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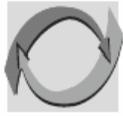


9th ASCOLA Conference Warsaw 2014 on
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

Procedural powers in competition enforcement: a look at inspections

Maria De Benedetto

CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
Warsaw, 26 – 28 June 2014



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*Professore Ordinario, Università Degli Studi Roma Tre.

Procedural powers in competition enforcement: a look at inspections

MARIA DE BENEDETTO*

Summary:

1. A few theoretical problems?
2. Competition inspections: convergence of principles but different rules
3. The point of view of Businesses
4. The point of view of Competition Authorities
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1. A few theoretical problems?

Administration needs information. As is well known, administrative powers presuppose an activity of collecting information, in order to adopt well-reasoned administrative decisions, capable of attaining administrative objectives and of responding adequately to the public interest¹. At the same time, administrative knowledge is a cost which should be paid in order to legitimate administrative decisions².

Competition law allows no exception to these general assumptions³.

On the other hand, administrative activity to reduce this information gap could take on different forms. The first and most simple form consists in simply collecting information, for example, about a single firm⁴. The second consists in the possibility to make inquiries⁵ and the third to make *vérifications*, *i.e.* a general power to investigate the environment of one person or of one firm, even through the use of inspections⁶.

However, the most prominent aspect of the third form (if we adopt an administrative law point of view) is that administrative knowledge can also be achieved by coercitive means.

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¹ See, in general, on this topic, G.J. Stigler, *The Economics of Information*, in “*Journal of Political Economy*”, 1961, 69, 3, p. 213.

² See, N. Luhmann, *Legitimation durch Verfahren*, Frankfurt a.M., Suhrkamp, 1983, originally published in 1969.

³ See, in general, on this point, D. Besanko, D.F. Spulber, *Antitrust Enforcement under Asymmetric Information*, in “*The Economic Journal*”, 99 (June 1989), p. 408

⁴ See J.B. Auby, *Le pouvoirs d’inspections de l’Union européenne*, in “*Revue Trimestrielle de Droit Européen*”, 2006, p. 132: “Le premier concerne simplement la possibilité de recueillir des informations sur la société”. On this point, in matter of European competition law, see art. 18, Regulation n. 1/2003 on the implementation of the rules of competition, “Request for information”.

⁵ On this point, see art. 17, Regulation n. 1/2003, “Investigations into sectors of the economy or types of agreements”.

⁶ See J.B. Auby, *Le pouvoirs d’inspections de l’Union européenne cit.*, p. 132-133. On this point, see art 20-21, Regulation n. 1/2003, “Inspections”.

In other words, there are a number of administrative provisions which provide – in several sectors – tools to reduce the information gap between institutions and their stakeholders (enterprises, private individuals, other public bodies). In some cases, it allows institutions to make obligatory the giving of information and to sanction non-cooperative behaviour.

The “most intrusive power”⁷ – or the “*façon plus marquée des attribution d’autorité*”⁸ – is the administrative power to dispose inspections which, as an authoritative act, could affect fundamental rights⁹ and requires specific guarantees to ensure that there will be no arbitrary exercise of the power.

Inspections (especially un-announced) represent, also in competition proceedings, the typical activity of an institution which is performing a prosecutorial role as a “fact-finding” administration: the earliest and most famous example in this regard is the U.S. Federal Trade Commission, strongly provided with investigative powers¹⁰.

If inspections can affect fundamental rights, the problem of “preserving a reasonable balance between agency powers and target rights”¹¹ arises. Furthermore, the problem of the target rights has also generated the most important litigation in the matter of inspections, focusing the conflict on the legitimate exercise of the inspection power and (especially) on proportionality in inspections¹².

The paper aims to highlight convergences of principles and divergences of rules between different competition systems, starting from important contributions of the European Competition Network and the International Competition Network, which have investigated many legal systems¹³.

The question will be analysed, firstly, from the point of view of undertakings, with particular regard to behaviour during the inspections, costs of inspections (even reputational), duty to cooperate and right to defence. Secondly, the different point of view of Competition authorities will be taken into account in order to describe the importance of planning inspections, of administrative capacity and of cooperation in performing inspections.

⁷ M. Furse, *Competition Law of the EC and UK*, sixth edition, Oxford University Press, 2008, p. 94

⁸ J.B. Auby, *Le pouvoirs d’inspections de l’Union européenne* cit., p. 133.

⁹ See M. Giannini, *Diritto amministrativo*, Milano, Giuffrè, II, 1993, p. 491

¹⁰ In particular, with reference to Federal Trade Commission, see C. McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission 1920-1930*, Cambridge Mass., Harvard University Press, 1933, p. 98. See also, S.G. Breyer, R.B. Stewart, *Administrative Law and Regulatory Policy*, Little Brown and Company, 1992, p. 19 and finally, S.T. Kanwit, *Federal Trade Commission*, Colorado Springs, Colo., Shepard’s, 1992.

¹¹ J.W. Bagby, *Administrative investigations: preserving a reasonable balance between agency powers and target rights*, in “*American Business Law Review*”, 1985, p. 319.

¹² The problem has been analysed in M. Bernatt, *Power of inspection of the Polish competition authority. Question of proportionality*, MPRA Paper no. 38517, 2011.

¹³ ECN have analysed 28 European jurisdictions and ICN 31, with some overlapping

Finally, the paper will conclude with some considerations about the need for competition enforcement and for an “intelligent market police”¹⁴, trying to explain which conditions could increase the efficacy and deterrent effects of inspections in order to perform the crucial competition authority “prophylactic function”¹⁵.

2. Competition inspections: convergence of principles but different rules

Procedures and organization can affect competition enforcement: in fact, inspections are strictly designed and guided by a procedural framework (which consists in both principles and rules) and are carried out by a complex fabric of competition authorities in charge of inspection powers, which operate at different levels of government. Nowadays, not only are inspections traditionally performed by national competition authorities, but also by supranational inspections (directly performed by EU level); delegated inspections (performed by national authorities on request of the Commission); co-operation in implementing inspections between, on one side, EU and member states and, on the other side, between different State competition authorities.

Different competition systems are looking for a convergence which could ensure a common minimum legal framework, capable of guaranteeing a good institutional performance and a competition enforcement but also to preserve target rights.

However, “*il n'existe pas de régime général de procédures d'inspections*”¹⁶ – also in competition proceedings - even if there seems to be a common set of principles expressing a largely shared idea about the way in which fundamental rights (such as the right to a fair trial, to liberty, to respect for private and family life etc.) must be protected¹⁷. Furthermore, European discipline on competition inspections provides an important factor of convergence.

On the other side, every competition system has its own peculiarity. A wide analysis of the different legal frameworks of competition inspections was carried out by the European Competition Network in 2012¹⁸ and by the International Competition Network in 2013¹⁹, as previously mentioned.

¹⁴ W. Roepke, *The social crisis of our time*, The University of Chicago Press, 1942

¹⁵ E. Pendleton Herring, *Federal Commissioners. A study in their careers and qualifications*, Cambridge, Mass., Harvard University Press, 1936, p. 116

¹⁶ J.B. Auby, *Le pouvoirs d'inspections de l'Union européenne cit.*, p. 136.

¹⁷ On this point, see Court of Justice, *National Panasonic (UK) Limited v Commission of the European Communities*, 26 June 1980, Case 136/79.

¹⁸ ECN Working Group Cooperation Issue and Due process, *Investigative Powers Report*, 31 October 2012

¹⁹ ICN Agency Effectiveness Project on Investigative Process, *Investigative Tools Report*, 15 April 2013

The two Reports present – more or less – the same structure which simplifies the comparative analysis. A chapter (in both reports) is dedicated to inspections in business premises; another chapter analyses inspections in non-business premises (including the homes of directors, managers and other members of staff), generally characterized by a higher degree of procedural guarantees.

There is large agreement about the fact that “in all jurisdictions, competition authorities have the power to inspect business premises”²⁰.

The most important type of inspection is considered, by both Reports, to be un-announced inspections “unless otherwise specified”²¹, as the “surprise-effect” makes this kind of inspection the most important tool to reduce the information gap between competition authorities and undertakings²². An un-announced inspection differs from an announced one in the lack of an obligation to give prior notice²³.

Substantive and procedural requirements are needed everywhere for conducting competition inspections.

From a substantive point of view, the presence of “reasonable grounds for suspecting an infringement”²⁴ is generally required.

From a procedural point of view, an inspection decision or a court warrant is alternatively necessary to conduct inspections²⁵. A specific discipline is established by EU Competition law in which inspections are possible on the basis of a mandate (directly adopted by the Commission, which need spontaneous cooperation of undertakings) or on the basis of a formal decision (which implies a binding nature).

In different competition systems the content of an inspection can vary²⁶. In the same way, there are differences in the extent of inspection powers: sometime it includes the power to make copies of documents, less frequently it allows the power to seize original documents²⁷.

When “the inspection continues for more than one day”, there is also the possibility to seal premises²⁸. This power, which is not recognized everywhere, has had an interesting

²⁰ ECN, *Investigative Powers Report* cit., p. 6

²¹ Ibid.

²² Ibid.

²³ ICN, *Investigative Tools Report* cit., p. 9 and 20

²⁴ ECN, *Investigative Powers Report* cit., p. 8 and ICN, *Investigative Tools Report* cit., p. 8

²⁵ ECN, *Investigative Powers Report* cit., p. 8 and ICN, *Investigative Tools Report* cit., p. 9

²⁶ ECN, *Investigative Powers Report* cit., p. 12

²⁷ Ibid.

²⁸ Ibid., p. 15

application in the E.on. case, when European Commission inflicted a high sanction just for infringing a seal²⁹.

Another point of the analysis regards police assistance to Competition authorities during inspections. We can find three different cases. First, many competition authorities have “the possibility to ask for police assistance during inspections”³⁰. Secondly, there are cases in which police assistance is compulsory. Thirdly, sometimes fiscal police officers “regularly assist the competition authority’s official in conducting inspections”³¹, as in Italy.

A specific position must be recognized for EU competition inspections³²: in this regard, in fact, the Commission has broad powers even in fact-finding (art. 17-22) and in conducting inspections both at premises of undertakings and at private premises³³. But art. 20(6) requires that Member states – when an undertaking opposes the inspection – “shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection”³⁴.

Another point of the comparative analysis, regards judicial review in matter of inspections: “in many jurisdictions parties can appeal the competition authority’s decision/court warrant authorising the inspection separately”, but elsewhere “the legality of the inspection may be assessed in an appeal brought against the final prohibition decision”³⁵. In fact, in some cases competition authorities’ final decisions are “considered the only act capable of affecting the parties’ rights and legitimate interests”³⁶.

Finally, there is the important question of “enforcement measures and sanctions for non-compliance”, one of the most relevant points of convergence because non-compliance during investigations “is sanctioned in almost all jurisdictions”³⁷ and because there is an obligation for undertakings to cooperate in competition proceedings and especially during inspections³⁸.

²⁹ European Commission, COMP/B-1/39.326, E.ON Energie AG, 30 January 2008.

³⁰ ECN, *Investigative Powers Report* cit., p. 16

³¹ ECN, *Investigative Powers Report* cit., p. 17

³² Under Regulation n. 1/2003 on the implementation of the rules of competition laid down in articles 81 and 82 of the Treaty.

³³ When “serious” breaches of art. 81 and 82 are being investigated.

³⁴ The Commission officials may not use force in carrying out their investigations (Hoechst AG v Commission, joined cases 46/87 and 227/88, 21 September 1989, para. 31) although they may be able to fall back on the assistance of National authorities where this is necessary to compel an undertaking to comply with an investigation. See, in general, European Commission, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, 2011/C 308/06.

³⁵ ECN, *Investigative Powers Report* cit., p. 19 and ICN, *Investigative Tools Report* cit., p. 15-16

³⁶ Ibid.

³⁷ ECN, *Investigative Powers Report* cit., p. 21 and ICN, *Investigative Tools Report* cit., p. 16

³⁸ See Fabbrica Pisana 80/334 (1980) OJ L75/30, in which the undertaking had made all its files available but had not assisted the Commission’s officials in finding the relevant documents.

Non-compliance in itself is sanctioned: it means that competition authorities can increase the effectiveness of their powers through specific tools which could represent, for undertakings, an incentive to cooperate: not only sanctions for competition infringements but also sanctions to strengthen competition institutions when prosecuting competition infringements³⁹.

3. The point of view of businesses

An inspection could be considered a problematic or conflictual moment in the relationship between authorities and undertakings, even in competition procedures.

Undertakings have in some cases adopted *Guidelines and internal rules* for giving instructions to be followed during a competition inspection⁴⁰. Furthermore, lawyers and business advisors provide support to undertakings in preparing a possible competition inspection, suggesting to the same undertakings how (or whether) to cooperate in order to be (at least) formally compliant and to avoid the risk of incurring fines. Furthermore, this is even more true when there are criminal sanctions for non-compliance with the power of investigations⁴¹.

On the other hand, we have to take into account that *inspections* not only represent a problematic phase in the relationship between competition authorities and undertakings but also they could represent a *relevant cost*⁴². Firstly, there could be a cost for non-compliance during the inspection, with a predictable amount (the weight of fines). Secondly, there could be a less predictable cost connected with possible reputational damage following inspection and possible sanctions⁴³.

There is, in other words, a high risk for undertakings in obstructing competition authority inspections. Many cases could be mentioned in this regard: the already mentioned E.On. case, in which the European Commission imposed a 38 million Euro fine on E.On. Energie AG in 2008 for having broken a seal affixed by the Commission during its

³⁹ See, on this point, M. De Benedetto, *Istruttoria amministrativa e ordine del mercato*, Torino, Giappichelli, 2008, p. 203

⁴⁰ See the Shell Code of Conduct, section “Antitrust and Competition Law”, 2006, p. 14 and the Antitrust Code of Conduct of the Italian Snam, 2013, with specific reference to inspections, p. 28

⁴¹ On this point, see R. Whish, *Competition Law*, sixth Edition, Oxford University Press, 2009, p. 392.

⁴² See F. Blanc, *Inspection Reforms: Why, How and with what Results*, Oecd, 2012, in particular regarding the cost of inspections (“how do inspections weigh on business activity”), p. 9.

⁴³ On this point see G. Langus, M. Motta, *On the Effect of EU Cartel Investigations and Fines On the Infringing Firms’ Market Value*, European University Institute, Robert Shuman Centre for Advanced Studies, 2006 where they “look for the exact dates on which some critical events of an Commission antitrust investigation take place, and – by using standard event study techniques – [they] estimate the impact that this new information (the event) has on the market prices for shares of the firms involved”.

inspection⁴⁴; the Polish Competition Authority (UOKiK) have fined the telecommunication services provider Polkomtel 32 million Euro for having obstructed a dawn raid carried out by the authority in December 2009 on suspicion of anticompetitive conduct⁴⁵; the Spanish competition authority (CNC) imposed a fine of 161,600 Euro against the company Grafoplas del Noroeste S.A., for obstructing antitrust inspections and for the disappearance of documents during the inspection in October 2010⁴⁶.

Adopting this point of view, it is clear that if undertakings have a *duty to cooperate* they must at the same time be safeguarded against the possible arbitrary exercise of inspections.

A first guarantee is represented by the provision of *limits to the same power of inspection* (and, more in general, to the power of investigation): legal professional privilege (which protects communications between legal advisors and their clients) and privilege against self-incrimination, are examples of this kind of guarantee⁴⁷.

A second guarantee is represented by *judicial review* on proportionality, both in choosing the least intrusive means to achieve information and in determining the sanction. In fact, European law is informed by a proportionality principle which allows – in our field of interest – limitation of economic freedom and to right to privacy “only if procedural safeguards are put in place and only if the goal of the inspection cannot be achieved with the use of less intrusive methods”⁴⁸. In other words, there are many cases in which competition inspections were impugned for not being strictly proportionate to their legitimate aims⁴⁹. Furthermore, there is a question of proportionality (and of related reason giving) in

⁴⁴ European Commission, COMP/B-1/39.326, E.ON Energie AG, 30 January 2008.; General Court, T-141/08, *E.ON v Commission*, ECR 2010, II-5761, 15 December 2010; European Court of Justice, C-89/11 P, *E.ON v Commission*, 22 November 2012.

⁴⁵ UOKiK, Polkomtel (DOK-1/2011), 24 February 2011. See on this point M. Kozak, Simple procedural infraction or a serious obstruction of antitrust proceedings – are fines in the region of 30-million EURO justified? Case comment to the decisions of the President of the Office for Competition and Consumer Protection of 4 November 2011, in “Yearbook of Antitrust and Regulatory Studies”, vol 2011, 4(5), p. 283; see also K. Stolarski, Fines for Failure to Cooperate within Antitrust Proceedings – the Ultimate Weapon for Antitrust Authorities?, *ibid*, p. 67.

⁴⁶ Consejo de la Comisión Nacional de la Competencia (CNC), Resolución (Expediente SNC/0010/11 Grafoplas del Noroeste), 1 de marzo de 2011: “la actuación de GRAFOPLÁS DEL NOROESTE S.A, en el curso de la inspección desarrollada por funcionarios de la Comisión Nacional de la Competencia en su domicilio social el 27 de octubre de 2010 es constitutiva de una obstrucción de la labor de inspección de la CNC tipificada en el apartado 2.e) del artículo 62 de la Ley 15/2007, de 3 de julio, de Defensa de la Competencia”. CNC has imposed “una sanción de 161.600 EUROS, de acuerdo con lo previsto en el apartado 1.a) del artículo 63 de LDC”.

⁴⁷ On this point see R. Whish, *Competition Law* cit, p. 389-391.

⁴⁸ M. Barnatt, Powers of inspections of the Polish competition authority. Question of proportionality cit. p. 51

⁴⁹ See, on this point, a number of cases of ECtHR, mentioned in M. Barnatt, Powers of inspections of the Polish competition authority. Question of proportionality cit., p. 50.

determining the amount of the fine and competition authorities should develop adequate criteria to this purpose.

A third guarantee is represented by the *right to defence* during the investigation, with – for example - the access to files⁵⁰. Furthermore, the right to defence involves the right to legal assistance during the investigation and in particular during dawn raids, as reaffirmed recently by the French Supreme Court in the “Car rental case”⁵¹.

4. The point of view of Competition Authorities

If we take a look at competition inspections from the point of view of Competition authorities, further questions should be raised.

The first regards the important topic of *planning inspections*. More generally, planning control is becoming crucial in the enforcement of public law: controls must be selective and well-directed, also because controls have high cost⁵². Limited administrative resources could be strengthened also thanks to risk analysis by which it is possible to carry out controls capable of usefully combating against infringements⁵³.

This is absolutely clear, even in Italy, in the field of fiscal controls. This is becoming progressively clear also in competition investigations. A very interesting case, in this regard, is that of the Federal Trade Commission, which is in charge – from its beginning - of a wide power of case selection, “case by case”⁵⁴. In the FTC Operating Manual, “careful planning” has been considered “a prerequisite to an orderly and expeditious investigation”⁵⁵. Moreover, in planning any investigation “it is essential that the staff consider at the outset the various enforcement mechanisms that are available”⁵⁶.

The second question concerns the *administrative capacity in performing inspections*. In fact, limited resources could suggest addressing the organization of a competition authority, to reform it and make it more efficient in order to increase investigations in quantity and quality and, as a consequence, the same inspections. This is the case for the recently reformed UK Competition and Market Authority (CMA)⁵⁷: UK Treasury has estimated that

⁵⁰ See S. White, Right of the Defence in Administrative Investigations: Access to the File in EC Investigations, in “Review of European Administrative Law”, 2, 2009, p. 55.

⁵¹ Cour de Cassation, Chambre Criminelle, 27 novembre 2013, n°12-86.424.

⁵² F. Blanc, Inspections Reforms: Why, How and with what Results cit., p. 16: “what do inspections cost (to the state)”.

⁵³ Ibid., p. 31 (risk based planning).

⁵⁴ L.J. Jaffe, Investive and Investigation in Administrative Law, in “Harvard Law Review”, 1939, p. 1128

⁵⁵ Federal Trade Commission, Operating Manual, ch. 3, Investigational Procedures, p. 2

⁵⁶ Ibid., p. 3

⁵⁷ Enterprises and Regulatory Reform Act 2013, art. 25

the new competition authority – thanks to its increased resources and more efficient organization - will undertake additional investigations every year⁵⁸. On the other side, it is true that “greater results can be achieved when the inspection reform is part of a country-wide mid-to-long term ‘competitiveness drive’ that includes a systemic regulatory reform (not only inspection-related measures)”⁵⁹.

The third question has been developed mainly by the OECD, and regards *international cooperation in competition inspections*⁶⁰. We have already mentioned the articulated systems in which competition authorities operate (and co-operate) nowadays. Starting from 1995, the OECD has given recommendations on administrative co-operation in competition matters. More recently, the OECD Global Forum on Competition debated “Improving International Co-operation in Cartel Investigations”. The summary of discussion highlighted that there are “systemic obstacles to effective co-operation” mainly due to “differences between administrative and criminal enforcement systems”⁶¹ but also that “the majority of international co-operation takes place following confidentiality”⁶².

5. Some conclusions

Competition enforcement is possible only thanks to organizational and procedural tools which allow competition law to become competition standard practice.

Inspection (as a procedural tool carried out by competition authorities) is a formidable means to understand if any competition infringements have taken place. So, inspections are crucial in order to put in place the “intelligent market police”⁶³ which has been considered absolutely necessary for the functioning of the market, and to rebalance the unavoidable information gap between undertakings and competition authorities.

Moreover, inspections (and subsequent sanctions) simultaneously have a deterrent effect from engaging in anticompetitive behaviour⁶⁴ and a positive effect on the degree of

⁵⁸ See Department for Business, Innovation and Skills, A Competition regime for Growth: a Consultation on Options for Reform, Impact Assessment, March 2011.

⁵⁹ Investment Climate Advisory Services of the World Bank group, Inspections Reforms: Do Model Exist?, December 2010, p. 29-30

⁶⁰ See F. Blanc, Inspections Reforms: Why, How and with what Results cit., p. 26 (Coordination issues)

⁶¹ OECD Global Forum on Competition debated in February 2012 “Improving International Co-operation in Cartel Investigations”, February 2010, p. 310

⁶² Ibid.

⁶³ W. Roepke, The social crisis of our time cit.

⁶⁴ See G. Langus, M. Motta, On the Effect of EU Cartel Investigations and Fines On the Infringing Firms’ Market Value cit., p. 1

market competition⁶⁵. Competition investigations (and specifically inspections as part of investigations) are crucial to performing the competition authority “prophylactic function”⁶⁶, indispensable for improving competition in the market.

There is, however, a great debate on inspection reforms as a general topic, because inspections are considered more and more decisive for regulatory enforcement (also in the field of competition)⁶⁷.

In this regard, we should mention the debate about criminalization of EU competition law⁶⁸, which is absolutely consistent with the wider tendency towards “the new punitive regulation”⁶⁹. This debate might even sound strange in some legal systems (such as the Italian one or in other legal systems characterised by a dirigist tradition, such as in France) where the State itself and other Regional and local institutions have largely contributed to restricting or distorting competition by adopting anticompetitive regulation⁷⁰. A criminal enforcement for competition infringements (and for the violation of the duty to cooperate in inspections) could be embarrassing in these cases: in fact, criminal enforcement “may not lead to compliance”⁷¹. Moreover, criminal sanctions in some regulated sectors in Italy (e.g. financial regulation) have been simply ineffective because of recurrent amnesties and pardons which undermine the deterrent effect of the sanctions⁷².

Which conditions could increase the deterrent effect of inspections and their positive effects on competition? Is a sort of convergence (or even uniformity) necessary for the legal regimes of competition inspections between the different competition systems? Is it necessary to strengthen authoritative profiles of legal provisions which regulate competition inspections?

First of all, a convergence in rules may not be indispensable. However, a *convergence in the principles* which inform investigations (and inspections) in competition proceedings is

⁶⁵ On this point see A. Çelen, B. Günalp, Do investigations of competition authorities really increase the degree of competition? An answer from Turkish cement market, in “Prague Economic Papers”, 2, 2010.

⁶⁶ E. Pendleton Herring, Federal Commissioners. A study in their careers and qualifications cit., p. 116

⁶⁷ See, on this point, HM Treasury, Hampton Report, Reducing administrative burdens: effective inspection and enforcement, March 2005, p. 1, “there should be no inspections without a reason, and data requirements for less risky businesses should be lower than for riskier businesses; resources released from unnecessary inspections should be redirected towards advice to improve compliance”. See also F. Blanc, Inspection Reforms: Why, How and with what Results cit.

⁶⁸ See W.P.J. Wils, Is Criminalization of EU Competition Law the Answer?, in K. J. Cseres, M.P. Schinkel, F.O.W. Vogelaar, (eds.) Criminalization of Competition Law Enforcement: Economic and Legal implications for the EU member States, Edward Elgar Publishing, 2006, p. 60.

⁶⁹ R. Baldwin, The New Punitive Regulation, in “The Modern Law Review”, vol. 67, May 2004, p. 351

⁷⁰ See OECD, Review on Regulatory Reform, Italy, Better Regulation to Strengthen Market Dynamics, 2009, p. 179

⁷¹ See R. Baldwin, The New Punitive Regulation cit., p. 351.

⁷² On the general limits of criminal sanctions for economic offences, in see H.L. Packer, The limits of criminal sanctions, Stanford, Stanford University Press, 1968, p. 356.

important; this could ensure an analogous degree of protection for affected fundamental rights as well as an acceptable degree of market competitiveness.

Furthermore, it is important to evaluate *convergence in the effects* of procedural rules which regulate inspections in every (national or European) competition systems. There is no complete uniformity between competition systems all over the world, as the already mentioned ECN and ICN Reports have demonstrated. In some cases it could be better to reduce un-announced inspections⁷³ while in other cases it could be better to increase them temporarily: it would depend (in part) on the degree of competition in the national market and (in part) on specific characteristics of the legal system. In this regard, the same European power of inspection (also in competition proceedings), which seems to be characterized by a lower degree of *puissance public* (because it is not assisted by autonomous coercion like corresponding State powers), has been considered as being informed by “*un pouvoir très réel de commandement*”⁷⁴.

Secondly, instead of increasing authoritative profiles of inspections it could be useful to *strengthen administrative capacity* to intervene in the market (as in the recent UK reform of Competition authorities) and to *strengthen administrative co-operation* (also at supranational and international levels)⁷⁵: in fact, according to an economic approach, if we increase the risk of incurring a sanction (without changing the weight of the fine) compliant behaviour could improve⁷⁶.

Thirdly, instead of increasing authoritative profiles of inspections (connected with the duty “to cooperate fully and actively with the inspection”⁷⁷) it could be more effective to look at the way in which *compliance* is achieved⁷⁸. There are several instruments which competition authorities can use for this purpose: competition assessment, for example, but also a behavioural approach in regulating and in conducting inspections. This approach, in particular, suggests that individuals and firms react positively and comply not only by

⁷³ See, on this point, M. Bernatt, Power of inspection of the Polish competition authority. Question of proportionality cit., p. 64

⁷⁴ J.B. Auby, Le pouvoirs d’inspections de l’Union européenne cit., p. 140.

⁷⁵ See, on this point, ECN, Recommendation on Investigative Powers, Enforcement Measures and Sanctions in the Context of Inspections and Requests for Information, Recommendation on Assistance in Inspections Conducted under article 22(1) of Regulation (EC) No. 1/2003, Recommendation on the Power to Collect Digital Evidence, Including by Forensic Means (December 2013).

⁷⁶ See, on this point, G. Becker, Crime and punishment: An economic approach, in “Journal of Political Economy”, 76, 1968, p. 169 and A. Ogus, Regulation: Legal Form and Economic Theory, Clarendon Press, 1994, Oxford

⁷⁷ European Commission, Explanatory note to an authorization to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003, point 11.

⁷⁸ See F. Blanc, Inspections Reforms: Why, How and with what Results cit., p. 75 (Promoting compliance)

responding to disincentives (such as fines) but also to positive incentives⁷⁹. Correctness on the part of undertakings, for example, should be rewarded by competition authorities with a public recognition which could impact positively on reputation (and indirectly on the market value of the firm).

Sanctions, in this light, remain absolutely important, as a bastion for public power, but really they should be considered as an *extrema ratio*⁸⁰ because “the good inspector [...] has the knack of gaining compliance without stimulating legal contestation”⁸¹, in other words he should be capable of mixing “carrots and sticks”⁸².

⁷⁹ The paradox of control has been described by K. Hawkins, *Law as Last Resort. Prosecution Decision-Making in a Regulatory Agency*, Oxford University Press, 2002, p. 299: “under certain condition the suspension of formal legal action may serve to produce compliant behaviour more effectively than actual enforcement”.

⁸⁰ About the need to optimize antitrust sanctions, see J.M. Connor, R.H. Lande, *Cartels as Rational Business Strategy: Crime pays*, in “*Cardozo Law Review*”, vol. 34, December 2012, in particular p. 430 where optimal deterrence is described.

⁸¹ E. Bardach, R.A. Kagan, *Going by the Book. The Problem of Regulatory Unreasonableness*, originally published in 1982, Transaction Publishers, New Brunswick, New Jersey, 2010, p. 128. See also F. Blanc, *Inspection Reforms: Why, How and with what Results* cit., p. 4 (Inspection and enforcement procedures).

⁸² On this point see D.J. Walsh, *Carrots and Sticks—Leniency and Fines in EC Cartel Cases*, in “*European Competition Law Review*”, Vol. 30, Issue 1/2009, p. 30. See also G. Dari-Mattiacci e G. De Geest, *Carrots, Sticks and the Multiplication Effect*, in “*Journal of Law, Economics and Organization*”, 2009.