



ECN WORKING GROUP COOPERATION ISSUES AND DUE PROCESS

INVESTIGATIVE POWERS REPORT

31 October 2012

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References to jurisdictions

AT:	Austria
BE:	Belgium
BG:	Bulgaria
CY:	Cyprus
CZ:	Czech Republic
DE:	Germany
DK:	Denmark
EE:	Estonia
EL:	Greece
ES:	Spain
EU:	European Union; 'EU' is used here in reference to enforcement action by the European Commission (COM) under Articles 101/102 TFEU and its review by the EU Courts
FI:	Finland
FR:	France
HU:	Hungary
IE:	Ireland
IT:	Italy
LV:	Latvia
LT:	Lithuania
LU:	Luxembourg
MT:	Malta
NL:	The Netherlands
PL:	Poland
PT:	Portugal
RO:	Romania
SI:	Slovenia
SK:	Slovakia
SV:	Sweden
UK:	United Kingdom (all references to the UK competition authority should be understood as referring to the Office of Fair Trading (OFT))

GENERAL REFERENCES

ECN:	European Competition Network, which is composed of the NCAs and COM
NCA:	National Competition Authority
MS:	Member States
SO:	Statement of Objections
Competition authorities:	the members of the ECN, namely NCAs and COM

1. INTRODUCTION

Competition law and enforcement in the EU is characterised by the co-existence of EU law and national laws for substantive rules and procedures. Convergence in substantive analysis in antitrust is achieved through the obligation for NCAs and national courts to apply Articles 101 and 102 TFEU pursuant to Article 3 of Regulation 1/2003 and the mechanisms contained in this instrument to ensure co-operation and coherency (Articles 11 to 16 and 22).

However, the situation is more complex in relation to procedures and sanctions for the implementation of the EU competition rules in the Member States, as this is not generally regulated or harmonised by EU law. They are largely governed by national laws, subject to general principles of EU law, in particular, the principles of effectiveness and equivalence.

The Report on the functioning of Regulation 1/2003¹ found that divergences of Member States' enforcement systems remain on important aspects. It concluded that this aspect may merit further examination and reflection.

In line with this orientation, the ECN Working Group on Cooperation Issues and Due Process has prepared this Report based on information provided by the members of the ECN Working Group Cooperation Issues and Due Process. The purpose of the Report is to provide an overview of the different systems and procedures for antitrust investigations within the ECN. This Report addresses the powers related to inspections in business premises and non-business premises, as well as those related to requests for information and interviews.

The Report is based on information from 28 jurisdictions (**AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, EU, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK**). Input and comments were taken into account up to 31 October 2012.

This Report reflects the state of convergence within the ECN and can serve as a basis for well-informed discussions on the need for further convergence and how this can be achieved, whether through soft law or legislative harmonisation.

Definitions are addressed in the beginning of each section in order to establish a common understanding of some relevant concepts for the purpose of the present Report. They have been compiled solely for the purpose of this Report and in order to have a common reference basis.

¹ Communication from the Commission to the European Parliament and the Council, COM (2009)206 final.

2. INSPECTIONS IN BUSINESS PREMISES

2.1. Legal basis

In all jurisdictions, competition authorities have the power to inspect² business premises³. Most jurisdictions foresee a single legal basis for such inspections, while some authorities carry out inspections on the basis of different sets of powers. Some jurisdictions distinguish between different types of proceedings as specified hereafter. The report typically focuses on unannounced inspections unless otherwise specified⁴.

More particularly, the following examples of the above distinctions can be highlighted:

- In **DE**, a distinction is made between "fine procedures" and "administrative procedures"⁵. In both types of proceedings inspections can be conducted. "Fine" and "administrative procedures" are distinct with different legal safeguards for the parties concerned and different limitations to the NCA's powers. The proceedings referred to for the purpose of this Report are inspections in fines proceedings, as inspections in administrative proceedings are exceptional. When the competition authority envisages imposing a fine, it will always conduct the inspection under the fines procedure.
- In **EE**, different legal acts (Competition Act, Code of Criminal Procedure and Code of Misdemeanour Procedure) make a distinction between "inspections" (possible in administrative procedures) and "searches" (possible in criminal and misdemeanour procedures)⁶. Inspections in the course of administrative procedures can only take place if the undertaking is willing to cooperate with the NCA. They are rarely used as, if a suspicion of a crime or misdemeanour is found, a criminal search must be conducted.
- In the **EU** system⁷, a distinction is made between inspections on the basis of a written authorisation/mandate and inspections ordered by decision of the Commission. If reference is made hereafter to **COM** inspections, it relates to inspections ordered by decision unless otherwise specified.

² Definition of **inspection**: Any form of on-the-spot investigation, including in particular (i) the power to enter premises, land and means of transport of undertakings or 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.

³ Definition of **business premises** for the purposes of this Report: any premises, land and means of transport of undertakings. On the other hand, the definition on **non-business premises** refers to other premises than business 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.

⁴ "**Unannounced**" inspections are carried out without advance notice; for 'announced' inspections prior notice is given to the object of the inspection. Some jurisdictions e.g. **EU, HU, LT, NL** and **SV** have the power to conduct announced inspections.

⁵ Article 59 of the Act against Restraints of Competition ("ARC").

⁶ Article 60 of the Competition Act, Article 91 of the Code of Criminal Procedure and Article 35 of the Code of Misdemeanour Procedure, respectively.

⁷ As provided by Article 20 of Regulation 1/2003.

- In **FR**, the investigatory system provides for two different sets of powers, provided for by two different legal basis: "simple powers" (inspections without a court warrant, rarely used to perform unannounced inspections, hereinafter referred to as "**FR(1)**") and "enhanced powers" (inspections with a court warrant, referred to as "dawn raids", hereinafter referred to as "**FR(2)**")⁸.
- **LU** has a similar system to the French system (see above **FR(2)**). In **LU** only unannounced inspections with court warrants have been carried out (and hence, these will be referred to when referring to **LU** in the report).
- In **LV**, a distinction is made between "visits" and "inspections". "Visits" can take place without a court warrant and police assistance and they regard only business premises⁹. For the purposes of this report, reference will be made only to "inspections".
- In **PL**, there are two types of inspections of business premises: "plain inspections" (**PL(1)**) and "inspections with search"(**PL(2)**)¹⁰. Plain inspections may be conducted at any time during explanatory¹¹ or antimonopoly proceedings before the President of the competition authority and within the scope of these proceedings. As a general rule, inspections with a search shall take place after initiation of antimonopoly proceedings. However, in the event of any justifiable suspicion of serious breach of the provisions of the Act, particularly whenever obliteration of evidence may occur, the President of the competition authority may file a request to the court for a search warrant prior to the antimonopoly proceedings being instituted (i.e. within explanatory proceedings). The Polish competition authority is not required to announce the inspection to the undertaking before its initiation.
- In **PT**¹², the competition authority, as a general rule, carries out unannounced inspections (to ensure that evidence is not destroyed). A distinction can be drawn between inspections of general business premises and of lawyers' or doctors' offices. In these two latter cases, inspections must be personally attended by a judge and the relevant Professional Association is also advised to be present. There are also specific rules for seizing evidence inspections in banks and other financial institutions.

⁸ Book IV of the French Code of commerce: Article L. 450-3 refers to simple powers (**FR(1)**) and Article L. 450-4 refers to inspections with a court order (**FR(2)**).

⁹ While in "visits" the undertakings must also comply with demands of the competition authority's officials and administrative liability for refusal may be incurred, any search activity or seizure of documents cannot be forced, i.e. consent from the undertakings must be received, where the latter is not necessary if an inspection is carried out.

¹⁰ Articles 105a-105l of the Polish Act of 16 February 2007 on Competition and Consumer Protection.

¹¹ Before instituting antimonopoly proceedings the Polish competition authority may initiate explanatory proceedings, the aim of which is to evaluate whether there is a likelihood of a breach of the competition law. Such proceedings are conducted "in a case" and not against a particular undertaking, therefore no formal objections are formulated at this stage. The explanatory proceedings should be completed within 30 days, or in complicated cases, within 60 days. This time limit is of an instructive character and it may be legally extended.

¹² The legal basis to undertake inspections in business premises in **PT** is Article 18(1)c of the Portuguese Competition Act (Law 19/20123, of 8 May).

- In the **UK**, if the competition authority has reasonable grounds for suspecting that an agreement falls within one or both of Article 101 TFEU and the Chapter I prohibition, and/or that one or both of Article 102 TFEU and the Chapter II prohibitions have been infringed, it may conduct an investigation and has the power to enter premises to carry out inspections, either with or without a warrant. These powers enable the authority to enter premises and to gain access to documents relevant to an investigation. (Article 27 and 28 of the CA98). It is noted however that the power to carry out inspections without a warrant is limited to business premises.

2.2. Requirements for conducting inspections

2.2.1. Substantive requirements

The most common ground for launching inspections is generally the existence of elements pointing towards reasonable grounds for suspecting an infringement (e.g. **AT, BE, BG, CZ, DE, DK, EE, EL, ES, FR(2), HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SV, and UK**).

2.2.2. Procedural requirements relating to the stage of the procedure

Some jurisdictions require that an investigation has been opened in order to undertake inspections (e.g. **BG, CY, HU, LT, MT, PT and RO**); others have adopted such a requirement in practice (e.g. **CZ, FR and LU**). In **IT**, a decision to conduct an inspection can be adopted only following a formal decision to open an investigation that can be closed only by a formal and motivated decision. In **HU**, investigative measures may only be performed in the course of proceedings in respect of a specific case.

Generally, an inspection can be carried out at any time during the proceedings. If a case starts with an inspection, the order initiating the proceedings has first to be given to the undertaking concerned, followed by the court warrant authorising the inspection.

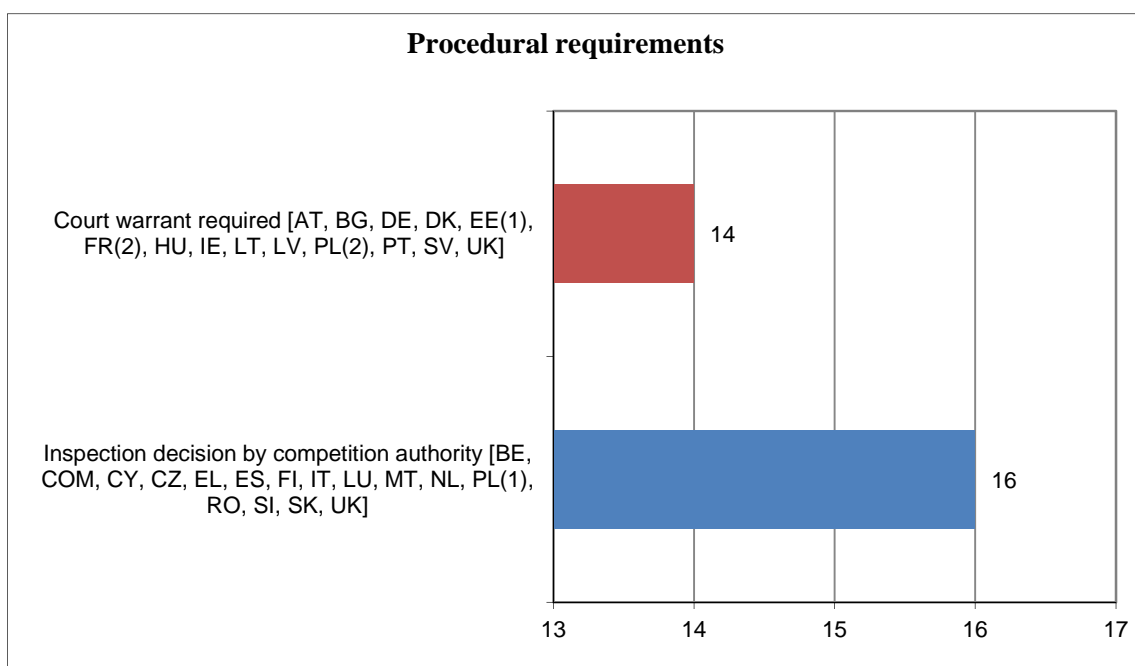
2.3. Procedural requirements

2.3.1. Authorisation by decision / court warrant

In all of the jurisdictions, either a court warrant or an inspection decision¹³ granted by the competition authority is required in order to conduct an inspection in business premises (see graph below). As noted above, in *section 2.1*, in the **UK** court warrants are mostly but not always required.

¹³ For the purposes of this report, the term **inspection decision** will refer to all decisions, administrative acts or other measures of any kind which the competent organism or person in the competition authority issues with the purpose of ordering or authorizing an inspection. The term "**court warrant**" is used for a decision by a court authorizing inspections.

Graph 1



In addition, in some jurisdictions competition authorities need a court warrant in case they face opposition, they want to use coercive measures, or they want to rely on the cooperation of the police or a similar body: e.g. **ES**¹⁴, **IT**¹⁵, **LU** and **MT**.

In the **EU** system, the **COM**, when encountering opposition, can rely on the assistance of **MS'** authorities¹⁶.

The following further aspects can be highlighted:

- In **BE**¹⁷, in the case of inspections in business premises, specific instructions issued by a competition prosecutor and the prior authorization of the president of the Competition Council (or of a member of the General Assembly of the Council who is empowered to this by the president) will be required.

¹⁴ According to the Competition Act, if access is given by the parties, an inspection decision by the **ES** competition authority's Director of Investigation suffices. On the contrary, if there is opposition from the parties, in addition to the inspection decision, it is necessary to obtain a court warrant.

¹⁵ In **IT**, a court warrant is needed only when, should the parties oppose to the investigation and the Fiscal police proceed to the inspection, the parties do not allow sealed envelopes/locked drawers to be opened.

¹⁶ Article 20(6)-(8) of Reg. 1/2003.

¹⁷ In **BE**, the NCA consists of two main bodies: on the one hand, the Directorate General for Competition, which is part of the Federal Public Service Economy, and on the other hand, the Competition Council (an administrative tribunal) which is composed of the General Assembly (a court, which is divided into chambers to handle the cases) and of the College of Competition Prosecutors (the prosecuting body).

- In **CZ**, no formal decision of the authority is issued for an inspection: the Chairman of the competition authority merely authorizes certain officials to carry out the inspection.
- In **DE**, in exigent circumstances (i.e. a court order cannot be obtained in due time without diminishing the chances for success) the inspection may be carried out without a court warrant (for instance, if the warrant is limited to one premise and the case team sees the need to search other premises). If the NCA seizes evidence and the undertaking objects to this, it has to apply for the required court order immediately (usually up to three days) after the inspection.
- In **EE**, an authorisation from the court (more specifically, a court ruling) is necessary in misdemeanour proceedings¹⁸, or usually an order from the preliminary investigation judge or court ruling, or the order of the official of the investigative body (the competition authority) under exceptional emergency circumstances in criminal proceedings (referred to as **EE(1)**). Inspection of premises in administrative procedure shall be carried out on the basis of the order of the competition authority¹⁹ (referred to as **EE(2)**).
- In **FI**, where the conduct of an inspection requires an inspection decision signed by the Director General, the competition authority must notify the undertaking of the starting time of an inspection, unless it would compromise the purpose of such inspection. In practice, for unannounced inspections, the authority presents an inspection decision signed by the Director General when requesting entry to the premises of an undertaking.
- In **FR**, no formal decision is required for inspections without a court warrant, which are rarely used for unannounced inspections (referred to as **FR(1)**) while a court warrant is required to perform a search (or "dawn-raid") (referred to as **FR(2)**).
- In **LV**, a court warrant is the basis for an inspection and it should be handed to the representative of the undertaking together with the decision of the competition authority to initiate the case and the authorization for particular officials to proceed with the inspection (which is issued by the director of the Executive Office of the competition authority).
- In the **NL**, the board of the competition authority takes the inspection decision which is an internal decision and will therefore not be delivered to the concerned undertaking. Both for announced and unannounced inspections, an official of the competition authority provides the undertaking with a written description of the objective and subject of the investigation.
- In **PL**, as indicated in *Section 2.1* above, according to Article 105a of the Act, in plain inspections (**PL(1)**) the inspectors act upon the authorisation issued by the President of the competition authority. According to Article 105c, inspections with

¹⁸ As established in Article 35(1) of the Code of Misdemeanour Procedure and Article 91(2) of the Code of Criminal Procedure.

¹⁹ As established in Article 60 (3) of the Competition Act.

search (**PL(2)**) additionally depends on a prior authorisation from the court of competition and consumer protection, which shall be issued, within 48 hours, upon the request of the President of the competition authority. In the framework of an inspection, a search in business premises may be performed by the staff of the competition authority with the participation of the police before the institution of antimonopoly proceedings. The authorization to perform this kind of search is delivered by the Court of competition and consumer protection upon request of the President of the competition authority. Such request is filed in particular when obliteration of evidence may take place and it appears necessary to conduct a search in the framework of explanatory proceedings. As regards inspections in non-business premises, they always consist of a search performed by the police with the participation of competition authority representatives. This type of search is not required to take place within the framework of an inspection. However, it may only be performed in the course of proceedings before the President of the competition authority and with the authorization granted by the Court of competition and consumer protection.

- In **PT**, the law foresees the possibility to seize documents without prior order or authorisation whenever there is urgency or danger in delaying. Any seizure made in these conditions must be validated by a judicial authority within 72 hours.
- In **RO**, inspections at business premises are performed based on the Order of the President, within the competition authority's investigation. A prior order of investigation must be also issued in order to open the investigation. At the request of competition authority, in case of opposition by the parties, the police are obliged to accompany and ensure support to inspection teams when exercising the inspection powers.
- In **SI**, the competition authority needs a court warrant to inspect non-suspected undertakings²⁰.
- Similar to **CZ** (see above), in **SK** the conduct of an inspection requires an authorization by the Chair of the competition authority.
- In the **UK**, the competition authority has the power to enter premises to carry out inspections, either with or without a warrant. However, the power to carry out inspections without a warrant is limited to business premises and is subject to the UK competition authority having given the occupier of the premises at least two working days' written notice of the intended entry. For inspections with a warrant, the competition authority may apply to the High Court for a warrant under s.28 of the Competition Act 1998 (or s.28A concerning specifically the power to enter domestic premises under a warrant). In certain circumstances, the competition authority does not have to give advance notice of entry when acting without court warrant, for example if it has reasonable suspicion that the premises are, or have been, occupied by a party to an agreement which it is investigating, or if the

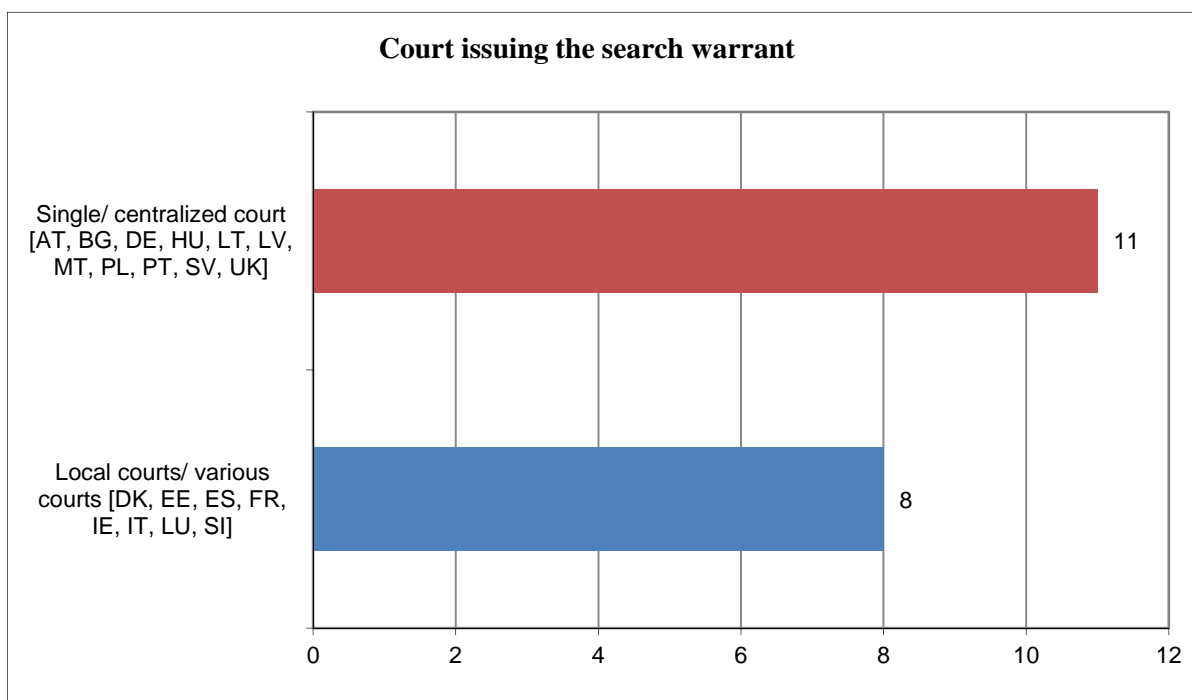
²⁰ More specifically, in **SI** there is no need for a court warrant in order to carry out inspections in business premises except where the NCA has reasonable grounds to suspect that business books and other documentation relating to the subject matter of an inspection are being kept at the premises of an undertaking against which the procedure has not been initiated.

authorized officer has been unable to give notice to the occupier, despite taking all reasonably practicable steps to give notice.

2.3.2. Competent courts

Court warrants, when and where necessary, may be requested before different types of courts. In some cases, (i) a central court is competent to issue the warrant, while in others (ii) local administrative or criminal courts near the seat of the undertaking to be inspected are competent²¹.

Graph 2



2.3.3. Contents of the inspection decision or court warrant

The contents of inspection decisions by competition authorities or court warrants may vary considerably. Nevertheless, the main elements can be identified as follows:

2.3.3.1. Authority

The inspecting authority, and in some cases (e.g. in **BE, EL, ES, FI, LU, PL, RO, SI**) the identification of the persons empowered to conduct the inspections, is designated in the decision or court warrant.

²¹ In **LU**, the court of the place where the inspection has to be carried out is competent. If several undertakings are concerned and they are seated within different judicial districts, or if the same undertaking has premises in different districts, the court of Luxembourg-town is competent (the whole territory of Luxembourg is divided in only two districts).

2.3.3.2. Legal basis

Generally the decisions or warrants include a reference to the legal basis empowering competition authorities to conduct them.

2.3.3.3. Addressee

Requirements regarding the addressee may vary. The addressees are normally specified in the inspection decision or court warrant.

2.3.3.4. Object / suspected infringement / conduct / affected market

In most jurisdictions, the object or reason for the inspection or search is mentioned in the decision or court warrant. Differences arise in the level of detail provided in such document and in the aspects of the infringement included.

In some cases, the suspected infringement or facts of the case are described. Reference may also be made to the subject matter and purpose of the inspection. In some jurisdictions, the market affected or the economic sector or products concerned is mentioned.

2.3.3.5. Rights and obligations (sanctions if applicable)

In some jurisdictions, e.g. **CY, EL, ES, EU, HU, IT, MT, PL, RO, SI, UK**, the inspection decision or court warrant as the case may be (e.g. **HU**) includes the penalties or legal consequences that may be imposed in case the undertaking or association of undertakings refuses to comply.

2.3.3.6. Temporary scope of the inspection

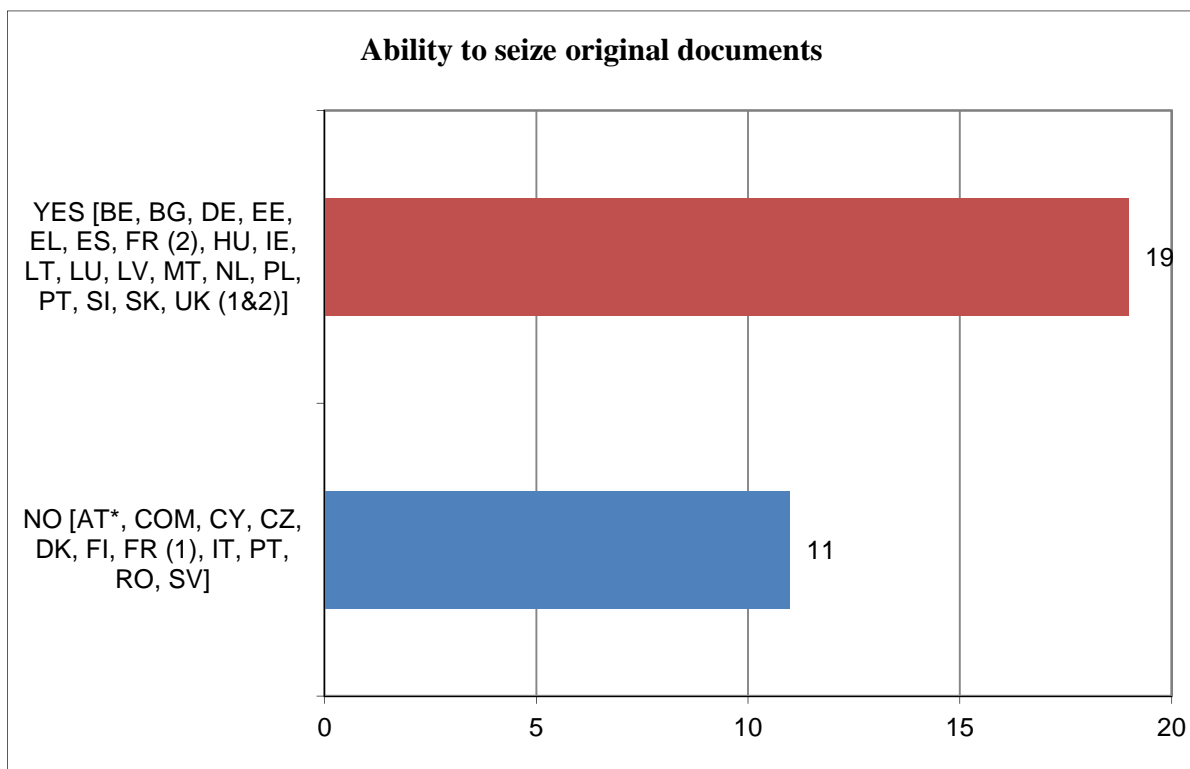
The exact date or temporary scope of the inspection or search is indicated in the decision or warrant (for instance, **BE, CY, DK, ES, PT, PL, SI** and **SV**). In **DE**, according to the case law, the competition authority has to conduct inspections within six months after the issuance of the court warrant. In **LV**, where possible the inspection should take place without delay after the court warrant has been issued. In **HU**, the competition authority may carry out inspections within three months of the issuance of the court authorisation. Within this period, the warrant can be used several times.

2.4. Extent of inspection powers

2.4.1. *Possibility to make copies and seize original documents*

All competition authorities have the possibility to make copies of documents during inspections. However, not all of them can seize original documents during inspections. The following graph compares jurisdictions' powers to seize original documents:

Graph 3



* At the time of finalisation of this Report, in **AT** a bill was pending which would foresee the possibility to seize documents insofar it is necessary in order to ensure the success of the investigation.

2.4.2. Possibility to collect digital/forensic evidence

All of the competition authorities have the power to collect digital/forensic evidence. Their powers in this regard may differ, according to the respective legal requirements.

Several authorities have the power to take digital copies/forensic images of the evidence found at the premises investigated, whereas others have the possibility to take a digital copy/forensic image of the evidence for sifting at their offices. In another variation, some authorities carry out a complete or partial sifting of data at the premises subject to the investigation. Finally, some competition authorities copy all the digital data to which they have access from the location of the investigation (regardless of where the data is physically stored).

Competition authorities may use different Forensic IT (FIT) tools, which means that the possibility to index, search, sort and extract material may differ between jurisdictions.

The time-limits for collecting and processing digital evidence differ between jurisdictions.

With regard to Legal Professional Privilege (LPP), there are differences in scope between jurisdictions (see *section 2.5* below).

2.4.3. Possibility to seal premises

All jurisdictions foresee the power to seal premises, except for **AT**²², **IE** and **LU**. In most cases, seals are normally only used over night when the inspection continues for more than one day, and the principle of using the "least intrusive means" is applied.

Regarding time limits for the sealing of premises, in many jurisdictions including e.g. **BE, CZ, EL, EU, PL, PT, RO, SI** and **SK**, premises can remain sealed for the period necessary to carry out the inspection. The EU law principle of proportionality applies. In some jurisdictions, e.g. **DE** and **HU** there is no strict time limit. In **SV**, the seal remains in force for as short time as possible, normally one day or over the weekend.

In **DK, LT, LV** and **UK**, the competition authorities are entitled to seal the relevant business premises (and documentation if applicable) for a maximum of 3 working days. In the **UK**, this time period may be longer where an undertaking consents to a longer time or where access to documents is unduly delayed, such as by the unavailability of a person who can provide access. In the **NL**, normally, seals are released the morning after the sealing between 8 and 9 in the morning.

Regarding the implications of breaching the seals, in e.g. **DE, FI, HU, RO** and **SV**, the breach of seals is considered a criminal offence. Some jurisdictions e.g. **COM**²³ and the **NL** have adopted decisions imposing fines for the breach of seals.

2.4.4. Power to ask questions during inspections

All authorities have the possibility to ask questions related to the inspection and to the investigation during inspections. This must be distinguished from the power of competition authorities to conduct interviews or hear/interrogate witnesses on a separate legal basis. See further *chapter 5*.

The power to ask questions is often limited by the privilege against self-incrimination. See further *section 4.2 below*.

Examples of specificities regarding the power to ask questions are as follows:

- In **DE**, a distinction is made between "exploratory questions" (i.e. regarding the structure of holding, locations, structure of the IT-server, etc.) and questions in relation to the allegations. The latter should not be asked during the inspections.
- In **FR**, questions can be asked in both types of inspections. In the case of **FR(2)**, two limitations have to be taken into consideration: only the occupying person of the premises can be asked questions (i.e., to the person to whom the court warrant shall be

²² At the time of finalisation of this Report, in **AT** a bill was pending which would foresee the power to seal premises.

²³ See Commission decision and press memo in case 39326 - E.ON (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39326) as well as Commission decision in case 39796 – Suez Environment (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39796).

notified to or his or her legal representative), and they should be addressed in the presence of a police officer entrusted with judiciary powers ("officier de police judiciaire").

- In **RO**, competition inspectors may address questions to the representatives of the undertakings or other members in charge of the coordination of the undertaking inspected, and their answers will be recorded. In the case that the person responsible for the coordination of an inspection was not authorized to reply to the competition authority's questions, corrections to the statements made within the inspection can be added by the member in question in a time limit fixed by the authority.
- In **SV**, the competition authority may only ask for oral explanations on the spot, concerning for example the meaning of abbreviations or names; the questions may never directly concern the suspected infringement.

2.4.5. *Police assistance*

Most competition authorities have the possibility to ask for the police's assistance during inspections. In most of these jurisdictions, 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 (e.g. **AT, BE, DK, PT, RO**²⁴, **SI** or **SK**). In some cases, police assistance is necessary to undertake specific steps of the inspections.

Police assistance is compulsory in some jurisdictions e.g. **BG, FR (2), LU** and **LV**. In **FR (2)**, police officers are only entitled to enter the premises by force if the undertaking refuses to give access to the premises and does not comply with the court warrant; they cannot use their powers once they are within the premises.

The following specificities can be highlighted:

- In **AT**, in the competition authority's practice, the police has been present in the early phase of inspections. This is a precautionary measure to safeguard smooth entry into companies' premises in case the competition authority faces opposition.
- In **DE**, where the presence of the police is not compulsory but is normally requested by the competition authority, it especially relies on IT specialists from the police, and if Federal State law allows for it, the police can also actively take part in the investigation and examine documents.
- In **DK**, police officers often accompany the competition authority at the beginning of unannounced inspections.
- In **EL**, while police assistance (or assistance from any other competent authority) is usually required when the undertaking refuses to submit to an inspection, police (or any other competent authority's) assistance may also be requested as a precautionary measure.

²⁴ Following the 2010 amendments to Competition law no. 21/1996, republished.

- In **HU** and **FI**, police assistance is only required when the undertaking refuses to submit to an inspection.
- In **IE**, an issued warrant authorises members of An Garda Siochana to attend and assist the competition authority's officers in searches of premises or dwellings. Also, the authority has a detective-sergeant on their staff seconded from the Garda Bureau of Fraud Investigation that could assist with such searches.
- In **IT**, fiscal police officers regularly assist the competition authority's officials in conducting inspections. Their power is essential in case the parties oppose the inspection or when it is necessary to seal premises.
- In the **NL**, the competition authority requests police assistance when the undertaking refuses to submit to the inspection.
- In **PL**, the inspectors may use the assistance provided by the police or officers of other state inspection authorities, who perform activities upon the inspectors' request.
- In **PT**, it has sometimes been the practice that the police accompanies the competition authority when entering the undertaking to be inspected, leaving once the undertaking has agreed to cooperate.
- In **SV**, the competition authority has the right to request the assistance of the Swedish Enforcement Agency (SEA) when carrying out inspections and has so far always been assisted by the SEA, which has the power to open locked doors and the power to seal premises.

2.4.6. *Use of staff from another EU Member State to attend or assist*

The use of staff from another Member State's competition authority in inspections is particularly relevant in the context of Article 22(1) of Regulation 1/2003 (where a competition authority from one Member State may carry out inter alia an inspection on behalf and for the account of a competition authority from another Member State) but can also arise where several authorities deal with parallel or related infringements.

The possibility for staff from one authority to attend and/or assist in an inspection carried out by an authority from another Member State differs among jurisdictions.

Several competition authorities accept the presence or cooperation of staff from other Member States, e.g. **AT**, **BE**, **CZ**, **DE**, **DK**, **ES**, **FI**, **LU**, **NL**, **SI**²⁵, **SK** and, to a certain extent, **SV**.

Other competition authorities would only accept the presence or cooperation of staff from another Member State in the context of an Article 22 request (e.g. **BE**, **EL**, **NL**, **PL** and **UK**).

²⁵ Art. 35(2) of ZPOMK-1.

2.5. Limitations

The power of competition authorities to inspect business premises is limited or circumscribed for various reasons.

First of all, in nearly all jurisdictions²⁶ (e.g. **BE, BG, CY, CZ**²⁷, **DE**²⁸, **DK, EE**²⁹, **EL, EU**³⁰, **FI, FR**³¹, **HU**³², **IE, IT**³³, **LU, LV, MT, NL**³⁴, **PL, PT, RO, SV, SI**³⁵, **SK, UK**), the competition authorities respect well-founded claims for the protection of Legal Professional Privilege (LPP), subject to certain conditions.

Whereas in most of these jurisdictions, LPP relates only to external legal counsel, in **IE, PT** and the **UK**, LPP specifically covers all lawyers independently of their capacity as in-house or external legal counsel.

Some authorities may have time limits that restrain their power to inspect with regard to the validity of the decision or court warrant ordering or allowing the inspection.

For example, in **DE**, according to the case law, the authority has to conduct inspections within six months after the release of the court warrant and any electronic data that is preliminarily secured has to be searched in due time (usually up until 6 months, which could vary depending on the individual case); in **HU**, inspections may be carried out within three months of the issuance of the court authorization; in **IE**, the validity of a warrant would be one month unless otherwise stated; and in the **UK**, the warrant continues in force for one month from the date of issue.

²⁶ In **AT**, LPP is not recognized.

²⁷ In **CZ**, LPP is respected following a judgment of the Supreme Administrative Court.

²⁸ Only documents that have been prepared for defending oneself in the on-going fine proceedings are legally privileged and legal privilege relates only to external legal counsel. Therefore not every document prepared by or for lawyers, like strategic or normal legal advice, is protected.

²⁹ LPP as such is normally respected in administrative as well as in criminal and misdemeanour proceedings. LPP is not an absolute concept and in very exceptional circumstances there are some possibilities for the investigators to conduct searches even in private law firms as well as to seize documents covered by LPP. This possibility in law does not mean that LPP is not normally respected.

³⁰ The Hearing Officer may be asked to examine claims that a document which was withheld from the Commission is covered by LPP pursuant to Article 4(2)(a) of the Terms of Reference of the Hearing Officer, OJ L 275, 20.10.2011, p.29.

³¹ In **FR**, there is no other limitation foreseen than LPP.

³² Like in other jurisdictions, parties may however waive the application of this privilege, Article 65/B(1) of the Competition Act.

³³ In **IT**, LPP is derived from EU case law and thus is also applied.

³⁴ LPP covers not only external legal counsel, but also in-house legal counsel as long as they are registered at the bar. When LPP protected information is nevertheless handed over to the competition authority, this information will be handed over to the (independent) privilege officer who will decide whether it needs to be deleted from the file.

³⁵ In **SI**, there are no limitations related to RFIs.

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.

2.6. Binding nature of inspections

Inspections are normally binding on the targeted undertakings in almost all jurisdictions, without prejudice to the right of undertakings to legally oppose an inspection if this is beyond the scope of the investigation as described in the inspection decision.

There is generally an obligation on undertakings to cooperate.

2.7. Judicial review

In many jurisdictions (e.g. **AT, BG, CZ, DE, DK, ES, EU, FR(2), IE, LU, LV, NL, PT, RO, SV**) parties can appeal the competition authority's decision/court warrant authorising the inspection separately, although the appeal has no suspensive effect. In the **UK** it is possible to appeal (and suspend) an inspection decision/warrant.

In other jurisdictions (e.g. **BE, CY, EE, FI, FR(1), HU, PL** and **SI**), the legality of the inspection may be assessed in an appeal brought against the final prohibition decision³⁶.

In terms of further specificities:

- In **DE**, in cases where the authority acts without a judicial warrant – in case of imminent danger of removal and/or destruction of the documents – the suspect can appeal to the Local Court (concerning the search itself as well as the seizure of evidence). There is no time limit to make this appeal. An appeal can be filed in all cases - even in those in which a court warrant was issued - in which the undertaking feels violated due to the way the search was conducted by the authority. In cases in which there is a judicial warrant (or a judicial confirmation of the authority's action) the undertaking has the right to appeal to the Regional Court. There is no time limit for this appeal either. In both cases of legal remedies the standard of review refers to the facts of the case as well as the correct application of the legal provisions.
- In **IT**, according to case law there is generally no possibility to appeal the competition authority's decisions to open investigations and to conduct inspections, so that the parties can only challenge the competition authority's final decision (which is considered the only act capable of affecting the parties' rights and legitimate interests).
- In **MT**, the Competition Act is silent on this question and there has not been case law on this point under the Competition Act.

³⁶ In **EL**, there is no case law to date on the issue of whether the inspection decision is a challengeable act.

- In **PL**, the judicial review of inspection decisions is only possible when lodging an appeal against the decision on the merits issued by the President of the competition authority. However, the *Act on freedom of economic activity* allows undertakings to submit a reasoned objection against the institution and execution of an inspection. Such objection may be made in a few determined situations (e.g. when the inspectors do not deliver their authorization to carry out the inspection or do not present their official ID, or when the inspectors omit to inform the inspected undertakings of their rights during inspection). The objection must be submitted to the President of the competition authority in writing within three days following the initiation of the inspection. The President of the competition authority considers the objection and issues a resolution which can be appealed to the Court of competition and consumer protection. The objection has a suspensive effect until the court delivers a legally binding decision rejecting or dismissing the appeal against the resolution in question or if the appeal is not lodged within the determined time limit.
- In the **UK**, the Competition Appeal Tribunal can examine appeals on the merits, which is wider than judicial review. However, where the law does not provide for an appeal, an application for judicial review may be brought in certain circumstances³⁷.

2.8. Treatment of incidental evidence³⁸

In several jurisdictions incidental evidence can be secured or seized if it relates to an infringement of the competition rules. In others, the authorities would need to obtain a new authorization to inspect according to the applicable law and procedures.

2.9. Power to search undertakings which are not subject to investigation

In a clear majority of jurisdictions (e.g. **AT, BE, BG, CY, CZ, DE, DK, EE, EL, EU, FI, FR, HU, IT, LT, LU, LV, MT, PL, PT, SI, SK**) the inspection powers and sanctions for non-compliance apply equally to undertakings which are subject to an investigation procedure and to other undertakings³⁹.

- In **DE, IT, LT, LV** and **SI**, premises of undertakings which are not subject to an investigation can be searched in the same way as undertakings subject to an investigation if there are concrete facts from which it can be deduced that specific evidence will be found in these premises and a court order/warrant is required (with

³⁷ A judicial review application may be brought before the Administrative Court of the Queen's Bench Division under Part 54 of the Civil Procedure Rules.

³⁸ "**Incidental evidence**" is any evidence found incidentally in the course of an inspection and relating to suspected infringements of competition rules not covered by the initial inspection decision.

³⁹ It refers to any undertaking which is not suspected to be party of an alleged infringement but which may dispose of information that could serve as evidence in an investigation directed against other parties.

the exception of **IT**, where the competition authority's decision is sufficient, and a court order/search warrant is not necessary).

- In the **NL**, the general principle of good administration imposes more restraint on the conduct of the competition authority's officials in the context of inspections of undertakings which are not subject to an investigation. Therefore the specific powers are more limited than in the case of the undertakings which are subject to an investigation.
- In **RO**, within the investigation procedure, requests for information can be sent in order to obtain relevant information for the assessment of the case. The specific powers of inspection are performed only within the investigation procedures, therefore the application of these tools are limited to undertakings which are subject to an investigation. However, the power to request information and to take statements may be exercised during investigations for the purpose of collecting information relating to the subject-matter of the investigation; these powers can be exercised also over undertakings which are not subject to an investigation, whether they have relevant information and/or they consent to be interviewed.
- In **SV**, an undertaking which is not subject to an investigation may be inspected only if there are, in addition to the general requirements, specific reasons to believe that the undertaking concerned is in possession of evidence. The power to search non-business premises is only available in cases of undertakings which are subject to an investigation.
- In the **UK**, it is possible to carry out inspections of undertakings which are not subject to an investigation, such as customers and suppliers, where reasonable grounds exist to believe that this can help the investigation. However, in practice it is more likely that the competition authority will send requests for information to such parties.

2.10. Enforcement measures and sanctions for non-compliance

Non-compliance in the course of an investigation is sanctioned in almost all jurisdictions.

In a large number of jurisdictions (e.g. **BE, BG, CZ, EL, ES, EU, FR, HU, LT, NL, PT, RO, SI, SK**), the fine prescribed in their competition act for this type of conduct can be up to 1% of the undertaking's annual turnover in the preceding year, which is the same as the maximum level foreseen in Article 23(1) of Regulation 1/2003. In **LU**, it may be up to 5% of the undertaking's annual turnover in the preceding year.

In **CY**, the fine can be up to €85 000, in **IT**, up to €52 000 and in **PL**, up to €50 000 000. In **HU**, the fine for natural persons may be of an approximated maximum of €2 000; in **LV**, natural persons can be fined up to €700, while undertakings can receive fines of up to €14 000. In several jurisdictions (e.g. **EE(1), ES, EU, FI, FR, MT, NL, PL, RO, UK**) penalty payments or periodic penalty payments are foreseen.

In some jurisdictions (e.g. **AT, BE, ES, EU, LU, LV**), non-cooperation might be taken into account as aggravating circumstances in the final decision.

Some authorities (e.g. **CY, DK, FR, SI, UK**) underlined that non-compliance by the undertakings which are the target of an investigation can constitute criminal offence.

In **DE** and in **SV**, there is no fine for non-compliance, but the authority can gain access to the premises - with the help of the police (Swedish Enforcement Agency ("SEA") in **SV**) - in a case of non-compliance. Resisting the police or the SEA can constitute a criminal offence. In **LU**, where access to the premises may be enforced by way of a judicial warrant, the legislator considered that it was not appropriate to give the possibility to impose penalties on the undertakings for non-cooperation.

3. INSPECTIONS IN NON-BUSINESS PREMISES

This section describes the powers of inspection of the competition authorities regarding non-business premises. It typically focuses on the relevant differences identified in comparison to inspections in business premises.

3.1. Legal basis and substantive requirements

The possibility of inspecting non-business premises is envisaged in the vast majority of jurisdictions (e.g. **AT, BE, CY, CZ, DE, EE, EL, ES, EU, FI, FR, HU, IE, LT, LU, LV, MT, NL, PL⁴⁰, PT, RO, SV, SI, SK, UK**). In most cases, competition laws include a specific provision granting such power and defining its scope.

Where inspections in non-business premises are available, the decision to launch an inspection in non-business premises is commonly subject to the existence of a degree of suspicion that records related to the business and to the subject-matter of the inspections are being kept in other premises than those of the undertaking.

The jurisdictions empowered to inspect non-business premises have pointed to (i) either applying the same standard as for business premises (e.g. **DE, UK⁴¹**), or (ii) referred explicitly to elements pointing towards "reasonable grounds", "reasonable suspicion" or "founded suspicion" that evidence will be found on the premises (e.g. **CZ, EE, EL, EU, FR, HU, IE, LT, LU, LV, MT, PL, PT, RO, SI, SK, UK**).

⁴⁰ Pursuant to Art. 91 of the Act of 16 February on Competition and Consumer Protection: "1. If there are grounds to suppose that any objects, files, books, documents and other data carriers within the meaning of the regulations on informatisation of operations of entities performing public tasks are stored in residential premises or any other premises, building or means of transportation and such storage may affect the findings which are material to pending proceedings, the Court of Competition and Consumer Protection, upon the request of the President of the Office, may consent to perform a search in such premises by the Police, including seizure of objects that may be used as evidence in the proceedings. The provisions of Article 105c, paragraphs 2 to 4 shall apply accordingly. 2. The search referred to in paragraph 1 shall be also attended by an authorized employee of the Office and other persons referred to in Article 105a, paragraph 2. 3. On instruction of the Court of Competition and Consumer Protection, the police shall perform the actions referred to in paragraph 1."

⁴¹ In the **UK**, the judge must be satisfied that there are reasonable grounds for suspecting that there are documents on the premises to be searched both in the case of business and domestic premises. In other words, the same standard is applied. However, domestic premises may not be entered without a warrant.

Article 21 of Regulation 1/2003 defines non-business premises as: "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".

Examples of non-business premises under national law include:

- In **BE**, the competition authority can inspect the home of heads of undertakings, directors, managers and other members of staff, as well as the home address or the business premises of the internal or external natural or legal person(s) entrusted with commercial, accounting, administrative, fiscal or financial management responsibilities.
- In **CZ**, non-business premises can only be inspected if a reasonable suspicion exists that the business records are kept elsewhere than in the business premises, including the homes of natural persons who are statutory bodies of the undertaking or their members, or who are in an employment or similar relation with the undertaking.
- In **EL**, the national competition law provides for the inspection of residences.
- In **ES**, the term "non-business premises" refers to "the private homes of the entrepreneurs, managers and other members of staff of the undertakings".
- In **HU**, rooms used for private purposes or privately used, including vehicles and other land, can be searched, when they are in the use of any executive official or former executive official, employee or former employee, agent or former agent of the undertaking under investigation, or of any other person who exercises or exercised control as a matter of fact.
- In **IE**, non-business premises include vehicles and private dwelling homes.
- In **LT**, inspections can be conducted on land and in means of transport, including residential and other premises of heads and employees of the undertaking.
- In **LU**, "non-business premises" refers to "other premises, real estate or means of transport, including the private homes of the entrepreneurs, managers and other members of staff of the undertakings".
- In **MT**, non-business premises include "other premises, land or means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings".
- In the **NL**, the term "non-business premises" refers to private homes where it is likely that relevant documents are kept. In most cases, this is the private home of a manager.
- In **PL**, the concept of non-business premises refers to any housing apartment or in any other room, real estate or means of transportation.
- In **RO**, based on both the inspection order and the judicial authorization granted through ruling by the President of the Bucharest Court of Appeal, inspections can be performed on any premises, including domiciles, land or means of transport belonging to managers, administrators, executives and other employees of the undertakings or associations of undertakings submitted to investigations.

- In **SV**, the possibility to search non-business premises is limited to those belonging to the board and employees of undertakings being suspected of an alleged infringement. A specific reason must exist to believe that the evidence of the infringement can be found at the non-business premises and inspections of such premises are only allowed in cases of serious infringements.

3.2. Procedural requirements

3.2.1. Authorisation by decision / court warrant

In most jurisdictions where inspections in non-business premises can be undertaken⁴², a court warrant is required. In several jurisdictions where a decision by the competition authority is sufficient to conduct inspections in business premises, a court warrant for the inspections in non-business premises is required. That is the case in e.g. **BE, CY, CZ, EU, FI, LU, MT, PL, RO, SI, SK, UK**.

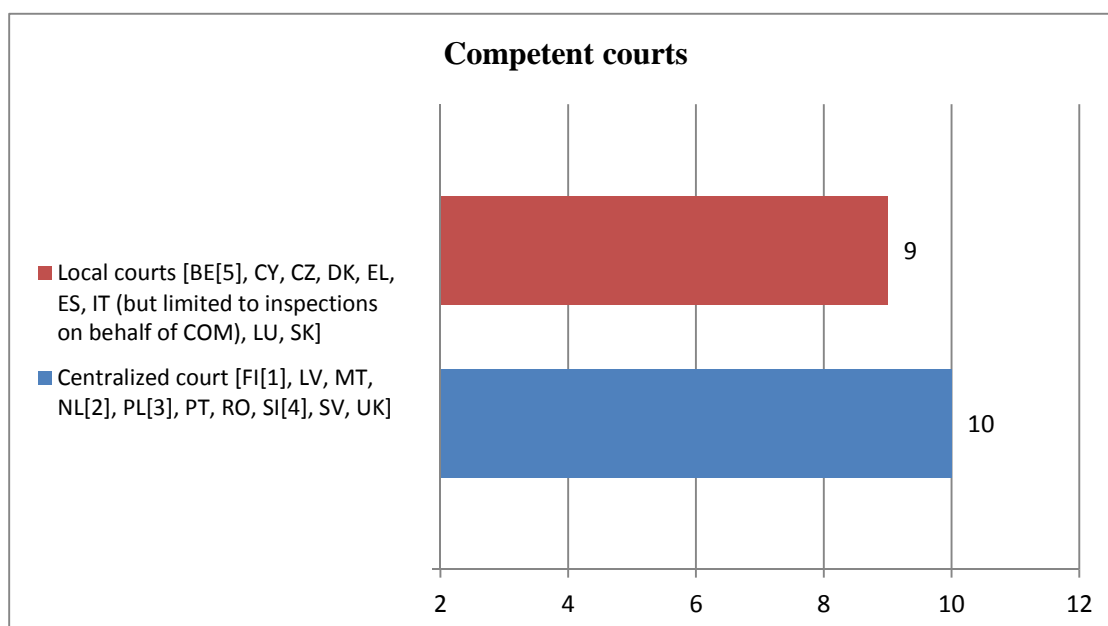
In **EL**, non-business premises can be searched under an inspection decision by the competition authority, but the presence of a judge or prosecutor is compulsory. For a judge or prosecutor to be present, an order by the competent prosecutor shall be issued. In the **NL**, a court warrant is needed when the parties involved do not agree to the competition authority entering and searching the premises. If the parties agree, no court warrant is necessary.

3.2.2. Competent courts

In some jurisdictions, a court warrant to conduct an inspection of non-business premises can be sought from a centralised court, whereas in others the authority must go to the local court where the non-business premises to be searched are located. In some cases, especially those involving several parties, this may mean that the competition authority has to go to several courts.

⁴² E.g. in **DE** a court warrant is required for business as well as non-business premises (with the exception that in cases of imminent danger of removal and/or destruction of the documents, the **DE** competition authority is entitled to inspect all kinds of premises without court warrant).

Graph 4



- [1] In **FI**, the competition authority seeks a permission from the Market Court to conduct an inspection in non-business premises.
- [2] In the **NL**, the Court of Rotterdam is the competent court for issuing a court warrant.
- [3] Only one court is empowered to issue such court warrants in Poland – the Court of Competition and Consumer Protection.
- [4] Art.33(1) of ZPOMK-1 declares “the competent court in Ljubljana”.
- [5] In **BE**, in the case of an inspection in non-business premises, a court warrant from an investigative judge (“juge d’instruction”) of the district court where the dawn raid is located is necessary.

3.3. Extent of inspection powers

3.3.1. Possibility to make copies and seize original copies

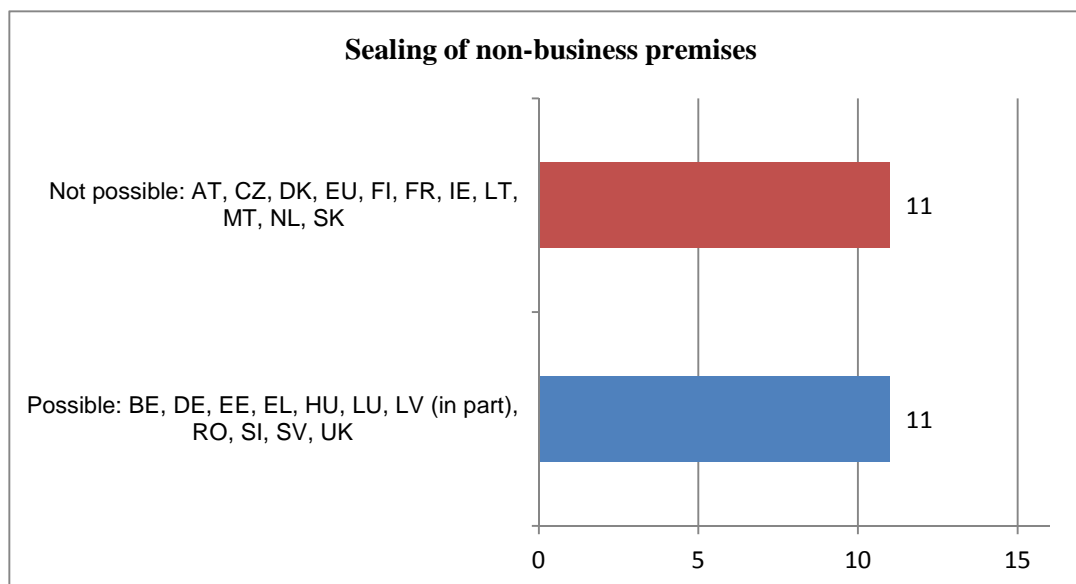
No specific differences with regard to the possibility to make copies and seize original documents in inspections of non-business premises in comparison to inspections of business premises have been raised regarding this power.

In the **UK**, the warrant shall authorise the named officer of the competition authority (and any other of its officers whom the authority has authorised in writing to accompany the named officer) to: (i) search the premises and take copies of, or extracts from, any document appearing to be of the relevant kind; (ii) take possession of any documents appearing to be of the relevant kind (if such action appears necessary for preserving the documents or preventing interference with them; or if it is not reasonably practicable to take copies of the documents on the premises); (iii) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his or her knowledge or belief, where it may be found; (iv) to require any information which is stored in any electronic form and is accessible from the premises, and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form in which it can be read and taken away.

3.3.2. Sealing of premises

In several jurisdictions it is possible to seal non-business premises during inspections (e.g. **BE, DE, EE, EL, HU, LU, LV** (in part), **RO, SI, SV, UK**), while in others it is not possible to use this power (e.g. **AT**⁴³, **CZ, DK, EU, FI, FR, IE, LT, MT, NL, SK**).

Graph 5



The following specificities can be highlighted:

- In **BE**, the competition authority may affix seals for the duration of the mission and to the extent necessary for its purposes, without however exceeding 72 hours, in premises other than those of the undertakings or association of undertakings (in the case of business premises, seals can be affixed without particular limits).
- In **IE**, the competition authority does not have the power to seal premises per se; however, an authorised officer can take any steps which appear to the officer to be necessary for preserving, or preventing interference with, any books, documents and records found on any premises.
- In **LV**, it is not possible to seal living or residential premises, but this does not concern non-residential premises, means of transport, constructions and other objects and the storage facilities therein.
- In **RO**, application of seals shall be done according to the Code of Criminal Procedure.

⁴³ At the time of finalisation of this Report, in **AT** a bill was pending which would foresee the power to seal premises.

3.3.3. Power to ask questions during inspections

While almost all authorities have the possibility to ask questions related to the subject matter of the inspection during inspections in business premises, some do not have this power in the framework of inspections in non-business premises: e.g. **AT**, **COM** and **FI**.

MT has such a power in inspections in business premises, but in the case of non-business premises, statements from a natural person, not being an undertaking or a director, manager, secretary or other similar officer of an undertaking, can only be taken with his or her prior consent.

3.3.4. Assistance from the police

The following specificities in terms of police assistance with inspections of non-business premises, in comparison with inspections of business premises, can be highlighted:

- In **MT**, the Director General of the competition authority may request the assistance of the police in both inspections of business premises and inspections of non-business premises, and in both cases, the police shall require a warrant from a Magistrate to assist the Director General in the search.
- In the **NL**, police assistance can be requested in the framework of inspections in business premises as well as non-business premises. Section 55, sub 2 of the Dutch Competition Act states that "the officials, referred to in section 52(1), shall, if necessary, exercise the powers assigned to them under section 5:17 of the General Administrative Law Act, as well as the power to enter and search a home as referred to in subsection (1), with the assistance of the police".
- In **PL**, the inspections in non-business premises shall be performed by the police with the participation only of authorised employees of the competition authority or other authorised persons.
- In **RO**, police assistance might be required and, in this case, the judge may inspect the searched places, and may decide to suspend or to terminate the inspection at any moment.
- In **SI**, during the inspection of residential premises, two adult persons shall be present as witnesses.

3.4. Limitations

There are not any differences in general regarding limitations in the case of inspections in non-business premises as compared with inspections of business premises.

3.5. Enforcement measures and sanctions for non-compliance

The following specificities in terms of enforcement measures and sanctions for non-compliance with inspections of non-business premises, in comparison with inspections of business premises, can be highlighted:

Some jurisdictions e.g. **CY** and **LU** have no sanctions in the case of non-compliance in the course of an inspection in non-business premises (while their laws envisage sanctions in the case of non-compliance with inspections in business premises).

In **PL**, according to Article 105d, the owner of a dwelling (living quarters), room, real estate, or means of transportation being searched may refuse to provide information or co-operate in the course of an inspection only if this would expose him or her, or his or her spouse, ascendants, descendants, siblings, relations in the same line or to the same degree, as well as any persons being related thereto by adoption, custody or ad hoc guardianship, or a person being related thereto on the basis of cohabitation, to criminal liability. The right to refuse provision of information or co-operate in the course of an inspection shall survive the cessation of marriage or dissolution of the relationship of adoption, custody or ad hoc guardianship.

4. REQUESTS FOR INFORMATION⁴⁴

4.1. Legal basis and scope of the relevant provisions

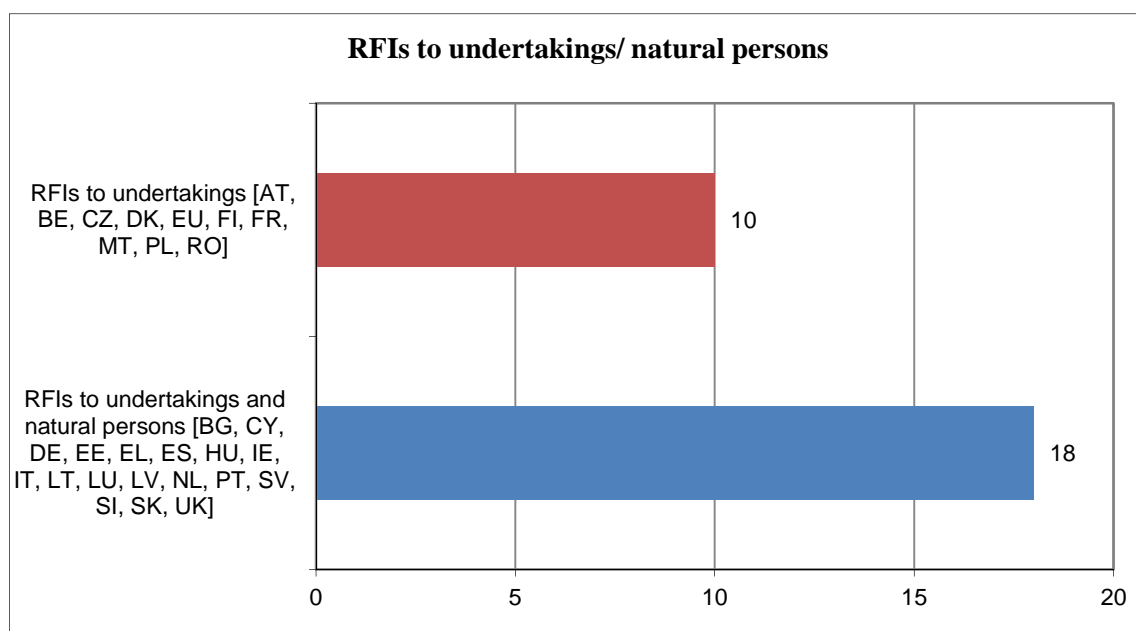
All competition authorities have the power to request information in the context of investigations of competition law infringements.

Whereas in several jurisdictions (**AT, BE, CZ, DK, EU, FI, FR, MT, PL, RO**) requests for information (RFIs) may be addressed only to undertakings and/or associations of undertakings, in the majority of jurisdictions (**BG, CY, DE⁴⁵, EE, EL, ES, HU, IE, IT, LT, LV, LU, NL, PT, SV, SI, SK, UK**) requests may also be addressed to natural persons (mostly representatives of the undertaking concerned).

⁴⁴ **Requests for information** are any form of request addressed by a competition authority to an undertaking and/or association of undertakings and/or natural person to provide information in the context of an investigation (normally in writing, but may be also in oral form: e.g. in **IE** a witness summons hearing. Such witnesses may be compelled to produce documents within their power).

⁴⁵ Administrative and fine proceedings.

Graph 6



The scope of the relevant provisions is generally comprehensive (e.g. “*all kind of information necessary/relevant for the investigation*”, “*any question regarding the alleged infringement*”). The information which can be requested includes documents, and data.

The following specificities can be indicated:

- Similar to some other jurisdictions, in **EL**, the competition authority may summon and examine witnesses also during oral hearings.
- In **IE**, the competition authority may summon witnesses to attend before it. The authority may examine on oath such witnesses. In this context, it can also compel the witness to produce documents in his or her power or control at a hearing.

The competition authorities usually state the legal basis and the purpose of the RFI, specify what information is required and within which time-limit. Penalty payments for non-compliance may also be imposed (e.g. **BE, BG, COM, CY, CZ, EE, ES, FI, HU, LT, LU, LV, MT, PL, PT, RO, SI, SK, SV**).

The following specificities have been highlighted:

- In **IE**, a witness summoned before the competition authority enjoys the same immunities and privileges as if he were a witness before the High Court. He has a right to legal representation that includes representation by a lawyer of his or her own choice.
- In **IT**, a RFI must indicate in addition the facts and circumstances in relation to which clarification is requested and the procedures to be followed for disclosing the documents, and the individual or individuals to whom the documents may be disclosed or the information requested may be notified.

4.2. Limitations

The power of the competition authorities to ask for information is limited for various reasons:

4.2.1. *Legal Professional Privilege (LPP)*

For further information, see *section 2.5* above.

4.2.2. *Privilege against self-incrimination*

In the vast majority of jurisdictions, well-founded claims invoking the privilege against self-incrimination will be respected. The scope of this right may vary. For example:

At **EU** level, the scope of the privilege against self-incrimination is set out in case law, see e.g. Case C-301/04 P *Commission v SGL*, [2006] ECR I-5915, which specifies that addressees of an Article 18(3) decision may be required to provide pre-existing documents, such as minutes of cartel meetings, even if those documents may incriminate the party providing them. Where the addressee of a simple non-compulsory request for information pursuant to Article 18(2) of Regulation 1/2003 refuses to reply to a question in such a request invoking the privilege against self-incrimination, it may refer the matter to the Hearing Officer, after having raised the matter with the Directorate-General for Competition. In appropriate cases, and having regard to the need to avoid undue delay in proceedings, the Hearing Officer may make a reasoned recommendation as to whether the privilege against self-incrimination applies and inform the director responsible of the conclusions drawn, to be taken into account in case of a compulsory request for information under Article 18(3) of Regulation 1/2003⁴⁶. Self-incriminating questions may be asked in interviews as they are carried out on a voluntary basis. The interviewee is not obliged to reply.

In **CZ**, the competition authority has to respect the prohibition on asking questions that are suggestive or questions that constitute false and misleading facts.

In **DE**, there is a duty on undertakings to answer truthfully. However, persons obliged to provide information may refuse to answer questions if the answers would expose them or their relatives to the risk of criminal prosecution or to proceedings under the Administrative Offences Act. In fines proceedings, persons and undertakings charged with any offence are not obliged to contribute to their own conviction (*nemo tenetur* principle). Accordingly, they are under no duty to answer any questions. Notwithstanding, they may give oral statements if they wish, but there are no legal consequences if the given statements are false, incorrect or misleading. With respect to RFIs, in fine proceedings, a suspect does not have to answer RFIs; vis-à-vis witnesses only formal, i.e. obligatory RFIs can be issued; whereas in administrative proceedings informal RFIs, i.e. which cannot be enforced, are possible and are used regularly.

In **DK**, the privilege applies in the context of questions during inspections.

⁴⁶ Article 4(2)(2b) of the Terms of Reference of the Hearing Officer, OJ L 275, 20.10.2011, p.29.

In **EE**, the Code of Criminal procedure grants a person an explicit right not to incriminate itself. The Competition Act does not contain any comparable provision but the testimonies acquired within the administrative procedure may not be used against the person to impose a penalty if the right not to incriminate itself has not been granted. The principles of the criminal procedure will be applied also in the misdemeanour procedure.

In **FI**, the privilege against self-incrimination applies in the context of questions during an inspection. For other interviews, a right not to *answer* a self-incriminating question is protected.

In **FR**, interviewees are not obliged to provide answers which would constitute an admission of infringement but must however defer to questions of facts.

In **HU** and **LV**, parties are not obliged to make statements admitting an infringement of the law, but they may not refuse to supply incriminating evidence of any other kind.

In **LV**, the competition authority is not precluded from asking for information which may serve as evidence against the party.

In **LT**, the Supreme Court has held that the scope of the privilege against self-incrimination is narrower on competition proceedings than in criminal proceedings. The undertaking under investigation cannot refuse to provide information on the grounds that this information is incriminatory, i.e. can be used to find an infringement of competition law.

In the **NL**, the obligation to cooperate only applies when cooperation is not incriminating for the natural person or undertaking. This results in a tension between the right not to incriminate oneself and the obligation to cooperate, and failure to comply with the latter which can be sanctioned.

4.2.3. *Others*

Other limitations may also play a role in certain very limited circumstances, such as privacy, data protection and banking secrecy.

4.3. **Binding nature of RFIs**

In most jurisdictions no distinction is made between a simple RFI and a compulsory RFI (e.g. **BE, BG, CY, CZ, DK, EE, EL, FI, FR, HU, IE**⁴⁷, **IT, LT, LU, LV, MT, NL, PL, PT, RO, SK, SV**⁴⁸, **UK**).

⁴⁷ There is however a general practice that during civil investigations of competition law infringements, the authority tends to seek RFIs by way of voluntary disclosure. However the competition authority in the conduct of its criminal investigations would invariably utilize its compellable statutory powers.

⁴⁸ Chapter 5, Article 1 of the Swedish Competition Act only provides for the competition authority's power to issue compulsory RFIs. In practice, however, the authority often uses simple RFIs as a first step. A penalty payment may not be imposed on a company for not replying to a simple RFI.

Some jurisdictions distinguish between a simple RFI and a compulsory RFI. For example:

- In **AT**, the competition authority sends a RFI to an undertaking. If the undertaking does not provide an answer, the authority asks the Cartel Court to issue a court order⁴⁹. The undertaking has to provide the competition authority/Cartel Court with the information on the basis of this court order.
- In the **EU** system, the **COM** can request information on the basis of Article 18(1) of Regulation 1/2003 as a simple RFI or on the basis of Article 18(3) in the form of a compulsory decision. Undertakings are obliged to answer to requests by decision but can refuse to reply to requests by simple letter.
- In **DE**, the competition authority has two possibilities to request information in the administrative procedure: (1) it can issue an informal RFI. In this case, the addressee has to be informed that all answers are made on a voluntary basis; (2) it can also issue a formal RFI according to Article 59 of the German competition law (ARC). In fine proceedings only formal RFIs can be sent to the addressees.
- In **SI**, the competition authority may, prior to issuing an order on the commencement of procedure, address a RFI which is not compulsory. The authority may also request information from an undertaking by a special order (compulsory request).

In principle, RFIs are binding on the addressee⁵⁰ and refusal to answer may be sanctioned by the imposition of fines or periodic penalty payments (see further *section 4.5*).

In **IE**, there is a general practice that during civil competition law infringements, the competition authority tends to seek requests for information by way of voluntary disclosure. However, the competition authority in the conduct of criminal investigations would invariably utilize its compellable statutory powers.

There are several limitations to the obligation to provide information, in particular, the privilege against self-incrimination. See further *section 4.2 Limitations*.

In **EL**, persons who may not be summoned as witnesses to penal procedures according to the relevant penal provisions are also not obliged to reply to a RFI by the NCA.

4.4. Judicial review

In several jurisdictions an application can be made for the RFI to be reviewed by the court.

In other jurisdictions, there are no separate legal remedies against RFIs. Nonetheless, an appeal can be brought in the context of an appeal against the final decision.

⁴⁹ At the time of finalisation of this Report, in **AT** a bill was pending which would give the competition authority itself the power to issue an RFI by way of a compulsory decision.

⁵⁰ E.g. for **COM**, there is a duty of the undertaking to cooperate also for a simple RFI. RFIs are binding in case of a decision pursuant to Art.18(3) of Regulation 1/2003.

4.5. Enforcement measures and sanctions for non-compliance

In all jurisdictions, fines or penalty payments may be imposed in case of non-compliance or refusal by an undertaking to submit a reply to a RFI. Most jurisdictions equally provide for periodic-penalty payments as a means to enforce RFIs.

In many jurisdictions the fine may amount up to 1% of the annual turnover in the preceding business year (e.g. **AT**⁵¹, **BE**, **BG**, **CZ**⁵², **EL**⁵³, **ES**⁵⁴, **EU**, **FR**⁵⁵, **HU**⁵⁶, **LT**, **NL**⁵⁷, **PT**⁵⁸, **RO**, **SI**, **SK**). In **LU**, a fine of up to 5% of the annual turnover in the previous business year may be imposed if the undertaking provides incorrect or misleading information in response to a request or provides incorrect, incomplete or misleading information or does not provide information within the required time-limit in response to a formal decision.

In addition, in many jurisdictions, sanctions of a different nature (administrative and/or criminal), of a different form (fines and/or imprisonment) and of varying extent (rather low to very high) may also be imposed on individuals.

The following particularities have been mentioned:

- In **BG**, fines can be imposed on individuals who fail to provide complete, accurate and true information or provide misleading information.
- In **CY**, the maximum fine provided for by the law amounts to € 85 000 for an omission to provide the required information and additionally up to €17 000 per day for an omission to provide the required information within the fixed time limit.

⁵¹ The Cartel Court imposes fines upon request of the competition authority of the Federal Cartel Prosecutor.

At the time of finalisation of this Report, a bill was pending which would give the competition authority itself the power to issue an RFI by way of a compelling decision. Accordingly, non compliance with a decision of the competition authority would constitute an administrative offence punishable with a fine of up to € 75 000 or up to € 25 000 respectively for false or misleading information imposed by the competition authority.

⁵² For an administrative offence a fine can be imposed up to CZK 300 000 or up to 1% of the net turnover achieved in the preceding business year.

⁵³ Also in case of undue delay (e.g. erroneous or incomplete information).

⁵⁴ Fines up to 1% of the turnover may be imposed if the information supplied is incorrect or misleading.

⁵⁵ In case of undue delay (e.g. erroneous or incomplete information).

⁵⁶ In case of behaviour which is aimed at protracting the proceeding or preventing the disclosure of facts or which has such an effect (Article 61(1) and (3) of the Competition Act).

⁵⁷ Section 69(1) Competition Act.

⁵⁸ Article 69(3) of the Competition Act.

- In **DE**, in the context of the administrative procedure, fines up to €100 000 can be imposed for failure by individuals to provide full information on the basis of a RFI⁵⁹. Failure to answer an informal RFI does not result in sanctions.
- In **DK**, fines may be imposed in case of procedural infringements such as failure to comply with conditions imposed or orders issued under the Danish Competition Act. Fines may also be imposed if an undertaking provides incorrect or misleading information to the competition authority or conceals matters of importance in the case. There is no statutory maximum for fines in the form of criminal sanctions. They can only be imposed by national courts. The authority as an administrative authority can only impose periodic penalty payments.
- In **EE**, in administrative proceedings, the competition authority may impose (administrative) penalty payments of up to €3 200 on natural persons and up to €6 400 on legal persons or misdemeanour fines of up to €3 200 on legal persons. The competition authority may impose penalty payments on regular basis until the person has complied with the RFI.
- In **ES**, penalty payments up to €12 000 a day may be imposed on natural and legal persons in case of non-compliance with a RFI from the competition authority. Fines up to 1% of the turnover of the preceding business year may be imposed if the information supplied is incorrect or misleading.
- In the **EU system**, undertakings are obliged to answer to requests by decision but can refuse to reply to requests by simple letter. If they reply to either type of request by submitting incorrect or misleading information, they are subject to fines⁶⁰. The provision of information outside of the required time-limit is subject to fines when required by decision. Periodic penalty payments may be imposed as a means to enforce RFIs by decision⁶¹.
- In **FI**, the competition authority may order a conditional fine to enforce the undertaking's obligation to provide information. The Market Court may impose a conditional fine to be paid. In addition, criminal sanctions (fine or imprisonment up to 6 months) are foreseen for persons providing false documents or comparable technical records.
- In **FR**, penalty payments up to 5% of the average daily turnover⁶², per day, may be imposed on an undertaking if it does not comply with a summons or does not answer within the time limit or answers inaccurately. In addition to fines amounting to 1% of the annual turnover in the preceding business year (*see above*), criminal sanctions (fine of €7 500 and/or imprisonment of up to 6 months) are foreseen for anyone who

⁵⁹ Article 59 in conjunction with Article 81 para 2 N°6 and para 4 sentence 5 of the German competition law (ARC): "... In all other cases, the administrative offence may be punished by a fine of up to €100 000. In fixing the amount of the fine, regard shall be given both to the gravity and to the duration of the infringement."

⁶⁰ Article 23(1)(a) and (b) of Regulation 1/2003.

⁶¹ Article 24 (1)(d) of Regulation 1/2003.

⁶² Article L 464-2 V.

objects, in any way whatsoever, to the fulfilment of the duties with which the investigating agents are entrusted.

- The **HU** Competition Act provides for procedural fines which may be imposed on undertakings and natural persons participating in proceedings. In case of behaviour which is aimed at protracting proceedings or preventing the disclosure of facts, or which has such an effect, the minimum procedural fine shall be 50 000 HUF (ca. € 180), the maximum shall be up to 1% of the annual turnover in the preceding business year. In the case of non-compliance with a time limit, the maximum procedural fine shall be 1% of the per day net turnover in the preceding business year for undertakings and 50 000 HUF (ca. € 180) for natural persons. A separate legal remedy may be sought against an order imposing a procedural fine. No fine can be imposed in procedures relating to complaints as these procedures are not part of the competition supervision proceedings.
- In **IE**, any person who obstructs or impedes an authorised officer of the Irish competition authority in pursuit of their statutory powers under section 45 of the Competition Act, 2002 is deemed guilty of a criminal offence. The court may impose sanctions including a maximum fine of €3 000 and/or a maximum six-month term of imprisonment.
- In **IT**, the competition authority may fine⁶³ anyone who refuses or fails to provide the information or exhibit the documents without justification by an amount up to € 26 000, which is increased up to €52 000 in the event that they provide untruthful information or documents⁶⁴.
- In **LU**, penalty payments up to 5% of the average daily turnover, per day of delay, may be imposed on an undertaking, if it does not comply in the specified time with a formal decision requesting answers to the questions set out in the RFI.
- In **LV**, in the case of failure to provide information in the possession of a legal or natural person to the competition authority within the time limit and to the extent specified upon its request, as well as in the case of provision of false information, fines of up to €70 shall be imposed on natural persons and fines from €700 up to € 14 000 on legal persons. According to Article 175⁵ of the Latvian Administrative Violations Code fines may be imposed on legal or on natural persons, not necessarily an undertaking.
- In **MT**, any undertaking or association of undertakings which fails to supply complete and correct information pursuant to a request for information may, at the discretion of the Director General of the competition authority, be liable to a daily penalty payment not exceeding 5% of the average daily turnover of the undertaking or association concerned. Furthermore, where an individual, being a director, manager, secretary or other similar officer of an undertaking or association of

⁶³ Art.14 Competition Act.

⁶⁴ With regard to the criteria followed by the authority to calculate the sanction, the Competition Act refers to Law 689/91 concerning the principles on administrative sanction. In particular, these criteria are: (i) the gravity of the violation; (ii) the actions put in place by the party in order to eliminate/attenuate the violation; (iii) the economic conditions of the party.

undertakings fails, without reasonable cause, to supply information requested within the time given, he or she shall be liable to an administrative fine of up to €2 400 for each day in default. Moreover any person who in the course of an investigation gives any false, inaccurate or misleading information; or supplies incomplete information or prevents or hinders any investigation shall be liable to the payment of an administrative fine of not less than €1 000 and not more than €10 000 as imposed by the Director General.

- In the **NL**, the competition authority can impose fines on undertakings not exceeding 1% of the annual turnover in the preceding business year (*see above*). In addition, fines on individuals not exceeding €200 000 may be foreseen⁶⁵.
- In **PL**, administrative fines amounting to €50 000 000 can be imposed upon an undertaking, if it, *even unintentionally*, (i) has not provided information as demanded by the President of the competition authority, or provided untrue or misleading information, as well as if it (ii) has not co-operated in the course of the inspection. Moreover, a financial penalty of up to fifty times the average salary can be imposed on a natural person⁶⁶.
- In **RO**, the submission of inaccurate, incomplete or misleading information in reply to the competition authority's RFIs or the failure to submit information and documents requested by the authority constitute an offence and it is sanctioned with fines between 0.1% and 1% of the annual turnover in the preceding business year. In addition, periodic penalty payments of up to 5% of the daily average turnover for each day of failure to comply are foreseen. For the same contravention, the authority applies fines on public institutions (central or local public administration) between approx. €222 (equivalent of 1000 Ron) and €4 444 (equivalent of 20000 Ron), with comminatory fines of up to €1 000 for each day of delay.
- In **SI**, pecuniary penalty payments of up to €50 000 can be imposed. The competition authority can impose fines on undertakings which refuse to cooperate with a maximum of 1% of the annual turnover in the preceding business year (*see above*)⁶⁷.
- In **SK**, fines on undertakings not exceeding 1% of the annual turnover in the preceding business year can be imposed (*see above*). In addition, a fine of up to €

⁶⁵ Article 11(4)(a)(1) of the Policy Rules of the Minister of Economic Affairs on the imposition of administrative fines by the competition authority.

⁶⁶ A natural person holding a managerial post or being a member of a managing authority of the undertaking, should such a person, intentionally or unintentionally, have failed to provide information or provided unreliable or misleading information, requested by the President of the competition authority.

⁶⁷ Article 27 of the Act provides that if an undertaking to which the competition authority has addressed a request to provide data via special order provides inaccurate, incomplete or misleading data, or if it fails to provide such data within the specified time, the authority may issue an order imposing a pecuniary penalty of up to €50 000. At the same time as issuing the order of penalty mentioned in the preceding paragraph, the authority shall issue an order specifying a new deadline for provision of information. The authority shall treat undertakings which continue to refuse to cooperate in the same manner as described above until the sum of pecuniary penalties from individual orders reaches 1% of the undertaking's annual sales in the preceding financial period.

165 may be imposed on natural persons⁶⁸ who impede the proceedings. A sanction of up to €99 can be imposed on natural persons for failure to provide correct or complete information or explanation to the competition authority.

- In **SV**, RFIs may be imposed, subject to penalty payments⁶⁹. No additional sanctions are provided for. Penalties may only be enforced by a court upon application by the competition authority.
- In the **UK**, fines can be imposed by the competition authority for failure to cooperate and comply when the powers of investigation are exercised. Criminal penalties are imposed by the criminal courts. Fines (on summary conviction) can be up to a statutory maximum (currently approx. £ 5 000 (€7 900)) for offences in relation to providing information/documents; intentionally obstructing investigations; and knowingly or recklessly provide information that is false or misleading in a material particular.

4.6. Requests for information in the context of sector inquiries

In most jurisdictions, the competition authorities have the same powers for RFIs in the context of sector inquiries (SIs)⁷⁰: e.g. **AT, BE, BG, CZ, DE, DK, EE, EL, ES, EU, FI, FR, HU, IE, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV**.

In **IT**, the competition authority can request information in the context of a SI, although it has no power to impose fines.

In some jurisdictions (**CY** and **UK**⁷¹) the respective competition authorities have no power to conduct SIs. The OFT can however carry out market studies or make market investigation references to the UK Competition Commission under the Enterprise Act 2002 (which are different procedures).

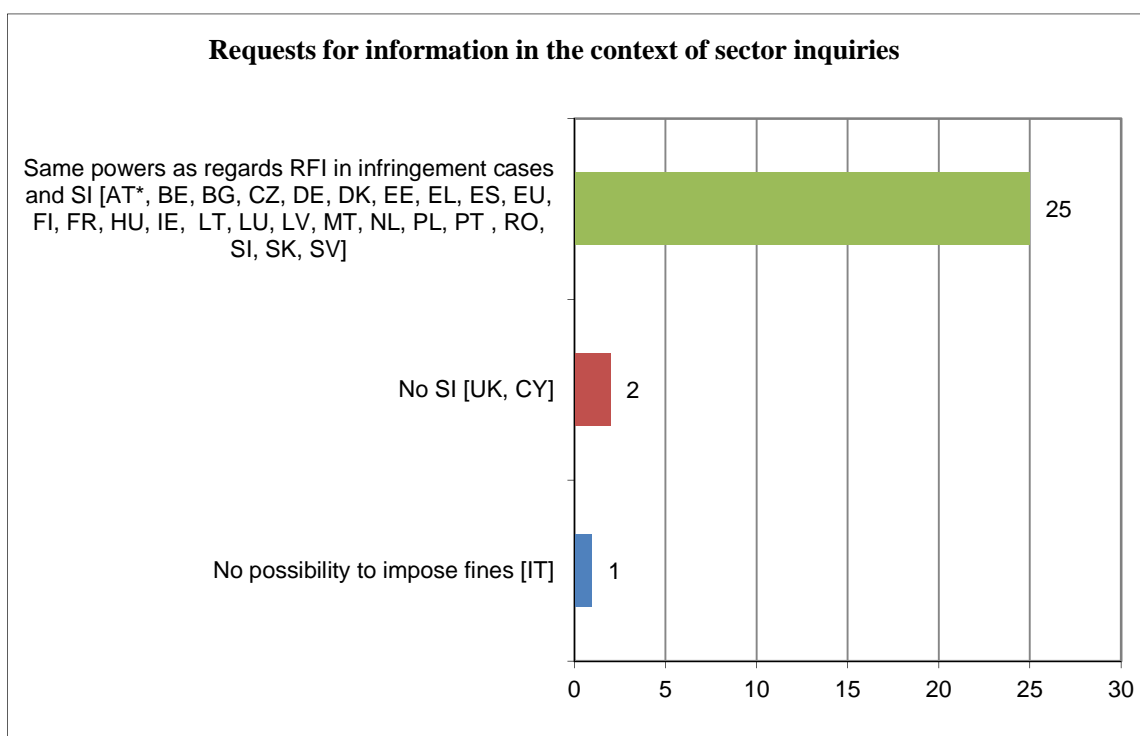
⁶⁸ Pursuant to general Code of Administrative Procedure, "A person who impedes the proceedings, mainly if he/she does not arrive to the authority without serious reasons, breaches the order in spite of previous reprimand, unreasonably refuses witness evidence, submission of document or the realization of an inspection."

⁶⁹ Chapter 6 Article 1 of the Swedish Competition Act and Article 6 of the Act on the duty to provide information (2010:1350).

⁷⁰ The term "sector inquiry" refers to the power of a competition authority to conduct an inquiry into a particular sector of the economy or into a particular type of agreement across various sectors.

⁷¹ In the **UK**, the Office of Fair Trading does not carry out SIs in the strict sense.

Graph 7



* At the time of finalisation of this Report, in **AT** a bill was pending which would give the competition authority itself the power to issue an RFI by way of a compulsory decision. In the context of sector inquiries, a decision would have to be preceded by an informal RFI.

The following specificities have been raised:

- In **DE**, the competition authority is allowed to issue formal RFIs in the framework of a SI basically under the same conditions as a formal RFI in the administrative procedure since the same sections of the German competition law (ARC) are applicable. There is however one difference, in order to issue a RFI in a SI, a sufficiently precise suspicion is not necessary. It is sufficient to prove that there are reasons to believe that competition is restricted in a particular economic sector.
- In **HU**, the rules are basically identical. However, in the context of a SI, the President of the competition authority may request, setting a time-limit for compliance, the undertakings in the relevant economic sector, to provide information. The President of the authority may also impose fines on undertakings that do not comply with the RFI.
- In **SV**, the powers to request information in the context of a SI are set out in a separate legal framework that governs investigations into alleged infringements⁷². In case of non-compliance, penalty payments may be imposed. If an undertaking refuses to comply with a RFI in the context of a SI, there is no possibility for the competition authority to conduct an inspection (unless the requirements in the Competition Act regarding inspections concerning suspected infringements apply).

⁷² The Act on the duty to provide information (2010:1350).

5. INTERVIEWS⁷³

5.1. Legal basis

Almost all competition authorities have the possibility to conduct interviews, either on a voluntary or compulsory basis (e.g. **AT, BE, BG, CY, CZ, DE, EE, EL, ES, EU, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK**).

Specific rules are normally provided for in the respective competition laws. In some jurisdictions, other specific rules are foreseen in general administrative law (e.g. **AT**⁷⁴, **HU**⁷⁵, **NL**⁷⁶) or criminal law (e.g. **EE**⁷⁷).

In several jurisdictions, participation in interviews cannot be refused (e.g. **BG, CY, FR, LU**⁷⁸). Conversely, in some jurisdictions, e.g. **EU**⁷⁹, **FI, RO** and the **UK** interviews are always voluntary. There are no powers to carry out compulsory interviews.

In **DK**, the competition authority does not have the power to conduct interviews: only the public prosecutor for serious economic crime may conduct interviews. During unannounced inspections, the competition authority may ask questions in order to obtain factual information⁸⁰.

A further specificity exists in **FI**: the competition authority does not have any interrogation powers, but it can request a specific natural person for an interview in exceptional circumstances, if there is reasonable suspicion that he/she has committed a competition infringement⁸¹. During inspections, the authority can request oral explanations on the spot and make a record of the replies obtained (*see section 5.2*).

In **SV**, the undertaking/person is obliged to appear at hearings. As regards interviews with representatives of investigated undertakings, the request to appear at a hearing may, according to the preparatory works of the Swedish Competition Act, be combined with a request to supply specific oral information, which could be subject to penalty payments.

⁷³ **Interviews** are defined, for the purposes of this Report, as the power of a competition authority to ask natural or legal person oral questions and to take statements for the purpose of collecting information in the context of an investigation.

⁷⁴ Cartel Act, Competition Act and General Administrative procedure Act.

⁷⁵ General rules on Public Administrative Procedures.

⁷⁶ Article 5:16 of the General Administrative Law Act.

⁷⁷ § 68 Code of Criminal Procedure.

⁷⁸ In **LU**, undertakings are obliged to cooperate, while individuals may refuse to reply.

⁷⁹ Article 19 of Regulation 1/2003.

⁸⁰ The right of non-self-incrimination has to be respected.

⁸¹ Additionally, the Competition Act states that business undertakings or association of business undertakings are obliged, at the request of the Finnish competition authority, to provide the authority with all the information and documents needed for the investigation of the content, purpose and impact of a competition restriction and for clarifying the competitive conditions. The competition authority may request the information to be submitted orally; interviewing employees of the undertaking in question. However, the competition authority cannot oblige an undertaking to provide information orally.

5.2. Types of interviews

The type of interviews which can be conducted takes three principal forms:

- 1 In most jurisdictions, the conduct of interviews is a general investigative power which can be used during inspections and afterwards in the course of the investigation (e.g. **AT, BE, BG, CZ, DE, EE, EL, ES, FR, IE, IT, LT, LU, LV, NL, PL, PT, RO, SI, SK**).
2. In some jurisdictions, e.g. **CY**, interviews may be conducted only during inspections.
3. Some jurisdictions distinguish between the possibility to ask oral questions at inspections and interviews which are carried out separately from inspections (e.g. **EU**⁸², **FI**⁸³, **HU**⁸⁴, **MT, SV**⁸⁵, **UK**).

The following particularities have been pointed out:

- In **FR**, there are no substantive requirements for conducting interviews when they are not performed pursuant to Article L.450-3 ("simple" investigatory powers), whether during an inspection or via a summons. Under the "simple" powers, any person can be interviewed during an on-the-spot investigation. Powers entrusted by Article L.450-3 can also be used to substantiate a sector inquiry.⁸⁶ When interviews are conducted during inspections performed under Article L.450-4 (inspections with a court order), special requirements apply: the interviewee can only be the official occupying person of the premises searched (i.e. the person to whom the court order must be shown), with the assistance of the police to verify that the rights of defence were complied with. The person occupying the premises can request the assistance of his legal counsel.
- In **PL**, undertakings (understood *sensu largo*, i.e. those both suspected and non-suspected of antitrust infringements) are obliged to provide all necessary information and documents upon request of the President of the competition authority. During an inspection, the inspectors are authorized to request oral explanations on the subject of

⁸² Interviews are based on Article 19 of Regulation 1/2003 and oral questions on the spot are based on Article 20(2)(e) of Regulation 1/2003.

⁸³ The power to ask questions on the spot during inspections is based on Article 37 of the Competition Act, the general power to request information - often used for interviews also - on Article 33 and the power to interview natural persons in exceptional situations on Article 34.

⁸⁴ During an inspection the investigator may oblige the party or its agent or former agent, employee or former employee to provide information and explanations orally or in writing, or collect information on the spot in any other manner. This means that the competition authority may ask employees, chief officers on the spot (when conducting an inspection) basically requesting explanations but it cannot conduct *de facto* interviews.

⁸⁵ During inspections the staff of the competition authority may not interview persons but may only ask for oral explanations regarding e.g. a certain document, the position of a certain person etc.

⁸⁶ The term "sector inquiry" refers to the power of a competition authority to conduct an inquiry into a particular sector of the economy or into a particular type of agreement across various sectors, see *section 4.6* above.

the inspection from the inspected party, the person authorized, the holder of apartments, buildings or means of transportation⁸⁷. Furthermore, the President of the competition authority may summon for a hearing, and examine the parties, witnesses as well as ask for an expert opinion⁸⁸.

5.3. Procedural requirements

In most jurisdictions, requirements as regards interviews depend on the specificities of the individual enforcement system, in particular in relation to whether the interviews are voluntary or compulsory.

The interviews are normally conducted by the case-handlers of the investigation team or other staff of the authority.

The interviews take place generally at the premises of the competition authorities but may also be carried out at the premises of the undertakings.

In most cases, written minutes/protocols are established during/after the interview, which are signed by the interviewer and the interviewee. A copy is handed over to the interviewee. The interviewee normally has the possibility to comment. If a comment/objection does not result in an amendment, it should be noted.

In many jurisdictions, the interview is recorded on tape or by other electronic means and/or a summary is prepared.

Normally, an interviewee is instructed about his or her rights of defence. In some jurisdictions, leading questions may not be asked.

Legal counsel is admitted to interviews in almost all jurisdictions (**BE, BG, DE, EE⁸⁹, EL, ES, EU, FI, FR⁹⁰, HU⁹¹, IE⁹², IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK, SV, UK**). In **CZ**, legal counsel is not admitted to assist the interviewed individuals that are not party to the proceedings.

5.4. Further requirements and limitations

Interviews may be subject to further requirements. Moreover, the power of the authorities to ask for information may be limited or circumscribed for various reasons.

⁸⁷ Article 105b section 1 point 3 of the Act of 16 February 2007 on Competition and Consumer Protection.

⁸⁸ Article 60 section 3 of the Act of 16 February 2007 on Competition and Consumer Protection.

⁸⁹ Within the criminal procedure the accused has the right to a defense attorney. Legal counsel is also admitted to the interviews in the administrative procedure.

⁹⁰ Legal counsel is admitted to assist their clients during interviews pursuant to a summons.

⁹¹ Legal counsel may participate in the interview but may not make statements instead of the interviewee.

⁹² Interviewed individuals have a constitutional right to be assisted by a lawyer.

Requirements and limitations may vary in view of the fact that in some jurisdictions the power to carry out interviews is compulsory, whereas in others it is voluntary (see also *section 5.1* above).

The vast majority of authorities notably recognise the privilege against self-incrimination. For further details, see also *section 4.2* above. The application of these rules implies that there can be differences between interviews of parties to the proceedings and other persons.

Specifics from individual jurisdictions include:

- In **AT**, witnesses, including employees, may refuse to testify in certain circumstances: (i) regarding questions when the answer would result in a direct material pecuniary prejudice or in the risk of criminal prosecution or in discrediting himself, one of his/her relatives, a person entrusted with his/her custody, his/her guardian or his/her foster person; (ii) regarding questions he would not be able to answer without violating an officially recognized secrecy obligation of which he had not been released with legal effect or in case he would disclose a secret of art, manufacturing or business; (iii) regarding questions as to how he/she has cast a vote if exercising it has been declared to be secret; (iv) persons authorized to professionally represent parties can also refuse to testify on what has been confided to them in their capacity as representative of a party; (v) nobody has the right to refuse to testify regarding births, marriages and cases of death of persons on the grounds of the risk of a pecuniary prejudice. Witnesses have the obligation to tell the truth; otherwise they are responsible under criminal law. Persons involved have the same privilege to refuse to give evidence as witnesses except on the grounds of incurring financial loss. In case of false evidence they are not responsible under criminal law.
- In **CZ**, the party to the proceeding can refuse to comply with the authority in accordance with principle of self-incrimination. Other individuals as well as employees of the undertaking, who are not acting on behalf of the party to the proceeding, have to answer questions. However, a witness cannot be asked questions about confidential information protected by a special law or cannot be interviewed if his testimony results in the breach of non-disclosure imposed or recognized by the state. A person who may by his or her testimony cause himself or a person close to him to be subject to prosecution for a crime or administrative delict may refuse to testify.
- In **DE**, in administrative proceedings refusal to participate in the interview as such is possible, notwithstanding the right to refuse to testify. In the fine procedure there is a general right not to incriminate oneself (*nemo-tenetur* principle), so the parties have the right not to answer questions on the subject-matter. The exception to this rule is the leniency programme (firstly, the leniency applicant has the duty to cooperate to the fullest extent; secondly, due to the U.S. discovery procedure, some leniency applicants are reluctant to submit written documents). External witnesses on the other hand are generally obliged to answer questions.
- In **EE**, the party has the right not to incriminate him/herself. § 71 Code of Criminal Procedure sets out grounds for refusal to give testimony for personal reasons (possible criminal prosecution of family members), professional reasons

and state secrets. A witness may request the presence of a lawyer at the interrogation. Moreover, the following requirements apply: (1) The rights and obligations of witnesses and the right to write the testimony in hand-writing shall be explained to a witness. (2) A witness of at least 14 years of age shall be warned against refusal to give testimony without a legal basis and knowingly giving false testimony, and the witness shall sign the minutes of the hearing to that effect. If necessary, it is explained to the witness that intentional silence on the facts known to him or her shall be considered as a refusal to give testimony. (3) While giving testimony, a witness may use notes and other documents concerning numerical data, names and other information which is difficult to memorize. (4) A witness may be heard only as regards the facts relating to a subject of proof. It is allowed to pose leading questions only under the condition stated by Code of Criminal Procedure. It is prohibited to pose leading questions. (5) The testimony of a witness concerning such facts relating to a subject of proof of which the witness has become aware through another person constitutes evidence only if the direct source of the evidence cannot be heard. (6) Questions concerning the moral character and habits of a suspect, accused or victim may be posed to a witness only if the act which is the object of the criminal proceeding must be assessed as an inseparable connection with his or her previous conduct.

- In **EL**, persons who may not be summoned as witnesses under penal provisions may not be invited as interviewees by the NCA i.e. clerks, in case of professional secrecy (lawyers, notaries, technical advisors, doctors, pharmacists, midwives) and in case of military or diplomatic secrecy (civil servants).⁹³
- In **FI**, the privilege of parties against self-incrimination is protected. Also, undertakings can refuse to answer oral questions (except during inspections) and submit the information requested in a written form. The competition authority is empowered to request a natural person for an interview in exceptional situations, if there is reasonable suspicion that he/she has enforced a competition infringement.
- In **HU**, parties are not obliged to make statements admitting an infringement of the law. They may however not refuse to supply incriminating evidence of any other kind. As regards witnesses, a person may not be required to testify if he or she is unlikely to produce any admissible evidence; or if he or she was not released from the obligation of confidentiality concerning any protected data or privileged information (nevertheless, the Competition Act contains special rules, pursuant to which witnesses may be interviewed about the business secrets of parties even if the witnesses have not been released from their obligation of secrecy by the parties). Testimony may be refused if the witness is a relative of any of the clients or it would implicate the witness himself or his relative in some criminal activity. Neither the party nor the witness may be required to make statements/testimony concerning data protected by state secret or service secret (unless he was released from the obligation of confidentiality). With some statutory exceptions persons enjoying diplomatic immunity may not be obliged to testify.

⁹³ Art. 39 para. 1 of Law 3959/2011 and art. 212 Code of Penal Procedure.

Parties are notified of interviews and may participate in the hearings (interviews) of the witnesses or external experts. If a party is interviewed no other individual (except legal counsel) may participate. Whereas it is possible to treat the identity of witnesses as being confidential, this is not the case for parties. The witness is obliged to tell the truth, while the party does not have such an obligation. The interview of the witness may not be attended by the party or any other person of the proceeding, if the witness's testimony concerns any protected data, or if the natural identification data of the witness are to be handled confidentially.

- In **IE**, the statements obtained must comply with certain safeguards afforded to the suspect. Otherwise the statements may be excluded as inadmissible evidence by the criminal trial court. These safeguards include the cautioning of suspects to ensure compliance with Judges Rules. Also any confession evidence must be voluntarily made, otherwise it would be inadmissible at trial.
- The law of **MT** foresees that in the case of a natural person, not being an undertaking or a director, manager, secretary or other similar officer of an undertaking or association of undertakings, statements may be taken only with his/her prior consent.
- In **PT**, parties to the investigation may be accompanied by a lawyer and have the right not to incriminate themselves.
- In **SI**, there is a substantial difference between the treatment of parties which must tell the truth and witnesses. Article 188 of the General Administrative Procedure Act (Statements by the Party) provides that: (1) If for establishing some fact there is no other evidence, an oral statement by the party may also be taken as constituting evidence to establish such a fact. A statement by the party may also be taken as constituting evidence in less important matters if a fact is to be proved by examining the party who lives in a place remote from the main office of the agency, or if because of searching other evidence the exercising of the rights of the party would be aggravated. A person who participated in a proceeding as an official cannot be a witness. As regards the credibility of a statement by a party, the official authorized shall decide upon which facts are considered proven following his/her own persuasion based on a conscientious and attentive evaluation of individual items of evidence separately and all the evidence as a whole. Before the official accepts a statement, he/her must warn the parties of their criminal responsibility and material liability if they commit perjury.

Article 181 of the General Administrative Procedure Act stipulates that a witness can be everyone who is capable of observing a fact of which they are to testify, and who can demonstrate their observation, may be a witness. Limitations for witnesses are e.g. the exposure to criminal prosecution, business, art or scientific secrets, facts which fall under a professional secret (attorney, doctor, priest) (Article 183 of the General Administrative Procedure Act).

5.5. Judicial review

In many jurisdictions there are no specific legal remedies available to challenge an interview. Nonetheless, normally, an appeal can be brought against the final decision (in this context, e.g. breach of procedural law, violation of rights of defence with regard to the interview may be claimed). Specific remedies exist in several jurisdictions.

5.6. Sanctions for non-compliance

In most jurisdictions fines and/or penalty payments may be imposed in case of non-compliance and/or incomplete or misleading information and/or if evidence is withheld in the context of interviews (e.g. **AT, BE, BG, CY, CZ, DE⁹⁴, DK, EE, EL, ES, FI, FR, HU, IT⁹⁵, LT, LU, LV, MT⁹⁶, NL, PL, PT, SI, SK, SV**).

In **EU** proceedings no fines may be imposed for failure to answer questions correctly or in a manner which is not misleading⁹⁷. The **COM** reflects however on the possibility to introduce sanctions in this regard⁹⁸.

In several jurisdictions the fine imposed on undertakings may amount up to 1% of the annual turnover in the preceding business year (e.g. **BE⁹⁹, BG, CZ, ES, FR, HU, LT, NL, PT, SK**).

In addition, in many jurisdictions sanctions may also be imposed on individuals.

The following specificities are of interest:

⁹⁴ In administrative proceedings. Destroying and falsifying documents and witness tampering are criminal offences but only under certain circumstances.

⁹⁵ A sanction may not be applied only if the requested party provides an objective justification for not complying with the request. In this regard, Art. 10.3 of the implementing regulation provides that: "In no instance shall the following be considered justifiable grounds for refusal or failure to supply all the information and documents requested for the purposes of the penalties referred to in section 14(5) of the Act: a) confidentiality, or the exercise of powers and authority imposed by company regulations or internal instructions, including oral instructions; b) the need to protect the party concerned from the risk of fiscal or administrative penalties; c) the need to protect company or industrial confidentiality, unless the Authority acknowledges particular requirements of this kind that have already been brought to its attention".

⁹⁶ Any person who in the course of an investigation gives any false, inaccurate or misleading information; or supplies incomplete information or prevents or hinders any investigation shall be liable to the payment of an administrative fine of not less than €1 000 and not more than €10 000, as imposed by the Director General.

⁹⁷ To be distinguished though from oral questions asked during inspections. In the latter context fines may be imposed on the basis of Article 23(d) of Regulation 1/2003.

⁹⁸ See the Report on the functioning of Regulation 1/2003 SEC(2009) 574 final of 29.4.2009 and the accompanying Staff Working Paper, para 84.

⁹⁹ Article 64 of the Belgian Competition Act. It must be noted that the wording of this national provision does not refer specifically to "interview" and is rather broad (to provide incomplete information or not to provide information within the prescribed time) and there is a lack of case-law for anti-competitive practices.

- In **AT**, witnesses may be forced to appear. In case of unjustified refusal to testify fines may be imposed. False testimony is a criminal offence.
- In **BG**, individuals who fail to provide complete, accurate, true and not misleading information under Article 47(5) of the LPC, may be fined from BGN 500 (€256) to BGN 25 000 (€12 782).
- In **CY**, fines and criminal sanctions are foreseen in cases of procedural breaches. Criminal sanctions fall within the exclusive jurisdiction of the court. Up to now the competition authority has imposed only fines with regard to procedural breaches and those cases were few. The fines provided for in the law are the following: A maximum of € 85 000 may be imposed where an undertaking or association of undertakings intentionally fails to provide information during an inspection or alters documentation or refuses to comply with the order for inspection. A fine up to €17 000 per day may be imposed if an undertaking or association of undertakings refuses to comply with an order for inspection of business premises or to provide information. Criminal sanctions of up to one year imprisonment and / or €85 000 fine may be imposed on a person who refuses to answer questions and/or hides, destroys or falsifies documents or gives misleading information.
- In **EE**, in the case of the administrative procedure a fine may be imposed by the competition authority. In the case of criminal and misdemeanour proceedings incorrect and misleading statements may result in a fine or imprisonment.
- In **FI**, no sanctions can be imposed if an undertaking refuses oral questions but provides the requested information in a written form. Giving false evidence to an authority is a criminal offence.
- In **FR**¹⁰⁰, penalty payments of up to 5% of the average daily turnover, per day of delay, may be imposed if an undertaking does not comply with a summons or does not answer within the prescribed time-frame or answers inaccurately, to a RFI. An undertaking can be fined up to 1% of its worldwide turnover before tax if such an undertaking unduly delays the proceedings, among others, by submitting erroneous or incomplete information (*see above*). If an individual objects to the fulfilment of the duties with which the investigating agents appointed are entrusted, this shall be punished by a prison sentence of up to six months and/or fine of €7 500 (Article L 450-8).
- The **HU** Competition Act¹⁰¹ provides for procedural fines which may be imposed on undertakings and natural persons participating in a proceeding. In case of behaviour which is aimed at protracting the proceeding or preventing the disclosure of facts, or which has such an effect, the minimum procedural fine shall be HUF 50 000 (ca. € 180), the maximum shall be up to 1% of the annual turnover in the preceding business year (*see above*). In the case of non-compliance with the deadline, the maximum procedural fine shall be 1% of the per day net turnover in the preceding business year for undertakings and HUF 50 000 (ca. €180) for natural persons. A

¹⁰⁰ Article L 464-2 V.

¹⁰¹ Article 61.

separate legal remedy may be sought against an order imposing a procedural fine. No fine can be imposed in procedures relating to complaints as these procedures are not part of the competition supervision proceedings.

- In **IE**¹⁰², any person who has been summoned by the competition authority for a witness hearing and fails to attend, fails to take an oath, fails to produce documents sought under the summons, refuses to answer any question to which the authority may legally require an answer and does any other thing which, if the authority were a court having the power to commit for contempt of court, would be contempt of such court, the person is guilty of a criminal offence and the sanctions are a maximum fine of €3 000 or a maximum of 6 month term of imprisonment or to both.
- In **IT**, the competition authority may fine¹⁰³ by an amount of up to €26 000 anyone who refuses or fails to provide information or exhibit documents without justification, which is increased up to € 52 000 in the event that they submit untruthful information or documents¹⁰⁴.
- In **LT**¹⁰⁵, a fine for non-compliance may be imposed on an individual for non-compliance or obstruction of an inspection. The fine can amount from 500 to 2 000 litas (€144 - €579) or from 2 000 to 5 000 litas (€579 – €1448) if the person has already been punished for the same type of infringement. A fine amounting to 1% of the annual turnover can be imposed on an undertaking (*see above*).
- In **LV**, sanctions are foreseen in case of refusal to provide information or in case of provision of false or misleading information. Sanctions for natural persons may not exceed €700, for legal persons up to €14 000.
- In the **NL**, the competition authority can impose fines on undertakings not exceeding 1% of the annual turnover in the preceding business year (*see above*). In addition, fines on individuals not exceeding €200 000 are foreseen¹⁰⁶.
- In **PL**, administrative fines can be imposed upon the undertaking amounting to € 50 000 000, if the undertaking, *even unintentionally*, (i) has not provided information as demanded by the President of the competition authority, or has provided untrue or misleading information, as well as if it (ii) has not co-operated in the course of the

¹⁰² Section 31(4) of the Act.

¹⁰³ Art.14 Competition Act.

¹⁰⁴ With regard to the criteria followed by the competition authority to calculate the sanction, the competition act refers to law 689/91 concerning the principles on administrative sanction. In particular, these criteria are: (i) the gravity of the violation; (ii) the actions of party which eliminate/attenuate the violation; iii) the economic conditions of the party.

¹⁰⁵ Article 189 of the Code of Administrative Law Infringements.

¹⁰⁶ Article 11(4)(a)(1) of the Policy Rules of the Minister of Economic Affairs on the imposition of administrative fines by the competition authority.

inspection. Moreover, a financial penalty of up to fifty times the average salary can be imposed on a natural person¹⁰⁷.

- The **PT** Competition Act provides that procedural infringements may be subject to a fine that may not exceed 1% of the annual turnover of an undertaking in the precedent business year (*see above*). Moreover, the competition authority may impose a fine on individuals of between 10 to 50 units of account¹⁰⁸.
- In **SI**, fines up to €500 may be imposed on witnesses if they do not appear (without due justification) or if they refuse to testify (without reason). If the witness continues to refuse to testify, another fine up to € 500 may be imposed. The official who conducts the proceeding may decide that a witness must bear the expenses incurred due to their failure to appear or due to their refusing to testify. The fine imposed may be annulled (*ab initio*) afterwards if the witness justifies his or her absence. A special appeal against such a fine is available.
- In **SK**, fines on undertakings not exceeding 1% of the annual turnover in the preceding business year can be imposed (*see above*). In addition, a fine of up to € 165 may be imposed on natural persons¹⁰⁹ who impede the proceedings. A sanction of up to €99 can be imposed on natural person for failure to provide correct or complete information or explanation to the Authority.
- In **SV**, the obligation to appear at a hearing may be imposed subject to penalty payments. No other sanctions for non-compliance are available.
- In the **UK**, section 44 of the Competition Act 1998 on false or misleading information applies.

6. CONCLUSION

A significant degree of voluntary convergence of Member States' laws has been achieved to date. Basic elements of investigation powers are present in all or in a very vast number of jurisdictions. For instance, the investigation powers in the form of inspections, including in non-business premises and requests for information are very wide-spread. Also procedural rights that are crucial in terms of safeguarding fair procedures (such as the right not to self-incriminate) are, in one form or another, present in all jurisdictions.

¹⁰⁷ A natural person holding a managerial post or being a member of a managing authority of the undertaking, should such a person, intentionally or unintentionally, have failed to provide information or provided unreliable or misleading information, requested by the President of the competition authority.

¹⁰⁸ Article 69(3) and (6) of the Competition Act. A 'unit of account' is a monetary unit whose concrete amount is reviewed every year. It is used in many procedural instances, and is not specific for competition. In 2012, the value of one unit of account is €102.

¹⁰⁹ "A person who impedes the proceedings, mainly if he/she does not arrive to the authority without serious reasons, breaches the order in spite of a previous reprimand, unreasonably refuses to witness evidence, submit a document or impedes the realization of an inspection."

This demonstrates that national legislators have made clear efforts to make their procedures for the enforcement of Articles 101 and 102 TFEU more convergent. The trend to take account of developments elsewhere in the ECN is welcome. It has however not led to uniformity. Divergence subsists for questions such as the legal framework for interviews, as well as numerous aspects at a more detailed level, such as the sanctions for non-compliance with investigatory measures.

The question remains open to which extent a further harmonisation is desirable or needed, taking account of the cost involved. This Report can provide a basis for informed debate about the need for further procedural convergence within the ECN. The ECN will continue looking into this matter.

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