electronic material took place in the cities of Mossoró, Natal and Rio de Janeiro and had operational support of Federal Highway Police (PRF) from the states of Rio Grande do Norte and Rio de Janeiro.

Public union statements affirming that the companies, accounting for about 80% of national production of salt, constantly met to discuss product price and production quantities led CADE to request search warrants to the Federal Court in Natal, Mossoró and Rio de Janeiro. According to an economic study conducted by CADE, “since the start of such meetings between the companies, the price of salt increased to levels close to what they would be if there were a monopoly in the sector”.

“The action also included technical support from the State Prosecutor’s office and from Federal Police experts. Altogether, there was the participation of: 42 PRF officials, 22 Cade technicians, 18 officers and two security agents from the Federal Justice System, four Federal Police experts, and various sections of the Federal Attorney General’s Office”.

Source: Press Release by CADE, 25 September 2012, available at <http://www.cade.gov.br/Default.aspx?380b1bee061bf131e573c591a2a6>.

2.4 Inspection powers and leniency programmes

“The use of search warrants (...) minimizes the opportunity for document destruction and concealment, prevents the failure to produce responsive documents either deliberately or through inadvertence, and often spurs a race for leniency”⁵²

⁴⁸ E.g., in Belgium, France (in the case of inspections with a court warrant), Luxembourg and Latvia. See ECN (2012).

⁴⁹ ECN (2012).

⁵⁰ Competition Bureau Canada (2008).

⁵¹ DOJ (2012).

⁵² DOJ (2012).

57. When coupled with the threat of severe sanctions, the power to carry out unannounced inspections is not only an effective investigative measure in itself, but it may also reinforce the success of leniency or amnesty programmes⁵³, contributing to the instability of cartels and serving as a deterrence mechanism on anticompetitive conduct. Conversely, a leniency programme may not be successful if there is no threat of inspections to find evidence.

58. Searches or raids can prove instrumental both for increasing the probability of detecting cartels and ensuring that offenders are punished accordingly. Cartel members may be more concerned about the prospects of being the target of an investigation and subsequent enforcement proceedings. These concerns may directly induce leniency applications by cartel members. But such concerns also feed the fear of being betrayed by fellow conspirators, thus increasing the incentive to apply for leniency before other members of the cartel do so.

59. To illustrate, consider two cartel members – A and B. A believes the competition authority is capable of successfully exposing the cartel and causing it to be punished, but B believes A’s perceptions of the competition authority’s capabilities are overestimated. In such a case, A’s perceptions may of course lead A to apply for leniency, but if B is aware of A’s perceptions, B might also be induced to race to the competition authority and report A⁵⁴. Thus, the power to perform surprise unannounced inspections may be a valuable asset for competition authorities which have leniency programmes in place.

60. Finally, it may be worth mentioning that the information and evidence brought through leniency applications plays an important part in competition authorities’ decisions to conduct unannounced inspections. A leniency application may be the first piece of evidence of cartelisation obtained by the competition authority. The application and accompanying evidence may not only provide accurate information on possible targets for inspection (both firms and individuals) and on the whereabouts of evidence, but may also allow the competition authority to meet the legal requirements for conducting an inspection.

2.5 *Potential issues for discussion in written submissions and at the Forum*

- Please describe your powers to conduct unannounced inspections in antitrust investigations, the legal basis for those powers, when they were acquired and how they have evolved. Have you engaged in advocacy before government or legislators to obtain or reinforce these powers? If so, please describe the arguments put forward to overcome any concerns or perceptions relating to granting those powers to the competition authority.
- Please describe the role played by the judiciary or any other public bodies, such as police forces, in conducting unannounced inspections. If a warrant or judicial authorisation from a Court to conduct a search is required in your jurisdiction, have you faced any difficulties or reluctance from the judiciary to provide the necessary warrants? How would you describe the level of initial evidence necessary to justify carrying out an inspection and how has it affected your investigations?
- Please describe how often are the powers to conduct unannounced inspections used, in which types of antitrust investigations do you consider using these powers and when would your authority opt for a different investigatory tool. Please discuss the importance of having the ability

⁵³ See, e.g., Hammond (2009) and ICN (2009b).

⁵⁴ See discussion of the “pre-emption effect” in Harrington (2013).

to carry-out inspections in the context of the investigatory tools at the disposal of the competition authority, illustrating with some examples of cases.

- What are the main restrictions or difficulties your authority has faced in conducting effective inspections in antitrust investigations? Please also describe any issues raised by the targeted parties regarding an unannounced inspection. Has your authority faced any litigation case following an inspection? Please describe any case law from your jurisdiction in this context.
- Please describe your experience of organising and conducting unannounced inspections. Please describe how your authority plans and prepares for a search, the organisation of the search teams, the main steps taken during the inspection, and the aftermath of the inspection. What kind of training do the staff involved in conducting inspections attend? Has your competition authority issued guidance for carrying-out unannounced inspections?
- Please describe the scope of your inspection powers regarding paper documents and digital evidence. Please describe any limitation which may apply regarding the scope of your inspection powers (legal professional privilege rules relating to in-house or to external legal counsel; privacy, data protection, protection of correspondence, protection of banking secrecy, time limitations, amongst others). Please discuss how these limitations may affect your ability to investigate antitrust infringements, whilst taking into consideration the underlying rationale for such limitations.
- If evidence is found relating to an infringement of competition rules not covered by the initial inspection decision or court warrant, how does your authority proceed regarding such evidence?
- Please discuss how the powers provided by your current legal framework regarding unannounced inspections may influence the effectiveness of a leniency programme. Please describe how your leniency programme has evolved in relation to the evolution of your inspection powers.
- In case your competition authority does not have the powers to conduct unannounced inspections, please discuss, illustrating with some examples, whether the lack of this investigatory tool has affected your ability to investigate antitrust infringements. Please describe whether your authority has been seeking to obtain these powers and the arguments you may have put forward before government or legislators. If your authority may conduct inspections but is required to give advance notice to the targeted parties, please discuss the difficulties which may arise from such a legal framework.

3. Rights of defence and procedural fairness

“Because inspections are highly invasive, they have frequently raised issues of compatibility with human rights safeguards”, Venit, 2010.

61. What makes unannounced inspections such a powerful and effective investigation tool is the ability to gain control of concealed incriminating evidence by surprise. In addition, the commotion and pressure which naturally accompany a surprise inspection may lead to uncovering additional evidence, for example through confessions or leniency applications.

62. In the interest of enforcing prohibitions against cartels, competition authorities are legally authorised to take actions, such as entering the target’s premises, interfering with the regular course of business, taking control of documents, records and other evidence and inspecting them, which may clash

with natural and legal persons' rights. However, authorisation to conduct unannounced inspections is by no means a *carte blanche* to disregard those rights.

63. In order to keep a balance between the public interest in competition law enforcement on the one hand, and the rights of those affected by such enforcement action on the other, competition authorities' powers to conduct unannounced inspections are typically circumscribed or limited. Moreover, competition agencies normally follow certain procedures aimed at ensuring that their interventions are not disproportionate or arbitrary.

*“As regards whether the investigation to be carried out is justified or not and the scope of the duty to cooperate of the undertakings concerned, it must be observed that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of EU law (...). That principle was laid down in Article 7 of the Charter of Fundamental Rights of the European Union (...) under which ‘[e]veryone has the right to respect for his or her private and family life, home and communications’.”*⁵⁵

64. This section will briefly discuss rights of defence and “procedural fairness” or “due process” in the context of unannounced inspections. The grounds to carry-out unannounced inspections and how these relate to the rights of defence and procedural fairness were discussed in section 2.1.. This section will hence focus, firstly, on legal counsel and protection of legal professional privilege, secondly, on the privilege against self-incrimination and, finally, on judicial review of competition authorities' decisions and conduct.

3.1 Legal counsel and protection of legal professional privilege

65. Why are the competition authority's agents entering the premises and taking control of offices and communication lines? Is it legal for the agents to enter the premises? Is there a duty to co-operate with the competition authority's agents? To what extent? What would constitute an obstruction of the inspections? What are the repercussions for interfering with the inspection? These are among the many complex legal questions and dilemmas which may arise right at the moment when the competition authority's agents are at the doorstep to carry-out an inspection.

66. While laypersons usually lack the knowledge and expertise to properly address these questions (especially when they are in a state of emotional distress) the decisions they make in the course of an unannounced inspection may have severe repercussions. For example, employees may be subject to severe punishment if they interfere with an inspection by destroying incriminating evidence; on the other hand, employees may feel pressured to go beyond their legal duty to co-operate and may thus implicate themselves or their firm in competition law violations. Hence, legal consultation and representation are an important to guarantee that firms' and individuals' rights are duly respected and that the competition authority's powers are used proportionately.

67. On the other hand, there is a real risk that employees might take advantage of the competition authority's willingness to delay the inspection for the purpose of exercising the right to legal consultation, for obstructing and interfering with the inspection. In particular, employees may take advantage of the delay in order to destroy evidence, to alert other persons involved in the investigation, or to co-ordinate their stories.

⁵⁵ Judgment of the General Court of 14 November 2012, Nexans France SAS and Nexans SA v European Commission, T-135/09, para. 40.

68. The European Commission's "Explanatory note to an authorisation to conduct an inspection of a Commission decision under Article 20 (4) of Council Regulation No 1/2003" provides a formula for balancing the interest of companies to consult with their lawyers with the interest of preventing interference with the Commission's inspections⁵⁶. According to the note, the Commissions inspectors may "enter the premises, notify the decision ordering the inspection and occupy the offices of their choice without waiting for the undertaking to consult its lawyer". While the inspectors may agree to delay some of the inspection procedures (e.g., examining and copying of books and records, sealing business premises and receiving oral explanations) in order to allow legal consultation, "[a]ny such delay must be kept to the strict minimum".

69. Possible conflicts of interest may arise amongst the persons under investigation. For instance, while the target firm may wish to limit its co-operation with the competition authority so as to limit its exposure, employees may have an incentive to confess and implicate the firm and other employees in exchange for lenient treatment. It follows that some persons may seek independent legal advice, and refuse to be represented by the target firm's lawyers. Competition authorities should be aware of possible divergence of interests not only because exploiting them can be beneficial for developing the case, but also in order to ensure that those persons seeking independent counsel are accorded with their rights⁵⁷.

70. Most jurisdictions recognise the legal professional privilege ("LPP"), which safeguards the confidentiality of exchanges between attorneys and their clients. This privilege is designed to enable clients to freely confer with their counsel and provide the latter with information needed for providing sound legal advice. As the European Court of Justice noted in *Akzo*⁵⁸, the mere seizure of a privileged document constitutes a breach of the privilege:

"Any breach of legal professional privilege in the course of investigations does not take place when the Commission relies on a privileged document in a decision on the merits, but when such a document is seized by one of its officials."

71. In the particular context of unannounced inspections, LPP may be invoked to protect the confidentiality of legal consultation taking place at the time of the investigation itself, as well as to protect past communication between lawyers and their clients.

72. For particular documents to be protected by LPP, certain requirements must be met. One typical requirement is that counsel is a trained legal professional and a member of the local bar or law society. In addition, in certain jurisdictions, the privilege is applicable only to external legal counsel whose services are retained by the client, while communication with "in-house" lawyers directly employed by the client, are not protected⁵⁹.

⁵⁶ European Commission, Explanatory Note to an Authorisation to Conduct an Inspection in Execution of a Commission Decision Under Article 20(4) of Council Regulation No 1/2003 (available at: http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf).

⁵⁷ See Anderson and Cuff (2011).

⁵⁸ See Judgment of the Court of Justice of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, C-550/07 ECR 2010, I-08301.

⁵⁹ ICN (2013).

**Box 10. Cases AM & S v. European Commission and Akzo v. European Commission:
in-house lawyer communication not covered by LPP**

The legislation of the EU does not contain any reference to LPP; it is however a privilege undertakings enjoy according to the EU case law. LPP was first applied in the context of competition law in the AM & S case (1982), in which the Court of Justice recognised "the confidentiality of written communications between lawyer and client". However, the privilege was only applicable to consultations with independent lawyers. The Court AM & S reasoned that: *"it should be stated that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose. Such a conception reflects the legal traditions common to the Member States and is also to be found in legal order of the Community, as is demonstrated by Article 17 of the Protocols on the Statutes of the Court of Justice of the EEC and the EAEC, and also by Article 20 of the Protocol on the Statute of the Court of Justice of the ECSC"*.

The AM & S Court's ruling was reaffirmed in Akzo⁶⁰. In 2003, the European Commission inspected Akzo Nobel's premises in the UK in the context of a cartel investigation. Among the seized documents were e-mails exchanged between the general manager and the in-house legal counsel who was a member of the Netherlands' Bar. Akzo challenged the decision of the Commission to seize the documents and argued that they are covered by LPP. The European Court of Justice, in its judgement of 2010, followed the AM & S reasoning and rejected the appeal on the grounds that an in-house lawyer does not enjoy a level of professional independence comparable to that of an external lawyer⁶¹.

Source: Judgment of the European Court of Justice of 18 May 1982, AM & S Europe Limited v Commission of the European Communities, Case 155/79 ECR 1989 1575; Judgment of the Court of Justice of 14 September 2010, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission, C-550/07 ECR 2010, I-08301.

73. In certain cases, the European Commission may consider the making of "clearly unfounded claims for protection under legal professional privilege merely as a delaying tactics or opposing, without objective justification, any cursory look at the documents" as an obstruction of an investigation (in which case the undertaking may be subject to a fine) and/or as "aggravating circumstances" leading the Commission to consider imposing a higher fine for the substantive competition law violation⁶².

74. Questions concerning the protection of LLP are very likely to arise in the context of inspections of attorneys' offices. Hence, the circumstances where such inspections are conducted may be rather limited. For example, the Antitrust Division Manual of the Department of Justice (US) provides that "[b]efore searching the premises of an attorney, staff should consider obtaining information from other sources or through a subpoena, unless these efforts could compromise the investigation or prosecution, result in obstruction or destruction of evidence, or would otherwise be ineffective"⁶³. The Manual also provides that "a privilege team of agents and attorneys not involved in the investigation should be

⁶⁰ See Judgment of the Court of Justice of 14 September 2010, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission, C-550/07 ECR 2010, I-08301.

⁶¹ See also Laurel S. Terry, *Introductory Note to the Court of Justice of the European Union: the Akzo Nobel EU Attorney-Client Privilege Case*, 50 INTERNATIONAL LEGAL MATERIALS 1 (2011).

⁶² C 308/6 Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 or 102 TFEU, para 58.

⁶³ DOJ (2012), p. III-107.

designated to protect the attorney-client privilege and to ensure the investigation/prosecution team is not exposed to privileged material. The procedures should ensure that seized materials are reviewed for privilege claims.”

75. There are various procedures competition authorities follow in order to protect LPP, while at the same time ensuring that only those documents which enjoy the privilege are withheld from the competition authority. “In most cases, documents for which LPP is invoked, may be transferred either to a judge in a sealed container, in order for him/her to decide whether or not the privilege applies (e.g. New Zealand, Poland), or to another designated person or persons not involved in the investigation (e.g. officer of the court, sheriff or person agreed upon by the competition authority and the person invoking LPP in Canada, a team of law enforcement agents and attorneys not otherwise involved in the investigation in the United States or a Hearing Officer in the EU (EC))”⁶⁴.

76. In some jurisdictions, competition authority’s officials may browse or partly browse the documents so as to determine whether these may be protected by LPP. In case of disagreement with the claims of privilege, the dispute may be resolved by the courts. In other jurisdictions, however, competition authorities do not examine or even take a cursory look whenever privilege is claimed over certain documents. Documents are normally placed in a sealed envelope and the issue of privilege is resolved by a judge⁶⁵.

3.2 *The privilege against self-incrimination*

77. The privilege against self-incrimination and the complementary right to remain silent are “generally recognised international standards which lie at the heart of the notion of a fair procedure”⁶⁶. The Fifth Amendment to the United States Constitution states, inter alia, that no person “shall be compelled in any criminal case to be a witness against himself”.

78. One measure taken by competition authorities to protect the privilege against self-incrimination is the procedure of warning people under investigation that information they provide may be used against them; failure to do so may constitute a violation of procedural rights and may serve as good defence in enforcement proceedings. To illustrate, in Australia, cartel cases may be pursued either through civil or criminal procedure; since “[a]t the beginning of a cartel investigation, it may not be immediately apparent whether a matter is likely to provide evidence of serious cartel conduct” (which may be pursued criminally), the ACCC conducts its investigation in a manner which preserves the capacity to press criminal charges. The ACCC is particularly careful to “use ‘cautions’ where considered appropriate, thereby placing persons on notice that their responses may later be given in evidence”⁶⁷.

79. In the course of an unannounced inspection, individuals risk making statements or engaging in certain types of behaviour which could be self-incriminating. For example, it is quite common for competition authorities to interview employees or to request them to provide explanations regarding documents seized by the competition authority. In this framework, individuals may be under pressure to confess and incriminate themselves.

80. In the United States, employees or managers have the right to remain silent and are not compelled to answer any questions in the course of the search. In Europe, under Council Regulation

⁶⁴ ICN (2013).

⁶⁵ See ICN (2009).

⁶⁶ Judgment of the European Court of Human Rights of 3 May 2001, J.B v. Switzerland, 2001-III Eur. Ct. H.R. 450, para 64. See also Anderson and Cuff (2011).

⁶⁷ ACCC (2009), para 22-25.

1/2003, the European Commission is empowered “to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers”⁶⁸. Undertakings that “fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered by a decision adopted pursuant to Article 20(4)”, may be subject to a fine⁶⁹.

81. The scope of an undertaking’s privilege against self-incrimination in the European Union was delineated in *Orkem*⁷⁰, where the Court noted that “*the Commission is entitled (...) to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, 'even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned. (...) Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove'*”⁷¹. Conversely, in the United States, only natural persons are accorded with the privilege.⁷²

82. It follows that in the appropriate cases before the European Commission, the undertaking may invoke the privilege against self-incrimination and refuse “to answer questions which would involve an admission on its part of an infringement (so-called ‘leading’ questions)”⁷³. However, at the same time, the undertaking may still be compelled to answer “factual questions”. Anderson and Cuff (2011) note that “[i]n the context of antitrust investigation, this poses significant concerns, as many of the questions asked will be ‘factual’ requests for explanation”⁷⁴. The Commission’s Explanatory note provides that the undertaking’s obligation “to co-operate fully and actively with the inspection” and states that the undertaking may be required to provide “explanations on the organisation of the undertaking and its IT environment”.

83. As mentioned, individual behaviour may also be self-incriminating. For example, in the United States, “[a]lthough the contents of voluntarily created, preexisting documents are not protected by the Fifth Amendment privilege (...) an individual’s act of producing such documents may be self-incriminating by implicitly conceding the existence of the documents, the individual’s possession of the documents, or the authenticity of the documents”⁷⁵. It is however important to note that while search warrants issued in the

⁶⁸ Regulation 1/2003 (EC), article 20(2)(e).

⁶⁹ Regulation 1/2003 (EC), article 23(1)(d).

⁷⁰ Judgment of the European Court of Justice of 18 October 1989, *Orkem v. Commission*, Case 374/87 ECR 1989 3283.

⁷¹ *Idem* para. 34-5. See also Judgment of the Court of First Instance of 29 April 2004, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission of the European Communities*, ECR 2004 II-01181, para 406.

⁷² DOJ (2012), p. III-85.

⁷³ Yves Van Gerven, *Bringing “Dawn Raids” to Light: Regulation 1/2003: Inspections (“Dawn Raids”) and the Rights of Defence*, in *NEUESTE ENTWICKLUNGEN IM EUROPÄISCHEN UND INTERNATIONALEN KARTELLRECHT*, 13. ST. GALLER INTERNATIONALES KARTELLRECHTSFORUM 326, p. 336-338 (Carl Baudenbacher, ed.).

⁷⁴ Anderson and Cuff (2011).

⁷⁵ See DOJ (2012), p. III-85. Citations omitted. Note that while individuals may incriminate themselves in this manner in the course of a search, this passage refers to individuals’ compliance with subpoenas *duces tecum*.

United States compel individuals not to obstruct the search, they do not compel them to engage in such self-incriminating behaviour.

84. In sum, competition authorities' agents should be aware of persons' privilege against self-incrimination and of the various procedures applicable in their jurisdiction to protect this privilege (e.g., to warn interviewees that their statements may be used against them or to refrain from asking "leading questions"). Failure to follow such procedures and to protect the privilege may result in the inadmissibility of evidence on unfairness grounds, which may have serious consequences on the competition authority's enforcement action.

3.3 *Judicial review of competition authority's decisions and conduct*

85. To ensure the protection of rights, decisions to perform surprise inspections are normally subject to *ex ante* and/or *ex post* independent judicial review. For example, in the United States, the Department of Justice is required to apply a magistrate for a search warrant⁷⁶. In addition to this *ex ante* review designed to prevent arbitrary searches, the courts in the United States are empowered to conduct an *ex post* review in order to determine whether evidence was gathered lawfully and whether the persons affected by the search warrant were accorded with their "due process rights"; where appropriate, the court may order certain evidence inadmissible⁷⁷.

86. In contrast, the lawfulness of the European Commission's inspections and of the actions it takes are only subject to *ex post* review by the European Court of Justice, with the exception of raids on "non-business" premises (e.g., private homes, vehicles and other private premises where business records may be kept) which are also subject to prior authorisation from the relevant national judicial authority. However, some authors argue this type of *ex ante* judicial review by the national courts is rather limited in scope, since Council Regulation 1/2003 provides that such courts may not "call into question the necessity for the inspection nor demand that it be provided with information in the Commission's file"⁷⁸.

⁷⁶ See DOJ (2012), p. III-90.

⁷⁷ See, e.g., *Herring v. United States*, 555 U.S. 135 (2009).

⁷⁸ See, e.g., Anderson and Cuff (2011).

Box 11. Envelopes Cartel Case⁷⁹ - Israel

To illustrate the extent to which inspections are reviewed by courts, consider the matter of the Israeli “Envelopes Cartel”. In that case, the Jerusalem District rejected the argument that a folder containing incriminating documents which was found in a closet located in one of the defendants’ bedroom should not be admitted into evidence, “in light of the manner in which the [Israeli Antitrust Authority’s] investigators handled the investigation”.

In its decision, the Court referred to the testimony given by the Authority’s investigator who provided a detailed account of the manner in which the inspection was carried out. Inter alia, the investigator asserted that the defendant was presented with a warrant authorising a search in his home and provided explanations as to the investigators’ powers and the purpose of the search. She also testified that the defendant was told he had the right to consult a lawyer, and that the defendant was allowed to confer with him by telephone. In addition, according to the testimony, the defendant and his wife were present throughout the entire search of their home. In light of this testimony, the Court concluded that the defendant was made aware of his rights and that the notebook was obtained “lawfully and fairly”, and dismissed the defendant’s allegations in this regard.

Source: Criminal File (Jerusalem) 377/04 The State of Israel vs. Yaron Wohl.

87. Finally, in addition to the powers granted to disqualify evidence, persons whose rights were violated by competition authorities may seek reparations through civil proceedings as well⁸⁰.

3.4 Potential issues for discussion in written submissions and at the Forum

- What are the main restrictions or difficulties your authority has faced in conducting effective inspections in antitrust investigations? Please also describe any issues raised by the targeted parties regarding an unannounced inspection. Has your authority faced any litigation case following an inspection? Please describe any case law from your jurisdiction in this context.

4. International co-operation in planning and conducting unannounced inspections

“[W]hile cartels have gone global, many competition authorities operate predominantly within the framework of their national jurisdiction. Investigating cartels with international scope therefore poses both procedural and substantive challenges. Co-operation between the different authorities involved is required to ensure the successful resolution of these challenges”⁸¹.

88. Successful enforcement against cartels with an international dimension most often requires different jurisdictions to engage in international co-operation. Despite the growing number of jurisdictions with anti-cartel rules and benefiting from powerful investigatory tools, applying these rules and powers independently may not be effective when fighting international cartels.

⁷⁹ Criminal File (Jerusalem) 377/04 The State of Israel vs. Yaron Wohl. Incidentally, this case also illustrates the advantage of having powers to search residences in addition to business premises. In that case, the investigators had prior information according that the folder which contained incriminating documents was hidden above the acoustic ceiling panels in the defendant’s office; however, the defendant decided to conceal the folder in his home after he became aware of an Israeli Antitrust Investigation of a tangent market and became concerned that his office might be searched.

⁸⁰ See Anderson and Cuff (2011).

⁸¹ OECD (2012a), “Improving International Co-operation in Cartel Investigations”.

89. Conducting simultaneous surprise inspections in different jurisdictions may be an effective means of jointly gathering valuable evidence to uncover international cartels. By keeping the element of surprise, co-ordinated inspections increase the likelihood of success, avoiding that the investigatory steps taken by one given jurisdiction negatively impact the investigations by other jurisdictions. In particular, co-ordinated inspections may prevent the destruction or concealment of information by cartelists.

90. International co-operation⁸² has increased consistently over the years. The Marine Hose case⁸³ and the first joint dawn raid conducted by Brazilian, EU and US authorities, in February 2009, on the refrigerator compressor market are good examples of successfully co-ordinated dawn raids.

Box 12. International refrigerator compressor cartel – joint dawn-raids by Brazil, the EU, and the US

In 2009, the European Commission conducted a joint dawn raid with the help of Brazilian and US authorities at the premises of ACC, Danfoss, Embraco, Panasonic, Tecumseh and Whirlpool. The companies were suspected of price fixing and keeping market shares stable to recover cost increases in the small refrigerator compressor market in the European Economic Area (EEA). The cartel members held bilateral, trilateral and multilateral meetings at which they discussed prices and exchanged sensitive market information. Dawn raid were carried-out simultaneously in Brazil, in the US and in several EU countries.

ACC, Danfoss, Embraco and Panasonic were fined by the European Commission a total of € 161 198 000, for participating, together with Tecumseh, in a cartel which covered the whole EEA.

Source: EU Press Release (http://europa.eu/rapid/press-release_IP-11-1511_en.htm?locale=en), Speech of Neelie Kroes (SPEECH/09/454), Case COMP/39.600 ([http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012XC0427\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012XC0427(01):EN:NOT))

91. Jurisdictions lacking the powers to conduct unannounced inspections are not able to participate in co-ordinated surprise inspections with foreign authorities, which may undermine the success of their own domestic enforcement. A number of jurisdictions have recently introduced or reinforced their powers to conduct unannounced inspections, which may allow them to benefit from co-operation.

92. Organising and executing unannounced inspections and international co-operation are both generally resource demanding. New and less experienced competition authorities lacking institutional capacity may hence find it hard to co-operate effectively in conducting surprise inspections. Trust and confidence in legal systems is also important for co-operation⁸⁴. For example, if there is a risk that information may be leaked, it could put at risk the antitrust investigations carried-out by other jurisdictions.

⁸² International co-operation can be facilitated through multilateral platforms, such as the OECD or the ICN, but also “through a variety of frameworks, both general and competition specific. Countries may rely on formal Mutual Legal Assistance Treaties (MLATs), extradition treaties or letters rogatory, although these are mainly used by jurisdictions with criminal cartel regimes. General, regional and bilateral trade agreements often involve specific competition provisions, which may be used to facilitate co-operation. (...) Competition specific instruments encompassing specific co-operation agreements, memorandums of understanding and national law provisions provide further avenues for international co-operation. Bilateral interagency competition agreements have proliferated, and usually include provisions on co-ordination of parallel investigations, exchange of information, consultations or staff exchanges between the authorities. (...) Although less concrete than bilateral agreements, memorandums of understanding still provide a tentative first step in establishing a longer-term co-operation framework” (OECD, 2012a, “Executive Summary”, p. 12).

⁸³ Case COMP/39406 (Joint dawn raid conducted by the EU, UK and US).

⁸⁴ See OECD (2012b).

93. When the competition agencies are in different stages of their investigation, it may also be difficult to co-operate. For example, a search warrant may already have been issued in one country and might soon expire, but the other country may still be gathering sufficient initial evidence to be able to get a warrant from the court. Difficulties in co-ordinating simultaneous inspections may also arise due to the fact that different competition agencies are operating in different time zones or due to language barriers.

94. Effective mechanisms to facilitate information sharing⁸⁵ between the investigating authorities are normally needed to plan and conduct a successful international dawn raid. With very few exceptions, the exchange of confidential information is not permitted in the majority of instruments and agreements of co-operation in the antitrust field⁸⁶. Nonetheless, successful co-ordination of inspections can usually be achieved through sharing of public or agency information, even without the need to share confidential information.

95. Differences in legal frameworks may also pose difficulties in international co-operation. For example, the ability to exchange of information and evidence between civil and criminal jurisdictions may be limited. Evidence gathered during dawn-raids may be impossible to share between jurisdictions, which may hinder the ability of competition agencies to assist each other in their investigations.

96. Leniency programmes are the best means to obtain the necessary evidence to justify conducting surprise inspections and for the success of these inspections. Although co-ordinated inspections would benefit from sharing information obtained from leniency applicants, the exchange of information between competition agencies should not reduce the incentives of firms to apply for leniency. The information submitted by a leniency applicant to one jurisdiction should not be used against that applicant in another jurisdiction. Convergence of leniency programmes would benefit international co-operation amongst competition agencies, as companies would more likely apply for leniency in multiple jurisdictions and would have an incentive to provide confidentiality waivers. Exchange of information at an early stage of the investigation would render co-operation more effective.

97. Despite the difficulties and limitations that still remain in international co-operation between competition authorities, co-operation has increased steadily over the years. More agencies now co-ordinate their investigation efforts and conduct simultaneous surprise inspections, increasing the likelihood of success in the fight against international cartels.

4.1 *Potential issues for discussion in written submissions and at the Forum*

- Has your authority co-operated with another competition authority to conduct any joint unannounced inspections? In case you have agreements in place with foreign countries or authorities, do these allow your authority to conduct unannounced inspections on behalf of a competition authority from another jurisdiction?
- Please describe any difficulties you may have encountered relating to international co-operation to prepare or conduct inspections (e.g., difficulties arising from only being allowed to conduct searches during specified hours, from having to give advance notice of the inspection to targeted parties, if it is the case, amongst others).

⁸⁵ See OECD (2005).

⁸⁶ See OCED (2012b).

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