

**C L I F F O R D  
C H A N C E**



**HOW TO BEHAVE IN THE EVENT OF  
EUROPEAN COMMISSION OR  
FEDERAL CARTEL OFFICE INSPECTIONS**

# HOW TO BEHAVE IN THE EVENT OF EUROPEAN COMMISSION OR FEDERAL CARTEL OFFICE INSPECTIONS

## GENERAL PREPARATION

The following steps should be taken in order to be prepared for potential inspections by competition authorities into alleged breaches of competition rules:

1. Produce a list of members of the management board, in-house lawyers and IT personnel to be immediately informed of any inspection by competition authorities (including office, home and mobile numbers).
2. Produce a list of personnel to be made available in the event of an inspection by competition authorities in order to accompany the inspectors during their inspection, to take copies of documents seized, electronically stored or copied by the inspectors and to produce a detailed record of the inspection proceedings. Designate an executive person responsible for providing information to the competition authority.
3. Identify which room(s) can be made available to the inspectors in the event of inspections. These rooms should be sufficiently separated from the current business activities. No documents or files should be kept in these rooms and inspectors should not be able to hear conversations among employees of the company. It should be possible to make available photocopying machines or electronic storage media in these rooms on short notice. You should have barrel-locks available which are separate from the master key system to allow sealing of the rooms.
4. Produce a list of your external lawyers who should be immediately informed of the arrival of inspectors of competition authorities (including telephone and fax numbers).
5. Ensure that receptionists, gatekeepers and security personnel understand how to react upon the arrival of inspectors from a competition authority and provide them with the above contact lists.

## HOW TO BEHAVE IN AN “EMERGENCY CASE”

In the event of an inspection by the competition authorities at your company, the following steps should be taken upon the arrival of the inspectors:

1. Never keep the inspectors waiting upon arrival, but guide them to the room(s) identified for the purpose of inspections and immediately inform the members of the management board, in-house lawyers and IT personnel mentioned on the above contact list.
2. Immediately inform your external lawyers of the arrival of the inspectors.
3. Check the inspectors' identity and authority: Service cards, written authorisation or decision of the European Commission, search warrant issued by a local court (“Amtsgericht”) judge, inspection decision of the Federal Cartel Office. Take photocopies or scans of the respective documents or write down their substantial content. Send copies of these documents to your external lawyers by email or fax.

4. After having guided the inspectors to the respective rooms, ask them to await the arrival of your external lawyers. Generally, the inspectors will sometimes be prepared to wait for up to 30 minutes. However, it is possible that the inspectors will not wait (in particular if an in-house lawyer is present).

In addition, during the waiting period, inspectors should be permitted to speak to senior IT personnel in order to secure electronic records (e.g. blocking email accounts of employees). Note that in principle there is no obligation for them to await the arrival of external lawyers, unless a European Commission inspection would only be based on a simple written authorisation and not on a decision.

Take advantage of the waiting period for the organisation of the inspection, for example, by making available further suitable rooms for the inspectors, organising access to photocopying machines and IT facilities, and identifying further personnel who can accompany the inspectors. IT personnel should be briefed on how to cooperate with the competition authority, including making sure that blocked email accounts remain blocked, making available electronic storage media such as empty laptops or hard drives and explaining the structure of the company's IT systems to the competition authority.

5. The obligation to actively support the inspectors is limited. In principle, the inspection must only passively be tolerated and only on the premises of the company or companies explicitly mentioned in the inspectors' authorisation. Closed containers must be opened upon request. In case the inspectors search for specific documents, it may be advisable to deliver these specified documents in order to avoid incidental discoveries.

Upon explicit request of the authority, the duty to cooperate obliges all representatives and employees of the company to hand over certain information. The use of this information as evidence against natural persons is restricted. In this case, you should insist on the presence of a lawyer to ensure adherence to the procedural rules (EU law or German law).

6. At the end of the inspection, ask the inspectors for an official record of the inspection and for a copy of an index or list of the documents that the inspectors have seized, copied or electronically stored, or a certificate that nothing suspicious has been found. The official record, index and/or list should be reviewed for completeness and accuracy. Ask for copies of all documents signed by you. In case of European Commission inspections, the inspectors should not take originals or hardware and leave a complete copy (data carrier) of all the documents and data that they copied for their take-away

7. In case the Federal Cartel Office wants to secure documents and items during the inspection, do not hand them over voluntarily, but object to the securing and record your objection in the official report. If the Federal Cartel Office seizes these documents and items, you have the right to request for a judicial review of the seizure.
8. Depending on the applicable law the inspectors have the following competences:
  - To enter factory and office premises, to search means of transport of the company (other rules may apply to privately owned cars) and the content of furniture and, in the case of a respective authorisation, also to enter and inspect private premises, for example the apartments of company executives. Under German law, the inspectors may also use force, for example, to open a closet, also with the help of police officers, or impose a penalty payment in case of non-compliance.
  - To examine folders and other records related to the business, such as minutes of meetings, diaries, photographic materials, audio recording, expense- and travel cost reports, documents in folders and executive cases, book-keeping and financial documents, market studies, IT environment (e.g. servers, desktop computers, laptops, tablets and other mobile devices) and all storage media (e.g. CD-ROMs, DVDs, USB-keys, external hard disks, backup tapes, cloud services). This applies also to private devices and media that are used for professional reasons when they are found on the premises.
  - To take away documents and storage media (e.g. hard disks) that are relevant to the investigation. In the case of European Commission investigations, only copies from documents and storage media may be taken, whereas in the case of Federal Cartel Office proceedings originals and hardware may be seized. In order to identify relevant documents, the European Commission will copy all potentially relevant electronic records to its "NUIX" system at the company's premises, in order to be able to index and analyse them by using lists of search terms. The analysis of documents may be continued on the premises of the European Commission in Brussels in presence of the undertakings concerned.
  - To seal any business premises and books or records for the period of the inspection. Ensure that inspectors use as few seals as possible (e.g. by placing all records in the same room) and that in no circumstances the seals are damaged in any way. Please make sure to clean the surface of the door and the doorframe on which the seal is to be applied in order to ensure the adhesive strength of the seal.
- In the case of European Commission investigations to ask for oral explanations on facts or documents found relating to the subject-matter and to record the answers. Respective explanations should only be provided in the presence of an external lawyer.
- To examine correspondence: In the case of European Commission investigations generally only in so far, as no correspondence with an EU qualified external lawyer on the subject matter is concerned. In any case, the privileged part of the correspondence has to be redacted prior to delivery. In the case of investigations by the Federal Cartel Office, the legal privilege is subject to very restrictive conditions. It should, thus, be examined by an external lawyer in the individual case.

## GENERAL GUIDELINES

1. Inform your external lawyers immediately of the inspection.
2. Do not obstruct the inspection. Create an impression of open cooperation wherever possible. However, you need not be too accommodating. The inspectors' powers are not unlimited. Discuss the issue with your external lawyers.
3. Do not do anything that later may be held against you (for example destroying documents, deleting emails, warning third parties of the inspection).
4. Each inspector should be accompanied at all times.
5. Keep (electronic or physical) copies of all documents that the inspectors copy or seize.
6. Prepare a comprehensive written record of the inspection, including a note of all search terms used and questions asked by the inspectors.

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