11. Summary of main findings and overall conclusions

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11.1 Introduction: the goals of this project

This project addressed the question of whether there is a need to recalibrate and improve the OLAF legislative framework for the gathering of information and evidence related to suspicions of irregularities or fraud affecting the EU's financial interests. It has done so by comparing the OLAF framework with other bodies of EU law with law enforcement tasks, i.e. tasks in the area of monitoring individuals and economic actors, investigating alleged infringements by them and, possibly, sanctioning these infringements.

For this purpose, we have identified DG Comp, ESMA and ECB as the relevant authorities. Obviously, there are also differences between these authorities (mutually, and in relation to OLAF). Particularly ESMA and ECB also have other tasks than enforcing EU law. These authorities are primarily supervisory authorities; they monitor actors which needs an authorization by these authorities before they can become active. As a consequence, ECB's and ESMA's information position is generally of a high level, particularly because the economic actors concerned have a direct interest in cooperation with them.

By contrast, the position of OLAF, and also DG Comp, is quite different. These bodies cannot automatically rely on the cooperation of the individuals (potentially) under investigation.[2] Their activities are not related to a relatively closed circuit of known undertakings, but concern entire EU markets or policy areas. 'Finding the right cases' is already a momentous task in such an open setting. This is also why some argue that powers of criminal investigation are of more use in these areas, where potential cases are unknown and potential offenders are not likely to cooperate voluntarily.

Although there is merit in these considerations, they are not the end of the story. First of all, they do not do away with the fact that the EU legislator has in fact entrusted ECB and ESMA with enforcement tasks, and corresponding powers. Though practical experience with those powers is limited, these authorities are required by law to investigate infringements of EU law and to sanction violations thereof. These can be punitive sanctions. As a consequence, criminal procedural safeguards have to be taken into account.

There is another similarity that merits specific attention. Like OLAF, the frameworks of ECB, ESMA and DG COMP can come into contact with criminal law enforcement *sensu stricto*, mostly for natural persons, but sometimes also for the undertakings concerned. That means that the follow-up of their investigations – and the safeguards possibly to be applied as

1 The authors thank Ms. Danielle Arnold for her very valuable assistance during the writing of chapter 11.

2 DG Comp's leniency policies obviously tackle a substantive part of the problems.

a result thereof – need specific attention. The debate on the potential of the EU Charter and the applicable fundamental rights standards are of interest here. Even where investigations are purely administrative at the start, they cannot make criminal law safeguards at a later stage illusory.[3]

The foregoing explains why ECB, ESMA and DG Comp are relevant authorities for a comparison with OLAF. Such a comparison will enable an analysis of the similarities and differences in the respective legislative frameworks of these bodies. Taking into account the differences in tasks and positions, recommendations for the improvement of the OLAF legislative framework can be made in cases where no reasonable explanation for these differences can be found and they hamper the fight against EU fraud and/or the rights of the individual. This project has focused specifically on how these authorities interact with the national legal orders. The comparative analysis of the different authorities and their interactions with six national legal orders took place on the basis of the following research questions:

1) What powers do these authorities have at their disposal (and, possibly, explain why some authorities have less or more powers than the others);
2) How are fundamental rights and procedural safeguards integrated into these systems and, if so, at which level (national or EU?);
3) How is judicial control organized;
4) How does the design of these powers anticipate a possible subsequent use in criminal proceedings; and
5) Do pending criminal investigations hamper the functioning of the investigations by the EU authorities?

11.2 Again: different models for interaction

In chapter 10.2 we have introduced four models to help analyze the interaction between the EU authorities and the national legal orders of the Member States. They all emphasize the need to integrate national legal systems into the institutional design of the EU authorities. The links with the national legal orders help to deal with language problems and becoming acquainted with local customs, but also remove certain capacity problems at EU level. Moreover, shared enforcement can promote the sharing of knowledge and best practices in the European Union and contribute to the creation of a harmonized enforcement culture and a level playing field.[4] Finally, in all cases where EU authorities meet opposition and coercive powers are needed, national law comes into play.

Simultaneously, the authorities all have to deal with the challenge of guaranteeing such interaction between the national and European levels, while also ensuring a European level playing field. The *raison d'être* of the authorities is after all their EU-wide mandate.[5] This mandate not only has a vertical dimension of interaction between the EU and national legal orders (including the prevention of conflicts between national and EU law), but also a horizontal one. As the EU

3 Cf. M. Luchtman, 'Transnational Multi-disciplinary Investigations and the Quest for Compatible Procedural Safeguards,' in K. Ligeti & V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US* (2017).

4 Cf. 2016 Special report No. 29 of the European Court of Auditors, 'Special Report Single Supervisory Mechanism – Good start but further improvements needed', p. 63 (with respect to the SSM framework).

5 M. Scholten et al. in M. Scholten & M. Luchtman (eds), *Law Enforcement by EU Authorities. Political and judicial accountability in shared enforcement* (2017) [forthcoming].

authorities are also active on the territories of various Member States, diverging national laws may hamper their operational activities (during investigations, but they may also prevent a later use as evidence of material acquired under a different set of laws).

The foregoing analysis reveals that the main instruments for dealing with this dilemma are, first, via different ways of the allocation of tasks to the EU or national level (exclusive or shared competences); second, via different models for such interaction (autonomous investigations, mixed investigations, *Organleihe* and mandated investigations as well as mutual administrative assistance); and, third, via different ways of determining the applicable law in a vertical setting to achieve a level playing field (from unification, to harmonization, to bottom-up/voluntary accommodation of EU law by national legal systems).

Obviously, the models have different consequences for the interaction between the EU and national legal orders. Autonomous on-site inspections, *Organleihe* and mandated investigations have the advantage of a truly European level playing field, but only if EU authorities are also given truly autonomous powers (and have to take account of corresponding safeguards). As explained by AG Kokott, in relation to legal professional privilege: 'Indeed, the interpretation and application of legal professional privilege in a uniform manner across the European Union is essential for the purposes of investigations conducted by the Commission in antitrust proceedings. The uniform application of EU law would be adversely affected if decisions on the lawfulness of acts adopted by the organs of the Union were made by reference to provisions or principles of national law; the lawfulness of such acts – in this case, the lawfulness of search measures carried out by the Commission as European competition authority – can be judged only in the light of EU law. The introduction of special criteria stemming from the legislation or constitutional law of a particular Member State would damage the substantive unity and efficacy of EU law as well as of the internal market.'[6]

There is no doubt that such models require a high degree of integration (substantive and procedural laws) and also a clear delineation of tasks between the EU and national authorities in order to avoid problems with the principle of legal certainty, stipulating that rules involving negative consequences for individuals should be clear and precise and their application predictable for those who are subject to them.[7] This finding is confirmed by our analysis of the frameworks for ECB, DG Comp and ESMA. OLAF, though capable of conducting autonomous on-the-spot checks, seems to be the exception that confirms the rule. It is dependent on national partners, even when conducting its own investigations. The result can be nothing other than a conflict between its mandate and the instruments necessary to execute it.

However, even completely autonomous models of law enforcement still need integration into national law. This is illustrated, first, by the fact that the use of genuine coercive powers ('the opening of doors') remains in the hands of the Member States. Second, autonomous EU inspections may be hampered by clashing national interests (ongoing national investigations, for instance), and *vice versa*. Third, EU authorities may need information from their national partners for the exercise of their duties (before or during the investigation). Finally, the results of autonomous investigations may later be used in national proceedings. This, too, requires a certain amount of coordination, particularly in the area of the harmonization of defence rights. Whereas

6 Opinion, Case C-550/07 P, *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd*, [2010] ECR I-08301, ECLI:EU:C:2010:229, paras. 167-168.

7 Case C-550/07 P, *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd*, [2010] ECR I-08301, ECLI:EU:C:2010:512, para. 100, with further references; see also supra chapter 10.3.

EU law should at all times respect the obligations of the Charter, national evidentiary laws, in turn, should facilitate, where possible, the use of materials that were gathered by EU authorities.

Mixed investigations and mutual assistance, on the other hand, are less intrusive from the perspective of Member States and can arguably better accommodate conflicts between the national and EU legal orders. Yet the risk of losing a level playing field is eminent. This is also why these areas of interaction still require a significant level of approximation of laws to realize an equivalent set of rules in all the participating Member States and also to ensure a later use of evidence in punitive proceedings.

11.3 Conclusions and possible strategies for OLAF's legal framework

The models for interaction between the EU and national authorities are not only a suitable way to analyze OLAF's legal framework and to pinpoint and explain inconsistencies within its legal framework by comparing it to others. As the models impose different requirements on the allocation of powers, safeguards and remedies, they also stress the need for different strategies to overcome difficulties in ensuring a level playing field for such powers, safeguards and remedies. Indeed, the models pose quite different challenges with respect to investigative powers, applicable safeguards and judicial control.

To that extent, they are also of assistance for the more forward-looking ambitions of this project. In the remainder of this section, we will introduce our main findings and indicate what could be the legal consequences of these for OLAF's legal-institutional framework. We will do so by consequently dealing with the organizational requirements, the investigative powers included in this project, the applicable safeguards and remedies, as well as the need to take consecutive stages of the proceedings into account, including, possibly, criminal trials in the Member States.

11.3.1 Tasks and powers of the EU authorities and their partners

The four EU authorities have all been entrusted with powers of law enforcement. But their organizational setting is different. Unlike for OLAF, ECB (significant entities) and ESMA exercise exclusive jurisdiction over undertakings (monitoring, investigation, sanctions). DG Com shares the responsibility to enforce Arts 101 and 102 TFEU with national authorities (parallel competences of investigation and sanctioning).[8] OLAF, on the other hand, has certain investigative competences, which may be exercised in parallel with the competences of other (national/EU) authorities, but is at any rate dependent on IBOAs or Member States for the follow-up (particularly sanctioning).

Our analyses show that there appears to be no imperative link between the tasks of the EU authorities (exclusive, or not), on the one hand, and the models for interaction with their national partners on the other. Although it is true that some models (autonomous investigations, *Organleihe*, mandated investigations) are particularly suitable in the setting of exclusive competences at EU level (ESMA; ECB), the reverse is not necessarily true. Autonomous investigations can in our view be very helpful in a setting of shared competences between the EU and the national level. Indeed, the concept of autonomous investigations is well known to all these authorities. In a similar vein, there exists no clear relationship between the competences of the EU (exclusive or shared; Arts. 3-4 TFEU) and the models chosen. Rather, our analysis shows that also in those areas

8 With the exception of Art. 17 Regulation No. 1/2003, there is no real monitoring stage in competition law.

where competences are exclusively European, national law and national authorities continue to play a role.

We have seen, however, a clear link between the models and the applicable legal rules. In our view, particularly for autonomous investigations, it is essential that these take place on the basis of a uniform legal framework defining the powers of the authorities, including the possible consequences in cases of non-cooperation (through imposing fines, but also via ensuring the assistance by national law enforcement officials). It also implies the powers to enforce investigative acts (and to introduce remedies at the corresponding EU level). This is indeed the case for ECB, ESMA and DG Comp.

It is particularly at this point where the OLAF framework differs significantly from the other authorities (autonomous investigations). While formally in the form of regulations, the main instruments for OLAF do not state that the necessary investigative powers should work autonomously (for investigations in the Member States); rather they indicate what information should ultimately be made available to OLAF via the powers of national law. The regulations therefore refer back to national law on many crucial points. Yet, in turn, at the national level specific legislation for OLAF is in many cases fragmented or absent. Of the countries in this study, only the Netherlands has introduced specific legislation covering this aspect, but even then cooperation in, particularly, the area of expenditure remains difficult. We clearly see that the absence of such a framework causes great uncertainty in practice, as is well illustrated, for instance, in the French report. In addition, OLAF's 'administrative' statute has led to additional hurdles in Germany and the Netherlands, where customs and tax authorities have far-reaching (criminal law) powers in the national setting (like the *Guardia di Finanza* in Italy), but those are not used or cannot be used for OLAF investigations. As soon as an on-the-spot check turns into a suspicion, the investigation has to be halted and is handed over to the judicial authorities in these countries.

By contrast, the regulations of the other authorities do provide for enforceable investigative powers on the basis of directly applicable EU law. Competition law has led the way in this regard with respect to the legal design of powers for the interviewing of persons, production orders and on-the-spot checks. The content and scope of these powers follows directly from the applicable regulations. These powers can be enforced, if taken in the form of a decision; such powers bring about a change in the legal position of the person concerned. By enforcement, we then mean the imposition of a penalty in cases of non-cooperation, not the use of (physical) coercion which remains the competence of national authorities for understandable reasons.[9] However, none of these authorities have powers in the area of the online monitoring of bank accounts or the interception of telecommunications (except, to some extent, traffic data).[10]

The question is to which extent there really is a causal link between the ECB's and ESMA's fining powers and their strong information position. Arguably, this strong position is not so much because of the (mere threat of) fines for non-cooperation, but because the economic actors all require an authorization from these authorities to become active.[11] All of this begs the question as to whether powers of administrative oversight are sufficient in policy areas which are by definition 'open'.[12] We will not deal with this issue further, as it falls outside the scope of this

9 Supra chapter 9.3.4.1, sub b.
10 Supra chapter 10.7.5.
11 As is also indicated by the transversal report, cf. chapter 9.3.3.1, sub a.
12 Cf. the conclusions of the German report, supra 3.5.

project and also relates to the relationship between OLAF and the EPPO. Suffice it to say that the fining power is also available to DG Comp, which is in a more comparable position to OLAF. Moreover, we must note that combinations of administrative and criminal law regimes are not uncommon for such open regimes either, particularly where reactions to law infringements not only lead to punitive, but also to reparatory sanctions. Rather than questioning the effectiveness of administrative enforcement in such a setting, we therefore submit that these areas require strong coordination between administrative and criminal law enforcement regimes. This is necessary for effective law enforcement cooperation, but also to prevent criminal law safeguards from becoming illusory at a later stage.

The need for uniform rules at EU level does not, of course, do away with the need for a robust framework for cooperation at the national level. Autonomous investigations still need coordination with national law. Indeed, the examples of ECB, ESMA and also DG Comp show how important a strong national framework is for the EU authorities. The relevant rules and regulations ensure a) that there is a national counterpart for cooperation with the EU authority in each sector, b) that these authorities cooperate with the EU authority by sharing operational information, c) possess a certain set of investigative powers for that purpose (interviews, productions orders, site visits), including – particularly – the assistance of the police or equivalent forces, and – in cases of concurrent jurisdiction, such as in competition law with respect to Arts. 101 and 102 TFEU – d) coordination with ongoing national cases, as well as e) provisions with respect to admissibility as evidence (including the need for equivalent standards of legal protection).[13]

By contrast, such a framework is not available to OLAF. The national AFCOs provide very useful services, but they are (mostly) coordinative bodies. Because of OLAF's complicated mandate, operational cooperation at the national level remains difficult, particularly for EU expenditure. The other issues (powers, the sharing of information, coordination) do not even come into play under those circumstances.

The foregoing considerations hold true *mutatis mutandis* for the other types of interaction between the EU and the national level. The problems referred to in the above do not appear to be fundamentally different for mixed investigations or requests for mutual assistance. In such instances, however, there appears to be a lesser need for a uniform EU framework. In order to reconcile the sometimes contradictory requirements of respecting national laws and a level playing field, the harmonization or approximation of laws may be sufficient. Compared to the other areas of law, only OLAF uses the concept of mixed investigations.[14] Administrative powers of investigation are however not harmonized, as is the case in the other areas of study. We did come across mutual assistance as a type of interaction between the EU and the national level, particularly in the area of competition law (Art. 22 (3) Reg. 1/2003), but there is not much practical experience with that type of assistance.

11.3.2 The applicable safeguards

The debate on the applicable fundamental rights standards, as well as the remedies available, are another important point of attention. Particularly where investigative tasks are exercised in

13 The latter consideration was not a part of this study.

14 As indicated in the above, we do not consider JSTs (ECB) to be such investigations, because representatives of NCAs do not execute their own national tasks in such a setting, but are part of the ECB structure; supra chapter 10.2.

parallel or are later used as evidence in national criminal proceedings, such issues do emerge. While administrative investigations do not necessarily have to take into account the relevant safeguards of criminal procedure, it may be wise to anticipate such use during the stage of gathering information.[15] This holds true for exclusive, as well as shared competences. That approach – which again needs backing by the evidentiary laws of the Member States – is clearly represented by Regulation 883/2013, particularly Art. 9.

The provisions in Art. 9 of Regulation 883/2013 are not found in the regulations of ECB, ESMA and DG Comp, not even after formal investigations have started. As indicated in the above, their legal frameworks are almost silent on the applicable safeguards (the privilege against self-incrimination, access to a lawyer and LPP). The difference with the OLAF framework may be explained by the position of OLAF, whose tasks are related to fraud or related investigations and, therefore, to criminal prosecution. But this cannot be a fully satisfactory explanation. As we have seen in the above, similar questions may come up in other areas of law, because punitive (administrative and sometimes criminal) sanctions are available there, too. The unanswered question is therefore why similar provisions have not been included in their frameworks.

In connection with this, we must note that there appear to be differences between the case law of the Court of Justice and the European Court of Human Rights, particularly with respect to the privilege against self-incrimination. The differences relate particularly to (the use of compulsory powers to obtain) statements. Although case law is scarce, the distinction between factual questions and questions related to the admission of guilt seems to be unknown in the Strasbourg case law, although that court has sometimes held that the use of compulsion in order to obtain answers to simple questions does not contradict the privilege.[16]

The overall picture is therefore that while OLAF has few truly autonomous powers of investigation, it needs to take into account procedural safeguards that exceed those of the other authorities, even though OLAF investigations themselves cannot be considered to be criminal proceedings; i.e. proceedings where criminal charges are instigated or procedures that are part of punitive sanctioning. Indeed, the absence of important fundamental rights guarantees and the apparent arbitrariness by which some safeguards have been mentioned and others not is a striking observation.

The foregoing conclusions relate primarily to autonomous investigations by the EU authorities. With respect to other types of cooperation between the EU authorities and national partners, much depends on the applicable law. We can after all discern differences between the relevant fundamental rights standards at the national and the EU level. That is of particular relevance for mixed investigations and mutual assistance proceedings (in which national law is applied). Within the setting of mixed investigations, this could lead to an erosion of EU standards, in cases where national standards are lower. At any rate, however, as the national authorities would then also apply EU law, the minimum thresholds of the Charter need to be respected. This appears to be particularly relevant for LPP, because this principle as such is not protected in administrative proceedings in Poland and Germany. *Vice versa*, the question is also at which stage higher national constitutional guarantees – such as, again, LPP (in-house lawyers) and the privilege against self-incrimination in some countries (Germany)[17] – would render the EU investigations ineffective. There is still no case law on this matter.

15 M. Luchtman in K. Ligeti & V. Franssen, supra note 3.
16 Supra chapter 10.3.
17 Supra chapter 10.5.6.

Particularly the latter situation (higher national standards) appears to be relevant for OLAF in the setting of mixed investigations, as OLAF then needs to respect both the EU and the national rules (Art. 3 Reg. 883/2013). The former situation (lower national standards) may arise during the execution of requests for mutual assistance by national authorities. In those situations, there is a risk that the safeguards of the national legal order and those of the EU order are played off against one another and that there are problems for individuals in determining the applicable legal rules. That risk is particularly pertinent in areas where competences are shared, like the PIF area but also competition law.[18]

11.3.3 The applicable remedies; judicial control

The legal design of the investigative acts also determines whether remedies at the EU level are available. Where non-cooperation can lead to the imposition of sanctions, those measures will usually take the form of a decision, which can be appealed before the General Court. Those decisions concern the decision to execute, for example, the on-site inspection itself, not the individual investigative acts during that inspection.[19] The way such inspections are carried out can be challenged later, during the main proceedings (if any). As follows from the above, this means that for ECB,[20] ESMA and DG Comp remedies are offered at EU level. In those instances, the actions of these bodies bring about a distinct change in the legal position of the individuals concerned. As is well known, this is different for OLAF, because OLAF cannot enforce its investigative acts itself.

The question is to which extent other types of investigative action – for instance those capable of interfering with one's privacy – can also be appealable at the EU level and/or require other types of judicial control (e.g. judicial authorization). To a large extent, this issue coincides with our previous remarks, because investigative acts intruding on privacy are only enforceable through a decision (which, as a rule, will not have a suspending effect).

Real coercive powers ('opening the door') are not available at EU level. To that extent, it is no surprise that judicial control concerning such powers also remains at the national level. National judicial bodies have a (limited) role, prior to on-site inspections (in cases of expected opposition) and access to traffic data (ESMA). In those instances, EU law allows for a judicial warrant procedure at the national level. The scope of the authorization is limited to a strict test of proportionality and the prevention of arbitrariness. Moreover, the procedure is optional. In our view, the leeway that is thus offered to the cooperating authorities is regrettable.[21] However, as such it does not appear to be in contradiction with the relevant case law of the Strasbourg and Luxembourg courts. There was some controversy, for instance in the Netherlands, as to whether judicial authorization for inspecting business premises would be necessary, after it became clear that a 'home' as referred to in Art. 8 ECHR also includes the registered office of a company run by a private individual and a legal entity's registered office, branches or other business premises.[22]

18 Supra chapter 10.3.

19 It is likely that the same holds true for ECB and ESMA; cf. chapter 9.5.

20 See, however, the remarks on information requests in the ECB framework, supra chapter 10.5.4.

21 See also section 9.3.2.1, sub b. The important exception is found in Art. 21 Regulation No. 1/2203 (inspection of other premises), including homes. Art. 21 (3) states that a decision to inspect cannot be executed without prior authorisation from the national judicial authority of the Member State concerned. The wording is mandatory, and rightfully so.

22 *Société Colas Est a.O. v. France*, Decision of 16 April 2002, [2002] ECHR, para. 41.

Because of this, a discussion arose as to whether entering premises that did not formally qualify as a home ('*woning*') under Dutch law, but did fall under the scope of Art. 8 ECHR, required *ex ante* judicial authorization.[23] Until now, Dutch case law has not followed this reasoning.[24] This appears to be in line with both 'Strasbourg' and 'Luxembourg', as both hold that the presence of a post-inspection judicial review is capable of offsetting the lack of prior judicial authorization.[25]

As with the applicable legal safeguards, the issue of the availability of the remedies in principle depends on the specific model for interaction. As a rule of thumb, actions by EU authorities (producing a distinct change in the legal position) are to be challenged at EU level, in due time,[26] whereas acts by national authorities can be challenged at national level (if need be with the assistance of the Court of Justice via Art. 267 TFEU).[27] Some of the more advanced ways of cooperation pose challenges in this respect. Those challenges relate to JSTs or instructions in the ECB setting, but also to issues of delegation in ESMA investigations.[28] There is as yet no case law on this.

It is a starting point of the EU system of court organization that Member States shall ensure effective legal protection in the fields covered by EU law (Art. 19 TEU). Some of the national reports (France, Italy and the Netherlands, for instance) indicate that remedies against specific investigative acts are not always available. Legal protection is offered if fines are imposed for non-cooperation, or upon the conclusion of the main proceedings. These systems are problematic if they are applied automatically – i.e. without adjustments – to the setting of mutual assistance. In such instances, there may be no EU or national court that has full jurisdiction to look into the case. And even where one can find such a court, the question is how to remedy a violation. Actions for damages may for instance be open at EU level, but – as noted in the transversal report on judicial protection[29] – the question is to what extent a remedy consisting of purely financial compensation can be either 'effective' or 'appropriate' where (in the case of OLAF) the material or information gleaned from the contravening inspection is forwarded to the national authorities regardless.

11.3.4 The follow-up at the national level

Finally, a few remarks remain on the follow-up at the national level. The laws of evidence have not been a part of this study. Yet the stages of investigation and the later trial stages can of course not be isolated from each other. The following remarks are of particular interest in those cases where competences at EU level are not exclusive, but the models for cooperation are defined autonomously. All of the four authorities confront this problem to a certain extent, particularly as their investigations may end up in criminal prosecutions at the national level. In such cases, the potential gaps and duplications between the EU and national framework need to be accommodated (at the EU level and/or the national level through the laws on evidence),

23 On this, see also B. van Bockel, 'Gone fishing? Grenzen aan de toelaatbaarheid van 'toevallig' tijdens een inspectie verkregen bewijs in Deutsche Bahn', (2016) *NTER*, no. 3, pp. 69-74; Y. de Vries, 'De onderzoeksbevoegdheden van de Commissie scherp gesteld', (2015) *NTER*, no. /3.

24 Cf. Rechtbank Den Haag, 9 April 2004, ECLI:NL:RBSGR:2003:AF7087; College van Beroep voor het bedrijfsleven/CBB, 8 July 2015, ECLI:NL:CBB:2015:191.

25 M. Luchtman & M. Wasmeier in M. Scholten & M. Luchtman, supra note 5.

26 Chapter 9.2.3. After a two-month time period the legality of the actions becomes unchallengeable.

27 Chapter 9.3.4.3.

28 Chapter 10.2

29 Chapter 9.2.3.

particularly where the EU standards are lower than the applicable national standards.[30] It once more illustrates that even a fully autonomous model of investigation can never lose the national dimension of its enforcement tasks out of sight. Also decentralized models of cooperation may still need a certain degree of the harmonization of safeguards in order to accommodate a possible later use in other jurisdictions.

The reverse problem seems to be on the table for OLAF. In this respect, we must note once more a substantial difference between OLAF and the other actors involved. The combination of safeguards applicable to the OLAF regime (Art. 9 Reg. 883/2013) and the rules on the admissibility of evidence in national proceedings is striking. Art. 11 (1) Reg. 883/2013 holds that OLAF reports shall constitute admissible evidence in the administrative or judicial proceedings of the Member State in which their use proves to be necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports. The question that remains open for now is to which extent the combination of the high level of safeguards included in Art. 9 and this provision of the assimilation of OLAF reports is not in fact 'overprotective'.

11.3.5 Possible strategies for improving OLAF's legal framework

In the light of the conclusions improvements can and should be envisaged at both the EU level and at the national level.

As far as the EU level is concerned, it is clear from the comparison that although OLAF is mandated as an investigative office, it has only autonomous and well-defined powers in the area of internal investigations. As far as external investigations are concerned OLAF is very much dependent for the existence and the reach of its powers upon the administrative powers of similar administrative enforcement authorities. This is also the case when OLAF wants to trigger autonomous investigations under Regulation 2185/96.

From the comparison with the other EU enforcement agencies a first strategy could be to define in a EU regulation, amending Regulation 2185/96, a clear set of autonomous investigative powers, without referring back to national law. An autonomous mandate of investigation comes with autonomous powers that can be used in the territories of all member states. This also has the advantage that these autonomous powers would not differ from country to country and, within every country, would not differ between the income and expenditure side of the EU budget. Needless to say that these external investigations should be possible in the whole area of PIF protection, as defined by the ECJ, which means including for, for instance, Vat carousels.

Second, as OLAF will in the future also prefer mixed inspections in the majority of cases, this means that it must be able to trigger national inspections and to join them. Also here it could be advised to elaborate a common model for all mixed inspections, not depending on the area in which PIF violations might occur. Although in mixed inspections the national authorities have the lead, the OLAF inspectors have investigative powers. These powers should also be defined clearly in the EU regulations and depend less on the national provisions. Moreover, mixed investigations call for provisions on the relationships between the national and EU procedures (the mutual sharing of information and, likely, also later use as evidence).

30 Cf. R. Widdershoven & P. Craig in M. Scholten & M. Luchtman, supra note 5.

As far as the national level is concerned, it became clear from the comparison that even when EU enforcement agencies have strong autonomous powers there is and must be interaction with the national level and national enforcement agencies (let us call it the national mirror). The ideal is that this is organized in a systematic manner. The AFCOS network is a first tentative step in that sense. Yet compared to the other national mirrors of the EU enforcement agencies the national OLAF mirror is very weak and disparate. There is a great need to define the competent national agencies for OLAF cooperation that do have similar powers as OLAF investigators have, which means beyond coordination powers. This would facilitate mixed inspections and in some could also open the possibility for mandated investigations or even *Organleihe.* This can only be realized through the harmonization of the national enforcement mirrors.

With a clear setting of institutional and organizational structures and related investigative powers, it becomes also easier to define the necessary level of legal safeguards and remedies, as has been done in the regulatory frameworks of the other EU enforcement agencies. Once the applicable law is clearly defined, the safeguards and remedies can follow the same path.

What could also be envisaged is creating enforcement mechanisms for OLAF investigations. This can be done without giving OLAF sanctioning powers for substantive PIF breaches or without changing its legal status as an administrative investigative agency. In cases of non-cooperation it should be possible for OLAF to impose daily penalty payments on economic operators in order to enhance the effectiveness of their production orders and on-site inspections.

Given OLAF's mandate and field of operations it is also necessary to provide a better bridge/link with criminal investigations and their follow-up. As can been seen from the comparative setting this is to a certain extent also the case for some other EU enforcement agencies, but in the OLAF setting it is more likely to be a structural pattern. The interaction between administrative and criminal enforcement in the Member States differs a great deal. In the light of the common EU policies and the common interest in protecting PIF interests, it is no longer feasible that in some countries OLAF investigations have to be restarted from scratch when judicial investigations are triggered. OLAF evidence cannot be reduced to starting information for criminal proceedings. Second, the statutory position of OLAF inspectors as auxiliary judicial authorities should be regulated under national law in case OLAF mixed inspections turn into judicial investigations, because of the triggering of the suspicion of criminal facts during the administrative investigation.

Finally, the establishment of the EPPO, in whatever form or model, will have consequences for OLAF if both are dealing with the same substantive field of enforcement, namely PIF. OLAF will remain and should remain the main responsible authority for internal investigations (into disciplinary misbehaviour) and for administrative investigations. To which extent OLAF can and should play a role as auxiliary judicial investigators for EPPO depends to a large extent on the outcome of the investigation.