

# **CATALOGUE OF INVESTIGATIVE POWERS FOR CARTEL INVESTIGATIONS<sup>1</sup>**

The following provides a list of investigative powers for effective and efficient anti-cartel enforcement. This list collects various investigative powers that can be included in the legislative framework of competition agencies and applies in administrative, civil and criminal anti-cartel enforcement systems<sup>2</sup>.

1. **Searches/Inspections** ('Inspections'): These are searches of data (paper or electronic) to collect information about illicit behaviour.

## **1.1. Inspections can be:**

- a. Announced or unannounced;
- b. Voluntary or compulsory (this may imply different procedural requirements, e.g. decision of an agency or court order).

## **1.2. Inspection powers may include:**

- a. Inspection of business premises<sup>3</sup>: right to enter the undertakings' premises, land, right to inspect means of transportation (company cars), books and records (irrespective of the medium in which they are stored), right for digital information gathering (i.e. all digital information which is accessible to the undertaking or person being inspected, irrespective of where they are physically stored or the medium in which they are stored), etc.;
- b. Inspection of private premises: right to enter private premises, right to inspect private means of transportation, books and records (irrespective of the medium in which they

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<sup>1</sup> This document lists different investigative powers and the idea is that it can serve as a checklist/menu for agencies to see what kind of investigative powers a competition authority may need.

<sup>2</sup> This catalogue does not include screening tools to assist in the detection of cartel conduct nor data analysis tools, e.g. comparison of public databases to identify indicators of anti-competitive activity using bid-rigging indicator analysis systems, or other informal means of cartel detection (the so-called proactive-type cartel detection methods) such as market screening (structural assessment of industries, industry monitoring), use of certain economic methods, etc.

<sup>3</sup> In some jurisdictions this may include the right to order inspections of public entities' premises when there is evidence of anticompetitive practices (for instance, public procurement officers who have been involved in a big-rigging conspiracy, soliciting and receiving bribes in return for the award of contracts) or when there is evidence that the public entity has information that is vital at any stage of a cartel investigation and the public entity will not provide it by other means.

are stored), right for digital information gathering (i.e. all digital information which is accessible to the person being inspected, irrespective of where they are physically stored or the medium in which they are stored),etc.;

- c. Copying or seizing records;
- d. Taking photographs and video footage at the premises;
- e. Sealing records for follow-up inspection at the agencies' premises;
- f. Sealing premises for later inspection on the spot;
- g. Asking for explanations or information in the course of an inspection from present representatives or members of staff of the undertaking under investigation<sup>4</sup>;
- h. Conducting interviews during the inspection<sup>5</sup>;
- i. Imposing penalties for failure to comply with inspection powers;
- j. Obtaining police assistance in order, for example, to overcome opposition, including as a precautionary measure.

**1.3. Within the inspection powers, the power for digital information gathering may include for example:**

- a. Making digital copies of or seizing records;
- b. Searching and making forensic images of digital information;
- c. Sealing (copies) of records for follow-up searches at the agency's premises.

**2. Requests for Information:** these are requests to an addressee (individual or an undertaking) to provide all necessary information and documents.<sup>6</sup> They can be:

- a. Voluntary;
- b. Compulsory, i.e. where sanctions can be imposed for non-compliance with the request;
- c. There can also be a power to impose penalties if the addressee gives incorrect/misleading replies (for both voluntary and compulsory requests).

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<sup>4</sup> Privilege against self-incrimination and right to counsel as guaranteed by the jurisdiction in question may have to be taken into account.

<sup>5</sup> Privilege against self-incrimination and right to counsel as guaranteed by the jurisdiction in question may have to be taken into account.

<sup>6</sup> In this respect the privilege against self-incrimination as guaranteed by the jurisdiction in question may have to be taken into account.

3. **Interviews**: interviews are meetings between representatives of a competition agency and an interviewee for the purpose of obtaining information and evidence<sup>7</sup>. Interviews can be:
  - a. Voluntary;
  - b. Compulsory, i.e. where sanctions can be imposed for non-compliance with the request;
  - c. There can also be a power to impose sanctions if an individual gives incorrect/misleading answers.
4. **Leniency/amnesty programs**: these are programs aimed at obtaining information from applicants who participated in the cartel in exchange for immunity (amnesty) or reduction of fines (leniency).<sup>8</sup>
5. **Informant sources**: the agency can have the power to consider other sources of information about an illicit behaviour. These sources of information may include the following:
  - a. Informants participating or having participated in the cartel, i.e. whistle-blowers;
  - b. Complainants or third parties such as customers or suppliers;
  - c. Informants who have knowledge of illicit behaviour (despite not having participated in the cartel themselves).

Experience shows that for those types of schemes it is very important for the Agency to be able to protect the identity of the information provider (for example by keeping them anonymous)<sup>9</sup>.

6. **Cooperation with other agencies**:

- a. With other national agencies, i.e. agencies of one jurisdiction informing each other when they uncover evidence of a possible cartel; e.g. cooperation between the various national enforcement agencies with competence over collusion and corruption in public procurement; cooperation with the police, signing MOUs with the police and anti-corruption bodies, etc.
- b. With foreign competition agencies, e.g. coordination of simultaneous inspections; exchange of information<sup>10</sup>; interviewing witnesses on behalf of another agency;

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<sup>7</sup> In this respect the privilege against self-incrimination and right to counsel as guaranteed by the jurisdiction in question may have to be taken into account.

<sup>8</sup> It is preferable that the competition authority has discretion to take into account the degree of cooperation of a company in setting fines.

<sup>9</sup> In some jurisdictions protection may be guaranteed until disclosure is required under the disclosure obligations in the relevant jurisdiction.

information requests to foreign competition agencies at pre-investigation, investigation and post-investigation stage; a competition agency asking another competition agency to collect evidence/information on its behalf.

7. **Other possible investigative powers**: in some jurisdictions other investigative powers exist. However, in many countries national laws impose strict limits on the use of these powers, often requiring court authorization or restricting their use to criminal investigations. Such powers may be :
- a. Covert tapping or monitoring of data transmission;
  - b. Covert making or using recordings of communications among suspects, conversations between colluding competitors;
  - c. Continuing the prohibited conduct in an undercover capacity to enable the competition agency to collect information or evidence about co-conspirators (e.g. recording meetings or telephone conversations or providing information or evidence to enable an agency to utilise its investigative powers, such as searches or wiretaps);
  - d. Electronic surveillance: for ongoing cartels when the agency has sufficient information about the details of the operation of the cartel;
  - e. Obtaining communications data (including subscriber data, telephone numbers of incoming and outgoing calls, dates and durations of telephone calls) from telecom providers<sup>11</sup>;
  - f. Obtaining access to the content of stored communications providing access to data held or stored by third party telecommunications carriers, such as voicemail, SMS, MMS, VoIP messages and email communications without the knowledge of the sender or intended recipient.
  - g. In some jurisdictions, there is a right to detain someone to the offices and even arrest a suspect for the purpose of answering questions.

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<sup>10</sup> See also the Chapter on International Cooperation and Information Sharing of the ICN ANTI-CARTEL ENFORCEMENT MANUAL under the following link: [http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/icn\\_chapter\\_on\\_international\\_cooperation\\_and\\_information\\_sharing.pdf](http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/icn_chapter_on_international_cooperation_and_information_sharing.pdf)

<sup>11</sup> This power does not extend to accessing the content or substance of communications.