EUROPEAN COMMISSION

Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003

This note is for information only and is without prejudice to any formal interpretation of the European Commission's powers of investigation.

1. Undertakings [In this note the term “undertaking” includes both undertakings and associations of undertakings] are legally obliged to submit to an inspection ordered by decision of the Commission under Article 20(4) of Council Regulation No 1/2003. Written authorisations serve to name the officials and other accompanying persons authorised by the Commission to conduct the inspection (“the Inspectors”). They prove their identity by means of their European Commission ID card.

2. Officials and other accompanying persons authorised by the Commission to conduct the inspection The Inspectors cannot be required to enlarge expand upon the subject matter as set out in the decision or to justify the decision in any way the taking of the decision. They may however explain procedural matters, particularly with regard to confidentiality, and the possible consequences of a refusal to submit to the inspection.

3. A certified copy of the decision is to be handed to the undertaking. The minute of notification of service serves only to certify delivery and its signature by the recipient does not imply submission.

4. The officials and other accompanying persons Inspectors are empowered, pursuant to Article 20(2) of Regulation No. 1/2003:

   a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

   b) to examine the books and other records related to the business, irrespective of the medium in which they are stored;

   c) to take or obtain in any form copies of or extracts from such books or records;

   d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

   e) to ask any representative or member of staff of the undertaking, or association of undertakings, for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

5. Officials of and those The officials and other accompanying persons authorised or appointed by the competition authority of the Member State in whose territory the inspection is conducted are entitled to actively assist the officials and other accompanying persons authorised by the Commission Inspectors in carrying out their duties. To this end, they enjoy the same powers under Article 20(2) of Council Regulation No 1/2003 as the officials and other accompanying persons authorised by the Commission Inspectors (see paragraph 4 above). They shall prove their identity in accordance with the relevant national rules.
6. The undertaking may consult a legal adviser during the inspection. This consultation can be carried out by telephone. However, the presence of a lawyer is not a legal condition for the validity of the inspection. The officials or other accompanying persons authorised by the Commission Inspectors can enter the premises, notify the decision ordering the inspection and occupy the offices of their choice without waiting for the undertaking to consult its lawyer. The officials and other accompanying persons authorised by the Commission Inspectors will accept only a short delay pending consultation of the lawyer before starting to examine the books and other records related to the business, taking copies or extracts of those documents, sealing business premises and books or records if needed or asking for oral explanations. Any such delay must be kept to the strict minimum.

7. Where any representative or member of staff of the undertaking gives, pursuant to Article 4(1) of the Commission Regulation No 773/2004, oral explanations on the spot on facts or documents relating to the subject-matter and purpose of the inspection at the request of the officials or other accompanying persons authorized by the Commission Inspectors, the explanations may be recorded in any form. A copy of any such recording will be made available to the undertaking concerned after the inspection pursuant to Article 4(2) of the European Commission Regulation No 773/2004.

8. In cases where a member of staff of an undertaking who is not or was not authorised by the undertaking to provide explanations on behalf of the undertaking has been asked for explanations, the Commission shall set a time-limit within which the undertaking may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded during the inspection.

9. The officials and other accompanying persons authorised by the Commission Inspectors are entitled to examine any books and records related to the business, irrespective of the medium on which they are stored, and to take or obtain in any form copies of or extracts from such books or records. This includes also the examination of electronic information and the taking of electronic or paper copies of such information. In this regard the Commission can also block individual email accounts for a certain period. During this period the undertaking must not interfere in any way with these blocked accounts. It is the undertaking’s duty to inform the concerned employees accordingly.

10. As part of its investigation, the Commission Inspectors can search the IT environment, and storage media and hardware (laptops, desktops, tablets, mobile phones, CD-ROM, DVD, USB-key and so on) of the undertaking. The officials and other accompanying persons authorised by the Commission may use the search tools built into the storage media investigated. The investigation may also include searches based on keywords and the use of keywords search tools but may also make use of their own dedicated software and/or hardware brought by the officials and other accompanying persons authorised by("Forensic IT tools"). These Forensic IT tools allow the Commission. The dedicated software allows the Commission to copy, search and recover data whilst respecting the integrity of the undertakings systems and data.

11. The undertaking has the obligation to cooperate fully and actively with the inspection. This means that the undertaking may be required to provide appropriate
representatives or members of staff to assist the Inspectors, not only for explanations on the organisation of the undertaking and its IT environment, but also for specific tasks such as the temporary blocking of individual email accounts, temporarily disconnecting running computers from the network, removing and re-installing hard drives from computers and providing “administrator access rights”-support. When such actions are taken, the undertaking must not interfere in any way with these measures and it is the undertaking's responsibility to inform the employees affected accordingly. The Inspectors may ask to use hardware (hard disk, CD-ROM, DVD, USB-key, connection cables, scanner, printer and so on) provided by the undertaking but cannot be obliged to use the undertaking's hardware.

12. The undertaking's storage media that will be examined can be kept by the Inspectors until the end of the inspection. They may be returned earlier, for instance after a forensic copy of the data under investigation has been made. Such forensic copy is an authentic duplicate of (part of) the data stored on the original medium, and allows for the continued inspection of the data on this copy.

13. At the end of the inspection the Inspectors cleanse [The technical term for this cleansing is 'sanitize'. The goal of sanitizing is to completely remove the data from a storage device in a way that the data cannot be reconstructed by any known technique.] all the Forensic IT tools that contain data from the undertaking. Hardware provided by the undertaking will not be cleansed by the Inspectors.

14. If the officials or other accompanying persons authorised by the Commission consider it appropriate, an integral copy of a digital storage medium, such as a forensic image, can be taken as well. This may occur, by way of example, where the Commission's selection of documents and data is not finished in situ, or when the officials or other accompanying persons authorised by the Commission find it necessary for the preservation of information that otherwise could be lost or when the access to the selected data or documents is not possible in situ.

15. The undertaking will receive a copy, in electronic or paper format, of all the documents and the data copied by the Commission services Inspectors and may request a signed list of the copies and extracts taken by the Commission officials Inspectors during the inspection. Where the undertaking makes available photocopies of documents material for making copies at the request of the Commission officials Inspectors, the Commission shall, at the request of the undertaking, reimburse the cost of the photocopies material used to produce a copy for the Commission.

16. The documents and the data copied during an inspection will be covered by the
provisions of Article 28 of Council Regulation No 1/2003 concerning professional secrecy. If, at a later stage of the procedure, it becomes necessary to grant other parties access to those documents and data, the undertakings will be asked to identify any business secrets or other confidential information contained in the documents or data, to justify those claims and to provide non-confidential copies for the purpose of granting access to the file.

14. In addition to the documents and the data requested and inspected by the officials, other accompanying persons authorised by the Commission and officials of and those authorised or appointed by the competition authority of the Member State, the undertaking is entitled to draw attention to other documents, data or information where it considers this necessary for the purpose of protecting its legitimate interest in a complete and objective clarification of the matters raised, provided that the inspection is not thereby unduly delayed.

15. Where the officials and other accompanying persons authorised by the Commission decide to seal business premises and books or records, a minute will be made. The undertaking has to ensure that seals that have been affixed as well as the immediate environment of the place where they have been affixed (e.g. door, doorframe, cupboard) remain untouched until the seals are removed again by the Commission's representative. The officials and other accompanying persons authorised by the Commission will also record, prepare a separate minute, any changes in the seals following their affixation and, if such changes are found, at the time when the seals are removed and will record the state of the seals at that stage.

16. Any personal data, as defined in Regulation No. 45/2001 in documents copied or obtained during the inspection will be processed in compliance with that Regulation.