

8. THE NETHERLANDS

K. Bovend'Eerd

8.1 OLAF

8.1.1 Transfer of information from the AFCOS to OLAF

8.1.1.1 OLAF Dutch enforcement partner (AFCOS)

Regulation 883/2013 lays down that Member States are to designate an AFCOS to facilitate effective cooperation and to facilitate the exchange of information, including information of an operational nature, with OLAF. This AFCOS *may be* – although not necessarily so – the competent authority for the purposes of Regulation 883/2013.¹

The Act on administrative assistance to the European Commission during inspections and on-the-spot checks (*Wet op de verlening van bijstand aan de Europese Commissie bij controles en verificaties ter plaatse*)² designates the Minister of Finance as the *competent authority* for the purposes of Regulation 883/2013.³ The act stipulates that the Minister of Finance serves as a contact point for OLAF. The Minister of Finance, in light of the purpose and objective of the OLAF investigation envisaged, determines in turn who is the appropriate Minister to offer assistance.⁴

Up until 2016 the Dutch Customs Information Centre (*Douane informatiecentrum*, hereinafter referred to as *DIC*) – which falls under the Ministry of Finance – functioned as the AFCOS and served as a central hub for cooperation with OLAF.⁵ In 2016 AFCOS and DIC were separated. While the DIC still exists, it is currently only responsible for mutual assistance: responsibility for cooperating with OLAF is now vested in a separate team, entitled AFCOS.⁶ The AFCOS is organisationally a part of the Customs Authority (*Douane*) and operates directly under the

1 Regulation (EU, Euratom) 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) 1074/1999 (*OJ* 2013, L 248/1), Art. 3(4).

2 *Wet op de verlening van bijstand aan de Europese Commissie bij controles en verificaties ter plaatse*, *Stb.* 2012, 467.

3 The Act on administrative assistance to the European Commission during inspections and on-the-spot checks, Art. 2(1); *Kamerstukken II* 2011/12, 33247, 3, p. 5.

4 The Act on administrative assistance to the European Commission during inspections and on-the-spot checks, Art. 2(2); *Kamerstukken II* 2011/12, 33247, 3, p. 6.

5 Customs Manual (*Handboek Douane*), ch. 45.00.00, para. 2.2. The Customs Manual can be consulted here: <<https://www.belastingdienst.nl/bibliotheek/handboeken/html/boeken/HDU/index.html>> (last accessed 10 January 2018).

6 J. Graat, 'The Netherlands', in: M. Luchtman & J. Vervaele (eds.), *Investigatory powers and procedural safeguards: Improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)* (Report, April 2017), pp. 92-93.

Director of Customs in the Rijnmond Region (*Douane Rotterdam Rijnmond*).⁷ The Customs Authority falls under the Tax Authority (*Belastingdienst*) which, in turn, falls under the Ministry of Finance (*Ministerie van Financiën*). AFCOS personnel are therefore customs officials.

AFCOS serves as a central and first point of contact for OLAF, both in cases relating to expenditure and in cases concerning revenues.⁸ When it comes to cases involving revenue (specifically cases concerning customs duties, the levying of VAT on imports and the levying of consumption taxes and excise duties on imports) AFCOS is in charge of transferring information to OLAF. When it comes to expenditure (specifically cases concerning structural funds) AFCOS informs the national authority in charge. The relevant national authority, in turn, is in charge of the transfer of information to OLAF. As AFCOS is located within customs and is solely responsible for the transfer of information in this field, Section 8.1.1.2. focuses on customs only. In particular, Section 8.1.1.2-8.1.1.6 focuses on customs legislation in the narrow sense, i.e., the laws on import and export duties and related topics.⁹ Section 8.1.2. considers the transfer of information from administrative authorities to OLAF in the area of Structural Funds (for which AFCOS only serves as OLAF's first point of contact).

8.1.1.2 Obligations as regards the information transfer

Obligations concerning the transfer of information stem from directly applicable Union law, particularly Articles 17 and 18 of Regulation 515/97.¹⁰ Also the means by which information is to be transferred (on request,¹¹ spontaneously,¹² or automatized)¹³ are laid down in Union law.

7 Interview with AFCOS (31 October 2017). From January 2018 further organisational changes will take place. AFCOS will no longer be part of the regional Rijnmond customs office, but will be placed under the National Customs Tactical Centre (*Douane Landelijk Tactisch Centrum*).

8 Customs Manual, ch. 45.00.00, para. 2.2.

9 The Customs Manual, ch. 1.00.00 para. 1.1 includes the following topics under this heading: the establishment of common customs duties and related topics (e.g., preferential arrangements, customs value, exemptions from customs duties), import levies on agricultural products imported into the Customs Union and ad valorem or specific duties imposed on products in the context of anti-dumping and anti-subsidy measures. Excluded from customs legislation in the narrow sense are the following: (i) the imposition of turnover taxes, excise duties and consumption tax on imports on the basis of the Turnover Tax Act 1968 (*Wet op de omzetbelasting*, *Stb.* 1968, 329), the Excise Duty Act (*Wet op de accijns*, *Stb.* 1991, 561), the Non-Alcoholic Beverages and Some Other Products Consumption Tax Act (*Wet op de verbruiksbelastingen van alcoholvrije dranken en van enkele andere produkten*, *Stb.* 1992, 684) and the Environmental Taxes Act (*Wet belastingen op milieugrondslag*, *Stb.* 1994, 923); (ii) non-fiscal customs legislation on safety, health, economics and the environment (*VGEM*). Regarding the first mentioned, the transfer of information is laid down in the State Taxes Act, Art. 67 (*Algemene wet inzake rijksbelastingen*, *Stb.* 1959, 301). Until 2008, when the Adw entered into force, the transfer of information regime (and the duties of secrecy laid down therein) also applied to customs duties. See Customs Manual ch. 5.00.00 para. 13.3.

10 Council Regulation (EC) 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (*OJ* 1997, L 82/1).

11 *Ibid.*, Art. 18(3)

12 *Ibid.*, Art. 18(1).

13 *Ibid.*, Title V establishes the Customs Information System (CIS) whose aim is to assist in preventing, investigating and prosecuting operations which are in breach of customs or agricultural legislation by making information more rapidly available and thereby increasing the effectiveness of the cooperation and control procedures of the competent authorities referred to in this Regulation. Title Va establishes the Customs Files Identification Database (FIDE) whose objective is to help to prevent operations in breach of customs legislation and of agricultural legislation applicable to goods entering or leaving the customs territory of the Community and to facilitate and accelerate their detection and prosecution. The use of these systems is regulated in Council Decision 2009/917/JHA on the use of information technology for customs purposes (*OJ* 2009, L 323/20).

In the Netherlands the General Customs Act (*Algemene douanewet*, hereinafter *Adw*)¹⁴ is the law which contains provisions supplementing or implementing the directly applicable Union Customs Code adopted at Union level and other provisions supplementing or implementing it.¹⁵ The *Adw* serves three purposes, in particular: (i) supplementing, where necessary, EU customs law;¹⁶ (ii) implementing the provisions of EU customs law;¹⁷ and (iii) regulating topics not dealt with by EU customs law.¹⁸

The *Adw* provides for a regime regulating the flow of information from (i) the relevant ministries, public bodies (*openbare lichamen*) and legal entities incorporated under public law (*rechtspersonen die bij of krachtens een bijzondere wet rechtspersoonlijkheid hebben verkregen*)¹⁹ to the tax inspector (*inspecteur*);²⁰ (ii) the tax inspector to the relevant ministries, public bodies and legal entities incorporated under public law;²¹ (iii) the tax inspector to the civil servant in charge of tax matters on the BES Islands (Bonaire, Sint Eustatius and Saba which are Dutch overseas municipalities) (interregional);²² and (iv) from the tax inspector to OLAF.²³ It is the latter which is of interest for this project. The *Adw* determines that the tax inspectors, i.e., the (customs) officials charged with the application of the *Adw*, are to transfer the information defined in Articles 12 and 47(2) of the (directly applicable) Union Customs Code to OLAF.²⁴ Information can be transferred verbally, in writing, or otherwise. By which means information is transferred is left to the customs inspector's discretion.²⁵ In practice, this general provision which falls under national law – for the purposes of transferring information to OLAF – is not used as a legal basis for transferring information, but functions only to accommodate Union law and to avoid possible contradictions between national and EU law.²⁶ As stated above, the specific rules provided by Union law (in particular Regulation 515/97 for customs legislation in the narrow sense) are used as the basis for transferring information to OLAF.²⁷

8.1.1.3 Type of information

The types of (customs) information that need to be transferred can be found in Regulation 515/97. Article 1:33(4) *Adw* adds that the tax inspectors are to transfer the information defined in Articles 12 and 47(2) of the Union Customs Code to OLAF.²⁸ The information in Article 12 of the Union Customs Code comprises all information acquired by customs in the course of

14 Wet van 3 april 2008 tot algehele herziening van de douanewetgeving, *Stb.* 2008, 111.

15 *Adw*, Art. 1(1)(a) and (b). The *Adw* also serves to put in place rules to comply – inter alia – with obligations that stem from interregional law (*Adw*, Art. 1:1(2)(a)), international treaties (*Adw*, Art. 1:1(2)(b)) and customs-related decisions emanating from international organisations (*Adw*, Art. 1:1(2)(c)).

16 For instance, the appointment of customs authorities is left to Member State law. See Regulation (EU) 952/2013 laying down the Union Customs Code (*OJ* 2013, L 269/1), Art. 4(3)).

17 For instance, the creation of an administrative appeals procedure at the national level, *ibid.*, Art. 245.

18 For instance, enforced recovery. The three purposes are derived from F. Wiarda, *Algemene douanewet*, Deventer: Kluwer 2010, p. 11 and the Customs Manual, ch. 1.00.00, para. 2.1.

19 Including their subordinate institutions, departments and persons who primarily execute the Kingdom's policies.

20 *Adw*, Art. 1:33(1)

21 *Ibid.*, Art. 1:33(3).

22 *Ibid.*, Art. 1:33(5).

23 *Ibid.*, Art. 1:33(4). The *Adw* mentions the European Commission rather than OLAF, but OLAF has taken over the Commission's tasks in this respect.

24 *Ibid.*, Art. 1:33(4).

25 *Ibid.*, Art. 1:33(4).

26 Interview with AFCOS (31 October 2017).

27 Interview with AFCOS (31 October 2017).

28 *Ibid.*, Art. 1:33(4).

performing their duties which is *by its nature confidential* or which is provided on a confidential basis and is covered by the obligation of *professional secrecy*.²⁹ The information in Article 47(2) is information obtained in the framework of customs controls and concerns data received in the context of the entry, exit, transit, movement, storage and end-use of goods, including postal traffic, moved between the customs territory of the Union and countries or territories outside the customs territory of the Union, the presence and movement within the customs territory of the Union of non-Union goods and goods placed under the end-use procedure and the results of any control.³⁰ In practice, as the interviewees pointed out, the main sources of information transferred to OLAF concern seized goods and suspicions of fraud.³¹

8.1.1.4 Consequence of the official opening of an OLAF investigation

The official opening of an OLAF investigation does not have any consequences for the transfer of information from AFCOS to OLAF.

8.1.1.5 Limitations on the transfer of information

In general, where Union law imposes obligations to transfer information, such obligations take precedence over any limits imposed by national law on such a transfer. The interviewees pointed out that, in practice, AFCOS transfers on the basis of data minimalization as a matter of policy: where OLAF requests information, AFCOS only transfers the information which has been requested.³²

Speciality principle

The limits imposed by the speciality principle under the Adw directly stem – just like the types of information that can be transferred to OLAF – from Union law.³³ Information listed under Article 47 of the Union Customs Code may be transferred for the purposes of minimizing risk and combating fraud and for the purpose of ensuring a uniform application of the customs legislation.³⁴ Article 12 does not impose limits based on the specialty principle.

Secrecy of investigations

A public prosecutor can request that AFCOS does not transfer information to OLAF if this is in the best interest of an ongoing criminal investigation. In practice, however, due to the nature of the information transferred on the basis of Regulation 515/97 (i.e., control information), the secrecy of investigations does not easily act as a limitation.³⁵

Banking secrecy

Banking secrecy does not impose a limit on the transfer of information from AFCOS to OLAF.

29 See Regulation (EU) 952/2013 supra note 16, Art. 12.

30 Ibid., Section 7 deals with the control of goods.

31 Interview with AFCOS (31 October 2017).

32 Interview with AFCOS (31 October 2017).

33 Adw, Art. 1:33(4).

34 See Regulation (EU) 952/2013 supra note 16, Art. 47(2).

35 Ibid.

Professional secrecy

Customs officials are bound by an official duty of secrecy. This duty of secrecy stems directly from Article 12 of the Union Customs Code. The duty of secrecy entails that all confidential information acquired by the customs authorities in the course of performing their duties is covered by professional secrecy.³⁶ Information is therefore, in principle, confidential and cannot be transferred or disclosed by the competent authorities without the express permission of the person or authority that provided it. An exception to this duty is information that falls within the framework of customs controls mentioned in Article 47(2) (see Section 8.1.1.3.). Information may, however, be disclosed without permission where the customs authorities are obliged or authorised to do so pursuant to the provisions in force, particularly in respect of data protection, or in connection with legal proceedings.³⁷

Article 1:33(4) Adw accommodates this transfer of information regime based on Union law. It states that tax inspectors are to transfer the information defined in Articles 12 and 47(2) of the Union Customs Code to OLAF (see also the answer under Section 8.1.1.2.).³⁸ The official duty of secrecy does not therefore impose a limitation on the transfer of information from customs to OLAF.

For the purposes of the transfer of information between OLAF and national customs authorities Article 1:33(4) Adw makes a general exception to the duty of official secrecy which stems from the Union Customs Code.

Business secrecy

Business secrecy does not impose a limitation on the transfer of information from AFCOS to OLAF.

Other legal limits

Customs is not obliged to transfer information where such a transfer is considered contrary to the essential interests of the state's security. This limitation stems directly from the Treaty on the Functioning of the European Union,³⁹ but is mentioned explicitly in the Customs Manual.⁴⁰

8.1.1.6 Conditions on the use of transmitted information

AFCOS does not impose conditions, other than those which directly stem from Union law, on the further use of information by OLAF.

8.1.2 Transfer of information from other administrative authorities to OLAF

This section concerns only the transfer of information from national authorities involved in the implementation of EU Structural Funds to OLAF.

36 See Regulation (EU) 952/2013 supra note 16, Art. 12(1).

37 Ibid., Art. 12(1).

38 Adw, Art. 1:33(4).

39 See Wiarda supra note 18, p. 110.

40 Customs Manual, ch. 5.00.00 para. 13.2.2.

8.1.2.1 Administrative authorities transmitting information to OLAF

Regulation 1303/2013 lays down common provisions on EU structural funds (i.e., the European Regional Development Fund, the European Social Fund, and the Cohesion Fund).⁴¹ The structural funds are implemented under shared management by both the Commission and the Member States.⁴² Under shared management, both the Commission and the Member States must fulfil a number of control and audit obligations and assume resulting responsibilities.⁴³ Under shared management Member States must also take the necessary measures to protect the Union's financial interests in the implementation of the structural funds (i) by ensuring that actions financed from the budget are implemented correctly and effectively and in accordance with the rules laid down in Regulation 1303/2013, and (ii) by preventing, detecting and correcting irregularities and fraud.⁴⁴ To ensure that structural funds are implemented correctly and that fraud and irregularities are prevented, detected and corrected, Regulation 1303/2013 imposes a number of obligations on the Member States.⁴⁵ Of particular importance is the obligation to designate national, regional or local public authorities or bodies or private bodies as management, certifying and audit authorities for each fund.⁴⁶ The management authority is responsible for managing the fund in accordance with the principle of sound financial management.⁴⁷ The certifying authority is responsible, in particular, for the drawing up and submitting of payment applications to the Commission and certifying that they result from reliable accounting systems, are based on verifiable supporting documents and have been subject to verification by the managing authority.⁴⁸ Lastly, the audit authority is to ensure that audits are carried out on the proper functioning of the management and control system of the fund and on an appropriate sample of operations on the basis of the declared expenditure.⁴⁹

In the Netherlands, the constellation of competent authorities and the ways in which they implement EU structural funds is a complex one.⁵⁰ The administrative authorities designated by the Netherlands differ per fund and are located both at the central government level as well as at (functionally) decentralised levels.⁵¹ Depending on the fund in question, a host of administrative authorities can be involved, ranging from the Provinces, relevant ministries of the central government, governmental agencies (*agentschappen*), and/or autonomous administrative

41 Regulation (EU) 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) 1083/2006 (*OJ* 2013, L 347/320). As the name suggests, Regulation 1303/2013 also lays down common provisions for other funds, namely the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund.

42 Regulation (EU, Euratom) 966/2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) 1605/2002 (*OJ* 2012 L 298/1), Art. 59(1). in conjunction with Regulation 1303/2013 supra note 41, Arts. 73 and 74.

43 Regulation 966/2012 supra note 41, Art. 59(1).

44 Regulation 966/2012 supra note 41, Art. 59(2).

45 Regulation 1303/2013 supra note 41, Arts. 72-47 and 123-128.

46 Regulation 1303/2013 supra note 41, Art. 123.

47 Regulation 1303/2013 supra note 41, Art. 125(a).

48 Regulation 1303/2013 supra note 41, Art. 126(a).

49 Regulation 1303/2013 supra note 41, Art. 127(1)

50 See D. Comijs, *Europese structuurfondsen*, Deventer: Kluwer 1998, p. 65 for a clear explanation of the implementation (and enforcement) of EU structural funds in the Netherlands.

51 *Kamerstukken II*, 2001/01, 27 813, 1, pp. 58-65.

authorities (*zelfstandige bestuursorganen*),⁵² i.e., administrative bodies – part of the central government – endowed with public authority by means of a Governmental Decree (*algemene maatregel van bestuur*) or Ministerial Regulation (*ministeriële regeling*) which is not subordinated to a minister.⁵³

To illustrate this, I give the example of the European Regional Development Fund (hereinafter *ERDF*). The ERDF falls under the authority of the Ministry of Economic Affairs and Climate Policy (*Ministerie van Economische Zaken en Klimaat*).⁵⁴ Under the ERDF four geographically dispersed management authorities are active: (i) the North Netherlands Partnership (*Samenwerkingsverband Noord-Nederland*) covering the northern provinces of Drenthe, Friesland and Groningen; (ii) STIMULUS, which falls under the province of North Brabant, covering the southern provinces of Limburg, North Brabant and Zeeland; (iii) the Provincial Executive (*Gedeputeerde-Staten*) of Gelderland, which covers the eastern provinces Gelderland and Overijssel; and (iv) the Municipality of Rotterdam (*Gemeente Rotterdam*) which covers the western provinces of North Holland, South Holland, Flevoland and Utrecht.⁵⁵ These management authorities are charged with individual applications from persons under the ERDF and fulfil the functions listed under Article 125 of Regulation 1303/2013. The management authorities submit management summaries and management declarations to the Commission. In addition, the management authorities compile all individual applications for funds under the ERDF for the certifying authority.

The Director-General of the Netherlands Enterprise Agency (*Rijksdienst voor Ondernemend Nederland*) serves as the certifying authority for the purposes of the ERDF. The Netherlands Enterprise Agency is an implementing department (*uitvoerende dienst*) of the Ministry of Economic Affairs and Climate Policy.⁵⁶ The Director-General, by means of random checks, certifies the payment applications submitted by the four management authorities and thereby serves as an external controller. In exercising this controlling function, the Agency takes into account in particular the demands of Article 126 of Regulation 1303/2013. After the certification process a list of annual accounts is submitted to the Commission.

The Director-General of the Audit Service (*Auditdienst Rijk*) is designated as the audit authority for the purposes of the ERDF. The Audit Service serves as the independent and internal auditor of the central government and is part of the Director-General Cluster (*Cluster SG*) of the Ministry of Finance (*Ministerie van Financiën*).⁵⁷ The Audit Service prepares annual control reports and conducts its activities in conformity with Article 127 of Regulation 1303/2013. The findings in the annual control reports are based on a systematic assessment of the implementation of the ERDF programmes. These annual control reports, in addition to the Audit Service's opinion on the management and certifying authorities' submissions to the Commission, are transmitted to

52 See the online register for autonomous administrative authorities, <https://almanak.zboregister.overheid.nl/overzicht_op_alfabet> (last visited 18 September 2017).

53 Wet van 2 November 2006, houdende regels betreffende zelfstandige bestuursorganen, *Stb.* 2006, 587, Art 1(a). See also *Kamerstukken II* 2011/12, 33 186, 3, pp. 6-7.

54 Wet van 22 januari 2014, houdende regels omtrent de uitvoering van Europese verordeningen inzake financiële bijdragen uit het Europees Fonds voor Regionale Ontwikkeling, *Stb.* 2014, 48.

55 The management authorities of a particular region are appointed, by means of a decision, by the State Secretary of the Ministry of Economic Affairs and Climate Policy. See for the decision on the eastern provinces for instance Besluit van de Staatssecretaris van Economische Zaken van 11 december 2014, nr. DGNR-RRE/14197634, houdende aanwijzing van de managementautoriteit, de certificeringsautoriteit en de auditautoriteit voor het Operationeel Programma EFRO Oost-Nederland 2014–2020, Art. 2. The same applies mutatis mutandis to the certifying authority and the audit authority.

56 Ibid.

57 Ibid.

the Ministry of Economic Affairs and Climate Policy and to the Commission. The Netherlands Court of Audit (*Algemene Rekenkamer*), in turn, checks the Audit Service and the individual applicants under the ERDF.

The example of the ERDF is illustrative of the complexity of the implementation of structural funds in the Netherlands. Within the context of the ERDF, the management, certifying, and audit authorities all transfer information directly to the Commission on a structural basis. These authorities only report directly to OLAF in cases of irregularities or suspected fraud (see Sections 8.1.2.2. and 8.1.2.3.).

All of the above-mentioned authorities fall within the scope of the General Administrative Law Act (*Algemene wet bestuursrecht*, hereinafter *GALA*).⁵⁸ The GALA provides for general rules which govern the relationship between administrative authorities (*bestuursorganen*)⁵⁹ and citizens that can be qualified as interested parties (*belanghebbenden*).⁶⁰

8.1.2.2 Obligations as regards the information transfer

The GALA does not specifically regulate or impose obligations with regard to the exchange of information between administrative authorities and EU law enforcement authorities.

For obligations concerning the transfer of information recourse must be had to Union law. Article 122(2) of Regulation 1303/2013 states that Member States must notify the Commission (OLAF) of any irregularities that exceed EUR 10 000 in contributions from the structural funds and keep it informed of significant progress in related administrative and legal proceedings.⁶¹ Detailed rules on the type of information are laid down in Commission Delegated Regulation 2015/1970 and Commission Implementing Regulation 2015/1974.⁶² In practice, the transfer of information to OLAF in the case of irregularities and/or suspected fraud must be done by any of the authorities involved in the implementation of structural funds by means of the Irregularity Management System or via the OLAF website. The basis for the transfer of information is therefore Union law.

8.1.2.3 Type of information

The type of information that must be transferred stems directly from Union law (see in particular the relevant provisions of the legislation mentioned in Section 8.1.2.2.).

8.1.2.4 Consequence of the official opening of an OLAF investigation

The opening of an OLAF investigation does not have any consequences for the transfer of information.

58 Wet van 4 juni 1992, houdende algemene regels van bestuursrecht, *Stb.* 1992, 315.

59 Administrative authorities are defined in the GALA Art. 1:3 as organs of a legal entity which has been established under public law or other persons or bodies which are invested with any public authority. Excluded from this definition are, in summary, the legislature, the judiciary, the audit chamber and the ombudsman.

60 The GALA Art. 1:2 defines interested parties as persons whose interest is directly affected by an administrative authority's decision.

61 Regulation 1303/2013 supra note 41, Art. 122(2).

62 Commission Delegated Regulation (EU) 2015/1970 supplementing Regulation (EU) 1303/2013 with specific provisions on the reporting of irregularities concerning the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund (*OJ* 2015, L 293/1) and Commission Implementing Regulation (EU) 2015/1979 setting out the frequency and the format of the reporting of irregularities concerning the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund (*OJ* 2015, L 293/20).

8.1.2.5 Limitations on the transfer of information

Speciality principle

The speciality principle does not impose a limit on the transfer of information from administrative authorities to OLAF.

Secrecy of investigations

The secrecy of investigations principle does not impose a limit on the transfer of information from administrative authorities to OLAF.

Banking secrecy

Banking secrecy does not impose a limit on the transfer of information from administrative authorities to OLAF.

Professional secrecy

While the GALA does not specifically regulate the exchange of information between administrative authorities and EU law enforcement authorities (OLAF or others), it does impose a general duty of secrecy on administrative authorities. The GALA proscribes the disclosure of information, unless a statutory regulation⁶³ stipulates such a disclosure or if it is necessary for the performance of the authority's duties.⁶⁴ Statutory regulations which are applicable to the EU authorities' counterparts studied in this project impose such deviating duties from the general duty of secrecy laid down in the GALA. In addition, the GALA's duty of secrecy still applies to other administrative authorities, including those which are not governed by a specific regime on the transfer of information to EU authorities (see also the sections below on other administrative authorities and the cooperation with DG COMP, the ECB and ESMA).

The personal scope of the duty of secrecy laid down in the GALA extends to (i) any person involved in performing the duties of an administrative authority, who is not already subject to a duty of secrecy by virtue of his or her *office* or *profession* or any *statutory regulation*⁶⁵ and to (ii) institutions, and persons belonging to them or working for them, involved by an administrative authority in the performance of its duties, and to institutions and persons belonging to them or working for them performing a duty assigned to them by or pursuant to an Act of Parliament.

The material scope of the duty of secrecy pertains to information which any of the above-mentioned persons know, or should reasonably infer, to be of a confidential nature.⁶⁶ Therefore, not all information falls under the ambit of the GALA's duty of secrecy: only information which can *reasonably be inferred* to be *confidential*. Which information is to be considered confidential is determined by the Government Information Act (*Wet openbaarheid bestuur*, hereinafter *Wob*).⁶⁷ The logic underlying the *Wob* is that public access to information serves the public interest and that, as a result, information held by administrative authorities ought to be public.⁶⁸ Relevant

63 This does not necessarily need to be an Act of Parliament, but can be (as shown in supra 6) a governmental decree, ministerial regulation, municipal bylaw, etc.

64 GALA, Art. 2:5.

65 Thereby allowing deviations from this general duty of secrecy. See for illustrations Sections 8.2.1, 8.3.1, and 8.4.1.

66 GALA, Art. 2:5.

67 Wet van 31 oktober 1991, houdende regelen betreffende de openbaarheid van bestuur, *Stb.* 1991, 703. The *Wob* is a statutory regulation (see supra note 53) which provides for exceptions to the general duty of secrecy.

68 *Wob*, Art. 2(1).

exceptions to the rule are information concerning business or manufacturing data provided by natural or legal persons in confidence to the government⁶⁹ or special personal data⁷⁰ unless this data does not interfere with a person's private life.⁷¹ Furthermore, information will not be made public when the interest at stake does not outweigh the importance of any of the following interests: the investigation and prosecution of criminal offences; inspection, control and supervision by administrative authorities; and respect for privacy.⁷²

The rationale underlying the GALA's duty of secrecy is twofold. First, premature or inappropriate disclosure of information can disrupt the performance of administrative duties. Second, administrative authorities often possess information which they could only have obtained in their capacity as an organ of the state.⁷³ For instance, the Dutch Central Bank grants a licence to a financial enterprise if it satisfies a host of informational requirements, e.g. proof of prudent investment policies, proof of solvency, etc.⁷⁴ This specific relationship between the government and the governed justifies secrecy.⁷⁵

The duty of (professional) secrecy laid down in the GALA does not apply to civil servants, as they are bound by a deviating duty of secrecy tied to their respective office.⁷⁶ The Central and Local Government Personnel Act (*Ambtenarenwet*, hereinafter *Aw*)⁷⁷ stipulates that a civil servant is a natural person who is an employee in public service.⁷⁸ Not all persons involved in performing the duties of an administrative authority, or institutions and persons belonging to them or working for them, are considered to be civil servants according to the *Aw*.⁷⁹ Of those who are considered to be civil servants some, like public prosecutors and judges (see Section 8.1.3 below), operate under yet another separate regime which comes with different duties and obligations which (can) affect the transfer of information to European authorities.⁸⁰ Persons working for the national counterparts examined in this study are considered to be public servants for the purposes of the *Aw* either because the counterpart is deemed to be part of the state – as is

69 Ibid., Art. 10(1)(c). The underlying rationale is to protect persons providing information from unfair competition. See G. Wuisman, 'Toelichting bij artikel 10 Wob', in: *Wet openbaarheid van bestuur*, Lelystad: Koninklijke Vermande, p.3.

70 Wob, Art. 10(1)(d). The special personal data referred to is listed in the Personal Data Protection Act Art. 16 (*Wet van 6 juli 2000, houdende regels inzake de bescherming van persoonsgegevens*, *Stb.* 2001, 180) which lists information regarding religion or convictions, race, political affinity, health, sex life, information concerning membership of a trade union, personal data concerning criminal law matters and personal data on unlawful or objectionable conduct in connection with a prohibition imposed in response to such conduct.

71 It goes beyond the confines of this study to elaborate on the notion of privacy and the interpretation of this concept within the Dutch legal system. For such an analysis see A. de Moor-van Vugt et al., 'Gegevensuitwisseling door toezichthouders' (Research carried out by the University of Amsterdam for the Research and Documentation Centre) 2012, p. 12.

72 Wob, Art. 10(2)(c), (d) and (e). The exception on privacy grounds does not apply if the person concerned has consented to making the information in question public (Wob, Art. 10(3)). A separate regime applies to information regarding environmental issues, see Wob Art. 10(4), (7) and (8).

73 J. Verburg, *Het beroepsgeheim*, Arhem: Gouda Quint 1985, pp. 18-19.

74 FSA, Art. 2:3.0d.

75 M. Luchtman, *Geheimhouding en verschoning in het effectenrecht*, Amsterdam: Nederlands Instituut voor het Bank-, Verzekerings- en Effectenbedrijf 2002, p. 32.

76 H. Helsen, 'Wettelijk kader bij: Ambtenarenwet 1929, Artikel 125a' in: *Lexplicatie Ambtenarenwet en Algemeen Rijksambtenarenreglement*, Deventer: Kluwer 2011.

77 Wet van 12 december 1929, houdende regelen betreffende den rechtstoestand van ambtenaren, *Stb.* 1929, 530.

78 *Aw*, Art. 1(1).

79 Cf. GALA, Art. 2:5.

80 *Aw*, Art. 2(2). Judges and prosecutors are considered to be civil servants, but are not administrative authorities under the GALA, Art. 1:1(2)(c) and (g). See supra note 45 for the definition of an administrative authority.

the case for the national competition authority, customs and the authorities involved in structural funds – or because the counterpart is a legal entity which has been established under public law, is invested with public authority and the exercise of such public authority is the core activity of the entity (as is the case for prudential as well as market conduct supervision).⁸¹ As a result, persons employed by the national counterparts are bound by an official duty of secrecy. The official duty of secrecy encompasses an obligation to keep secret that which has come to a person's attention in connection with his or her appointment as a civil servant, insofar as such an obligation follows from the nature of the case.⁸² The purpose of the official duty of secrecy is to protect both the general and the individual interest.⁸³

In practice any national duty of secrecy incumbent on an administrative authority is superseded by EU obligations on the transfer of information. The duty of secrecy laid down in the GALA therefore does not impose a limitation on the transfer of information from administrative authorities to OLAF.

Business secrecy

Business secrecy does not impose a limit on the transfer of information from administrative authorities to OLAF.

Other legal limits

There are no other legal limits to the transfer of information from administrative authorities to OLAF in national law.

8.1.2.6 Conditions on the use of transmitted information?

Administrative authorities do not impose conditions on the further use of information by OLAF.

8.1.3 Transfer of information from judicial authorities to OLAF

8.1.3.1 Judicial authorities transmitting information to OLAF

The Act on the Organisation of the Judiciary (*Wet op de Rechterlijke Organisatie*, hereinafter *Wro*)⁸⁴ lays down provisions on the composition of the judiciary. The judiciary consists of judicial officers entrusted with the administration of justice (*rechterlijke ambtenaren met rechtspraak belast*) and other judicial officers (*rechterlijke ambtenaren*).⁸⁵ Judicial officers entrusted with the administration of justice are judges at the district courts, Courts of Appeal and the Supreme Court.⁸⁶

81 See supra note 45.

82 Aw, Art. 125a(3).

83 See Helsen supra note 63. See also E. Verhulp, *Grondrechten in het arbeidsrecht*, Deventer: Kluwer 1999.

84 Wet van den 18den April 1827, op de zamenstelling der Regterlijke magt en het beleid der Justitie, *Stb.* 1827, 10.

85 Wro, Art. 1(c).

86 Ibid., Art. 1(b)(°1), (°2) and (°3). The judicial officers entrusted with the administration of justice listed are the President, Vice President and Justices (Extraordinary) (*raadsheren (in buitengewone dienst)*) of the Supreme Court (*Hoge Raad*); (Senior) Justices of the Courts of Appeal (*raadsheer*)/Deputy Justices of the Courts of Appeal (*raadsheer-plaatsvervanger*); and (Senior) Judges of the District Courts (*rechter in de rechtbank*)/Deputy Judges of the District Courts (*rechter-plaatsvervanger in de rechtbank*). Judicial officers entrusted with other tasks are the following: the (Deputy) Procurators General (*plaatsvervangend procureurs-generaal*) and the Advocates General (extraordinary) (*advocaten generaal (in buitengewone dienst)*) employed by the Supreme Court; the Procurators General which constitute the Board of Procurators General (*college van procureurs-generaal*); the (Senior)(Deputy)(Chief) Advocates General of the Procurator General's Office at the Courts of Appeal (*resortspakket*) and of the National Office of the Public Prosecution Service (*parket-generaal*); the Chief Public

Public prosecutors are not considered to be judicial officers entrusted with the administration of justice, but are considered to be judicial officers and are part of the judiciary.⁸⁷

The rules on the transfer of information for the purposes of mutual legal assistance are laid down in the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*).⁸⁸ Article 552h states that the rules on international legal assistance apply to requests made by the authorities of a *foreign state* in connection with a *criminal case*.⁸⁹ The rules on mutual legal assistance therefore only apply to state-state cooperation and not to cooperation between EU authorities and judicial officers.⁹⁰ In addition, OLAF proceedings (and proceedings of other EU authorities) are not criminal in nature.⁹¹

8.1.3.2 Obligations as regards the information transfer

There are no obligations for judicial authorities to transfer information to OLAF under Dutch law. However, such a transfer is possible under the Judicial Data and Criminal Records Act (*Wet justitiële en strafvorderlijke gegevens*, hereinafter *Wjsg*),⁹² a *lex specialis* of the Personal Data Protection Act (*Wet bescherming persoonsgegevens*),⁹³ and its implementing Decree on Judicial Data and Criminal Records (*Besluit justitiële en strafvorderlijke gegevens*, hereinafter *Bjsg*),⁹⁴ and the Instruction on Judicial Data and Criminal Records (*Aanwijzing Wet justitiële en strafvorderlijke gegevens*, hereinafter *AWjsg*).⁹⁵

8.1.3.3 Type of information

The *Wjsg* covers information on natural or legal persons concerning the application of substantive or procedural criminal law, i.e., mainly historical information on a person's prior

Prosecutor (*hoofdofficier van justitie*), Deputy Chief Public Prosecutors (*plaatsvervangende hoofdofficieren van justitie*), Senior Public Prosecutors (*senior officier van justitie*), Deputy Public Prosecutors (*plaatsvervangende officieren van justitie*), Substitute Public Prosecutors (*substituut-officieren van justitie*), Single-Judge Session Public Prosecutors (*officieren enkelvoudige zittingen*) and the Single-Judge Session Deputy Public Prosecutors at the District Courts' Public Prosecutor's Office, the National Public Prosecutor's Office, the National Public Prosecutor's Office for Financial, Economic and Environmental Offences (*functioneel parket*), the Office for Traffic Offences (*parket centrale verwerking openbaar ministerie*) and the National Office of the Public Prosecution Service; the (Senior) Assistant Judges (*senior gerechtsauditeuren*) at the Courts. The Registrar and Deputy-Registrar of the Supreme Court (*Hoge Raad*); Trainee Judicial Officers (*rechters in opleiding*) and Trainee Public Prosecutors (*officier in opleiding*)

87 Ibid., Art. 1(c) in conjunction with Art. 1(b)(°7).

88 *Wetboek van Strafvordering*, *Stb.* 1921, 14, Title X.

89 Ibid., Art. 552h(1).

90 P. Verrest, 'Verzoek/strafzaak/autoriteiten/soorten rechtshulp' in: *Tekst & Commentaar Strafvordering*, Deventer: Kluwer, Art. 552h Sv under 4b. See also HR 28 March 2000, ECLI:NL:HR:2000:ZD1753.

91 See Verrest *supra* note 77, under 3.

92 *Wet van 7 november 2002 tot wijziging van de regels betreffende de verwerking van justitiële gegevens en het stellen van regels met betrekking tot de verwerking van persoonsgegevens in persoonsdossiers*, *Stb.* 2002, 552.

93 *Kamerstukken II 2002/03*, 28 886, 3, p. 1. As a result, the obligations provided for in the Personal Data Protection Act do not apply to judicial and criminal information, unless the Personal Data Protection Data Act explicitly states that this is the case. See Personal Data Protection Act, Art. 2(e).

94 *Besluit van 25 maart 2004 tot vaststelling van de justitiële gegevens en tot regeling van de verstrekking van deze gegevens alsmede tot uitvoering van enkele bepalingen van de Wet justitiële gegevens*, *Stb.* 2004, 130. The *Bjsg* is an implementation of *Wjsg* Art. 2(2) which states that a Governmental Decree dictates which information is to be qualified as judicial.

95 *Aanwijzing verstrekking van strafvorderlijke gegevens voor buiten de strafrechtspleging gelegen doeleinden*, *Stcrt.* 2004, 223/9.

convictions (*justitiële gegevens*)⁹⁶ and information on natural or legal persons obtained in a criminal investigation and which are processed by the public prosecutor's office (*strafvorderlijke gegevens*).⁹⁷

Justitiële gegevens can be transferred by the Minister of Justice and Security (i.e., not a judicial authority) to an organ of the EU charged with supporting and strengthening Member States' law enforcement authorities in the prevention, combating, investigation and prosecution of serious criminality, as regulated by a Governmental Decree (*algemene maatregel van bestuur*).⁹⁸ This Governmental Decree is also to set detailed rules regarding the transfer, use by the receiving EU organ and conditions attachable to a transfer.⁹⁹ The Bjsjg, the governmental decree in question, does not appoint any of the four authorities studied in this project (it makes mention of Europol and Eurojust). This means that the Minister of Justice and Security may not transfer *justitiële gegevens* to OLAF (or DG COMP, ECB and ESMA for that matter).

Strafvorderlijke gegevens and *justitiële gegevens* may be transferred by the Board of Procurators General (*College van procureurs-generaal*, hereinafter the College).¹⁰⁰ The Procurators General, which head the Dutch Public Prosecution Service (*Openbaar Ministerie*), make up the College.¹⁰¹ The College as such is considered to be a judicial officer and is therefore part of the judiciary.¹⁰² While the College can transfer information, such a transfer is a competence, not an obligation. Furthermore, a transfer of information is only considered when such a transfer would fit the performance of the Public Prosecution Service.¹⁰³ The College may transfer *strafvorderlijke and justitiële gegevens* in case a major general interest necessitates a transfer and the information is transferred in such a way that it cannot (reasonably) be traced back to any other person than the person concerned.¹⁰⁴ A major general interest consists of national security, public safety, the prevention of disorderliness or criminal acts, the protection of public decency, or the protection of the rights and freedoms of others.¹⁰⁵ In deciding whether to transfer information, the College must weigh two sets of interests against each other: the interest that the person or authority in question has in receiving the information and the interests of the investigation and prosecution of

96 Wjsg, Art. 1(a). The Decree on Judicial and Criminal Information defines what is to be considered as judicial information. Whether information is judicial depends on a variety of factors, for instance whether the information relates to a misdemeanour or a serious criminal offence (Arts. 2, 3 and 4), it relates to a natural or legal person (Bjsjg, Arts. 7 and 8), whether the information concerns a person who has been convicted and pardoned (Bjsjg, Art. 8) and decisions made by non-Dutch judges on the basis of international obligations (Bjsjg, Art. 9).

97 Wjsg, Art. 1(b).

98 Ibid., Art. 8(6).

99 Ibid., Art. 8(9).

100 Wjsg, Arts. 8a in conjunction with 39f.

101 Wro, Art. 130.

102 Wro, Art. 1(b)(5) in conjunction with Art. 130(4).

103 See AWjsg, Section III. Para. 1.

104 Wjsg, Art. 39f(2)(a) and (b).

105 *Kamerstukken II 2002-03*, 28 886, 3, pp. 5-8.

criminal acts and the privacy of the persons concerned.¹⁰⁶ A decision is based on the principles of subsidiarity,¹⁰⁷ proportionality¹⁰⁸ and necessity.¹⁰⁹

The College can transfer information for the following purposes: (i) the prevention and investigation of criminal offences; (ii) the maintenance of public order and security; (iii) the exercise of supervising compliance with the law; (iv) the taking of an administrative decision; (v) the assessment of the necessity of taking a disciplinary measure or a measure regarding a person's legal position; (vi) the offering of assistance to victims and others involved in a criminal act; and (vii) for the performance of a legal act under private law by a person or authority charged with a public law task.¹¹⁰ The AWjsg states that the College can transfer *strafvorderlijke and justitiële gegevens* to OLAF for purpose (iii): the exercise of supervising compliance with the law.¹¹¹

8.1.3.4 Consequence of the official opening of an OLAF investigation

The opening of an OLAF investigation does not have any consequences for the transfer of information from judicial authorities to OLAF.

8.1.3.5 Limitations on the transfer of information

Speciality principle

Both types of data may only be transferred¹¹² if this is necessary for the purposes defined by the Wjsg.¹¹³ They may only be transferred for another purpose for which they were obtained insofar as the former is proportional and not contrary to the latter. In addition, a further transfer of both types of data may only be done by persons and authorities appointed by law, based on a major general interest.¹¹⁴ The prevention of criminal acts is, amongst other things, considered to be a major general interest which justifies a transfer.¹¹⁵ The interests of the individual natural or legal person do not, in and by themselves, constitute major general interests.¹¹⁶

Secrecy of investigations

The secrecy of investigations does not impose a limit on the transfer of information from judicial authorities to OLAF.

106 AWjsg, Section III, para 1, under *Belangenafweging: subsidiariteit, proportionaliteit, noodzakelijkheid*.

107 Subsidiarity means that when the goal of the recipient can be achieved in a way that proves to interfere less with the privacy of the person to whom the information pertains, a transfer on the basis of the Wjsg is refrained from. See AWjsg, para. 1, under *Belangenafweging: subsidiariteit, proportionaliteit, noodzakelijkheid*.

108 Proportionality entails that only as much information is transferred as is required for the achievement of any of the purposes listed in Wjsg, Art. 39f. See AWjsg, para. 1, under *Belangenafweging: subsidiariteit, proportionaliteit, noodzakelijkheid*.

109 Necessity requires that the transfer is necessary: information is only transferred where the person in question 'needs to know' rather than when he or she 'wants to know'. See AWjsg, para. 1, under *Belangenafweging: subsidiariteit, proportionaliteit, noodzakelijkheid*.

110 Wjsg, Art. 39f(1)(a)-(g).

111 AWjsg, Section III, para. 3(c).

112 The Wjsg uses the term 'to process' (*verwerken*), which is a much broader term that encompasses a transfer. See Wjsg Art. 3(2) in conjunction with Art. 1(g) and Wbp Art. 1(b).

113 Ibid., Art. 3(2) in conjunction with Art. 39c(1).

114 Ibid., Art. 3(3) in conjunction with Art. 39c(1).

115 P. Boer, 'Commentaar op Artikel 39e Wet justitiële en strafvorderlijke gegevens' in: *Lexplicatie*

116 *Kamerstukken II 2003/04, 28 886, 3, p. 6.*

Banking secrecy

Banking secrecy does not impose a limit on the transfer of information from judicial authorities to OLAF.

Professional secrecy

Judicial authorities operate under a diverging regime of secrecy compared to that which applies to administrative authorities and/or civil servants (see Section 8.1.2.5 under professional secrecy). General duties regarding secrecy are laid down in the Wro.¹¹⁷ The Wro states that judicial officers,¹¹⁸ such as the College, are under a duty of secrecy with regard to information that has come to their knowledge in the exercise of their official duties and of which the confidentiality should be known or should reasonably be inferred, except where (i) a statutory provision obliges disclosure or (ii) the performance of their office necessitates disclosure.¹¹⁹ Whether information is to be considered confidential is left to the discretion of the judge or public prosecutor.¹²⁰ The duty of secrecy is applicable to all judges (civil, administrative and criminal) at all levels (first instance, appellate and appeals in cassation) and all public prosecutors.

Business secrecy

Business secrecy does not impose a limit on the transfer of information from judicial authorities to OLAF.

Other legal limits

There are no other legal limits to the transfer of information from judicial authorities to OLAF in national law.

8.1.3.6 Conditions on the use of transmitted information

The Wsjg regulates the further transfer of both types of data. Article 52 stipulates that anyone who, in accordance with the Wsjg, obtains information concerning a third party is obliged to keep such information secret, unless a statutory regulation allows for a further transfer or if such a transfer is necessary for the proper performance of the purpose for which the information was initially transferred.¹²¹ Article 52 Wsjg is a *lex specialis* of the general duty of secrecy applicable to the judiciary as laid down in the Wro. Whereas the Wro exhaustively provides possibilities concerning *disclosure*, the Wsjg does so specifically for the *transfer* of information. In addition, for the purposes of the Wsjg it is irrelevant whether the information is to be qualified as confidential.¹²²

117 See Wro supra note 71.

118 So including both judges and public prosecutors. Ibid., Art. 1(b)(°1), (°2), (°3) and (°7).

119 Ibid., Art. 13 in conjunction with Arts 142 and 144.

120 M. Luchtman, *Grensoverschrijdende sfercumulatie: over de handhavingssamenwerking tussen financiële toezichthouders, fiscale autoriteiten en justitiële autoriteiten in EU-verband*, Nijmegen: Wolf Legal Publishers 2007, p. 201.

121 Wsjg, Art. 52(1).

122 Ibid., Art. 52(1). See Luchtman supra note 109, p. 204.

8.2 DG COMPETITION

8.2.1 Transfer of information from national counterparts (NCAs) to DG COMP

8.2.1.1 DG COMP national enforcement partner (NCA)

The Authority for Consumers and Markets (*Autoriteit Consument en Markt*, hereinafter *ACM*) is deemed to be the competent national authority for the enforcement of EU competition law, particularly with regard to Regulation 1/2003.¹²³ The ACM supervises the compliance of undertakings with the rules provided for in the Competition Act (*Mededingingswet*),¹²⁴ and is charged with executing a number of other statutory tasks laid down in sectoral legislation.¹²⁵ The ACM is an autonomous administrative authority (*zelfstandig bestuursorgaan*).¹²⁶

8.2.1.2 Obligations as regards the information transfer

The ACM transfers information in the context of Articles 101 and 102 TFEU to DG COMP directly on the basis of Union law. Regulation 1/2003 serves as a legal basis for the transfer of information.¹²⁷ Article 12 of Regulation 1/2003 states that for the purpose of applying Articles 101 and 102 TFEU, DG COMP and NCAs *have the power* to provide one another with, and use in evidence, any matter of fact or of law, including confidential information. That NCAs *have the power* to transfer information to DG COMP does not imply an obligation to do so. In practice, however, as the interviewees have pointed out, the ACM acts as though it is under an obligation to transfer information. More detailed rules on the transfer of information are laid down in the Commission Notice on cooperation within the Network of Competition Authorities¹²⁸ and in the Antitrust Manual of Procedures.¹²⁹ The latter lays down non-binding uniform procedures for the exchange of information within the ECN.

The information transfer takes place through ECN2, a digital service which allows for the secure exchange of information on competition cases and policy within the ECN.¹³⁰ The transfer of information within ECN2 is not automatic, but is always case-specific. All NCAs, even those

123 Competition Act, Art. 88. The ACM also supervises compliance with consumer laws and specific sectoral regulations, see *Kamerstukken II 2011/12*, 33 186, 3, pp. 2-3.

124 *Mededingingswet*, *Stb.* 1997, 242.

125 The ACM's statutory tasks extend to enforcing not only the Competition Act, but also the Electricity Act 1998 (*Elektriciteitswet 1998*); the Gas Act (*Gaswet*); the Heating Supply Act (*Warmtewet*); the Passenger Transport Act 2000 (*Wet Personenvervoer 2000*); the Railway Act (*Spoorwegwet*); the Aviation Act 1992 (*Wet luchtvaart*); the Pilotage Act (*Loodsenwet*); the Shipping Traffic Act (*Scheepsvaartverkeerswet*); the Postal Act 2009 (*Postwet 2009*); the Telecommunications Act (*Telecommunicatiewet*); the Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*); the BES Islands Telecommunications Facilities Act (*Wet telecommunicatievoorzieningen BES*); the BES Islands Postal Act (*Wet post BES*) and the BES Islands Electricity and Drinking Water Act (*Wet elektriciteit en drinkwater BES*). See *Kamerstukken II 2011/12*, 33 186, 3, pp. 2-3.

126 See the online register for autonomous administrative authorities, <https://almanak.zboregister.overheid.nl/overzicht_op_alfabet> (last visited 18 September 2017).

127 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty (*OJ 2003*, L 1/1).

128 Commission Notice on cooperation within the Network of Competition Authorities (*OJ 2004 C 101/43*).

129 Commission, 'Antitrust Manual of Procedures. Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU' (March 2012) <http://ec.europa.eu/competition/antitrust/information_en.html> (last accessed 13 January 2017).

130 See for more information <https://ec.europa.eu/isa2/actions/managing-and-supporting-exchange-information_en> (last accessed 13 January 2017).

not directly involved in a case, and DG COMP have access to ECN2. (see the EU report for a detailed exposition of the EU legal framework for the exchange of information).

In Dutch law, the transfer of information from the ACM is regulated in the Act Establishing the Authority for Consumers and Markets (*Instellingswet Autoriteit Consument en Markt*, hereinafter *Iw ACM*),¹³¹ as amended by the Streamlining Act (*Stroomlijningswet*).¹³² The *Iw ACM* covers the ACM's tasks in the field of competition law and its other statutory tasks laid down in sectoral legislation.¹³³ Article 7 *Iw ACM* allows for the transfer of information in certain – exhaustively – listed circumstances. Article 7, however, plays only a supplementary role with regard to competition law: it applies only insofar as it does not conflict with EU law, in particular Regulation 1/2003, or where EU law does not provide for more detailed rules on the transfer of information.¹³⁴ The interviewees have pointed out that, in practice, Article 7 *Iw ACM* is not used as a legal basis for the transfer of information to DG COMP in the context of Articles 101 and 102 TFEU. The ACM acts on the basis of EU law, which provides for a more elaborated legal framework for the transfer of information. The ACM transfers information on the basis of Article 7 *Iw ACM* mainly (i) in fields other than EU competition law – for instance supervising the energy market – where no (specific) rules are in place which detail the transfer of information or (ii) in cooperating with third countries in the application of competition law.

The *Iw ACM* distinguishes between two classes of information transfer: the internal transfer of information between ACM departments and the transfer of information from the ACM to other entities (i.e., external transfers).¹³⁵ Only the external transfer of information is relevant for the purposes of this report.

The *Iw ACM* states that the ACM is competent (i.e., national law does not impose an obligation on the ACM) to provide data and information to three types of entities.¹³⁶ First, information may be transferred to an administrative authority, service, supervisor and/or other person charged with investigating criminal offences or supervising compliance with the law, if a Ministerial Regulation determines that such a transfer is necessary for the proper performance of a task

131 Wet van 28 februari 2013, houdende regels omtrent de instelling van de Autoriteit Consument en Markt (*Instellingswet Autoriteit Consument en Markt*), *Stb.* 2013, 102. Of importance is also the Act Streamlining Market Supervision by the ACM, amending the Act Establishing the Authority for Consumers and Markets. See Wet van 25 juni 2014 tot wijziging van de *Instellingswet Autoriteit Consument en Markt* ten enige andere wetten in verband met de *stroomlijning* van de door de Autoriteit Consument en Markt te houden markttoezicht, *Stb.* 2014, 247.

132 Wet van 25 juni 2014 tot wijziging van de *Instellingswet Autoriteit Consument en Markt* en enige andere wetten in verband met de *stroomlijning* van het door de Autoriteit Consument en Markt te houden markttoezicht (*Stroomlijningswet*), *Stb.* 2014, 247.

133 The ACM's statutory tasks extend to enforcing not only the Competition Act, but also the Electricity Act 1998 (*Elektriciteitswet 1998*); the Gas Act (*Gaswet*); the Heating Supply Act (*Warmtewet*); the Passenger Transport Act 2000 (*Wet Personenvervoer 2000*); the Railway Act (*Spoorwegwet*); the Aviation Act 1992 (*Wet luchtvaart*); the Pilotage Act (*Loodsenwet*); the Shipping Traffic Act (*Scheepsvaartverkeerswet*); the Postal Act 2009 (*Postwet 2009*); the Telecommunications Act (*Telecommunicatiewet*); the Consumer Protection Enforcement Act (*Wet handhaving consumentenbescherming*); the BES Islands Telecommunications Facilities Act (*Wet telecommunicatievoorzieningen BES*); the BES Islands Postal Act (*Wet post BES*) and the BES Islands Electricity and Drinking Water Act (*Wet elektriciteit en drinkwater BES*). See *Kamerstukken II 2011/12*, 33 186, 3, pp. 2-3.

134 *Kamerstukken II 2011/12*, 33 186, 3, pp. 10, 18-19.

135 J. Kohlen & P. Kuipers, 'Stroomlijningswet – nieuwe bevoegdheden voor de reeds samengevoegde autoriteiten in ACM', (2014) 4 *Markt & Mededinging*, p. 127.

136 The competence to transfer information to other authorities stems from Art. 91 of the old Competition Act (*Mededingingswet*, *Stb.* 1997, 242) and Art. 24 of the old Independent Post and Telecommunications Authority Act (*Wet onafhankelijke post- en telecommunicatie autoriteit*)

with which one of these entities or persons is charged.¹³⁷ With the entry into force of the Iw ACM, the Minister of Economic Affairs published the Ministerial regulation on the supply of data by the ACM which contains an exhaustive list of authorities, services, supervisors and persons to which the ACM may transfer information.¹³⁸ Included on the list are the Tax and Customs Administration (*Belastingdienst*),¹³⁹ the Fiscal Intelligence and Investigation Service (*FIOD*),¹⁴⁰ the Public Prosecution Service (*Openbaar Ministerie*),¹⁴¹ the Dutch Central Bank (*De Nederlandsche Bank*),¹⁴² and the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*).¹⁴³

Second, information may be transferred to the person or entity to which the information in question pertains, if the information in question has been transferred by, or on behalf of, that person or entity.¹⁴⁴ Third, and most importantly, information may be transferred to a foreign institution when the transfer concerns information that can be of use to that foreign institution.¹⁴⁵ The term 'foreign institution' covers inter alia the competition authorities of other member States,¹⁴⁶ national sectoral supervisors (e.g., post, energy or telecom) and DG COMP.¹⁴⁷ Again, in practice, an information transfer from the ACM to DG COMP takes place on the basis of EU law; Article 7 Iw ACM only fulfils a supplementary function.

8.2.1.3 Type of information

Information is transferred to DG COMP through ECN2 before or immediately after the ACM commences its first formal investigative measure in cases that fall within the scope of Articles 101 and 102 TFEU. The information concerns mostly details on the case (to be) investigated. This information is filled in on a standardized 'Article 11(3) form' used by all NCAs and DG COMP.¹⁴⁸ No later than 30 days before the adoption of a decision, the ACM updates DG COMP on the status of the investigation. It also transfers to DG COMP a concept decision which allows DG COMP to provide for comments or suggestions. The ACM is not obliged to take these comments or suggestions into account.¹⁴⁹ In addition, when the Commission conducts its own investigations

137 Iw ACM, Art. 7(3)(a).

138 Regeling van de Minister van Economische Zaken van 15 maart 2013, nr. WJZ/12356756, houdende regels omtrent het verstrekken van gegevens en inlichtingen door de Autoriteit Consument en Markt en wijziging van een aantal ministeriële regelingen in verband met de instelling van de Autoriteit Consument en Markt (hereinafter *Regeling gegevensverstrekking ACM*), *Stc.* 2013, 8150.

139 Ibid., Art. 2(1)(a).

140 Ibid., Art. 2(1)(a).

141 Ibid., ACM, Art. 2(1)(n).

142 Ibid., Art. 2(1)(l).

143 Ibid., Art. 2(1)(p).

144 Iw ACM, Art. 7(3)(c).

145 Ibid., Art. 7(3)(b). See supra note 114 for the areas in which the ACM operates.

146 In the Shrimp case (*Garnalenzaak*), the ACM used its competence laid down in Art. 7 Iw ACM (Art. 91 of the old Competition Act) to transfer information to the German *Bundeskartellamt*. See *Beschikking van de directeur-generaal van de Nederlandse Mededingingsautoriteit als bedoeld in artikel 62, eerste lid, van de Mededingingswet, nummer 2269/326, betreft zaak: 2269/Garnalen* < https://www.acm.nl/sites/default/files/old_publication/publicaties/884_boetebesluit-kartelverbod-noordzeegarnalen-2003-01-14.pdf > (last accessed 3 October 2017), para 7.

147 *Kamerstukken I* 2012/13, 33 186, 3, p. 11; E. Lamboo, in: *Tekst & Commentaar Mededingingswet*, Deventer: Kluwer 2016, Art. 7 Iw ACM under C.

148 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty (*OJ* 2003, L 1/1), Art. 11(3).

149 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty (*OJ* 2003, L 1/1), Art. 11(4).

it can request information from NCAs through ECN2. Of particular importance in preparing an on-site inspection is information on undertakings subject to investigation in the context of Articles 101 and 102 TFEU.

The Iw ACM, which in practice does not apply in Article 101 and 102 TFEU proceedings, does not exhaustively list the types of information that may or must be transferred. Article 7(3) (b) states that any information that can be of use to a foreign institution in the performance of its tasks and is statutorily charged with the application of rules in areas in which the ACM operates may be transferred.¹⁵⁰

Certain types of information are, however, excluded from transfer on the basis of Dutch law. In 2014 the ACM adopted the ACM Procedure Concerning Legal Professional Privilege (*ACM werkwijze geheimhoudingsprivilege advocaat 2014*).¹⁵¹ This Procedure provides insight into the way in which the ACM deals with information covered by legal professional privilege (hereinafter *LPP*). It applies mostly during the *gathering of information* by the ACM, particularly when the ACM uses its power to conduct interviews and to issue production orders¹⁵² and its power to inspect business documents and records.¹⁵³ The Procedure states that a person – required by law to provide information – can claim that the information in question is covered by LPP.¹⁵⁴ If he or she can substantiate this claim by providing facts and circumstances which support the claim that the information is protected by the LPP,¹⁵⁵ this matter can be brought before a so-called LPP officer (*functionaris verschoningsrecht*). The LPP officer – who functions independently despite being employed by the ACM¹⁵⁶ – assesses whether the information in question is of a privileged nature.¹⁵⁷ If the LPP officer finds that this is the case, the information will not be transferred to the ACM file.¹⁵⁸ If the LPP officer finds that the information does not fall under the protective scope of LPP, he or she transfers the information to the ACM file after 10 working days.¹⁵⁹ Any information exchanged between the person concerned and the LPP officer may not be reused in another investigation or transferred to parties other than the person concerned.¹⁶⁰ Furthermore, the LPP officer must destroy all information exchanged between him/herself and the person concerned.¹⁶¹

8.2.1.4 Consequence of the official opening of a DG COMP investigation

The official opening of a DG COMP investigation does not have any consequences for the transfer of information from the ACM to DG COMP.

150 Iw ACM, Art. 7(3)(b).

151 *ACM werkwijze geheimhoudingsprivilege advocaat 2014* <https://www.acm.nl/sites/default/files/old_publication/publicaties/12595_acm-werkwijze-geheimhoudingsprivilege-advocaat-2014-02-06.pdf> (last accessed 5 October 2017).

152 GALA, Art. 5:16.

153 *Ibid.*, Art. 5:17(1).

154 See *ACM werkwijze geheimhoudingsprivilege advocaat 2014* supra note 133, Art. 3(1).

155 This is an implementation of the rule laid down in case C-155/79 *AM & S Europe Limited v Commission* [1982], para. 29. The person substantiates his or her claim by demonstrating the author and addressee of the information, their respective functions and responsibilities, and the ways, purpose and context in which the information has been composed. See Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akros Chemicals v Commission* [2007], para 80, cited in *ACM werkwijze geheimhoudingsprivilege advocaat 2014* supra note 133, p. 7.

156 *ACM werkwijze geheimhoudingsprivilege advocaat 2014* supra note 133, p. 7.

157 For a full overview of the procedure see *ibid.*, Arts. 3 and 4.

158 *Ibid.*, Art. 5.2.

159 *Ibid.*, Art. 5.3.

160 *Ibid.*, Art. 6(1).

161 *Ibid.*, Art. 6(2).

8.2.1.5 Limitations on the transfer of information

Speciality principle

Under Regulation 1/2003, information transferred for the purposes of applying Articles 101 and 102 may only be used in respect of the subject-matter for which it was collected by the transmitting authority.¹⁶²

Under the Iw ACM, the ACM may only transfer information to foreign institutions if the non-disclosure of the information by DG COMP is sufficiently guaranteed and there is a sufficient guarantee that the information will not be used for a purpose other than that for which it is supplied.¹⁶³ The ACM makes this assessment based on Dutch law. If the ACM finds that the above two guarantees are not sufficiently safeguarded, it can stipulate additional requirements to be met before the transfer can take place. The Iw ACM is silent on the form of such additional requirements.¹⁶⁴

Secrecy of investigations

Secrecy of investigations does not impose a limit on the transfer of information from the ACM to DG COMP.

Banking secrecy

Banking secrecy does not impose a limit on the transfer of information from the ACM to DG COMP.

Professional secrecy

Article 7 Iw ACM contains a duty of secrecy incumbent upon the ACM¹⁶⁵ which states that, in principle, information obtained by the ACM in the performance of its tasks with which it is statutorily charged¹⁶⁶ can only be used insofar as this is necessary for the execution of any such task.¹⁶⁷ This duty of secrecy is – as stated above – of a general and supplementary nature meaning that if there are specific obligations that stem from national or Union law, these latter obligations will apply.¹⁶⁸ One of the exhaustively listed exceptions, as discussed above, is the transfer to ‘foreign institutions’ if the transfer concerns information that can be of use to that foreign institution in the performance of its tasks and is statutorily charged with the application of rules in areas in which the ACM operates.¹⁶⁹ In addition, the non-disclosure of the information by

162 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*OJ* 2003, L 1/1), Art. 12(2).

163 Iw ACM, Art. 7(4). See also *Kamerstukken II* 2011/12, 33 186, 3, p. 10.

164 See Lamboo *supra* note 131, under d.

165 Art. 7 Iw ACM constitutes a *lex specialis* of the general duty of secrecy laid down in Art. 2:5 GALA.

166 See *supra* note [x].

167 Iw ACM, Art. 7(1).

168 *Ibid.*, Art. 7(2) states that the general duty of secrecy does not apply when another statutory provision governs the use of obtained information. See also *Kamerstukken II* 2011/12, 33 186, 3, pp. 10, 18-19. However, with regard to the *disclosure* of governmental information to the public, the District Court of Rotterdam has ruled that the scheme laid down in the Iw ACM is exhaustive and has priority over the arrangement laid down in the Public Access Act (*Wet openbaarheid bestuur*, *Stb.* 1991, 703). See Rb. Rotterdam 13 May 2015, ECLI:NL:RBROT:2015:3381, paras 5.3-5.7.

169 Iw ACM, Art. 7(3)(b). See *supra* note 115 for the areas in which the ACM operates.

these foreign institutions must be sufficiently guaranteed and there is a sufficient guarantee that the information will not be used for a purpose other than that for which it is supplied.¹⁷⁰

The material scope of the duty of secrecy covers the following sources of information: (i) information that undertakings are obliged to provide to the ACM by law; (ii) information obtained by using the powers vested in the ACM's supervisors by the GALA in supervising compliance with the provisions of the Competition Act and other sectoral legislation;¹⁷¹ (iii) any other information obtained by other means by the ACM.¹⁷²

Business secrecy

Business secrecy does not impose a limit on the transfer of information from the ACM to DG COMP.

Other legal limits

There are no other legal limits to the transfer of information from the ACM to DG COMP in national law.

8.2.1.6 Conditions on the use of transmitted information

The ACM does not impose conditions on the further use of information by DG COMP.

8.2.2 Transfer of information from other administrative authorities to DG COMP

8.2.2.1 Administrative authorities transmitting information to DG COMP

There are no other administrative authorities which transmit information to DG COMP (at least not on a structural basis'. The interviewees have pointed out that, on occasion, the Ministry of Economic Affairs may transfer information to DG COMP. The Ministry of Economic Affairs falls outside the scope of Regulation 1/2003 and is not constituent of the ECN.

8.2.2.2 Obligations as regards the information transfer

National law does not lay down any special rules on the transfer of information from the Ministry of Economic affairs to DG COMP.

8.2.2.3 Type of information

National law does not specify the type of information that has to be transferred from administrative authorities to DG COMP.

¹⁷⁰ Ibid., Art. 7(4).

¹⁷¹ Supervision powers, such as the interviewing of persons, production orders and entering premises, are not exercised by administrative authorities – in this case the ACM – but can only be exercised by natural persons who are appointed as supervisors under the GALA (see T. Borman, in: *Tekst & Commentaar Algemene wet bestuursrecht*, Deventer: Kluwer 2015, Art. 5:11 GALA under 2a). A supervisor under the GALA is a (natural) person who by or pursuant to a statutory regulation has been charged with supervising the observance of the provisions made by or pursuant to any statutory regulation. Administrative bodies appoint their own supervisors who will conduct the supervision and exercise the supervision powers laid down in the GALA (GALA, Art. 5:11). Specific Acts can limit the use of certain powers in the GALA or provide complementary powers. The ACM has appointed its supervisors in the ACM Designation of Supervisors Decree (*Besluit aanwijzing toezichthouders ACM*, *Stert.* 2013, 9716). See for a detailed report of the supervision powers exercised by the ACM Graat supra note 6, pp. 87-128.

¹⁷² See Lamboo supra note 131, under a.

8.2.2.4 Consequence of the official opening of a DG COMP investigation

The official opening of a DG COMP investigation does not have any consequences for the transfer of information from administrative authorities to DG COMP.

8.2.2.5 Limitations on the transfer of information

There are no limits under national law.

8.2.2.6 Conditions on the use of transmitted information

Administrative authorities do not impose conditions on the further use of information by DG COMP.

8.2.3 Transfer of information from judicial authorities to DG COMP

8.2.3.1 Obligations as regards the information transfer

The obligation to transfer to DG COMP a copy of any written judgment of a national court deciding on the application of Articles 101 and 102 TFEU stems directly from Article 15 of Regulation 1/2003. For administrative law judges this obligation is reflected in Article 8:79 GALA. Article 8:79 GALA states that a copy of a judgement must be sent, without delay, to the European Commission. The actual transmission of the judgement is done by the Council for the Judiciary (*Raad voor de rechtspraak*) unless it concerns a judgement of the Supreme Court (*Hoge Raad*) or the Council of State (*Raad van State*).¹⁷³

Where the European Commission, acting on its own initiative, wishes to submit written observations before a national court (*amicus curiae*), Article 44a of the Dutch the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) imposes an obligation on civil law judges to transmit or ensure the transmission to the European Commission of any documents which are necessary for the assessment of the case.¹⁷⁴ The duty to transmit such documents incumbent on administrative law judges stems directly from Article 15(3) of Regulation 1/2003. Article 8:45a(3) only states that where an administrative law court has transmitted such documents, it must inform the parties to the proceedings.¹⁷⁵

8.2.3.2 Type of information

A copy of the judgement after rendering a decision on the application of Articles 101 and/or 102 TFEU or, in case the Commission wishes to submit written observations before a national court, any documents necessary for the assessment of the case.

8.2.3.3 Consequence of the official opening of a DG COMP investigation

The official opening of a DG COMP investigation does not have any consequences for the transfer of information from judicial authorities to DG COMP.

8.2.3.4 Limitations on the transfer of information

There are no limits under national law.

¹⁷³ GALA, Art. 8:79.

¹⁷⁴ Art. 44a(2), *Wetboek van Burgerlijke Rechtsvordering*, Stb. 1828, 14.

¹⁷⁵ GALA, Art. 8:45a(3).

8.2.3.5 Conditions on the use of transmitted information

Judicial authorities do not impose conditions on the further use of information by DG COMP.

8.3 ECB

8.3.1 Transfer of information from national counterparts to ECB

8.3.1.1 ECB national enforcement partner

Within the framework of the Single Supervisory Mechanism, the Dutch Central Bank (*De Nederlandsche Bank*, hereinafter *DNB*) is the national competent authority¹⁷⁶ in accordance with – and for the purposes of – the Capital Requirements Regulation and the Capital Requirements Directive 2013/36.¹⁷⁷ Under the Financial Supervision Act (*Wet op het financieel toezicht*, hereinafter *FSA*), which implements EU legislation on financial supervision,¹⁷⁸ the DNB exercises prudential supervision over financial enterprises and fosters the stability of the financial sector.¹⁷⁹ In addition to its prudential supervisory tasks, the DNB also functions as a central bank and, in that capacity, exercises a number of tasks in the field of monetary policy. Other tasks of the DNB include the resolution of banks within the Single Resolution Mechanism. This report only deals with the transfer of information within the framework of the Single Supervisory Mechanism. The DNB is a public company (*naamloze vennootschap*)¹⁸⁰ and an autonomous administrative authority.¹⁸¹

8.3.1.2 Obligations as regards the information transfer

The transfer of information from the DNB to the ECB takes place on the basis of national law. The information transfer takes place as part of continuous supervision and on request. FSA Section 1.3.4. contains specific rules on the cooperation and exchange of information between the DNB and the ECB.¹⁸² FSA Article 1:69 states that the DNB cooperates with the ECB, in its capacity as the supervising authority, when such cooperation is necessary for the performance of the DNB's tasks under the FSA or the performance of the tasks of the ECB.¹⁸³

8.3.1.3 Type of information

In cooperating with the ECB, the DNB provides the ECB with *all the data and information required for the performance of its duties*.¹⁸⁴ Furthermore, the FSA mentions that the DNB,

176 The DNB only functions as an enforcement partner for the ECB when it is part of a Joint Supervisory Team.

177 *Kamerstukken II* 2014/15, 34 049, 3, pp. 3-4.

178 P. Boswijk et al., *Transnationale samenwerking tussen toezichthouders in Europa* (Research and Documentation Centre/Ministry of Justice, The Hague) 2008, p. 128.

179 Wet van 26 September 2006, houdende regels met betrekking tot de financiële markten en het toezicht daarop, *Stb.* 2006, 664, art 1:24; Wet van 26 maart 1998, houdende nieuwe bepalingen inzake De Nederlandsche Bank N.V. in verband met het Verdrag tot oprichting van de Europese Gemeenschap, *Stb.* 1998, 244, Art. 4(1)(a) and (c).

180 The DNB's sole shareholder is the Dutch State.

181 The DNB, although legally a private legal person, is an autonomous administrative authority as it has been created with the specific purpose of carrying out a governmental task. See Konijnenbelt & Van Male supra note 47, p. 63 and Wet van 26 maart 1998, houdende nieuwe bepalingen inzake De Nederlandsche Bank N.V. in verband met het Verdrag tot oprichting van de Europese Gemeenschap, *Stb.* 1998, 200.

182 These rules prevail over the more general rules laid down in GALA, Art. 2:5 and the Personal Data Protection Act (*Wet bescherming persoonsgegevens*, hereinafter *Wbp*), Art. 9(4). See Luchtman supra note 109, p. 190.

183 FSA, Art. 1:69(1).

184 FSA, Art. 1:69(2).

in cooperating and exchanging information with the ECB, *can* request information from any party, if such information is necessary for the fulfilment of a task with which the ECB, in its capacity as the supervising authority, is charged.¹⁸⁵ The purpose of the DNB's power to request information is therefore to transfer the information thus obtained to the ECB.¹⁸⁶ The power to request information may only be used in so far as this can reasonably be assumed to be necessary for the performance of its duties.¹⁸⁷ A person from whom information is requested is obliged to cooperate,¹⁸⁸ but may refuse cooperation if he or she is bound by a duty of secrecy by virtue of his or her office or profession, in so far as his or her duty of secrecy makes this necessary (see Section 8.1.2.5 for more information).¹⁸⁹

8.3.1.4 Consequence of the official opening of an ECB investigation

The official opening of an ECB investigation does not have any consequences for the transfer of information from the DNB to the ECB.

8.3.1.5 Limitations on the transfer of information

Speciality principle

See section on professional secrecy below.

Secrecy of investigations

Secrecy of investigations does not impose a limit on the transfer of information from the DNB to the ECB.

Banking secrecy

Banking secrecy does not impose a limit on the transfer of information from the DNB to the ECB.

Professional secrecy

National law imposes a strict duty of confidentiality on the DNB.¹⁹⁰ Due to far-reaching obligations incumbent upon supervised entities to transfer information to the DNB and to foster the exchange of information between these entities and the DNB, these entities should be able to trust that the information they provide remains confidential.¹⁹¹ The duty of confidentiality entails that the DNB,¹⁹² in the performance of its duties that stem from the FSA or decisions taken pursuant to the FSA, is prohibited from making any further or other use, including the exchange

185 FSA, Art. 1:70(1).

186 *Kamerstukken II* 2014/15, 34 049, 3, p. 16; M. van Eersel, 'art. 1:70 Wft, aantekening 5: betekenis van de bepaling', in: D. Busch (ed.), *Groene Serie Toezicht Financiële Markten*, Deventer: Kluwer.

187 GALA, Art. 5:13.

188 *Ibid.*, Art. 5:20(1).

189 *Ibid.*, Art. 5:20(2).

190 FSA, Section 1.5.1.

191 W. de Haan & G. Oosterhuis, *Geheimhouding en transparantie in het financieel recht en het mededingingsrecht* (Serie Preadviezen commerciële rechtspraak deel 1) Zutphen: Paris 2008, p. 21; *Kamerstukken II* 1995/96, 24 456, 3, p. 3.

192 The duty of confidentiality also extends to persons who are – or were – involved in the performance of any task which has its basis in the FSA or who have otherwise obtained information. See FSA, Art. 1:89(3). These persons include current and former employees and contractors of the DNB and others involved in the execution of the law. See Council of State 30 June 2010, ECLI:NL:RVS:2010:BM9675, para. 2.4.

of *confidential* information that the DNB (i) has gathered *suo moto*,¹⁹³ (ii) has received from a supervisory authority from another Member State,¹⁹⁴ or (iii) has received from a delegated judge, administrator or liquidator appointed in bankruptcy proceedings¹⁹⁵ or appointed because of the application of emergency regulations to financial enterprises having their registered office in the Netherlands.¹⁹⁶

The FSA does not provide for an exhaustive definition of ‘confidential information’. The FSA considers information to be confidential when it can (adversely) influence the entities’ competitive position vis-à-vis other entities or when it intervenes disproportionately in a person’s private life.¹⁹⁷ This could, for instance, concern solvency margins, information on (potential) board members, information on debtors, creditors or clients, marketing strategies, or plans for mergers or acquisitions.¹⁹⁸ Naturally, information in the public domain cannot be placed under the heading of confidential information (e.g., information that has been disclosed to third parties, with the implied consent of the entity, or information disclosed to third parties who are not bound by duties of confidentiality).¹⁹⁹ The ECB is not prohibited from making any further or other use of non-confidential information.²⁰⁰

Notwithstanding the duty of confidentiality incumbent upon the DNB, the FSA allows for the transfer of confidential information to the ECB under certain conditions.²⁰¹ The DNB *may* supply confidential data, or information obtained in the performance of its supervisory duties assigned to it pursuant to the FSA, to the ECB,²⁰² taking into account the following factors: (i) the purpose for which the confidential data or information will be used has been adequately determined,²⁰³ (ii) the intended use of the confidential data or information fits within the context of the supervision of financial markets or of persons operating on those markets; (iii) the provision of the confidential data or information is compatible with Dutch law or public order; (iv) the non-disclosure of the data or information is sufficiently guaranteed;²⁰⁴ (v) the provision of the confidential data

193 Powers provided for by the FSA, such as the power to request information laid down in Art. 1:70, and the General Administrative Law Act (hereinafter *GALA*), such as the power to enter premises laid down in Art. 5:15 or the power to take samples provided for in Art. 5:17, allow the DNB to gather information of its own volition. See for a detailed report of these powers Graat supra note 6, pp. 87-128.

194 FSA, Arts. 1:89(1) and 1:90(1).

195 Art. 14(1) of the Dutch Bankruptcy Act (*Faillissementswet*) states that, in the case of bankruptcy, the bankruptcy order shall provide for the appointment of a delegated judge from one of the members of a district court and the appointment of one or more liquidators.

196 FSA, Arts. 1:89(1) and 1:91(1). At the DNB’s request, the court within whose jurisdiction the credit institution has its registered office can declare emergency regulations to be applicable when the solvency or liquidity of the credit institution shows signs of a dangerous development and no improvement of that development may be expected within reason or (ii) when it may be expected within reason that the credit institution will be unable to honour all or part of its obligations in respect of the funds it has obtained.

197 *Kamerstukken II* 2003/04, 29 708, 3, p. 47.

198 *Ibid.*, p. 47.

199 *Ibid.*, p. 47.

200 C. Grundmann-van de Krol & J. Hijink, *Koersen door de Wet op het financieel toezicht*, The Hague: Boom 2012, p. 693. See also Council of State 30 June 2010, ECLI:NL:RVS:2010:BM9675, para. 2.4

201 FSA, Art. 1:90(8); *Kamerstukken II* 2003/04, 29 708, 3, pp. 299-300. This national report only mentions those circumstances that are of direct relevance to the project. Other circumstances, such as the transfer of information to supervisors in other Member States, to a delegated judge in bankruptcy proceedings, or to a body entrusted with exercising powers to prosecute, are not dealt with. See FSA, Arts. 1:90, 1:191 and 1:92.

202 FSA, Art. 1:90(1).

203 This requires that the DNB ascertains for which purpose the ECB will use the information in question. See *Kamerstukken II* 2003/04, 29 708, 3, p. 56; *Kamerstukken II* 1992/93, 23 170, 3, p. 8.

204 The confidentiality of the information, once transferred to the ECB, must be guaranteed. See *Kamerstukken II* 2003/04, 29 708, 3, p. 56; *Kamerstukken II* 1992/93, 23 170, 3, p. 8.

or information is not or might not reasonably be considered to be contrary to the interests that the FSA seeks to protect; and (vi) there is a sufficient guarantee that the confidential data or information will not be used for a purpose other than that for which it is supplied.²⁰⁵ Where the DNB has obtained confidential information from a supervisory authority of another Member State, the DNB may not disclose it to the ECB, unless the supervisory authority from which the data or information was obtained has expressly consented to the disclosure of the data and information and, where applicable, has consented to the use of this data or information for a purpose other than that for which it was supplied.²⁰⁶

Business secrecy

See section on professional secrecy above.

Are there any other legal limits to the transfer of information in domestic law or domestic practice?

There are no other legal limits to the transfer of information from the DNB to the ECB in national law.

8.3.1.6 Conditions on the use of transmitted information

If the ECB asks the DNB for permission to use confidential data or information for a purpose other than that for which it was supplied, the DNB may only grant this request if the following three, cumulative, requirements are met:²⁰⁷ the intended use is not contrary to what is mentioned in the last paragraph of the section on professional secrecy above., the ECB could obtain the information in question for that other purpose in a manner not provided for in the FSA with due observance of the applicable statutory procedures and – in case the request concerns criminal acts – after consultation with the Minister of Justice.²⁰⁸

8.3.2 Transfer of information from other administrative authorities to ECB

8.3.2.1 Administrative authorities transmitting information to ECB

The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, hereinafter *AFM*) – the Dutch market conduct supervisor – transfers information to the ECB on certain occasions.

See Section 8.4.1.1 for more information on the AFM.

8.3.2.2 Obligations as regards the information transfer

Recital (33) and Article 3(1) of the SSM Regulation state that the ECB, where necessary, should enter into memoranda of understanding (hereinafter MOU) with the competent authorities responsible for markets in financial instruments describing in general terms how they will cooperate with one another in the performance of their supervisory tasks under Union law in

205 FSA, Art. 1:90(1).

206 Ibid., Art. 1:90(2).

207 Ibid., Art. 1:90(3).

208 During consultation the Minister of Justice establishes whether the requested confidential information can also be obtained by means of mutual legal assistance. If so, the information shall be provided; if not, the request shall be denied due to incompatibility with public order. See *Kamerstukken II 1992/93*, 23 170, 3, p. 9.

relation to the financial institutions referred to in the SSM Regulation.²⁰⁹ The ECB has concluded such an MOU with the AFM.²¹⁰

The MOU falls outside the scope of the SSM framework.²¹¹ The MOU does not establish any legally binding obligations nor supersedes any provisions of national, international or supranational legislation in force in the Netherlands or any Union law applicable to the ECB or the AFM.²¹² However, the parties do intend to use their best efforts to provide each other, to the fullest extent possible, with mutual assistance in the performance of their respective tasks.²¹³ In doing so, information may be transferred on request or on the AFM's or ECB's own initiative.²¹⁴

8.3.2.3 Type of information

The MOU's scope covers financial markets legislation,²¹⁵ the SSM Regulation and the national legislation transposing both (hereinafter the *applicable legislation*).²¹⁶ Cooperation and the transfer of information can concern in particular: (i) general supervisory and regulatory issues; (ii) issues relating to the operations, activities, and regulation of supervised entities; (iii) investigation and enforcement of the provisions of the applicable legislation falling within the remit of the AFM's and ECB's respective tasks; and (iv) any other areas of mutual supervisory interest.²¹⁷

The MOU states more in particular that the AFM, pursuant to the applicable legislation and within the scope of its respective tasks and obligations, will use its best efforts to transfer information, also in the form of sharing documents prepared by the AFM or otherwise in its possession, that is needed for the performance of the ECB's duties under the applicable legislation.²¹⁸ Within the context of investigations and on-site inspections, the AFM can transfer information to the ECB in connection with its on-site inspection programmes, as appropriate and purely for coordination purposes, insofar as the planned inspection refers to a supervised entity either individually or at the group level and the exchange is relevant for their respective supervisory tasks.²¹⁹ The AFM can also notify the ECB of any non-public enforcement or sanction decision against a supervised entity which is also supervised by the ECB.²²⁰

8.3.2.4 Consequence of the official opening of a ECB investigation

The official opening of an ECB investigation does not have any consequences for the transfer of information from the AFM to the ECB.

209 Council

210 Memorandum of Understanding on cooperation between the European Central Bank and the Netherlands Authority for the Financial Markets (SSM/2017/0210) < <https://www.afm.nl/nl-nl/over-afm/werkzaamheden/internationale-samenwerking/mou> > (last accessed 14 January 2018).

211 A. van Gelder & P. Teule, 'Gedragstoezicht en het SSM: op weg naar een nieuwe balans' (2014) 11 *Tijdschrift voor Financieel Recht*, p. 464.

212 Memorandum of Understanding supra note 199, Art. 3(2).

213 Ibid.

214 Ibid. A detailed procedure for the exchange of information or assistance is laid down in Art. 6 of the Memorandum.

215 This covers Directive 2004/39/EC on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC and repealing Council Directive 93/22/EEC (*OJ* 2004, L145/1); Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (*OJ* 2014, L 179/349); Regulation (EU) 600/2014 on markets in financial instruments and amending Regulation (EU) 648/2012 (*OJ* 2014, L 173/84). See Memorandum of Understanding supra note 199, Art. 2(5).

216 See Memorandum of Understanding supra note 199, Art. 2(8).

217 Ibid., Art. 3(1).

218 Memorandum of Understanding supra note 199, Arts. 3(2) and 4.

219 Ibid., Art. 5(2).

220 Ibid., Art. 5(3).

8.3.2.5 Limitations on the transfer of information

The MOU states that a transfer of information may be denied where cooperation with a request for information would require the AFM to act in a manner that would violate the applicable legislation or be detrimental to the effective performance of its tasks; a request falls outside the supervisory tasks of the AFM; a request for information is not made in accordance with the terms of the MOU; or where complying with a request is likely to adversely affect the AFM's own investigations, enforcement activities or – where applicable – a criminal investigation.²²¹

In addition, the MOU explicitly states that it does not supersede national law and the transfer of information need only take place to the extent permitted by national law.²²² As the AFM operates under the same transfer of information regime as the DNB in its capacity as a supervisory authority, the limits which stem from the FSA detailed in Section 8.3.1.5 apply mutatis mutandis to a transfer between AFM and ECB.²²³

There are no other legal limits to the transfer of information from the AFM to the ECB.

8.3.2.6 Conditions on the use of transmitted information

The MOU states that the ECB may use confidential information and confidential documents received under the MOU solely for the exercise of its respective tasks and duties resulting from the applicable legislation.²²⁴ In order to use information and documents received under the terms of the MOU for a different purpose, the ECB will be required to obtain prior written consent from the AFM.²²⁵

8.3.3 Transfer of information from judicial authorities to ECB

There are no obligations for judicial authorities to transfer information to the ECB under national law.

8.4 ESMA

8.4.1 Transfer of information from national counterparts to ESMA

8.4.1.1 ESMA national enforcement partner

The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, hereinafter *AFM*) is the national competent authority for the purposes of Regulation 1060/2009 on credit rating agencies²²⁶ and for trade repositories under Regulation 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR).²²⁷ The AFM, like the DNB, operates under

221 Ibid., Art. 6(4).

222 Ibid., Arts. 3(2) and 4.

223 Both the DNB and the AFM are supervisors (*toezichthouders*) to which the general part of the FSA (Arts. 1:1-1:129) applies. Of particular importance are FSA, Arts. 1:69, and 1:89-1:93.

224 See Memorandum of Understanding supra note 199, Art. 7(1).

225 Ibid., Art. 7(2).

226 Regulation 1060/2009/EC on credit rating agencies [2009] OJ L 302/1, Art. 22 in conjunction with FSA, Art. 5:89 in conjunction with Regeling aanwijzing bevoegde autoriteit toezicht effectenverkeer, *Stcrt.* 1995, 25. See also Besluit uitvoering EU-verordeningen financiële markten, Art. 2(1)(d)(1^o) and the explanatory memorandum to Wijziging van de Regeling aanwijzing bevoegde autoriteiten toezicht effectenverkeer in verband met wijziging van de grondslag voor aanwijzing van de bevoegde autoriteit voor het toezicht op ratingbureaus in de Wet op het financieel toezicht, *Stcrt.* 2011, 11753.

227 Besluit uitvoering EU-verordeningen financiële markten, Art. 2(1)(i)(2).

the FSA, but functions as the financial conduct authority exercising supervision over orderly and transparent financial market processes, integrity in relations between market parties and due care in the provision of services to clients.²²⁸ The AFM is a foundation (*stichting*)²²⁹ and an autonomous administrative authority.²³⁰

8.4.1.2 Obligations as regards the information transfer

The transfer of information from AFM to ESMA is bound by the same regulatory regime as the transfer from DNB to ECB because the rules laid down in the FSA apply *mutatis mutandis* to the AFM (see Section 8.3.1.2.). This entails that the AFM cooperates with ESMA, in its capacity as supervising authority, in case such cooperation is necessary for the performance of the AFM's tasks under the FSA or the performance of the tasks of ESMA.²³¹ In practice however, supervision in the framework of Regulation 1060/2009 and Regulation 648/2012 is carried out directly and only by ESMA, i.e., there is no doubling of supervision by both the AFM and ESMA.²³² This means that where ESMA requires information it will, in most cases, request the information directly from credit rating agencies (CRAs) or trade repositories (TRs). On the occasion that ESMA would require information held by the AFM, the AFM transfers information under the regime set out in Section 8.3.1.2. et seq. Again, in practice – as the Netherlands does not host any CRAs or TRs – such a request has yet to take place and AFM does not have any past experience with such requests.

ESMA can also delegate supervisory tasks to the AFM. For CRAs, national rules on delegation are organised in the FSA. For TRs, national rules on delegation can be found in the Decree on the Execution of EU Regulations on Financial Markets (*besluit uitvoering EU-verordeningen financiële markten*).²³³ Neither deals with the transfer of information from AFM to ESMA. In practice, delegation has never occurred: ESMA has always carried out its supervisory tasks autonomously.²³⁴

8.4.1.3 Type of information

See Section 8.3.1.3.

8.4.1.4 Consequence of the official opening of an ESMA investigation

The official opening of an ESMA investigation does not have any consequences for the transfer of information from the AFM to ESMA.

228 FSA, Art. 1:25.

229 Dutch Civil Code (*Burgerlijk wetboek*), art 2:3.

230 See the online register for autonomous administrative authorities, <https://almanak.zboregister.overheid.nl/overzicht_op_alfabet> (last visited 18 September 2017).

231 FSA, Art. 1:69(1).

232 This is different in cases where ESMA is not the sole supervisor, such as market abuse. In those cases the AFM and ESMA both carry out supervisory tasks and exchange information with one another.

233 Besluit van 8 november 2012, strekkende tot uitvoering van EU-verordeningen op het terrein van de financiële markten en tot wijziging van het Besluit bestuurlijke boetes financiële sector in verband daarmee, *Stcrt.* 2012, 567.

234 Interview with Ellen Boelema, Strategic Policy Advisor AFM and Marit de Vrijer, Policy Advisor Public & International Affairs AFM (18 October 2017).

8.4.1.5 Limitations on the transfer of information

Speciality principle

See section 8.3.1.5. under professional secrecy.

Secrecy of investigations

Secrecy of investigations does not impose a limit on the transfer of information from the AFM to ESMA.

Banking secrecy

Banking secrecy does not impose a limit on the transfer of information from the AFM to ESMA.

Professional secrecy

See section 8.3.1.5 under professional secrecy.

Business secrecy

Business secrecy does not impose a limit on the transfer of information from the AFM to ESMA.

Other legal limits

See Section 8.3.1.6.

8.4.1.6 Conditions on the use of transmitted information

The AFM does not impose conditions on the further use of information by ESMA.

8.4.2 Transfer of information from other administrative authorities to ESMA

8.4.2.1 Administrative authorities transmitting information to ESMA

There are no other administrative authorities transferring information to ESMA.

8.4.3 Transfer of information from judicial authorities to ESMA

There are no obligations under national law.