



Unannounced Inspections as an Investigatory Tool: EU Commission's Powers and Safeguarding Fundamental Rights

Katerina BUCHTOVA*
Case Handler
Cartels Directorate
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*All views expressed are personal and do not bind the Commission or its services

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EU Commission's Powers during Inspections

EU Commission's Powers during Inspections: Legal Basis

- Art. 20 Reg. 1/2003
 - Enter any premises, land and means of transport
 - Examine the books and other records related to the business, irrespective of the medium on which they are stored
 - Take or obtain in any form copies of or extracts from such books or records
 - Seal any business premises and books and records
 - Ask for explanations on facts or documents on the subject-matter and purpose of the inspection

Gathering of Digital Evidence

- Update of the Explanatory Note in March 2013
- New workflow for the collection of digital evidence, but no change to the digital review method
- Taking electronic copies of digital evidence
- Scanning of paper documents (in progress)

Inspection Decision I.

- Requirements on the Inspection Decision => sufficient reasoning for a national court to control proportionality and arbitrariness
- Elements in the Inspection Decision
 - Addressee
 - Subject-matter and purpose of the decision
 - The starting date of the inspection
 - Information on fines and periodic penalty payments
 - Information on the right to have the Inspection Decision reviewed by the EU Courts

Inspection Decision II.

- Requirements on the subject-matter and purpose
 - Description of the essential features of the suspected infringement
 - Explanations on the involvement of the inspected undertaking in the infringement
 - Explanations on EU Commission's available factual information and evidence
 - Indication of the evidence sought
 - Explanations for the national court on the indispensability of the inspection

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Conclusions

- EU Commission has wide powers of examination
- The gathering of digital evidence workflow was updated recently
- The inspection decision has to contain sufficient reasoning for a national court to control proportionality and arbitrariness ("reasonable grounds" for an inspection)

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Judicial Review and Safeguarding Fundamental Rights during Inspections

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Limits to EU Commission's Powers during Inspections

- Taking away only business records related directly or indirectly to the subject matter and purpose of the inspection
- Safeguarding the rights of defence at this stage of procedure
 - Right to legal representation
 - Privileged nature of correspondence between lawyer and client

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Review by the EU Courts

- Ex post judicial review for inspections on business premises
 - Independent of any final decision on the infringement
 - Application for annulment without suspensory effects
- Search warrant by the national courts for inspections on private premises necessary

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Review by the EU Courts: EU Commission's Powers during Inspections

- GC in Nexans/Prysmian
 - Examination of records
 - Information not covered by the inspection decision
 - Copying business records (on whatever medium) + Obtaining explanations on specific documents => intermediate measures implementing the decision (no separate appeal possible)

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Review by the EU Courts: Inspection Decision

- GC in Nexans/Prysmian
 - Specification of the subject matter, purpose and the geographic scope of the alleged infringement
 - Indication of presumed facts
 - Product market thought to be affected
 - Identification of sectors with sufficient precision for
 - The undertaking to be able to establish cooperation
 - The GC to determine reasonable grounds

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Review by the EU Courts: Fundamental Rights

- Stakeholders increasingly raise fundamental rights issues
- Privilege against self-incrimination
 - leading vs. factual questions
- Authorisation of inspections
- Legal professional privilege (LPP)
 - communication with independent lawyer
 - in relation with the ongoing EU competition law proceedings

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Conclusions

- EU Commission's investigatory powers are wide, but not unlimited
- The scope of the inspection has to be defined with sufficient precision
- EU Commission has to safeguard fundamental rights during inspections
- Only ex post judicial review of inspections decisions is available for inspections on business premises

Back up



Fundamental Rights

- Jurisprudence: rights of defence = fundamental rights
- Lisbon Treaty: EU Charter of Fundamental Rights = primary EU law (Art. 6 (1) Treaty on European Union)
- Accession to the European Convention on Human Rights (European Court of Human Rights competent to review Union acts)